ties are illustrated in the recent case of *in re Drummond*, [1914] 2 Ch. 90. As Lord Watson pointed out in *Pemsel's* case, there has been no occasion in Scotland to draw a hard and fast line between charitable and other public trusts, and I must decline the invitation which was made to us by the counsel for the Crown to introduce such a distinction in the present case.

The following authorities were cited at the debate as bearing on the position of the Lord Advocate in regard to charities, viz., a dictum of the Lord Chancellor (Cairns) in *Magistrates of Aberdeen* v. *University of Aberdeen*, (1877) 4 R. (H.L.) 52, and a dictum of Lord Deas in *Mitchell* v. *Burness*, (1878) 5 R. 959. We were also favoured with a copious citation of English decisions, but I do not think it necessary to allude to more than two of them. The case of *in re Macduff*, already cited, is interesting as showing that however wide may be the legal conception of a charitable purpose in the law of England, there may yet in the opinion of eminent English Judges be philanthropic purposes which are not charitable. Again, the case of *in re Slevin*, [1891] 2 Ch. 236, seems to be very similar to the present one, except that the Attorney-General there appeared for the purpose of supporting, and not, as does the Lord Advocate in the present case, for the purpose of defeating, the charity. In the concluding passage of his opinion, Kay, L.J., made it clear that he did not proceed upon the ground of any supposed "general charitable intention." I understand (though I do not profess to be sure) that his statement that the "property falls to be administered by the Crown, who will apply it according to custom for some analogous purpose of charity," does not imply that such application of the funds was a mere act of grace on the part of the Sovereign who, but for a contrary custom, might have appropriated them as *bona vacantia*.

In order to avoid misapprehension, I may say that I have looked through the long series of cases in which the property of dissenting churches and congregations, and more particularly the property of congregations of the Secession Church, has formed the subject of litigation in our Courts. I have found nothing in the way either of decision or of judicial dicta which goes to support the judgment of the Lord Ordinary. On the other hand, I have found nothing in any of these cases which I can usefully cite in support of the judgment which I advise your Lordships to pronounce, and which is as follows:—Recal the interlocutor of Lord Cullen, dated 24th June 1913, and repel the claim for the Lord Advocate: Remit the cause to the Lord Ordinary in order that he may give to the defenders fourth called, viz., the Reverend Ebenezer A. Davidson, 12 Argyle Place, Edinburgh, minister, and John Youngson, 76 Marchmont Crescent, Edinburgh, clerk of kirk-session of the congregation of United Original Seceders worshipping at 7 Victoria Terrace, Edinburgh, as representing said congregation, an opportunity to tender, if so advised, a condescendence and claim in the present action claiming the fund *in medio* as of right, and in order that he may receive such claim if tendered on such terms as he thinks fit, and may thereafter dispose thereof, all as to the Lord Ordinary shall seem just; with further instructions to him to prepare a scheme for the administration of the fund *in medio* in the event of his deciding that the trust purposes for which the said fund was originally held have failed.

The LORD PRESIDENT and LORD JOHNSTON concurred.

LORD MACKENZIE was not present.

The Court recalled the Lord Ordinary's interlocutor, and remitted to him to give to the Victoria Street congregation an opportunity of tendering a claim as of right, with instructions to him to prepare a scheme for the administration of the fund in the event of his deciding that the original trust purpose had failed.

Agents for the Pursuers — Ronald & Ritchie, S.S.C.

Counsel for the Reclaimers — Christie, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Counsel for the Claimants the Synod of the United Secession Church — Macphail, K.C.—Normand. Agents—Traquair, Dickson, & M'Laren, W.S.

Counsel for the Lord Advocate—The Solicitor-General (Morison, K.C.)—Smith Clerk. Agent—James Ross Smith, S.S.C.

Wednesday, July 15.

FIRST DIVISION.

M'ILWAINE *v.* STEWART'S TRUSTEES.

Reparation—Property—Landlord and Tenant—Negligence—Defective Premises—Possession and Control—Access—Outside Wooden Stair and Gangway.

