

Friday, February 29.

FIRST DIVISION.

[Sheriff of Lanarkshire.

DOCHERTY AND OTHERS v. WATSON.

*Reparation—Road—Carriage—Negligence.*

In an action to recover damages for loss sustained through the death of an old man who was run over in the street by a van and killed, it was proved (1) that the accident happened in daylight; (2) that the van was being driven at a slow trot; and (3) that the driver called out to the old man, who halted and then tried to cross in front of the van, which however knocked him down and killed him. *Held* that the accident was not caused by the negligence of the driver, but in consequence of what was merely a misunderstanding.

This was an action at the instance of the widow and children of Bernard Docherty, who was an inmate of St Joseph's Home, Glasgow, against Robert Watson, rag merchant, Glasgow, for damages for personal injuries to Docherty which caused his death.

The material facts of the case were as follows:—On 12th February 1883, at about half-past four o'clock in the afternoon, when it was daylight, the deceased, who was sixty-four years of age, was crossing Castle Street, when a van belonging to the defender, and driven by his son Robert Watson, a lad of sixteen, knocked him down and killed him. Robert Watson, who was the first witness for the pursuers, deponed—"I was driving down Castle Street. When I came near to the foot of Garngad Hill, there were about six vehicles on the street. There were two carts going down the road, three lengths of a cart away from me, and two coal carts going up the road. At that time I was going at the rate of between a trot and a walk. My van was a spring cart with sides. I never noticed Docherty until he came out from the back of a coal cart. He was then about six yards off from my horse's head. When I saw him I roared out 'Hey.' He did not appear to notice me. I roared about four or five times. He was going from the west to the east side of Castle Street. I was driving perhaps eight or nine feet from the east pavement of Castle Street. I was pulling up at the same time as I roared to the old man Docherty. He looked up about the third time I roared, and made a quick step forward, and the left-hand tram struck him and knocked him down." Robert Hogg, nineteen years of age, deponed—"I was crossing the road at the old man's side, but nearer to the horse. I was passing from the west to the east side. Before I got into the track of the van I heard the vanman shouting. When I heard the shouting I stopped altogether, and put out my hand to try and catch the old man. Docherty heard the shout as well as me, for he lifted his head. The boy cried out a few times. . . . The van was not going at a great pace; it was going just at a trot. When I saw the van approaching I looked towards the van, and the old man and I both stopped to let the van past us, and the van pulled up, and

we thought he was going to stop the horse altogether. I jumped back, and the tram struck the old man." Daniel M'Connell, twenty-eight years of age, a spirit salesman, saw the accident from a shop in Castle Street, and deponed—"I saw the old man making to cross the street. I saw him going across the street, and the van going down, and he made to cross the street, and he was barely opposite the horse's head when he took a notion that he would not have time to go across, and halted, and the van halted also. Then, after the old man halted, he seemed to think he would have time to pass and went on, and then the van went on. It was a misunderstanding between them which of them should move first." Bernard Trayner, aged sixteen, who was about 6 or 7 yards from the van when he heard the shout, deponed—"I saw the old man leaving the pavement on which I was to cross the street. I noticed a van coming down. It came down on the east side. I heard the driver of the van shout. I heard it quite distinctly. He shouted two or three times. I think the old man heard the shout. I saw him lifting up his head, and he made to run forward to cross in front, and the shaft struck him. When I heard the boy shouting, the van was going at a slow trot."

On 19th January 1883 the Sheriff-Substitute pronounced this interlocutor:—"Finds that on the 12th February last Bernard Docherty, the husband of the female pursuer Mrs Mary Docherty, and father of the other pursuers, came in contact with a horse drawing a van driven by the defender's son in Castle Street, and was knocked down, and received injuries, of which he died: Finds that the lad was driving carefully, and keeping a look-out, and called out several times to the old man, and that the mishap was not due to fault on his part: Therefore assolvizies the defender," &c.

On appeal the Sheriff (CLARK) on 15th November 1883 pronounced this interlocutor:—"Finds that on the occasion libelled, the now deceased Bernard Docherty, while crossing Castle Street, Glasgow, met his death in consequence of being knocked down and run over by a horse and van belonging to the defender: Finds that on said occasion it was broad daylight, that the street was not crowded, but had very little traffic thereon, that the driver, the defender's son, a lad of sixteen years of age, was in a position to see all before him, and must have seen the deceased, when at a distance, amply sufficient to enable him to bring his vehicle to a stand, or at all events to have enabled him to pass without injury to the deceased: Finds that the said driver did not bring his horse and vehicle to a standstill, and did not take any proper means for keeping out of the way of the deceased: Therefore recalls the interlocutor appealed against: Finds that the death of the deceased took place in consequence of fault on the part of the defender, or of one for whom he is responsible, and that he is in consequence liable in damages to the pursuers: Assesses these at the sum of £100 sterling.

