Counsel for the Appellants—The Lord Advocate (Hon. W. Watson, K.C.)—Robertson, K.C.—D. Jamieson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondent—Mackay, K.C. —Macgregor Mitchell. Agents J. Miller Thomson & Company, W.S.

Wednesday, January 24.

SECOND DIVISION.

[Sheriff Court at Stirling.

HENDRY *v.* M'DOUGALL.

Reparation—Negligence—Horse and Cart Left Unattended in Public Street—Driver Temporarily Absent on Owner's Business —Liability of Owner for Damage Caused by Runaway.

The driver of a horse and cart left them unattended in a public street opposite the door of a shop while he went into the shop to execute a message for his employer, the owner of the horse and cart. He was delayed there for a few minutes waiting his turn to be served. Meantime the horse bolted, and the wheels and axle parting from the cart struck and injured a woman who was walking on the pavement. In an action of damages at her instance against the driver's employer, the owner of the horse and cart, *held* that in the circumstances the owner was liable.

Observations (*per curiam*) on the circumstances in which liability will attach to owners of horses left unattended in the street for damage caused by their running away.

Mrs Jane Anderson or Hendry, certificated nurse, Denny, *pursuer*, brought an action in the Sheriff Court at Stirling against Elizabeth M'Dougall, Fankerton Farm, Denny, *defender*, for payment of £500 in name of damages for personal injuries sustained by her in consequence of a horse harnessed to a cart belonging to the defender bolting while standing unattended in the street.

Proof was allowed and led.

The *facts* of the case and the import of the proof so far as material to this report were as follows:—The defender on 6th December 1921 sent a horse and cart into Denny in charge of a youth of sixteen named Tough in order to get an empty tin filled with paraffin at a shop in the village. The horse, which was about nine years old, had been in the stable for two days and had a light load on the occasion in question, but it was normally a quiet animal. Tough left it at the shop door with its head turned from home while he went into the shop with the empty tin. He was kept waiting for a few minutes because there were other customers waiting to be served. While he was inside, the horse wheeled round with the cart and bolted in the direction of its home. No one was able to say what startled it. In its course the axle and wheels of the cart became separated from the body, and mounting the pavement injured the pursuer, who was walking there.

On 29th July 1922 the Sheriff-Substitute (DEAN LESLIE) assoilzied the defender. The pursuer appealed to the Sheriff (MACPHAIL), who on 3rd October 1922 adhered.

The pursuer appealed, and argued—If a horse and cart were left on the street unattended, the owner was liable for any damage done by the horse bolting—*Illidge* v. *Goodwin*, 1831, 5 C. & P. 190, at p. 192; *Engelhart* v. *Farrant*, [1897] 1 Q.B. 240, at p. 245; *Shaw* v. *Croall*, 1885, 12 R. 1186, *per* Lord Mure at p. 1189, 22 S.L.R. 792. Nothing short of an inevitable accident could excuse him — *M'Ewen* v. *Cuthill*, 1897, 25 R. 57, 35 S.L.R. 58; *Milne & Company* v. *Nimmo*, 1898, 25 R. 1150, 35 S.L.R. 883.

Argued for the defender—Every case depended on the circumstances involved, and the cases cited did not apply to the present circumstances. [LORD ORMIDALE referred to *Wright* v. *Dawson*, 1895, 5 S.L.T. 196.] The general principle on which such cases had been decided was in the defender's favour — *Hayman* v. *Hewitt*, Peake's Add. Cases 170; *Lynch* v. *Nurdin*, 1841, 1 Q.B. 29; *Clark* v. *Chambers*, 1878, 3 Q.B.D. 327; *Tollhausen* v. *Davies*, 1888, 57 L.J., Q.B. 392; *Smith* v. *Wallace*, 1898, 25 R. 761, 35 S.L.R. 583; Bevan on Negligence (3rd ed.), vol. i, pp. 161, 545; Glegg on Reparation (2nd ed.), p. 383.

LORD JUSTICE-CLERK—In this action the pursuer, a pedestrian using the street, sues a farmer who owns a horse and cart. The action is laid on fault, the fault attributed to the defender being (1) with reference to her driver, and (2) with reference to her cart.

