a husband has no curatorial duty to give his consent to an unfounded action, and that if he does so it is sufficient participation to render him responsible in expenses. It is very difficult, perhaps impossible, to lay down any rule for these cases. Each case must depend on its special circumstances, although, of course, it is quite right that we should have regard to the previous cases which have been laid before us.

LORD KINNEAR—As soon as it is determined—and as I understand all your Lordships agree in holding—that the concurrence of a husband in an action in his wife's name does not of itself render him liable in expenses, then I think the question comes to be whether in any particular case he has taken such an active part in the case as to make it proper that he should share in the expenses. That is a proper question for the judge who tries the case, and I should not be prepared to dissent from his judgment; but having regard to the explanation which your Lordship in the chair has given us, I concur in the decision which your Lordship proposes.

The Court applied the verdict, and found the pursuer and her husband jointly and severally liable to the defenders in expenses.

Counsel for the Pursuer—Munro. Agent—James G. Bryson, Solicitor.

Counsel for the Defenders—King. Agents—Hope, Todd, & Kirk, W.S.

Friday, November 1.

SECOND DIVISION.

[Lord Low, Ordinary.

MENZIES *v.* MARQUIS OF BREADALBANE.

Property—Right of Access—Access of Necessity—Only Access across River or through Neighbour's Lands.

A proprietor whose lands lay on the north bank of a river owned also certain land, formerly an island, but now united to the south bank, to which he could obtain access only by crossing the river from his own lands on the north or by passing through the lands of the adjoining proprietor on the south. In an action of declarator at his instance against the proprietor of the neighbouring lands lying to the south, in which he claimed a right of access through the defender's lands as necessary for the reasonable use of his property, *held* (1) that as the pursuer could obtain access to his own lands by crossing the river, the alleged necessity of access through the defender's lands did not exist, and (2) that even assuming the pursuer to have no means of access to his own lands, in the absence of some relation other than mere neighbourhood between the parties, such as seller and purchaser or superior and vassal, there was no legal obligation on the defender to afford him such access.

Sir Robert Menzies of that Ilk, Baronet, raised an action of declarator against the Marquis of Breadalbane, in which he concluded *first* for declarator "that the pursuer, as heritable proprietor of the northern half of the lands known as Farleyer Island, in the parish of Dull and county of Perth, is entitled to a right of access to and egress from his said half of Farleyer Island through the defender's lands to the public road leading from Kenmore to Aberfeldy;" and *second* for declarator that he had right to such access by means of a gate at the west end of the march fence which separated his half of said island from the defender's, and thence by a roadway or track leading through the defender's lands to a gate opening upon the said road from Kenmore to Aberfeldy.

The pursuer, whose lands at this point lay on the north bank of the Tay, was proprietor of the northern part of Farleyer "Island," a piece of land about 18 acres in extent, which apparently was at one time in fact an island, but was now, except in time of high flood, united to the south bank of the river. The southern half of the "island," together with Bolfracks Haugh by which it was bounded on the south side, belonged to the defender.

A march fence running east and west separated the pursuer's from the defender's half of the "island."

The pursuer averred that the only available access to Farleyer Island was from the Bolfracks side through the defender's lands, and that said access was necessary for the reasonable enjoyment of his property. In particular, he claimed the right to use a gateway situated towards the west end of the said march fence, and a road leading therefrom to a gate at the west end of Bolfracks Haugh and opening upon the said public road, and averred that this was the only safe and constant access available to his half of Farleyer Island, and that it was necessary for the reasonable enjoyment of his property.

The defender denied that the only available access to Farleyer Island was from the Bolfracks side, and averred that the pursuer could obtain access to his portion of the island by crossing the Tay.

The pursuer averred further that the access claimed by him was part and pertinent of his lands, or otherwise that he had acquired right to it by prescription. The defender denied these averments.

The defender, while denying the pursuer's right to the access claimed by the west end of the march fence, offered to the pursuer an access by the east end of the line of march, which he explained would be less burdensome to the defender. He further offered *ex gratia* to give a gate at the west end for egress in times of emergency, to be used only for live stock, and on payment of 1s. a-year if asked.

The pursuer refused these offers, and thereafter raised the present action.

The pursuer pleaded, *inter alia*—"(1) The pursuer, as proprietor of the subjects described in the summons, being entitled to access to and egress from his said half of Farleyer Island as part and pertinent thereof through the defender's lands, he is entitled to decree in terms of the first conclusion of the summons. (5) The access claimed being necessary for the reasonable use of the pursuer's property, he is entitled to decree."

