the precise limits of his jurisdiction, or to what extent he should exercise it. He may or may not be entitled to punish the offender precisely as the Inner House could while the Court is sitting. But at least he has power, in the words of Lord Fullerton, "to the extent of preserving matters entire until the Court have power to determine the matter finally."

The fact that this is an Inner House process (although the respondent raised no objection on that ground) may affect the course which I shall take if breach of interdict is proved. All I decide at present is that I have power to entertain the petition and complaint.

Since the foregoing opinion was delivered the necessity for further proceedings in the Bill Chamber has been obviated by the respondent agreeing to find caution to await the meeting of the Court, and meantime not to commit any breach of interdict. If caution is found as proposed the case will stand over for disposal by the First Division of the Court of Session. I may add that if the proof had proceeded, and I had found the breach proved, I should probably have followed substantially the same course—left the question of punishment to the Court, and contented myself with insuring the respondent's appearance and prevention of further breaches by ordering substantial caution to be found.

The respondent's plea of no jurisdiction was repelled.

Counsel for the Petitioners and Complainers—Craigie. Agents—Bell & Bannerman, W.S.

Counsel for the Respondent—Younger. Agents—Simpson & Marwick, W.S.

Saturday, October 26.

FIRST DIVISION.

PICKEN *v.* CALEDONIAN RAILWAY COMPANY.

Expenses — Parties Liable — Husband — Action by Wife with Consent and Concurrence of Her Husband—Liability of 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. Circumstances in which the Court *decerned* against the husband for expenses jointly and severally with his wife, on the ground that he had taken a leading and active part in what proved to be an unfounded litigation.

An action was raised by Mrs Catherine Simpson or Picken with the consent and concurrence of her husband Thomas Picken, mason, Port Glasgow, against the Caledonian Railway Company for damages in respect of injuries which she averred had been caused to her through the fault of the defenders.

The pursuer averred that on 30th October 1900, accompanied by her daughter aged four, she went on the defenders' line of railway from Port Glasgow to Bishopton; that she intended to return by a train timed to leave Bishopton at 9·57; that on the arrival of the train her daughter was lifted by the pursuer's sister into a carriage, and that the pursuer had stepped on to the footboard and was in the act of entering the carriage when the train suddenly and without any warning from the defenders' servants was set in motion, with the result that while the pursuer succeeded in reaching the platform her child was carried off in the train.

The pursuer further averred—"(Cond. 3) The pursuer sustained serious injury through the fault of the defenders, and as a direct result thereof she in consequence laboured under great excitement and suffered great anxiety, and was seriously ill. Her nervous system sustained a severe shock, partly in consequence of the apprehension she experienced regarding her own safety, and partly in consequence of her separation from her child under the circumstances narrated. In consequence of the injury she sustained on the occasion referred to, the pursuer suffered from headache, palpitation, and tremors. She was confined to bed for more than five weeks, during the whole of which time she was regularly attended by a doctor. She was unable to perform her household duties even after she was allowed to leave her bed, and her health was completely undermined."

The pursuer maintained that the injury suffered by her was due to the fault of the defenders in re-starting the train before the passengers had a reasonable time to enter it, and without proper warning.

The defenders averred that ample time was given to the pursuer to enter the train, and that the fright sustained by her was due to her own fault in attempting to enter the train while in motion. They further averred that the symptoms stated by her were greatly exaggerated.

The case was tried before the Lord President and a jury on the following issue:—"Whether on or about Tuesday, 30th October 1900, and at or about Bishopton Railway Station, the pursuer was injured in her person through the fault of the defenders, to the loss, injury, and damage of the pursuer? Damages laid at £300 sterling."

The husband gave evidence in support of his wife, but as he was not present upon the occasion in question he only spoke to the resulting injury caused to his wife's health.

The jury returned a verdict for the defenders.

In moving to apply the verdict the defenders moved the Court to find the pursuer and her husband, jointly and severally, liable in expenses.

Argued for the defenders—The pursuer's husband had taken an active interest in the case, and had given support to it by giving evidence as to her state of health. The case was therefore different from one where a husband merely lent his name for

the purpose of raising the action, but took no active interest in it. The jury had disbelieved the husband's evidence, and it was only fair that he should be liable for the expenses of this unsuccessful action—*MacGowan* v. *Cramb*, February 19, 1898, 25 R. 634, 35 S.L.R. 494.

