

forward such a claim, and therefore the defenders, assuming them to have been otherwise liable, were free from such a claim being made by the pursuer. In my opinion it was not in the power of the pursuer thereafter to subject them to it by marrying the mother of the child, and thus, so to speak, acquiring a title which he did not previously possess. The marriage took place within four months of the death, but it might have been delayed for years, or possibly the mother of the child might have in the meantime married another man, as in *Kerr v. Martin*; and the pursuer's argument would have been just the same if on the termination of that marriage by the death of the husband he had married the mother of the child.

There is no hardship in imposing this limitation. The pursuer abstained from marrying the child's mother during the three and a-half years that the child lived; and if he has thereby lost rights which he would otherwise have possessed as the father of a child lawfully begotten, he had himself to blame. The nature and basis of the pursuer's claim makes this all the more clear. How could a claim which depends on reciprocity of rights and obligations between parent and child (*Clarke v. Carphin Coal Company, Limited*, 18 Ret. (H.L.) 63) be reared up after reciprocity had become impossible through the death of one of the parties?

It remains to notice the old case of *Crawford's Trustees v. Hart's Relict*, M. 12,698 (January 20, 1802). The question was between the widow claiming terce and the husband's trustees. Now, at the date when the claim for terce arose the widow had been lawfully married and was the mother of lawful children by her deceased husband. I do not see how the Court could have arrived at any other decision. In the eye of the law the children were lawfully begotten as if they had been born in wedlock, and the interests of third parties, that is, parties other than the husband's representatives and the children of the marriage, were not affected. The heir-at-law, who owed his legitimacy to the marriage, could not have challenged his mother's right to terce, and equally, I apprehend, the husband's trustees could not question it.

In the opinion of the minority in *Kerr v. Martin*, 2 D. 767, the following passage occurs—"Indeed, there must be a fiction of some kind in every view of the matter, for how are children to become legitimate so as to be accounted equally so with others afterwards born in lawful wedlock, or born previously of a lawful marriage, except by some fiction or presumption of the law by which the subsequent marriage obliterates the stain on their birth, and makes for them a status of actual and full legitimacy which does not exist by the natural course of things." I am disposed to accept this, with the qualification that the fiction is not inflexible. It yields to and will not be applied so as to defeat vested rights. Lord Gillis says, in the case of *Rose v. Ross*, 5 S. 649—"It is an invariable maxim that no

fiction shall extend to work an injury. But on the other hand it may be held to be a general maxim that a fiction shall be so far extended as to accomplish its object, and to work out the rule with a view to which it was adopted." The solution of such questions is to be found in reconciling these maxims.

Now when this claim, which is made against third parties, emerged, the pursuer had no title to sue, and the defender's right of immunity from any claim at the pursuer's instance was as fully vested in them at the date of the marriage as was the right of priority vested in the children of the intervening marriage in the case of *Kerr v. Martin*. It may sound strange to speak of a vested right not to be sued in respect of what I assume to have been a civil wrong, but that phrase expresses the defenders' position with sufficient accuracy. When the child was killed there was no one who in the eye of the law had suffered a legal wrong through her death, and was thus entitled to sue the defenders.

I am therefore of opinion that the pursuer has no title to sue, and on that ground that the Sheriff-Substitute's judgment should be affirmed.

LORD YOUNG was absent.

The Court dismissed the appeal, affirmed the interlocutor appealed against, of new dismissed the action, and decerned.

Counsel for the Pursuer—John Wilson, K.C.—J. W. Forbes. Agent—William Finlay, W.S.

Counsel for the Defender M'Gregor—Salvesen, K.C.—D. Anderson. Agent—J. S. McCulloch, W.S.

Counsel for the Defenders Walker and Cairns—Salvesen, K.C.—Crurie Steuart. Agents—Coutts & Palfrey, S.S.C.

Tuesday, November 12.

## SECOND DIVISION.

[Sheriff Court at Glasgow

HIGGINS v. CORPORATION OF  
GLASGOW.

*Reparation—Negligence—Safety of Public  
— Safety of Street—Defective Gutter—  
Burgh—Road—Street.*

In an action of damages by the tenant of a house in Glasgow against the Corporation of the city, the pursuer averred that on 3rd November 1900, between 9.30 and 10 p.m., when returning home and crossing the street to her house, she placed her foot in a grating situated in the gutter of the street, and fell and broke her left leg; that at the time of the accident, and as she had since ascertained for at least four weeks previous thereto, the grating, which should have been flush with the street, was sunk about 4 inches below the level of the street, and was thus in

a defective condition and dangerous to pedestrians; that at the time of the accident it was dark, and there was no artificial light nearer than about 20 yards; that shortly after the accident the defenders caused the grating to be raised to the level of the street; and that the accident was due to the fault of the defenders in permitting the grating to fall into and to remain for at least four weeks in a defective state, which would have been apparent upon inspection.

