to Archibald, to pay the remainder to and in favour of James' children. She, however, retained her right to bequeath or alienate any part of the trust-estate to the extent of £3000.

Major-General Ogilvie's next of kin at his death were Archibald and James and Isobel, wife of Mr Miller of Leithen. The trust-estate was computed to amount to upwards of £25,000, and after deduction of the undisputed legacies to upwards of £9000, and of the disputed legacy to Archibald of £3300, to nearly £6000. The value of the estate as at May 1868 was estimated at upwards of £42,000. The opinion of the Court was asked on the questions,—Whether Mrs Miller was entitled to one-third of the residue as next of kin, on the ground that under the codicil the provisions to the widow were to be held as revoked? and Whether, in that event, Archibald was entitled to his legacy under the codicil?

FRASER and WATSON, for Mrs Miller, argued—Under the trust-disposition the widow is residuary legatee. But the codicil must be read as implying a revocation of this appointment. And as James did not survive the widow, the residue must be treated as intestate succession. Archibald is not entitled to the legacy given to him by the codicil, because he was only to take if James took.

SOLICITOR-GENERAL and MONRO in answer.

The Court held that, as James had predeceased the widow, the codicil was not to be read as revoking the bequest of the residue in her favour.

SOLICITOR-GENERAL having asked for expenses, WATSON argued—This is not a case for expenses. If a multiplepoinding had been brought the trustees would have got the expenses of raising the action out of the trust-estate; and the expense of a claim in a multiplepoinding would be much greater than a special case.

The Court gave expenses, observing that under this special case the trustees did not get decree of exoneration, and if Mrs Miller chose this form of action she must abide the consequence of failure.

Agent for Mrs Miller and Husband—Stuart Neilson, W.S.

Agent for Trustees and Others—James Renton, S.S.C.

Tuesday, January 25.

SECOND DIVISION.

MACDONALD *v.* MALCOLM.

Poinding—Ownership of Goods—Nexus. *Held* that certain nets, of which the owner had allowed another party the use, could not be attached while in the possession of the latter for a debt due by him, so as to lay any *nexus* on them; and the owner, who had taken possession of the nets at his own hand, protected against a petition brought for restoration of the nets and penalties of breach of poinding.

This was an appeal from the Sheriff-court of Caithness in two conjoined petitions relative to the poinding of certain nets. The appellant had poinded nets in the possession of a party against whom he held a small-debt decree. The respondent, to whom the nets belonged, and who had merely hired them to the appellant's debtor, carried them off, or got them carried off, in disregard of the poinding. The appellant therefore presented a petition to the Sheriff, craving restoration of the nets, and that the respondent should forfeit double the appraised value. The respondent presented a cross petition, craving interdict against the appellant in any way interfering with the nets.

The two petitions having been conjoined and a proof led, the Sheriff-Substitute (RUSSELL) pronounced the following interlocutor:—"The Sheriff-Substitute having resumed consideration of the conjoined applications, with the writs produced, proof adduced, heard parties' procurators, and advised the cause: Finds that the petitioner Murdoch Macdonald was employed by the respondent Angus M'Leod as a hired hand during the fishing here, from July to September 1868; and at the end of the fishing there was a balance of wages due to him of £5, 16s. 6d.: Finds that, during the said fishing, the said Angus M'Leod was the owner of the boat and drift of nets used in the fishing; and that, during the fishing season in the present year, the said Angus M'Leod continued to use the boat and drift of nets as the ostensible owner thereof: Finds that, upon the 27th of July last, the said Murdoch Macdonald obtained a decree in the Sheriff Small Debt Court against the said Angus M'Leod for the balance of wages aforesaid; and that, upon the 28th of August last, he caused James Weir, sheriff-officer, to poind seven nets, as the property of the said Angus M'Leod, and that a poinding was executed accordingly: Finds that, in the knowledge of the said poinding, Alexander Malcolm, fishcurer in Pultneytown, directed the said Angus M'Leod to remove the nets so poinded from the ground rented by the said Angus M'Leod, on which the officer had attached them, and to carry them to the store of the said Alexander Malcolm; and the said Angus M'Leod also, in the knowledge of the said poinding, removed the nets to said store, where the same were detained or used by the said Alexander Malcolm and Angus M'Leod: Finds that the said Murdoch Macdonald presented the complaint, setting forth the breach of poinding, and for restoration of the nets: Finds that, whatever might be the claims of the said Alexander Malcolm in relation to these nets, his procedure in the removal thereof, at his own hand, was highly reprehensible, and therefore, in so far sustains the complaint, and Finds the said Alexander Malcolm and Angus M'Leod liable in the expenses of process applicable to the said complaint, and remits the account, when lodged, to Mr Bisset to tax and report: *separatim*, Finds that the said Alexander Malcolm, after removal and disposal of the said nets, presented the application for interdict against the said Murdoch Macdonald interfering with, or selling the said nets, on the allegation that the nets were the property of him, the said Alexander Malcolm: Finds it established that the said nets had, *inter alia*, been acquired for an onerous cause by the said Alexander Malcolm from the said Angus M'Leod previously to or during the currency of the last fishing; and that the said Angus M'Leod was in possession of the said nets solely as having received them on 'deal' for a stipulated consideration of £20 or thereby, payable to Malcolm as owner, and therefore sustains the application, and perpetuates the interdict formerly granted; but in respect of the censurable conduct of the said Alexander Malcolm, above referred to, Finds no expenses due; and decerns."

Both parties appealed to the Sheriff (FORDYCE) who pronounced the following interlocutor:—"The Sheriff having considered this case on the appeals of the parties respectively, and having

heard parties thereon, and advised the same, recals 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 poinding 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 poinded 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 poinding: 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 assoilzied *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 adduced 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 assoilzied *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.