

railway company. There is no averment that the train was started so quickly as to give no proper opportunity to alight. All that is said is that it is negligence because the train was started while a door was still open. I do not think that is common sense. I think, therefore, your Lordship should dismiss this action as being wanting in relevancy of averments against the Railway Company.

I think that is a safer ground to go upon than what was also urged on us—the disclosure of contributory negligence on the part of the pursuer in bar, because, although no doubt I do think the chances, so to speak, are all in favour of it being the man's own fault that he allowed himself to be struck by the door of a railway carriage while on the platform, still that is not a universal proposition. There may have been circumstances in which he was not able to get away, and the proof of contributory negligence must, of course, lie upon the person who is alleging it, namely, the defender. But before the defender is put to any such proof there must be a case of negligence against him. It is there I think that this case fails, and I am therefore for dismissing the action.

LORD KINNEAR—I agree. I only add that I do not find any averment that the defenders did not give the pursuer time to alight, and that he was knocked down before he had time to step from the carriage to a safe place. There is no averment of that kind, and in the absence of an averment of that kind I think the case rests exactly as your Lordship has put it.

LORD DUNDAS—I also agree. I only add that to my mind the case is an extremely plain one.

The Court dismissed the action.

Counsel for the Pursuer (Appellant)—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders (Respondents)—The Solicitor-General (Ure, K.C.)—Grierson. Agent—James Watson, S.S.C.

Friday, November 1.

FIRST DIVISION.

[Sheriff Court at Inverness.

MACFARLANE v. COLAM.

Reparation—Road—Motor Car—Accident Caused by Horses Shying at Motor Car on Road when Stationary but Unattended—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), sec. 123, incorporating the General Turnpike Act 1831 (1 and 2 Will. IV, cap. 43), sec. 96.

A motor car, having its machinery stopped, was left unattended on a road, drawn up at the side of the road so as to leave ample room available for passing vehicles. The driver desired to visit a house and was away about fifteen

minutes. During his absence the horses in a waggonette, on passing, shied, and damage was done to horses and carriage. An action of damages having been raised in the Sheriff Court, the Sheriff-Substitute held that the driver of the motor had committed a contravention of the General Turnpike Act 1831, section 96, by leaving the motor car unattended, and consequently that the owner thereof was liable in damages. Held that the leaving the motor car unattended had no relation to the accident, which was caused by the shying of the horses and the driver's inability to control them, and defender *assolvié*.

Question whether any contravention of the General Turnpike Act 1831, section 96, had been committed.

The General Turnpike Act 1831 (1 and 2 Will. IV, cap. 43), section 96, *inter alia*, enacts—"If any person shall leave any waggon, cart, or other carriage whatever upon such road or upon the side or sides thereof without any proper person in the sole custody or care thereof longer than may be necessary to load or unload the same . . . or shall not place such waggon or other carriage during the time of loading or unloading the same, or of taking refreshments, as near to one side of the road as conveniently may be, either with or without any horse or beast of draught harnessed or yoked thereto . . . every person offending in any of the cases aforesaid shall for each and every such offence forfeit and pay any sum not exceeding fifty shillings sterling, over and above the damages occasioned thereby."

The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), section 123, enacts, *inter alia*, that the above enactment, in so far as the same is not inconsistent therewith, shall be and is incorporated with the Act, and in any county shall extend and apply to all the highways made or to be made within such county.

The Locomotives on Highways Act 1896 (59 and 60 Vict. cap. 36), section 1 (b), enacts—"A light locomotive shall be deemed to be a carriage within the meaning of any Act of Parliament, whether public, general, or local, and of any rule, regulation, or bye-law made under any Act of Parliament. . . ."

In September 1906 Arthur Macfarlane, horsehirer, Kingussie, raised an action in the Sheriff Court at Inverness against William Newby Colam, civil engineer, Ard-na-Coil, Newtonmore, to recover the sum of £38 with interest, as damages for injuries sustained by a carriage and two horses belonging to him.

On March 12, 1907, the Sheriff-Substitute (J. P. GRANT) pronounced this interlocutor—"Finds in fact that about 6 p.m. on 30th July 1906 the defender's motor car was left by the defender's son upon the public road without any proper person in the sole custody or care thereof; that a pair of horses, the property of the pursuer, drawing a waggonette, also the property of the

pursuer, took fright at the said motor car and upset the waggonette, causing damage to themselves and the waggonette; and in law that there was no contributory negligence on the part of the pursuer or his servant driving the waggonette, and that the defender is liable to the pursuer for the damage sustained, and assesses the same at thirty-three pounds ten shillings sterling, for which sum decerns against the defender: Finds the pursuer entitled to his expenses," &c.