The material facts lie within narrow compass and are not in dispute. They are these —The defender on 6th December 1921 sent a horse and cart into Denny in charge of Tough, a lad of sixteen. His mission was to get an empty tin filled with paraffin at a shop in the village. He drew up the horse at the shop door, and left it with its head turned from home while he entered the shop to execute his errand. He was delayed for a little time because there were other customers being served in the shop. In Tough's absence the horse, for some unexplained reason, bolted and made for home. The cart became disintegrated, the axle and the wheels parting from the body. They bowled along, mounted the pavement, and injured the pursuer, who in the exercise of her undoubted right was walking there. To these facts fall to be added that the horse was a quiet animal of ten years or thereby, and that the cart was not provided with what are known as lynch pins. These are pins which lock the iron bolts connecting the body of the cart to the axle, and which thus, it is said, prevent them from springing out of position. It was originally alleged by the pursuer that the horse had bolted on a previous occasion, and that Tough was not a competent driver. But these charges were, however, abandoned in the debate before us. What then remains? Two things—(1) a complaint that the defender was in fault because Tough left the horse unattended in a public street while he went

into a shop to execute his commission, and (2) a complaint that the defender was in fault because there were no lynch pins in the cart.

[*His Lordship dealt with the second point, which is not reported.*]

The other part of the case presents more difficulty. The question remains whether the conduct of the defender's servant Tough was blameworthy. His blameworthiness is said to consist in leaving his horse unattended in a public street while he went into an adjoining shop. Now in my opinion the question whether a driver is in fault in leaving his horse unattended is a question of circumstances, and I agree with what the Lord Justice-Clerk said in *M'Ewen* v. *Cuthill* (25 R. 57) that "there is no general rule." Much, for example, will depend on the type of horse, the time during which the driver is absent, the distance to which he goes, and also the character of the *locus*. Thus I think the famous dictum of Tindal, C.J., in *Illidge* (5 C. & P. 190)—"If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done"—must be read in light of the circumstances in that particular case. In each instance therefore the question is, do the circumstances amount to fault on the part of the defender? This the pursuer in my opinion must aver and prove if he is to succeed. Thus in *Shaw* v. *Croall* (12 R. 1186), where a horse was left unattended for a short time in a station yard, the Court held that fault was not established, but Lord Shand said—"It is, in the first place, important to observe that the cab was not standing in the public street, where perhaps more care would be required; it was standing in what may fairly be described as enclosed ground." Again, in *M'Ewen* v. *Cuthill*, where the defender was held liable for damage resulting from his horse being left unattended, the judgment proceeded on two specialties, to wit, (1) that the driver had gone into the back part of a shop out of sight of his horse, and (2) that the place where the horse was left was within a few yards of passing trains.

Viewing this case, then, as one in which the decision must turn upon the circumstances proved, I feel constrained to hold that the defender's servant Tough was in fault, and that his fault caused the injuries to the pursuer. Tough is, I think, really convicted out of his own mouth, for he says —"It (the horse) was out of my reach and control." But I do not rest my judgment on this admission, which may be capable of innocent explanation. Apart from the admission, however, it is clear that Tough left the horse unattended in a public street, and that he placed a half-shut shop door between him and it. Indeed, the case is in its circumstances *a fortiori* of the case of *Milne & Company* v. *Nimmo* (25 R. 1150), where the driver of a pony opened the gate of a stable yard which separated the yard from the street and went back a few yards to get his coat, and where liability was held established. Here Tough was further from his horse than was the driver in *Milne;* he left his horse in a public street, while it was left in a yard in *Milne;* and finally the driver in this case was within an adjacent shop when the horse bolted instead of being but a few yards behind his horse as in *Milne*.

The case, in my judgment, lies just over the frontier of liability, and I think it is a hard case for the defender. Apart from the fortuitous circumstance that there were some customers in the shop before Tough there would in all probability have been no accident. But regarding the circumstances as a whole, I think that his conduct is proved to have been blameworthy, that the interlocutors of the Sheriffs fall to be recalled, and that decree should be pronounced for the sum at which parties agreed that damages should be assessed in the event of liability being established, viz., seventy pounds (£70).

