

heard parties thereon, and advised the same, recalls the interlocutor of the Sheriff-Substitute of 13th September current, complained of: Finds, in point of fact, (1) That the nets referred to in the process are sufficiently instructed or proved to have become the property of the respondent Malcolm, in 1868, by a valid transaction between him and William and Angus M'Leod, the then owners of the nets; (2) That a poiding of certain of the said nets was executed on 28th August last at the instance of the petitioner Macdonald, an alleged creditor of the said Angus M'Leod; (3) Finds, in point of law, that the nets so poided could not be validly attached as the property of the said Angus M'Leod, in respect that, though the said Angus M'Leod had, with his brother William, the use of them for the fishing of 1869 from the respondent Malcolm, they were the property of the latter, and not that of Angus M'Leod; therefore sustains the application for interdict, and renders the interdict formerly granted perpetual: Dismisses the complaint at the instance of the said Murdoch Macdonald for breach of poiding: Finds the said Murdoch Macdonald liable to the said Alexander Malcolm in the expenses of process: Allows an account thereof to be lodged, and remits the same, when lodged, to Mr Bisset, in lieu of Auditor of Court, to tax and report; and decerns."

The petitioner (Macdonald) appealed.

MAIR for him.

M'LENNAN in answer.

The Court adhered to the Sheriff's judgment.

Agent for Appellant—W. Officer, S.S.C.

Agent for Respondent—Philip Laing, S.S.C.

Wednesday, January 26.

FIRST DIVISION.

GOURLAY v. RAE.

Damages—Injury—Liability—Tender. The defender, returning home in a November afternoon quite sober, and driving carefully a quiet horse on the proper side of the street, in seeking to avoid injury to the children running about knocked the pursuer over with the wheel of the gig. *Held* that but for his tender of a certain sum he must have been assoltized *simpliciter*.

John Gourlay, bobbin-turner at Dalbeattie, sued William Rae for the sum of £250 as damages for injuries sustained by him in consequence of his being knocked over by his gig on 20th November 1868. The following minute was lodged for the defender:—"The procurator for the defender stated that the defence was a denial of the libel, except that the pursuer was accidentally knocked down in a crowd, on the day stated in the summons, by the defender's gig, but through no fault of the defender. The defender offered to the pursuer to pay him the amount of the weekly wages he was earning at the time of the accident for the time he was off work, also the amount of the account due to the surgeon who attended him, and also the expenses then incurred, and he now renews that offer to the pursuer, and will also pay the judicial expenses as betwixt party and party to this date." As this tender was not accepted, a proof was led, which added the following state of circumstances. The polling for a Member of Parliament took place that day in Dalbeattie, and

between 3 and 4 P.M. Rae was driving home in a gig drawn by a quiet horse belonging to himself, and which he was accustomed to drive. He was perfectly sober, and was driving slowly and carefully on the proper side of the road, taking pains not to injure any of the children running about on the street. Gourlay, who had had one or two glasses of whisky that day, was standing on the side of the street with his back towards it, and not being observed by Rae was driven against and knocked over by the wheel of his gig. Rae, who was not asked why he did not observe Gourlay, at once pulled up when the accident occurred, but being told there was little wrong, drove on. The bulk of the testimony shewed that Gourlay was standing a few feet on to the roadway talking to some friends, and that had he been an inch farther off the wheel would not have touched him. There was no crowd on the street at the time so as to prevent Rae driving at the pace he was going at at the time.

The Steward-Substitute (DUNBAR) estimated the sum tendered as amounting to £5, 10s., and gave decree for this sum, with expenses as between party and agent up to the closing of the record, after taxation by the auditor. The Steward (HECTOR), considering Rae more in fault than the Substitute had done, assessed the damages at £10.

Rae appealed.

MILLAR, Q.C., and SCOTT for him.

J. C. SMITH and STRACHAN in answer.

The Court recalled both interlocutors. They held that it was plain the defender had his attention employed in avoiding the risk of injury to the numerous children running about, and that it was quite in the power and the duty of Gourlay, as being a grown-up person, to keep a look out. The tender by Rae was very creditable to him, and it did him much credit that he still offered to implement it; and but for it he must have been assoltized *simpliciter*, as in law he was not liable at all. They therefore gave decree against the defender for £5, 10s. of damages and £3, 9s. 10d., being the expenses of process as between party and agent up till the 15th January 1869, when the record was closed.

The following was the interlocutor pronounced:—"Edinburgh, 26th January 1870.—The Lords having heard Counsel on the closed record, proof, and whole process, recal the interlocutors of the Sheriff and Sheriff-Substitute since the close of the proof: Find that on 20th November 1868, between 3 and 4 o'clock afternoon, the pursuer, while standing on the carriage-way of the High Street of Dalbeattie, was injured by the wheel of the dog-cart driven by the defender coming in contact with the pursuer's person: Find that the said injury was not caused by the reckless, careless, or furious driving of the defender: Find it not established that the said injury was caused by any fault or negligence of the defender: Therefore find in law no ground of liability or reparation for the said injury has been established against the defender. But, of consent of the defender, decern against him for payment of £8, 9s. 10d., being equivalent to the value of the tender made by him in his defences: Find the pursuer liable in expenses in this Court and also in the inferior court subsequent to 18th January 1869, and remit to the auditor."

Agent for Pursuer—James Barclay, S.S.C.

Agent for Defender—W. S. Stuart, S.S.C.