COURT OF SESSION.

Saturday, July 14.

FIRST DIVISION.

[Lord Ashmore, Ordinary.

M'CRAE *v.* BRYSON AND ANOTHER.

Expenses — Two Defenders Sued Jointly and Severally—Liability of Unsuccessful Defender for Expenses of Successful Defender.

In an action of damages against two defenders, the owners respectively of a motor car and motor lorry which had collided, the pursuer craved decree against both defenders, jointly and severally, in respect of the death of her husband, which she alleged was caused by the collision. Before the action was raised the owner of the motor car had taken up the position that there had been no collision, and in his defences, while not admitting the collision, he averred that if it had taken place it was not due to any negligence on his part. The owner of the motor lorry admitted that there had been a collision but blamed the owner of the motor car. The owner of the motor car having been found liable and the owner of the motor lorry assoilzied, *held* (*diss.* Lord Cullen) that in the circumstances the owner of the motor car was liable in expenses to the owner of the motor lorry as well as to the pursuer.

Mrs Susan Bradley or M'Crae, widow of Patrick M'Crae, New Mains, as an individual and as tutrix for her pupil children, *pursuer*, brought an action against Thomas Bryson, farmer, Cambuslang, and Joseph Callaghan, contractor, East Kilbride, conjunctly and severally, *defenders*, for damages in respect of the death of her husband, who while travelling on a motor lorry belonging to the defender Callaghan was killed as the result of a collision between the lorry and a motor car belonging to the defender Bryson.

Prior to the raising of the action the defender Bryson took up the position that there had been no collision between the vehicles. In his defences he did not admit that the collision between the vehicles had taken place, but averred that if there had been a collision it was not due to any negligence on his part. He did not expressly blame the defender Callaghan. The latter in his defences admitted that there had been a collision, and averred that it was entirely due to the fault of the defender Bryson.

The case was heard before a jury, when a verdict was returned for the pursuer against the defender Bryson and for the defender Callaghan. On 26th January 1923 the Lord Ordinary applied the verdict, decerned against the defender Bryson for payment of the damages assessed by the jury, assoilzied the defender Joseph Callaghan, and found the defender Bryson liable to the pursuer and to the defender Joseph Callaghan in expenses.

Opinion.—"In this case the pursuer Mrs M'Crae, as an individual and also as tutrix of her three pupil children, sued two defenders—the defender Bryson and the defender Callaghan—jointly and severally, for damages in respect of the death of her husband as the result of a collision between the defender Bryson's motor car and the defender Callaghan's motor lorry, claiming £1000 for herself and £500 for each of the three children, representing £2500 in all.

"Both defenders defended; each denied liability; the defender Bryson did not admit that any collision took place between his car and the lorry, and he did not expressly attribute blame to the defender Callaghan; the defender Callaghan on the other hand admitted that there was a collision and blamed the defender Bryson for causing the collision.

"The case was tried before a jury, and the jury brought in a verdict for the pursuer against the defender Bryson, assessing the damages as follows:—For the widow £350, and for each of the three children £150—in all £800—and they brought in a verdict for the defender Callaghan.

"It appears that before the trial the defender Bryson had lodged a tender of £400 for the widow and £50 for one of the children and £25 for each of the two other children—in all £500.

"Both the pursuer and the successful defender Callaghan moved for expenses against the unsuccessful defender Bryson.

"For the defender Bryson it was contended on the one hand that the pursuer Mrs M'Crae as an individual having recovered less than the amount tendered to her, the award of expenses to her ought to be modified; but, on the other hand, each of the three children recovered more than was tendered, and the expenses of obtaining a verdict at their instance were *ex hypothesi* properly incurred as in a question with the defender, and I think that the fact that Mrs M'Crae remained in the case did not add to the expense.

"In my opinion, having regard to the circumstances, no modification in the award of expenses ought to be made.

"It was further contended for the defender Bryson that he ought not to be held liable in the expenses of the defender Callaghan in respect (*a*) that the pursuer herself in the action as originally brought convened both defenders, and (*b*) that the defender Bryson in his defences did not attribute blame to the other defender.

