Friday, December 15.

FIRST DIVISION.

[Sheriff Court at Cupar.

HOGG *v.* CUPAR DISTRICT COMMITTEE OF FIFE COUNTY COUNCIL.

Reparation—Negligence—Duty of Driver of Horse Yoked to Road Brusher to Guard against Danger to Public—Horse Suddenly Backing while Driver Removing Nose-Bag.

S., the driver of a horse yoked to a road brusher, which had been drawn up on a piece of vacant ground near a cottage, was removing a nose-bag which he had placed on the horse's head, when the horse suddenly backed, injuring H. (an old woman of 75), the occupier of the cottage, who was passing behind the brusher. The brusher was in a place where it might legitimately be, and there was no evidence that S. had any reason to anticipate that the horse would back. S. did not look behind the brusher before pulling off the nose-bag, though he was aware that H. had been in that vicinity shortly before.

In an action at H.'s instance against S.'s employers, *held* that S. had not been guilty of negligence in failing to look behind the brusher before removing the nose-bag, and defenders *assoilzied*.

Mrs Isabella Johnstone or Hogg, wife of William Hogg, ploughman, Newton, Falkland, *pursuer*, brought an action against the Cupar District Committee of the County Council of Fife, *defenders*, in which she claimed £160 damages for personal injury sustained by her through being crushed between a road brusher and a wall in the neighbourhood of her cottage, owing, as she alleged, to the fault of the defender's servant Sutherland in causing the horse yoked to the brusher to back.

On 21st March 1911 the Sheriff-Substitute (ARMOUR HANNAY) found in fact (1) that on 4th August 1910 the pursuer was crushed against the end of a wall in front of her dwelling-house by a road brusher belonging to the defenders and in charge of their servant George Sutherland; and (2) that the pursuer had failed to instruct that the accident was due to the fault or negligence of the defenders or of their servant George Sutherland, and therefore assoilzied the defenders.

The pursuer appealed to the Sheriff (MORISON), who on 13th May 1911 pronounced the following interlocutor:—"Sustains the appeal: Recals the Sheriff-Substitute's interlocutor of 21st March 1911: Finds in fact (1) that on 4th August 1910 the defenders' servant George Sutherland in the course of his employment drew off a horse and road brusher from the main road in the village of Newton, Falkland, on to an open space in front of the pursuer's cottage, leaving a distance of about 4 feet between the back of the brusher and the end of a wall which adjoins the pathway leading from the public road to said cottage; (2) That about 1·30 on said date the pursuer left her cottage in order to point out to a message girl the house of a Mrs Duncan, and for this purpose proceeded by the said pathway passing through the said 4 feet space between the wall and the back of the brusher on to the public road, and having directed the message girl, was returning to her house by the same route when the defenders' said servant Sutherland pulled a nose-bag out of which the horse was feeding off the horse's head and thereby caused the said horse to back; (3) That the pursuer was thereupon crushed between the end of the wall and the back of the brusher and thereby sustained the injuries detailed in the joint medical report; (4) That shortly before pulling off the nose-bag Sutherland was aware that the pursuer, her husband, and a man named Ogilvie, were about the back of the brusher, but that he failed to look and ascertain whether the pursuer was exposed to the danger of being crushed at the time when he caused the said horse to back; (5) That said accident was caused by the negligence of the defenders' said servant Sutherland, for whose neglect the defenders are responsible: Finds in law that the defenders are liable in reparation to the pursuer, and assesses the damages due to her at the sum of £62 sterling: Therefore grants decree against the defenders for the sum of £62 sterling as in full of the principal sum craved in the initial writ; and decerns."

Note.—"In this case the pursuer, who is seventy-five years of age, and resides in a cottage at Newton, Falkland, claims damages for personal injuries sustained by her through being crushed against the wall on the footpath adjoining her house by a road brusher belonging to the defenders and in charge of their servant George Sutherland. Many of the facts admit of no doubt, and the only question on the merits of the case is whether the unfortunate accident which occurred is due to actionable negligence on the part of Sutherland.

"The circumstances are briefly these—. . . [*After narrating the facts the Sheriff proceeded*—] . . . There is some doubt as to the precise manner in which the bag was pulled off, but in my opinion it is in accordance with the weight of the evidence that it was Sutherland's act in pulling off the bag which caused the horse to back. It was strongly urged for the defenders that this was not a negligent act, and under ordinary circumstances I am prepared to assent to this view. But the situation was peculiar. Sutherland had drawn up the brusher on the vacant ground in such a position as to expose any one using the pathway to the danger of being pinned between the end of the wall and the back of the brusher if the horse backed even the small distance of 4 feet. He was aware of the vicinity of the pursuer and her husband to the end of the brusher, and his duty, I think, was either to look and ascertain that no one was

placed in the position of danger before he pulled off the nose-bag, or at least to have taken adequate precautions against the backing of the horse, a contingency which most of the witnesses describe as quite likely in the circumstances. I think Sutherland failed in this duty. . . ."

