same rule which obtains in proper criminal cases.

But the error is so patent as to amount practically to a clerical error, and no prejudice being alleged, I think that we should allow the amendment, subject to the payment of any expenses which may have been incurred by the respondent in consequence of the error.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"The Lords having considered the note for the petitioners, and heard counsel for the parties, allow the petitioners to amend the petition in the terms and to the effect set forth in said note; also allow the respondent to amend her answers, if so advised, by Monday the 11th March current: Find the petitioners liable to the respondent in the expenses occasioned by the amendments, and remit," &c.

Counsel for the Petitioners—Guy. Agents—Duncan Smith & M'Laren, S.S.C.

Counsel for the Respondent — Christie. Agent—A. Elliot Keay, Solicitor.

Thursday, March 7.

FIRST DIVISION.

[Sheriff Court of Ayrshire.

MAXWELL *v.* YOUNG.

Expenses — Parties Liable — Husband — Action by Wife with Consent and Concurrence of her Husband—Husband and Wife.

In an action of damages for personal injuries raised by a married woman, with the consent and concurrence of her husband, the defender was successful. The Court *found* the husband liable for expenses jointly and severally with his wife, on the ground that he, having been present when his wife sustained the injuries complained of, ought, in the view taken by the jury, to have known that his wife's claim was unfounded, and ought consequently not to have given his consent to the action, and that in addition to giving his consent he had taken an active part in the litigation.

Opinion reserved as to whether a husband renders himself liable for the expenses of an action at the instance of his wife by merely giving a formal consent thereto as his wife's curator.

An action was raised by Mrs Mary Gilfillan or Maxwell, wife of and residing with William Maxwell, plumber, 4 Houston Square, Johnstone, with the "consent and concurrence of the said William Maxwell as her curator and administrator-in-law," against Alexander Young, butcher, 23 New Street, Stevenston, concluding for payment of £500 as damages in respect of personal injuries.

The pursuer averred that her husband had taken from the defender on lease for a year from Whitsunday 1900 a house situated at the back of the defender's premises at 23 New Street; and that on 28th May 1900 she and her husband were engaged in removing their furniture to said house. She also averred as follows:—"(Cond. 4) The house taken by pursuer is entered by a stone stair leading to the second storey of the back building, and said stair is about 7 feet 4 inches in height. On the day in question, while pursuer was standing on the landing of said stair waiting for her husband to ascend said stair and to pass her with a part of the household furniture, pursuer in stepping back on said landing came in contact with the right hand railing of said stone stair, which immediately gave way and precipitated pursuer to the ground, whereby she sustained the injuries after mentioned."

The pursuer further averred that the railing in question was in a weak and rotten condition; that the defender ought to have known this, and repaired the railing or warned the pursuer, and that as a result of its dangerous condition the pursuer had met with the injuries complained of.

The defender averred as follows:—(Ans. 4) "The pursuer's husband was carrying up the stairs a large burden wrapped in packing, and containing a wool bed, two pairs of blankets, two bedcovers, six bolsters, and other articles. This bundle, which more than occupied the full width of the stair, was carried by Mr Maxwell on his back. As he ascended the stair the pursuer had commenced to come down, and was on the seventh step. Instead of stepping back into the house, and so allowing her husband to get up without obstacle, she remained on the stair, and leaned back over the handrail on the right side of the stair. When her husband reached the seventh step the end of his bundle rested on her chest, and the hand-rail, unable to bear the double weight of the pursuer—who is a big heavy-made woman—and of her husband's bundle, gave way, and the pursuer fell backwards to the ground, a depth of about 5 feet, and sustained injuries."

He maintained accordingly that the accident was due to the pursuer's own fault and negligence, and that he was not responsible.

The action was tried before Lord M'Laren and a jury on the following issue:—"Whether, on or about 28th May 1900, the pursuer, while using the stair leading to a house situated behind the premises occupied by the defender at 23 New Street, Stevenston, was injured in her person through the fault of the defender, to the loss, injury, and damage of the pursuer?"

The jury found for the defender by a majority of seven to five.

The pursuer's husband gave evidence at the trial in support of her claim.

The defender, on a motion to apply the verdict, moved the Court to find the pursuer and her husband jointly and severally liable in expenses.

