Tuesday, November 1.

PAXTON *v.* NORTH BRITISH RAILWAY CO.

Reparation—Railway Company—Carriage of Live Animals—Fault. A railway company having contracted to carry a horse, the animal was tied up in the horse-truck by the company's porter in presence of the owner. It was proved that the halter was tied in such a way as to allow the horse to have four feet of rope between the bar and its head instead of two feet. The result was that the animal was able to rear up, and, in consequence, to fall on its back. At the end of the journey it was found dead by strangulation, In an action against the railway company, *held* that the cause of death was the improper tying of the halter, which enabled the horse to rear and fall back; that the railway company were responsible for the tying of the animal, and were liable in reparation for the result of their fault.

This was an appeal from the Sheriff-court of Edinburgh in an action by James Paxton, farmer, Tillicoultry, against the North British Railway Company, concluding for £40, as the value of a blood mare, which had died from injuries received in its carriage from Drem to Tillicoultry on the defenders' line of railway.

A proof was led before the Sheriff-Substitute, from which it appeared that on 2d August 1869 the pursuer brought the mare to Drem station and asked for a horse-box for the conveyance of the animal from Drem to Tillicoultry, *via* Edinburgh.

The mare was tied up in the horse-box by one of the company's porters in presence of the owner. When the train arrived at Edinburgh the mare was found lying dead on her back in the box, with her head at the opposite end of the horse-box from that at which the ring to which she was tied was situated, but with the halter still attached to her head and to the ring, and pulled as tight as possible.

The Sheriff-Substitute (CAMPBELL) assoilzied the defenders, finding that the pursuer had failed to prove that the death of the mare was attributable to any fault or negligence on the part of the defenders or their servants. He observed in his note:—"The evidence upon which this case falls to be decided is very obscure, and the cause of the death of the mare in question is not very satisfactorily ascertained. The only person who gives a positive opinion on the subject is one of the defenders' lamplighters at their Edinburgh station, who seems to have no special qualification to speak on such a subject, but who was the first person to discover the accident, and who cut the halter with which she was tied. This man Griffiths, p. 33, proof, says:—'The collar being on, and the mare falling in the position she was in, caused the end of the collar to press upon the windpipe, and this again caused her death.' This would seem not unlikely, and no other theory is broached. Then who was responsible for the collar being left on the mare? The pursuer says he was passive in the hands of the defenders' porters, knowing nothing of the trucking of horses, and ready to agree to whatever they suggested; and he says he asked twice over whether the harness should not come off, and was assured by the porters, or by a porter of the defenders, that this was unnecessary. But, 1*st*, The pursuer really took charge of the trucking himself; he led the mare into the horse-box, and did it awkwardly too, letting her strike her head against the side of the box as she went in, and adding to her nervousness. 2*d*, He was warned by Allen, proof, p. 37, that as she was nervous or 'crazy,' the harness had better be taken off, in case she should hurt herself with it; but he seemed to think this would be inconvenient, and did not act upon the warning. 3*d*, It is the usual practice for the consigners of horses to take charge of placing them and securing them in the box provided, and to satisfy themselves that they are properly put up before the box is closed. 4*th*, The pursuer had the fullest opportunity of doing so in this case, and seemed perfectly satisfied that all was done rightly.

"In point of fact, the only fault the pursuer can point to, is the tying of the mare in the box. He says the porters should have taken the defenders' slip collar, which was hanging, or ought to have been hanging, in the box, and have used that for tying the mare instead of her own halter; but this will not do. The pursuer led in the mare in her halter, and was in the act of tying her up with it himself when the porter Lunn interfered, thinking that the pursuer was not tying her up short enough. The pursuer must be held to have chosen that she should be tied with that halter. But it is said that Lunn did not tie the halter properly, and that it slipped. Lunn says he tied it with care, and that it was tied at the proper length, viz., two feet, or two feet and a half between the mare's head and the ring, and that it could not slip. In point of fact, the knot with which it was tied to the ring must have slipped, for the mare's head got from the one end of the box to the other; and Griffiths, who cut the rope, says there were from four to five feet of rope between the head and the ring. But no one can tell when it was drawn out, or whether its being drawn out was the cause of the mare getting her hind legs under her, or whether it was not drawn out in consequence of her legs getting under her, in which case the strain on the rope must have been very intense.

