houses would make them all villas. Such a contention was absurd. The cases showed that when it was contended that a villa should stand alone, the feu-contracts provided that it should be self-contained or detached—*Buchanan* v. *Marr*, June 7, 1883, 10 R. 936; *Miller* v. *Carmichael*, July 19, 1888, 15 R. 991; *Meldrum* v. *Kelvinside, Estate Trustees*, June 21, 1893, 20 R. 853.

Argued for the respondents—The cases quoted by the other side were against their contention. In those cases the word "detached" was put into the charter to prevent the erection of "semi-detached" villas. On the view of the other side there would be no distinction between "villas" and "dwelling-houses." But the words in the charter made the reading of these two as synonymous impossible. The opinion of the experts was on the side of the respondents, and the decision of the Dean of Guild Court should be affirmed. The case of *Naismith* v. *Cairnduff*, June 21, 1876, 3 R. 863, was analogous to this.

At advising—

LORD JUSTICE-CLERK — The important question in this case is whether what the appellant proposes to do is in accordance with the condition in the title which requires that no houses or buildings shall be erected on the feu "other than villas or offices," that being one term for a building of residence with suitable offices. The term villa is an expression the meaning of which may change or be modified at different times. It is a term to be interpreted by practical men engaged in the building trade and other trades connected therewith. Here we have the decided opinion of the Dean of Guild, who is a civil engineer, and other members of his court—builders and other men of business skilled and experienced in these matters, and having no interest in this case—that the houses in question being built up against one another and joined together, are not "villas" as the term is presently understood. I think we must accept the opinion of these gentlemen on this subject, and affirm the judgment of the Dean of Guild Court.

LORD TRAYNER—The petitioner is by his title restricted from erecting on his land anything but "villas or offices," which I take to mean villas for residence with suitable accommodation offices.

The question here is whether the buildings proposed to be erected are of this character. From the discussion before us it appears that the term "villa" has a somewhat technical meaning, and we are thus under the necessity of resorting to the opinion of experts to ascertain what the technical language of the petitioner's title imports. The Dean of Guild and his council, whom he has consulted, are all experts in this matter, and are just the class of men whose opinion or evidence on such a matter would be taken. As they are unanimous in thinking that the proposed buildings are not villas, I think the only course open to us is to affirm the judgment appealed against and dismiss the appeal.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

The Court affirmed the judgment of the Dean of Guild and dismissed the appeal.

Counsel for the Petitioner—Ure—Sym. Agents—A. & A. S. Gordon, W.S.

Counsel for the Respondents, the Trustees for the Endowment Committee of the Church of Scotland—Cheyne—Clyde. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the Respondents, the Royal Edinburgh Asylum for the Insane—Monteith Smith. Agents—Scott-Moncrieff & Trail, W.S.

Friday, March 6.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'ARA *v.* MORRISON.

Reparation—Negligence — Leaving Vehicle Unattended on Street—Child.

While the carter in charge of a horse and lorry was absent in a public-house, a child of less than six years of age, who was playing in the street, crept underneath the lorry, which had been left standing at the door of the public-house. On his return the carter drove off without observing the child below the lorry, the wheel of which passed over him and caused serious injuries.

In an action at the instance of the child's father against the carter's employers, *held* (*diss.* Lord Trayner) that the accident was caused by the fault of the carter in failing to look below the lorry before driving off, and that his employers were liable.

Opinion by Lord Young that the carter was also in fault in leaving his lorry unattended in the street, his doing so being a contravention of sec. 149, sub-sec. 16, of the Glasgow Police Act 1866 (29 and 30 Vict. c. 273).

William Morrison, baker, Glasgow, as tutor and administrator-in-law of his pupil son Hector Morrison, raised an action in the Sheriff Court of Lanarkshire at Glasgow against Alexander M'Ara, lime and cement merchant, Glasgow, for payment to him of £500 as damages for injuries sustained by the pursuers through the fault of Hugh Connell, a carter in the employment of the defenders.

Proof was led before the Sheriff-Substitute (GUTHRIE) the results of which are fully stated in his interlocutor.

By the Glasgow Police Act 1866, sec. 149, sub-sec. 16, it is enacted that any person having care of a waggon or cart who suffers the same to stand longer than is necessary for loading or unloading goods shall be liable to a penalty of forty shillings, or in default of payment to imprisonment for fourteen days.

