

ness being conducted or directed in this country.

Corporation profits tax has been imposed upon it under section 52 of the Finance Act 1920, which by sub-section 2 (a) charges all profits of a British company carrying on any trade or business or any undertaking of a similar character. That description applies in terms to the profits of the appellant company, which is a British company within the meaning of the Finance Act 1920, and particularly of section 52 (3).

It appears from the case that in respect of the exclusively foreign control of the appellant company it has not been assessed to British income tax or to excess profits duty. The argument for the company is that by analogy it ought not to be liable in corporation profits tax. One can see reasons (which have been very well presented by Mr Patrick) upon which it might have been regarded as reasonable to make the incidence of income tax, excess profits duty, and corporation profits tax identical. We are not, however, at liberty to speculate upon the matter, but are bound to take the terms of the taxing Act just as they stand. It seems to me indisputable that the profits which have been subjected to corporation profits tax in this case are within the definition of chargeable profits under the Finance Act of 1920. The word "determined" in sub-section (2) of section 53 was said to point to a limitation of the incidence of the tax, and its use in that sub-section was contrasted with the word "computed" in sub-section (1) of the same section. But the last words of sub-section (2), viz., "whether the profits are assessable to income tax under that schedule or not," seem to me to deprive the contrast of any significance for the present purpose.

The case raised a second point with regard to depreciation, but the question which was directed to elicit an answer upon it has been withdrawn, and it is therefore unnecessary to answer it. With regard to the first question, I am for answering it in the affirmative.

LORD SKERRINGTON—I concur.

LORD CULLEN—I concur.

LORD SANDS—I concur.

The Court answered the first question of law in the affirmative.

Counsel for the Appellants—Robertson, K.C.—Patrick. Agents—Croft-Gray & Company, S.S.C.

Counsel for the Respondents—Leadbetter, K.C.—Skelton. Agents—Stair A. Gillon, Solicitor of Inland Revenue.

Tuesday, May 22.

SECOND DIVISION.

[Lord Ashmore, Ordinary.]

RICHARDSON v. BEATTIE.

Reparation—Negligence—Restive Horse Placed in Charge of Boy Incapable of Managing it—Liability of Owner for Accident—Averments—Relevancy.

In an action of damages by a father, as tutor of his pupil son, for injury alleged to have been sustained by the latter, the pursuer averred that his son, when employed by the defender in delivering milk cans, was thrown from a cart driven by one of the defender's servants, owing to the horse, which belonged to the defender, bolting; that the horse was a powerful and spirited animal; that it was restive and difficult to control, and unsuitable for traffic in a city and near a railway; and that the defender, who was aware of these defects, had put it in the charge of a boy of fifteen, who was quite incapable of managing it. *Held* that these averments were relevant to infer fault against the defender.

Reparation—Negligence—Illegal Contract—Employment of Children under Twelve—Injury to Child while in Defender's Employment—Whether Claim on Child's behalf against Employer Excluded.

In an action of damages by a father, as tutor of his pupil son, a boy of eleven, for injury sustained by the latter while in the defender's employment, owing to alleged fault on his (the defender's) part, the defender founded on a bye-law of the Education Authority of Glasgow prohibiting the employment of children under twelve years of age, and maintained that as he (the defender) was in breach of that bye-law the pursuer was disabled from suing him for damages. *Held* that the fact that the employment of the pursuer's son was illegal did not exclude a claim on his behalf against the defender, the claim being founded not on a contract but on delict.

William Richardson, locomotive fireman, Glasgow, as tutor of his pupil son Robert Richardson, *pursuer*, brought an action against James Beattie, dairyman, Glasgow, *defender*, for payment of £250 in name of damages for injuries sustained by his son through the latter being thrown from a milk cart belonging to the defender, in consequence of the bolting of the horse.

The pursuer's averments sufficiently appear from the opinion of the Lord Ordinary.

The defender pleaded, *inter alia*—"1. The pursuer's averments being irrelevant, the action should be dismissed. 3. The pursuer's son not being at the time of said accident in the execution of any employment by or any duty owed to the defender, and the defender having no duty towards him in the matter, the defender should be absolved."

On 30th January 1923 the Lord Ordinary (Ashmore) repelled the defender's plea to the relevancy, and allowed an issue.

Opinion.—"In this case the pursuer, as the tutor of his pupil son, a boy aged 11, is suing the defender, a dairyman in Glasgow, for £250 damages for personal injuries sustained by the boy.

"The circumstances as averred by the pursuer may be summarised as follows:—The defender in the course of his business sends out horse-drawn milk carts for the purpose of delivering and selling milk, and these carts are accompanied by boys and girls employed by the defender to help to deliver the milk cans.