"It was proved, however, that before the action was instituted the defender Bryson consistently took up the position that his car never came into collision with the defender Callaghan's lorry. Further, as already mentioned, the defender Bryson in his defences did not admit that there was any collision.

"Now the jury held that it was proved that the position so taken up by the defender Bryson was inconsistent with the facts. I think that the defender Bryson made it expedient that the pursuer should convene as defender both him and Callaghan, and I also think that it is reasonable that as the

defender Bryson by his erroneous representation as to a material fact was responsible for bringing the defender Callaghan into the case, he, the defender Bryson, ought to bear the expense thereby occasioned.

"My opinion to this effect seems to me to be fair in the circumstances, and I think that it is in accordance with the principles expressed in the opinions in *Morrison* v. *Waters & Company*, 1906, 8 F. 867, and *Brownlie* v. *Tennant*, 1855, 17 D. 422.

"I will accordingly find the pursuer and also the defender Callaghan each entitled to expenses as against the defender Bryson."

The defender Bryson reclaimed, and argued—This defender was not responsible for the defender Callaghan having been brought into Court, and should not therefore be made liable for his expenses—*Brownlie* v. *Tennant*, 1855, 17 D. 422, *per* Lord Justice-Clerk at p. 427. Nothing that this defender had done amounted to throwing the blame on Callaghan. The pursuer had to select her defender, and having elected to call Callaghan was liable for his expenses if unsuccessful against him. That the pursuer had reasonable cause for calling both defenders made no difference if that cause was not created by the conduct of the unsuccessful defender—*Fleming* v. *Gemmill*, 1908 S.C. 340, *per* the Lord President at p. 344, 45 S.L.R. 281; *Mackintosh* v. *Galbraith and Arthur*, 1900, 3 F. 66, 38 S.L.R. 53; *Thomson* v. *Kerr*, 1901, 3 F. 355, 38 S.L.R. 263; *Morrison* v. *Waters & Company*, 1906, 8 F. 867, 43 S.L.R. 646; *Craig* v. *Aberdeen Harbour Commissioners*, 1909 S.C. 736, 46 S.L.R. 508; *Laing* v. *Paul & Williamsons*, 1912 S.C. 196, 49 S.L.R. 108; *Kennedy* v. *Shotts Iron Company*, 1913 S.C. 1143, 50 S.L.R. 885; *Taylor* v. *Glasgow Corporation*, 1919 S.C. 511, 56 S.L.R. 458. The Lord Ordinary's interlocutor should therefore be recalled so far as it found this defender liable for the expenses of the defender Callaghan. Counsel also referred to *Kirkpatrick* v. *Douglas*, 1848, 10 D. 367, *per* Lord Jeffrey at p. 369; *Torbet* v. *Borthwick*, 1849, 11 D. 694, at p. 702; *Shepherd* v. *Elliot*, 1896, 23 R. 695, 33 S.L.R. 495.

Argued for the defender Callaghan—This defender was entitled to expenses from either the pursuer or the defender Bryson, but the latter was really responsible for bringing this defender into Court and therefore was liable for his expenses. To suggest that to make one defender liable for another's expenses he must have expressly blamed the other was taking too narrow a view—*Morrison* v. *Waters & Company* (*cit.*); *Craig* v. *Aberdeen Harbour Commissioners* (*cit.*); *Laing* v. *Paul & Williamsons* (*cit.*); *Thomson* v. *Kerr* (*cit.*); *Crawcour* v. *St George's Steam Packet Company*, 1843, 6 D. 190; *Cowan* v. *Dalziels*, 1877, 5 R. 241, 15 S.L.R. 151; *Milliken* v. *Glasgow Corporation*, 1918 S.C. 857, 56 S.L.R. 4. The position taken up by Bryson that there had been no collision implied a *prima facie* case against this defender and was the cause of this defender being called. Nor was it necessary that the action should originate against one of the defenders only if the pursuer in calling both acted reasonably—*Kennedy* v. *Shotts Iron Company* (*cit.*), *per* Lord Mackenzie at p. 1144 and Lord Kinnear at p. 1154. Further, the question was one in which the Lord Ordinary's discretion ought not to be interfered with unless there was a clear case of injustice.