On 13th November 1895 the Sheriff-Substitute pronounced the following interlocutor:—"Finds that on the 21st of March 1895 the defender's lorry, loaded with bags of lime and driven by his servant Hugh Connell, was standing in Crookston Street, S.S., Glasgow, opposite the public-house of Craig: Finds that Connell, the carter, on the invitation of an acquaintance went into the public-house to get a dram, and was absent for a few minutes: Finds that the horse's head could be seen from the counter of the public-house: Finds that the pursuer's son Hector Morrison, then less than six years of age, was playing with two companions in the street; that he threw the cap of one of these, named Black, under the lorry while the carter was absent; that Black went under the lorry, got his cap and returned, and then threw Hector Morrison's cap under the lorry; that Morrison went between the wheels on the off-side of the lorry to get his cap, and was under the lorry when Connell returned and got on the lorry from the near side (which was next the public-house) and drove away: Finds that when the lorry moved away, the boy attempted to get out between the wheels, as he had got in, and was seriously injured: Finds that Connell was in fault in driving away without looking whether the wheels of the lorry were clear, and that the injury was due to his negligence: Therefore finds the defender liable in damages; assesses the damages at the sum of £150 sterling; and decerns therefor against the defender in favour of the pursuer."

Note.—"I do not accept the view put forward by the pursuer that the defender is liable because his carter contravened a section of the Glasgow Police Act by leaving his horse unattended while he visited a public-house. There are many necessary or usual and venial occasions for which a carter may or must leave his horse, and having regard to all the circumstances I could not find damages due merely because the man by doing so gave occasion to boys to indulge in larks about the lorry. Had the horse run off during his absence, perhaps the question might be different. However we look at the facts of the case, and whatever effect we give to the statute referred to, the man Connell's absence was not the proximate cause of the accident.

"Contrary to the impression which I had formed during the leading of the proof, and before I had directed my attention to the structure of the lorries one sees in the street—especially to the height of the body above the ground—I am now satisfied that the carter's failure to use his eyes, so as to make sure that his lorry was clear of all obstruction and all danger to the lieges before he jumped on it and drove off, was the immediate cause of the injury to the boy. No one could look attentively at an ordinary lorry without being aware that, if Connell while crossing the footway from the public-house door had looked at all at his vehicle, he must have seen that the child was underneath it. That this was the state of things seems to be clearly proved by the evidence of the boys who were playing with the injured child; and that it was the carter's business so to look about is admitted by Connell himself.

"There is no doubt that the boy was in fault himself in going under the lorry, and some reference has been made to the cases in which the contributory negligence of children has been considered. I do not go into this question, because assuming the boy to be capable of negligence, and in a certain measure guilty of it, I am of opinion that the facts do not support what is called the plea of 'contributory' fault. It seems clear, on the evidence, that the proximate cause of the accident, looking at the critical moment and final stage of the occurence, was the carter's failure to look whether he could safely drive on. The boy was foolishly and recklessly below the lorry, yet (to adopt the language of Lord Penzance in *Radley* v. *L. & N.-W. Ry. Co.*, 1 App. Cas. 759) the carter could in the result, by using ordinary care and diligence, have avoided the mischief which happened, and therefore the pursuer's negligence will not excuse him.

"One observation remains to be made. It may be argued that even on this view the boy was in fault in trying to escape from his position by going between the wheels. It rather seems that the boy's instinctive effort to escape when he found the lorry in motion is not to be regarded as a fault causing the accident. It was a blunder made by a child in an emergency, in a moment of excitement and danger, such as is not to be regarded as *culpa*. (*See* some illustrations and *dicta* cited in Guthrie-Smith on Reparation, p. 24 and 99.) When one considers how low the axle-bar between the hind wheels of the lorry is, and that even a child to avoid it would have to be flat on the ground, while there is a wide space between the wheels at the side, it is not surprising that in his excitement the child should have taken the wrong way of escape."

The defender appealed to the Sheriff (BERRY), who on 6th January 1896 adhered.

Note.—"The witnesses are not altogether at one as to the way in which the accident to the boy Morrison occurred, but the explanation on which the Sheriff-Substitute has proceeded seems to me that to which the proof points as the most probable, namely, that the boys had been larking about the lorry while Connell, the carter, was in a public-house, and that Morrison's cap being the last that had been thrown in, he was under the lorry at the time when the carter came out and started it again. Taking that to be the true state of matters, I am of opinion that the Sheriff-Substitute has correctly applied the law to the facts. Whether there was any transgression of the Police Act by Connell in going into the public-house and leaving his horse and lorry standing at the door need not be considered. His doing so was in no respect the immediate cause of the accident. The real cause was his starting his horse again, without giving a sufficient look to see that

nobody was about or under his lorry, so as to make it safe for him to go on. He says, no doubt, that he did look under it, but I am afraid that his statement on that point cannot be accepted as in accordance with the fact. At all events, the look he may have given had not been sufficient.