LORD ORMIDALE—In this case it was maintained that the accident which befell the pursuer was due to the fault of the defender on the grounds, first, that the horse and cart had been left in a public street unattended outwith the control of the carter who was in charge of them, and second, that the cart was in a defective condition in respect that the cadder pins or bolts which connected the body of the cart with the wheels were not locked with lynch pins.

[*His Lordship dealt with the second point, which is not reported.*]

The other ground raises a question of more difficulty. In the Scots cases to which we were referred it is said that the question whether a man in charge of a horse and cart is in fault for leaving the horse and cart unattended in a public street is a question of circumstances, and I am not disposed to dissent from that view. On the other hand it appears to me that when a passer-by is knocked down and injured in a public street by a runaway horse and cart, as the pursuer was, the onus is on the driver or his employer to show that she was placed in this predicament through no fault of his. What were the circumstances in the present case? On reaching Bulloch's shop, the carter, a young lad of sixteen called Tough, took the empty oil can from the cart and carried it into the shop. He left no one to stand by the horse. He could not be served at once as there were other customers to be served before him. He was absent, waiting, for about three minutes. He says he kept the horse in view the whole time. This I think is doubtful. According to the witness Scotland who was in the shop, the inner door of the shop was partially closed, and Tough could not readily see out without opening it. "He opened it once and looked out." Tough says he walked out more than once. The horse was normally a quiet beast about eight or nine years old. It had been in the stable for two days, and had a light load on the occasion in question. While Tough was inside the shop the horse started, wheeled round with the cart, and bolted in the direction of home. No one was able to say by what, if by anything, it was startled. "The horse was away," Tough says, before he got to the door of the shop.

Now, even if Tough kept the horse in view

the whole time, that is not necessarily a sufficient precaution. In *Milne & Company* v. *Nimmo* (25 R. 1153) the Lord Justice-Clerk says—"A driver may in certain cases go a little distance from his horse, and if an accident happens it will not be attributed to him as having occurred through his fault. It is recognised for instance that a man may take something off his cart and hand it in at a shop door although he leaves his horse meanwhile, because in such circumstances he remains in sight of his horse and near enough to get to its head if it starts off." With this opinion Lord Young did not agree, but assuming it to be correct, merely keeping the horse in view is not, according to the dictum, sufficient. The man must also be near enough to get to the horse's head if it starts off. Tough, however, admits that after the horse got away he was never within 4 or 5 yards of it. It is not suggested that the pursuer was in any way in fault.

In the circumstances so disclosed I am not prepared to agree with the Sheriffs in holding that Tough was not in fault. His conduct may not have been very blameworthy, but there was nothing at all to prevent him using greater vigilance and care than he did. For example, he might have called someone out of the shop to get the empty can, or he might have waited and got someone to stand by the horse during his absence in the shop, just as he afterwards did when he had recovered his horse and paid a second visit to the shop to collect his replenished can of oil.

Having in view the added fact that Tough entered the shop to deliver his parcel, it appears to me that what Lord Young says in *Milne* v. *Nimmo* applies *a fortiori* to the present case. "I am of opinion that if a carter leaves his cart to deliver a parcel at a shop door, and his horse runs away and knocks down someone in a street, the risk is with him and his master and not with the innocent person on the street."

No case really analogous to the present was cited to us in which a driver or his employer was assoilzied. In *Smith* v. *Wallace & Company* (25 R. 761) the action was held to be irrelevant for want of specification. *Wright* v. *Dawson* (5 S.L.T. 196) and *Hayman* v. *Hewitt* ((1798) Peake Add. Cas. 170) were not concerned with injury done to a member of the public but with damage done to goods which the defenders were engaged under contract to carry and deliver. The case of *Shaw* v. *Croall* (12 R. 1186) again was materially different in its circumstances from the present, for in it the horse and cab were left standing not in a public street but in enclosed ground. Had they been left standing in a public street greater care, Lord Shand observes, would have required to be taken.