"It is certain, from the height of the mare and of her collar above her shoulder, which made together a total height of from six feet to six feet and a half, that the mare could not have thrown herself over by rearing upwards, because the height of the roof of the horse-box was only from seven feet to seven and a-half feet. She could only have got over by her hind feet getting under her. Supposing then that the halter had held and the knot had not slipped, could the mare have got her hind feet under her? On this subject the witnesses differ. Arundel, proof, p. 22, says that she might. See also Baird, p. 38, and Lingard, p. 40, &c. On the other hand, Griffiths, p. 32, says she could not have got her feet under her while she was 'tied by the head short.' But even if it were assumed that the slipping of the knot was the cause of the mare turning over on her back, where is the proof that her so turning over caused her death? Was it the turning over that killed her, or was it the pressure of the point of her collar upon her windpipe that did so? and if she had not had on her collar, would she have been killed? The pursuer must bring home the fault to the defenders, and it is not thought that he has done so.

"In short, the defenders provided a suitable horse-box; their servant tied up the mare carefully, and to the apparent satisfaction of the pursuer,

who was present and saw what was done; and they conveyed the horse-box safely and smoothly over their railway as far as Edinburgh. The death of the mare on the railway seems to have arisen from her own nervousness and fractiousness, not from any cause for which the defenders are responsible. That she was timid and nervous is proved, it is thought, very clearly, by the evidence of Allen, Lunn, and Bathgate, and it is probable that it was in consequence of her restlessness and struggles in the box that she got ner feet under her and capsized. For that the defenders are not responsible.

"As the pursuer paid the sum of 15s. 9d. for the mare's carriage to Tillicoultry, and as the transit was interrupted by her death, he seems to have at least an equitable claim for repayment of that sum; but from the form of the summons the Sheriff-Substitute cannot decern for it, although he has no doubt that the defenders will willingly recognize the claim, if it is thought worth while to make it on them."

The pursuer appealed, and the Sheriff-Depute (DAVIDSON) adhered. In his note he observed:—"The liability of the defenders depends on its being proved that the death of the mare was caused by their fault. The averment in the summons is, that it was caused by the defenders 'having culpably and carelessly failed properly to truck the said mare so as to secure her safety in transit.' Now, in the first place it is not clearly proved what caused the death of the mare. She may have suddenly died from disease; and it does not follow from the fact that the collar was pressing against her windpipe when she was found dead that that was the cause of death. She may have died immediately before, or in the act of falling. There was no *post mortem* examination. The pursuer seems to have intended having an examination, but he did not. It can hardly be said it was the business of the defenders to have had an examination. If the pursuer meant to establish that the mare did not die of disease, it was his interest to have had her examined. The result of no examination is, that it is impossible to say surely what was the true cause of death. The supposition is that she died from the pressure of the collar on her windpipe as she lay on her back. That however is only conjecture. The most that can be said is that it is probable.

"Now, supposing it had been proved that this was the cause of death—were the defenders, in the circumstances of this case, responsible? The defenders furnished a proper and sufficient horse-box. The pursuer brought the mare to the station at Drem. He did not at once give her in charge to the defenders. It does not clearly appear that they would have at once taken charge; and it is said that owners or their servants place the horses in their horse-boxes themselves, or at least assist, and are parties in the doing of it. At all events, in this case the pursuer kept the charge of his mare after he arrived at the station; conducted it himself into the horse-box, and was in the act of tying her up there with his own rope (and it was not proved that the ropes of the defenders were shorter or better than his), when one of the railway porters came to his assistance and shortened the length of the rope. This may be said to be the first act in the process done by the defenders. Their porter or porters may have assisted him, but the mare was placed in the box by the pursuer himself. Then, was the tying up of the mare an independent act of the porter, for which the defenders are entirely responsible? The shorter length was better than the longer, which the pursuer himself was allowing. The tying was done in the presence and with the approval of the pursuer, who was standing beside the porter, and in fact taking part in the operation. Was the mare improperly and insufficiently tied? It is not proved that it was. It was not a matter of any peculiar nicety, or beyond the knowledge of the pursuer himself, who is a farmer. It was done in the sight of several persons acquainted with horses, and none of them suggested that the tying was not well done. The animal having fallen back, from some cause not ascertained, her great weight drew the rope out (and it probably took some time) to it utmost length; but its holding at all in such circumstances does not lead to the conclusion of imperfect fastening.

