estimated, and what are to be the deductions from it. The other party says the words "as aforesaid" refer merely to the "lands hereby disponed." The one party says it is to be a provision of a third of the free rent which is to be ascertained as aforesaid; the other says it is to be a provision out of the rents of the lands disponed as aforesaid. I am very clear that the former is the proper reading of these words.

The expression "free rent," if it were not defined, might give rise to very great difficulties of interpretation. On the one hand, one could not be sure that he did not mean the free rent after providing for public and parochial burdens. That is the ordinary meaning of the expression. But again it would be very difficult to suppose that the entailer used the words in a sense which would allow the whole rents of the estate to be covered by provisions to widows and children so as to leave nothing at all for the heir in possession. Therefore, I say, one looks for some definition of what it is the entailer means, and when that expression occurs, as it does in the clause regulating children's provisions, one searches the deed for a description by the entailer of the terms he has used.

But I am further of opinion that the words "as aforesaid" must be applied to the definition of the term "free rent," and not to the words "hereby disponed." Indeed, the latter application is something very like nonsense. These words as applicable to the estate are out of place and have no meaning, and although the words "estate hereby disponed" are very favourite words in this deed, and occur over and over again, the words "as aforesaid" are nowhere else coupled with them.

I am therefore very clearly of opinion that these are words of reference which carry you back to the terms of the definition or description which the entailer has given of "free rent." Now, when you do go back it is very clear that the widow's provision is not to be reckoned, for it is expressly provided that the deductions or discount is to be a deduction or discount exclusively of former liferents, a term which cannot by any possibility apply to the provision for the widow of the person making the provision. That is perhaps sufficient, but there is another provision tending to the same conclusion. There is a clause which forbids the heir in possession "to burden the said estates with new provisions to children till the first provisions contracted by the preceding members of entail for their children are paid and extinguished, at least such heirs shall only be entitled to contract new provisions to the extent of what remains unexhausted of the three years' free rent, allowed as a fund for providing younger children by this tailzie, so as that the said estates may never at any one time be affected beyond the said sum, and none of the children, whether of one or more heirs, to have more in any event than the provisions hereinbefore allowed of three years' free rent." Now, if it had been intended that the widow's annuity should be deducted from the free rents from which the children's provisions are given, one would have expected that there would have been an allowance, or power to increase the provisions to children on the expiration of any rights which limited the amount of free rent available for them, and therefore—on the contention of the petitioner—on the expiration of a widow's annuity. But there is no provision of the kind.

Then, again, there is a provision for the increase of the widow's liferent, as the provisions for former widows' liferents fall out, but none for increasing this liferent as any provision which may have been made for the children comes to an end. And so in the case of children, where they, by reason of subsisting provisions to former children, cannot get the full fund available for children, it is provided that on the dropping of any such provision they may, but there is nothing said about their rights being augmented as provisions for widows fall out. The two funds are quite distinct.

And as I come clearly to the result that the provisions to children are not to be limited by the amount required for the widow's liferent, I need only add this, that I think it is unnecessary to refer to any prior authorities. The decision of this case depends entirely on the construction of the clauses of this entail, and I think it is very plain upon it.

Lord Mure, Lord Shand, and Lord Adam concurred.

The Court adhered.

Counsel for Petitioner—C. K. Mackenzie. Agents—John C. Brodie & Sons, W.S.

Counsel for Respondents—Strachan. Agent—Æneas Macbean, W.S.

Tuesday, June 9.

OUTER HOUSE.

[Lord M'Laren.

MALOY *v.* MACADAM.

(Sequel to case reported *ante*, p. 243, Dec. 19, 1884, and 12 R. 431.)

Reparation—Seduction—Mora—*Condonation of Injury.*

In an action of damages for seduction, brought after the death of the alleged seducer, it appeared that after the first intercourse with the deceased the pursuer had cohabited with him for many years, during which time she was ostensibly in the position of a servant. *Held* that the action was barred by delay, and by the remaining in the service.

In this action of declarator of marriage and legitimacy, and alternatively of damages for seduction of the pursuer Elizabeth Maloy by the deceased Andrew Macadam, the Court, as previously reported, adhered to the interlocutor of the Lord Ordinary by which his Lordship assoilzied the defenders from the conclusions for declarator of marriage and legitimacy.

The process was then remitted to the Lord Ordinary to proceed. Elizabeth Maloy maintained before the Lord Ordinary that she was entitled on the facts established by the proof already led to damages for seduction.

After hearing counsel the Lord Ordinary

assoilzied the defenders from this conclusion also, but found no expenses due.

