the Workmen's Compensation Act 1897" finding it unnecessary to pronounce further.

The pursuer appealed to the Court of Session.

On 16th May 1906 the Court was proceeding to dismiss the action on new findings in fact other than that no fault had been proved against the defenders or anyone in the position of superintendent, when the pursuer moved the Court to determine the amount of compensation due under the Workmen's Compensation Act, and referred to section 1, sub-section 4, of that Act. The defenders asked that the case should be continued, and the Court granted a continuation of a week.

At the continued hearing on 2nd June it was argued for the defenders—The Court which was to assess the compensation payable under the Workmen's Compensation Act was the Court in which the action was tried, *i.e.*, in which proof is taken. The case should be remitted to the Sheriff to assess the compensation—*Little* v. *P. & W. MacLellan, Limited*, January 16, 1900, 2 F. 387, 37 S.L.R. 287.

Argued for the pursuer—In *Little* (*supra*) there were no materials upon which the Court could have proceeded to assess compensation, there having been no proof on the merits. Here there were the necessary materials, and this was the Court which tried the case because it finally ascertained the facts on which the judgment was to proceed.

The Court pronounced this interlocutor—

"Sustain the appeal and recal the said interlocutor appealed against: Find in fact . . . (5) that no fault has been proved against the defenders or anyone in the position of superintendent in their employment within the meaning of the Employers' Liability Act 1880: Therefore dismiss the action, remit to the Sheriff to determine the amount due to the pursuer under the Workmen's Compensation Act 1897, and decern . . . ."

Counsel for Pursuer (Appellant)—R. L. Orr, K.C.—J. H. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders (Respondents)—George Watt, K.C.—Macmillan. Agents—Cuthbert & Marchbank, S.S.C.

Tuesday, June 5.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

WATSON *v.* WORDIE & COMPANY.

Reparation — Damages — Accident — Street — Horse · Vice — "Reesting" — Stopping Suddenly when in Front of Another Vehicle—Relevancy.

The pursuer in an action for damages averred that when driving a lorry along a street, seated with his legs over the near side, and when about to overtake a two-horse lorry of the defenders proceeding in the same direction at a walking pace, he looked back over his shoulder on hearing the bell of a tramcar; that while in the act of doing so he was injured by his legs coming against the defenders' lorry, which had suddenly stopped owing to one of its horses having come to a standstill in accordance with a vicious habit of "reesting" known to the defenders. He further averred that the defenders were in fault in using such a horse in their business.

Held that the pursuer had not stated a relevant case of fault against the defenders.

Thomas Watson, lorryman, in the employment of Messrs J. & A. Hutton, Edinburgh, brought an action against Wordie & Company, general carriers, in which he sued them for £500 damages for injuries.

He averred, *inter alia*—"(Cond. 2) On or about 23rd March 1905, between 8 a.m. and 9 a.m., the pursuer was driving a lorry containing a load of timber from Leith Docks to the timber yards of his employers at Newington. He was, as is customary when driving a lorry, seated on the left-hand corner thereof, with his right leg hanging over the end nearest the horse, and his left leg over the side. While proceeding up the North Bridge the pursuer overtook a two-horsed lorry (afterwards ascertained to belong to defenders) proceeding slowly in the same direction. The North Bridge is very wide, and between the eastmost car line and the footway there is ample room for two lorries to pass each other. (Cond. 3) As the pursuer was anxious to reach East Newington Place as soon as possible, and defenders' lorry was proceeding slowly, it was necessary for pursuer to pass defenders' lorry on the right-hand side. To accomplish this pursuer pulled his horse to the right. As he was doing so he heard a car bell ring, and in order to satisfy himself that he was not the cause of any obstruction he turned his head for a moment in the direction of the car. At that moment one of the horses in the defenders' lorry 'reested,' or suddenly halted, with the result that defenders' lorry suddenly and unexpectedly stood still, and before pursuer was able to pull up, the defenders' lorry came into contact with pursuer's left leg and crushed it between the two lorries. Had said horse not 'reested' pursuer could easily have passed the defenders' lorry. (Cond. 5) The said accident was due to the fault and negligence of defenders. They were well aware that one of the horses yoked in said lorry was a 'reester,' or one which has the vicious habit of suddenly halting in the street, without any cause or without any previous warning, and obstinately refusing to proceed. This kind of horse is well known to all horse-dealers and users of horses, who in consequence do not use them in the public streets, as their employment there is attended with danger to the public using said streets. The defenders well knew that

the use of the horse in question in their said lorry was attended with danger to the public, as the said horse which 'reested' had on previous occasions (as the defenders well knew) behaved in the same manner in the public streets. It was not safe for defenders to employ said 'reester' in the public thoroughfares, and in so employing it they were guilty of gross and culpable negligence. The pursuer had no knowledge of said horse."

