in attending to the horse. The question in every case accordingly is, Was the driver attending to his horse—that is, was he looking after it with reasonable care? This question, in my opinion, cannot be answered favourably to a driver unless it be shown that he has remained in such proximity to his charge as to enable him to exercise control over its movements. There are cases, such as *Shaw* (12 R. 1186), in which it was held that a driver was attending to his horse although he was some distance from it. In others, such as *Illidge* (5 C. & P. 190), *M'Ewen* (25 R. 57), and *Milne* (25 R. 1150), it was held that a driver who had gone some distance from his horse was not attending to it and was therefore in fault. Each case, as I have said, must be decided on its own facts.

The present case is undoubtedly a narrow one, but I have reached the conclusion, differing from the Sheriffs, that the driver was not attending to his horse when it bolted and that he was therefore guilty of negligence for which the defender is responsible in law. The driver chose to go inside the shop to wait his turn when he need not have done so but might have waited outside in the vicinity of his horse. He put himself in a situation in which it was impossible for him to exercise any control, vocally or manually, over his horse should it become restive. The result was that before he could reach the place where he he had left his horse it had turned round and bolted and he was able to do nothing.

The case seems one to which the language of Lord Young in *Milne* (25 R. 1153) is peculiarly applicable—"If a carter leaves his cart to deliver a parcel at a shop door and his horse runs away and knocks down someone in the street, the risk is with him and his master and not with the innocent person on the street."

I am therefore of opinion that the pursuer must have decree for the agreed-on damages of £70.

The Court recalled the interlocutor appealed against, found that the defender was liable in respect of the fault of her servant in leaving the horse unattended in the street, and granted decree for £70 as the agreed-on amount of damage.

Counsel for the Pursuer and Appellant—Burns. Agent—C. Forbes Ridland, S.S.C.

Counsel for the Defender and Respondent—MacLean. Agents—Macpherson & Mackay, W.S.

Tuesday, December 5, 1922.

FIRST DIVISION.

BROWN *v.* CUSTODIAN FOR SCOTLAND UNDER TRADING WITH ENEMY ACTS 1914-1918.

War — Emergency Legislation — Enemy Property—Money Vested in Custodian for Scotland—Application by Creditor of Enemy Company for Order for Payment — Competency—Trading with the Enemy Amendment Act 1914 (5 *Geo. V, cap.* 12), *sec.* 5 (2), *as Amended by the Trading with the Enemy Amendment Act* 1916 (5 *and* 6 *Geo. V, cap.* 105), *sec.* 12.

The Trading with the Enemy Amendment Act 1914 (5 Geo. V, cap. 12), section 5 (2), as amended by the Trading with the Enemy Amendment Act 1916 (5 and 6 Geo. V, cap. 105), section 12, enacts—"The property held by the Custodian under this Act shall not be liable to be attached or otherwise taken in execution, but the Custodian may, if so authorised by an order of the High Court or a judge thereof, pay out of the property paid to him in respect of that enemy the whole or any part of any debts due by that enemy and specified in the order. . . ."

In a petition under the above section at the instance of a creditor of an enemy company who had arrested a sum which, pending an action of furthcoming, had become vested in the Custodian for Scotland under section 4 of the Act, for an order upon the Custodian to pay the sum to the petitioner, *held* that the Court had no jurisdiction under the section to pronounce the order.

Opinions (*per curiam*) that the power conferred on the Court by section 5 (2) of the Trading with the Enemy Act 1914 had ceased with the termination of the war.

Alfred Brown, commission agent, Barrow-in-Furness, *petitioner*, brought a petition under the Trading with the Enemy Acts 1914 to 1918, and in particular section 5 (2) of the Trading with the Enemy Act 1914, and Act of Sederunt 15th December 1914, for an order on the Custodian for Scotland to make payment to the petitioner of a sum of £1030, 18s. 3d. held by the Custodian under a vesting order dated 30th December 1918.

