I do not think, however, that that circumstance would destroy the character in which he came, viz., that of a broker, if he introduced the purchaser to the builder. The second point, which is a very important one, is, that as a result of the conversations at these two meetings, I think it is proved that the builder gave the broker distinctly to understand that if the purchase was concluded at the price then spoken of, there would be no commission, and that the broker does not seem to have objected. It is no doubt true, as has been observed, that the word "commission" was used in a loose sense; primarily, in the sense that there was to be no deviation from the price—no discount; but I think the broker was bound to take it as including his commission, unless he had said that it was to be understood that the builder was to pay it. Therefore if at either of the meetings at which the broker was present business had been transacted, there would have been no commission due unless it had been expressly stipulated for after their conversation. But the result of these negotiations show that the parties did not come to terms; they split upon the price, and so the transaction went off.

The broker never resumed negotiations with regard to his vessel, but his client did, and with this result, that he purchased what was substantially the same object; the ship was of increased dimensions, but that is not material; the price also was a little higher, but that is not material either. The question is whether the waiver by the broker ran on, and is to be held as applicable to the second transaction. I think not, for, as was justly observed by Mr Mackintosh, it was not a case in which the builder said, "Remember, we are negotiating on the footing that there is be no commission;" on the contrary, they were negotiating on the footing that there might be commission. I think the waiver by the broker only applied to the negotiations at the two first meetings, when he was to get an advantage in respect of which he waived his right to commission. But there was nothing of this kind in the subsequent dealings. Then the builder took the benefit of the introduction, business resulted, and therefore giving effect to the custom of trade, which has been proved, the builder is liable for the broker's commission.

It may be that it did not occur to the shipbuilder that he was incurring this liability, but if that was his view he mistook his own position. As the builder was taking advantage from the broker's introduction, he should have taken care to stipulate for such a price as would lower the broker's commission, or have refused the contract.

There was no question argued as to the rate of commission, and therefore it is not necessary to give any opinion as to the principles upon which the rate should be fixed.

LORD MURE was absent.

The Court pronounced the following interlocutor:—

"Repeat as matters of fact the findings contained in the interlocutor of the Sheriff-Substitute of 30th June last: Refuse the appeal," &c.

Counsel for Pursuers (Respondents)—Mackintosh—Dickson. Agents—Sprot & Wordie, W.S.

Counsel for Defenders (Appellants)—Sol.-Gen. Asher, Q.C.—Pearson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Friday, December 21.

FIRST DIVISION.

[Lord Lee, Ordinary.

HUNTER *v.* HUNTER.

Husband and Wife—Divorce for Adultery—Lenocinium—*Voluntary Contract of Separation—Provision for Wife.*

A man married a prostitute with whom he had been living. During their married life he frequently in the course of quarrels told her in coarse language to go back to her former life. A short time after the marriage he left her, but provided her with ample means of subsistence under a contract of separation into which he entered with her. Two years thereafter she resumed her life as a prostitute and committed adultery, and he then sued for divorce. She pleaded *lenocinium*, founding on his having left her and having recommended her to return to her former life. *Held* (1) that the fact that he had amply provided for her under the contract of separation proved that his words and conduct were not intended to induce her to live by prostitution, and (2) that the wife's conduct showed that she did not so understand him. The Court therefore *repelled* the plea.

Francis Bell Hunter was upon 5th June 1880 married to Maria M'Guire by interchange of consent *de presenti* before the Sheriff-Substitute of Midlothian. They resided for some months after their marriage at Joppa, where they had cohabited before their marriage.

Mrs Hunter before her marriage had kept a brothel at 11 Leith Street Terrace, Edinburgh, and it was in this house that the parties first met. They had cohabited in this house also before the marriage.

In the end of 1880 Hunter left his wife at Joppa and went to America. After Hunter left this country, arrangements were made by the commissioner in Scotland for him for the adjustment of a deed of separation between him and Mrs Hunter, the principal conditions of which were—(1) the settlement of an annuity upon Mrs Hunter of £70, (2) the handing over to her of the furniture of the house at Joppa, and (3) the redeeming for her from pawn certain articles of her jewellery. These conditions were all carried out on Hunter's behalf by Mr Walker, accountant, Greenock, his factor and commissioner. The amount of the annuity was settled after some negotiation, in which an agent acted for Mrs Hunter. Prior to this contract she had threatened an action of adherence.