"I was asked on behalf of the defender to allow further proof with the object of showing that 'it is not the duty and custom of lorrymen, after a short stoppage of their lorry on the streets of Glasgow, and before restarting, to see that there is no obstruction underneath the lorry.' The additional proof so asked for was in view of the evidence given by Connell, to a contrary effect in answer to a question put by the Sheriff-Substitute. It was said that the defender was taken by surprise by this question, and so was not prepared to meet Connell's evidence at the time. Fresh proof cannot be admitted without strong grounds, and in my opinion they do not exist here. The defender can hardly say that he was taken by surprise when we see that, in examining Connell in chief, and before any questions were put by the Sheriff-Substitute, his agent obtained from Connell a statement that at the time he started his horse he took a careful look to see that nobody was about the wheels. That could only be to meet a suggestion that Connell had been negligent in not looking. It was argued for the defender that the amount of damages awarded is excessive, and should be reduced. The amount certainly seems to me ample, but I am not prepared to interfere with it, as in assessing damages the Sheriff-Substitute acts as a jury, and his assessment ought not, in my opinion, lightly to be interfered with."

The defender appealed, and argued—The judgment of the Sheriffs was unsound. (1) There was no fault or negligence proved on the part of Connell. During the few minutes that he was in the public-house he kept his eye upon his horse, and there was no *culpa* on his part inferring liability against his employers—*Shaws* v. *Croall & Sons*, July 1, 1885, 12 R. 1186; *Hayman* v. *Hewitt*, 1798 Peakes' Additional Cases at Nisi Prius 170. (2) The child injured was guilty of grave recklessness amounting to contributory negligence—*Frasers* v. *Edinburgh Tramways Company*, December 2, 1882, 10 R. 264. (3) The damages were twice as much as ought to have been given.

Argued for pursuer—(1) A case of fault on the part of the carter was clearly made out. The accident would not have happened (*a*) if he had not improperly and in violation of the Glasgow Police Act gone into the public-house, leaving his horse and cart standing in the street; and (*b*) if when he came out he had looked under the lorry as he ought to have done and as he said that he did. (2) There was no contributory negligence on the part of this child of six years old. (3) The damages were not too much. The child's leg had been shortened for his lifetime.

At advising—

LORD JUSTICE-CLERK—The facts of this case shortly stated are these. Connell, the defender's carter, left his cart and went into a public-house to get a drink. A school was coming out at the time, and the children were playing on the footpath and street. One of the boys threw the pursuer's child's cap under the lorry, and the child went underneath to get it out. While he was there Connell came out of the public-house and drove off. The child tried to creep out between the wheels, and while doing so was caught by them and injured.

I quite agree with the Sheriffs that the proximate cause of the accident was not Connell's going into the public-house. A public-house was no doubt a place in which he had no business to be at that time, but the only weight I attach to that is that, being where he had no right to be, he may have come out quickly and driven off hastily to escape observation without much thought as to any person being about his lorry.

The evidence he gives us is that he did look under the cart before driving off. That is the natural and proper course for a person in charge of a vehicle to take before driving off when he finds a school coming out and a number of children about. Connell himself says it is the usual course, and says he did it. But I am satisfied that if he had done what he thinks he did, he could not have failed to see the child.

In that state of matters we have to consider whether there is any ground for interfering with the judgments of the Sheriffs. After giving the best consideration I can to the matter, I think there are no such grounds, and am of opinion that we should affirm the judgments appealed against.

On the question of damages, I think these are too high. No doubt one leg is a little shorter than the other, but looking to the child's age, and the walks of life which he has to follow, I do not think his prospects are materially injured by reason of the accident. But I cannot say that they are so high that we ought to interfere.

LORD YOUNG—I also see no ground for interfering with the judgment of the Sheriffs.

I have, as I shall presently explain, my own views, which do not concur with those of the Sheriff, as to the effect of the conduct of the carter in stopping his lorry at the public-house in order that he might have a drink, which was admittedly an improper proceeding on his part.

