Ordinary's interlocutor ought to be adhered to. I do not see what other conclusion he could have come to, for the title of the pursuer is not denied, and the liability of the defender is not denied.

LORD YOUNG—I am of the same opinion, but I should just like to add a single remark. If a party is distressed by a double claim brought on plausible grounds he is entitled to bring a multiplepoinding. Distress need not be in the form of diligence. The law never requires that distress should proceed the length of diligence. But there was nothing of the sort done here. The defender stood off until Mrs Dudgeon makes her demand, and now suggests that someone else is making the same claim. But this is not double distress.

LORD CRAIGHILL—It does not appear that any course is open to us other than to give decree in terms of the Lord Ordinary's interlocutor. The Court cannot bring a multiplepoinding. If there is double distress there can be a multiplepoinding, that two claimants may be brought face to face. But what the defender has not done the Court cannot do.

The Lords adhered.

Counsel for Pursuer — Darling. Agents—Purvis & Wakelin, S.S.C.
Counsel for Defender—Trayner—J. A. Reid. Agent—A. Rodan Hogg, Solicitor.

Thursday, December 1.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GRANT *v.* GLASGOW DAIRY COMPANY.

Reparation—Road—Negligence—Carriage.

A boy four years old was crossing a thoroughfare in charge of a girl about nine years old, who was close beside him. Just after he came out from behind a lorry which was standing at the side of the street, and which prevented him from seeing up the street, he was knocked down and had his thigh broken by a milk van which was coming down the street on its own side. The evidence was contradictory as to whether the van was being driven at an excessive pace or not; the driver was not sitting on his own seat, but low down beside the shaft of the van. The accident happened in broad daylight. *Held* that the accident having occurred in daylight, there was a presumption of fault against the driver, and that on the evidence he had not overcome that presumption, and damages assessed at £50.

This was an action raised in the Sheriff Court of Lanarkshire by Adam Grant, boilermaker, as administrator-in-law for his pupil son, to recover £100 as damages for an injury inflicted on the pupil through his being run over in Garscube Road, Glasgow, on 2d November 1880, by a van belonging to the defenders. The proof led showed that at two o'clock on the afternoon of that day the pursuer's son, who was then between three and four years of age, and who had been sent in charge of his sister, a girl ten years of age, to a shop in Garscube Road, was in the act of crossing the street, which is of considerable width, on his return home. About two doors above the shop to which the children had been sent a lorry laden with bottles had been newly drawn up, which obscured to some extent from the child the view of the street in the direction from which the defender's van was at the time approaching. Just after the child had come out from behind this lorry he was struck by the horse in the defender's milk cart, which was being driven down the street on its proper side, and had passed within a few feet of the lorry. The boy was thus knocked down and a wheel passed over him, causing a comminuted fracture of the right thigh, from which he suffered great pain, was for some time in a hospital, and was lame for a considerable period, but from which no constitutional injury appeared at the time of this action to have been sustained. The little girl, according to her own evidence, was at that time close to the boy, and ran back when she saw that the accident was inevitable, and it was admitted by one of the boys in the defenders' cart at the time that he saw the children, and saw the girl run back, but that it was then too late to avoid the accident. The child appeared to have been coming pretty quickly out from behind the lorry when the accident happened. The evidence was contradictory as to the speed at which the van was being driven at the time when the accident occurred. Two persons who were with the lorry, on the one hand, deponed that the van was being driven furiously and recklessly by a boy who had been sent along with the driver for the purpose of assisting him in the delivery of the milk. This evidence was corroborated by that of the mother of the boy, who had seen the accident from her window at the other side of the street. On the other hand, the driver of the van (a lad of seventeen) deponed that he was himself driving at the time at an ordinary trot, and this evidence was corroborated both by the boy who was with him and by several bystanders who had observed the van immediately before the accident, and had witnessed the accident. It was proved that the driver was not at the time sitting in his own high seat, which ran across the cart above the barrels of milk, but was sitting low down at the corner of the cart with his feet outside. It was also proved that immediately before the accident the driver and the boy were laughing and talking together, though this was denied by the driver. The evidence for the defence was to the effect that the driver had no time to draw up after the child came in sight from behind the lorry.

The Sheriff-Substitute (GUTHRIE) found that it was not proved that the defenders' driver was driving recklessly, or that the accident occurred through his fault, and assoilzied the defenders.

The Sheriff (CLARK) on appeal adhered. He added this note to his interlocutor:—(After examining the evidence and holding the preponderance to be with the defenders)—"In addition to this it seems very clear that a certain amount of contributory negligence attaches to the pursuer's case. His son—a boy between three and four years of age—seems not to have been properly looked after, and it is very obvious on the proof that he rushed out of the shop and put himself in such a position that it might have been difficult, if the defenders' driver had exercised the utmost amount of circumspection, to have prevented

what occurred. At the same time, I cannot entirely relieve the defenders' driver from a certain degree of blame. He had a high seat in front of the conveyance, on which he ought to have seated himself. A good deal of contradiction exists as to which particular part of the conveyance he occupied, but even if his own statement be adopted, it is plain that he was not occupying the seat he ought to have occupied. In these circumstances, while adhering to the interlocutor appealed against, it seems to me that there is no good reason for awarding the expenses of the appeal."