*Held* that the action was irrelevant.

Mrs Mary M'Cafferty or Higgins raised an action in the Sheriff Court at Glasgow against the Corporation of the City of Glasgow, acting under the Glasgow Police Acts 1866 to 1900, in which she craved decree for £250 as damages for personal injuries sustained by her.

The pursuer averred that at the date of the accident after mentioned, and for about three months prior thereto, she had been tenant of the house situated at 31 Society Street, Camlachie, Glasgow, and that the defenders were responsible for the upkeep of that street. (Cond. 2) Immediately opposite the door of pursuer's said house, which is on the ground flat and on the west side of the street, there is a pavement about 3½ feet wide with a kerbstone at the edge thereof. At the side of the kerbstone there is an iron grating placed almost opposite the said door, in the water-channel of the street. The grating is 1 foot 4 inches long and 1 foot broad. (Cond. 3) At time of the accident after mentioned, and, as the pursuer has since ascertained, for at least four weeks previous thereto, the said iron grating, which should be flush with the street, was sunk about 4 inches below the level of the street, thus leaving a hole of these dimensions. The grating was consequently in a defective condition, and was dangerous to the pursuer and other pedestrians who had occasion to use said street. (Cond. 4) On or about 3rd November 1900, between 9:30 and 10 o'clock in the evening, the pursuer was out shopping. When returning home she required to cross the said street from the east to the west side, and when so crossing to go to her house she placed her foot in the said grating, with the result that she stumbled and fell heavily to the ground and broke her left leg. (Cond. 5) At the time of said accident it was dark, and there is no artificial light nearer to said grating than about 20 yards. Said street is not well lit, and there was no light at the said grating to warn pedestrians of its dangerous condition. (Cond. 6) Shortly after the date of the said accident the defenders caused the said grating to be raised to the level of said street, and so to be rendered safe. (Cond. 9) The accident to the pursuer was due to the fault of the defenders in permitting the grating aforesaid to fall into and remain for a period of at least four weeks in a defective and dangerous state. Looking to its condition, the street was not in a reasonably safe condition for the use of pedestrians, particu-

larly after nightfall. It is the duty of the defenders to keep the street and all parts of it in a proper state of repair, and to that end to examine its condition, or at anyrate to have it examined from time to time. Ordinary inspection would have revealed to the defenders that the condition of the said grating constituted a danger to the public. The defenders, however, failed to examine the grating or to have it examined, or in any event they failed to remedy its condition, with the result that the pursuer was injured as aforesaid."

The pursuer pleaded, *inter alia*—" (1) The pursuer having suffered loss, injury, and damage through the fault of the defenders, is entitled to reparation therefor with expenses."

The defenders pleaded, *inter alia*—" (1) The action is irrelevant."

On 8th February 1901 the Sheriff-Substitute (BALFOUR) before answer allowed parties a proof of their averments.

The pursuer appealed for jury trial.

Argued for the defenders—The action was irrelevant. The gutter was a place that was always more or less depressed below the level of the street. The pursuer should have stepped over more carefully. In the most favourable view of the case for her, she was at least guilty of contributory negligence—*Driscoll v. Partick Burgh Commissioners*, January 10, 1900, 2 F. 368, 37 S.L.R. 274.

Argued for the pursuer—The case was relevant. The gutter was out of repair, and had been so for a month before the accident. The defenders had therefore ample time to see the defect in their ordinary inspection of the public street. The pursuer had not been guilty of contributory negligence. She was entitled to take it for granted that the defenders had performed their duty. Besides, there was no light to show the dangerous condition of the grating, and it was absurd to contend that it was the duty of foot-passengers to strike matches in order to find their way about the public streets of Glasgow.

