Macgregor & Co. were only the sellers' agents to forward the goods to their destination. Now, the question is, had these goods reached their destination, or had the buyer ended their destination and substituted another before they were stopped? I am clearly of opinion on the evidence that the goods were stopped before they reached their destination and while on their way, and that they were therefore stopped *in transitu*. The idea is very well expressed in the bill of lading granted for the goods, and which the Lord Ordinary gives as a specimen in his note—"To be delivered in the like good order and condition at the aforesaid port of Riga, unto the agent of the Riga Dunaburg Railway Company, or to their assigns, to be by them forwarded in transit to Messrs William Blews & Sons, Moscow, freight for the said goods, Leith to Moscow, including Riga charges, being hereby agreed upon to be 30¾ cops per pood, to be paid in Moscow with primage and average accustomed, and charges as stipulated." And it was while the goods were being thus forwarded in transit to Blews & Son, Moscow, that they were stopped. It would have been a different case if Blews & Son had changed their order and instructed their agent at Riga to keep them there as their destination, and we allowed the defenders time to enable them to make a statement to this effect and put it on record. But we have got no such statement, but only an account of what must necessarily happen in one way or other to all goods on their way from Leith to Moscow by Riga. With respect to the allegation that the goods were sent to the Dunaburg Railway Station on the assurance of Helmsing & Grimm that they would not be stopped, the averment is not made properly. An averment which goes to bar a party of a legal remedy otherwise competent, ought to be precise and substantial; and further, it is an averment which raises a new issue, and is only important on the assumption that the defender has failed on his original issue that the law of transit did not apply. I do not think the defenders would be entitled to lead evidence on the new issue without paying all previous expenses, and as the estate is originally a small one it is scarcely likely they would deem it worth while to go further into the matter, even if the averment were precise enough to induce us to admit it.

I therefore concur that the additional amendment ought not to be allowed, and that the Lord Ordinary's interlocutor should be affirmed.

The Court therefore affirmed the Lord Ordinary's interlocutor.

Counsel for Appellant—Asher—Keir. Agent—John H. Lindsay, S.S.C.

Counsel for Respondent — Kinnear—Rhind. Agent—W. Pasley Stevenson, S.S.C.

Tuesday, December 7.

SECOND DIVISION.

[Sheriff of Forfar.

FLEMING *v.* BURNS.

Heritable and Moveable as between Landlord and Tenant.

A person who had been yearly tenant for a period of ten years of a house and garden, removed at the expiry of his period of occupancy a number of small trees which he planted in the garden, a quantity of turf which he had laid down on the terraces in the garden, and a quantity of gravel, which he had also laid down, from the walks. *Held* that he was not entitled to remove the bushes or turf.

Question, Whether he was entitled to remove the gravel?

Tuesday, December 7.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

BUCHANAN *v.* STEVENSON AND OTHERS.

Process—Expenses—Caution for Expenses in a Reclaiming-Note where Fraud Alleged—Reduction—Bankrupt.

In an action of reduction on the ground of fraud the Lord Ordinary gave decree against a defender. Both parties reclaimed. On the reclaiming-notes appearing in Single Bills counsel for the pursuer moved that the defender should be ordained to find caution for expenses, in respect that his estates were in sequestration, and that the trustee thereon had not appeared. The Court *refused* the motion, with three guineas of expenses, observing that the general rule, as laid down by the House of Lords in *Taylor* v. *Fairlie's Trustees*, March 1, 1833, 6 W. & S. 301, was against a defender in such a position as this being obliged to find caution for expenses of process, and that in this case, where the bankrupt's character was challenged, fraud being alleged, he should be allowed to proceed in the action without doing so.

Counsel for Pursuer—Mackintosh. Agent—Alex. Morison, S.S.C.

Counsel for Defender—Robertson. Agent—James Coutts, Solicitor.

Thursday, December 9.

SECOND DIVISION.

[Sheriff-Substitute of Midlothian.

SETON *v.* PATERSON.

Hiring—Liability of Hirer—Breach of Implied Condition of Contract of Hire.

If the subject of hire suffer injury while the hirer is dealing with it in a way not contemplated by the contract, it lies upon him

to show that there is no connection between his breach of contract and the injury to the subject.

Damages—Consequential Damages.

A person hired a horse for an afternoon ride. He took it into a field in the course of his ride, and made it gallop round the field. While in the field it suddenly became lame from a fracture, as it afterwards appeared, of a pastern bone. The horse was kept in a stable for six weeks, unable to take exercise from the result of the injury. At the expiry of the six weeks it took inflammation of the bowels and died. It was proved that want of exercise tends to make a horse more liable to such a disease. *Held* that the use of the horse to gallop in the field was a breach of the contract, and that the hirer was therefore liable for the injury which there happened; that while it was not certain that the supervening inflammation resulted from the injury for which the hirer was responsible, it was at least highly probable that it did so result; and that in the circumstances the hirer was liable for the value of the horse—Lord Gifford dissenting and holding (1) that the hirer was fairly entitled to use the horse as he had done; and (2) that the inflammation not being proved to have been directly connected with the injury, the hirer should not, even assuming him liable for that injury, be found liable for the price of the horse.

