Wednesday, March 16.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CAMPBELL AND COWAN & COMPANY *v.* TRAIN.

(See *ante*, 16th December 1909, 47 S.L.R. 200.)

Reparation—Negligence—Road—Contributory Negligence—Motor Car—Lorry Coming Out of Works Run into by Motor Car going at Excessive Speed—Fault on Part of Lorryman.

A lorry while coming out of certain works into a main road was run down by a motor car travelling at an excessive rate of speed. The carter in charge did not look to see what traffic was coming before leading out the horse and lorry. The carter and the owners of the lorry having raised actions of damages against the owner of the motor car, *held* that the pursuers had been guilty of contributory negligence, and defender assoilzied.

James Campbell, carter, 15 Williamson Street, Glasgow, brought an action in the Sheriff Court at Glasgow against John Train, building contractor, Rutherglen, in which he claimed damages for personal injuries sustained by him in consequence of a collision between a motor car belonging to defender and a lorry which he was leading belonging to Cowan & Company, cartage contractors, Glasgow, in whose employment he was. Cowan & Company also brought an action against Train, in which they claimed damages for injuries to the horse and lorry.

At the time of the accident Campbell was leading by the head the horse in the lorry, up a slight incline, out of the works of Young & Sons, soapmakers, Springfield Road, Glasgow. These works are situated on the east side of Springfield Road, which runs north and south. The carter was on the left side of the horse and the motor was approaching on his right. The works are separated from the road by a wall over 9 feet high. The width of the road at that part was over 44 yards, and there were two sets of tram rails in it, the rail nearest to the works being 7 feet away, with a pavement of 3 feet 4 inches broad occupying part of that space. When the collision occurred the horse had just reached the nearest tram rail. The defender in the Court of Session admitted that the car had been travelling at an excessive rate of speed, and the sole question therefore was whether there had been contributory negligence on the part of the carter in emerging from the works without looking up the road to see if there was a clear passage. [For further details *see* Sheriff's findings.]

The two actions were conjoined, and after a proof the Sheriff (BALFOUR) pronounced the following interlocutor—"Having heard parties' procurators, and considered the cause, finds that, on 29th October 1908, the pursuer James Campbell was leading a horse yoked to a lorry belonging to the pursuers Cowan & Company out of Messrs James Young & Sons' works in Springfield Road, Glasgow, when a motor car belonging to the defender, and driven by John Alexander, his servant, came rapidly down Springfield Road from London Road, and came into collision with the horse and lorry: Finds that the shafts of the lorry were broken, and the injuries to the horse were so serious that it had to be destroyed: Finds that the pursuer Campbell was leading the horse by the head, and he was going at a walking pace up a slight incline leading to Springfield Road: Finds that the horse had got its forelegs on to the near car rails when the motor car struck the horse on the right leg, and the shaft of the lorry struck the pursuer Campbell on the breast and knocked him down: Finds that the motor car gave no warning of its approach by horn or otherwise, and the locality where the collision occurred is dangerous in this respect that there are several gateways of different works abutting on the road, and a considerable amount of traffic comes from these works: Finds that there were a horse and lorry, and also a pony and trap, standing on the opposite side of the road, south of Young's gateway, and the motor car, after striking the lorry, skidded across to the other side of the road, and came in contact with the pony and trap with considerable violence, and damaged the trap: Finds that the driver of the motor car could have seen the horse in the lorry coming out of Young's works at the distance of at least 15 yards off, but he did not slacken speed and did not sound his horn, and he could have avoided the collision by turning to the right, or stopping when the horse and lorry became visible: Finds that the collision was caused by the driver of the motor car not keeping a proper look-out, and by his going at too rapid a rate, and failing to sound his horn: Finds therefore that the defender is liable in compensation to the pursuer Campbell for the injuries sustained by him, and to the pursuers Cowan & Company for the damage done to the horse and lorry; assesses the compensation due to the pursuer Campbell at the sum of £10, and the compensation due to the pursuers Cowan & Company at the sum of £50."

Note.—" . . . I am unable to attribute any fault to the driver of the lorry, inasmuch as he was coming up a slight incline out of the works, and it would have been a difficult thing for him to have stopped his horse with a loaded lorry and gone out to see if there was any traffic coming along Springfield Road. It would have been a different affair altogether if he had come out of the works at a rapid rate, but the bulk of the evidence goes to show that he came out cautiously, and that the collision was caused by the motor car crashing in upon the lorry when the horse had its forelegs on the nearest tram rail. The plan, although not drawn to scale, is a distinct and reliable plan and has not been proved to be defective in any way, and it

shows that there was plenty of room for the motor car to have shaped a course away from the gateway to the west of Springfield Road. . . .