Counsel for the pursuer maintained that the Lord Ordinary's interlocutor should be adhered to, and adopted the argument for the defender Callaghan.

At advising—

LORD PRESIDENT—The pursuer's case on record was that her husband met his death by the overturning of Callaghan's motor lorry as the consequence of a collision on the open road between that lorry and Bryson's overtaking motor car. She attributed the collision to fault on the part of both Callaghan and Bryson. Callaghan admitted the collision but put the whole blame on Bryson. Bryson denied the collision. He did not positively allege any fault against Callaghan, but in answer 2 he stated that after he had passed Callaghan's lorry "the said motor ran into the side of the road and [the pursuer's husband] was killed." Further, in answer 3, while denying that he was in any way responsible for what occurred, he averred that "if the said motor lorry came into contact at all with [his] motor car, which is not admitted, this was not due to any negligence on the part of this defender."

The fact of a collision between two vehicles on the open road, if not otherwise explained by some special circumstance, is by itself relevant to infer negligence on one or both of the drivers of the colliding vehicles, and the fact of the collision between Callaghan's motor lorry and Bryson's motor car was the pivot of the pursuer's case. Bryson was, no doubt, honestly unaware of any contact having taken place in passing between his motor car and Callaghan's motor lorry, but his pleadings were framed to meet the case that such contact might none the less be proved to have occurred. Now if it did occur (as the jury found that it did) either Bryson or Callaghan or both must have been to blame in the absence of any special circumstance to account for it. No special circumstance was suggested on record by Bryson. It follows that the moment the fact of a collision was proved Bryson's denial of responsibility necessarily threw the blame on Callaghan.

The case does not therefore in my opinion differ from one in which each of two defenders openly charges the other with negligence, and in which it is sometimes just and equitable to make the unsuccessful defender pay not merely the pursuer's expenses but those of the successful defender also. The Lord Ordinary knew much better than we can what the attitude of parties was at the trial and in argument, and I am therefore not disposed to interfere with the discretion which he exercised—as far as I can see rightly exercised—in the present case.

We heard an interesting argument with regard to the general principle on which

expenses are awarded. But I doubt if it is possible—and still more if it is expedient—to add to what is to be found in the judgments already pronounced in decided cases. It is clearly competent to make an award such as was made in this case. But it must not be imagined that such an award would necessarily be equally just and equitable in another case.

LORD SKERRINGTON—This case is not a favourable one for interfering with the Lord Ordinary's exercise of his discretion on a question of judicial expenses, because the facts are not fully before us. So far, however, as the facts are known to us they amply justify in my opinion the course taken by the Lord Ordinary. The argument to the contrary addressed to us on behalf of the unsuccessful defender Bryson (to whose negligence the jury found that the accident was solely attributable) has not satisfied me that the expenses incurred by the successful defender Callaghan ought not to be borne by the author of the negligent act rather than by the pursuer, who was one of its victims. Indeed, the whole argument seemed to me to verge upon the extravagant. In the first place, it was maintained that although before the action was raised Bryson had assured the pursuer that his motor car did not in overtaking Callaghan's motor lorry collide with it, as alleged by Callaghan, and so cause the lorry to upset and kill the pursuer's husband, who was a passenger in the lorry, it was nevertheless the pursuer's duty to disbelieve that assurance, and to act upon that disbelief by directing her action against Bryson alone to the exclusion of Callaghan—a course which the pursuer could not have followed without disastrous consequences if it so happened that Bryson's version of the accident was correct. In the second place, it was maintained that Bryson never made any attack upon Callaghan, although Bryson's defence (the denial of any collision) necessarily implied that Callaghan was to blame for a mishap which he did not attribute either to inevitable accident or to the fault of the deceased. I think that the Lord Ordinary's decision was right on principle, and was also consistent with the authorities cited to us.