"*Opinion.*—In this case the conclusions for declarator of marriage are disposed of in the Inner House, and I have now heard counsel on the claim of damages for seduction, and the answers to that claim on the part of Mr Macadam's representatives. The law of Scotland undoubtedly recognises a right of action at the instance of that injured woman for indemnification against such a wrong, and it is not disputed that after the death of the wrongdoer the liability to make compensation will be transmitted against his representatives. If it were necessary to give a reason for the legal recognition of such actions, I might refer to Sir Ilay Campbell's exposition as quoted by Lord Fraser—H. & W. i. 503. It may suffice to say that a moral injury will in general give rise to a claim of reparation where it is accompanied by civil injury—as, for example, the suffering in the estimation of friends and of society, loss of employment, injury to future prospects, and the like. And in such cases the reparation will not be confined to the actual pecuniary loss which the pursuer may be able to prove, but will expand into what is known as *solatium* or satisfaction to the conscience and injured feelings of the suitor.

"In the case with which we are concerned, if an action of damages had been brought against Mr Macadam within a reasonable time subsequent to the letter of 26th February 1858, on the ground of seduction under promise of marriage, I do not doubt that a jury would have given the pursuer an award of damages, and that a verdict of damages in such a case would have been sustained.. But in my opinion the present action must fail, because the action was not brought within a reasonable time after the claim had arisen, and because the circumstances are sufficient to establish the defence of presumed discharge or abandonment of the claim which is maintained by Mr Macadam's representatives. Were it not for the interest that attaches to this case, and the possibility that it may hereafter be referred to on this point, it would not be necessary to say anything regarding the reason which I have put first in order. I have, however, a very strong opinion that in the interest of justice and fair dealing, not less than of the peace of families, we ought not to give any encouragement to claims of this nature when put forward at a period remote from the occurrences to which they relate. In the present case I have the less hesitation in expressing myself strongly on this subject, because this is precisely a case in which one can discuss the general question without appearing to reflect on the conduct or motives of the pursuer, who certainly has my sympathy in her endeavour to obtain a better provision than the deceased Mr Macadam was able to make for her. All the facts of the case have been made public through the proof that was taken in the declarator of marriage, and the prosecution of this claim can do no injury to the reputation or feeling of anyone which has not already been done. But in this respect the case is very exceptional. It is almost impossible that such a claim can be publicly put forward after a long interval of time without the risk of inflicting irreparable injury on those against whom it is preferred—injury possibly greater than the wrong for which redress is to be sought. In such cases it must be remembered that the merits of the action depend in large measure on the view which may be taken of her case by the lady herself. She knows best whether she was a willing lover, or whether she was compromised through arts to which her inexperience or weakness left her exposed. It is, I need hardly observe, very much against the best interests of the injured woman that wrongs of this kind should become known to the public; and if, either in the knowledge that she is not a victim of seduction, or in the conviction that she has nothing to gain by exposure, a woman who has had immoral relations with a man elects to be silent on the subject, and to make no pecuniary claim against him, my view is that her silence, if unexplained, ought to be sufficient to put her out of Court. More especially would this hold true where she comes forward after an interval of more than 20 years, when injury to feelings may be supposed to be effaced by the lapse of time, and when there can be no interest to prosecute the action except the pecuniary interest. I see nothing in the evidence to suggest that the present pursuer ever would have brought an action of damages against Mr Macadam in his lifetime. She was evidently much attached to Macadam, and had no desire either to give him annoyance or to extort money from him. But if such a claim were to be made or intimated in any similar case the considerations which I have stated would in my judgment lead to its rejection. These considerations constitute the first, and in my view sufficient, objection to the claim, because if the claim could not have been successfully preferred in Mr Macadam's lifetime it can be in no better position after his death. But, as already indicated, there are also circumstantial reasons which operate as a bar to the present claim. The pursuer remained in the service of Mr Macadam as his housekeeper. I do not imagine that any employer would retain in his service a person who held over him an action of this description, nor could the servant honestly accept employment without either relinquishing the claim of damages or giving her employer notice that it was in reserve. But according to the evidence no suggestion of such a claim was ever communicated to Mr Macadam, and I think that by remaining in his service Miss Maloy condoned the injury. That the immoral relation continued is nothing to the purpose. They understood each other. They were willing to maintain relations which were not consistent with good morals, but which to a person in the pursuer's situation in life probably involved no social humiliation. She was provided for during Macadam's life, and I am satisfied she never meant to bring, and never could have brought, such an action after accepting the position in his establishment which she held during his life. I say nothing in this connection about the legacy of £1000 which Mr Macadam left to the pursuer, because if the pursuer were a creditor on the estate I rather think that the legacy would not be viewed by the law as a satisfaction of the debt. It may, however, be taken into view along with other elements as evidence of a kind of intimacy which is entirely inconsistent with the present claim.

