M'LAREN v. RAE, &c.

evidence of the thickness, therefore, is to be taken merely as a means of judging of the sufficiency of the staves, and you must decide whether, if they are not $2\frac{1}{2}$ inches thick, they are not marketable. The correspondence is important on this point, and one witness said, if there was no bargain as to thickness, he thought he must take staves commissioned, though under that thickness. These staves are proved insufficient for whisky, but it is not proved that the bargain was for whisky staves. If the defender had received the staves, it might have gone far to fix them on him, but he rejected them immediately.

Verdict—For the pursuers, damages L. 362.

Jeffrey and *Neaves*, for the Pursuer.
Cockburn and *Rutherford*, for the Defender.
(Agents, *John Murdoch*, s. s. c. and *John Harvey*.)

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

M'LAREN v. RAE, &c.

1827. Dec. 10.

Damages against a master and servant, for injury caused by the negligence of the servant.

AN action of damages against a master and servant for injury caused by the negligence of the servant.

M'LAREN v. RAE, &c.

DEFENCE.—The master is not liable for the culpable negligence of the servant, and neither are liable for an accident.

ISSUE.

"Whether, on or about the 11th day of Sep-
"tember 1826, in the street called Gallowgate,
"in the city of Glasgow, a horse and cart, the
"property of the defender, John Rae, and un-
"der the management of the defender, Thomas
"Downes, then acting as his servant, did,
"through the fault, negligence, or want of skill
"of the said Thomas Downes, cause bodily
"harm to the pursuer, to the loss, injury, and
"damage of the pursuer?"

Cockburn opened the case, and stated the facts, and said, That the master was clearly liable, —that by the police act carts were not to be left in dangerous situations, and practice had explained, that, unless some one was at the head of the horse, it was to be held dangerous.

In an action for damage done by a cart, sufficient to give *prima facie* evidence of the property.

A witness having stated that there was no name on the cart, but that the carter said it belonged to Rae.

LORD CHIEF COMMISSIONER.—This is not proof of the property of the cart, but is good

prima faciæ evidence; and the other party, if they dispute the fact, must prove the contrary.

Rutherford, for Rae.—I admit the property, though it has not been proved by the best evidence. The facts proved are, that, while the servant is loading two carts, the horse of one bolts off, partly through the negligence of the pursuer, he therefore cannot get damages. The regulations of police requiring a person to be at the head of the horse are not carried home to the defender. The question here is, whether there was great negligence? In the case of Linwood and Hathorn strong doctrines were laid down; but the question is, whether the accident was likely to happen? Here there is merely a legal responsibility, and the facts raise a question of law.

Linwood *v.* Hathorn, &c. 14th May 1817.

LORD CHIEF COMMISSIONER.—This case has been correctly conducted on both sides, and the evidence has been properly circumscribed. You are to consider the situation of these parties, and that the point to be made out is negligence, not malevolence; and in considering the case of the servant, you will not be disposed to give against him what might distress him.

The words of the issue clear away the obser-

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vation that has been made on the law; for the question here is not whether this was a culpable act of the servant, or whether it was wilful disobedience of orders, or without or beyond his employment, but whether the servant did not do what was necessary for the protection of the public. The act of the servant to make his master answerable for it must be in the regular course of his duty.

The fault must arise from want of skill or attention, and not from a wilful act. A criminal act will not subject the absent and innocent master. In this case want of skill may be laid aside, as not applicable to the circumstances.

The police act being public, all are bound to notice it, but it carries the matter very little farther than the common law; and the question is, whether a cart in the situation of this one was dangerous to the public, and whether one of the men ought not to have been at the head of the horses? The question here is on the common law, whether this person was in his common employment, and was negligent? Whether there was such diligence used as is requisite to free passengers from injury? and it is clear that the accident would not have happened if there had been any one at the head of the horses.

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.*)

PRESENT,

LORD CHIEF COMMISSIONER.

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-