LORD CULLEN—The pursuer's husband was killed through the upsetting on the road of a motor lorry on which he was travelling. In respect of his death the pursuer raised an action of damages against Callaghan, the owner and driver of the lorry, and also against Bryson, the owner and driver of a motor car. She alleged that the accident was due to a collision between the two vehicles, and that both defenders were to blame for the collision on specified grounds, and she claimed damages from them jointly and severally.

Bryson in his defences limited himself to a denial of the pursuer's material averments. He said that there had been no collision, and alternatively, that if there had been a collision it was not due to any of the faults alleged against him by the pursuer. Callaghan, on the other hand, admitted that there had been a collision, denied the pursuer's averments of fault against him, and said that Bryson was to blame for the collision on specified grounds.

If the pursuer had brought an action against Callaghan alone and his defence had been such as it was in the actual action, she would on the authorities have been justified in convening Bryson, and if she had failed against Bryson and won against Callaghan she would have been in a position to claim that as the nature of Callaghan's defence had led to the convening of Bryson, Callaghan ought to relieve her of the expenses in which she had become liable to Bryson. If on the other hand she had begun by raising action against Bryson alone, and if Bryson's defence had been such as it was in the actual action, then, as I read the authorities, the pursuer would not have been justified in convening Callaghan at Bryson's risk, seeing that Bryson made no allegations against Callaghan but only by his denials put the pursuer to make good the case she had stated against himself.

In the action now before us, where the defences returned by the two defenders respectively were as above stated, the pursuer according to the verdict of the jury proved her case against Bryson and failed to prove her case against Callaghan. She has been found entitled to her expenses against Bryson; she has incurred liability for expenses to Callaghan in respect of her failure to obtain a verdict against him; and the question for consideration is raised by the motion that her liability to Callaghan should be devolved on Bryson.

In cases of this kind, where there are two defenders, against one of whom the pursuer succeeds and against the other of whom he fails, the rule relating to the liability of the unsuccessful defender to bear the expenses of the successful defender and so relieve the pursuer thereof, has been often stated. I venture to refer to the case of *Morrison* v. *Waters & Company*, 8 F. 867. Lord Dunedin said—"The question on which the rule in such cases depends is this—Through whose fault was it that the additional defender was brought into Court? Of course a pursuer who has a right of action is not entitled to bring the whole world into Court, but there may be cases in which a pursuer is forced to call more than one party owing to the action of another defender." Lord M'Laren said—"*Prima facie* it is for a pursuer to find out who is responsible to him for a wrong which he considers he has sustained, and in general if he calls as a defender a party who is innocent of the alleged wrong he will be liable in expenses. But this rule is subject to exceptions, especially where the claim is made, in the first instance, against the party who is truly responsible, and it is at his request and instance that another party is called into the field. Here the question is, who is responsible for bringing the successful defender into Court? In this case I have no doubt that it was the unsuccessful defenders who, as we see, from the beginning sought to shift the burden from their own shoulders and to put it on the tramway contractor." The case was

one in which each defender had blamed the other, and where a material fact was whether the driver of a certain vehicle was the servant of the one defender or of the other—a fact which reasonable inquiry on the part of the pursuer might have failed to discover.

In the present case, which is a very ordinary one, I do not think it can be said that the ascertainment of the party truly responsible involved facts likely to elude due inquiry by the pursuer. We do not know how much inquiry she made, but having made inquiry she took the course of bringing action against both Bryson and Callaghan, alleging a collision, and that both were to blame therefor. And on an application of the rule, as indicated in the opinions which I have quoted, the question is whether it can be said to have been Bryson's fault that the pursuer raised and insisted to verdict an action against Callaghan.