The petition as presented was directed against the Custodian as sole respondent, but subsequently the Department for the Administration of Austrian and Bulgarian Property, London, compeared and was sisted as respondent, and answers were lodged by both respondents.

The following narrative of the circumstances is taken from the opinion of the Lord Ordinary (ASHMORE)—"Before the war the petitioner, who is a commission agent in Barrow-in-Furness, acted as selling agent in Great Britain for the Skoda Works Pilsen, Limited, manufacturers at Pilsen in Bohemia, and in August 1914 the Skoda Company owed the petitioner £1366, representing commissions earned by him as their agent. In October 1917 the petitioner sued the Skoda Company in the Court of Session and obtained decree in absence against them for £1366 with interest and expenses. He then lodged an arrestment in the hands of Willock, Reid, & Company, Limited, Glasgow ('the arrestees'), and attached a sum of £1041 due by them to the Skoda Company. In November 1917 the petitioner, in order to receive payment of the arrested money, brought an action of furthcoming against the arrestees and the Skoda Company. The arrestees lodged defences pleading, *inter alia*, that the action was incom-

petent in respect that their liability to the Skoda Company was suspended by the war, and that pending the war the petitioner could not receive payment. The Lord Ordinary having repelled the defence of incompetency the arrestees reclaimed, and their Lordships of the First Division of the Court of Session in July 1918 appointed the proceedings to be laid before the Custodian for Scotland. The Custodian applied for a vesting order, and on 30th December 1918 the Lord Ordinary officiating on the Bills ordered that the amount arrested in the hands of the arrestees should be vested in the Custodian 'to be held by him as directed by the Trading with the Enemy Amendment Acts.' Following on this vesting order the arrestees paid over to the Custodian £1041 as the sum due by them to the Skoda Company, and that sum, less certain expenses (which reduce it to £1030), is now held by the Custodian. After the termination of the war the petitioner endeavoured ineffectually to obtain payment of the sum in the Custodian's hands to account of his claim against the Skoda Company—applying successively between February 1920 and January 1922 to the Custodian, to the Public Trustee (the Custodian for England and Wales), to the Administrator of Austrian Property, and to the Administrator for Hungarian Property. What I have said describes generally the position when the petition now under consideration was presented on 31st January 1922."

The answers for the Custodian narrated the preamble to the Trading with the Enemy Amendment Act 1914 as indicating its temporary character, the Treaty of Peace (Austria and Bulgaria) Act 1920, and the Order in Council with reference thereto, dated 13th August 1920, establishing the Clearing House for dealing with enemy debts. The Trading with the Enemy (Custodian Direction) Order, 31st August 1921, was also referred to. The Custodian submitted that the petition should be refused on the following grounds:—"1. That the power contained in section 5 of the Trading with the Enemy Amendment Act 1914 on the Court to authorise the Custodian to make the payment sought has come to an end as a result of the provisions of the said Treaty of Peace, the Treaties of Peace (Austria and Bulgaria) Act 1920, and the said Order in Council. 2. Even on the assumption that section 5 of the said Act of 1914 is still in operation, the respondent maintains that on a sound construction of sub-section (2) thereof he cannot be required to make payment of the sum referred to in the petition against his will. The respondent has not consented to pay the said sum to the petitioner; on the contrary, he objects to making such payments."

The answers for the Administrator of Austrian Property also referred to the Order in Council of 13th August 1920, and particularly to section 1 (ii), (iii), (ix), and (x) (*b*), and the Trading with the Enemy (Custodian Direction) Order, 31st August 1921, and maintained that the petition should be refused in respect "(1) that it is incompetent, (2) that the petitioner had not completed any diligence to attach the fund in question, (3) that the said fund is enemy property within the meaning of the Statute and Orders in Council above referred to, and falls under the charge created by the Treaty of Peace (Austria) Order 1920, and (4) that the respondent is entitled in terms of said Statute and Order to obtain payment of the said fund to be used by him for the purposes of the said Order."