In the cases of *M'Ewen* v. *Cuthill* (25 R. 57) and *Milne* v. *Nimmo*, where the defenders were held liable, the negligence may have been greater, but in neither of them do I find either a rule of law or a state of facts which would entitle a driver, acting as Tough in the present case acted, to absolvitor from blame. While it is said that there may be circumstances in which a driver or carter may without fault leave his horse unattended without negligence in law being attributed to him, even though an accident results from his doing so, it is difficult to figure such a case. It depends perhaps on the meaning that is given to the word "unattended." If that signifies merely that the driver is not in all circumstances bound to be at his horse's head or holding on to the reins, then I assent to the proposition. But the driver must always, it seems to me, be in such proximity to the horse as to leave him, in a reasonable sense, master of the situation, and able if the horse shows signs of becoming restive to get to its head and steady it.

I cannot hold that in the circumstances of the present case there was put on the general public who were using the streets with due regard to their safety the risk and peril of the unattended horse bolting and in its flight injuring one of their number. As I have said, the risk of such a happening was with Tough and the defender. A horse and cart left unattended in a public street is always a potential source of danger. In *Illidge* v. *Goodwin* (5 C. & P. 190) a horse and cart were left unattended in a public street. The horse got startled and backed into the shop window of a china merchant and damaged his goods. The owner of the cart endeavoured to prove that it did so because a passer-by had struck it. The jury intimated that they did not believe the witnesses called to support this defence. Tindall, C.-J., said that even if they were speaking the truth it did not amount to a defence, and added—"If a man chooses to leave a cart standing in the street he must take the risk of any mischief that may be done."

That dictum has been approved in several cases cited to us—*Lynch* v. *Nurdin* (1 A. & E. 29); *Clarke* v. *Chambers* (3 Q.B.D. 327); *Engelhart* v. *Farrant & Company* ([1897] 1 Q.B. 240, Lopes, L.J., at pp. 245-6).

On the whole matter I agree that the appeal should be sustained and the pursuer found entitled to damages. Parties are agreed that these should be assessed at £70.

LORD HUNTER—The pursuer was seriously injured by one of the wheels of a cart when she was walking on the foot-pavement of a street going towards Denny. For this accident she was herself in no way responsible. The defender is the tenant of a farm in the neighbourhood. She had sent a horse and cart in charge of a lad in her employment to do some business of hers in Denny. He had left the horse and cart unattended on the street while he went into a shop to get a can filled with paraffin. For some unexplained reason the horse bolted, with the result that one of the wheels, which came off, bounded on to the pavement and struck the pursuer. She has brought an action to recover damages against the defender, but the Sheriff-Substitute has assoilzied the defender and the Sheriff has agreed with this view.

The action can only succeed on proof of fault on the part of the defender or someone for whom she is responsible. It is neces-