"The pursuer put the mare into the box with its harness on, and particularly with its collar, which is supposed to have been the instrument of death. When the mare was discovered to be dead no injury besides was apparent; and therefore if the collar had not been on the presumption is the mare would not have died. The keeping on of the harness was the act of the pursuer. If a railway porter said, in answer to an inquiry, that it would do no harm to keep it on, that opinion or statement would not throw the responsibility of the consequences on the porter or the defenders. It was the act of the pursuer himself; and he was warned against doing it by Allen, who knew the mare, and told him it was nervous. That it was a nervous and timid animal is proved; and that it was in a nervous state when placed in the box, partly caused perhaps by the pursuer's awkward guidance in leading it in.

"Thus the mare was placed in the horse-box, and the door was secured. It was then in the custody of the defenders; and no violence or accident, nor any unusual occurrence, happened in attaching the box to the train, or to the train between Drem and Edinburgh."

The pursuer appealed to the Court of Session.

WATSON and JOHNSTONE, for him, argued—(1) That the railway company being common carriers it was not necessary for the pursuers to prove fault. Erskine, 3, 3, 28, and Bell's Prin. 235; and *Harrison* v. *London and Brighton Railway Company*, 29 Law Journal. (2) That fault had been proved.

The LORD-ADVOCATE and the SOLICITOR-GENERAL, for the railway company, replied—(1) The pursuer did not deal with the railway company as common carriers. He made a special contract, embodied in the receipt which the company granted. (2) Railway companies are not insurers of the lives of stock which they carry; their only obligation is to provide suitable trucks. (3) The pursuer relieved them of responsibility by himself superintending the tying of the animal in the horse-box.

At advising—

LORD JUSTICE-CLERK — The Sheriff and the Sheriff-Substitute have assoilzied the defenders from the conclusions of this action, which relate to the value of a horse which was sent by the North British Railway from Drem, with the intention of being transmitted to Tillicoultry, but the first part of the journey terminating at Edinburgh. The horse, it appears, was in good health when it was put into the truck at Drem, but it was found dead on the arrival of the train in Edinburgh, and the question is, Whether the North British Railway Company

are liable for the value of the horse or not? It is pleaded on the part of the pursuer that, in the first place, the company undertook by their contract of carriage to deliver the horse in safety, and that if they failed in that implied insurance they must be liable whether they are guilty of fault or not; and in the second place, it is said that even if that be not well founded, they were in this case guilty of fault. Upon the first of these propositions, I am of opinion that it is not well founded. In the first place, I think, as a general proposition of law, it cannot be maintained to the extent to which it is pleaded in this action. I do not think that in the carriage of live animals a railway company are insurers to the extent that if the animal die in the course of transit the value or loss must fall upon them. I think, that, as a general proposition, cannot be maintained. There may be presumptions in a particular case throwing the *onus* of proof of the cause of death on the one side or the other, but I do not think that the general proposition is well founded. But in this case I think it is entirely excluded by the terms of the contract; because under the Act of 1854 the company were certainly entitled to exclude accidents or injuries arising in whole or in part from fear or restiveness on the part of the animals conveyed. Now that contract, if there was no fault, would be quite sufficient, in this case at all events, to exclude the demand, and I do not think it was maintained on the part of the railway company that if fault was proved the fact that fear or restiveness contributed to the death would be sufficient to enable the company to escape under the terms of that special contract. But, at all events, whether conceded or not, I think it quite clear, upon the terms of the Act of 1854, that such a special contract only applies where the railway company have truly fulfilled their duty, and are not guilty of negligence or fault; and therefore the whole question resolves itself into a matter of fault—Were the company guilty of fault or not, and did that fault lead to the death of the horse? The Sheriff has found that there is no proof that the death of the horse resulted from any causes with which the railway company or the transit were connected. It is quite true that there was no *post mortem* examination, and it is barely possible that there might have been some other cause of death than that disclosed. But I think, in the first place, that the evidence satisfactorily shows that the death of the horse was caused by its pulling and tugging at the halter and rope by which it was tied, falling backwards, and being strangled by the pressure of the collar. That is the *prima facie* cause of death. The body remained in the custody of the railway company. They had it in their power, if they had chosen, to have had a farther examination to show that the horse had died from some other cause. They not only did not take that course, but they did not give any facilities when the pursuer applied to have some such examination made. On this part of the case I am of opinion that we may safely assume that the *prima facie* cause of death was the strangulation in consequence of the horse falling, and the pressure of the collar. No other is suggested, and I think that is sufficient for that part of the case.

