were of opinion that, upon a sound construction of the agreement, it provided for the relation of the parties under the servitude of thirlage continuing, subject to pactional regulations, not for the termination or extinction of that servitude. I may add that the case of *Spottiswoode* v. *Pringle* does not appear to have been brought under the notice of the Court in that case.

For the reasons now given I am of opinion that the first party is entitled to exact from the second party payment of the sums commuted in the verdicts in so far as applicable to the second party's lands, although Kinross Mill is no longer in existence.

The second question relates to dry multures, to which the Act of 39 Geo. III. c. 55, does not apply, and which consequently were not dealt with by the juries in 1807 and 1810. Dry multures are duties or money paid to a millowner by the owner or occupier of land at some time astricted to the mill, whether the grain grown on the land is or is not ground at the mill. The right to exact such multures is acquired by payment of them continuously for forty years, implying an agreement to pay and accept them. Dry multures are paid in consideration of the millowner absolving the suckener from an obligation to take his corn to the mill to be ground, and the payment is made and accepted as compensation to the millowner for the loss of profit which he sustains in consequence of the grain not being ground at his mill. The amount of the dry multure would therefore practically correspond to the difference beeween the insucken and the outsucken rates for grinding. This being so, the question comes to be, whether the proper inference from a course of payment for a period greatly exceeding forty years is not that the agreement to pay and accept the dry multure was a permanent, not a temporary, arrangement, and this seems to me to be the just inference in the circumstances. But if it must now be assumed that the millowner agreed permanently to acquit the landowner from all obligations to the mill in consideration of his undertaking to pay the dry multure in perpetuity, and that the landowner assented to this, the effect was, in my judgment, to make a permanent commutation of the thirlage, resulting like the statutory commutation in the extinction of the servitude, and if the servitude was extinguished there could be no obligation to maintain the mill as a condition of the right to exact the dry multure. The conclusion that the mill was to be kept up notwithstanding the agreement permanently to pay and accept the dry multure could only be reached by supposing that it was an implied condition of the agreement that an efficient mill should be maintained on the dominant estate, and it would be contrary to good sense to read into any agreement by mere implication a condition from which neither of the parties to it could derive any benefit. For these reasons I am of opinion that the second question put in the case should, like the first, be answered in the affirmative.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court answered both branches of the question in the affirmative.

Counsel for the First Party — H. Johnston, Q.C.—Cullen. Agents—Alex. Morison & Co., W.S.

Counsel for the Second Party—Rankine. Q.C.—Constable. Agents—John C. Brodie & Sons, W.S.

Tuesday, January 15.

FIRST DIVISION.

THOMSON *v.* EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED.

THOMSON *v.* KERR.

Expenses — Several Defenders — Conjoined Actions—One Defender Successful—Liability for Expenses of Successful Defender —Liability of Defenders inter se.

In an action of damages for personal injuries alleged to be due to the fault of the defender, the defender in defence averred that the accident in question was solely due to the fault of a third person. In consequence of this averment the pursuers raised an action of damages against this third person. The two actions were conjoined, and were tried together before a jury upon separate issues. The jury found that the original defender was alone responsible for the accident, and that he was liable in damages to the pursuers, and returned a verdict in favour of the second defender. *Held* that the pursuers and the successful defender, both in the separate and conjoined actions, were entitled to expenses against the original defender.

Observed (*per* Lord M'Laren) that the effect of conjoining the actions was that the case must be treated as if it had been originally raised against two defenders called in one summons.

Opinion reserved by Lord Kinnear upon the question whether the same result as regards liability for expenses might not have followed even if the actions had not been conjoined.

On 1st September 1900 Miss Nellie Turner Thomson and Miss Margaret Thomson, dressmakers, London, were passengers on a touring coach belonging to John Kerr, coach-hirer, Edinburgh, which was driven by his son. They went to Roslin on the coach, and were returning to Edinburgh, when on reaching the Braid Hills terminus of the tramway car lines, the coach collided with a cable car belonging to the Edinburgh and District Tramways Company, Limited, and the pursuers were thrown to the ground, sustaining injuries

in respect of which they raised an action of damages against the Tramways Company, in which they averred that the accident was due to the fault of the driver of the cable car.