Henry Seton let out a chestnut mare to the Rev. J. A. Paterson for an afternoon ride on 13th March 1880. Mr Paterson and a friend, who had also hired a horse from Seton, rode out to near Cramond, where they entered a grass field to gallop on the grass. While riding in the field the mare ridden by Mr Paterson, which had been going well previously, became very lame, and had to be taken to a farm steading and left there, as she was unable to walk home. Next day a veterinary surgeon pronounced her to be suffering from split past ern, and ordered her to be removed to Seton's stables in a cart. It was there treated for that injury till the 1st of May following. Before that date she had recovered so far as to walk without going lame, and was ordered walking exercise by the veterinary surgeon. The evidence of skilled witnesses proved that after such an injury the mare could never be pronounced sound, though it might do work. On 1st May the animal showed symptoms of severe inflammation of the bowels, and died the same day from that cause. A *post-mortem* examination showed the immediate cause of death to be a twist in the bowel, which might have been caused by rolling in the stall, and been the source of the inflammation, or might have been caused by rolling about while suffering from inflammation. It was proved that the want of exercise necessary for a considerable period in treating the mare for split pastern would render her more liable to inflammation of the bowels.

Seton then brought this action for £35, 11s.6d., "being the loss and damage sustained by him by and through the defender's reckless, violent, and wrongful or illegal usage" of the mare. This sum was arrived at by adding to the price he had paid for the mare a few months before the injury —being £27—a sum of £7 for livery for 47 days during which she had stood in his stables, and the expense of conveying her from Cramond to Edinburgh, with the veterinary surgeon's fee.

He stated (Cond. 2) . . . "It was distinctly understood that the hiring was for the purpose of using the mare for riding in a moderate and reasonable way, and that she was to be subjected to no violent or dangerous exertion."

On this point his evidence as a witness was—"I have three rates of hire—3s. an hour for a saddle horse, and for a day, according to distance, from 10s. 6d. to 15s; when used for military purposes, where there is any galloping or any risk, a guinea a-day; and for hunting purposes the charge is two guineas a-day. . . . On that particular day I warned him to be careful. It was certainly within the understood conditions on which I hired out this mare that the hirer was not to gallop her across a field or make her canter in a field. I never would have given permission for that to be done. It is a dangerous thing for a mare to do that. I have not the slightest doubt, after hearing the evidence today, that taking the mare off the road and galloping her in a field was the cause of the accident. I have seen a number of similar cases." In cross-examination he said—"What I object to is when the galloping is reckless and unduly violent."

The defender offered to pay a sum of £10 in full of the pursuer's claims, being a little more than would cover the sum charged for livery and the expense of carting the mare into Edinburgh, but denied liability for the value of the animal, on the ground stated in his third plea-in-law—"(3) The death of the animal in question not having been due to the fault of the defender, *et separatim*, said death being due to causes entirely unconnected with the fracture in respect of which the action is brought, the defender falls to be assoilzied."

The Sheriff-Substitute (HALLARD), after a proof, pronounced this interlocutor:—

"*Edinburgh, 20th October* 1880.—The Sheriff-Substitute having heard counsel upon the closed record, proof, and productions, Finds, in point of fact—(1) That the defender hired the mare in question from the pursuer for a ride on 13th March last; (2) that in the course of said ride the defender took the mare from the road into a grass field, and had a gallop or canter there; (3) that on said occasion the defender was accompanied by a friend of his, the witness M'Ewan, who hired his horse from the pursuer, went over the same road, and the same field, at the same pace, and returned his animal to the pursuer in a perfectly sound condition; (4) that the mare in question was discovered to be going lame just as the defender and his friend M'Ewan came out of the grass field above mentioned; (5) that the cause of lameness was discovered to be split pastern, that the animal was placed under treatment, and was in the course of getting better when she was seized with inflammation of the bowels, of which disease she died on 1st May; (6) that split pastern is an injury which may arise from mere accident in the legitimate use of a horse, and does not necessarily imply any improper or reckless use thereof; (7) that there was no necessary connection between the accident of 13th March and the death of the animal on 1st May; (8) that no *culpa* has been proved against the defender, nor circumstances from which *culpa* can necessarily be inferred:

Finds, in point of law, that the facts above found imply no liability against the defender; therefore sustains the defences, assoilzies the defender from the whole conclusions of the libel: Finds him entitled to expenses," &c.