The Lord Ordinary (ASHMORE) dismissed the petition.

Opinion.—[*After the narrative of the circumstances already quoted*]—"Both the respondents in their answers object to the competency of the petition. Before dealing with that question, however, I ought to explain that certain arguments were raised by counsel for the petitioner which seem to me, having regard to the nature of the preliminary objection to the petition, to have no bearing on the question of competency.

"It was contended, for example, for the petitioner that there is nothing in any of the Treaty or statutory provisions which in the events that have happened entitle the Custodian or the Administrator to hold or deal with the money in question.

"The contention was founded on facts which I understand are admitted by the respondents, viz., (*a*) that the Skoda Company is incorporated at Pilsen, and (*b*) that Pilsen is no longer in Austrian territory but in Czecho-Slovakia. In that state of the facts it was argued that on a sound construction of the Treaty of Peace with Austria, the Treaty of Peace (Austria) Order 1920, the relative No. 2 Amendment Order of 1921, and the Trading with the Enemy (Custodian Direction) Order 1921, the 'charge' created over enemy property in this country is inapplicable as regards the debt due to the Skoda Company which was arrested by the petitioner, and the amount of which is in the hands of the Custodian.

"The petitioner's grievance was put thus in the argument submitted by his counsel—The Administrator not only claims right to receive from the Custodian the money which the petitioner attached by his arrestment, but also takes up this position, that the petitioner has no preferential claim of any kind on the money, and has no claim in respect of the debt due to him by the Skoda Company or otherwise to participate in the distribution of the Austrian assets (in which *ex hypothesi* the arrested money is regarded by the Administrator as included), but that these Austrian assets must be held by the Administrator for payment of claims by British nationals against Austrian nationals. The grievance complained of means in effect that the petitioner is to get no share of the fund attached by his arrestment or of the Austrian assets recovered by the Custodian and Administrator under the general 'charge,' that the petitioner's only remedy, if he has any remedy, is to sue the Skoda Company in Czecho-Slovakia, and compel the Skoda Company to pay over again the sum of £1041 which was due to them by the arrestees and was arrested by the petitioner, but is now to be taken by the Administrator to pay other British creditors.

"The argument so submitted by the petitioner's counsel might have been effective in an application made during the war or before the establishment of the Clearing Office and the appointment of the Administrator. In the view that I take, however, it has really no bearing on the question of competency raised by the respondents, and indeed counsel for the respondents dealt with the case on that footing. In these circumstances I think that I ought to express no opinion of my own on that statement of the case for the petitioner on its merits.

"Counsel for the petitioner also put forward other arguments which for the same reason have no bearing on the question now at issue, and which therefore I think it unnecessary to deal with.

"I come now to the question on which both parties—the petitioner and the respondents—join issue, viz., Is this petition competent?

"The petition is expressly based on section 5 of the Trading with the Enemy Amendment Act 1914, and in particular sub-section 2 as amended by the later Act of 1916.

"In effect section 5, so far as it bears on the question under consideration, provides (by the first sub-section) that the Custodian except in so far as the Court of Session or a judge thereof may otherwise direct, and subject to the provisions of the second sub-section, 'shall hold any money paid to and any property vested in him under this Act until the termination of the present war, and shall thereafter deal with the same in such manner as His Majesty may by order in Council direct,' and (by sub-section 2) it is further provided that the property held by the Custodian shall not be liable to be attached or otherwise taken in execution, but the Custodian 'may,' if so authorised by the Court or a judge thereof, pay out of the property paid to him in respect of an enemy the whole or any part of any debts due by that enemy and specified in the Order.

"The objection taken by the respondents to the competency of the petition is twofold, viz., (1) that the power conferred on the Court by section 5 has come to an end, and (2) that assuming that it is still effectual (*a*) it is discretionary in its character, and (*b*) if exercised it ought to be merely by way of granting an order authorising the Custodian in his discretion to make a payment out of the moneys held by him.

