this, that the liferenter could keep no game or rabbits at all in the neighbourhood of any plantations on the estate. The form of the summons was unprecedented, and decree could not go out under it as it stood.

The pursuer answered—The only question at this stage was whether his averments were so irrelevant as to render proof undesirable. The case could not be satisfactorily settled except on a full view of the facts.

Authorities—Ersk. Inst., ii., 9, 56; Bell's Prin., sec. 1062; *Gray* v. *Seton*, 1789, M. 8250; *Dickson* v. *Dickson*, Jan. 24, 1823, 2 S. 152; *M'Alister's Trustees* v. *M'Alister*, June 27, 1851, 13 D. 1239.

At advising—

Lord President—This is undoubtedly a very peculiar case, and involves some questions on which there is confessedly no authority. The first set of conclusions of the summons appeared to me from the first time I read them over to raise a grave question as to the title of the pursuer to maintain such an action. I listened with great attention to the arguments on both sides, and I still entertain great doubts whether, under any circumstances that could be disclosed upon the evidence to be led, the pursuer could succeed under these conclusions. But the Lord Ordinary having thought fit to send the case to proof, reserving all the questions of law in the case under the words "before answer," I am not disposed to press the necessity of separating the case into parts; for as to the other conclusions I think it is clearly right to have a proof before they are decided. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Deas—This case if it goes on will involve some novel and very difficult questions of law, on some of which there seem to have been no decisions at all. I have a distinct impression about some of these, and not about others, but I think in any view it would be desirable to get at the distinct state of the facts.

Lord Shand concurred.

The Lords adhered, reserving all questions of expenses, and remitted to the Lord Ordinary to proceed with the proof.

Counsel for Pursuer (Respondent)—Lord Advocate (Balfour, Q.C)—Mackintosh. Agents—J. & A. Peddie and Ivory, W.S.

Counsel for Defenders (Reclaimers)—Solicitor-General (Asher)—Jameson. Agent—F. J. Martin, W.S.

Wednesday, October 26.

FIRST DIVISION.

[Lord Adam, Ordinary.

SCROGGIE *v.* SCROGGIE.

Husband and Wife—Process—Expenses—Divorce—Interim Award of Expenses to Wife.

John Scroggie, tobacco pipe manufacturer, Glasgow, brought an action of divorce against his wife. The Lord Ordinary (Adam), after proof led, assoilzied the wife, and Scroggie reclaimed against this judgment. A short time before the proof the Lord Ordinary had made an interim award of £10 to the wife towards expenses of process. Before the reclaiming note came on for hearing she presented a note to the Inner House asking a further award. It was stated for her that she had still an untaxed amount of Outer House expenses, amounting to about £40, and her counsel now asked an award of £50, or at least that the said expenses should be taxed and decree for the amount thereof awarded. Counsel for Scroggie submitted that as he had had to aliment his wife since the Lord Ordinary's judgment, and was in poor circumstances, and had a family dependent on him, £10 would be enough.

The Lords made an interim award to the wife of £15.

Counsel for Pursuer (Reclaimer)—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Counsel for Defender (Respondent)—Rhind. Agent—Wm. Officer, S.S.C.

Wednesday, October 26.

FIRST DIVISION.

[Jury Trial—Lord Shand.

M'EWEN *v.* LOWDEN.

Reparation — Damages — Culpa—*Liability of a Proprietor for Accident occurring on his Premises.*

A man having sustained injuries by falling through a defective paving stone into a cellar in front of a shop, sued the proprietor of the shop for damages. The jury, upon the facts proved, found for the defender, and the Court on a motion for new trial *refused* to disturb the verdict.

Thomas M'Ewen, tobacco merchant, Glasgow, sought to recover £2000 in name of damages from Matthew Lowden, a retired merchant, and proprietor of a house at the corner of Gordon Street and West Nile Street, Glasgow. The ground floor of the said house consisted of a shop, occupied by a fruiterer as the defender's tenant, with cellars underneath which extended for some feet under the pavement in front of the shop, that space being covered partly with glass, and partly with stone. As the pursuer in passing along the street stepped over the said cellar a slab of stone gave way under him, and he partially fell into the cellar below, and sustained some injuries to his person, for which he now sought damages.

The pursuer pleaded—"(1) It being pursuer's duty to provide a safe and sufficient covering for the foresaid cellars so as to protect the public walking over the same from harm, and having failed to perform that duty, he is liable in damages as concluded for. (2) The pursuer having sustained the injuries foresaid through the insufficiency of the foresaid pavement for the purpose for which it was intended, owing to the fault of the defender, or those for whom he is responsible, decree ought to be pronounced against him, as libelled, with expenses."

The defender pleaded—"(3) The occurrence in question being attributable to a cause over which the defender had no control, and for which he is not responsible, the defender should be assoilzied."