He added this note:—"The mare got her pastern split on 13th March, in the course of the defender's ride to Cramond that day. She was galloped in a grass field in the course of that ride. On these two facts the pursuer's case rests. His contention was that they infer *culpa* and its resulting liability, the connection between the accident and the death being taken for granted.

"Even on that assumption the Sheriff-Substitute is unable to accept that conclusion. He has just re-perused the evidence of the defender and his friend Mr M'Ewan, and is more than ever impressed with its trustworthiness. The stoppage in the field mentioned by one of these gentlemen, and omitted by the other, is too trifling a discrepancy to have any weight. Both horses were treated that day in precisely the same manner; one went lame, and the other did not. The inference, strengthened by Professor Williams' opinion, is that the split pastern was an accident of the ride for which no one is to blame.

"But even were *culpa* proved, much more is needed for the pursuer's success. His claim of damages is one and indivisible. It is damages for the loss of a mare which died by the defender's fault. Now, it is proved beyond a doubt that between the death of the mare and the accident there was no necessary connection. She was more liable to inflammation of the bowels while under treatment for split pastern than before. The evidence goes no further than that special care was needed; and if special care had been given she might not have died. For the lack of the special care the defender is not liable.

"But it is sufficient for the defender's relief from any liability that there is no proof of *culpa* against him. Direct evidence there is none, and no sufficient ground for such an inference."

The pursuer appealed to the Court of Session, and argued—It was in breach of the contract to take the mare into the field to gallop her there. That caused the injury, from the necessary treatment for which the inflammation ensued of which the mare died. The defender was therefore responsible for the value of the mare, and for livery and cartage charges concluded for. At anyrate he was liable for the permanent injury done to the mare, and the Sheriff-Substitute was wrong in thinking that unless he proved that the death was directly caused by the injury to the pastern nothing could be recovered in this action.

Authority—Oliphant on the Law of Horses.

Argued for defender.—The mare had not been improperly used. Assuming the defender to be liable for the split pastern, the death was wholly unconnected with the split pastern. The pursuer in any event was asking consequential damages. The defender had made a fair order.

At advising—

Lord Young—I think it a pity this was not settled, but that has not been done, and we are now to determine whether the Sheriff-Substitute was right. I am of opinion that he was not. I think it is not according to the implied condition of the contract on which this horse was hired that the defender should open a gate and gallop the horse in a field. That that is often done is very probable, though we have no evidence on the subject. People are willing to run risks, and if no harm ensues, no question arises. If, then, the defender did this thing, which I think is not within the contract, and harm comes of it—if he takes the horse into the field sound and brings it out with a broken pastern—he is *prima facie* liable. We have not here to consider a case in which it is established that an irregularity not of a dangerous character has been committed, *e.g.*, that the field was safer than the road, or just as safe, and that therefore there was no connection between the accident and the irregularity. I think that since here the customer galloped the horse in the field to the horse's destruction, as it turned out, and that it lies on him to disprove the case for the pursuer, which is *prima facie* established by proving the irregularity and the consequent splitting of the horse's pastern bone, there is nothing in the Sheriff-Substitute's observation that the same calamity did not befall the other horse which was treated in the same way. What happened or did not happen to the other horse is immaterial. If twenty horses had galloped through the field, their pastern bones would certainly not have been broken. So, in a question between the horse-hirer and the customer who was riding the horse which had this bone broken, that has no bearing at all. Since, then, there is this *prima facie* liability, the question of damages remains. I am perplexed again by the remark of the Sheriff-Substitute that the claim of the pursuer is one and indivisible, and so that however wrong and actionable the conduct of the defender may have been, yet this action is not maintainable unless the death of the horse be held directly attributable to that wrong. That seems to mean that if you injure a horse never so grievously, you shall not, in a common action of damages such as this, for loss sustained "through the defender's reckless, violent, and wrongful or illegal usage" of the mare, recover anything unless death be shown to have resulted from the injury. That is an unfounded idea. Death may not be the result of the injury, and yet the action may be quite good. But I am not satisfied that death was not the consequence of the injury in a sense sufficient to make the defender responsible for the value of the horse at the time the injury was received. This horse by reason of the split pastern was laid up and incapable of exercise. It is not doubtful that such a horse was more likely to take inflammation of the bowels, and would be a worse patient if she took it. There was no certainty of such inflammation, and there is no absolute certainty that though it did occur that was attributable to the injury. But there is a probability that the inflammation resulted from the injury, arising from the greater liability of a horse in that condition to take a complication and die than not. This horse took this disease and died, and I am not prepared to say that the defender by using the horse otherwise than the implied conditions of the contract allowed, and so causing the split bone, did not make himself liable for the animal's death. I think he is. Speaking with relation to the value of the horse, I hold he did it a great injury irrespective of the question as to its death. The pursuer is, I think, entitled to the value of the horse, and I should put that value at what he paid for it. I think we

ought to find that the horse was severely injured through the fault of the defender, and assess the damages at £27.