In May 1882 Mrs Hunter became tenant of a shop at 64 Sauchiehall Street, Glasgow, as a tobacconist, also tenant and occupant of a dwelling-house

at 62 Buccleuch Street, Glasgow, and it was in consequence of what took place at the latter house that the present action of divorce was raised by Hunter against her. He averred that while she occupied the house in Buccleuch Street she returned to her former vicious mode of life, and gave herself up to a course of continuous and habitual adultery, and he specified dates upon which he averred that she had committed adultery with men whose names and designations were unknown to him. He further alleged that adultery was committed in the house in question with David Arnot and with Thomas Pearson.

The defender averred that for some time after the marriage she had continued to keep on her brothel, with the full consent of her husband, who assisted in the conduct of it and got part of the proceeds, and that during the course of their married life the pursuer had treated her with great cruelty, that he often struck her, and was very intemperate both in his habits and language.

She pleaded—"(1) The pursuer is bound to sist a mandatory. (2) No jurisdiction. (3) Not guilty. (4) Even had the defender been guilty of adultery, the pursuer would have been barred from obtaining divorce."

By minute for the pursuer he undertook to obey all citations addressed to him at his factor's office, and further to be present at all diets of Court in the cause. In respect of this minute the Lord Ordinary upon 29th June 1882 refused the motion that the pursuer be ordained to sist a mandatory.

A proof was led, when adultery with the above named persons was proved. The import of the proof bearing on the defence of *lenocinium* sufficiently appears from the Lord Ordinary's note and the passages of the evidence quoted in the opinion of the Lord President.

On 6th July 1883 the Lord Ordinary (LEE) issued this interlocutor:—"Finds that the pursuer and defender were married at Edinburgh on or about 5th June 1880, the pursuer being at the time a domiciled Scotsman, and finds it not proved that the pursuer has abandoned his Scottish domicile; therefore repels the defender's first and second pleas-in-law, and sustains the jurisdiction of the Court: Finds facts and circumstances proved relevant to infer that the defender committed adultery as libelled in the condescendence; but finds it proved that the pursuer, by his conduct towards the defender, knowingly conduced to her return to her former vicious mode of life, and must be held to have occasioned or allowed the same; therefore sustains the fourth plea-in-law for the defender, and assoilzies her from the conclusions for divorce, and decerns, &c.

"*Opinion.*—I am of opinion that the marriage is proved, and I take the defender to be confessing the adultery, which is clearly established. The only question is, whether the defender has or has not substantiated her plea that the pursuer by his conduct must be held to have consented or contributed to her guilt. I think it is quite settled that the principle of the plea of *lenocinium*, whether that is to be taken as the right name of it or not, is consent. It is because the party against whom the plea is stated must be held as having consented to what was done that he is barred from maintaining his action. The consent does not require, however, to be express consent, nor does the law require that he should be directly a party to the temptation to which the wife yielded. It is settled, I think, by the cases, that the consent may be merely a passive consent. It must be consent with a corrupt knowledge of what is likely to happen, but it does not require to be actual direct consent to any particular act of adultery. In the case of a man who has knowingly married a prostitute, I think it is settled upon the soundest principles by the case of *Marshall*, 8 R. 702, that the plea of *lenocinium* may arise very easily. If the man comes into Court, and his conduct is such as to show that after taking this prostitute as his wife, and undertaking the special obligations towards her which were referred to by the Lord Justice-Clerk in the case of *Marshall*, he has cast her off and abandoned her to her fate, in such a manner as to show that whether he said it or not he induced her to go back to her old life, that would be sufficient. Now, the question is, whether in this case this has or has not been proved? I must say that if it is proved that the pursuer was a party to that kind of conduct, it would be of no weight to my mind that the defender misconducted himself in the gross way which was referred to by the Dean of Faculty. Even if her relapse to her old life was so complete and disgraceful as he represented it to be, if it was the pursuer's fault, he is barred by his action not less completely, and I do not think that it should be in his mouth to complain that she fell so far. Now, then, let us see how the fact stands. The parties lived together, apparently, in Joppa for nearly a year and a half—from November 1878 to June 1880—before the ceremony of marriage took place, and from June 1880, after the ceremony, they lived there about other six months. I think it proved from the pursuer's own statement in evidence that he had nothing to complain of as regards her conduct during that period. I think it proved that he had no excuse for leaving her as he did, except that she became, in his opinion, disagreeable. I suppose she had taken to drink heavily. But she drank along with him. He was just as bad as she was. The quarrels were mutual and the drinking was mutual. With regard to the positions of the parties as to agreeableness, I must say that the defender was not in my opinion legitimately open to the observations which were made upon her, on behalf of the pursuer, as regards her character and her age. He was quite as able to take care of himself as she was. If there was any blame in the drinking, I hold him to be to a large extent to blame for it. He ought to have kept his wife in order. That was one of the obligations which he undertook. If he knew it to be a difficult obligation to fulfil, he should have considered that before he entered into the contract. At all events, down to December 1880 his own evidence satisfies me that he had no just ground to complain against her. She was exactly as he took her, certainly no worse; and he was bound, all the more because of her former life, to do what he could to protect her against the world and against herself. I think it also proved that a quarrel took place in December on account of the groom. I do not know what the quarrel was about, but I think it clearly proved by the evidence of Miss Henderson that it was the groom who was the source of quarrel. I think it further proved by the pursuer's own evi-