He pleaded, *inter alia*—"(1) The pursuer having been injured through the fault of defenders in negligently and culpably employing said vicious horse on a public street, as above condescended on, is entitled to reparation from defenders as concluded for in the summons."

The defenders pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (3) The said accident having been entirely due, or at least materially contributed to, by the negligence of the pursuer, the defenders ought to be assoilzied from the conclusions of the summons."

On 3rd February 1906 the Lord Ordinary (SALVESEN) pronounced an interlocutor approving of an issue in ordinary form.

Opinion.—"The circumstances out of which this action of damages has arisen are of a somewhat unusual and perhaps novel character. The pursuer avers that he was driving a lorry along North Bridge, and that he was on the point of passing another lorry belonging to the defenders, which was proceeding somewhat more slowly, when one of the horses of the latter lorry suddenly halted, with the result that his left leg, which was hanging over the side, was jammed between the two lorries and seriously injured. The fault alleged against the defenders is that the horse which suddenly halted was a 'reester'—that is to say, an animal which has the vicious habit of stopping suddenly of its own accord when it is being driven in the ordinary way. The pursuer says that such horses are well known to all users of horses, and that their habits make them a source of danger to public traffic. He accordingly maintains that the defenders were to blame in employing such an animal in one of their lorries.

"The defenders urged that the action was irrelevant on the ground that the driver of a lorry is entitled at any moment to bring his vehicle to a stand without regard to the traffic behind him, and that no liability can rest upon them for the lorry being suddenly brought to a stop, whether that was done by the action of the lorryman or occurred in consequence of the vicious nature of the horse. In my opinion, the contention thus broadly stated is not well founded. It is, of course, plain that there may be many occasions where the driver of a vehicle is not merely entitled but bound to bring it to a sudden stop, *e.g.*, in order to avoid collision with other vehicles or with foot-passengers, but I cannot affirm that no liability will ever rest on a lorryman or his employers if a lorry is unnecessarily brought to a standstill so as to endanger vehicles which are immediately behind or in the course of passing. While the primary duty of the driver of a vehicle is to look ahead, I think that there may sometimes be a duty upon him if he wishes to bring his vehicle to a sudden stop to ascertain whether that can be safely done with reference to the traffic immediately behind, and if necessary to warn such traffic of his intention. If so, it would seem to follow that the employment of a horse whose character is such that it may at any time bring the vehicle to a sudden stop without the knowledge of the driver and without any action on his part, may, I think, constitute negligence. At all events I am not prepared, in the state of the averments, to hold that the pursuer has not stated a relevant case for inquiry.

"The defenders further pleaded that it was plain from the pursuer's averments that his own want of caution or failure to fulfil the duties of a driver had contributed to the accident. The pursuer admits that at the moment when the accident happened he had turned his head at the sound of a bell from an approaching tramcar. Whether that very natural action on his part constituted contributory negligence in the particular circumstances in which it occurred seems to me a question which cannot safely be decided on relevancy, but ought to be submitted to the determination of the jury. I shall accordingly approve of the issue which the pursuer has lodged for the trial of the cause."

The defender reclaimed, and argued—There were no relevant averments of fault. The averment that the horse suddenly halted was not a relevant averment of fault, because a lorry horse proceeding at a walk might stop or be stopped for many innocent purposes, and such a stoppage was one of the ordinary incidents of the streets which should have been kept in view by anyone following behind. The fact that in this particular case a stoppage, in itself innocent and normal, was caused by a bad habit of the horse was obviously immaterial, as the bad habit had not produced any result which might not have followed from the ordinary proceedings of the most exemplary of horses and drivers. The case of *Auld* v. *M'Bey, &c.*, February 17, 1881, 8 R. 495, 18 S.L.R. 312, was distinguishable, the vehicles in that case having been progressing at a rapid pace. In any case the pursuer's averments showed that he had been guilty of contributory negligence.

Argued for the pursuer and respondent—If the horse had not been vicious he would not have stopped at that particular moment, and no accident would have happened. Accordingly it was a vicious habit known to the defenders which had caused the accident. This was not a case of a driver voluntarily stopping for a justifiable cause. There had been no contributory negligence, but in any event that was a question for the jury.