The next question is, how did this arise? and I think it is clear enough that it arose from the horse having been imperfectly tied when put into the truck. I do not think there is any doubt about that. The rope ought to have been a rope of two feet—that is to say, the horse's head should not have been further from the ring to which it was fastened than two feet; and if that had been the case, then from all the evidence it is plain that the horse could not have so far got loose, or have stretched the rope to such an extent, as to enable it to fall in the way in which it was found. But then the railway company say, in the first place, they are not responsible for the way in which the horse was fastened; and second, they say that the pursuer relieved them of that responsibility by undertaking the responsibility themselves. On the first of these, I think the railway company are responsible to see that the animals they carry are properly fastened; and one strong indication of that responsibility being assumed is, that there were appliances in the horse-truck for the purpose of having the animals properly secured. The case of *Raimes* was quoted to us, but that was a case of an entirely different description. There, a cattle-dealer or farmer had hired a truck, and having taken possession of the truck, he at his own hand overloaded the truck which was to convey a certain number of cattle, overloading it manifestly in order to save his own pocket, and in order to enable the one truck to carry all he wanted. That is an entirely different matter. But as a general rule if carriers, whether by sea or land, whether by railway or on board ship, receive animals for the purpose of transit, they do undertake that they will take due and reasonable care that the animals shall be safely conveyed, and they have the responsibility, and I think they alone have the power, of taking the necessary means to enable that transit to be safely performed. In the second place, I am of opinion that the pursuer did not in any way whatever undertake that obligation. It is quite true that the porter Lunn, who superintended the putting of the horse into the truck, and who tied the horse up, says—"I thought pursuer was going to tie her head up with too long rope, and that was my reason for interfering." But, first, it was the fault of this porter, if it was the fault of any one, that the horse was not properly tied, and he is liable to that observation; and second, he is a single witness, and he is contradicted by the three or four witnesses who were there at the time—not only by the pursuer himself, but by the other persons who saw the horse put into the truck, not one of whom says anything about the pursuer being in the act of tying the animal up; and on the evidence I am of opinion that it is not proved that he interfered in that matter. And therefore, on the whole case, I think, in the first place, the question is, whether the defenders were or were not in fault in this matter, and I think it clear that the accident happened from the rope slipping, and that the rope slipped in consequence of insufficient tying; and further that the responsibility for that insufficient tying rests upon the railway company, and that consequently they ought to be found liable.

Lord Cowan—This is a case attended with considerable nicety upon the evidence, and also upon the argument that has been addressed to us. The first matter that I think it necessary to inquire into is the cause of death. The Sheriff considers that it is left in doubt, and probably there may be a considerable degree of doubt upon the evidence as to the cause of death, but as the case is presented to us upon the evidence, I cannot for myself hesitate to say that this animal died from having got loose from the rope to a certain extent,