dence that he did take the groom to his bedroom and took him to bed with him, although his wife complained of it. I think that was an intelligible source of quarrel; whether there was anything so gross connected with it as was suggested in the evidence I know not, but I think it was an intelligible source of quarrel. I hold that pursuer is inexcusable for the quarrel that then took place. I think it altogether inexcusable, according to his own evidence, that he should abandon the defender as he did without sufficient cause—far more sufficient cause than is shown here. I must say that that of itself very nearly amounts to throwing her upon the world, and throwing her back upon her old life, by act and deed, if not by word, because he left her to herself, knowing what she was, and knowing the temptation to which she would be exposed from her former habits and her old associates. But if I am driven to it, I must consider the evidence as to the actual use of expressions, and I must say I do not doubt that these expressions were used. The evidence of the witness Macdonald, though subject to an observation, seemed to me to be reliable. I am not indisposed to think that the expressions were sometimes used in passion, and possibly in drink. The fact is proved that they were used repeatedly, and that the pursuer was constantly casting back in the defender's teeth her old life. I think it not unintelligible that that should grievously injure a woman like the defender. I do not say whether the expressions of feeling that were exhibited in the box were genuine or not—I saw, indeed, no reason to doubt their genuineness. If it was true that the expressions to which I have referred were used, I think them sufficient to explain even some genuine expression of feeling such as she appeared to have. That being my opinion upon the evidence, I think the case quite comes up to the case of *Marshall* but for one consideration, and I have now to deal with that. The only difficulty I have in holding this case to be ruled by the case of *Marshall* is the fact that in this case the pursuer ultimately made a provision for her. The fact that he did make a provision for her certainly makes a distinction between his case and *Marshall's*, because here you have a woman accepting a provision from her husband upon the footing of being his wife, and yet committing the most gross breaches of conjugal duty, and pleading that he consented. The question with me is whether that bars her plea. I must deal with that, however, upon the footing that he has by his conduct so contributed to her fall back into her old life that he would be debarred, unless she has done something to exclude her from raising this plea. I do not know of a case in which that point has arisen before. I do not think it arose in the case of *Marshall*. No doubt in the case of *Marshall* there was the observation—a perfectly just observation—that it was not owing to poverty that the woman fell back into her old ways. But then this is the case of a woman who took a provision as from a husband to a wife, and yet pleads that he was consenting to her return to evil ways. I think there is a considerable difference here, but my opinion upon the law and upon the facts is, that it is not sufficient to bar her from pleading that conduct of his as conduct amounting to an occasion of her relapse into her old life, and upon that ground I sustain the defence. I find the marriage proved, and the adultery proved, but I sustain the defender's fourth plea-in-law and grant absolvitor, with expenses."

The pursuer reclaimed.

In the Inner House counsel for the defender were required by the Court to amend their pleadings so as more clearly to raise the defence of *lenocinium* which the Lord Ordinary had sustained.

The defender then added this new statement—"The pursuer frequently, during the time that he and the defender lived together after their marriage, addressed her in the foulest language, called her a whore, and applied other obscene and degrading epithets to her, and told her to resume her old trade as a brothel-keeper, and become again a prostitute."