The defender pleaded—"(1) The pursuer's averments are irrelevant. (2) The defender ought to be assoilzied, in respect (*a*) that the pursuer has no right to the access claimed by him, either in virtue of his titles or of any possession or servitude use had by him or his predecessors, or on any other ground; (*b*) that the pursuer's averments, so far as material, are unfounded in fact."

The Lord Ordinary (LOW) before answer allowed a proof. The import of the evidence, so far as is necessary for the purpose of this report, is set forth in his Lordship's opinion *infra*.

On 17th January 1901 the Lord Ordinary pronounced this interlocutor:—"Finds (1) that the pursuer has not established that he has acquired right to an access to the portion of Farleyer Island belonging to him along the west side of Bolfracks Haugh, belonging to the defender; (2) that the defender has formed a road at the east end of said haugh connecting the pursuer's portion of Farleyer Island with the public road leading from Kenmore to Aberfeldy, for the purpose of being used as an access to the said portion of Farleyer Island, and that the defender has further offered, and has undertaken on payment of one shilling a year, if asked, for the privilege, to consent to a gate being put in at the west end of the march fence by which Farleyer Island is divided, for the purpose of being used by the pursuer for the removal of live stock from his portion of Farleyer Island when by reason of a flood in the river Tay it is impossible with safety to remove such stock by the said road at the east end of Bolfracks Haugh; and (3) that the said road, with a gate at the west end of the march fence to be used as aforesaid, will constitute a reasonably sufficient access to the pursuer's said lands: Therefore, in respect of the construction by the defender of said road and his offer and undertaking in regard to the said gate, finds that it is unnecessary to dispose of the first declaratory conclusion of the summons, and dismisses the same, and assoilzies the defender from the remaining conclusions of the summons, and decerns: Finds the pursuer liable in expenses," &c.

Opinion.—"I think that it is not doubtful that at one time Farleyer Island was, as its name implies, truly an island. The course of the channel which divided it from the lands of Bolfracks can still be traced throughout the greater part of its length. It must, however, have been silted up a very long time ago, because the earliest plan which has been produced, and which is dated in 1769, shows that Farleyer was at that date no longer an island, although it was only connected with the south bank of the river by a narrow neck.

"The old island of Farleyer was divided in practically equal parts between the Menzies estate on the north and the Bolfracks estate on the south—the northern half of the island belonging to Menzies and the southern half to Bolfracks. So long as Farleyer remained an island, the probability is that no question could arise as to a right of access by either proprietor over the lands of the other, because each proprietor would reach his portion of the island by crossing the branch of the river which lay between it and his lands. When, therefore, the southern branch of the river became silted up, and what had formerly been an island became part of the south bank, no right of access from that bank would necessarily arise to the proprietor of the northern part of the old island. If such a right exists upon a definite line, it must have been acquired subsequent to the silting up of the south channel.

[*His Lordship examined the evidence as to the use alleged by the pursuer, and expressed the opinion that he had failed to establish a right of access by prescription.*]

"The pursuer contends alternatively that he is entitled to the access which he claims as a way of necessity. The argument is, that although Farleyer may at one time have been an island, it has ceased to be so for at least a century and a half, and during that period has been used for pasture, or for hay crop, and indeed at one time seems to have been ploughed. The pursuer contends that he is entitled to continue such use of the lands, and that to enable him to do so it is absolutely necessary that he should have an access by land.

"The defender has recognised the force of that view to this extent, that while denying any absolute right on the pursuer's part, he has offered to him an access to the nearest point of the adjacent public road—that is, at the east end of the island. . . . [*After examining the evidence as to the reasonableness of the defender's offer, his Lordship proceeded*]—"It seems to me that the access offered by the defender will enable the pursuer to continue to use his lands for the purposes to which they are suited, and for which they have been used in the past, and that the small additional benefit which the pursuer would derive from having a road to the west would not justify the imposition upon the defender's lands of the burden which such a road would involve.

"I am therefore of opinion that the pursuer is not entitled to declarator that he has right to a road running along the west side of Bolfracks Haugh."