"On the whole case, I have come to the conclusion that, while there may be a difference of opinion as to a carter coming out of a gateway such as we are dealing with here and looking up and down the road to see if there is any traffic to interfere with his passage, the real fault here was on the part of defender's chauffeur in not keeping a proper look-out and in going at too rapid a speed and not sounding his horn. The evidence for the pursuers strikes me as being most distinct with regard to the fault of the chauffeur, particularly the evidence of the two Hamiltons, who were standing on the opposite side of the road and saw the collision very distinctly."

The defender appealed to the Sheriff, and on 16th November 1909 the Sheriff (MILLAR) pronounced the following interlocutor:— "The Sheriff having heard parties' procurators and considered the cause, Recals the interlocutor of 11th June last: Finds in fact in terms of the Sheriff-Substitute's interlocutor, with the exception of the last two findings in fact; finds further in fact, that the driver of the motor car was going at too rapid a rate considering the dangerous nature of the locality, that he did not sound his horn, and that he did not keep a sufficiently good lookout in approaching the gateway in question; finds that the carter when coming out of the gateway with his lorry failed to keep a proper lookout for approaching traffic which he was bound to do; finds that the collision was caused by the driver of the motor car proceeding at too rapid a rate, failing to sound his horn, and not keeping a proper lookout, and by the carter suddenly taking out his lorry from the gateway without ascertaining whether there was any traffic approaching; finds that both parties were to blame for the accident, and that the pursuers are not entitled to recover damages in respect thereof: Therefore assoilzies the defender from the conclusions of the conjoined actions: Finds none of the parties entitled to nor liable in expenses, and decerns."

Note.—". . . With regard to the carter, it appears that he also knew the character of this road, as he had been several times at Messrs Young's works. It is admitted that he did not look out to see if any traffic were approaching before leading out his horse and lorry. His excuse is that there was an incline towards the gate from the inside of the work, and that there was a difficulty in stopping with his horse and lorry. It appears that the incline is very slight, and there is evidence that he would have to block his wheel if had stopped his lorry. In these circumstances the question is whether the carter is at fault. The learned Sheriff-Substitute has found that he was not, and for that judgment of course I have the highest possible respect and differ only with great hesitation. Looking to the dangerous character of the road, which was well known to the carter, I think it was his duty to have taken some means to ascertain whether there was traffic approaching. I find it difficult to hold that a carter is entitled suddenly to bring a horse pulling a heavily laden lorry out into the road without taking some care to avoid accident from approaching traffic. . . .

"It was further argued that even if there was fault on the part of both the chauffeur and carter, yet if the chauffeur after the carter appeared could by applying his brakes and turning his car round towards the middle of the road have avoided the accident, then it was his failure to do so that was the proximate cause of the accident, and that therefore the negligence of the carter did not matter. I think, however, that the pursuers have failed to prove that the chauffeur could have so avoided the accident. The space in which he had to manœuvre his car was limited by the lorries standing on the other side of the road and the approach of Laidlaw's pony trap, and therefore I do not think the chauffeur was at fault in this respect.

"In the whole circumstances I think the accident was due to the fault of both the chauffeur and carter, and that therefore the defender is entitled to be assoilzied."

The pursuers appealed, and argued—The carter was not in fault. He was entitled to come out of the gates without looking up the road, if he did so at a slow pace. The driver of a carriage, or a motor car was not bound to descend and look, and the driver of a lorry could not be in a worse position. He was entitled to assume that traffic on the road would proceed at a reasonable pace—*Dublin, Wicklow, and Wexford Railway Company* v. *Slattery*, 1878, 3 A.C. 1155; *Mitchell and Strachan* v. *Caledonian Railway Company*, 1909 S.C. 746, 46 S.L.R. 517. Further, even assuming fault on the part of the carter, the motorist had time to stop, or failing that, might have swerved; and where a pursuer was guilty of negligence which might have contributed to the accident if, but for defender's subsequent negligence, the accident could have been avoided, the pursuer's negligence would not bar him—*Radley* v. *London and North-Western Railway Company*, 1876, 1 A.C. 754; *Carse* v. *North British Steam Packet Company*, March 13, 1895, 22 R. 475, 32 S.L.R. 418; *Mitchell and Strachan, cit. sup.*