She also amended the fourth plea-in-law above quoted, so as to make it read thus—"Even had the defender committed adultery, the pursuer having been guilty of *lenocinium*, is barred from obtaining divorce."

She also added this plea—"The pursuer having told the defender, who had previously kept a brothel and prostituted herself, to return to this mode of life, and thus left her without protection, he cannot found upon the fact that she did so as entitling him to divorce."

The pursuer argued—(1) The case of *Marshall*, upon which the Lord Ordinary had proceeded, had been wrongly decided, and it was not the law of Scotland that a man who married a woman of the defender's class was bound to any special duty in point of law towards her which the husband of a woman who has been always virtuous did not undertake. The law as to *lenocinium* was better laid down in the case of *Wemyss*, March 20, 1866, 4 Macph. 660. It must not be a remote but the proximate cause of the crime—Fraser, ii. 1184, 86, 88, 90. (2) But *Marshall's* case, assuming its soundness, was distinguishable. There was not in this case, as in *Marshall's*, the plea of necessity to induce the wife to return to her old life, for she had a comfortable allowance for her position, and she had a home and furniture besides. It could not therefore be said that the pursuer's act had given meaning to any coarse language he had used, and that he had induced her, by leaving her destitute, to commit the adultery he founded on. (3) The lapse of time between the use of the expressions objected to and the defender's return to a vicious life was too great to entitle the Court to attribute her relapse into vice to the use of these words.

Authorities—*Rodgers* v. *Rodgers*, 1830, 3 Hag. Consist. Rep. 57, 72; *Walker* v. *Walker*, 1796, referred to, 3 Hag. 59.

Argued for defender—The mere lapse of time from the use of the expressions to the wife's fall from virtue would not affect the question if it could be shown that the wife's fall was the direct result of her husband's advice. She had simply acted upon his advice; the words were not spoken in joke, but were intended by the pursuer both to insult his wife and to induce her to return to her old life. Then there was the pursuer's desertion of his wife within six months of their marriage, though it was peculiarly his duty to watch over her. That circumstance, taken with the expressions used, showed pursuer's intention, and together formed *lenocinium*. Taken together, they were the direct cause of the defender's relapse,

and so were within the definition of *lenocinium* given by the Lord President in the case of *Wemyss*, 4 Macph. 660. The contract of separation had no bearing on the present question, as it was merely an answer to a threatened action of adherence.

Authorities—*Donald* v. *Donald*, March 30, 1863, 1 Macph. 741; *Marshall* v. *Marshall*, May 20, 1881, 8 R. 702.

At advising—

LORD PRESIDENT—The pursuer and defender were married in June 1880. They had both previously been persons of immoral life, and each was well acquainted with the habits of the other, but that circumstance did not in any way lessen the obligations of the spouses in the new relation they had entered into, as they had promised by their marriage vow to be faithful to each other as husband and wife. The parties lived together for somewhat less than a year, and then the pursuer left the defender in a house at Joppa, and proceeded to Chicago, where it is alleged that he is at present residing. Before leaving he made use of certain expressions to his wife which it is maintained are sufficient to support her plea of *lenocinium*.

The defender's adultery in November 1882 and the following months is not seriously disputed, but it is explained that in doing what she did she was merely acting according to his directions. There are three witnesses who speak to the expressions made use of by the pursuer to the defender, and the first of these is Alexander Macdonald. He says—"So far as I saw, he sometimes behaved very affectionately towards his wife, and sometimes the opposite. I have seen them at least twenty times together. At times his language to her was most endearing, and at other times the very opposite. I have heard him call her a whore, and cast up her past way of life to her. I have heard him tell her to go back and whore it as she had done before. I have heard him say that both when he was drunk and when he was sober. I heard him say it a dozen times, both before and after their marriage. *Cross.*—When these things occurred they were both in great excitement and quarrelling. They generally had drink. (Q) Sometimes they had not so much as at other times; but had you any doubt they had been drinking before these quarrels?—(A) Very little doubt. (Q) In short, you thought very little of it except that it was very nasty?—(A) That is so. I have seen him assault her in his sober moments. Generally when he was sober he behaved kindly towards her." The second witness is John Aitchison, who knew the parties, and was at one time in the pursuer's service. He says—"He sometimes got hold of firearms and frightened people. I have heard him call her an old whore, and tell her to go back to her brothel. *By the Court.*—I cannot tell in what year that was; it was in the bathing time. *Examination continued.*—(Q) Did you hear that more than once?—(A) No; once was the row when I was there. *By the Court.*—I cannot swear whether it was the summer of 1880 or 1879 that I have been speaking of. It may have been 1879." Now, if that be so, then the expressions were used by the pursuer prior to his marriage in June 1880, and can of course have no bearing upon the present case The third witness is Mrs Middlemass, who also knew the parties. She says—"He used very bad language to her. He frequently called her a whore, and other bad names. He used the expression for her to go back to her bawdy-houses. This was just before he went away—in November 1880. I heard him use that expression more than once. He told her to go back to her bawdy-houses and whore it out. The last time I heard him say that was just before he went away."