"*Note.*— . . . Upon the whole I have come to be of opinion, that keeping in view the case of *Clark v. Petrie*, June 1879, 6 R. 1076, and the views therein expressed by the Judges, fault has been clearly made out on the part of the driver of the van; and the only question that

remains is the amount of damages to be awarded. I have assessed these damages at £100, taking into account the whole circumstances of the case, which seem to me to point entirely to *solatium* for injury to feelings. If it had been made out that the deceased was the support of his family, or even contributing by his exertions in any appreciable degree to their support, the damages would have been considerably greater."

The defender appealed to the Court of Session, and argued—This was merely a case of misunderstanding. The accident happened in broad daylight, the van was being driven at a slow pace, and the driver called out so as to give the deceased warning. In *Clark v. Petrie*, June 19, 1879, 6 R. 1076, the shouts were not sufficient to attract the attention of the person run over. In *Grant v. The Glasgow Dairy Company*, Dec. 1, 1881, 9 R. 182, the driver was not in his proper place; *Ramsay v. Thomson & Son*, Nov. 17, 1881, 9 R. 140; *Auld v. M'Beay*, Feb. 17, 1881, 8 R. 495.

The pursuers replied—It was observed in *Clark v. Petrie* that there is a strong presumption of negligence against a driver who runs down a person in daylight. The street where the accident took place was not crowded, and the driver must have seen all before him. There was therefore a plain duty on him not merely to slacken his pace but to pull up.

At advising—

**LORD MURE**—In this case, which is an action against a van-owner arising out of an accident by which an old man was knocked down and killed, the Sheriff and the Sheriff-Substitute have come to different conclusions, and I am rather disposed to agree with the Sheriff-Substitute.

In the condescence the pursuer's allegation as to the manner in which the accident happened is that the occurrence took place about half-past four o'clock in the afternoon, when it was broad daylight, that there was very little traffic on the street at the time, and nothing to have prevented the driver of the horse from seeing Docherty in ample time to have kept clear of him; but that the driver, who was the son of the defender, was not keeping a sufficient look-out, and was driving negligently and carelessly; that he kept his horse going at a smart trot southwards down Castle Street, making no attempt to clear the deceased nor to warn him to get out of the way, and that although Docherty had all his faculties about him, he was not sufficiently active to get out of the way of the horse, and so was killed.

I think that it appears, after careful consideration, that the averments in the condescence are not proved. The *onus* is on the pursuer to show that the accident occurred through the negligence of the defender, or of a person for whom he was responsible. Now, the defender's son, who was driving the van, gives this account of what he saw and did—"I was driving down Castle Street. When I came near to the foot of Garnagad Hill there were about six vehicles on the street. There were two carts going down the road, three lengths of a cart away from me, and two coal carts going up the road. At that time I was going at the rate of between a trot and a walk. My van was a spring cart with sides. I never noticed Docherty until he came out from the back of a coal cart. He was then about six yards off from

my horse's head. When I saw him I roared out 'Hey.' He did not appear to notice me. I roared about four or five times. He was going from the west to the east side of Castle Street. I was driving perhaps eight or nine feet from the east pavement of Castle Street. I was pulling up at the same time as I roared to the old man Docherty. He looked up about the third time I roared, and made a quick step forward, and the left-hand tram struck him and knocked him down."

That is the defender's account. His son (the driver) says that the horse was going between a walk and a trot, and that was certainly a pace at which he was entitled to go. In this he is corroborated by one of the witnesses for the pursuer, who uses somewhat the same expression, and therefore one may conclude that the van was being driven at a fair ordinary pace, and not too quickly. That being so, is there anything to show that the condescence is correct in saying that the driver did not keep a sufficient look-out? He says that he saw the man and shouted to him, and the account given by three witnesses for the defender, M'Connell, Hogg, and Trayner, in their evidence, substantially comes to this, that the van was coming down at that pace when the old man was crossing, and that there was some hesitation as to how he was to cross. The driver was pulling up as hard as he could, though he could not get the horse to a stand-still, and he says "he looked up about the third time I roared, and made a quick step forward." Now, M'Connell corroborates that. "I saw the old man making to cross the street. I saw him going across the street, and the van going down, and he made to cross the street, and he was barely opposite the horse's head when he took a notion that he would not have time to go across and halted, and the van halted also. Then after the old man halted, he seemed to think that he would have time to pass and went on, and then the van went on. It was a misunderstanding between them which of them should move first." In cross-examination also he says—"He halted, not when he was right before the horse. When he went to the shaft he kind of halted, and thought he would not have time to pass, and then when the driver halted with the van he thought he would have time to pass, as I thought." There was just a certain amount of hesitation on both sides. The man was not sure whether it was safe to cross, and the driver did not know whether to go on. This evidence is clear that the man thought he could pass, so that there was no negligence or want of care, but merely a misunderstanding, and M'Connell is corroborated by Hogg, who says—"I was crossing the road at the old man's side, but nearer to the horse. I was passing from the west to the east side. Before I got into the track of the van I heard the vanman shouting. When I heard the shouting I stopped altogether, and put out my hand to try and catch the old man. Docherty heard the shout as well as me, for he lifted his head. The boy cried out a few times." And then again—"The van was not going at a great pace. It was going just at a trot. When I saw this van approaching I looked towards the van and the old man, and we both stopped to let the van pass us, and the van pulled up, and we thought he was going to stop the horse altogether. I jumped back, and the tram struck the old man." These two witnesses cor-

roborate the account given by the van-driver, and though there were others who say that they thought the driver should have pulled up, yet in the face of the fact that there certainly was some hesitation and halting, which led to a misunderstanding, I am unable to see that the averment in the condescence is proved. I am therefore disposed to take the same view as the Sheriff-Substitute.