The defenders denied that there had been any fault for which they were responsible, and averred—"The accident was due solely to the recklessness of the driver of the said coach in attempting to pass in front of car No. 157 at the time in question, without warning the driver thereof, and without ascertaining that the driver was aware of his intention, and would stop the car in order to let him cross, or otherwise would not start the car at the time he intended to cross."

On 3rd November 1900, before the record in this action was closed, the pursuers raised an action of damages against John Kerr, based on the assumption that the accident was due to the fault of the driver of the coach.

The defender in this action averred that the accident was due to the culpable and reckless conduct of the driver of the cable car. He further averred that the action was raised in consequence of the charge of fault made against him by the Edinburgh and District Tramways Company in the first action, and pleaded, *inter alia*, that the two actions should be conjoined.

On 27th November 1900 the Lord Ordinary (KINCAIRNEY) conjoined the two actions.

Issues were adjusted and the two actions were tried together upon separate issues before the Lord President and a jury. The jury returned a verdict finding the Tramways Company solely responsible for the collision, and awarding damages to both pursuers.

On the motion to apply the verdict the pursuers and the defender John Kerr moved that the Tramways Company should be found liable in the expenses incurred by them respectively in the action against Kerr, on the ground that the action had been raised in consequence of the statements quoted above, which were made by the Tramways Company in the action against them.

They argued that the Court had power to award expenses against anyone, and accordingly they might find one defender liable for the expenses of another. The whole expenses of the second action had been caused by the averments of the Tramways Company in the first, and it was only right that they should defray them—*Rooney* v. *Cormack*, October 18, 1895, 23 R. 11; *Cowan* v. *Dalziels*, November 23, 1877, 5 R. 241; *Caledonian Railway Company* v. *Greenock Sacking Company*, May 13, 1875, 2 R. 671. The effect of conjoining the actions was to put them in the same position as if there had originally been one action raised against two defenders.

Argued for the defenders the Tramways Company—The statements made by them in the first action did not render it necessary for the pursuers to raise the second action. They referred to facts which must have been known to the pursuers from the beginning, and the conduct of the trial proved this, for the liability of the company was proved by the pursuers' own witnesses, and not by those of the defender Kerr. Accordingly it could not be said that the expenses of the second action had been caused by the company, or that they were liable for them —*Mackintosh* v. *Galbraith & Arthur*, November 6, 1900, 38 S.L.R. 53; *Brownlie* v. *Tennant*, February 14, 1855, 17 D. 422.

LORD PRESIDENT—The circumstances of this case are briefly these—The pursuers, two ladies, were passengers in a brake, or excursion coach, belonging to the defender John Kerr. While descending the hill on the road past the Braid Hills, near where the tramway line begins, the brake crossed in front of a tramway car, and a collision took place, resulting in the back part of the brake being cut off. By this accident the pursuers were injured, and they brought an action of damages against the Tramways Company. The company did not put forward any defence personal to the pursuers, but they maintained that the pursuers were mistaken in attributing to them the fault which caused the accident, alleging that the fault lay with the driver of the brake in crossing in front of the car, and they accordingly maintained that the owner of the brake, John Kerr, was the person liable to make reparation to the pursuers. The pursuers, when challenged by the Tramways Company in this pointed way to raise an action against John Kerr, very properly did so, in order to bring the company and John Kerr, one or other of whom must be liable, into the field together, so that they might fight the matter out between themselves. Thus the second action was raised in consequence of the position taken up by the company. The actions were conjoined and tried together, and the two defenders cross-examined each other's witnesses, and when the cross-examination of a witness by the pursuers' counsel was regarded by counsel for a defender as satisfactory, he adopted it as the cross-examination for his client. Both defenders are thus before the Court in what must now be regarded as one action. I agree with what Lord M'Laren said in the case of *Rooney* v. *Cormack*, 23 R. 11, to the effect that this Court has jurisdiction over the whole subject of expenses in any action before it, and can give decree against one defender in favour of another where the justice of the case demands that this should be done, and in my opinion this is as strong a case for the exercise of that power as could well be imagined. I therefore think that the Tramways Company should be found liable in expenses both to the pursuers and to John Kerr.