It is thus established, I think, beyond a doubt, that these expressions were made use of by the pursuer to his wife, and they in themselves, no doubt, amount to an encouragement to her to return to her old life. But it is always of the greatest importance to discover in cases such as this the intention with which the words were used.

It cannot be said that these epithets were used in any sense as a joke, for it appears from the evidence that on those occasions the pursuer was excited and angry with his wife, and meant to use these expressions as terms of insult; but the question comes to be, whether these expressions were merely the outcome of his anger and excitement, or whether he really intended that she should act upon what he had said, and whether she believed that he so intended her to act, and behaved as she did in consequence. For in order to make out a defence of *lenocinium* in a case such as this it is essential (1) that the expressions must be used with the intention of inducing the wife to return to her old mode of life, and be so understood by the wife; and (2) they must be acted upon by her with this understanding, and be the cause of the subsequent adultery.

Now, it is necessary, in order to answer the question whether or not there was *lenocinium* here, to consider the circumstances under which these words were used. The pursuer left the defender about December 1880, and it was prior to his departure that these offensive expressions were addressed to her. It has been represented that in thus leaving the country he was deserting his wife, but that, I think, cannot be maintained, for in the January following we have arrangements entered into by his factor, Mr Walker, which resulted in the voluntary contract of separation, and the settlement of £70 per annum on the defender, and we have also a correspondence by Mr Walker, on the pursuer's behalf, and the defender's agent. It appears from this correspondence and otherwise that the defender had threatened to raise an action of adherence, and such an action could only be successfully maintained by her on the footing that she was faithful. But the contract of separation took its place, the principal provisions of which in her favour were the annuity of £70, the right to retain the furniture of the Portobello house, the payment of the taxes upon said house up till the term of Whitsunday ensuing, and the relieving from pawn of certain articles of jewellery. Now, the whole of these provisions were faithfully carried out by Mr Walker on behalf of the pursuer, and it appears from Mr Walker's evidence that this sum of £70 was quite as much as the pursuer could afford to pay.

This contract of separation appears to me to be the most important piece of evidence in the case, for if the pursuer had meant his words to be an encouragement to his wife to resume her old

mode of living he would not have proceeded to set her up in the way in which he did. If it had been his intention that she was to earn her livelihood by keeping a brothel, he would not have made the provision he did in the contract of separation; on the other hand, she would not have expected him to have provided for her in the manner in which he did if she was to return to her old life. That she so understood matters may, I think, also be gathered from what took place, for until November 1882 there is not a suggestion that she did not remain faithful to her marriage vow.

In these circumstances I cannot say that the words spoken by the pursuer before he left his wife can be held to have been the cause of, or incentive to, her subsequent adultery. The lapse of time between the using of these expressions and the adultery, which is the alleged outcome of their use, is considerable, and, besides, it is clear from the subsequent actings of parties that the pursuer never contemplated that his words would be acted on. I cannot see, therefore, that there is any room for the plea of *lenocinium* in the present case, as I think that these objectionable expressions were merely intended by the pursuer as an outlet for his feelings, and probably also as a mode of insulting his wife; while to constitute *lenocinium* the words must be intended by the user to be acted upon, and must be so acted upon, on this understanding. I am therefore for repelling the defences and granting decree as craved.