The pursuer appealed to the Second Division, and argued — The Sheriffs have given no weight to the fact that this child was run down in broad daylight. That fact of itself throws an *onus* on a driver. He has to discharge himself of fault—*Clerk* v. *Petrie*, June 19, 1879, 6 R. 1076. Nor did it matter that the injured person was a child—*Auld* v. *M'Bey*, February 17, 1881, 8 R. 495. Besides, the Sheriff had found that the driver was to blame in not occupying his proper seat, whence he could have more easily seen the child crossing the street, and more easily checked the horse, and this, added to the time of day when the accident occurred, was sufficient to convict him of negligence. The evidence showed that the van was driven recklessly, and that it was not the proper driver who was driving. But even if it were, it showed that he ought to have seen the child in time to pull up with safety. Assuming that he was himself driving, and at an ordinary speed, that was not in the circumstances sufficient care. He at least saw the loaded lorry which obstructed his view of the pavement, and a man who passed a hoarding or other obstruction was not entitled to go close past it at what would be an ordinary speed in a place where he could see the persons who were about to cross quite well. He must then be using special care, and be able to pull up at a moment's notice. There was no contributory negligence. Besides, a child is not in the question of contributory negligence to be dealt with as a grown person—*Campbell* v. *Ord & Madison*, November 5, 1873, 1 R. 149; *Auld*, *supra*. Even assuming that there was negligence imputable to the father in allowing the child to be there, which negligence was not proved on the evidence, the defenders' driver could in the result have avoided the effects of that negligence, and the defenders could not therefore avoid liability—*Davies* v. *Mann*, 10 M. & W. 574; *Radley* v. *London and North-Western Railway Company*, 1 L.R. App. Cas. H. of L. 754.

Answered for the respondents—The evidence showed that this was a pure accident which the driver could not have prevented. It was not disputed that he was on his own side of the street, and the evidence proved he was not driving furiously or even carelessly. It might be that he was not on his own seat, but even if that was a fault it had nothing to do with this accident, which was caused by the child coming suddenly out from behind the lorry and running right before the horse. Any blame which existed was for negligence imputable to the child's father in allowing so young a child to be out on a busy street without sufficient precaution for its safety. Shearman and Redfield on Damages, p. 56, sec. 48.

At advising—

Lord Justice-Clerk—My first inclination when I read the proof in this case was not to interfere with the judgments of the two Sheriffs upon what appeared to be a conflict of evidence, but upon further consideration I have come to the conclusion that the action is well founded. The whole question depends upon the fact whether fault is or is not attributable to the driver of the cart, as I think we must put out of view the plea of contributory negligence, there being no room for it. This little boy had been with his sister upon an errand, and it is said that he ran away from her, but that has not been proved. The milk cart was at this time coming down the street and knocked him down. Now, it is part of the duty of the driver of a cart or other vehicle not to run over passengers upon the highway, and to avoid doing so he is bound to use reasonable care. Passengers on the highway are entitled to cross the street, but in doing so they must also use reasonable care. The driver of a cart of the kind mentioned in this case, which is intended to move at a considerable pace, and which can be easily managed and easily stopped, is bound to take special care, and if this driver had acted as he ought to have done this accident would not have happened. What actually occurred here was that when the milk cart was coming down the street there was a lorry standing at the side of the pavement a little way up, and that that constituted an obstruction; but the driver of the dairy cart was not in his right place—the driving seat—and when the driver is not in his right place I assume he takes some risk for what may happen through want of sufficient command over his horse. The driver says he did not see the little boy, but the other boy who was with him saw the little boy before he was knocked down. I think this is a case for which the Dairy Company must answer. It is notorious that milk carts and other light carts of that kind are often driven too fast. I think, on the whole matter, that it has been proved (1) that the driver had not sufficient control over his horse, and had not a sufficiently wide view of the street, and (2) that if he had been going at a deliberate pace the accident would not have happened. I think, therefore, that this is a well founded action, and that we should find the Dairy Company liable in damages.