Now Bryson did not take the course of shifting responsibility on to Callaghan. He limited himself to denying the pursuer's allegations against himself. Neither before the action nor in his defences did he make any allegations against Callaghan. Accordingly he disarmed himself of any weapon of attack against Callaghan at the trial, and was not in a position to lead any evidence against the latter. Callaghan's bill of expenses accordingly was incurred not in warding off an attack from Bryson, but in warding off the pursuer's attack, originally made and persisted in to verdict. Putting aside for the moment one circumstance which has moved the Lord Ordinary, I am unable to see how it can be said that Callaghan's bill of expenses was caused through fault on Bryson's part, or to put it more accurately, that it was Bryson's fault that the pursuer raised and persisted in her action against Callaghan, and I do not see what more Bryson could have done in order to avoid liability for a double set of expenses in the event of his defence against the pursuer's attack failing.

The ground on which the Lord Ordinary has found Bryson liable is that Bryson denied the fact of a collision having occurred, before the action was raised, as in his defences. Now Bryson in defending himself against the pursuer's attack was entitled to put her to prove her case against him, including the fact of a collision, at the risk of having to pay *her* expenses if she succeeded, and such a purely defensive attitude on his part did not, so far as I can see, involve any need of convening Callaghan. But this *prima facie* view was said not to be the true one. It was contended by counsel for the pursuer and for Callaghan that Bryson's denial of the fact of a collision involved a subtle and silent attack on Callaghan, inasmuch as the upsetting of the lorry in the absence of a collision necessarily inferred some fault on Callaghan's part, although Bryson's defence expressed no such fault nor said in what it consisted. To this contention, which the Lord Ordinary does not mention, it seems to be a sufficient answer that the pursuer did not draw and act on any such inference. She was not induced by Bryson's denial to make any case against Callaghan on the alternative footing of no collision having occurred. The only case which she made against Callaghan and persisted in to verdict was that the two vehicles had collided and that he as well as Bryson was to blame for it.

The material factors in the question at issue seem to me to be these—(1) The pursuer, after due inquiry into a state of facts presenting no peculiar difficulty of ascertainment, chose to sue both Bryson and Callaghan; (2) Bryson maintained all through a purely defensive front to the pursuer's attack against himself, and made no attack on Callaghan; and (3) that Callaghan's expenses were thus incurred in defending himself from an unfounded attack directed against him solely by the pursuer which she was not induced to make by any fault on the part of Bryson. In these circumstances I am unable to see any ground in authority for holding Bryson liable to relieve the pursuer of the expenses incurred by Callaghan in repelling the unfounded attack which she chose to make on him.

It was contended by the respondents' counsel that some much wider view of the matter than the authorities warrant should now be evolved and adopted. The right of a pursuer to call several defenders should, it was said, arise directly from the nature of the case and be independent of the nature of conduct or actings of any defender in connection with claims or proceedings against him. As I understand this contention the practical effect of sustaining it would be that in such a case as the present a pursuer would always be justified, no matter how easy of solution by inquiry the truth as to responsibility might be, in convening all possible defenders, alleging that all of them or one or more of them must be liable, and leaving them to engage in a competition *inter se* for immunity from liability. I can only say that I prefer the rule as we find it in the authorities, which I have endeavoured to apply.

I am of opinion that the reclaiming note should be sustained.

LORD SANDS—I have some sympathy with the logical argument in Lord Cullen's opinion, but I do not think the Court, particularly a Court of review which has not all the facts and circumstances fully before it, can satisfactorily dispose of a question of expenses in a case upon the grounds suggested by strictly logical argument.

It is well settled that if, where A is charged with negligence causing an accident which brings injury to B, he puts the blame upon C, and B sues both A and C, A if found responsible for the accident may be made liable for C's expenses in the event of C being exonerated. I do not think that it involves any extension of the rule to hold that in certain circumstances A may put the blame upon C by implication as well as by direct statement. I confess that I am not, as at present advised, disposed to regard any further extension of the rule as consistent with authority. It appears to me that to hold A responsible for the expenses

incurred by C because A's negligence, from which the accident resulted, occasioned these expenses, cannot easily be reconciled with the rule which forbids the entertainment of claims for remotely consequential damages. That B should make an unfounded charge against C can hardly be regarded as a direct or naturally to be contemplated consequence of an act of negligence on the part of A. In the view I take, however, it is unnecessary for the purposes of this case to determine that question.