Argued for respondent (defender) — It was the duty of a person who was entering traffic on a roadway to look before hand and see that the passage was clear — *Ramsay* v. *Thomson & Sons*, November 17, 1881, 9 R. 140, 19 S.L.R. 125; *Fraser* v. *Edinburgh Street Tramways Company*, December 2, 1882, 10 R. 264, 20 S.L.R. 192; *Jardine* v. *Stonefield Laundry Company*, June 24, 1887, 14 R. 839, 24 S.L.R. 599; *Barnett* v. *Glasgow and South-Western Railway Company*, January 22, 1891, 28 S.L.R. 339; *Watson* v. *North British Railway Company*, December 6, 1904, 7 F. 220, 42 S.L.R. 165; *Cass* v. *Edinburgh and District Tramways Company, Limited*, 1909

S.C. 1068, 46 S.L.R. 734; *Macandrew* v. *Tillard*, 1909 S.C. 78, 46 S.L.R. 111. There was no supervening fault on the part of the defender. The present case was one of concurrent negligence.

LORD JUSTICE-CLERK—I have formed a clear opinion upon this case to the effect that the judgment which has been given by the Sheriff is right. We are relieved from all difficulty as regards any question except the question of contributory negligence, because anything which it might have been possible to say in favour of the motor car driver is not pleaded now. The case is accepted upon the footing that the motor car driver did not act with the care with which he ought to have acted. Therefore the sole question is, did the driver of the lorry when he came out of the gate act with reasonable care for his own safety and the safety of his horse and vehicle. I am of opinion that he did not. The place at which he came out may be looked at either as just an entry, a gateway into a yard, or as a cross road. Now it is a well established principle that where there is a main road, such as a road capable of carrying two lines of tramway rails on it, a main road reaching from one public place to another, any person entering with a vehicle from a cross road is bound to look out and keep clear of traffic coming along the main road, and this is for a very obvious reason. Traffic coming along the main road is necessarily expected to be going at a considerable pace, because it is not coming to a corner at all. It is crossing a corner, but not coming to a corner in order to turn, whereas the driver who is going to go round the corner, necessarily should be going slowly. That being a well established rule, I think it applies with greater force to the case of a mere gateway, out of which as a rule traffic emerges less frequently than out of a cross road, and which is not itself so visible to other drivers coming along as a cross road.

The next question is, when this man arrived at the gateway was it or was it not his duty by the use of his eyes to ascertain if there was any traffic which might make it dangerous for him to go straight out into the road. In considering that question it must be kept in view that this horse and lorry, being together of very considerable length, could not be turned at all until the horse was some way out on the roadway, probably quite out into the middle of the road. In point of fact at the time the accident happened, although the lorry was still in the gateway, the horse was out as far as the first rail of the tramway; if not further. When a man is leading his horse he naturally and properly is leading it from the near side for two reasons. In the first place, because it brings his right hand to the reins, which is the best hand for guidance; and, in the second place, because it is safer for the driver who is leading the horse not to be on the side where other traffic may come up against him. Being on that side of his horse it is said that he could not look up the road to his right because the horse's head or neck were between him and the roadway. I cannot accept that for a moment. I am quite sure that if you got half a dozen carters and asked them the question whether, coming out of such a place as that, they would manage to look up the road although leading their horse on the near side, they would at once say it was quite possible, and would admit that it was the right thing to do. There is nothing more necessary than just to slip or lean forward a little so as to look up the road and see if anything is coming. It is admitted that he did nothing of the kind. I must hold that that is contributory negligence. I think it is the bounden duty of anyone coming out of a gateway into a road to look up the road as soon as ever he can, and not to enter the road if there is traffic coming which may come in contact with his vehicle, but to wait and let it pass, or to wait until it stops and lets him out. In this case there was nothing to prevent the lorryman from seeing the approaching motor car if he had looked up the road as he emerged from the gateway. He did not do so, and I cannot come to any other conclusion than that he failed to do what he ought to have done. That being my view, I concur in the decision of the Sheriff.

LORD LOW—I am of the same opinion. It is plain that the situation of the gateway looking out of Messrs Young's premises into Springfield Road where the accident happened is such that very great care is required on the part of traffic coming out of the yard into the street. There are high walls on both sides of the gate, so that no one can see from the inside what traffic is coming upon the road, except, it is said, that the tops of tramway cars can be seen. Now Springfield Road itself is in this position—The total breadth of the carriageway is 30 ft. 10 inches. Upon that there are two tramway lines taking up altogether 14 feet, and the distance from the line of the gate to the nearest tramway line is only seven feet including the footpavement, so that it is a road in which traffic may be very much congested and forced into the side of the road, and it is obvious that in bringing a cart out of the yard on to that road great care is required or the result may be just what happened in this case, that a cart coming out may run against traffic coming along the road.