Lord Gifford—In such a case I am most unwilling to dissent, but I really am not able to concur in the judgment proposed. I doubt if *culpa* accounting for the injury or causing the damage has been shown. If there was any *culpa*, it was certainly *culpa levissima* or *levis culpa* at the most. The field appeared reasonably safe, and there was no apparent danger. We have nothing to do with trespass, and we are not in any question with the owner of the field or with the farmer complaining of trespass. Suppose the field had been a friend's field, and the defender had gone in to have a canter on the grass in a smooth and perfectly safe paddock, that surely, if *culpa* at all, would have been *culpa levissima*, and we have no evidence of the nature of the field, whether it was safe or not. Not a question is put on this subject, and no cross questions, and the reason is obvious. The only case stated against the defender is, not that he went to a dangerous place, but only that he rode in a violent and reckless manner. This is the only charge he had to meet, and so the evidence is confined to that point alone. The defender had frankly gone to the pursuer and told all that had happened. The pursuer knew where the field was or might have known. If it had been part of the pursuer's case that the field in which the defender took his canter was a dangerous field—a field into which by reason of its condition the defender had no right to go—I think he would have stated in his condescendence, and would have been bound to state, that fact, and that that was a fact which he relied on, and he has not done so. I am therefore inclined to hold that the defender went into a place quite suitable and safe for his purpose. It would be hard to say that a man may not ride or canter on grass when he hires a horse for a pleasure ride. Even Seton himself does not say that. It is "reckless galloping" he complains of.

But, again, assuming that there is *culpa*, I am not satisfied that the value of the horse is the measure of damages. No doubt the horse died, and so the pursuer claims its value. But was its death caused by anything that the pursuer did? I think not. I think it sufficiently appears that the injury to the pastern of the horse was the cause of the inflammation that led to its death. That might be a thing more or less likely, but there is certainly evidence that the death arose from a twist of the colon or intestine, occasioned by the animal rolling in its stall, but this was after its pastern was better. There is no necessary connection between the broken pastern and the twisted or knotted colon and the resulting inflammation; it is only proved that the inflammation is likely to be aggravated when the horse is kept tied up in its stall. But at all events a twist in the bowel seems from the *post-mortem* examination to have been the cause of death, and how we are to hold this gentleman liable for that I cannot see. I think he made a fair offer to pay for all the damage which happened to the animal when in his hands, and on the whole I incline to the judgment of the Sheriff.

Lord Justice-Clerk—This is a narrow case, but I confess that my impression has all along been in favour of the view of the case which Lord Young has adopted, and that because the defender acted in breach of an implied condition of the contract in going into the field and there galloping the horse. There is unfortunately no evidence as to whether that is a custom of those who hire horses or not, but at all events the man who let out this horse says that he never would have let it out at the rate he did for such a purpose. I think it common sense to hold that if the defender used the horse for such a purpose, and harm followed it, he is responsible for his deviation from the implied conditions of his contract.

When that conclusion is reached, I have no difficulty in following Lord Young to the further conclusion, that while it is not absolutely certain that the inflammation of the bowels was the result of the injury, it was in all probability the result—a rather consequential one no doubt, but still the result.

On the whole matter I concur with Lord Young.

The Court sustained the appeal, found the appellant entitled to damages, and assessed the same at £27.

Counsel for Pursuer (Appellant) — Brand. Agent—D. Turner, S.L.

Counsel for Defender (Respondent)—Shaw. Agent—James M'Caul, S.S.C.

Friday, December 10.

FIRST DIVISION.

[Lord Lee, Ordinary.

BLACK AND ANOTHER (YOUNG'S TRUSTEES) *v.* JANES AND OTHERS.

Succession—Representation—Meaning of "Nearest-in-Kin" in a Trust-Settlement — Intestate Moveable Succession Act 1855 (18 *Vict. c.* 23).

Held (*rev.* Lord Lee, Ordinary) that a destination in the residuary clause of a mutual trust-settlement to the testator's "nearest-in-kin" who should be alive at a certain period, meant those nearest in blood to the testator who should be alive at that period, and did not include the class of persons called by the Act of 1855 as representatives in moveables.

Observations (*per* Lord President Inglis) on *Ferrier* v. *Angus*, Jan. 21, 1876, 3 R. 396, and previous decisions.

Observed (*per* Lord President and Lord Shand) that the question whether next-of-kin in a settlement would mean nearest in blood or nearest in line of moveable succession was left open by this case, as the person here preferred happened to stand in both relations to the testatrix.

By mutual disposition and settlement, dated 2d March 1852, the Rev. Peter Young and Mrs Maitland M'Culloch or Young, his wife, on the narrative of their having resolved to make a settlement of their affairs by which the longest