monial, and as, at anyrate since *Lockhart's* case, 1790, M. *voce* Adultery, Ap. No. 1, mutual actions of divorce have been competent, the Court recognising that mutual guilt may affect patrimonial consequences, I could not say that I saw any reason why the prior decree in the husband's action should prevent the wife's action being carried to a conclusion, or any more inconsistency, issue having once been joined, in the Court pronouncing the formal decree of divorce in the mutual actions *ex intervallo* than *unico contextu*. But it is proper that in this matter I should defer to the opinions of your Lordships and of the Judges of the other Division who have been consulted.

LORD MACKENZIE concurred with the LORD PRESIDENT and LORD KINNEAR.

The Court adhered.

Counsel for Pursuer and Reclaimer—Ingram—Mercer. Agent—J. George Reid, Solicitor.

Counsel for Defender and Respondent—A. R. Brown. Agents—Grant & Gibb, S.S.C.

Saturday, December 17.

FIRST DIVISION.

[Lord Dewar, Ordinary.

CLELLAND *v.* ROBB.

Reparation—Negligence—Relevancy—Boy of Twelve Ordered to Yoke Horse Alleged to have been Known to be Addicted to Kicking, and Fatally Kicked while doing so.

In an action of damages the pursuer averred that his son, aged 12, was occasionally employed by the defender and was ordered by him to help in yoking horses to a threshing machine driven by horse power, and to yoke a certain horse to a beam, for which purpose it was necessary to stoop between the horses heels and the beam; that in performing this operation the boy was killed by a kick from the horse; that the defender knew the horse was addicted to kicking; that "the defender in ordering the deceased to yoke the said horse as aforesaid was negligent, and the deceased was killed owing to the defender's negligence."

Held (*aff.* judgment of Lord Dewar) that the pursuer's averment of negligence though in general terms was relevant, and issue *approved*.

Observations (*per* the Lord President and Lord Kinnear) upon liability for negligence being set up by failure to perform a duty.

William Clelland, miner, Whitburn, raised an action of damages against Robert Robb, farmer, Croftmalloch Farm, there, on the ground that his son had been killed through the negligence of the defender.

The pursuer averred—"(Cond. 2) For some time prior to 19th February 1910 the deceased James Clelland, a son of the pursuer, who at the said date was about eleven years and 11 months old and was still attending school, had been occasionally out of school hours employed by the defender at his said farm to do small pieces of light work. His remuneration consisted of such small sums as the defender chose to give him. (Cond. 3) At the said date the deceased James Clelland was at the said farm at the request of the defender. The defender was about to thresh corn. The threshing machine at the said farm is driven by horse power, the horses being yoked to the end of a beam by means of short chains from a swing bar hanging behind the horses' hips, which chains can be hooked on to the beam. (Cond. 4) The defender ordered the said James Clelland to help in yoking the horses to be used to drive the said mill. The said James Clelland accordingly, under the defender's directions, brought out one of the said horses, while the defender brought out another. When the said horses had been brought to the said mill the defender ordered the deceased James Clelland to yoke one of the said horses, which was a black horse, to the beam. The defender did not in any way warn the said James Clelland against attempting to yoke the said horse to the beam. It was necessary for the deceased James Clelland in order to do this to stoop down close behind the horse and between the horse and the beam. Just as he was fastening the said chains to the beam the horse kicked him in the forehead, rendered him unconscious, and caused injuries of which he subsequently died without regaining consciousness. (Cond. 5) The defender in ordering the deceased James Clelland to yoke the said horse as aforesaid was negligent, and the deceased James Clelland was killed owing to the defender's negligence. The said operation of yoking is one during which any horse is apt to be restive, and requires skill and quickness and experience in watching the behaviour of the horse on the part of the person performing it. The deceased James Clelland, as the defender well knew, was attempting the said operation for the first time, and was not of a proper age to do so with safety, and was without any experience in the management of horses. Further, the horse in question was, as the defender well knew, ill-tempered and given to kicking. For an inexperienced boy of the age stated to attempt to yoke the horse in question to the said beam was highly dangerous and well calculated to lead to the accident which occurred, and the defender, in ordering or permitting the deceased James Clelland to yoke the said horse, acted with gross negligence."

The defender pleaded—"(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed with expenses."