Now of course what is reasonable care depends very much upon circumstances. It was said that if this had been a carriage with a driver on the box, the driver could not have looked up and down the road before he began to come out of the gate. That is quite true, and all that would be required of him, because it is all that it would be possible for him to do, would be to drive out slowly with his horse well in hand so that directly he was able to see from the box along the road, he could if necessary stop his horse at once. That is all that could be required of the driver of the carriage, because that is all that is

possible, but with a carter leading a cart it is not all that is possible, because he is at his horse's head, and, when he comes to the line of the gate, by looking past his horse's head or under its neck, he can see before he emerges upon the street at all whether it is safe to do so. I am of opinion that if, in a dangerous place like this, he neglected that ordinary and simple precaution, that amounts to contributory negligence.

In this case I think it is plain that the carter took no heed where he was going at all, because he says himself that when he came to the gateway "I was looking back to see that my lorry was going to clear the gate," and I take that as meaning that just at the time when he should have looked up the road to see whether traffic was coming or not he was looking back. I cannot understand why he should have had to look back to see whether he was going to clear the gateway or not, because the photograph produced shows that the gateway is a very wide one, and that close up to the gate there are tramway lines upon which the lorry must have been running which would bring him out exactly in the centre of the gate. It is really an admission on the part of the carter that he was not taking any heed at all of what was going on in the road. Then he says that on account of the incline he could not have stopped his horse, I suppose, either to look along the road or to wait until the motor car passed. There was no necessity for him to stop his horse before looking along the road. He could have looked along the road while leading his horse, and if there was nothing coming he would never have had to stop it at all. In regard to the idea that he could not stop his horse because there was an incline and it was necessary to put blocks behind the wheels, that is obviously untenable. I quite agree that in the case of a prolonged stop it might be proper to block the wheels in order to ease the strain on the horse, but it is absurd to suggest that the horse could not hold the lorry by itself for the few moments which would be required in order to let the motor car pass. The incline is not very steep at any part, and apparently before the gate is reached the ground is almost level, and in so far as it is slightly up-hill that only means that the horse could the more quickly be brought to a standstill.

Upon the whole matter I think this is clearly a case of contributory negligence, and that the interlocutor of the learned Sheriff ought to be affirmed.

LORD ARDWALL—I also concur, although I had some difficulty, because in my view there was much grosser negligence on the part of the motor driver who ran down the horse which he ought to have seen coming out of the entry than on the part of the pursuer. But while that is so, I cannot absolve the carter from fault, because I think it was his duty, not only with regard to his own safety, but with regard to the safety of traffic on the street, to have taken some means or another to ascertain whether there was traffic approaching before he took the horse and lorry out across the road. As pointed out by your Lordship in the chair, the horse and the lorry together would stretch very far across this road, and in taking a vehicle like that out of an entry opening directly on a public street I think there was a duty to ascertain, as it would not have been difficult to do, whether there was traffic approaching. I therefore concur in holding that there was contributory negligence on the part of the carter which disentitles him to damages.

LORD DUNDAS concurred.

The Court dismissed the appeal.

Counsel for the Pursuers (Appellants)—Wilson, K.C.—Paton. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for the Defender (Respondent)—Crabb Watt, K.C.—J. A. T. Robertson. Agents—Wishart & Sanderson, W.S.

Friday, March 18.

FIRST DIVISION.

FINDLAY (LIQUIDATOR OF THE SCOTTISH WORKMEN'S ASSURANCE COMPANY, LIMITED) *v.* WADDELL.

Company — Winding-up — Production of Documents — Lien — "Officer" — Auditor — Accountant's Right to Retain Books Belonging to Company — Companies Consolidation Act 1908 (8 *Edw. VII, c.* 69), *secs.* 164, 174 *and* 193.

The liquidator of a company which was being wound up voluntarily claimed delivery of certain books and papers belonging to the company which had been placed in an accountant's hands to write up the books and to prepare a balance-sheet. The accountant having refused to hand them over unless the liquidator either paid his fees or recognised his lien therefor, the liquidator presented a petition to the Court under sections 164, 174, and 193 of the Companies Consolidation Act 1908 for their delivery, but that "*without prejudice*" to any right of lien competent to the respondent.

Held that while delivery without prejudice to an alleged right of lien did not involve its admission, it did not in any way prejudice it if it existed, and that as delivery of the books was necessary for liquidation purposes the petitioner was entitled to the delivery craved.

Opinion that the respondent had a good right of retention on the ground of implied contract, though not a good right of lien properly so called.

Opinion (*per* Lord Johnston) that an auditor is not an "officer" of a com-