and so jumped about in the box that she got choked with the collar. I think that is the cause of death, and I do not see any dubiety about it on the proof. There might have been a *post mortem* examination, but I do not enter into the question who was responsible for its not having taken place. That being so, where does the responsibility lie in respect of the non-delivery of the horse at the termination of the journey. It was delivered to the railway company in good health, and at a certain stage of the journey it was found dead in the box. The death arose from circumstances which we have to inquire into, and investigate. We have to consider the length of the rope by which she was attached to the ring in the box, the presence of the owner of the horse at the time it was tied up, and the fact that the collar was left on her when she was shut in; so that we may assume that the death arose from the combined operation of these different causes. I hold it to be clear, in point of law, in the first place, that had the man not been present, and the horse had been handed over to the railway servants at Drem, there was an obligation on the railway company to see that she was properly secured in the box, and tied up in the usual way. I know of no better evidence that this was regarded as the duty of the railway company than this, that there were hung up in the box halters intended to be used for that very purpose. I think the railway company was bound to see that the horse was properly secured, just as much as a shipowner or ship-master is bound to see that goods handed over to him for shipment are properly stowed in the vessel. Whose fault is it that a length of rope of from 4 to 6 feet was left for the horse to play upon? It is said the horse was brought there with a halter, and then it was tied up in the box. Now, was that properly done? I think not. It seems to me impossible to say it was properly done, otherwise it could not have got on its back in the way it was found when the train arrived in Edinburgh. The inference I draw from the evidence is, that in shortening the rope there must have been a noose put upon it, and the efforts of the animal to get quit of the halter had drawn out the noose. Now, I think that was an improper and erroneous way of tying the animal, and I cannot excuse the person whose duty it was to tie it up. The question is next—Why was the collar left on? and that leads to another difficult question. The farmer brought the horse to the box. I do not think that the man being present (who was proved not to have been a skilled man in these matters) ought to exonerate the railway company from the duty of seeing that the horse was properly secured. I think the company must be held responsible, and that the presence of the farmer cannot prevent liability from attaching to them. As to the collar being left on, it seems that the animal, having too great a length of rope, jumped about, and so caused the collar to press upon the windpipe, and led to strangulation. Now, it seems to me impossible that this should have happened if she had been tied up with only two feet of rope. With regard to the argument of the Solicitor-General on the terms of the receipt, I am quite satisfied that a clause of that kind introduced into the receipt, and not embodied in a contract subscribed by the party, cannot have any effect if fault and negligence on the part of the company be proved. Therefore I do not think that the circumstance that fear or restiveness may have led the animal to jump about can be held to be a good defence on the part of the railway company. Moreover, it is not established that the restiveness and fear did cause its death. They may have led to its making more efforts than another animal would have done, but is not the limitation of the length of rope to two feet for the very purpose of preventing an animal of that restive disposition from getting away from the ring? I think the cause of death can be traced to the fault of the porter who placed the horse in the box, and that the railway company are responsible for that.

Lord Neaves—I am of opinion that under this contract of conveyance there was a duty on the railway company properly to truck the horse, including the duty of seeing that it was duly tied with a view to its safety. They undertook and proceeded to discharge that duty, but they or their servants (for whom they are responsible) did it ill, whereby the horse met its death from strangulation.

Agents for Pursuer—Millar, Allardice, & Robson, W.S.

Agents for Defenders—Dalmahoy, Wood, & Cowan, W.S.

Wednesday, November 2.

FIRST DIVISION.

FARQUHARSON, PETITIONER.

Lease—Lease of Entailed Lands for Shooting Purposes—Rutherfurd Act, 11 and 12 Vict. c. 36, § 24. What constitutes a long lease under this section.

Held (1) that a lease of land for a period of years for the purposes of sport may be granted by an heir of entail, under the authority of the Rutherfurd Act; the lease being really one of the land, and not of a mere privilege of sport over the land; and the Court being satisfied of the expediency, and that the provisions of the statute are complied with. *Held* (2) (dissenting, Lord Deas) that the term long lease in the 24th section of the Rutherfurd Act must be taken to mean, not only building leases, and leases of such duration as to be virtual alienations, but leases also of a length exceeding that which the heir of entail in possession is entitled to grant in the ordinary administration of the estate, and under the fetters of the particular entail.

This was a petition under the Rutherfurd Act, 11 and 12 Vict., c. 36, § 24, and the Amendment Act, 16 and 17 Vict., c. 94, § 5, for authority to grant a lease of part of the entailed estate of Invercauld. The petitioner, James Ross Farquharson, set forth that he was heir of entail in possession of the entailed lands and estate of Invercauld, &c., under certain deeds of entail; and that he was infeft in the said lands and estate according to special service as the nearest and lawful heir of tailzie and provision in special of his father James Farquharson, last of Invercauld, under the said deed of entail. "That by the said deeds of entail the petitioner and the other heirs of entail thereby called to the succession of the foresaid lands and estate are especially prohibited, *inter alia*, from granting any tack or lease for a longer period than one year of a certain portion of the said entailed lands and estate, comprehending the lands to be contained in the lease after mentioned."

He then narrated the 24th section of the Rutherfurd Act, and the 5th of 16 and 17 Vict., c. 94,