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 saw-mill 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 saw-mill. (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,

or otherwise interfering with any of the timber upon the ground so leased; and (third) from erecting a sawmill, or buildings, or other erections of any kind, on said ground or any part thereof, and from digging foundations in, or in any way trenching, cutting up, or interfering with said ground for the purpose of erecting buildings or other erections of any kind thereon; and further, to ordain the respondents to fill up any trenches or other excavations made by them on the said ground, or any part thereof, and to restore the same to the state in which it was prior to the operations of the respondents thereon; and to grant interim interdict." On 25th February and 7th March respectively the Lord Ordinary on the Bills pronounced the following interlocutors:—"*Edinburgh, 25th February* 1913. —To see and answer within eight days, and to be intimated; meantime grants interim interdict. *Edinburgh, 7th March* 1913. —The Lord Ordinary having considered the note for the complainer, in respect the note of suspension and interdict has been duly intimated to the respondents, that the *induciæ* have expired, that no appearance has been entered, nor answers lodged, passes the note, and continues the interdict." (Cond. 7) The interim interdict thus obtained by the defender was obtained on a statement of facts which falsely stated that the whole ground within the red line on the plan was let to him under a minute of agreement dated 21st and 24th April 1911 in his favour by Mr Anton, and that he had the sole right to the use of the ground so leased, and did not disclose the fact of which he was well aware that by order of the Land Court dated 11th July 1912, made in an application which at his special request had been opposed by the landlord, Mrs Finlayson, widow, Balmacara Mains, had been declared to be a statutory small tenant under the Small Landholders (Scotland) Act of the greater part of the subjects comprised in the alleged lease. . . . (Cond. 8) No plan was served upon the pursuers with the note of suspension and interdict, and the pursuers were unaware that the interim interdict was intended to cover, or did in fact cover, Mrs Finlayson's holding. Further, the pursuers were induced by the false statements in the defender's statement of facts erroneously to believe that the original site of their sawmill mentioned in condescendence 5 hereof did not form part of Mrs Finlayson's holding. In that belief the pursuers felt bound to remove the said mill from the said site, and they accepted an offer made by Mrs Finlayson to allow them to erect the mill in a field which the defender admitted to form part of her holding on their paying her £5 an acre for the ground so used, and accordingly removed the mill to the site marked (2) on the said plan. The pursuers believed that they had thus removed all possible cause of objection on the part of the defender, and accordingly allowed the interlocutors of 25th February and 7th March to be pronounced in their absence."

The pursuers pleaded—"The pursuers having in consequence of the interim interdict wrongfully obtained by the defender suffered loss and damage to the extent condescended on, are entitled to decree as concluded for."

The defender pleaded, *inter alia*—"(1) The pursuers' statements being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (3) The defenders should be assoilized in respect that (*a*) the loss and injury alleged to have been sustained by the pursuers was entirely due to their unlawful actings; (*b*) the pursuers were not prevented by any interdict obtained by the defender from doing anything which they had a legal right to do."

On 5th June 1914 the Lord Ordinary (ORMIDALE) having heard counsel for the parties in the procedure roll on the question of relevancy, allowed the parties a proof of their averments.

Opinion.—"The defender pleads that the pursuers' averments are irrelevant and that the action ought to be dismissed.

"I am unable to give effect to this plea. That being so, it is not necessary or desirable at this stage to indicate any opinion on many of the questions discussed at the hearing. It is sufficient to say that in my opinion the pursuers have sufficiently set out that in consequence of an interdict wrongfully obtained against them they have suffered considerable loss and damage.

"With reference to the law ascertained by the case of *Aird* v. *School Board of Tarbert*, 1907 S.C. 305, the facts as disclosed by the pursuers' averments do not warrant its application. The interdict said to have been wrongously obtained has been recalled. That shows that it ought not to have been asked for. That is not sufficient *per se* to found an action of damages. The interdict must have operated a civil wrong. Now the pursuer set out that it did so operate, for it prevented them, *inter alia*, using a portion of ground for the site of their sawmill which they aver they were quite entitled to use; that they were in consequence compelled to change the site of their mill. Further, they aver that they were prevented from using the existing road to their mill, and forced at a great cost to make a new road. It is said that the pursuers have not disclosed any title to use either the ground occupied by their mill or the road in question, and that it is enough for the defender to show that whether he has the right to prevent them so using the ground and road or not someone else has. It appears to me to be a sufficient ground for repelling that contention, that so far as is disclosed in any proceedings to which I was referred, no one but the defender has challenged the pursuers' right. Since the interlocutor of Lord Skerrington was pronounced recalling the interim interdict of which they complain, the pursuers, from anything that appears, might have gone on to use the road which because of the interdict they had up to that date been prevented from using. It seems to me that I must take it that the approach road was part of the subjects let to Mrs Finlayson in the sense that it is included in that piece of ground forming part of the farm of