The defenders appealed, and argued—The *onus* of proving fault lay on the pursuer, and she had failed to discharge it. There was no evidence that Sutherland was in a position to anticipate that the horse would back when the nose-bag was being removed, and that being so there was no duty on him to look behind. It was a case of pure misadventure.

Argued for respondent—It was common knowledge that a horse went back if a nose-bag were pulled off, and that being so it was the duty of the defenders' servant to look behind before removing it. Where, as here, there was a reasonable probability of danger resulting, it was the defenders' duty to provide against it—*M'Ewan* v. *Cuthill*, November 16, 1897, 25 R. 57; 35 S.L.R. 58; *Milne & Co.* v. *Nimmo*, July 13, 1898, 25 R. 1150, 35 S.L.R. 883; *M'Dowall* v. *Great Western Railway*, [1902] 1 K.B. 618. [The LORD PRESIDENT referred to *Shaw* v. *Croall & Sons*, July 1, 1885, 12 R. 1186, 22 S.L.R. 792.] *Esto* that the horse had never backed before when the nose-bag was being removed, there must have been fault on defenders' part in so removing it as to cause the horse to back.

LORD PRESIDENT—In this case there is no doubt that the pursuer was severely injured by being crushed between a wall and a road brusher belonging to the appellants, and the only question is whether the injury she sustained was due to the fault of one for whom the appellants are responsible. The Sheriff-Substitute found no fault proved, and the Sheriff has reversed that finding and has found that the accident was caused by the negligence of the appellants' servant.

I am of opinion that the decision of the Sheriff-Substitute was right, but I do not form that opinion on the consideration that it was the Sheriff-Substitute who saw the witnesses and that therefore his opinion should be preferred to that of the Sheriff who did not see them. Where there are questions of credibility that consideration always receives weight, and it has received prominence in a recent judgment of the House of Lords. But it does not apply to the present case, nor to any case which turns not upon credibility but upon inferences or conclusions to be drawn from proved or admitted facts.

It is the duty of the Sheriff in cases such as the present to review the whole facts as well as the law laid down. Accordingly I think the learned Sheriff was entirely within his province when he came to a different conclusion from that reached by the Sheriff-Substitute, and I think we are within our province in considering which conclusion we should prefer. I prefer the judgment of the Sheriff-Substitute, because I do not find any proof of negligence. Negligence is a breach of some duty, and I think, with respect, that the interlocutor of the Sheriff fails in this—that while he states four findings in fact none of these support the fifth, which is a finding that the "accident was caused by the negligence of the defenders' said servant Sutherland." A finding of negligence is often a mixed finding of fact and law, and coming to the actual facts in question it seems to me that the case turns upon a very narrow point.

It is admitted that Sutherland did not look when he was removing the nose-bag to see whether there was anybody behind the road brusher. On the other hand, I think it is quite clear that there was nothing wrong in the brusher being where it was, because ample space was left between it and the wall behind it for a pedestrian to pass. Was there anything to make Sutherland suppose that the horse might back if he took the nose-bag off? I think not. I think it is proved that he performed the operation of taking off the nose-bag in what one may call the ordinary way. There must be a combination of pulling and lifting in removing a nose-bag, and there is no proof whatever that this man took off the nose-bag in any way in which he had not done the same thing during all the time that he had had the same horse. Nor is there any evidence that the horse had ever backed when the nose-bag was taken off. If the nose-bag was taken off in the ordinary way, what reason was there to suppose that the horse would back? I think none, and upon that simple ground I come to the conclusion that the interlocutor of the Sheriff-Substitute was right.

LORD KINNEAR—I concur.