sary, however, to consider what is the position of a person who has left a horse unattended on a public street with the result that the horse has bolted and a person lawfully using the street has in consequence been injured. In *Illidge* v. *Goodwin* (5 C. & P. 190, at p. 192) Tindal, C.-J., said—"If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done." This view seems to have received the approval of the Court of Appeal in *Englehart* v. *Farrant & Company* ([1897] 1 Q.B. 240), where L.J. Lopes said (at p. 245)—"Mears left the cart and horse in the street unattended, and for this, if nothing more had taken place, the defendant would be liable, provided Mears' act caused the mischief, for it was negligence on his part." Writers on the subject of negligence in law have criticised the dictum of Tindal, C.-J., if accepted in a general sense and without reference to the circumstances of the particular case with which he was dealing. See Bevan on Negligence in Law, 3rd ed., vol. i, at p. 545, and Glegg on Reparation, 382. There have certainly been cases where it has been held that the circumstance of leaving a horse unattended for a short period of time and for a necessary purpose does not of itself involve liability if the horse bolts. A useful illustration of this may be found in the case of *Shaw* v. *Croall & Sons*, 12 R. 1186. In that case the driver of a cab had drawn up his cab on a stance at a railway station which was within an enclosure railed off from the public street. He got down from his box, took a bag of oats from a place where it was kept at a distance of ten feet from the horse's head, filled his horse's nosebag, and had turned to put back the bag of oats when the horse bolted. It was held that in such circumstances there was no liability on the part of the defenders, who were owners of the cab. The Lord President said—"I cannot say that he (*i.e.*, the driver) was acting with anything but the ordinary caution to be expected and demanded of a man in his position." In *M'Ewen* v. *Cuthill* (25 R. 57) a lorryman left his horse and lorry unattended at the door of a shop in a village while he went into the back part of the shop to find out where the goods were to be deposited. He was out of sight of the horse, which bolted because it was startled by the whistle of a train which passed on a railway under the road a few yards from the shop. It was held that the employer of the lorryman was liable for injuries caused to a woman who was knocked down by the runaway horse. Similarly in *Milne & Company* v. *Nimmo* (25 R. 1150) the driver of a pony and van, who, after yoking the pony to the van preparatory to leaving the stableyard, opened the gate of the yard separating it from the public street, and then went a few yards behind the van to get his coat, was held in fault for injury caused by the pony bolting. On the other hand, in the case of *Wright* v. *Dawson* (5 S.L.T. 196) it was held that a case of liability was not made out because the driver of a lorry had left the horse's head to assist in unloading a second lorry. The last three cases were all decided in the Second Division of the Court. An examination of the opinions of the Judges shows a certain difference of outlook. Lord Young seems to take practically the same view as Tindal, C.-J., that responsibility for injury done through leaving a horse unattended in a street should attach to the person causing the risk. The other Judges do not go so far. I think, however, it is in accordance with principle, and not inconsistent with any of the decisions to which I have referred, to hold that where a horse left unattended in a public street has bolted and caused injury there is a presumption of liability on the part of the owner that can only be rebutted by his showing that the accident was inevitable, or, at all events, that the horse had been left unattended in such circumstances as to exclude the view that this arose from want of reasonable care on the driver's part.

If the case is looked at from the standpoint which I have thus indicated, I do not think that the defender is entitled to be assoilzied. The horse had been in the stable for two days before the accident, and the lad in charge had gone to such a distance from the horse's head that he was not only unable to control the horse, but even to make any real attempt to prevent its bolting. I think that the Sheriffs erred in a wrong application of legal principle to the proved facts in the case, and that the pursuer was entitled to a decree.

LORD ANDERSON—In the Sheriff Court three grounds of fault were maintained by the pursuer—(1) incompetency of the driver, (2) failure of the defender to lock the axle by a lynch pin, and (3) negligence of the driver in attending to his horse. The first of these grounds was abandoned in this Court. The second ground of fault has, in my opinion, not been proved. There remains only the third ground of fault, the alleged negligence of the driver in attending to his horse while it was standing at the shop in Denny.

It is manifest that no presumption of fault arises from the fact that a horse bolts. Bolting may take place when the horse is being most carefully driven and in circumstances which negative any suggestion of negligence. It is true that bolting may take place in circumstances, admitted by a defender or proved by a pursuer, which place on the defender an onus of explanation, but as a general rule in cases of this nature negligence must be averred and proved before a decree for damages can be pronounced. Both the English authorities and those in our own Courts make it quite clear that the circumstances of each case proved or admitted determine whether or not negligence has been established. The question of fault is always correlated to the question of duty, and the duty of one who is in charge of a horse towards the persons or property of third parties is to protect them from the activities of the animal of which he is in charge. This duty is discharged by the exercise of reasonable care

in attending to the horse. The question in every case accordingly is, Was the driver attending to his horse—that is, was he looking after it with reasonable care? This question, in my opinion, cannot be answered favourably to a driver unless it be shown that he has remained in such proximity to his charge as to enable him to exercise control over its movements. There are cases, such as *Shaw* (12 R. 1186), in which it was held that a driver was attending to his horse although he was some distance from it. In others, such as *Illidge* (5 C. & P. 190), *M'Ewen* (25 R. 57), and *Milne* (25 R. 1150), it was held that a driver who had gone some distance from his horse was not attending to it and was therefore in fault. Each case, as I have said, must be decided on its own facts.