Balmacara Mains of which Mrs Finlayson is the statutory small tenant, otherwise the interim interdict would have directly applied to it. And in the same way as regards the first site selected for the sawmill, while I must take it that it was within the subjects covered by the minute of agreement entered into between Mr Anton and Lord Blythswood to the effect of entitling Lord Blythswood to prevent the pursuers cutting down trees, it was *quoad ultra* not so, but was in fact on the ground forming part of the farm of Balmacara Mains. The averments having reference to the operations of the pursuers on the road, it is to be noted, were held by Lord Skerrington irrelevant to infer a right in Lord Blythswood to get the interdict craved, except as to the cutting down of trees. That is not *res judicata* with reference to Lord Blythswood's right, and it may be that he may yet establish his right. I am informed that he is endeavouring to do so in an action pending before Lord Hunter, and he also maintains his right in this action. It appears to me that having regard to the terms of the Balmacara Mains lease and the minute of agreement there is warrant for Lord Blythswood's contention, but it does not appear to me that at this stage and without inquiry of any sort I am in a position to decide the question, especially in an action to which neither Mrs Finlayson nor Mr Anton is a party. It may be—I do not say it certainly would be—that if Lord Blythswood is successful in establishing his contention, the law of *Aird's* case would become applicable. . . .

"Accordingly I cannot dismiss the action as irrelevant. . . .

"I shall allow a proof before answer. I think it right to add that while the pursuers must lead in the proof it will be on the defender to prove that he had or has the right to prevent the construction of the sawmill on the site number (1) in respect that it necessitated the cutting down of trees, and to prevent the use by the pursuers of the road in question.

"With reference to the action pending before Lord Hunter, in which I understand the question of the pursuers' right to use the road—or rather the defender's right to prevent their using it—is sharply raised, it is impossible, if his Lordship allows a proof in that action, to permit two inquiries into the same matter, and parties must endeavour—it may require the assistance of the Court—to take steps to obviate this."

The defender reclaimed, and argued—Even assuming that the interdict had been wrongfully obtained by the defender, the pursuers were not entitled to recover damages, because they had neither right nor title to the use of the ground in question. The pursuers had suffered no legal wrong in being interdicted from doing that which they had no right to do. The pursuers were merely "squatters." The following authorities were cited—*Clippens Oil Company, Limited* v. *Edinburgh and District Water Trustees*, March 20, 1906, 8 F. 731, *per* Lord Dunedin, at p. 751, 43 S.L.R. 540; *Aird* v. *Tarbert School Board*, 1907 S.C. 305, *per* Lord Kinnear, at p. 310, 44 S.L.R. 223.

Argued for the respondents—Assuming that the pursuers were "squatters" they were entitled to recover damages for the loss sustained by them arising out of the interdict wrongfully obtained against them by defender. The defender had no title to evict the pursuers or to obtain interdict against them—*Miller* v. *Hunter*, March 23, 1865, 3 Macph. 740; *Jack* v. *Begg*, October 26. 1875, 3 R. 35, 13 S.L.R. 17; *The Clippens Oil Company, Limited* v. *Edinburgh and District Water Trustees*, 1907 S.C. (H.L.) p. 9, *per* Lord Collins, at p. 13, 44 S.L.R. 669.

At advising—

LORD PRESIDENT—This is an action in which the pursuers claim damages from the defender for loss which they say they have incurred in consequence of an interim interdict having been wrongfully obtained against them at defender's instance. The Lord Ordinary has allowed a proof before answer.

I am of opinion that the pursuers' averments are irrelevant and ought not to be remitted to probation. The law is clear. A wrongful interdict does not of itself entitle the man who is placed under the interdict to have damages. He must show that there has been an invasion of his legal right and resultant civil wrong done him. In this case it is clear, I think, on the pursuers' own averments, that the interdict of which they complain did not invade their legal rights and did them no civil wrong of which they are entitled to complain. It was obtained on the 25th February 1913, and on its face bore to interdict the present pursuers from entering upon certain lands leased by the complainer, from cutting timber upon the land, and from erecting a sawmill upon the land. The interim interdict so granted was continued on the 7th March and was modified on the 20th of the same month. But in February, or at all events early in March, as I gather from the pursuers' averments, they, in the belief that they were precluded by the interdict from retaining a sawmill on what is called site No. 1, changed the site to another a few yards off, called site No. 2, and it is in consequence of the expense to which they were so put that they ask damages in this case. But they do not allege, nor could they allege, that they had any right whatever to erect the sawmill upon site No. 1. It is apparent that they had no right to do so, and accordingly that the interdict obtained against them by the complainer deprived them of no right, for they had none. It invaded no right, because they had no right to invade. And apparently feeling that they went to a certain Mrs Finlayson, who is said to be a statutory small tenant, under the Small Landholders (Scotland) Act 1911, of a portion of this property and obtained from her leave to erect a sawmill upon site No. 2.