"In considering the question of competency I think it necessary in the first place to keep in view the conditions under which the power conferred on the Court is to be exercised. Regarded generally, the Act (the Trading with the Enemy Amendment Act 1914) is temporary and provisional in its character. Its main objects as disclosed in the preamble are to prevent the payment of money to persons in enemy countries and to preserve during the war money and property belonging to enemies 'with a view to arrangements to be made at the conclusion of peace.' Moreover, as regards the provisions in section 5 on which the petitioner founds, these are preceded by a mandatory direction that the Custodian is to hold what is vested in him under the Act until the termination of the war, and is to deal with it thereafter in such manner as shall be directed by an Order in Council.

"In my opinion the petition is incompetent. I think that on the sound construction of the statute the Custodian since the termination of the war and the establishment of the Clearing Office under the Administrator is not subject to the orders of Court authorised by section 5 of the statute, and must hold and deal with the funds in his hands in accordance with the directions given or to be given by His Majesty by Order in Council.

"Further, with reference to the argument submitted for the petitioner I think this dilemma arises—If the post-war arrangements and directions contemplated by the Act of 1914 do entitle the Administrator to receive from the Custodian the money in his hands this petition is inappropriate and incompetent, and if on the other hand the post-war arrangements and directions already made and given do not authorise the Administrator to receive from the Custodian the funds in his hands and deal with them, or are otherwise defective or incomplete, nevertheless the petition is equally inappropriate and incompetent.

"In either case the Court has no power or duty under the statute to intervene at this stage on the lines of the prayer of the petition. The opinion expressed by Mr Justice Russell in the case of *Nierhaus* (1921, 1 Ch. 269), although that case arose under different circumstances, seems to me to recognise and give effect to the construction which I am putting on the statutory provision in this case."

The petitioner reclaimed, and argued—The Lord Ordinary's construction of section 5 (2) of the Act of 1914 as amended was wrong. The section meant that the property was to be subject to the orders of the Court. Such a matter as this was normally subject to the jurisdiction of the courts, and that jurisdiction could only be excluded by express provision. Under the section therefore this application was competent. Further, where, as here, a valid *nexus* had been created by the arrestment, and where, as here, it was doubtful whether a vesting order obtained under the Trading with the Enemy Acts was valid, the Court was entitled to interfere and to grant the order which the petitioner sought. Counsel referred to *Warre* v. *Rush*, 1922, 38 T.L.R. 900, and in addition to the Acts of 1914 and 1916; the Trustee Act 1893 (56 and 57 Vict. cap. 53) as to the effect of a vesting order; the Trading with the Enemy Amendment Act 1915 (5 and 6 Geo. V, cap. 79), sec. 1; the Trading with the Enemy Amendment Act 1918 (8 and 9 Geo. V, cap. 31), sec. 12; and the Trading with the Enemy (Custodian Direction) Order 1921.

Counsel for the respondent were not called upon.

LORD SKERRINGTON—We heard an able argument from Mr Duffes in support of this reclaiming note, but I confess that he did

not satisfy me that the Lord Ordinary's judgment was otherwise than sound. In some respects the argument appeared to me to go beyond the scope of the petition. At one time he seemed to argue that the money with which the application was concerned ought not to have been placed in the hands of the Custodian, and at another he seemed to maintain that, assuming the money to be properly in the hands of the Custodian, his client had a lien or charge over it which he was entitled to enforce by the procedure pointed out in section 12 of the Trading with the Enemy (Amendment) Act 1918 (8 and 9 Geo. V, cap. 31). I do not propose to consider either of these questions. No proposal was made to amend the pleadings, and accordingly I must deal with the petition as it stands.

