*Wednesday, October 29.*

## FIRST DIVISION.

[Lord Lee, Ordinary.

## CRAWFORD *v.* CRUICKSHANK AND OTHERS (LUSK'S TRUSTEES).

*Process—Jury Trial—New Trial—Surprise—Reparation—Contributory Negligence.*

In an action for damages for bodily injury the pursuer's case was, that through the defective state of a railing belonging to the defenders he had fallen into an area and received the injuries complained of. The defenders denied the alleged defective state of their property. They did not state any plea that the pursuer had been himself in fault, but at the trial they led evidence to show that the accident had been caused by his own fault. The jury found for the defenders. The Court *granted* a new trial on the ground that no notice had been given on record of the defence on which the defenders really relied.

This was an action for £250 damages at the instance of John Darley Crawford, teacher of drawing, 30 Woodlands Road, Glasgow, against Matthew Cruickshank, merchant, Glasgow, and others, the surviving and accepting trustees of the deceased Daniel Henderson Lusk, Berkeley Street, Glasgow. The pursuer averred that on the night of Saturday the 15th September 1883, about 11 o'clock, he and a friend were standing on the pavement in front of a tenement at the corner of Bath Street and Elmbank Street, Glasgow, the property of the defenders, in front of which, facing Bath Street, there was a sunk area, about 5½ feet wide, 3 or 4 feet deep, and 27 feet long, between the foot pavement and the tenement; that the sunk area was surrounded by a cast-metal railing to protect the public from falling in, the railing being of the usual height, and formed of upright balusters, fixed into copestones placed on the top of the retaining wall which surrounded the area; a metal strap or rail, through which the balusters passed, held them together; that he was about to part from his friend in front of the said tenement when he came slightly in contact with the railings, when about 15 feet, along with the copestone to which it was fixed, gave way and fell into the sunk area, and he (pursuer) was thus precipitated into the area, and severely injured. He further averred that the railing and copestones were in a bad state of repair, through the default of the defenders, and that their defective condition was known to the defenders.

The defenders denied the pursuer's averments, and averred that shortly before 11 o'clock upon the night in question the railing in front of their property was severely injured by an accident, of which their factor was not at the time made aware, and for which they were not responsible, and that about 11 o'clock the same night the pursuer carelessly fell into the area. They denied the alleged defective condition of their property, and refused to pay any sum to the pursuer. Their only pleas were—(1) The occurrence in question not having been caused by the fault of the defenders, or of those for whom they are responsible, the defenders should be assoilzied with expenses; (2) In any view, the damages claimed are excessive.

The following issue was sent to the jury:—"Whether, on or about 15th September 1883, in consequence of the defective condition of the railing of a sunk area in Bath Street, Glasgow, the property of the defenders, and through the fault of the defenders, the pursuer fell into the said area, and was injured in his person, to his loss, injury, and damage? Damages claimed, £250."

The jury found for the defenders.

The pursuer having obtained a rule on the ground that the verdict was against evidence, and on the ground of surprise, counsel for defenders showed cause against the rule being made absolute.

It appeared from the Judge's notes of the evidence that Cunningham, the first witness for the defenders, had deponed that upon the night of the accident when standing with two friends at the end of a close near the place, he saw the railing in question was broken, and that he saw three men and a woman standing, that one of the men stood upon the cope, and deliberately shook the railing, and that the whole thing went down with him into the area. Upon cross-examination he stated further that the man, when he saw him was inside the railing, that he entered by the gap and pulled the railings into the gap. Similar evidence was given by David Robertson, another witness for the defenders, both in his examination-in-chief and upon cross. The defenders did not lead any further evidence as to the night of the accident, but led evidence to show that very shortly before the accident the railing was in good repair, and that it was of the ordinary kind for such a purpose. The pursuer argued that neither in the defences nor in the pleas-in-law for the defender had he received the slightest intimation of the defence upon which the jury must have found for the defenders; that it was first suggested in the evidence-in-chief of Cunningham and Robertson; and that this new defence came upon him as a surprise which he was not prepared with evidence to meet.

At advising—

LORD PRESIDENT—It is not by any means desirable that in cases of this kind a new trial should be granted as a matter of course, but the case made out by the pursuer here is undoubtedly a very strong one. The state of the record is that the pursuer avers a case of fault on the part of the defenders, from the imperfect or defective condition of their property. The defenders meet this allegation by a denial of any fault on their part, or upon that of those for whom they were responsible, and they plead that they are entitled to be assoilzied accordingly, and they make no other defence. Now, I think it is quite clear that if in such a case the defender means to bring out in evidence that the accident was caused by the pursuer's fault, he was bound to have put that into his pleadings. In the same way also contributory negligence, if it is to be founded on as a defence, should be stated both in the defences and in the pleas-in-law.