LORD JUSTICE-CLERK—The averments of the pursuer are substantially that on the occasion in question he was driving a

vehicle sitting on the near side with his legs over the side; that he was overtaking the defenders' vehicle, which was moving at a walking speed; that hearing the bell of a tramcar he looked over his shoulder for a moment, and while in the act of doing so his legs came against the defenders' vehicle, and he was thus severely injured. He avers that this happened in consequence of the horse in the defenders' vehicle stopping, and thus not leaving room for him to go clear upon the off-side, and that the horse had a habit of stopping without cause, and was thus vicious; and that the defenders were in fault in using such a horse in their business.

The Lord Ordinary has found the pursuer's averments to be relevant to entitle him to an issue to go to a jury. I am unable to agree with the Lord Ordinary. I cannot hold that the averments of the pursuer disclose a case of fault or negligence. The things which he avers do not, to my mind, present any case which would make it a wrong to keep and use the horse in question in doing work at a walking pace. That a horse when walking should stop, without receiving indication by rein or voice to do so, does not, as I think, point to danger to anyone. A horse on the street may stop at any time, and cart-horses which are kept long hours in the shafts are expected to do so when stopping is necessary, and it is new to me to hear it suggested that such a stoppage could cause any danger to anyone who was attending to his own safety, whether on foot or on horseback or driving. Could it be held that a driver of a horse moving at a walk would be guilty of fault if he stopped his horse to adjust harness, or to pick up something dropped on the road, or himself to go to the side of the road for a necessary purpose? I do not suppose, until this case was raised, that any such idea ever occurred to anyone that a driver was bound to anticipate that someone might be coming up behind, so near, with his legs dangling over the side, and looking away from the direction in which he was going, as to cause danger. If this is so, then the thing itself was not a danger reasonably to be anticipated in the case of a horse which sometimes stopped without apparent cause, so that a person owning such a horse was doing a wrong in using it.

It would be a very different case, and one calling for inquiry, if it was averred that a horse was given to shying or bolting or jibbing. All such things are productive of active movement of an unexpected kind which may be highly dangerous. But what the pursuer avers has no resemblance to such actions, and I am unable to see that what is averred here is relevant to infer fault. I am therefore in favour of dismissing the action.

LORDS KYLLACHY, LOW, and STORMONTH DARLING concurred.

The Court recalled the interlocutor reclaimed against and dismissed the action.

Counsel for Pursuer and Respondent—Orr, K.C.—Laing. Agent—R. W. Cockburn, W.S.

Counsel for Defenders and Reclaimers—Watt, K.C.—Horne. Agents—Connell & Campbell, S.S.C.

Tuesday, June 5.

FIRST DIVISION.

MORRISON *v* WATERS & COMPANY AND ANOTHER.

Expenses—Several Defenders—Liability of Unsuccessful Defender for Expenses of Successful Defender.

In an action against two defenders "conjunctly or severally or severally" for damages in respect of the death of the pursuer's son, one of the defenders was found liable and the other assoilzied.

Held, in the circumstances of the case, that as the successful defender had been brought into Court owing to the conduct of the unsuccessful defender in repudiating liability, in the knowledge of facts peculiarly within his own province and which no inquiry on the part of the pursuer might have been able to discover, the unsuccessful defender was liable in expenses to the successful defender as well as to the pursuer.

Mackintosh v. *Galbraith and Arthur*, November 6, 1900, 3 F. 66, 38 S.L.R. 53; and *Thomson* v. *Edinburgh and District Tramways Company, Limited*, January 15, 1901, 3 F. 355, 38 S.L.R. 263, *commented on*.

On 15th July 1905 Robert Morrison, boiler maker, 23 Orchard Street, Renfrew, raised an action of damages against Waters & Company, contractors, 37 New Sneddon Street, Paisley, and William Martin Murphy, tramway contractor, 13 St James Place, Paisley, in which he sought decree "conjunctly and severally or severally" against the defenders for £500 in respect of the death of his son, who had been run over and killed by a tower-waggon belonging to Murphy but drawn by horses supplied by Waters & Company. The pursuer before raising his action had been unable to find out whose servant, Russell, the driver of the tower-waggon, was, and each defender had written saying his claim was against the other. The case was heard by Lord Ardwall and a jury on 6th December 1905, when a verdict was returned finding that Morrison's son had been killed through the fault of the driver Russell, and that Russell was at the time of the accident under the control of Waters & Company, and damages were assessed against them at the sum of £120. On a rule the Court refused a new trial, and on 5th June 1906 it applied the verdict, decerned against Waters & Company for £120, and found them liable to the pursuer in expenses. The defender Murphy there-