If you find for the pursuer, you will, on consideration of the facts, give what is reasonable; and damages ought never to be vindictive. The want of employment for three months at the rate stated would amount to about L. 18, and there is the expense of cure, and the permanent injury.

Verdict—For the pursuer. Damages against Rae, L. 75, and against Downes one shilling.

*Cockburn*, and *A. M'Neil*, for the Pursuer.
*Rutherford*, for the Defender.
(Agents, *Ch. Fisher*, *Anderson* and *Whitehead*.)

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PRESENT,

LORD CHIEF COMMISSIONER.

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## Miller v. Harvie.

1827. Dec. 24.

Finding for the defenders in an action of damages against a master and servant, for causing the death of the pursuer's child.

An action of damages against a master and servant for causing the death of the pursuer's child through the negligence of the servant.

Defence for the master.—The circumstances, if true, are not relevant. But the inatten-

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tion of the pursuer was the chief, if not the sole cause of the accident.

ISSUE.

"It being admitted that William Wilson "was servant to the defender, Thomas Harvie, "from Whitsunday to Martinmas 1826.

"It being also admitted, that on the 16th "day of September 1826, in the street in the "city of Glasgow called Gallowgate, a cart, "the property of the defender, passed over, "and caused the death of the pursuer's son; "and that at the time it so passed over the "child, the said cart was under the manage- "ment of the said William Wilson:

"Whether the death of the said child was "caused by the fault, negligence, or want of "skill on the part of the said William Wilson, "to the loss, injury, and damage of the pur- "suer?"

*Cockburn*, for the pursuer said, The case is simple, and both the master and servant are liable. The servant was drunk and sitting on one of two carts, with only a single rein. Law allows money to be given as the only reparation for mental suffering; and in a recent case L.40 was given for the loss of a finger.

Baird v. Hamilton, July 4, 1826. 4 Shaw and Dun, 790.

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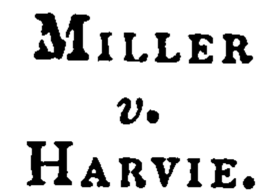
v.
Harvie.



*Jeffrey*, for the defender.—This is a hard case, as I only appear for the master; and this is in fact a trial as for culpable homicide against a person who was not present. The questions are, whether the death was caused by Wilson? and whether, if he were here and solvent, the master would be liable? There is no furious driving, or out of the regular course, and the child came in the way from the negligence of its parents. Having employed a careful servant, the master is not liable in *solatium*, though he might be liable for actual loss.

Lord Chief Commissioner.—An action of this sort is very rare, and this is the first of the kind which has come to be tried in this Court. The question here is, not the civil liability of a master to repair damage done by his servant, but whether he shall pay a sum of money as a consolation to a parent for his mental suffering for the death of his child, when there has been no public prosecution of the servant?

Throughout the empire, an action may be brought for the expenses caused by such an act, as is here charged; and by the law of Scotland the action is relevantly brought for reparation of the mental suffering by the parent.

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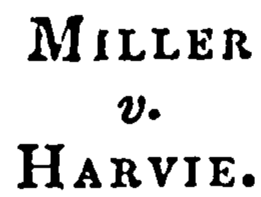

But there is still a question before you, whether, on the evidence, you are to find beyond the actual expense incurred?

We ought to consider this case soberly and discreetly, and with right feelings of justice, without any excitation. There is nothing to cause observation on the party who brings the action, or on the defender; nor should we be influenced by any opinion that it would be better if the law were otherwise. We must take the law as it is.

This is an action founded on the liability of a master for an act by a servant out of his sight. We had very recently occasion to consider the law on this subject, and though the facts of the one case do not bear on the other, the law is the same in both. The issue is laid on the fault and negligence of the servant; and it could not have been otherwise. Neither here nor elsewhere could it be held that the master is liable for the wilful acts or criminal acts of a servant; but he is liable for want of skill and attention, as he must employ skilful and attentive servants. He is civilly liable for the fault, negligence, or want of skill of the servant, but is not liable for wilful acts out of the duty he has to perform. The employer is clearly liable; but with this limitation, that, if the person is in

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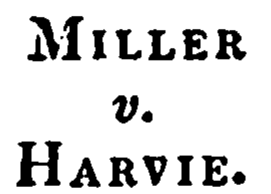

the regular discharge of his employment, and if the blame is in the person suffering, he must submit to the injury. But there are shades of cases and degrees of blame on both sides, which must be considered. Here you must consider the facts proved, and the degree of blame of leaving this child on the street; that the child had wandered to the opposite side of the street into a situation where it was not to be expected; and then make up your minds, as I should be sorry if you went on my impression of the case. The case is not one of rash, but of negligent and faulty driving, and if a servant is in the habit of acting in this manner, the master must be held to know it, and be liable for keeping a servant of that character. It is established, that, though the servant was drunk at the time, he was not habitually so. Had he been a habitual drunkard, the master was clearly liable, but if this was accidental drunkenness, the master was not on that ground answerable.

This brings it to the pure question of whether there was such freedom from fault on the part of the pursuer, and such fault on the other side as to render the defender liable? [His Lordship then stated the facts, and what he considered the carelessness of both parties, and then said,] If the carts were improperly equip-

HOPE v. MAGISTRATES OF SELKIRK.

ped, and the driver sitting in them with a single rein, and if they were in a wrong place, then this is fault and negligence for which the master is liable, and you must assess damages. The expense of the funeral is easily ascertained. But on the solatium, being myself a father and grandfather, I cannot assist you in estimating in money a claim for such an injury.

Verdict—For the defender.

*Cockburn* and *A. M'Neil*, for the Pursuer.
*Jeffrey* and *Pyper*, for the Defender.
(Agents, *N. W. Robertson*, S. S. C. *M'Millan* and *Grant*, W. S.)

PRESENT,

LORD CRINGLETIE.

1827. Dec. 26.

Finding as to the usage of a burgh in reference to the admission of freemen.

## HOPE v. MAGISTRATES OF SELKIRK.

THIS was a petition and complaint against the election of Magistrates of Selkirk in 1825, on the ground that the votes of certain masons had been improperly received in the election of the deacon of the hammermen. At the election of the deacon there were nineteen votes on one side, and twenty on the other, including eight votes now questioned.