Lord Deas—I only desire to say, that while at one time I had great doubts as to whether we should not adhere to the interlocutor of the Lord Ordinary, and find *lenocinium* proved in this case, I have been much moved by what your Lordship has said, and by the portions of the evidence to which reference has been made, and I am now prepared to concur in the judgment which your Lordship proposes.

Lord Mure—I do not think that there can be any difficulty in this case as to the fact of the defender's adultery, for that I consider to have been clearly proved by the evidence. The only question is, whether the defence maintained by the defender of *lenocinium* has been established?

The marriage took place in June 1880, and after the spouses had lived a not very happy life together for about six or seven months the pursuer left his wife and set out for America.

But it must be kept in mind that at the time of his departure, or immediately after, he made arrangements for settling an annuity upon the defender. There was some correspondence between a Mr Walker, who was acting for the pursuer, and the agent of the defender regarding the pursuer's income and fortune, but the question was settled on the footing that the defender was to receive an annuity of £70. The contract of separation was adjusted upon these terms in February 1881, and nothing more is heard of the defender until the summer of the following year, and then it appears that she took a tobacconist's shop in Glasgow, and it was not until the November and December of that year that the acts of adultery with which she is charged were committed, so that for nearly two years after the pursuer left this country the defender seems to have behaved herself with propriety. The question therefore comes to be, whether the expressions used by the pursuer to his wife were intended by him to induce her to resume her old mode of life, and whether she acted upon what he said, thinking that he really intended her to do so.

I agree with your Lordship in thinking that the contract of separation is a most important piece of evidence in this case, and that it shows that the pursuer in using these expressions to his wife used them in anger, and did not seriously mean what he said, nor desire that she should resume her old life.

I therefore agree with your Lordship in thinking that the plea of *lenocinium* has not been established, and in coming to this decision I do not think that we are running counter to the case of *Marshall*, decided in the other Division of this Court, where the circumstances were different, and where there was no such contract of separation as we have here to deal with.

Lord Shand—The evidence of adultery is so clear in this case that it was impossible for counsel seriously to dispute the fact, and that being so, the right of the pursuer to his decree of divorce can only be defeated if it can be shown that he has actively conduced to his wife's relapse to the vicious courses she had previously pursued. Now, it is said that he did so in two ways—First, by his desertion of her within six months of their marriage; and secondly, by the active encouragement which he gave her by his words to resume her old life.

If the alleged desertion stood alone there could be no *lenocinium* conducing to her relapse, for at the time when the pursuer left this country the defender was occupying a comfortable house furnished by him, and she was in receipt of an annuity which he provided for her. The question therefore comes to be, whether by the words which he used he conduced to her return to a vicious life? Did he in using these expressions mean her really to return to her old ways, and did he consent to her doing so? If that was what he intended when he used these words, then clearly he is not entitled to the decree which he now seeks. But if that was not his intention, and if the words were used for some other purpose, then the defence of *lenocinium* fails. Now, I agree with the view which your Lordships have taken of this matter. The alternative is not whether the words were used in joke or in earnest—in joke I certainly do not think they were used, but rather, whether the pursuer seriously meant his wife to follow the advice which he gave her.

The evidence convinces me that the pursuer was in anger when the words were spoken, and further, that he wished to wound the defender's feelings by the coarse expressions which he made use of, but I cannot see anything implying that he intended the defender to act upon what he said, or that he meant to give his consent to her returning to her old mode of life. I quite agree with what your Lordship has said regarding the voluntary contract of separation, which I think throws a good deal of light upon this transaction, and is of importance in ascertaining the meaning and intention of the pursuer at the time when the expressions founded on were made use of. I also agree with what my brother Lord Mure has said with reference to the case of *Marshall*, which I

consider to be clearly distinguished from the present case. In that case both the parties were in necessitous circumstances, and it was only after the defender had been deserted by her husband, and to some extent for the purpose of obtaining a livelihood, that she revisited her friends in houses of ill-fame and relapsed into her old mode of life.

I am therefore for granting the pursuer the decree which he craves.

The Court recalled the interlocutor of the Lord Ordinary, repelled the defences, and granted decree of divorce.

Counsel for Pursuer—D.-F. Macdonald, Q.C.—Trayner—J. A. Reid. Agents—Duncan & Black, W.S.

Counsel for Defender—Sol.-Gen. Asher, Q.C.—Scott. Agent—William Officer, S.S.C.