The facts necessary for the disposal of this case as presented to us are not in dispute. A van belonging to Callaghan, travelling on an open road at a slow pace, suddenly dashed across the road into a bank, with the result that pursuer's husband was killed. Both the pursuer and Callaghan averred that the cause of the aberration of the van was a collision with Bryson's car, for which Bryson was to blame. Bryson denied the occurrence of any collision, but it was proved to the satisfaction of the jury that the collision occurred, and that Bryson was alone to blame for it. Bryson now resists the claim that he should be made liable for Callaghan's expenses on the ground that whilst he denied the occurrence of the collision, he did not at any time in the course of the case or otherwise attribute blame for the accident to Callaghan. But in the circumstances of the case it appears to me that the Lord Ordinary was warranted in construing the attitude of Bryson as placing by implication the blame of the accident upon Callaghan. If Bryson was not to blame Callaghan was *prima facie* to blame. No doubt it is conceivable that such an accident might happen through some strange mischance without blame to anybody. But I am unable to reach the conclusion that the Lord Ordinary, who heard the evidence, was not entitled to refuse to regard the suggestion of such theoretical possibilities as obviating the effect of the *prima facie* charge against Callaghan involved in Bryson's denial of any collision. I am accordingly of opinion that the interlocutor of the Lord Ordinary ought to be affirmed.

The Court adhered.

Counsel for the Defender and Reclaimer Bryson—Mackay, K.C.—Christie. Agents—Manson & Turner Macfarlane, W.S.

Counsel for the Defender Callaghan—Watt, K.C.—Aitchison, K.C.—Montgomery. Agents—Balfour & Manson, W.S.

Counsel for the Pursuer—Maclaren, K.C.—Burnet. Agent—John Baird, Solicitor.

Thursday, July 19.

FIRST DIVISION.

GALASHIELS AND SELKIRK PARISH COUNCILS *v.* SCOTT PLUMMER.

Rates and Assessments — Poor Rates — Deductions — Heritors' Assessments — Minister's Stipend — Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 37.

The Poor Law Amendment (Scotland) Act 1845, sec. 37, provides with regard to the manner in which lands and heritages are to be valued for the purpose of levying the poor rate as follows:—"And be it enacted that in estimating the annual value of lands and heritages the same shall be taken to be the rent at which one year with another such lands and heritages might in their actual state be reasonably expected to let from year to year, under deduction of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same. . . ." *Held* (1) that heritors' assessments were included among the rates, taxes, and public charges which fell to be deducted in estimating the annual value of lands and heritages for the purpose of poor-law rating; but (2) that minister's stipend did not fall to be deducted, it not being a charge on the estate of property in the lands themselves but on the estate of teinds.

The Parish Council of the Parish of Galashiels and the Parish Council of the Parish of Selkirk, *first parties*, and Charles Henry Scott Plummer of Sunderland Hall, *second party*, brought a Special Case for the opinion of the Court upon questions regarding the deductions to be made by the first parties in estimating the annual value of the lands belonging to the second party in their respective parishes for the purpose of levying the poor rates and other rates levied in the same way, and also as to the method by which such charges if deductible fell to be fixed.

The Case stated—"1. The first parties are the rating authorities charged with the duty of levying within their respective parishes the poor, education, and registration rates, and other rates which are levied in the same way as the poor rate. 2. The second party is the proprietor of lands and others lying partly in the parish of Galashiels and partly in the parish of Selkirk, and is liable to be assessed by the first parties for all rates levied in the same way as the poor rate. 3. The second party is liable to pay land tax, heritors' assessments, and minister's stipend in the parish of Galashiels and the parish of Selkirk. 4. In the parish of Selkirk heritors' assessments have been levied twice in the last ten years, namely, on 21st October 1915 and on 20th April 1922. On each occasion the assess-