LORD SHAND—Although I have had some difficulty in regard to this case, I have come to the conclusion that we ought to revert to the judgment of the Sheriff-Substitute. There are three witnesses for the defender who were examined at the end of the cause who gave the same account, which is, practically, that while the driver was going down the street at a reasonably slow pace, the deceased was crossing in front of the van, and that he halted, and then, after halting, he changed his mind and attempted to go forward, when he was knocked over by the shaft. Assuming that these witnesses are giving a true account, the occurrence is thus described by M'Connell—“After the old man halted he seemed to think he would have time to pass, and went on, and then the van went on. It was a misunderstanding between them which of them should move first.” If that is a true account of what happened, then it certainly was an accident and not the fault of the driver, for he thought, from the fact of the old man halting that he did not mean to cross in front, and if the deceased changed his mind, then the driver is not responsible.

The only difficulty in the way of this view of the case is that the driver does not give specifically the same account of what happened, but it must be observed that he is the first witness examined for the pursuer, so that it is truly cross-examination. It is very unfortunate that he was not recalled or examined for the defender, but I think that it is possible, if his evidence is read reasonably, to find that he corroborates the view taken on the evidence of the other witnesses. He says that while he was driving slowly down he called out to the deceased several times—“I was pulling up at the same time as I roared to the old man Docherty. He looked up about the third time I roared, and made a quick step forward, and the left-hand tram struck him and knocked him down.” This appears to corroborate the view that on the third call the deceased halted and looked up, and that then the driver went on. On the whole, I have come to the conclusion that as the Sheriff-Substitute thought the witnesses who spoke to this mode of the occurrence were to be relied on, we should revert to his judgment, and assolvie the defender.

The LORD PRESIDENT concurred.

LORD DEAS having been absent at the time of the debate gave no opinion.

The Court pronounced this interlocutor:—

“Recal the interlocutor of the Sheriff of 15th November 1883: Of new find in terms of the findings in fact contained in the interlocutor of the Sheriff-Substitute of 19th June 1883: Assolvie the defender from the conclusions of the action, and decern: Find

the pursuers (respondents) liable to the defender in expenses since the date of the Sheriff-Substitute's interlocutor.”

Counsel for Pursuers (Respondents)—Ure—Law. Agents—Ker & Smith, W.S.

Counsel for Defender (Appellants)—Trayner—Wallace. Agents—Rhind, Lindsay, & Wallace, W.S.

Saturday, March 1.

## FIRST DIVISION.

[Sheriff of Lanarkshire.

WALKER v. SMITH.

*Sheriff—Debts Recovery (Scotland) Act 1867 (30 and 31 Vict. c. 96), sec. 2—“Men's Ordinaries” —Aliment—Implied Contract.*

*Held* that an action against a husband at the instance of his mother-in-law for board and lodging afforded to his wife and infant child, whom he knew to be living with the pursuer and for whom he was not providing aliment, was founded on implied contract, and competent under the Debts Recovery (Scotland) Act 1867.

This was an action under the Debts Recovery (Scotland) Act 1867 in the Sheriff Court at Glasgow, at the instance of a Mrs Walker against her son-in-law Joseph Smith, for the sum of £31, 5s., which was alleged to be due in respect of board and lodging furnished by the pursuer to the defender's wife and infant child between 15th November 1882 and 25th June 1883.

Section 2 of the said Act provides—“It shall be lawful for any Sheriff in Scotland, within his sheriffdom, to hear, try, and determine in a summary way, as more particularly hereinafter mentioned, all actions of debt that may competently be brought before him for house mails, men's ordinaries, servants' fees, merchants' accounts, and other the like debts, wherein the debt shall exceed the value of £12 sterling, exclusive of expenses and dues of extract, but shall not exceed the value of £50 sterling, exclusive as aforesaid.”

The defence was (first) that the action was irrelevant, and also incompetent under the Act; and (second) that the defender was not due the sums sued for, and that he made no contract with the pursuer to aliment his wife and child.

A proof was taken, and the material facts are detailed by the Sheriff-Substitute (BALFOUR) in the following interlocutor:—“Finds that this is an action raised by a mother-in-law against her son-in-law for board, washing, lodgings, clothing, and medicine furnished by her for about thirty-two weeks to the son-in-law's wife and child: Finds that the action is competent in this Court in respect that it is a claim for men's ordinaries, and in that category are included supplies or furnishings of the description already mentioned: Finds that the defender and his wife were married in April 1879, and they resided together until November 1881, when the defender left his wife; that at that time he left his wife in a house which he had taken