A shop was situated in the upper storey of a two-storey building and was reached by an outside wooden stair and gangway which led to no other premises, but had no gate on it and consequently was open to the public. The tenant had no written lease but occupied from year to year. When he first proposed to take the premises there was no stair and gangway, the access being internal, and these, without any definite stipulation, were erected to make the premises suitable. The landlord had executed repairs on the stair and gangway from time to time as he had also on the shop itself. In an action against the landlord by a customer of the tenant to recover damages for personal injury caused by an accident due to a decayed plank in the gangway, *held* (*dub.* Lord Skerrington) that there was no evidence of a duty on the part of the defenders to-

wards the pursuer to maintain the wooden gangway in a safe condition.

Process—Jury Trial—Bill of Exceptions—Motion to Apply Verdict after Exceptions Disallowed but before Time for Appealing has Expired—Jury Trials (Scotland) Act 1815 (55 *Geo. III, cap.* 42), *secs.* 7 *and* 9.

In a case where a bill of exceptions had been disallowed a motion to apply the verdict was made within the period of fourteen days allowed for an appeal to the House of Lords by the Jury Trials (Scotland) Act 1815, section 7. The Court applied the verdict.

Expenses—Husband and Wife—Reparation—Action by Wife with Consent of Husband—Liability of Husband.

In an action of damages for personal injury by accident brought by a woman with the consent and concurrence of her husband, the pursuer was unsuccessful. The husband and wife were partners together in a business, and at the trial the husband appeared and gave evidence. The Court found the pursuer and her husband jointly and severally liable in expenses.

On 3rd September 1913 Mrs Margaret Allan or M'Ilwaine, wife of Thomas M'Ilwaine, ironmonger, 16 Bute Terrace, Strathbungo, with his consent and concurrence, *pursuer*, brought an action against John Charles Stewart and others, the testamentary trustees of Francis Pott Stewart, of Craigweil, Ayr, *defenders*, to recover £250 as damages caused by a personal accident to the pursuer averred to be due to the negligence of the defenders.

The pursuer averred—"(Cond. 2) The pursuer and her husband carry on business in partnership as ironmongers and general hardware dealers under the firm name of Thomas M'Ilwaine & Company. The pursuer and her husband are the sole partners of the said firm, and are equally interested therein. Prior to the date of the accident aftermentioned the pursuer took full charge of the shop at 16 Bute Terrace, Strathbungo, belonging to the said firm, and also attended to the accounts in connection with the business, while her husband was for the most part engaged outside of the shop in executing plumber work, repairs, &c., and in following his own trade as a locksmith." The husband appeared at the trial and gave evidence.

The defenders were the proprietors at 114 Trongate, Glasgow, of a two-storey building, the upper flat of which was occupied by Messrs E. W. Powell & Co., electroplaters, and was reached by a wooden stair with a wooden gangway from the top of the stair to Messrs Powell's office door. The stair and gangway led nowhere else. On 31st January 1913 the pursuer was returning along the gangway after paying a bill to Messrs Powell when a plank giving way she met with an accident.