Argued for the defender—The husband had a direct interest in the success of his wife. Moreover, by coming forward to give evidence, he had taken an active part in the litigation, and was accordingly liable for the expenses caused thereby—*Macgowan* v. *Cramb*, February 19, 1898, 25 R. 634. In *Whitehead* v. *Blaik*, July 20, 1893, 20 R. 1045, where the husband was held not to be liable in expenses, the ground of the decision was that he had taken no active part in the litigation, having been furth of Scotland at the time, but had merely given a formal concurrence. In the analogous cases where a father sued on behalf of a pupil child, or gave his consent to an action by a minor child, the father had been found liable—*Wilkinson* v. *Kinneil Cannel and Coking Coal Company*, July 1, 1897, 24 R. 1001; *Fraser* v. *Cameron*, March 8, 1892, 19 R. 564; *White* v. *Steel*, March 10, 1894, 21 R. 649.

Argued for William Maxwell—The defender had only obtained a verdict by a majority of seven to five, and evidently therefore the case had been a proper one to raise, and the husband had been right to consent. If he had not consented a curator *ad litem* would have been appointed, who would have consented and would not have been liable in expenses. Why therefore should the husband be liable? There was nothing to show that he had taken an active part in the litigation, as was the case in the previous cases where a husband had been found liable. There was no precedent for such liability in respect of a husband merely giving his consent, apart from special circumstances such as existed in *Macgowan* v. *Cramb*, *supra*. The case of *Whitehead* v. *Blaik* and the *dicta* in *White* v. *Steel* were directly in favour of the husband's contention. See also *Baillie* v. *Chalmers*, 1791, 3 Paton's App. 213.

At advising—

LORD M'LAREN—The tendency of the decisions of our time in regard to liability for legal expenses has been to obliterate the distinction between persons suing or defending in their own right, and those who litigate in a representative capacity. It is now settled that trustees, whether representing the estate of an individual or the interest of creditors in their debtor's estate, are liable personally to indemnify the adverse party for the costs which he has incurred in vindication of his rights.

I shall say nothing as to the liability of judicial factors except that in the latest case raising the question the Judges were divided in opinion, and it was not found necessary to determine it, because we were agreed that on the true construction of the Lord Ordinary's interlocutor the judicial factor had been found liable for expenses only in his representative capacity—(*Craig* v. *Hogg*, 24 R. 6).

A nearer analogy to the present case is the case of a father who sues or defends in the character of tutor or curator for his child.

In *White* v. *Steel* (21 R. 649) a father suing as tutor for his infant child was held to be liable for expenses on the general ground that he, and not the child, was the party to the cause; and this decision was followed and extended in the case of *Wilkinson* v. *The Kinneil Coal Company* (24 R. 1001). In that case the son passed from the status of pupilarity to that of minority in the course of the action, and the father was found liable for so much of the expenses as was incurred while his son was in pupilarity, and liable jointly and severally along with his son for the expenses incurred after his son acquired the status of minority.

The principle underlying these decisions will no doubt be kept in view when the question is raised whether a husband, by merely giving a formal consent as his wife's curator or administrator to an action at her instance, becomes responsible for the expenses of process. On the one hand it may be said that he is not bound to give his concurrence, and that if he refuses to give it the Court will appoint a *curator ad litem*, who would not in general be liable for costs. On the other side, it may be said that the *curator ad litem*, if he did his duty, would inquire into the facts of the case and would put a stop to the action if it was ill-founded. But if the husband gives his consent as a matter of form, and without reference to the merits of the case, it may be said that by doing so he identifies himself with his wife's action, and causes the expense which the adverse party incurs in vindicating his rights. I may also point out that the question is not exactly the same under the present law as it was before the passing of the Married Women's Property Act 1881. Under the common law a wife's claim of damages fell under the *jus mariti*, and the husband was joined with her in the action, not only as her administrator but for his own right and interest. It is not now necessary that the husband should be a party for his own right and interest, but it is easy to see that he may have a substantial interest in the prosecution of his wife's claims.

In the present case I think it is not necessary to consider whether the husband is universally liable for expenses by merely giving his consent to the wife's action, because I think the case may be solved by applying the rule laid down by Lord Thurlow in the case of *Chalmers* v. *Douglas* (3 Paton, 213), where a remit was made to the Court of Session to inquire how much of the sum of expenses of process and extract "had been occasioned by the conduct of the defender (the husband) in the case." That was a case where the husband was called, along with his wife, as a defender in an action of damages in respect of the wife's slander. He was cited as a defender, and it was necessary that he should appear to prevent decree going out against himself. It was therefore necessary to distinguish between the expense which might have been incurred by the husband's appearance for the legitimate purpose of clearing himself, and the expense which he occasioned to the adverse party by identifying himself with his wife's cause, in which she was found to be in the wrong.

