is no reference to the defender's oath tendered, and if not tendered, the question necessarily arises whether such a contract can be established to any effect by parole. If it cannot, it would be a grave error to send the case to a jury, for the proceeding would be productive of no other result than the accumulation of unnecessary expense. Such a contract, to the effect of binding the parties to it, is certainly not provable by parole. It is a contract of lease for a longer period than a year, and, as to the valid construction of such contracts, writ is required as a solemnity. There is no contract set out in the record which can be proved by parole, and consequently, according to strict form, there is no issue capable of being extracted from the record, as it stands, as to which a jury, in return to an issue sent to them, can return an affirmative verdict so as to be the foundation of a right to inforce implement or to recover damages in the case of a breach of contract. Accordingly, the pursuers' counsel does not adhere to the proposition that we should adopt the issues as sent to us by the Lord Ordinary, but proposes that we should direct an issue, not as to a contract between January 1867 and April 1868, but for a year from the date of the alleged contract —that is, down to 18th January 1867. The *ratio* being, that though verbal agreements of lease may be invalid for a period longer than a year they may be sustained for one year. As indicated already, I doubt how far, under the averments as they stand, we could grant an issue involving the assertion of a twelve months' lease; but, apart from that consideration, I am not prepared to assent to the doctrine that a lease of furnished lodgings for sixteen months which is invalid, will be held binding for twelve, especially seeing that the rent is, according to the averment, payable monthly. There is a manifest distinction between leases in land, the ordinary endurance of which is from year to year, and the letting of furnished lodgings, the leases of which have an ordinary term of one week or four. The case of *Buchanan*, so much relied on by the pursuer, is not an authority on this point favourable to him In that case the Court, having directed the Lord Ordinary to inquire into damages which might be claimed against a party resiling from a five years' lease, in effect modified the damage to a year's rent, manifestly because the lessors in a reference to a subject of which the ordinary tenure was a year, were to that extent to be held as prevented from having a tenant. If it be a question of "damages for resiling," or what may perhaps more properly be described as a claim for loss incurred on the assumption of the contract being valid by the party who was proceeding to act in reliance on it, the amount of allowance would, on the *ratio* adopted in Buchanan's case, be not a year's rent but the rent of a month only. But it is unnecessary to determine this, as another objection against the claim to any extent arises on the application of the law as established by the decision in *Walker* v. *Flint*, where it was held that a verbal contract of lease for a longer term than a year required to be proved by writing or oath of party, so that *rei interventu* it should become binding. There is no averment here of any such *rei interventus* as would make any lease of extraordinary indurance binding. It is a mistake to say that mere possession is *rei interventis* such as to make the contract complete. What is required to constitute a *rei interventus* in such cases is the doing of acts which, from their nature, can be referred only to a contract for a period longer than a year. But here no writing exists, and oath of party is not as yet tendered, so that it seems impossible for the pursuer to make out a contract for sixteen months without writing or oath of party. If no contract for sixteen months can be proved, it follows that the pursuer cannot establish his case, which implies the existence of a valid contract for sixteen months before it can be set up or converted into a contract for twelve. It is argued, and very plausibly, that though a sixteen months' contract of lease cannot be proved substantively, and to the effect of supporting an action for implement, it may be so to the limited effect of instructing a twelve months' contract. The doctrine as to the admissibility of parole evidence being, it is argued, to be regulated on the principle that contracts touching heritage, which are invalid because of the non-intervention of writing, may be founded on to the effect of supporting a claim on the agreement to a different effect. It is enough to say that in the cases referred to there is no implement sought, and no damages for a breach in the proper sense of the term. In the case of *Walker*, 2 Sh. 373, and in that of *Bell*, 3 D. 1201, the action was sustained not as for a breach of contract, but for indemnification of expense into which the party has been led in reliance on what may be considered the implied assurance of the other that there was a contract, when there was really none. The case of an equitable claim for indemnification in consequence of being misled or deceived into a specific amount of expenditure, is not the case of an actual contract proved, so as to be operative *proprio vigoro* to any effect. Here there is no case laid for any equity—no expenditure claimed as outlay permitted and induced on the faith of a supposed contract; it is a case on which partial implement is asked, or general damage claimed as for a breach of a contract said to bind for a portion of the entire period. If your Lordships concur in these views, we should pronounce findings accordingly, and allow the pursuer to state his views as to further procedure.

The other judges concurred.

Agent for Pursuer—W. Milne, S.S.C.

Agents for Defender—J. & J. Gardiner, S.S.C.

Saturday, January 18.

OUTER HOUSE.

(Before Lord Kinloch.)

A. *v.* B. AND C.

Husband and Wife—Divorce—Adultery—Co-Defender—Expenses. Circumstances in which decree of divorce granted in absence of the defender, and the co-defender found liable in expenses.

This was an action of divorce at the instance of the husband against the wife and another, on the ground of adultery. There was no appearance for the defender. For the co-defender appearance was made, and a proof led. At the debate on the proof no serious question was raised as to the alleged adultery having been proved, but, with regard to the expenses,

SCOTT and BRAND, for the pursuer, argued that he was entitled to decree for expenses against the co-defender, in respect (1) he knew the defender was a married woman; (2) he had caused the expense by a wrong in which he was directly concerned; and (3) it is the rule in England, unless in very exceptional cases, to hold the co-defenders liable in ex-

penses. (*Evans* v. *Evans and Robinson*, L. J. vol. 28, N. S., P. & M. C., p. 136.)