It appears from the prayer of the petition that what the petitioner asks is that the Court should make an order ordaining the Custodian for Scotland to make payment to him of the sum of £1030, 18s. 3d., or such other sum as may be held by the Custodian under the vesting order of 30th December 1918. In a purely statutory application like the present, one naturally turns to the enactment which is founded on as its warrant, but I find nothing in section 5 of the Trading with the Enemy (Amendment) Act 1914 (5 Geo. V, cap. 12) as amended by section 12 of the Trading with the Enemy (Amendment) Act 1916 (5 and 6 Geo. V, cap. 105) which entitles us to grant the remedy asked for by the petitioner. The application fails, in my opinion, either on the ground that the Court has no jurisdiction to grant it, or on the ground that the petition is incompetent and irrelevant. The statute undoubtedly gives to the Court jurisdiction to authorise the Custodian to make certain payments out of the property in his custody. *Prima facie*, however, that is a jurisdiction which is not intended to be exercised except at the request of the Custodian or with his approval. There is nothing technical or unusual in the wording of the section. It is frequently enacted that trustees may do such and such a thing if they are authorised to do it by order of the Court. Words of that kind taken by themselve go no further than to make it competent for the trustees, either directly or indirectly, to apply to the Court for the particular special power mentioned in the enactment. As, however, trustees are subject to the control of a Court of equity in the administration of their trust, the Court may declare it to be their duty in particular circumstances to apply for a grant of special powers. So, in the case of a judicial factor or other officer of Court, the Court may direct him to present an application for special powers. Where, as it seems to me, the petitioner failed was in satisfying us that the Custodian stands to the Court in a relation at all analogous to that of a trustee or a judicial factor. The Custodian states that he does not consider it to be his duty to ask for the special power which the petitioner wishes us to confer upon him. In these circumstances the question is a short one. Have we jurisdiction to control the Custodian in the exercise of his official duties and to require him to apply to the Court under section 5 (2) of the Trading with the Enemy (Amendment) Act 1914 for authority to make a certain payment to the petitioner? I do not think that we possess any such jurisdiction.

The Lord Ordinary has held that the petition is incompetent not merely upon the ground which I have stated, but also for the reason that the jurisdiction conferred upon the Court by section 5 of the Act in question was of a temporary character and that it ceased to exist when the war came to a termination. It is unnecessary to decide this point, but as at present advised I think that the Lord Ordinary was right. It is difficult to suppose that both the Court and His Majesty in Council were intended to have control over the property remaining in the hands of the Custodian after the termination of the war.

For these reasons I think we have no course open to us except to affirm the judgment of the Lord Ordinary.

LORD CULLEN—I have come to the same conclusion. The jurisdiction which the petitioner seeks here to invoke is a purely statutory jurisdiction under section 5, subsection (2), of the Trading with the Enemy (Amendment) Act 1914. That sub-section, *inter alia*, enacts that the Custodian may, if so authorised by an order of the High Court or a judge thereof, make payments out of property held by him. In the present petition the petitioner craves the Court *in invitum* of the Custodian to make an order ordaining him to make a payment to the petitioner. Now that appears to me to be a different species of order from the order or authorisation contemplated by the statute, and to be one which we have no power to make. On that short ground I am of opinion that the petition is incompetent. From that point of view it is unnecessary to decide whether the function of the Court under section 5 (2) is still operative, but as at present advised I am inclined to agree with the view in the negative expressed by your Lordship and also by the Lord Ordinary.

LORD SANDS—I agree with Lord Cullen. There may be a good deal of potential law in this case, but I do not think such questions are properly before us, and therefore I think the petition should be refused.

The LORD PRESIDENT did not hear the case.

The Court adhered.

Counsel for the Petitioner—Gentles, K.C. —Duffes. Agents—Hutton, Jack, & Crawford, S.S.C.

Counsel for the Respondent the Custodian for Scotland—Wark, K.C.—Brown. Agent —Norman M. Macpherson, S.S.C.

Counsel for the Respondent the Administrator of Austrian Property — Moncrieff, K.C.—Dykes. Agents—J. & R. A. Robertson, W.S.