Now, the defenders here have no plea of sole fault or contributory negligence on the part of the pursuer, and yet the fact that the accident was due to the fault of the pursuer, or was contributed to by him was brought out in evidence,

and the facts so adduced are now sought to be made available as evidence of a plea of either sole fault or contributory fault on the part of the pursuer.

The defenders are undoubtedly to blame for the manner in which the case was laid before the jury, and it is entirely their fault for not pleading a defence upon which at the trial they came ultimately to rely. Upon these grounds I do not see how we can deny the pursuer the benefit of a new trial.

LORD MURE concurred.

LORD SHAND—I am entirely of the same opinion. I think that it is quite sufficient to warrant us in granting a new trial that the averments which the defender made as to the way in which the accident occurred were misleading, and that at the trial an entirely new case was made out from the defence stated upon record.

As no notice was given to the pursuer of the points upon which it is now alleged that the jury ultimately decided for the defenders, I do not see how we can refuse the pursuer the remedy which he seeks.

LORD LEE concurred.

The Court made the rule absolute for a new trial.

Counsel for Pursuer—M'Kechnie—Shennan. Agent—John Gill, S.S.C.

Counsel for Defenders—D.-F. Macdonald, Q.C. —Readman. Agents—Maconochie & Hare, W.S.

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*Thursday, October* 30.

## FIRST DIVISION.

### BLAIR (OFFICIAL LIQUIDATOR OF THE GREENOCK PROPERTY INVESTMENT COMPANY) *v.* M'CLURE AND CAIRD.

*Public Company — Liquidation — List of Contributories—Fraud—Reduction.*

In the liquidation of a building society under the Companies Acts, A objected to a motion by the liquidator craving that his name be settled on the list of contributories, on the ground that he had been induced to accept a transfer of his shares by false and fraudulent representations upon the part of the officials, to the effect that no liability attached to them, whereas it now appeared that they were borrowing shares, and that his name was to be entered on the list of contributories in respect of them. *Held* that before A could successfully resist the motion of the liquidator, the deed of transfer must be set aside by an action of reduction.

Counsel for Liquidator — R. V. Campbell. Agent—W. B. Glen, S.S.C.

Counsel for M'Clure and Caird — Graham Murray. Agents—Smith & Mason, S.S.C.

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*Friday, October* 31.

## FIRST DIVISION.

[Lord Lee, Ordinary.

### AULD *v.* AULD.

*Husband and Wife—Divorce—Divorce for Desertion—Adultery of Pursuer—Adherence—Conjugal Rights (Scotland) Amendment Act* 1861 (24 *and* 25 *Vict. c.* 86), *sec.* 11—*Statute* 1573, *c.* 55.

In an undefended action of divorce for desertion at the instance of a wife against her husband, which action was raised in 1884, it was proved that the defender deserted the pursuer in 1864. During the proof the pursuer admitted that she had a bastard child in 1871. *Held* that the wife's adultery was a sufficient cause for the non-adherence of the husband, and therefore that the action should be dismissed.

The Conjugal Rights (Scotland) Amendment Act 1861, sec. 11, has not changed the law as to divorce for desertion, but has only effected an alteration in the forms of procedure.

*Observations* on *Muir* v. *Muir*, 19th July 1879, 6 R. 1253, and *Winchcombe* v. *Winchcombe*, 26th May 1881, 8 R. 726.

This was an action of divorce for desertion at the instance of Mrs Janet Young or Auld against her husband R. C. Auld. The action was undefended.

It was proved that the parties were married in 1856, and that they lived together until March 1864, when the defender, who was in difficulties, went to America. After his departure the defender corresponded weekly with his wife for about five months, and enclosed her small sums of money, but subsequent to 1864 the pursuer had no communication from the defender.

During the course of the proof the pursuer admitted that she had had a bastard child in 1871. It appeared from a letter by the defender to his son, which was produced, that the defender knew that the pursuer had this child.

The Lord Ordinary (LEE) on 19th June 1884 pronounced this interlocutor:—"The Lord Ordinary having heard counsel, and considered the proof adduced and whole cause, in respect of the pursuer's confession that she had an illegitimate child seven years after her husband left her, under the circumstances stated in evidence, Finds her not entitled to insist for divorce on the ground of non-adherence: Therefore dismisses the action and decerns.

"*Opinion.*—In this undefended action of divorce on the grounds of adultery, and alternatively of non-adherence, no evidence was offered in support of the first ground of action, and the evidence adduced in support of the second ground disclosed the fact that while there had been non-adherence on the part of the husband for upwards of four years, the pursuer (the wife) had been guilty of adultery.

"The parties were married in 1856. There were children of the marriage. In 1864 the husband left Scotland for America. For five or six months he corresponded with his wife, and occasionally sent her money. But after that he ceased to have any commnuication with her; and in 1873, when his son appears to have written to him, his answer blamed the pursuer for the