But the facts of the case otherwise and including that must be called attention to.

Hugh Connell, the carter, says that he went on the invitation of an old friend into a public-house to have a glass of whisky, leaving his lorry unattended at the door while he was absent. He excuses himself by saying he was always in such a position that he could see the lorry standing on the street, and could run out if he saw it moving on, and that he did not take a minute to drink his whisky, and then jumped on the lorry and drove off.

But it is quite certain that during his absence in the public-house—it could not be much more than a minute—the accident happened, the child getting into a position of danger during that period. If he had not stopped his lorry at the public-house door, I think the accident would not have happened.

There were a number of children playing on the street, and amongst them the injured child and two other little boys, Black and Muirhead. It appears that Morrison threw Black's cap under the lorry, and Black got it out and then proceeded to retaliate on Morrison, throwing Morrison's cap under the lorry, and then Morrison ran after his cap to get it from under the lorry. Black says—"I threw Morrison's bonnet in below the lorry. He threw in mine first, and when I came out I threw his in, and he went in for his." Then Muirhead says—"The wheel would only be about an inch from the pavement. Hector Morrison took Black's bonnet off and threw it under the lorry, and Black went in for it and came out again, and then Black took off Morrison's bonnet and threw it under the lorry, and the carter came out and jumped on the lorry and made the horse go. Morrison was trying to run out, and the wheel knocked him down and ran over him. . . . The boy Morrison was not long under the lorry. He lifted his bonnet and put it on his head, and sat under for a wee while." Then a witness Mrs Findlay depones:—"He would be about two minutes under the lorry." You cannot take measurements of time from the witnesses, but it appears that one of the boys called to Morrison to come out from the lorry, and he replied he would not come for him.

Now, I say here that these things would take some little time, and could not have happened at all if the carter had done his duty, and had been attending to his horse when it was standing on the street. Indeed, one may confidently affirm that but for Connell stopping his lorry and going in for a drink, this accident would not have happened at all.

Now, I think the section of the Glasgow Police Act which this carter transgressed was enacted for the very purpose of keeping the street safer than it would have been had lorries been allowed to stand without attention. He distinctly transgressed the section, no doubt for a short time, but it would have been the same in the result had he done so for an hour. There is, of course, greater risk of an accident during a long than during a short period, but the risk was there during the period, and it was caused by him. That is the meaning of the expression *versans in illicito*. An accident which happens when a man is not *versans in illicito*, when he is not doing anything illegal, although damage ensues, is in a different position as regards his responsibility or that of those who are responsible for him, than an accident which happens when he is doing something illegal, when he is *versans in illicito*. He was *versans in illicito* in stopping his horse when he had no occasion to do so. It was on account of the fault involved in that that the child got into a position of danger which it could not have got into if he had done his duty.

But I also think that there is no ground for arriving at another conclusion on the view of the Sheriff-Substitute, that if he had used that care in coming out of the public-house which he himself says he did use, he would have seen what all the children say they saw. He could from the position of the lorry have seen this from inside the public-house. It is plain he just came out and jumped on the lorry and drove off. Now, I cannot say that that was legitimate conduct on the part of a man who was *versans in illicito* by being in the public-house at all, and therefore, so far as my own opinion is concerned, I can see no ground for saying that the Sheriffs came to an erroneous conclusion.

On the whole matter, therefore, I am of opinion that there was fault here. As regards the damages, I am of opinion that £150 is not too large a sum to award where a child gets his leg so marked that there is a probability of his having one leg shorter than the other for the rest of his life.

LORD TRAYNER—I think the Sheriffs were right in disregarding in this case the alleged infraction by the defender's servant of the Glasgow Police Act, they being both of opinion—an opinion in which I concur—that such infraction was not the cause of the injury for which damages are sought. My agreement with the Sheriffs ends there, for I am of opinion that no fault has been established against the defender's servant for which the defender could be made liable. It appears clear to me on the evidence that the injured boy was to blame; and, following the judgment in the case of *Fraser*, and there are others to a like effect, I am for recalling the interlocutor appealed against and granting absolvitor.

LORD RUTHERFURD CLARK was absent.

The Court dismissed the appeal, found in fact and in law in terms of the findings in fact and in law in the Sheriff-Substitute's interlocutor of 13th November 1895, and of new found the defender liable in damages and assessed them at £150.

Counsel for the Pursuer—Guy. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defender—Dundas—Salvesen. Agents—Macpherson & Mackay, S.S.C.