LORD JUSTICE - CLERK — The question whether the existence of a hole in a street will form a good ground of action against the road trustees is very much a question of position and degree. If a hole of any size is left unattended to in the middle of the causeway, or in the pavement, it is quite obvious that it will be a source of danger to the public, especially after dusk, because they are entitled to expect that the causeway and the pavement will be kept in a condition safe for traffic, or guarded and lighted if it is not so. But there is another part of the street which is in a different position, namely, the gutter. It is on very exceptional occasions that any member of the public walks in this part of the street. They usually step across it, and of course must be careful in doing so. As a rule the gutter lies in a depression between the pavement and the causeway. In some places there is no gutter except what is formed by the fall of the causeway as it approaches the pavement, the edge of

which rises abruptly above it. I do not for a moment say that there might not be a defect in the gutter which would form a good ground of action. There might be circumstances connected with it which would cause serious danger of a substantial kind. Thus if a gutter grating were taken away and no fence was put round the hole caused by its removal, that, I think, might give rise to a good claim for damages. But this is not a case of that kind. A gutter grating in a street is, as a rule, depressed below the level of its surroundings in order to prevent an overflow, and to let the water get at once down through the grating more easily. A person stepping off the pavement into the gutter must reasonably be expected to look first of all to its condition, and step off with caution. I do not think that there are circumstances stated on record sufficient to constitute actionable fault on the part of the defenders.

LORD YOUNG—The iron grating here is said to have been sunk about four inches below the level of the street. These iron gratings are more or less numerous in the water-channels of the streets, and the water-channels themselves and the gratings in them are liable to the tear and wear incident to such things. A grating in a water-channel, where water is running with more or less frequency, according to the state of the weather, will not last in a perfect condition always. It gets out of repair, and out of position; and when it gets notably into that state, I think that the public authorities may very reasonably expect that their attention will be called to it. But this grating did not get so notably out of repair and out of position as to be apparent to the pursuer, who had occasion to cross it going and coming across the street. Carriageways, foot-pavements, and streets are always getting worn by the lapse of time and by the weather, and the magistrates and city authorities can do no more than have reasonable attention paid to them. I do not think that there is anything stated on this record to show that the magistrates or city authorities did not do their duty. Indeed, it is stated that as soon as their attention was called to the matter by this having occurred, the grating was raised to the level of the street. The pursuer's contention comes to this, that if any part of a street is an inch or two below the ordinary level of the street, and if any person stumbles over it for want of such care as ought to be given by people who are using public streets, that person has a good claim for damages against the street authorities. I am not disposed to do anything which would give countenance to such an undesirable result as that. I am therefore of your Lordship's opinion that the action is irrelevant.

LORD TRAYNER—I think the action is irrelevant.

LORD MONCREIFF—I concur.

The Court sustained the first plea-in-law for the defenders and dismissed the action.

Counsel for the Pursuer—A. S. D. Thomson—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders—Shaw, K.C.—Cooper. Agents—Campbell & Smith, S.S.C.

## HIGH COURT OF JUSTICIARY.

Monday, November 4.

(Before the Lord Justice-General, Lord Adam, and Lord Kinnear.)

DEANS v. MITCHELL.

*Justiciary Cases—Review—Relevancy—Citation—Declinature to State Grounds of Preliminary Pleas Before Trial—Public-Houses Acts Amendment (Scotland) Act 1862.*

An hotel-keeper was charged with a contravention of the Public-Houses Acts Amendment (Scotland) Act 1862, sec. 2, and was cited to answer to the complaint on induciæ of three days. He appeared on the day named in the citation, and pleaded not guilty. Preliminary pleas were stated that the complaint was irrelevant, and that the accused had not been legally cited. The prosecutor asked for an indication of the grounds of these pleas, but none was given and the pleas were repelled. Accused was convicted.

*Held*, in a suspension, that in respect the complainer had declined to state his objections to the relevancy and to the citation before the case went to trial, he must be held to have passed from these preliminary pleas, and was not entitled to plead them in the Court of Appeal to the effect of suspending the conviction.

Walter Deans, hotel-keeper, Royal Hotel, Lerwick, was charged, in the Burgh Court, Lerwick, on a complaint under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, at the instance of Leslie Elmslie Mitchell, Burgh Prosecutor, with a contravention of sec. 2 of the Public-Houses Acts Amendment (Scotland) Act 1862, in respect that he did on Sunday 23rd June 1901 sell "to David Buchan, fisherman from Gordonsburgh, Buckie, Banffshire, then residing at Lerwick aforesaid (temporarily), who was neither a lodger in said hotel nor a traveller, a bottle containing two and a-half or thereby gills of whisky or other excisable liquors, and such offence is a first offence, whereby, and in virtue of the Act 9 Geo. IV. cap. 58, sec. 21, the said Walter Deans is liable to a penalty not exceeding five pounds sterling, with the expenses of conviction, to be ascertained on conviction, and in default of payment within fourteen days next after conviction, to be imprisoned for a period not exceeding one calendar month; and further, to have his said certificate declared forfeited and void and null."