The *evidence* as to possession and control of the stair and gangway was given at the trial before Lord Ormidale and a jury on May 19, 1914, by E. W. Powell as follows—"I am sole partner of the firm of E. W. Powell & Company, electroplaters there. I am a tenant of the premises, the landlord being Stewart's trustees, the defenders in this action. I have been fully twenty years in the premises—twenty to twenty-two years. When I originally took the shop there was no outside stair. The premises were reached by an inside stair. The rent was £20. It has continued to be that all along. You had to go through two closes to get to it from the street. It is a very old property. Shortly after I went there the outside stair in question and the gangway were erected by the landlord as an access to my shop. My premises consist of a workshop at the back, a small room where the girls work at the front, and a small room used as an office at the other side. The gangway and stair were not part of the premises let to me, only the shop. I had nothing to do with the stair. I had no written lease. It is by the year. Since the stair and the gangway were erected repairs have now and again been made. These have been made by the factor alone. I have never done anything, and as far as I know I have no duty to do so. I have taken no charge of the stair. There is no covering over the gangway or stair. They are quite open. They are not roofed or enclosed. I was never asked by the landlord or by the factor to take any charge of the stair, or be under any obligation to maintain it. It never occurred to me that I had any duty whatever in respect of that. It was the duty of the factor to keep it in order and to inspect it regularly. The factor is Mr Macskimming. He is a joiner and wright. He is the factor for the defenders. He does all the factoring for the property. I don't pay my rent to him; I pay my rent to Mr Stewart Pott. I believe he was the previous occupant of these premises. (Q) It is said by the defenders in answer 4 that the gangway and stair were used 'as a means of access of the said Messrs E. W. Powell & Company, who are tenants of the defenders, and in whose possession and control the said gangway was at the date of the accident, and has been throughout the whole period of their tenancy.' Is that true?—(A) No, it is not. There is no gate at the foot of the stair. I lock the door of my premises when I leave, and I can exclude people from them, but not from the stair. I remember that in November 1907 certain repairs were made to the stair by the defenders' factor. I cannot just recall to mind what was the nature of the repairs made then, but there seemed to be a great deal of repairs done at that time. (Q) But was part of the old wood of the gangway left where it was, or can you remember?—(A) I cannot tax my memory as to that, but it is quite possible; I don't remember. I took nothing to do with it. These repairs that were executed by the defenders or their factor in 1907 were done by them at their own hand without complaint by me, and they in point of fact took charge of the stair. . . . (Q) Do you remember what was the last repair that was made before the accident; was it to the stair or to the steps at the foot of the stair?—(A) There were some new steps put in—a sort

of ladder. The previous steps had become decayed. I cannot just remember how long that was before the accident. It did not run into years. It was somewhere about 1911 that some steps were renewed. I don't think anything had been done to the gangway itself for a longer period. The piece of wood shown to me by Mr M'Ilwaine was the piece that had given way; I saw that. One end of the wood was very very soft, like touchwood, and the other end had a clean break. . . . The old break was quite soft. I think that an ordinary reasonable inspection by anyone would have shown that. . . . *Cross.*—I took the premises about twenty years ago. I cannot recall the exact year. . . . When I took this place first I got to it by an inner stair. (Q) How did you get to that inner stair?—(A) The shop underneath mine was a store; the ground floor was the only entrance. That was a store belonging to the previous occupants. When I was asked if that shop on the top storey would suit me I said I would like to see it. To get into my upper place where I am now I went through the door and up a winding stair, and then I got into my place. (Q) Of course you thought it was very inconvenient to go into some other person's premises to get into yours?—(A) No, I did not think anything about that. (Q) Wasn't it inconvenient?—(A) I should never have taken it if it had been left. (Q) It was so inconvenient to go through the store which belonged to or was occupied by somebody else and up this winding stair that you would not have taken the premises. Is that what you mean?—(A) That is what I mean. (Q) Did you stipulate before you took the upper premises that you were to get a stair of your own?—(A) No; I took the shop, and the factor said he would put up an outside stair. I took the shop from what I saw that day. I took the upper storey, and the factor when I took it said he would make alterations and put up an outside stair for me. (Q) Didn't it come to this, that when you saw the place you said—'Well, I think I will take it, but I cannot have going through this store and going up that winding stair?'—(A) The thing was left to the factor to do what he liked after that. . . . (Q) But for his saying he would give you an outside stair you would not have taken the premises?—(A) No, certainly not. The shop was finished before I went in. The outside stair was put up before I entered the premises. (Q) And the stair and gangway were put up for your accommodation?—(A) Not solely for my accommodation. (Q) For whose accommodation?—(A) For the public; anybody can come into that court and up the stair, and I consider I have no right to put them off. Any member of the public can come up my stair and along my gangway. (Q) Do you mean to say that the public could come in and sit on the stair steps and the gangway, and you would not be entitled to order them off.—(A) Yes, I should not think it my duty to order them off unless they committed a nuisance. (Q) Wouldn't it be a perfect nuisance if you had the public coming in and sitting on the steps of your shop?—(A) It is the steps of the stair and not the steps of my shop? (Q) Am I to take it from you seriously as a business man that this stair and gangway were put up to accommodate the public who might come in there from the street, and might want to sit on the steps and gangway?—(A) It was to accommodate those who come to bring work to me, but if any strangers come up there they have a perfect right to sit or walk up and down those steps, and I have no right to turn them off. They have no right to come into my shop; I can lock the door against that. (Q) I suppose the landlord would have no right to object to them either?—(A) He could object. I have been told that if I had the custody and control of the gangway and stair I would be liable for this accident. . . . . I have seen people from the street sitting smoking, but apart from that nobody came there except the people who were going up and down to my shop. We swept down this gangway and stair and kept them clean. The landlord had all the control. (Q) Tell me anything he ever did in the way of exercising control or possession?—(A) By repairing the stair from time to time; I should think that was control sufficiently. (Q) Is that the only thing he ever did?—(A) He never turned anybody off. (Q) Except repairing it from time to time, did he ever exercise any possession or control over the gangway or the stair?—(A) I don't know that he did; I don't think so. (Q) In that respect did the gangway and stair differ in any way from the inside premises?—(A) It is quite different; I did not take the stair; I took the shop only. (Q) In that respect did the gangway and stair differ in any respect from the inside premises in respect of possession or control?—(A) I never considered myself to have control over the stair; I had no power to lock anybody out of that stair. (Q) You had no power because there was not a gate at the bottom of the stair?—(A) That is so, and I had no control over it. (Q) Did the landlord exercise any possession or control over the stair, differing from what he did over the inside premises—the shop?—(A) I can hardly follow you. The landlord did the repairs for the shop as well. (Q) So that he treated the gangway and stair exactly in the same way as he treated the shop?—(A) He did all the repairs on the shop, or anything broken belonging to the factory. (Q) Your answer is yes, that he just treated, as far as possession and control and repairs were concerned, the gangway and stair the same as the shop?—(A) No, I don't think so. (Q) Tell me any difference?—(A) Well, if there was a breakage on the stair, and if the stair had to be repaired, I generally sent him a postcard to tell him or remind him that there was a breakage. If I saw him about the premises, inspecting the premises, I might point it out to him, but otherwise he would do it himself, and if there was anything wrong with the shop or a window broken I would speak to him. (Q) So far as possession and control were concerned, he was in no different position with regard to the gangway and stair from what he was with regard to the shop?—(A)