Friday, December 21.

SECOND DIVISION.

[Sheriff Court of Lanarkshire.

BEVERIDGE *v.* KINNEAR & COMPANY.

Reparation — Negligence — Faulty Condition of Defenders' Premises.

A bale of goods which was being lowered into a cart from the third flat of a tenement of warehouses, swung in its descent against the folding-door of a warehouse in the flat below, causing a part of it to fall out, with the result that a boy in the cart below was killed. In an action of damages by the boy's father, it was proved that the cause of the accident was that the door was in an insecure condition. *Held* that the tenants of the flat to which it belonged were liable in damages for the death of the boy.

In this action the pursuer William Beveridge sued the defenders for the sum of £200 damages for the death of his son, who was killed in the following circumstances:—On 3d January 1883, the lad, who was about twelve and a-half years of age, accompanied a friend of his named Craighead, who was employed as a carter by a contractor, to take in a load of oilcake, which was to be lowered by means of a rope and pulley to Craighead's cart from the third flat of a warehouse in Exchange Street, Dundee. The flat from which the oilcake was being lowered was occupied by Messrs Primrose & Martin. One of the bags of oilcake, weighing about 2 cwt., swung in its descent against a large iron-covered door opening in halves, which belonged to the flat immediately below, occupied by the defenders Kinnear & Company as a warehouse, when one-half of it fell down on the pursuer's son and killed him on the spot. The defenders had become tenants of their warehouse in the preceding month. The half of the door which fell had no hinges on it, and the other half had only one hinge. The door had been last open in the defender's business on the 30th of December, and when work was finished that day the part having the hinge was closed, and then that which had no hinge (being the part which subsequently fell) was also placed in position, a batten being placed inside to keep it from falling inwards, and the only way in which it was protected from falling outwards being by a projection of the other half and by the usual "door stock." Before the defenders took the premises there had been a batten also outside the door which prevented bales lowered from above striking it. A partner of the defenders' firm deponed that he had removed it to prevent some lads in his employment swinging themselves by means of it into another doorway immediately alongside.

The Sheriff-Substitute (CHEYNE) pronounced this interlocutor:—"Finds in fact—(1) That the pursuer's son George Turnbull Beveridge, aged about twelve and a-half years, was killed in a court off Exchange Street, Dundee, by the south half of the door of a warehouse tenanted by the defenders falling upon him; and (2) That while the cause of said half door falling was its being struck by a bag of oilcake which, while being lowered from Messrs Primrose & Martin's warehouse in the flat above, swung against it, it is proved to have been at the time in an insecure and dangerous condition, and the accident would not have happened but for the negligence of the defenders in leaving it in that condition: Finds in law that the defenders are liable to the pursuer in damages and solatium for the death of his son as aforesaid; assesses these at the sum of £60, &c."

"*Note.*— . . . The question is, as it seems to me, narrowed to this, Were the defenders bound to have in view the contingency of goods swinging against the door while being lowered from the two warehouses above them, and were they guilty of negligence in not so securing the door as that it should be able to resist an ordinary swing from such goods? These questions I answer in the affirmative, and I think no one who has occasionally seen the operation of lowering goods from warehouses going on would do otherwise. It is no doubt possible to lower goods quite steadily, but as a matter of fact the operation is in general carried on so hurriedly that the goods go swinging about and knocking against the walls in their descent, and that being so, I think the defenders were, in the circumstances, guilty of a breach of duty in leaving their door in the insecure state in which it was on 3d January. Whether the outside batten mentioned in the proof was put in for the purpose of preventing an accident like that which has given rise to the present action, or whether, had it been there at the time, it would have prevented the accident, are points upon which I am not in a position to pronounce a decided opinion; but the fact of the batten having been put in does appear to afford some indication that the defenders' predecessors in the occupancy of the warehouse were alive to the dangerous condition of the door, and it is much to be regretted that the defenders removed it."

On appeal the Sheriff (TRAYNER) recalled this interlocutor and found that the pursuer had failed to prove that the death of his son was occasioned through the fault of the defenders, and therefore assoilzied the defenders.

"*Note.*—Although the accident out of which this action arises is very much to be regretted, I see no reason for ascribing that accident or its results to the fault of the defenders. The door