Note—"The motor car belonging to the defender in this case was left by his son upon the roadway of the public road between Kingussie and Newtonmore about 6 p.m. on the afternoon of 30th July 1906. No person was left in charge of the car, but Mr Colam jr. had stopped the machinery and disconnected it, in this complying with the Motor Car Regulations on the point.

"A waggonette and a pair of horses belonging to the pursuer came from the direction of Newtonmore, and the horses taking fright at the motor car, the waggonette was overturned and the horses and the waggonette damaged.

"The driver of the waggonette was a careful and experienced man, and in no way by his fault contributed to the accident.

"The available breadth of the roadway was a little more than 15 feet; of that the car occupied about one-third, leaving about 10 feet passage for the waggonette. There was a stone wall on the opposite side of the road to the car, so that there was no possibility of expanding the space by going on the verge.

"There was thus no absolute obstruction of the highway; ten feet of an opening are enough for the passage of a waggonette and pair, assuming the driver was of ordinary skill and the horses perfectly quiet.

"There was a grass verge to the road on the side on which the motor car lay, but it was not a place where Mr Colam could have placed his car, having reasonable regard to its care, nor could he prudently have placed it on either of the approaches of the house which he was visiting, an unfinished house his father was building.

"There remains the one point on which *culpa* may be inferred on the part of young Mr Colam, whether he acted in breach of the statutory regulations under the Road Acts in leaving his car unattended on the highway. Section 96 of 1 and 2 William IV, cap. 43, as incorporated in the Roads and Bridges (Scotland) Act 1878, section 123, *inter alia* enacts . . . [*quotes, supra*] . . .

"A motor car is a carriage in the sense of the Road Acts, *vide* Locomotives on Highways Act 1896, section 1 (b).

"Mr R. L. Colam did leave the car in question on the road without any proper person in the sole custody or care thereof. I cannot doubt that the fact of the car being there was the immediate cause of the accident. The horses were skilfully driven; they had passed motors in motion eight times that day without becoming unmanageable; and no other cause can be suggested for this accident than this stationary and unattended motor car placed

where it ought not to be according to the Road Acts. There is thus, I consider, a direct relation between young Mr Colam's act and the damage that resulted. . . ."

The defender appealed to the Court of Session.

Counsel for the defender (appellant) on opening the case was stopped by the Court.

Argued for the pursuer (respondent)—The use of the high road was an unreasonable and unwarrantable one which rendered defender liable in damages—*Harris v. Mobbs*, 1878, 3 Ex. D. 268, and *Wilkins v. Day*, 1883, 12 Q.B.D. 110. The judgment of the Sheriff-Substitute should be affirmed.

LORD PRESIDENT—In my view this is really a most preposterous case. The driver of a motor car in order to go up to a house leaves it on a road and he leaves it in such a position that there is plenty of room for other vehicles to pass. He goes up to the house, leaving the car standing, and he is absent for about fifteen minutes. He had stopped the car and the machinery was not running, and it was therefore not an object of terror to anything else on the road by means of noise, and there it stood on the side of the road. Another man comes along driving a pair of horses, and when he gets beside the car the horses shy and he has not sufficient control of them to prevent them getting into the ditch, and the carriage is injured and one of the horses is injured, and then he brings an action against the owner of the motor car. The only ground upon which the Sheriff-Substitute has allowed the case is that he finds that under a well-known section of the Turnpike Act no vehicle must be left unattended on the roadway and there is a fifty shilling penalty, and then he says—"That being so I do not doubt the car being there was the immediate cause of the accident." It was the immediate cause in the sense that it was the object at which the horses shied. But the car being unattended was, in the Sheriff's view, a contravention of the statute. All I can say is that if that were so there would be a great many convictions. I will assume, however, that there could have been a conviction under the statute. But the fact of the car being unattended did not make it something which became more terrifying than it otherwise would have been, for this good reason, that while it is quite true that the presence of a man, and especially if he use his voice, calms horses, the car might have been well attended with the man sitting behind the car and not visible. In the whole circumstances I think the case is quite irrelevant. It would have been a different thing if the car had been placed so as to cause an obstruction to the highway, but upon the facts, agreeing with the Sheriff, I do not think there was any obstruction. I advise your Lordships to recal the interlocutor, find in fact that the leaving of the car in the position described did not constitute an obstruction of the highway; find that the leaving of the car unattended had no relation to the

accident, and that the same happened through the shying of the horses and the inability of the driver to control them; find in law that the defender is not liable to the pursuer in damages, and assolzie him from the conclusions of the action.