Well, I should think so, because I consider the shop belonged to me because I paid for it, and I had a key and I could lock out anyone."

At the conclusion of the pursuer's evidence, counsel for the defenders moved the Court to direct the jury that the pursuer had adduced no evidence to maintain and prove her contention under the said issue, and in particular no evidence of a duty on the part of the defenders towards the pursuer to maintain the said wooden gangway in a safe condition, and that the jury should return a verdict for the defenders.

WATT, K.C., for the pursuer, objected, and contended (1) that facts had been proved from which the jury might reasonably infer a duty on the part of the defenders towards the pursuer as a member of the public to maintain the said gangway in a safe condition; (2) that evidence had been adduced showing that the defenders in fact recognised such a duty to maintain the said gangway in a safe condition, and employed a factor to discharge the said duty on their behalf; and (3) that it was admitted by the defenders in their written pleadings that a factor was employed by them to inspect, *inter alia*, the said gangway from time to time on their behalf, and to effect whatever repairs such inspection disclosed to be necessary.

LORD ORMIDALE repelled the objections of the pursuer's counsel, and directed the jury that the pursuer had adduced no evidence in law sufficient to maintain and prove her contention under the said issue, and that they should return a verdict for the defenders.

Whereupon counsel for the pursuer excepted to the said direction.

The case was heard on July 9th, when the following authorities were quoted—for the defenders—*Cavalier* v. *Pope*, [1905] 2 K.B. 757, [1906] A.C. 428; *Cameron* v. *Young*, 1907 S.C. 475, 1908 S.C. (H.L.) 7, 44 S.L.R. 344, 45 S.L.R. 410; *Mathieson's Tutor* v. *Aikman's Trustees*, 1910 S.C. 11, 47 S.L.R. 36; *Kennedy* v. *Shotts Iron Company, Limited*, 1913 S.C. 1143, 50 S.L.R. 885; *Grant* v. *Fleming*, 51 S.L.R. 187; *Cook* v. *Paxton*, 1910, 48 S.L.R. 7,—and for the pursuer—*Deans* v. *Grove*, referred to by Lord Hunter in *Mellon* v. *Henderson*, 50 S.L.R. 708, at p. 710; *Cleghorn* v. *Spittal's Trustees*, February 27, 1856, 18 D. 664; *M'Martin* v. *Hannay*, January 24, 1872, 10 Macph. 411, 9 S.L.R. 239; *Miller* v. *Hancock*, [1893] 2 Q.B. 177.