On 16th November 1910 the Lord Ordinary (DEWAR) approved of the following issue for the trial of the cause—"Whether,

on or about 19th February 1910, and at or near Croftmalloch Farm, Whitburn, James Clelland, a son of the pursuer, was killed through the fault of the defender, to the loss, injury, and damages of the pursuer."

Opinion.—"The pursuer in this action states that the defender occasionally employed his son to assist in farm work. On 19th February 1910, when the boy was eleven years and eleven months, the defender ordered him to assist in yoking horses to a threshing-mill. The boy led out one of the horses, and when he was in the act of hooking one of the short chains attached to a swing bar hanging behind the horse's hips, he was kicked in the head and killed. The pursuer avers that his son had no experience in the management of horses, had never yoked one before, and that the yoking operation in question was apt to make any horse restive, and required experience in watching the horse's behaviour, and that this particular animal was known to the defender to be ill-tempered and given to kicking.

"The defender maintains that there is no relevant averment of negligence for which he can be held responsible, in respect that it is not stated that the boy got any specific order to hook the chain, and that there is not sufficient specification that the horse was known to be vicious. I do not think that this contention is sound. If the boy were asked to 'help in yoking' he would naturally assume that that included the hooking of the chains, and I do not think that it was reasonably prudent to permit an inexperienced boy to interfere with chains at a horse's heels in circumstances where it was likely to become restive; and if the defender knew the horse was 'ill-tempered and given to kicking' he ought to have warned the boy to stand back, even although the horse had never previously succeeded in kicking anybody. 'Negligence is the omission to do something which a reasonable man, guided upon these considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do—*Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. (1856) 781, 784.

"I think a reasonably prudent man would in the circumstances set forth on record have adjusted the chain himself and warned the boy to keep away."

The defender reclaimed, and argued—There was no relevant averment of knowledge that the horse was dangerous; "given to kicking" was not sufficiently specific—*Smith* v. *Wallace & Co.*, March 11, 1898, 25 R. 761, 35 S.L.R, 583; *Cox* v. *Burbidge*, 1863, 13 C.B. (N.S.) 430; *Lee* v. *Riley*, 1865, 18 C.B. (N.S.) 722, 34 L.J., C.P. 212; *Taylor* v. *Sutherland*, 1910 S.C. 644, 47 S.L.R. 541. The deceased being a boy of twelve the defender did not owe to him a duty of protection as to a child.

Argued for the respondent—Specification was to be determined with reference to circumstances, and in such a case as the present a general averment would be held to be sufficient—*Renwick* v. *Von Rotberg*, July 2, 1875, 2 R. 855; *Burton* v. *Moorhead*, July 1, 1881, 8 R. 892, 18 S.L.R. 640. The averments in Cond. 5 made it unnecessary to aver knowledge of specific acts of kicking on the horse's part, the operation in question not being a usual one, such as yoking to a cart.

LORD PRESIDENT—This is an action brought by the father of a boy who was killed by the kick of a horse. The averment is that the deceased boy had been occasionally employed for odd jobs—not at a fixed but at a trifling remuneration—by the defender at his farm, and that upon a certain occasion in accordance with that practice the deceased boy was at the farm and was temporarily employed by the defender; that in the course of that temporary employment the defender gave him an order to yoke—by which I understand to attach—horses which were about to be used to drive a threshing mill; that in the course of that operation he did not in any way warn the deceased boy of the danger which he incurred, the danger, the pursuer explains, being that the boy was dealing with a horse which the defender knew to be given to kicking; that in consequence of that the boy got behind the horse, and the horse kicked and struck him on the forehead and he died.

I think that the case is a very thin one, but I cannot say that it is absolutely irrelevant, and I think that its relevancy primarily and necessarily depends upon there being this relation of employer and employed at the moment. By that I do not mean that the boy was in any sense taken into the defender's service, but that he was doing something which the defender had set him to do. Originally as the record stood there was an expression that the defender had "permitted" him to do what is alleged, but that has been taken out, and therefore the record as it stands must depend upon an order of some sort having been given.

It was objected that there was not sufficient specification of the facts, from which it was to be inferred that the defender knew of the kicking propensities of the horse. I have come to be of opinion that the averment as made in general terms is in accordance with the usual practice, although I can quite see that if a specific instance was proposed to be given at the trial, and it came out at the trial that the knowledge must have been in the possession of the pursuer's advisers, it might very well be that the evidence should be refused for want of due notice having been given. But the pursuer takes his risk of that, and I do not think that we can say that the case is irrelevant because specific instances are not given. Therefore I think there must be an issue.