Mair, for the co-defender, in reply, maintained (1) that there was no sufficient proof of the co-defender having known at the time of his alleged adultery with the defender that she was married; (2) that in similar cases in England the co-defender had not been held liable in expenses (*Boddington* v. *Boddington* and *Teagle* v. *Teagle*, L. J. vol. 28, P. & M. C., pp. 53 and 55; *Priske*, L. J. vol. 29, P. & M. C., p. 195); and (3) that the wrong committed by him was not of a kind for which he could be made liable as he met the defender in a house of ill-fame.

The Lord Ordinary issued the following interlocutor and note, giving the pursuer decree for his expenses:—

"*Edinburgh*, 15*th January* 1868.—The Lord Ordinary, having heard parties' procurators, and made avizandum, and considered the proof adduced, and whole process: Finds facts and circumstances proved sufficient to infer that the defender committed adultery with the co-defender: Finds her guilty with him accordingly; therefore divorces and separates the defender from the pursuer, his society, fellowship, and company in all time coming: Finds and declares in terms of the conclusions of the libel, and decerns: Finds the co-defender liable to the pursuer in expenses of process: Allows the account thereof to be lodged; and remits to the auditor to tax the same as between agent and client, and to report. W. Penney."

"*Note.*—It was maintained for the co-defender that there was no proof of his knowing the defender to be a married woman at the time when he committed adultery with her, and that therefore he should not be found liable in expenses. There is no direct proof of such knowledge on his part. But it appears to the Lord Ordinary to be fairly inferred from the proof; and no evidence was led by the co-defender tending to establish the contrary. The case is not one of seduction or of breach of friendship towards the husband, from whom his wife had for some time lived separate. But it seems to the Lord Ordinary that, according to a sound principle, and that which apparently prevails in England, the co-defender must, unless in an exceptional case, always reimburse the expenses incurred in obtaining redress against a wrongful act in which he was directly participant. (*Evans* v. *Evans and Robinson*, Law Journal, vol. 20, N.S., Probate and Matrimonial Cases, p. 136.)

(Initialed) "W. P."

Tuesday, January 21.

SECOND DIVISION.

LORD LOVAT *v.* MACDONELL.

Breach of Interdict—Emerging Title—Lease—Salmon Fishing. A party was interdicted by the Court of Session from fishing in a river *ex adverso* of certain lands. He afterwards acquired a right from the Crown, under a lease, to the salmon fishings of his own lands, but without prejudice to the other right which had obtained interdict. *Held* that the subsequent title of the Crown, conferring a *prima facie* right to fish there, had been no breach of interdict, or that, if there had been a breach, it was a justifiable one.

This is a petition and complaint at the instance of Lord Lovat, with concurrence of the Lord Advocate, complaining of a breach of interdict said to have been committed by Mr Macdonell, of South Morar, and concluding with the usual prayer. The petitioner made the following statements:—The complainer is heritable proprietor of, and duly infeft in the lands and estate of Morar, with the fishings after-mentioned, being part of the barony of Glengarry, lying within the lordship of Gartmorar and Lochaber, and sheriffdom of Inverness. He completed a feudal title to the said lands and estate in 1816, in which year he was infeft upon a precept from Chancery, *inter alia*, in all and whole the twelvepenny lands of Morar, comprehending therein the particular lands and others therein mentioned, "cum silvis piscationibus et pertinen. omnes jacen. infra dominium de Gartmorar et Lochaber et Baliam vestram. Et quæ terræ cum terris de Sleismein de Glengarry cum piscationibus et pertinen. earund. jacen. infra dominium et Baliam vestram in liberam baroniam erectae fuere Baroniam de Glengarry vocat, per Cartam sub magno sigillo de dato vigesimo septimo die mensis Martii anno Domini millesimo sexcentesimo vigesimo septimo in favorem Donaldi MacAngus MacAlister de Glengarry." The complainer's said lands are bounded on the south by the river Morar, and are usually designated by the name of North Morar. He and his predecessors, in virtue of their titles, have for time immemorial, or at least for forty years, exercised the sole and exclusive right of salmon-fishing in the river Morar *ex adverso* of their said lands and estate; and in particular, in that part of said river which forms the northern boundary of the lands of South Morar. During the said period the complainer and his predecessors have enjoyed uninterrupted possession of the said right of salmon-fishing, and they have constantly and continuously exercised the same by means of net and coble, in so far as practicable and convenient or expedient, and also by other lawful means.

The respondent is proprietor of certain parts and portions of the estate of South Morar, which are bounded on the north by the river Morar, and lie opposite to the said lands of the complainer. The respondent, or persons authorised or employed by him, were in the habit of encroaching and trespassing upon the complainer's said right of salmon-fishing in the said river, by angling for salmon therein *ex adverso* of the complainer's said lands of North Morar, and by spearing salmon in said part of the river.

Accordingly the petitioner, on or about the 8th day of October 1861, presented to your Lordships a note of suspension and interdict against the respondent, craving your Lordships "to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondent, by himself of others in his employment, or having his authority and permission, from fishing or angling for salmon, from spearing salmon, and from erecting or using yairs or other machinery for the taking of salmon in any part of the river Morar *ex adverso* of the lands of North Morar, belonging to the complainer, being part of the barony of Glengarry, and lying in the lordship of Gartmorar and Lochaber, and sheriffdom of Inverness; or to do otherwise in the premises as to your Lordships shall seem proper."

A variety of procedure took place under this note of suspension, and a proof was led. Ultimately, on advising this proof, the Lord Ordinary (Kinloch) pronounced the following interlocutor:—