LORD PRESIDENT—It appears to me that the course taken by the presiding Judge at the trial was not only formally but in substance correct, and that the verdict of the jury given under his direction was sound and unassailable.

The question which we have to consider is whether or no their unanimous verdict in favour of the defenders is contrary to evidence. Now the only evidence given was that adduced on behalf of the pursuer herself. An accident befel her on the 13th January 1913 when she was on a lawful errand (I assume) to the workshop owned by the defenders and in the tenancy of a person named Powell. The gangway from which she fell in consequence of its dilapidated condition formed the sole access to Powell's premises, but, what is more to the purpose, to nowhere else. Powell depones not only to these two facts, but also to the fact that he would not have taken the premises unless this access had been given to him by the proprietors when he effected his lease.

It appears to me, therefore, to be the legitimate inference from Powell's evidence that the staircase and the gangway were as much let to him as the workshop itself, and that the whole premises for which he paid rent included staircase, gangway, and workshop. No doubt he says that he had no right to exclude members of the public from the gangway and the staircase. I think he understated his rights in law when he said so, and that he was entitled at any time he pleased to exclude anybody he pleased from the use of that staircase and gangway. He could have put up a gateway. He could have prevented anybody from using it, and he could have regulated its use exactly as he thought fit. If that is a correct statement of Powell's rights, then unquestionably he was, to use the words of the pursuer's record—words that have been repeated so often in cases of this description—"in the control and possession of these premises," for I take that phrase to mean simply this, that the premises have been let to the tenant, and that he has the right to exclude therefrom anybody he pleases and to regulate their use as he pleases.

That was the sole evidence, then, given in the case on this vital topic, because your Lordships will see at a glance that this record would have been held irrelevant and the action would have been thrown out unless the pursuer had averred that the owner was in the control and possession of the staircase, and necessarily would have failed at the trial if she did not succeed in proving that averment.

Now it appears to me that the evidence was all one way upon that one vital topic. It is said by Mr King Murray—and he has referred us to evidence in support of his statement—that the gangway was in a dilapidated condition, and I assume that it was so for the purposes of my judgment. But then it is well-settled law—and has been well-settled law since the days of *Robbins* v. *Jones*, (1863) 15 C.B., N.S. 221—that a landlord who lets a house, including the access to the house, if it is the access to that house alone and in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term of the lease; and accordingly, however dilapidated was the condition of this staircase at the time when the accident befell the pursuer, it appears to me that the owner of the property at all events was not responsible to her for any mischief which might befall her.

Our attention has been directed to the fact that in the fourth answer to the condescendence the defenders expressly state that they employed a competent man to inspect the premises, that he did inspect, and that repairs were made whenever repairs were

found to be necessary; and Mr King Murray strongly founded upon that statement as indicating clearly that in his case, differing from the ordinary case, the owner had undertaken an express duty to inspect and repair. That may have been so, and I assume that it was so, but that was a duty that was undertaken to the tenant and not to the tenant's guests and customers; and accordingly if that duty was undertaken, and if there was a failure to perform that duty, it might be, for aught that I know, that if an action were brought against the tenant he might claim relief from his landlord.

But that does not in any degree affect the relationship between the tenant's customer and the owner of the property when an accident has occurred in consequence of the dilapidated state of the property. Lord Atkinson in the case of *Cavalier* v. *Pope*, [1905] 2 K.B. 757, [1906] A.C. 428, alludes to such a case as we have before us, where a landlord has undertaken such a duty of repair and inspection. He says—"The control necessary to raise the duty, for a breach of which damages were recovered in the several cases to which we have been referred, implies something more than a right or liability to repair the premises. It implies the right and the power to admit people to the premises and to exclude people from them." In my opinion Powell alone had the right to admit people to the premises and to this staircase and gangway and to exclude people from them, and the landlord had no such right; and accordingly I attach no importance in this case to the averment made in the fourth article of the defences.