"In July 1922 the pursuer's son was employed in this way, and when sitting in a milk cart driven by James Barbour, one of the defender's servants, the horse was startled and ran off and collided with a furniture van, with the result that the pursuer's son was thrown out and injured.

"The pursuer avers that the horse drawing the milk cart was powerful and high-spirited, restive, and difficult to control, and that Barbour, who was only 15 years old, was unable, by reason of lack of strength and want of experience, to manage the horse, that the defender, although he knew that the horse was difficult to control and was not suited for drawing a milk cart, and that Barbour was not fit to manage the horse, nevertheless culpably and negligently employed Barbour to drive it, and employed the pursuer's son to accompany the milk cart.

"At the diet for the adjusting of the issue proposed for the trial of the case various objections were taken for the defender to the relevancy of the pursuer's averments. I will deal with these *seriatim*—

"(1) In the first place it was maintained that, in order to infer liability in respect of the alleged unsuitability of the horse, it was essential for the pursuer to aver that the horse was unnaturally vicious or had some unusual propensity which made it dangerous, and that it was also essential to aver that the vice or dangerous propensity should have become known to the defender. Counsel for the defender based his contention on the following cases, viz.:—*Cox v. Burbidge*, 1863, 13 C.B. (N.S.) 430; 134 R.R. 586; *Bradley, &c. v. Wallaces Limited*, 1913, 3 K.B. 629; *Milligan v. Henderson*, 1915, S.C. 1030; *Fraser v. Hood*, 1887, 15 R. 178; *Wilson v. Boyle*, 1889, 17 R. 62; *Smith v. John Wallace & Company*, 1898, 25 R. 761.

"In my opinion the pursuer's averments regarding the alleged negligence of the defender in employing Barbour to drive the horse referred to are relevant. If the defender knew, as the pursuer avers he did know, that the horse was restive, that there was a risk of its being startled on the road and becoming unmanageable, and that Barbour, owing to inexperience and lack of strength, would be unable to control it, then he ought not to have trusted Barbour to drive it. In short, if the defender possessed the knowledge attributed to him he must have known that an accident was

likely to happen. It follows that he ought to be held answerable in law for the consequences of such an accident.

"The decision in *Brown v. Fulton*, 1881, 9 R. 36, seems to me to be in point. In that case the Court upheld the relevancy of averments by the pursuer to the effect that the defender had allowed his son, aged fourteen, to ride a horse which was powerful and high spirited with the result that it ran away and knocked down the pursuer.

"(2) It was further maintained for the defender that as the pursuer's son and Barbour were fellow-servants in the employment of the defender, he (the defender) was not responsible to one of them for an injury caused to him in the course of the employment by the negligence of the other.

"In my opinion, however, the doctrine of fellow-servant has no application in this case, in which the negligence complained of is the negligence of the defender himself in employing Barbour to drive the horse in the knowledge that Barbour was unfit for the duty.

"(3) The only remaining objection on this question of relevancy was to this effect, that the pursuer's son being only eleven years of age ought not to have been employed at all, inasmuch as bye-laws made by the Education Authority of Glasgow prohibit the employment of children under twelve, and that no claim can arise out of illegal employment of the kind averred by the pursuer.

"On this question counsel for the pursuer submitted an argument on the following lines:—(a) That the bye-laws referred to were made in the interest of the children and struck at the person who employed a child under twelve—*Gibb v. J. & J. Crombie*, 1875, 2 R. 886—and (b) that in no view could the pursuer's claim in this action be excluded, inasmuch as there was no causal connection between the alleged breach of the bye-laws and the accident to the pursuer's son.

"I must assume, accepting the pursuer's averments as I am bound to do, that the defender did in fact employ the pursuer's son although he was under twelve, and although that was contrary to the bye-laws, but that is all that appears on the face of the pleadings. The defender, I may explain, denies that he ever employed the pursuer's son.

"In that position of matters I think that the defender's argument on this head of the objection is not well founded. In my opinion the mere fact that the pursuer's son was employed contrary to the bye-laws would not exclude the present claim on the boy's behalf against the defender, who *ex hypothesi* was the person who employed the boy, and who according to the pursuer's averments was himself guilty of negligence which resulted in the injuries to the boy in respect of which the claim is made.

"The only other question raised for determination at this stage related to the mode of inquiry in the event of the pursuer's case being held relevant.

"Counsel for the defender urged that the case is not suited for trial by jury, but I see nothing in the practice of the Court to

justify the contention in a case like this which is relevant, and which, as I think, presents no exceptional features which call for a departure from the normal procedure.