"Something was said on both sides regarding

expenses. The only expenses worth considering are those incurred in relation to the declarator of marriage. It was explained to me that the trustees, while willing to act with all consideration to the pursuer in view of Mr Macadam's expressed wish to make some further provision for the pursuer, do not feel themselves at liberty to give up their claim to expenses. They have already obtained decrees for the expenses of the discussions in the Inner House on the reclaiming-note on the merits of the declarator. I think that in all the circumstances that decree sufficiently satisfies the rule that the successful party is entitled to an award of expenses. This action was brought in the name of the mother and children, and the legitimacy of the children was in question. If it had been brought in name of the children alone a decree for expenses would have been of no value to the defenders, and as in this case the *status* of the children was in issue, I think that the proceedings before the Lord Ordinary may be regarded as necessary procedure in which each party should be allowed to bear his own costs. I should have been very glad to go further, and to allow the children the costs of trying the question of their legitimacy out of the father's estate, but my impression is that in questions of *status* we have never gone so far as to give costs out of the estate to the unsuccessful party."

Counsel for Pursuer—J. P. B. Robertson—Goudy. Agent—J. Young Guthrie, S.S.C.

Counsel for Defender—Mackintosh—A. J. Young. Agent—John Macmillan, S.S.C.

Wednesday, July 1.

FIRST DIVISION.

[Sheriff of the Lothians.

SHAW *v.* CROALL & SONS.

Reparation — Hackney Carriage — Accident through Horse Bolting — Culpa — *Edinburgh Municipal and Police Act* 1879 (42 *and* 43 *Vict. c.* 132).

By the bye-laws applying to cabmen in Edinburgh it is provided that a cabman shall when at a stance either sit on the box or stand at the head of his horse. The driver of a cab, which was drawn up at a stance, was standing about three yards from his horse, which was feeding from a nose-bag, when the animal took fright and bolted. In an action by the representatives of a person who was alleged to have been knocked down and killed in consequence, *held* that (assuming the deceased to have been injured in the manner alleged) the provisions of the bye-law could not at all times be literally complied with, and that there had been a failure to make out such negligence on the part of the driver as would render his employer responsible.

Section 304 of the Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. 132) provides—"For regulating the hackney carriages . . . . and the owners and drivers thereof, the Magistrates may . . . . make bye-laws." . . . .

Bye-law 37, enacted by authority of this section, requires that when at a stance the driver of a hackney carriage shall "either sit on the box or stand at the head of his horse."

On the morning of the 1st January 1884, John Page, cabdriver, in the employment of Messrs John Croall & Sons, left his employer's stable. with a horse and hansom in his charge, in time to be at the Caledonian Station stance to meet the south train due at a quarter to seven o'clock.

The horse which Page was driving had been fed before it left the stables, and on reaching the stance he drew up his hansom in a line with three other cabs which were there. Page's hansom was first in the row of cabs, the Royal Mail van being in front. The horses were drawn up in a line with their heads looking west. As the train was late Page put on the nose-bag in order to give the horse a feed. He also took out the bit that the horse might feed more freely. There were two bags—a large bag called the feeding-bag, and a smaller called the nose-bag, which was filled from the feeding bag, and contained the allowance the horse was to receive at the time. Page had brought the feeding-bag from the box in which it was kept and had filled the nose-bag, and was in the act of restoring the feeding-bag to the place where it was kept, under a fixed seat, and was at the moment about ten feet from his horse's head, when, from some cause unascertained, the horse started, turned round, and proceeded to leave the station, passing safely through the gates. After reaching the gates it increased its speed to a gallop, and proceeded at this pace along Princes Street and down Leith Street to Albert Street, Leith Walk, where it was caught. When the horse bolted Page started to try and catch it but failed.

Somewhere about the time that the horse bolted, the late David Shaw, a porter, was, while crossing the west end of Princes Street, at a point which the horse passed, knocked down and run over by a horse and vehicle of some description. He was so severely injured that he died upon the following day.

An action was raised by the representatives of Shaw against Messrs Croall & Sons, in which it was alleged that the horse and vehicle by which Shaw met his death was the horse and hansom, the property of Messrs Croall, which bolted from the Caledonian Station about the time that Shaw met with the injuries which resulted in his death. The defenders denied that it was their horse and hansom which caused Shaw's death.

The Sheriff-Substitute, after a proof, found for the pursuers.

On the question of Page's fault the Sheriff-Substitute found—"The said horse and cab were without a driver, and wholly uncontrolled, the horse having been allowed through the negligence of John Page, a servant of the defenders, to move away unattended from the stance within the enclosure of said station, after which it seems to have taken fright, and bolting out of the station gates, galloped furiously along Princes Street."

"*Note.*— . . . It is enough to point out that at the moment when Page's mare wheeled off the stance, which she did quite quietly, not breaking into a gallop until she reached the station gates, Page was not at her head, as he ought to have been, but at the distance of about 10 feet, and with his back turned towards her. That he was