The authorities seem to me to be plain. *Kennedy* v. *Shotts Iron Company*, 1913 S.C. 1143, appears to me to almost completely cover the present case, which I hold to be distinguished in a vital particular from all the common stair cases that have been cited, because I think the answer of the common stair cases is remarkably well put by the judgment of Lord Justice Bowen in the case which Mr King Murray cited to us, the case of *Miller* v. *Hancock*, [1893] 2 Q.B. 177—"The defendant let the flats to tenants; but it seems to me plain, upon the facts, that the staircase" which gave access to the flats "remained in his occupation and control. The tenants could only use their flats by using the staircase. The defendant, therefore, when he let the flats impliedly granted to the tenants an easement over the staircase, which he retained in his own occupation, for the purpose of the enjoyment of the flats so let."

The phrase "control and possession" may be liable to criticism and qualification, but it appears to me that it means neither more nor less than this, that the man who has possession and control has the right to exclude from and to regulate the use of the staircase. That right Powell on his own evidence possessed in this case; and therefore the all-essential point in the pursuer's case—that the owner was in control and possession—fails. Accordingly I move your Lordships that this bill of exceptions be refused and the rule discharged.

LORD JOHNSTON—I think that this case is covered by the case of *Kennedy*, 1913 S.C. 1143. The fallacy in the argument of the pursuer seems to me to be in not giving proper force to the fact that you must distinguish between cases founded on contract and cases founded upon the doctrine which is usually termed invitation. As between the tenant and the landlord there may be—I do not say there is, but, putting it at the highest for the pursuer, there may be—an obligation to repair the stair as required. Failure in that obligation might give a right of action to the tenant, but failure in that obligation would not give a right of action to any third party. The third party must found his claim upon the holding out of this access as a proper access to the premises of the occupant. So long as the landlord is in personal occupation, of course it is he who holds out the access; but as soon as he has given over, as he has done here, the exclusive right to the use of his stair to the sole tenant of the premises, he ceases to be in a position to give that invitation, and the only person in a position to give that invitation is the tenant.

On these grounds I not only think that the case of *Kennedy*, 1913 S.C. 1147, was well decided, but that this case is governed by the case of *Kennedy*.

LORD SKERRINGTON—I confess that I have felt great difficulty in this case, and that my difficulties have not been removed by what has fallen from your Lordships. At the same time I am not sufficiently confident of any contrary opinion to justify me in dissenting from the judgment which is proposed.

My first difficulty arises from the circumstance that the gangway was external to the shop and house, and that no means had been provided by the landlord for preventing the public from having access thereto. If we assume that the gangway was in a dangerous condition in the month of May 1912, when the last yearly let commenced, I am not prepared to say that the landlord discharged himself of his duty towards the public by simply continuing the lease. Further, I am not prepared to hold as matter of law that the possession and control of the gangway were with the tenant because it formed an access to his premises and to no others.

LORD ORMIDALE concurred.

LORD MACKENZIE was not present.

The Court refused the bill and discharged the rule.

On July 11th counsel for the defenders moved to apply the verdict, when counsel for the pursuers objected on the ground that they were entitled to fourteen days in which to appeal, but if the verdict were applied now, *i.e.*, five days after the exceptions had been disallowed, as the interlocutor applying the verdict was only appealable on a question arising on the

application of the verdict, they would be deprived of their right of appeal—Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42), secs. 7 and 9.

On July 15th the Court (the LORD PRESIDENT, LORD JOHNSTON, and LORD SKERRINGTON) applied the verdict and assoilzied the defenders.