“For the reasons which I have given I will repel the defender’s plea as to the irrelevancy of the pursuer’s averments, and approve of the issue proposed by the pursuer for the trial of the case.”

The defender reclaimed, and argued—1. The pursuer’s case was irrelevant in respect that there were no averments of specific facts from which a knowledge of the horse’s alleged restiveness could be imputed to defender. A pursuer founding on the vicious character of an animal must not only aver knowledge on the part of the owner, but must specify the facts from which he proposes to prove such knowledge. There was here a bare averment that the defender knew the horse was restive. 2. The pursuer averred that his son, whom he stated to be eleven years of age, was in the employment of defender. If that were so, the employment was illegal, as by section 2 of the bye-laws of the Glasgow Education Authority under the Employment of Children Act 1903 the employment of children under twelve years of age was prohibited. Accordingly the negligence which was the foundation of this case arose, on the pursuer’s own averments, in connection with the carrying out of an illegal contract. Nothing arising out of such a contract could form a relevant ground of action. The case of *Gibb v. Crombie*, (1875) 2 R. 886, 12 S.L.R. 574, was distinguishable.

Argued for the pursuer—1. There must be specific averments of facts from which a pursuer proposed to prove a defender’s knowledge of an animal’s characteristics in such cases as those of biting or kicking, because such faults were not necessarily obvious to every owner. The present case, however, was different. The restiveness and difficulty of control which were here averred must have been obvious to the horse’s owner. No specific instances would require to be proved in order to infer knowledge on the part of the defender. The risk arising from these faults could have been averted by supplying a competent driver, which it was averred the defender had failed to do—*Brown v. Fulton*, (1881) 9 R. 36, 19 S.L.R. 24. There was the further averment that the horse was unsuited for work in a noisy locality such as that where the accident occurred. The use of such a horse in that locality required special precautions—*M’Ewan v. Cuthill*, (1897) 25 R. 57, per Lord Justice-Clerk Macdonald at p. 61, 35 S.L.R. 58. 2. The fact that the employment of the pursuer’s son might be illegal had no bearing on the present action, which was founded not on contract but on delict.

LORD JUSTICE-CLERK—This is an action by the father of a pupil child who was injured by reason of a horse, which belonged to the defender, throwing the pursuer’s child out of the milk cart in which he then was. The boy sustained injuries in respect of which this action has been

brought, and the Lord Ordinary has approved of an issue. I agree with the view of the Lord Ordinary, and very much upon the same grounds. I think that the averments are relevant.

The pursuer avers that the horse which was yoked to the cart was a powerful and spirited animal. He further avers that it was restive, and difficult to control. The defender maintains that there ought to be an averment of previous misconduct, so to speak, on the part of the horse. But we are in a different province from that with which we are here concerned when the fault alleged is that of biting or kicking on the part of the horse. We are here dealing with what I might term the demeanour or deportment of the horse, which must have been obvious to anybody who saw it. But however that may be, the pursuer specifically avers and offers to prove that the defender knew, or should have known, of the defects which he avers. And he proceeds to make this further and important averment, that whether or not this horse was safe on a quiet country road, it was quite unsuitable for traffic in busy city streets, near a railway, and accompanied by noises disturbing to a horse of this particular type.

The matter does not end there. The pursuer proceeds to aver that this horse, with all its defects and dangers, was put in charge of a boy of fifteen—lacking years, experience and strength—and that that boy was quite incapable of managing such a horse.

It seems to me that these two sets of averments combined disclosed a case the relevancy of which is undeniable. If I had any doubt about the matter it would be removed by the decision in *Brown v. Fulton* (1881, 9 R. 36), which appears to me to cover and confirm the view I venture to express.

There is just one other argument upon which the defender founded, and it was of this nature—He maintains that there is a certain bye-law enacted by the Education Authority in Glasgow whereby the employment of children under twelve years of age is prohibited. He says that he (the defender) was in breach of that bye-law, and he argues that the pursuer is therefore disabled from suing him for damages. If the pursuer had been suing upon a contract between the boy and the defender that might well be so. But the defender appears to forget that the action is founded not upon contract but upon delict—that fault, not breach of contract, is what is here alleged. It seems to me that a most anomalous situation would be disclosed were the defender right in this contention, for then he would be entitled to found upon his breach of the bye-law as affording him protection against a claim which otherwise would be good against him. The breach of the bye-law would provide him with a charter to injure this or any other child. I do not think that such a result is in accordance with the decision in *Gibb v. Crombie* (1875, 2 R. 886), to which we were referred, and which seems to confirm and cover that view also. Nor indeed, I will add, is the result in conformity with common-sense.