Lord Young—I am of the same opinion, and if I had had originally to decide this case in the Sheriff Court, I would have had no difficulty in deciding it in favour of the pursuer. The only hesitation I feel is in interfering with the judgment of both the Sheriffs, and particularly with that of the one who heard the evidence. In most cases that have to be decided on evidence, the Judge who takes the evidence possesses great advantages, but in other cases in which inferences have to be drawn from the evidence and applied, a Court of appeal are as fit judges as the Judge who heard the evidence. Any difficulty, in this case at all events, is lessened by the observations of the Sheriff-Principal in his note, where he says that the driver was to blame in not occupying his proper seat, although he only gives effect to that finding by refusing to give the defenders their expenses. I also think that the driver was to blame, and not only in the matter the Sheriff refers to, but, I am disposed to think, because he was driv-

ing at a furious pace. It constantly comes under our observation—and indeed we may almost take judicial notice of the fact—that when two lads are in charge of a light van like this they drive at a furious pace. In fact, the thing is so notorious that against such a van as this, driven by boys who are laughing and chatting together, and which has run over a person in daylight, the presumption is irresistibly strong, and I think it wholesome in the interests of the public safety that masters who send out boys with such vans should be held responsible for the injuries inflicted by the recklessness of these drivers.

Lord Craighill—I have come to the same conclusion, although I regret that I have to differ from the two Sheriffs. The Sheriff-Principal, however, has held negligence proved on the part of the defender, and therefore I think we cannot escape from the conclusion that the defender is liable. It also appears to me, as has already been observed by your Lordship in the chair, that contributory negligence cannot come into this case. It is not necessary to weigh in fine scales the evidence of the two different sets of witnesses, for even if, as the witness Young says, the cart was going at an ordinary pace, in the circumstances this was not enough, as he was not in his proper place, and had not the usual power of controlling his horse so as to protect the foot-passengers. He was only entitled to drive at his ordinary rate if he was using all the ordinary means for protecting foot-passengers. Young says that he did not see the little boy, but he did not see him because he was not in his proper place, and he did not see what he ought to have seen. This was enough to make his fault the distinct cause of the accident.

Lord Justice-Clerk—With regard to the assessment of damages—This was a very serious injury, and we are not yet in a position to say what the result will be. There appears to be some hope, however, of complete recovery. I think, however, we should give substantial damages, and £50 seems a proper sum. I will only add that I hope some strong-minded ædile will arise who will put down the furious pace at which these vans and spring-carts are driven.

The Lords sustained the appeal, recalled the interlocutors of the Sheriffs, found that the injury had been inflicted through the fault of the defenders, and assessed the damages at £50.

Counsel for Pursuer and Appellant—Sym. Agent—D. Cuthbert, S.S.C.

Counsel for Defenders and Respondents—Guthrie Smith—Brand. Agent—Adam Shiell, S.S.C.

Thursday, December 1.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

MACKENZIE AND BEATTIE *v.* MURRAY AND OTHERS.

(Sequel to *Gilbertson* v. *Mackenzie*, Feb. 2, 1878, *ante*, vol. xv. p. 334, and 5 R. p. 610; and to Special Case *Coulthard, &c.* v. *Mackenzie*, July 18, 1879, *ante*, vol. xvi. p. 768, 6 R. p. 1322.)

Fishings — Salmon - Fishing — Public Right of White-Fishing — White Fishing with Fixed Nets in Solway—Acts 1563, *cap.* 3—*Act of Queen Anne*, 21*st Sept.* 1705—29 *Geo. II. cap.* 23 (*Act for Encouraging the Fisheries in that Part of Great Britain called Scotland*, 1756).

A public right of white-fishing in the Solway by fixed engines having been declared to exist concurrently with a private right of salmon-fishing, "so as not to interfere with the salmon-fishing," and "reserving to the parties respectively to take such legal proceedings, the one against the other, as may be competent for preventing all undue or improper encroachment or interference with the respective rights of fishing" of the pursuer of the declarator, as representing the public, and of the proprietor of salmon-fishings, the latter in a subsequent process established that the white-fishing as conducted injured materially the salmon-fishing during the open season. *Held* that he was entitled to interdict against the white-fishing during the open season with fixed engines of the kind then in use.

In the case of *Gilbertson* v. *Mackenzie*, *supra*, which was a declarator brought by Gilbertson of his right as one of the public, at common law and under certain statutes which are fully quoted and referred to in the report of the case, to fish for white fish in the Solway by means of stake-nets, the Second Division pronounced this interlocutor:—"Having heard counsel for the parties on the reclaiming note for the pursuer, adhere to the interlocutor of the Lord Ordinary reclaimed against." It contained the following findings of fact:—(1) That the salmon-fishings in the Solway opposite the parish of Cummertrees belong to the defender Mr Mackenzie, and are possessed as tenant by the other defender Mr Beattie. (2) That these fishings for time immemorial have been fished by stake-nets fixed on the shore between high and low water-marks. (3) That the pursuer and other inhabitants of Cummertrees, as well as other persons living in that neighbourhood, have from time immemorial fished in the Solway for flounders and other white fish opposite that parish, also by means of stake-nets fastened on the shore between high and low water-marks. The interlocutor of the Second Division then went on to recal that of the Lord Ordinary *quoad ultra*, and in place thereof to "find that the pursuer (Gilbertson) as one of the public has right to fish for white fish including flounders, and all other kinds of fish, excepting salmon and fish of the salmon kind, in the sea and along the shores of the