I do not speculate upon the question whether Mrs Finlayson had any right to give them permission to erect the sawmill upon site No. 2. It is immaterial, because the defender has not sought to interfere with the sawmill, which I understand is still on site No. 2. So far therefore as the

pursuers' claim of damages rests upon the alleged expense they were put to in removing from the one site to the other, it appears to me to fail, because the interdict which was out against them had no effect whatever upon the first sawmill they had erected, inasmuch as it was erected without leave asked or given by anybody, and, as far as I can judge, without any right whatever. On the short ground, therefore, that the interdict invaded no legal right, and therefore could give rise to no claim for damages, I hold that the averments made in the eighth article of the condescendence are irrelevant. [*His Lordship then dealt with a question with which this report is not concerned.*]

LORDS JOHNSTON and SKERRINGTON concurred.

LORD MACKENZIE was sitting in the Extra Division.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action as irrelevant.

Counsel for Pursuers and Respondents—Macphail, K.C.—G. C. Steuart. Agents—J. C. & A. Steuart, W.S.

Counsel for Defender and Reclaimer—A. O. M. Mackenzie, K.C.—D. P. Fleming. Agents—Dundas & Wilson, C.S.

Friday, July 17.

FIRST DIVISION.

[Lord President and a Jury.

KEENAN *v.* SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, LIMITED.

Process—Jury Trial—Verdict Contrary to Evidence—Evidence of Pursuer's Witnesses on Essential Point Controverted by Witnesses for Defenders without Cross-examination for Pursuer—Credibility—Jury Trials (Scotland) Act 1815 (55 *Geo. III, cap.* 42), *sec.* 6.

In an action against a company to recover damages for personal injuries caused through being run down by a closed motor car, the pursuer averred that immediately before and at the time of the accident the driver of the motor car was engaged in conversation with a man who sat beside him in the motor car, and that the driver failed to keep any look-out. At the trial three witnesses for the pursuer spoke in almost identical terms of an old man being seated beside the driver, and of these two men being engaged in conversation at the time of the accident. The cross-examination of these witnesses disclosed that the evidence for defenders was to be that there was no one sitting beside the driver. For the defenders the man alleged to have been beside the driver appeared and stated that he was inside the car, and his cross-examination was directed, not to controvert this, but to show that he was in conversation with the driver. Three witnesses for the defenders also spoke to there being no one sitting beside the driver, and that the only occupant of the car other than the driver was sitting on the seat behind the driver. None of defenders' witnesses were cross-examined by pursuer's counsel on this point. It was impossible that the divergence in evidence was due to defective observation or recollection. *Held* that pursuer had abandoned that part of his case, and new trial *granted* on the ground that the verdict for the pursuer was contrary to evidence. *Held, further*, that pursuer had thereby admitted the incredibility of his witnesses.

Opinion (*per* Lord Skerrington) that the granting of the new trial should proceed on the ground that it was "essential to the justice of the case" under the Jury Trials (Scotland) Act 1815, sec. 6.

The Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42), sec. 6, enacts—"It shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue for a new trial, on the ground of the verdict being contrary to the evidence . . ., or for such other cause as is essential to the justice of the case."

On 11th November 1913 Patrick Keenan, rivetter, Govan, as tutor and administrator-in-law of his pupil daughter Mary Keenan, *pursuer*, brought an action against the Scottish Co-operative Wholesale Society, Limited, *defenders*, to recover £1000 as damages for personal injuries sustained by her through being run down by a motor car driven by the defenders' servant.

The pursuer averred, *inter alia*—"(Cond. 3) The said accident was due to the fault of the defenders' said servant. . . . Immediately before and at the time of said accident he was engaged in conversation with a man who sat beside him in the motor car, and he failed to keep any look-out."

On 6th January 1914 an issue was approved in ordinary form for the trial of the cause, and the trial took place on 23rd and 24th of March 1914 before the Lord President and a jury. The jury found for the pursuer, and assessed the damages at £200.

At the trial three witnesses for the pursuer deponed that they had seen a man seated beside the driver of the car, while for the defenders the man alleged to have been beside the driver, by name Mackintosh, deponed that he was inside the car, and his cross-examination was only directed to showing that he was in conversation with the driver, and three witnesses deponed that there was no one beside the driver. Counsel for the pursuer did not cross-examine these witnesses of the defenders on this point.

On 4th June 1914 the Court granted a rule on the pursuer to show cause why the verdict should not be set aside as being contrary to the evidence, and a new trial granted.

At the hearing on the rule:—Argued for