The present case is undoubtedly a narrow one, but I have reached the conclusion, differing from the Sheriffs, that the driver was not attending to his horse when it bolted and that he was therefore guilty of negligence for which the defender is responsible in law. The driver chose to go inside the shop to wait his turn when he need not have done so but might have waited outside in the vicinity of his horse. He put himself in a situation in which it was impossible for him to exercise any control, vocally or manually, over his horse should it become restive. The result was that before he could reach the place where he he had left his horse it had turned round and bolted and he was able to do nothing.

The case seems one to which the language of Lord Young in *Milne* (25 R. 1153) is peculiarly applicable—"If a carter leaves his cart to deliver a parcel at a shop door and his horse runs away and knocks down someone in the street, the risk is with him and his master and not with the innocent person on the street."

I am therefore of opinion that the pursuer must have decree for the agreed-on damages of £70.

The Court recalled the interlocutor appealed against, found that the defender was liable in respect of the fault of her servant in leaving the horse unattended in the street, and granted decree for £70 as the agreed-on amount of damage.

Counsel for the Pursuer and Appellant—Burns. Agent—C. Forbes Ridland, S.S.C.

Counsel for the Defender and Respondent—MacLean. Agents—Macpherson & Mackay, W.S.

Tuesday, December 5, 1922.

FIRST DIVISION.

BROWN *v.* CUSTODIAN FOR SCOTLAND UNDER TRADING WITH ENEMY ACTS 1914-1918.

War — Emergency Legislation — Enemy Property—Money Vested in Custodian for Scotland—Application by Creditor of Enemy Company for Order for Payment — Competency—Trading with the Enemy Amendment Act 1914 (5 *Geo. V, cap.* 12), *sec.* 5 (2), *as Amended by the Trading with the Enemy Amendment Act* 1916 (5 *and* 6 *Geo. V, cap.* 105), *sec.* 12.

The Trading with the Enemy Amendment Act 1914 (5 Geo. V, cap. 12), section 5 (2), as amended by the Trading with the Enemy Amendment Act 1916 (5 and 6 Geo. V, cap. 105), section 12, enacts—"The property held by the Custodian under this Act shall not be liable to be attached or otherwise taken in execution, but the Custodian may, if so authorised by an order of the High Court or a judge thereof, pay out of the property paid to him in respect of that enemy the whole or any part of any debts due by that enemy and specified in the order. . . ."

In a petition under the above section at the instance of a creditor of an enemy company who had arrested a sum which, pending an action of furthcoming, had become vested in the Custodian for Scotland under section 4 of the Act, for an order upon the Custodian to pay the sum to the petitioner, *held* that the Court had no jurisdiction under the section to pronounce the order.

Opinions (*per curiam*) that the power conferred on the Court by section 5 (2) of the Trading with the Enemy Act 1914 had ceased with the termination of the war.

Alfred Brown, commission agent, Barrow-in-Furness, *petitioner*, brought a petition under the Trading with the Enemy Acts 1914 to 1918, and in particular section 5 (2) of the Trading with the Enemy Act 1914, and Act of Sederunt 15th December 1914, for an order on the Custodian for Scotland to make payment to the petitioner of a sum of £1030, 18s. 3d. held by the Custodian under a vesting order dated 30th December 1918.

The petition as presented was directed against the Custodian as sole respondent, but subsequently the Department for the Administration of Austrian and Bulgarian Property, London, compeared and was sisted as respondent, and answers were lodged by both respondents.

The following narrative of the circumstances is taken from the opinion of the Lord Ordinary (ASHMORE)—"Before the war the petitioner, who is a commission agent in Barrow-in-Furness, acted as selling agent in Great Britain for the Skoda Works Pilsen, Limited, manufacturers at Pilsen in Bohemia, and in August 1914 the Skoda Company owed the petitioner £1366, representing commissions earned by him as their agent. In October 1917 the petitioner sued the Skoda Company in the Court of Session and obtained decree in absence against them for £1366 with interest and expenses. He then lodged an arrestment in the hands of Willock, Reid, & Company, Limited, Glasgow ('the arrestees'), and attached a sum of £1041 due by them to the Skoda Company. In November 1917 the petitioner, in order to receive payment of the arrested money, brought an action of furthcoming against the arrestees and the Skoda Company. The arrestees lodged defences pleading, *inter alia*, that the action was incom-