LORD MACKENZIE—I am of the same opinion, and should not have thought it necessary to add anything but for the fact that I take a different view from that come to by the learned Sheriff. I think that the Sheriff was entirely within his province in reviewing the decision of the Sheriff-Substitute on fact as well as in law, and I concur with what has been said on that point by your Lordship in the chair. The reason why I am unable to agree with the Sheriff is this, that I do not find any evidence of negligence on the part of the defenders' servant Sutherland. The first four findings in the interlocutor under review do not, in my opinion, support the fifth finding, that the accident was due to Sutherland's negligence. The fourth finding is the only one which says that he failed in any duty, viz., to look and see whether the pursuer was exposed to danger. It appears to me that there was no duty on the part of Sutherland to look unless he thought that the operation in which he was engaged—viz., removing the nose-bag—would cause the horse to back. The Sheriff says in his second finding that Sutherland caused the horse to back by pulling off the nose-bag, but he does not say that there was anything in the history of the horse which would lead him (Sutherland) to anticipate that this would be the

natural result of pulling off the nose-bag, and I prefer to judge of what the horse might be expected to do from the evidence of those accustomed to deal with it. The evidence of Mathieson, who knew the horse well, is entirely to the opposite effect, for he says it was not in the habit of backing when the nose-bag was being removed. Sutherland says he first lifted and then pulled the nose-bag off. This is not contradicted. I think the evidence comes to this, that while Sutherland was removing the nose-bag in a proper manner the horse unexpectedly stepped back, and that accordingly there was no failure of duty on his part. I think that this was just an unfortunate accident due to unforeseen circumstances for which the defenders cannot be made responsible.

LORD JOHNSTON was sitting in the Valuation Appeal Court.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff, dated 13th May 1911: Affirm the interlocutor of the Sheriff-Substitute, dated 21st March 1911; repeat the findings in fact and in law contained therein: Of new assoilzies the defenders from the conclusions of the action, and decern."

Counsel for Pursuer (Respondent)—Constable, K.C.—Mercer. Agent—R. S. Carmichael, S.S.C.

Counsel for Defenders (Appellants)—Munro, K.C.—T. G. Robertson. Agent—James Ayton, S.S.C.

Saturday, December 16.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'LEAN *v.* THE ALLAN LINE STEAMSHIP COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *Second Schedule* (9)—*Memorandum of Agreement—Application by Workman to Record Agreement Differing from that in fact Made—Power of Sheriff to Refuse to Record.*

The employers of an injured workman agreed to pay him compensation during total incapacity, the agreement providing, *inter alia*, "the amount of any payment due during partial disablement to be settled hereafter." The workman sent for recording a memorandum providing that the compensation was to continue "during the claimant's incapacity for work, or until such time as the same shall be ended, diminished, or redeemed in accordance with the provisions of the said Act." The employers having objected on the ground that the form proposed to be recorded contained terms to which they had not agreed, the Sheriff-Substitute refused to record.

Held that the Sheriff-Substitute had rightly refused to record the memorandum tendered in respect that it did not in fact correctly set out the agreement made between the parties.

This was an application under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), at the instance of Angus M'Lean, seaman, 110 Houston Street, Glasgow, in which he sought to have recorded a document purporting to be a memorandum of an agreement come to between him and his employers, the Allan Line Steamship Company, Limited. The Sheriff-Substitute (FYFE) having refused the application, a Case for appeal was stated.

The *facts* were—"(1) The appellant, whilst in the respondents' employment as a seaman on board their s.s. 'Hibernian, on 7th March 1911, sustained injury by accident arising out of and in the course of his employment, and he was thereby totally incapacitated from following his occupation.

"(2) The amount of compensation payable to appellant under the Workmen's Compensation Act was agreed upon at 13s. 9d. per week, and that is still being paid.

"(3) On 17th August the appellant signed a stamped document in the following terms:— "'*First Payment.*

"'Received this 17th day of August 1911 from The Shipping Federation, Limited, on behalf of the owners of the s.s. "Hibernian," the sum of Two pounds one shilling and threepence, being weekly compensation at the rate of 13s. 9d. per week from 25/7/11 to 15/8/11 inclusive, under the Workmen's Compensation Act 1906, under which Act I elect to claim for personal injury by accident sustained by me on or about the 7th day of March 1911. This weekly payment is to be continued during my total disablement resulting from the accident, in accordance with the provisions of the above-mentioned Act—the amount of any payment due during partial disablement to be settled hereafter. (Signed) Angus M'Lean, seaman, 110 Houston Street, Glasgow. (Witness) J. A. Ditchburn. Stamp sixpence.'

"(4) On 21st August 1911 the appellant lodged with the Sheriff-Clerk a memorandum to be recorded in terms of the Workmen's Compensation Act, in the following terms:—'The claimant claimed compensation from the respondents in respect of personal injuries sustained by him on 7th March 1911 while in the employment of the respondents, and on board s.s. "Hibernian," at Greenock, the claimant having sustained dislocation of the right shoulder and having been totally incapacitated from following his occupation from said date in consequence.

"'The question in dispute, which was as to the amount of compensation payable to the claimant, was determined by agreement.

"'The agreement was made on the six-