LORD KINNEAR—I concur.

LORD DUNDAS—I also concur. I observe that the Sheriff-Substitute does not in his interlocutor make any finding of fault on the part of the defender, but in his note he “concludes” that “the accident was occasioned by Mr R. L. Colam’s breach of the statute.” I am unable to see any relation of cause and effect between the breach of the statute (assuming there was a breach) and the accident to the pursuer’s horses and waggonette.

LORD M’LAREN was not present.

The Court pronounced this interlocutor:—

“Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute dated March 12, 1907: Find in fact (1) that the leaving of the car in the position described did not constitute an obstruction to the highway; (2) that the leaving of the car for the time without a person in attendance had no relation to the accident; and (3) that the same happened through the shying of the horses and the inability of the driver to control them: Therefore find in law that the defender is not liable in damages to the pursuer: Assolzie the defender from the conclusions of the action, and decern: Find the pursuer liable to the defender in expenses.”

Counsel for the Defender (Appellant)—The Dean of Faculty (Campbell, K.C.)—W. Thomson. Agent—Peter Macnaughton, S.S.C.

Counsel for the Pursuer (Respondent)—Hunter, K.C.—Lyon Mackenzie. Agents—Fletcher & Baillie, W.S.

Thursday, October 31.

FIRST DIVISION.

[Dean of Guild, Edinburgh.

MACANDREW v. DODS.

Dean of Guild — Appeal — Jurisdiction — Disputed Question of Fact — Sist of Cause in order that Action may be Brought.

• The proprietor of a piece of ground having presented a petition to the Dean of Guild Court for warrant to erect buildings on the same, answers were lodged by the proprietor of immediately adjacent ground objecting to the petition in respect that the proposed buildings were in contravention of certain building restrictions by which the petitioner was said to be bound. One of these restrictions was that no buildings

beyond a certain height (which the proposed buildings would exceed) should be erected to the south of a point marked X on a certain plan, which was lost, and the parties were at issue whether the proposed buildings were or were not to the south of this point. The Dean of Guild Court having sisted the cause in order that the petitioner might establish his rights in the Court of Session, the Court, on appeal, affirmed this interlocutor, in respect that, in addition to questions as to the construction of the parties’ titles, a question of fact which necessitated inquiry was raised, and that it was expedient, in the circumstances, that the question should be determined in an action at law.

Observed that if the question in the case had been merely as to the construction of a legal document, the Court would have decided it or sent it back to the Dean of Guild Court for decision.

Colin Macandrew, builder, Edinburgh, presented this petition to the Lord Dean of Guild of the City of Edinburgh and his Council, in which warrant was craved “to erect office building within the yard at his premises, No. 13 Lauriston Gardens, the building to consist of public and private offices, safe, and lavatory, the present stone wall fronting street having window and doorway slapped, and wallhead raised to higher level, the side, back, and internal walls to be of brickwork, floor and roof of timber with asphalt covering.”

Answers to the petition were lodged by the respondent, John Dods.

The petitioner was the owner of a piece of ground at 13 Lauriston Gardens, conform to disposition in his favour by Mrs Beattie and others as trustees therein mentioned, dated 30th March and 1st and 3rd April 1889, and recorded in the Register of Sasines on 8th April 1889.

The respondent was the owner of property adjoining the petitioner’s said ground, and produced as the foundation of his title a feu-contract dated 9th and 10th, and registered in the Register of Sasines 28th December 1863 between George Beattie and others, as trustees therein mentioned, of the first part, and William Gibson, draper in Edinburgh, of the second part. The ground both of the petitioner and of the respondent originally formed part of the lands of Lauriston Lodge, and their titles were derived from a common author.

The petitioner’s ground extended to little more than half an acre, and was bounded, *inter alia*, on the north by the centre of the wall forming the boundary between the petitioner’s said property and the ground feued to William Gibson, and now owned by the respondent, John Dods, and, on the east, by the street of Lauriston Gardens. The buildings for which warrant was craved were to be erected at the north-east corner of the said piece of ground, and the petitioner proposed to raise the wall, which formed the eastern boundary of the property and separ-