Argued for the pursuer—The question of a husband's liability in such cases was one of circumstances. Here the husband was not present when the accident occurred, had no personal knowledge of it, and was not in an active position as regards the action. He only gave evidence as to the result to his wife, and no evidence was led to contradict him. The Married Women's Property Act 1881 (44 and 45 Vict. cap. 21) had made a difference as to such questions, and there was no case where a husband had been found liable where he had not taken an active part in the action—*Whitehead* v. *Blaik*, July 20, 1893, 20 R. 1045, 30 S.L.R. 916. The case of *Maxwell* v. *Young*, March 7, 1901, 3 F. 638, 38 S.L.R. 443, was a very special one. The husband was present when the injuries were sustained, and it was held that he must have known that the action was unfounded.

LORD PRESIDENT—I fully accept, and entirely concur in, the doctrine which has been authoritatively laid down, that the fact of a husband giving his consent to an action at the instance of his wife does not, *per se*, render him liable in expenses to the other party, but I think that in this case the husband took such an active and leading, if not controlling, part in the proceedings as to make him very much the master of the litigation. Counsel are unable to tell us upon whose employment the action was raised and carried on, but the husband must have been—at least the natural inference in the absence of evidence to the contrary is that he was—a party to that employment, and he certainly took a prominent part in giving evidence at the trial. It appears to me that the jury must have thought—and I am not in the least surprised if they did think—that there was really no substance in the case. They must have considered that the evidence as to the condition of the wife's health was exaggerated and could not be relied upon; and if the husband initiated, or was a party to initiating, and supported by his evidence as well as by his instance a case which proved not to be a substantial one, it seems to me that he should be held liable to the opposite party in expenses. Great injustice might be done if a wife without means was allowed to litigate with the consent and concurrence and on the credit of her husband, supporting her case by his testimony, without his being liable in expenses to the opposite party. I therefore think that in this case both husband and wife should be found liable in expenses.

LORD ADAM—I do not think that there is any doubt that the mere fact of a husband giving his consent to an action raised by his wife in the capacity of curator and administrator-at-law is not sufficient to attach liability for the expenses of that action. It is a question of circumstances, depending very largely on his conduct, whether or not he shall be liable. Your Lordship, who tried the case, and who knows it better than any of us, has told us that in your Lordship's opinion it is a case in which the husband from his conduct should be found liable in expenses, and unless there was something very clear to the contrary I should certainly concur with the judge who tried the case. But nothing to the contrary has been said, and I am entirely of the same opinion as your Lordship. From what has been said to us it is quite clear to me that the jury thought, and unanimously thought, that the case was one which should never have been brought into Court, because on the pursuer's own evidence, as I understand, they found a unanimous verdict for the defenders. I also gathered that it was a question whether or not there had been any physical injury to the woman, and that the evidence given by the pursuer was corroborated, or at least concurred in and supported, by the husband as to the state of the woman's health after the alleged disturbance of it at the railway station. So far as I can see, nobody should have known better than her husband what her true state of health was, and nevertheless when he came forward and spoke to her state of health the jury did not believe him. I also agree with what Lord M'Laren is reported to have said in a former case, namely, that in the peculiar relation in cases of this sort of the husband and wife, living in the same house and both having a direct interest in the matter in dispute, it is very difficult to suppose that the husband was not taking an active control of the case throughout. I think with your Lordship that the evidence shows that the husband has been a partisan in the action, and that he as well as his wife should be liable in expenses.

LORD M'LAREN—I agree with your Lordships who have spoken that there may be cases where a husband by giving a formal consent to his wife's action does not render himself liable in the expenses incurred by the adverse party. That might be so, especially in the case where the action related to property, and where the husband, unless he was a lawyer, would not be able to give assistance or advice in the conduct of the case. But in personal claims like the present the presumption, as I am inclined to think, is that he does assist. Now, if the case had been a fair case for trial, it might be that the degree of assistance rendered by the husband (of which we have no precise knowledge in this particular case) might not be sufficient to render the husband responsible. But then it is clear that the jury looked upon this as an unsubstantial claim, and your Lordship who tried the case is, I understand, of the same opinion. Now the husband, as Lord Adam has observed, had better means of judging of the substance and truth of the claim than any other person; and taking my stand on the conclusions of the judge and jury who tried this case, I would say that

a husband has no curatorial duty to give his consent to an unfounded action, and that if he does so it is sufficient participation to render him responsible in expenses. It is very difficult, perhaps impossible, to lay down any rule for these cases. Each case must depend on its special circumstances, although, of course, it is quite right that we should have regard to the previous cases which have been laid before us.