LORD M'LAREN—I was anxious to hear argument on the question how far the practice had been extended of finding expenses due by one defender to another. It certainly appears from the cases of *Rooney* v. *Cormack*, and *Mackintosh* v. *Galbraith* that where there are two or

more necessary defenders, *e.g.*, in an action for the reduction of a deed where it is proper to call the disponee under the deed as well as the party who procured the granting of the deed, the one defender may be entitled to receive his expenses from the other. The same principle applies where a contractual relation exists between the two defenders as in an action directed against landlord and tenant, *e.g.*, an action to prevent a nuisance. To that extent I am of opinion that our jurisdiction exists, and if I were doubtful on the point I should feel bound by the authorities cited.

In the present case there were originally two distinct and independent actions, and if they had continued to be separate I think the present motion could not have been properly made, because the Court cannot in general find a person liable in expenses who is not a party to the cause. I must except the case where the true *dominus litis* does not appear as a party. But the result of the application to conjoin the actions was to put the two actions into the same position as if they had been originally one; and they are accordingly under similar conditions to those of the cases to which I have referred. At this stage we must assume that the Lord Ordinary had good reasons for conjoining the actions, though apart from specialties I should rather deprecate the indiscriminate conjoining of actions raised against separate defenders. But as the Lord Ordinary's judgment was acquiesced in, it must be assumed to be right, and the case must be treated as if it had been originally raised against two defenders called in one summons, who were both bound to appear if they did not wish decree in absence to be pronounced against them. For these reasons I concur with your Lordship.

LORD KINNEAR—I concur. I have no doubt after hearing your Lordship in the chair as to the circumstances of the trial and the questions raised, that there would be a grave miscarriage of justice if the pursuer were called upon to pay the expenses of the successful defender without relief against the unsuccessful defender. I think it would be a grave reproach against our system of procedure if we had not power to obviate this injustice by giving decree for expenses against the party who was really responsible for their being incurred. The authorities, however, show that we have such power, and there is a long continued course of practice in support of the decision proposed.

I agree with Lord M'Laren in attaching importance to the conjunction of the actions, and also in holding that at this stage we must assume they were rightly conjoined.

I wish, however, to reserve my opinion on the question whether the same result would not follow without their having been conjoined. The question does not arise, and it is unnecessary to express a definite opinion, but I am not persuaded that the same liability might not have been enforced if the actions had been technically separate. It is not incompetent for the Court to impose liability for the expenses of a case upon a person who is not directly a party to it; and I am not at present prepared to agree that the principle on which that has been done might not be applied to such a case as the present.

LORD ADAM was absent.

The Court pronounced this interlocutor—

"The Lords apply the verdicts found by the jury on the issues Nos. 19 and 21 of process, and in respect thereof decern against the defenders the Edinburgh and District Tramways Company, Limited, for payment to (first) the pursuer Nellie Turner Thomson, of One hundred and twenty pounds sterling, and (second) the pursuer Margaret Thomson, of the sum of Seventy-five pounds sterling: Further, apply the verdicts found by the jury on the issues Nos. 18 and 30 of process, and in respect thereof assoilzie the defender John Kerr from the conclusions of the summons: Find the pursuers and the defender John Kerr both in the separate and conjoined actions entitled to expenses against the defenders the Edinburgh and District Tramways Company, Limited," &c.

Counsel for the Pursuers—Jameson, Q.C. —A. S. D. Thomson. Agent—W. Croft Gray, S.S.C.

Counsel for the Defenders the Edinburgh Tramways Company, Limited — Watt, Q.C. — Chisholm. Agents — Anderson & Chisholm, Solicitors.

Counsel for the Defender John Kerr— W. Campbell, Q.C. — Glegg. Agents — Macpherson & Mackay, S.S.C.

Thursday, January 31.

FIRST DIVISION.

TRUSTEES OF COLLEGE STREET UNITED FREE CHURCH, EDINBURGH *v.* PARISH COUNCIL OF CITY PARISH OF EDINBURGH.

Burgh — Assessment — Exemption — Premises Exclusively Appropriated to Public Religious Worship—Church Hall—Mission Premises — Rating Exemptions (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 20), *sec.* 1.

By section 1 of the Rating Exemptions (Scotland) Act 1874 (37 and 38 Vict. cap. 20) it is provided that no assessment or rate for county, burgh, parochial, or other local purposes is to be levied on or in respect of "any church, chapel, meeting-house, or premises in Scotland exclusively appropriated to public religious worship."

A claim for exemption from assessment in terms of this section was made by the trustees of certain