But I cannot part from the case without saying that I do deprecate exceedingly what the Lord Ordinary has set forth in his note. He quotes the case of *Blyth* v. *Birmingham Water-works Company*, 11 Exch. (1856) 781 and 784, and also quotes the

definition there given of what negligence is. Well, the definition given there is a very good one, and was strictly in point in the case. The case itself has to do with the duty of a water-works company to make their pipes sufficiently strong to resist frost, and the dictum is given *secundum subjectam materiem*. But the Lord Ordinary quotes it as if negligence *per se* was sufficient to make liability. Negligence *per se* will not make liability unless there is first of all a duty which there has been failure to perform through that neglect. I also deprecate very much that the Lord Ordinary should say afterwards that he thinks "a reasonably prudent man would in the circumstances set forth in the record have adjusted the chain himself and warned the boy to keep away." Nobody can tell how the circumstances set forth in the record are going to come out, and how they come out, it seems to me, will make the whole difference.

LORD KINNEAR—I agree with your Lordship. I have nothing to add except that in particular I agree with what your Lordship has said as to the Lord Ordinary's observation about negligence, and I think it is extremely important that that should be said, because we constantly find in discussion of this kind that the primary necessity for resting the charge of negligence upon some relation of duty is forgotten. There can be no question as to the authority of the passage which the Lord Ordinary quotes from Baron Alderson, and which is so frequently cited. But the learned Judge was giving the standard or measure of negligence, assuming it to be an actionable wrong, and was not defining the conditions on which an action for negligence will lie. The law is well stated by Sir Frederick Pollock, where, after stating the general rule in the words of Baron Alderson, he goes on to say (Pollock on Torts, 6th ed., p. 420) —"It was not necessary for him to state, but we have always to remember, that negligence will not be a ground of legal liability unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care." I agree that the first condition of relevancy is that the pursuer should aver a duty on the part of the defender "of taking care" for the safety of the boy whose death resulted from the accident.

As to the averments, I agree with what your Lordship has said, and have nothing to add.

LORD JOHNSTON and LORD MACKENZIE concurred.

The Court adhered.

Counsel for the Pursuer and Respondent — Morison, K.C. — Hamilton. Agents — Sharpe & Young, W.S.

Counsel for the Defender and Reclaimer— J. C. Watt, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Tuesday, December 20.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

CATHCART *v.* CHALMERS.

Lease — Outgoing — Compensation for Improvements—Contracting Out—Substitution of Conventional for Statutory Compensation — Time for Making Claim — Illegal Condition — Agricultural Holdings (Scotland) Act 1883 (46 *and* 47 *Vict. cap.* 62), *sec.* 36.

The Agricultural Holdings (Scotland) Act 1883, sec. 36, provides—"Any contract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement specified in the schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act) shall, so far as it deprives him of such right, be void."

The lease of a farm prescribed compensation for improvements to be paid in lieu of the compensation provided by the Agricultural Holdings Act 1900, sec. 1, and relative schedule (which superseded sec. 1 and relative schedule of the Agricultural Holdings (Scotland) Act 1883). The lease also contained a proviso that no claim for compensation should be made by the tenant later than one month prior to the determination of the tenancy. The tenant having given notice in terms of the lease of his intention to terminate the tenancy, quitted the farm accordingly. He made claims for compensation prior to the determination of the tenancy (which but for the proviso would have been timeously made) but less than one month prior thereto. The landlord intimated to the tenant that the claims were excluded by the lease in respect that they were not timeous. Thereafter on the application of the tenant the Board of Agriculture and Fisheries appointed an arbiter for the purpose of dealing with the claims. A note of suspension and interdict having been presented by the landlord to prevent the arbitration being proceeded with, the Court—*rev.* the decision of the Lord Ordinary (Guthrie)—*refused* the interdict, holding that the stipulation contained in the lease as to the time of making the claim was void in respect that it was an agreement by the tenant by virtue of which he was deprived of his right to claim compensation.

The Agricultural Holdings Act 1900 (63 and 64 Vict. cap. 50) enacts—Section 1—"(1) Where a tenant has made on his holding any improvement comprised in the First Schedule to this Act, he shall, subject as in the [Agricultural Holdings (Scotland) Act] 1883 (in this Act referred to as the principal Act), and in this Act mentioned, be entitled