The case went to trial upon the following issue—"Whether on or about 24th September 1880, the pursuer, while passing along Gordon Street, Glasgow, was injured in his person through the fault of the defender, to the loss, injury, and damage of the pursuer;" and was tried before Lord Shand and a jury on 21st July 1881.

The evidence at the trial as to the state of the flagstone in question was as follows:—It appeared that there was very considerable traffic along the street, and that the fruiterer occasionally deposited apple barrels and other heavy boxes on the portion of the pavement over his cellars. Two skilled witnesses for the pursuer gave their opinion that the stone had, owing to wear and tear, become too thin for safety, that it was ill-supported, not having arching or a lintel under it, and that considering the traffic of the place it was in a dangerous condition. For the defender two skilled witnesses spoke to the safety and sufficiency, in their opinion, of the roofing of the cellar. The presiding Judge, in charging the jury, directed them that they must be satisfied of the defender's negligence and want of due care and precaution before they found him guilty of fault and responsible in damages for the accident, and that the question as to his negligence was one of fact for them to determine.

The jury found for the defender, and the pursuer having given notice of motion for a new trial, and his counsel having been heard thereon, the Court granted a rule on the defender to show cause why a new trial should not be granted.

The pursuer argued—He had sustained injuries through the falling-in of this paving-stone. The paving-stone, on the evidence, was in an unsafe condition, and though the witnesses differed in opinion on this point, yet, *res ipsa loquitur*, it was unsafe and fell through. The defender was liable for the unsafe condition and its results as proprietor of the house. Property had duties as well as rights, and in a question with the public the proprietor was bound to see that his cellar roof was safe; it was an overt danger of which he was or must be held to have been aware. In a question of "fault" it was not necessary to show personal knowledge on the part of the proprietor and the amount of presumed knowledge necessary to found liability was a question of degree. If the proprietor here was not liable, who was? Surely not the architect, or the contractor, or the tenant. Yet it would be hard to suppose there was no remedy against anyone.

The defender replied—No objection had been taken by either party at the trial to the law laid down by the Judge, and none could be taken now. The jury's verdict denied the proprietor's liability for this accident; and it was a verdict they were entitled to pronounce upon the question of fact which was left to them by the Judge. The rule should be discharged.

Authorities — *Cleghorn* v. *Taylor*, Feb. 27, 1856, 18 D. 664; *Campbell* v. *Kennedy*, Nov. 25, 1864, 3 Macph. 121; *Macmartin* v. *Hannah*, Jan. 24, 1872, 10 Macph. 411; *Reid* v. *Baird*, Dec. 13, 1876, 4 R. 234; *M'Feat* v. *Rankin's Trustees*, June 17, 1879, 6 R. 1043; *Pretty* v. *Bickmore*, May 7, 1873, 8 L.R., C.P. 401; *Brown* v. *Accrington*, 1865, 34 L.J. Exch. 208; *M'Lean* v. *Russell, M'Nee, & Co.*, March 14, 1849, 11 D. 1035, and March 9, 1850, 12 D. 887; *Thomson* v. *Greenock Harbour Trustees*, July 20, 1876, 3 R. 1194.

At advising—

Lord President—I am not prepared to say that this question is unattended with difficulty, but upon the whole I am for discharging the rule. The Judge who presided at the trial stated the law of the case in a way which was satisfactory to both parties, and, as I understand, his direction to the jury was in substance this, that before they could find for the pursuer they must be satisfied that there was fault on the part of the defender of the nature of neglect, and of course his negligence, if proved, would consist very much of his allowing the stone to remain in the condition it was in after becoming proprietor of the subject in question. Now, the parties go to the jury as to the original condition of the stone, and there is a difference of opinion among the witnesses as to that. But they had to consider also how far, assuming its original sufficiency, it continued to remain sufficient; and there was also this question, whether there was neglect on the part of the defender in failing to make himself acquainted with the nature of the roof of his cellar, and with any danger which might have been anticipated from the stone being too thin, or too little supported, or subject to too much tear and wear. All these circumstances were before the jury, and they had to judge simply of the matters of fact, subject to the direction in point of law from the bench, and they came to the conclusion that fault had not been established against the defender. Whatever our opinion might have been had we had the evidence in full detail before us as they had, I think it is hard to say that the case as left to the jury by the presiding Judge was not a purely jury question. If it had been clear from the verdict returned that the jury had disregarded the Judge's direction, that would have been good ground for a motion for new trial, but there is nothing of that sort here; and if they attended to the Judge's direction, but thought that in point of fact there was no evidence of negligence on the defender's part, they were entitled to return the verdict they did, and I see no reason for disturbing it.

Lord Deas—This case might have raised a nice and important question of law if it had been put before the Judge for decision, but that has not been done. Neither party asked his Lordship to lay down particular law at the trial, and the direction the Judge gave the jury was that he had to consider whether there was fault on the part of the defender as proprietor of the shop. There was nothing said by either party against that. Now, in that way it appears to me that the question as left to the jury was a proper jury one, and that we should not interfere with the verdict they have pronounced.