LORD KINNEAR—As soon as it is determined—and as I understand all your Lordships agree in holding—that the concurrence of a husband in an action in his wife's name does not of itself render him liable in expenses, then I think the question comes to be whether in any particular case he has taken such an active part in the case as to make it proper that he should share in the expenses. That is a proper question for the judge who tries the case, and I should not be prepared to dissent from his judgment; but having regard to the explanation which your Lordship in the chair has given us, I concur in the decision which your Lordship proposes.

The Court applied the verdict, and found the pursuer and her husband jointly and severally liable to the defenders in expenses.

Counsel for the Pursuer—Munro. Agent—James G. Bryson, Solicitor.

Counsel for the Defenders—King. Agents—Hope, Todd, & Kirk, W.S.

Friday, November 1.

SECOND DIVISION.

[Lord Low, Ordinary.

MENZIES *v.* MARQUIS OF BREADALBANE.

Property—Right of Access—Access of Necessity—Only Access across River or through Neighbour's Lands.

A proprietor whose lands lay on the north bank of a river owned also certain land, formerly an island, but now united to the south bank, to which he could obtain access only by crossing the river from his own lands on the north or by passing through the lands of the adjoining proprietor on the south. In an action of declarator at his instance against the proprietor of the neighbouring lands lying to the south, in which he claimed a right of access through the defender's lands as necessary for the reasonable use of his property, *held* (1) that as the pursuer could obtain access to his own lands by crossing the river, the alleged necessity of access through the defender's lands did not exist, and (2) that even assuming the pursuer to have no means of access to his own lands, in the absence of some relation other than mere neighbourhood between the parties, such as seller and purchaser or superior and vassal, there was no legal obligation on the defender to afford him such access.

Sir Robert Menzies of that Ilk, Baronet, raised an action of declarator against the Marquis of Breadalbane, in which he concluded *first* for declarator "that the pursuer, as heritable proprietor of the northern half of the lands known as Farleyer Island, in the parish of Dull and county of Perth, is entitled to a right of access to and egress from his said half of Farleyer Island through the defender's lands to the public road leading from Kenmore to Aberfeldy;" and *second* for declarator that he had right to such access by means of a gate at the west end of the march fence which separated his half of said island from the defender's, and thence by a roadway or track leading through the defender's lands to a gate opening upon the said road from Kenmore to Aberfeldy.

The pursuer, whose lands at this point lay on the north bank of the Tay, was proprietor of the northern part of Farleyer "Island," a piece of land about 18 acres in extent, which apparently was at one time in fact an island, but was now, except in time of high flood, united to the south bank of the river. The southern half of the "island," together with Bolfracks Haugh by which it was bounded on the south side, belonged to the defender.

A march fence running east and west separated the pursuer's from the defender's half of the "island."

The pursuer averred that the only available access to Farleyer Island was from the Bolfracks side through the defender's lands, and that said access was necessary for the reasonable enjoyment of his property. In particular, he claimed the right to use a gateway situated towards the west end of the said march fence, and a road leading therefrom to a gate at the west end of Bolfracks Haugh and opening upon the said public road, and averred that this was the only safe and constant access available to his half of Farleyer Island, and that it was necessary for the reasonable enjoyment of his property.

The defender denied that the only available access to Farleyer Island was from the Bolfracks side, and averred that the pursuer could obtain access to his portion of the island by crossing the Tay.

The pursuer averred further that the access claimed by him was part and pertinent of his lands, or otherwise that he had acquired right to it by prescription. The defender denied these averments.

The defender, while denying the pursuer's right to the access claimed by the west end of the march fence, offered to the pursuer an access by the east end of the line of march, which he explained would be less burdensome to the defender. He further offered *ex gratia* to give a gate at the west end for egress in times of emergency, to be used only for live stock, and on payment of 1s. a-year if asked.

The pursuer refused these offers, and thereafter raised the present action.