In the present case there is no room for this distinction. The action is an action of damages at the wife's instance in respect of personal injury, and the question is whether the husband, by his conduct of the cause, has identified himself with the wife's claim in which she has been unsuccessful.

The husband was present when the cause of action occurred. He was engaged with his wife in carrying his furnishings and luggage by an outside stair into a house which he had hired for the summer months. The wooden railing attached to the stair gave way, and the pursuer fell to the ground and sustained a fracture of one of the bones of the leg. She sued the landlord, alleging that the stair was insufficiently guarded. The defence was that the spouses came into collision while the husband was going up the stair with a load on his back; that the railing was not designed to be proof against an accident of that nature, but only to serve the ordinary purposes of a staircase railing, for which purposes it was sufficient. The jury accepted the defender's evidence, which must, accordingly, be taken to be true. Now, the husband being present at the time, and being himself the involuntary cause of the injury complained of, ought not to have given his instance to enable the action to proceed. The impression left on my mind when I tried the case certainly was that the husband was an active litigant, and he supported his wife's claims by evidence which the jury must have disregarded when they considered their verdict. I am therefore of opinion that he is liable in expenses in respect of his conduct as a litigant; and on the general question, whether a husband, by giving his consent and concurrence, renders himself liable for expenses, I agree with the dictum of the Lord President in *Macgowan's* case (25 R. 635), that this must stand as it does at present on the authorities.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Apply the verdict in the case, and in terms thereof assoilzie the defender from the conclusions of the action: Find the pursuer Mary Gilfillan or Maxwell, and her husband William Maxwell, jointly and severally liable in expenses, and decern," &c.

Counsel for the Pursuer—Munro. Agents—St. Clair Swanson & Manson, W.S.

Counsel for the Defender—Hunter. Agent—W. Croft Gray, S.S.C.

Thursday, March 7.

FIRST DIVISION.

ROBERTSON *v.* HALL.

Process—Proof—Jury Trial—Time of Trial—Motion for Postponement.

An action of damages was raised on 22nd November 1900, complaining of slanders alleged to have been uttered in March 1898 and November and December 1899. Issues and a counter issue were adjusted on 19th February 1901. The counter issue referred to alleged acts of dishonest appropriation of money said to have been committed in 1894. On 4th March the pursuer gave notice for the sittings commencing on 21st March 1901. The defender moved for a postponement of the trial in respect of the shortness of the time between the adjustment of the issues and the probable date of trial, the difficulty of procuring certain material evidence in support of the counter issue, which referred to periods so far back as 1894, and the delay between the dates of the alleged slanders and the raising of the action.

The Court *discharged* the notice of trial.

On 22nd November 1900 Robert Chisholm Robertson, miners' agent, Glasgow, raised an action of damages for slander against John Hall, miner, Slamannan.

The pursuer averred that upon four specified occasions in March 1898 and in November and December 1899 the defender had slandered him, (1) and (2) by using words of and concerning him in connection with the distribution of certain funds during a strike in 1894 which falsely and calumniously represented that the pursuer had dishonestly appropriated a portion of said funds; and (3) and (4) by saying that the pursuer had embezzled money belonging to the miners.

The defender denied having used the expressions 3rd and 4th complained of, and pleaded, *inter alia*—"(3) Any statements made by the defender of and concerning the pursuer having been true, the defender ought to be assoilzied."

On 19th February 1901 the Lord Ordinary (STORMONTH DARLING) approved of four issues for the pursuer which referred respectively to the four alleged slanderous statements above mentioned. He also approved of the following counter issue for the defender:—"Whether during the year 1894 the pursuer, as agent of the Forth and Clyde Miners' Association, received from the Scottish Miners' Association sums of strike money amounting in all to more than £300, of which he dishonestly appropriated the sum of £160 in or about July 1894, and the sum of £140 in or about October 1894."

On 4th March 1901 the pursuer gave notice for the sittings commencing on 21st March.

The defender presented a note to the First Division, craving the Court to postpone the trial of the case in view of "(1) the lack of time between the adjustment of issues and the probable date of the trial, and the difficulty in procuring certain