Lord Shand — The question here raised is certainly attended with difficulty, but I am of opinion with your Lordships that we should not disturb the verdict of the jury. The issue put the question, whether the accident occurred

through the fault of the defender—being framed in accordance with the invariable practice of the Court, and it was necessary therefore to prove fault on the defender's part in order to secure a verdict for the pursuer. I told the jury that a proprietor in circumstances such as here occurred was bound to use all reasonable care and precaution in making provision for the protection of the public in passing over that part of his property which consisted of a cellar covered over by a flagstone, and that the absence of such care and precaution would constitute fault within the meaning of the issue, and entitle the pursuer to a verdict, assuming that injury was proved—a matter which was not indeed disputed, though the case was said to be one of gross exaggeration. I understand that to be the law applicable to this class of cases. Neither party's counsel took any objection to it at the time, and if I had to deal with such a case again I should give the same direction to the jury. Proceeding further, I directed the jury that the question whether the defender had failed to exercise due care and precaution was one of fact, depending on the whole circumstances as disclosed in the evidence, and for them to determine. I may say frankly that I pressed upon them two circumstances which weighed in my own mind as deserving their serious consideration, viz.—*first*, that the *locus* of the accident was a populous place in the heart of Glasgow, constantly traversed by the public; and *secondly*, that the flagstone which gave way was not only used by the public passing over it, but that the tenant of the shop in the course of his business was in use to take heavy loads over it, which were sufficient to wear the stone down or to break it if the loads were incautiously taken over it, and I indicated that I thought a jury should exact very great care on the part of a proprietor in such circumstances. But all this did not take from them the question of fact, which was, whether the defender had or had not exercised due care and precaution? I confess that had I been on the jury I should have been inclined to give a contrary verdict, and to find that there had been fault on the defender's part, though at the same time I should have been for awarding a very small amount indeed of damages. But the question now is not what my verdict would have been, and I quite agree in thinking we should not now disturb the verdict which the jury have pronounced. There was evidence of skilled witnesses, who said that in their opinion all ordinary precautions requisite according to previous experience had been used; that there was nothing in the appearance or nature of the roof to lead the defender, or those representing him, to think the stone was not sufficient in strength and sufficiently supported; and that such an accident could not reasonably be anticipated. These considerations no doubt weighed with the jury in arriving at their verdict; and though they differed from the opinion I had formed, the case has been tried, and fairly tried, before them, and I am not disposed to send it to trial a second time. I think it is of great importance that parties when they go before a jury should know that if the case is fully and fairly tried, the Court will not afterwards disturb the jury's verdict as being contrary to evidence on light grounds, and unless it is made apparent that a clear injustice has been done.

The Lords discharged the rule, and of consent applied the verdict of the jury and assoilzied the defender, with expenses.

Counsel for Pursuer—Lord Advocate (Balfour, Q.C.)—M'Kechnie. Agent—R. Ainslie Brown, S.S.C.

Counsel for Defender — Robertson — Lang. Agent—Thomas Carmichael, S.S.C.

Wednesday, October 26.

FIRST DIVISION.

[Sheriff of Lanarkshire.

BROWNS *v.* FULTONS.

Reparation— Damages— Culpa— *Party Liable— Issue—Relevancy.*

In an action for damages against two defenders, a father and son, in respect of personal injuries sustained by the pursuer, who had been knocked down by a horse which belonged to the father, and was being ridden by the son, averments by the pursuer that the said horse was a powerful and spirited one, which the boy was unable to control owing to youth and inexperience, and that it had previously run away with him; that all this was known to both defenders; and that the father "culpably and carelessly authorised or allowed the boy to take it out for exercise" on the day in question, were *held* relevant to ground an issue of damages for the pursuer, and issue adjusted accordingly.

Agnes Sharp or Brown, wife of James Brown, commercial traveller, with consent and concurrence of her husband, and the said James Brown for his own right and interest in the premises, sued David Fulton, engraver to calico printers, Glasgow, personally and as curator and administrator-in-law to his son John Fulton, a minor fourteen years of age, and also the said John Fulton, in the Sheriff Court at Glasgow, for £400 in name of damages in respect of injuries sustained by the female pursuer through a fall occasioned by a horse which belonged to the said David Fulton, and was being at the time ridden by the boy John Fulton.

The pursuers' condescendence, after stating that the horse in question belonged, at the date of the accident after mentioned, to David Fulton, and was "a powerful and spirited animal, and known to him to be such," and that the boy, his son, "was at the date before referred to quite incapable of managing and controlling the said animal, and known to the other defender to be so," narrated that on 6th October 1880, while the pursuers were walking near the Alexandra Park gate in Glasgow, the female pursuer was knocked down by the horse, which was being furiously ridden by the said boy John Fulton, and was seriously injured thereby, in the manner and with the results set forth on record. The pursuer further averred—"(Cond. 7) In consequence of the injuries before referred to,