The pursuer reclaimed, and maintained, in addition to the pleas disposed of by the Lord Ordinary, that the defender was bound to afford him a reasonable and safe access through his lands, in respect that this was necessary to the reasonable enjoyment of the pursuer's lands, and cited Stair ii. 7, 10; Erskine, ii. 6, 9; ii. 9, 12—*M'Laren* v. *City of Glasgow Union Railway Company*, July 10, 1878, 5 R.

1042, 15 S.L.R. 697. The pursuer maintained that the access offered by the defender was not such as he was bound to accept, and that he was entitled to the particular line of access which he claimed.

Argued for the defender—In the absence of some relation between the parties other than neighbourhood, the defender was under no legal obligation to provide the pursuer with an access through his lands. There was no authority in the law of Scotland for such a contention.—Stair ii. 3, 79; ii. 7, 10; Erskine ii. 9, 12. Even if the law were as maintained by the pursuer, he was not, in fact, shut out from his own property. His own lands lay immediately on the other side of the river, and he could obtain access by a ford or a bridge.

At advising—

LORD TRAYNER — The pursuer claims right to the road in question on three grounds—(1) that it is an access of necessity; (2) that it is a part and pertinent of his lands; and (3) that at all events he has acquired a right of servitude over the road by prescription.

With regard to the first of these grounds it was maintained by the pursuer that if his land was so situated that he could not get access to it except over his neighbour's land, his neighbour was legally bound to afford such an access. I cannot admit the soundness of that proposition. If a man buys land to which there is no access (although such a thing is scarcely conceivable) he is obviously buying something in itself of no marketable value. But according to the pursuer's contention that man's neighbour is bound to dedicate a part of his own property to afford an access, that is, the neighbour is, to his own loss, to do something which will enhance the value of the property of another. I quite understand that where anyone acquires land from another he may require that other to give him both ish and entry to and from the land acquired. But where there is no relationship such as seller and buyer or superior and vassal between the two, and nothing but mere neighbourhood, I see no authority or principle which could sustain the pursuer's contention. But assuming the soundness in law of the pursuer's contention, it cannot be sustained here, because the necessity which is the foundation of that contention is here non-existent. The pursuer has ample means of access to the land called Farleyer Island without resorting for such to his neighbour's land. He has access to it by fording the river, he can have access to it by boat, or he may erect a bridge connecting Farleyer Island with the lands of Menzies on the opposite bank of the Tay. These modes of access may not be the most convenient or the cheapest, but the defender has nothing to do with such considerations. The plain fact is that the pursuer has or can afford himself access to Farleyer Island without going on the defender's land. The "necessity" on which his first ground of claim is based fails in fact, and the legal argument founded on the supposed or alleged fact fails as a consequence.

On the second and third grounds of the pursuer's claim I am of opinion that the pursuer has failed to prove such possession in point of extent, character, and time as are necessary to establish that the road in question is a part and pertinent of the pursuer's lands, or to establish by prescription a right of servitude over the road.

I do not differ from what the Lord Ordinary says with regard to the reasonableness and sufficiency of the access from the east which the defender has offered to the pursuer, or the reasonableness of the defender's offer as to the use of the west gate. But I do not regard these as material to the decision of the case. If the pursuer and defender can come to an agreement about this access well and good. But the pursuer claims certain things as his of legal right, which I think he has failed to establish. I would therefore merely sustain the defences and assoilzie the defender.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against and assoilzied the defender.

Counsel for the Pursuer and Reclaimer—Campbell, K.C.—D. Anderson. Agents—W. & J. Cook, W.S.

Counsel for the Defender and Respondent—Wilson, K.C.—Dewar. Agents—Davidson & Syme, W.S.

Friday, November 1.

SECOND DIVISION.

[Sheriff of Perth

MENZIES *v.* MARQUIS OF BREADALBANE.

Property — Boundaries — River — Alveus — Medium filum — Mode of Ascertaining Medium filum where Channel Divided by Islands.

The proprietor of a barony on the north bank of the Tay, near Aberfeldy and admittedly bounded by the *medium filum* thereof, brought an action against the *ex adverso* proprietor, whose lands were bounded by the "water of Tay," for declarator that certain gravel banks or islands belonged to the pursuer, in respect that they lay wholly on his side of the *medium filum* of the river. It was proved that at the point in dispute the Tay ran beween well defined banks, but was divided by the islands into two channels; that the greater body of water flowed down the south or defender's side of the islands; that when the river was ordinarily full a certain quantity always flowed down the north channel, although opposite one of the islands that channel was sometimes apparently dry for about two months during summer.