Counsel for the defenders moved for expenses against the pursuer and her husband jointly and severally, and referred to *Macgown* v. *Cramb*, February 19, 1898, 25 R. 634, 35 S.L.R. 494; *Maxwell* v. *Young*, March 7, 1901, 3 F. 638, 38 S.L.R. 443; *Schmidt* v. *Caledonian Railway Company*, March 10, 1903, 5 F. 648, 40 S.L.R. 460; *Picken* v. *Caledonian Railway Company*, October 26, 1901, 4 F. 39, 39 S.L.R. 31. Counsel for the pursuer referred to *Picken* v. *Caledonian Railway Company*, *cit. sup.*; *Currie* v. *Cowan & Co.*, 1911, 2 S.L.T. 467.

LORD PRESIDENT—We think, on the authorities that have been cited, it is clear that the husband must be made jointly and severally liable with his wife in the expenses of this action. That is not on the ground merely that he has given his consent and concurrence, for it is well-settled law that to give consent and concurrence will not make a husband liable for the wife's expenses. The ground of judgment is that the husband here has taken a prominent and active part in the litigation, for he and his wife seem to have been partners in business together, and therefore he was interested in a peculiar and exceptional way in the issue of this suit, and, indeed, as we see from the notes of evidence before us, appeared as a witness on his wife's behalf.

I am glad to say that we do not require to base our decision in this case on the ground taken by the Court in the case of *Picken* v. *Caledonian Railway Company*, 4 F. 39, but upon the ground stated in the other case—*Schmidt* v. *Caledonian Railway Company*, 5 F. 684—that the husband had taken a prominent and active part in the litigation. Therefore we think that the husband here must be, jointly and severally with his wife, liable in expenses.

The Court allowed expenses against the pursuer and her husband jointly and severally.

Counsel for the Pursuer — Watt, K.C. — King Murray. Agent — D. Maclean, Solicitor.

Counsel for the Defenders — Dean of Faculty (Dickson K.C.)—Lippe. Agents—Macpherson & Mackay, S.S.C.

Thursday, July 16.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

JOHN MACDONALD LIMITED *v.* LORD BLYTHSWOOD.

Reparation—Interdict—Wrongous Use of Interdict—Interdict Infringing No Legal Right—Relevancy.

A company of timber merchants raised an action to recover damages for wrongous use of interdict. The interdict, which was interim, prohibited them from entering or doing certain things on lands which were averred in his note to be included in a lease to the applicant for the interdict, whereas as now averred by the timber merchants they were not. The timber merchants, however, averred no title to enter on the lands. *Held* that the pursuers, having suffered no invasion of any legal right, were not entitled to recover damages, and action accordingly dismissed as irrelevant.

On 28th January 1914 John Macdonald, Limited, timber merchants, Inverness, *pursuers*, raised an action against Lord Blythswood, *defender*, to recover £230, 10s. as damages for wrongous use of interdict.

The pursuers averred — "(Cond. 2) In January 1913 the pursuers purchased from Sir Kenneth Matheson the whole matured timber on the estate of Balmacara, in the county of Ross and Cromarty, with the exception of what was growing within the policies of Balmacara House. Sir Kenneth Matheson, the seller, was proprietor of Balmacara till 1911, when he sold the estate to Mr William James Anton of Lansdowne Lodge, Tyndall's Park, Clifton, Bristol. The timber on the estate, however, was not sold to Mr Anton but remained the property of Sir Kenneth Matheson. (Cond. 5) The pursuers . . . in the execution of their contract in February 1913 proceeded to erect a sawmill at the point marked (1) on the plan. This spot, which from time immemorial has been used by the people of the district for depositing material awaiting shipment, and had been used by the pursuers under . . . . prior contracts, forms part of Mrs Finlayson's holding as after mentioned, and was pointed out to the pursuers by Sir Kenneth Matheson's overseer, under whose direction they proceeded to erect their sawmill. (Cond. 6) In February 1913 the defender raised a suspension and interdict under which he craved the Court "to interdict, prohibit, and discharge the respondents, their agents and servants, and all others acting by their authority, (first) from entering upon any portion of the ground leased to the complainer by minute of agreement between William James Anton of Landsdowne Lodge, Tyndall's Park, Clifton, Bristol, and the complainer, dated the 21st and 24th days of April 1911, being the ground described in said minute of agreement and shown as enclosed within red lines marked upon the plan annexed and signed as relative thereto; (second) from felling, injuring,