Whether or not the pursuer may be able to establish what he avers is not a matter of concern at the moment, but I am clearly of opinion that he should have an opportunity of endeavouring to do so.

LORD ORMIDALE—I concur.

LORD HUNTER—I concur.

LORD ANDERSON—I concur.

The Court adhered.

Counsel for the Pursuer and Respondent—Robertson, K.C.—W. A. Murray, Agents—Wallace, Begg, & Company, W.S.

Counsel for the Defender and Reclaimer—Mackay, K.C.—Christie, Agents—Manson & Turner Macfarlane, W.S.

Friday, May 25.

SECOND DIVISION.

[Lord Ashmore, Ordinary.]

FRASER v. PATE.

Reparation — Negligence — Road — Sheep Straying on to Public Road — Injury to Cyclist — Liability of Owner of Sheep.

Road — Sheep Straying on — Liability of Owner.

A motor cyclist was proceeding along a public road when a sheep, which had escaped from an adjoining field, suddenly ran across the road and collided with the bicycle, thereby causing serious injury to the rider. In an action of damages at his instance against the owner of the sheep, the pursuer averred that the fencing of the fields was defective, and that in any event the defender was in fault in allowing his sheep to be on the road. Held that no liability attached to the owner of the sheep, and action dismissed as irrelevant.

Observed (*per curiam*) that the law of Scotland in this matter did not differ from the law of England, and that the rule in *Heath's Garage, Limited v. Hodges*, [1916] 2 K.B. 370, fell to be applied.

William Fraser, 27 Barclay Place, Edinburgh, pursuer, brought an action against Robert Pate, farmer, Walstone, Penicuik, defender, for payment of £250 as damages for personal injuries.

The pursuer averred, *inter alia*—“(Cond. 2) On the evening of 20th September 1922 the pursuer was riding a motor bicycle from West Linton to Edinburgh. His son was riding on the back seat of the said motor bicycle. The pursuer uses the bicycle for the purpose of his business. (Cond. 3) About half-a-mile from Nine Mile Burn, towards Edinburgh, the road running from West Linton to Edinburgh forks, the right hand road going to Penicuik and thence to Edinburgh. The pursuer chose that road to return home. (Cond. 4) Certain fields belonging to the defender's farm are on the sides of said road at a little distance from the forks. There were sheep belonging to the defender

grazing in one of these fields, but the gate and fences of the field skirting the road were insufficient to contain said sheep, and several of said sheep had escaped from the field and were grazing at the side of the said road. In any event the defender was negligent in having sheep belonging to him grazing on said road at the time of the accident. They had no right to be there, and the defender was in fault in keeping the gate and fences of said field in such a condition that they were able to escape from the field. (Cond. 5) Seeing said sheep on the road the pursuer drew up his cycle and proceeded with great caution, but when he came opposite where the sheep were grazing two of them suddenly rushed across the road from the north to the south side, and the second of them came into violent collision with the front wheel of pursuer's cycle. . . . (Cond. 7) The accident is entirely due to the fault of the defender in allowing sheep belonging to him to be grazing upon the road as stated. Also and further, he was in fault in keeping his fences in such a state that sheep from his fields were able to stray on the roads. These fences have been in that condition for a long time and their disrepair was well known to the defender. Also he was well aware that in consequence his sheep were in the habit of straying on the said road. In these circumstances he is liable to the pursuer for his loss and damage.”

The defender pleaded, *inter alia*—“1. The pursuer's averment being irrelevant and insufficient to support the conclusions of the summons, the action ought to be dismissed.”

On 4th January 1923 the Lord Ordinary (ASHMORE) sustained the first plea-in-law for the defender and dismissed the action.

Opinion.—[After a narrative of pursuer's averments]—“The defender repudiates liability on various grounds, and at the diet for adjusting the issue proposed by the pursuer for the trial of the case it was maintained for the defender that the pursuer's averments are wanting in specification, and are, moreover, fundamentally irrelevant, and that the action ought therefore to be dismissed at this stage.

“I will deal with the objection as to the want of specification, and for that purpose will refer more particularly to what is averred by the pursuer regarding the insufficiency of the fencing.

“The pursuer, after explaining that ‘certain fields’ belonging to the defender's farm are situated on the sides of the public road, proceeds to aver as follows:—‘There were sheep belonging to the defender grazing in one of these fields, but the gate and fences of the field skirting the road were insufficient to contain said sheep, and several of said sheep had escaped from the field and were grazing at the side of the said road. In any event the defender was negligent in having sheep belonging to him grazing on said road at the time of the accident. They had no right to be there, and the defender was in fault in keeping the gate and fences of said field in such a condition that they were able to escape from the field.’