defenders asked the Auditor to tax the account as between agent and client, and the Auditor refused as he found no warrant for doing so in the interlocutor. The application to alter the interlocutor is too late, and it is vain to quote to us English cases as to the rules of procedure in our own Court. There is a perfectly appropriate time for such a motion being made, and the present contention would lead to this, that such questions as to whether or no a party was a public authority would be left to the decision of the Auditor.

LORD M'LAREN—It is a well-established rule by practice in this Court that where expenses are to be given on any other than the ordinary scale, this should be specified in the interlocutor awarding expenses. The Public Authorities Protection Act is not the only illustration of the application of that rule. There is, for instance, the very familiar case where the question is whether expenses are to be given against trustees or a judicial factor individually or in a representative capacity.

In such cases it is settled that the Court has no power to alter what is contained in its interlocutor awarding expenses. In a well-known case as to individual or collective liability, which went to a Court of Seven Judges, it was held that the only question was the construction of the interlocutor which was under consideration.

I agree with your Lordship in thinking that the practice of the English Courts cannot be a guide to us in settling what is the proper time in this Court at which application ought to be made for carrying out the provisions of the Act. I do not know whether, if this motion had been made at the proper time, it would have been granted; but it was not made, and we have no power to alter or amend our interlocutor.

LORD KINNEAR—I concur.

LORD PEARSON—I agree on the ground that the motion is made too late.

The Court refused the prayer of the note.

Counsel for Pursuers and Reclaimers—The Solicitor-General (Ure, K.C.)—T. B. Morison. Agents—P. Morison & Son, S.S.C.

Counsel for Defenders and Respondents—Clyde, K.C.—Chree. Agents—Alex Morison & Co., W.S.

Saturday, March 3.

FIRST DIVISION.

[Lord Johnston, Ordinary.

A B *v.* C B.

Husband and Wife—Nullity of Marriage—Impotency—Incapacity of Woman—Absence of Structural Defect—Impracticability of Consummation—Circumstances in which Impracticability Inferred.

Seven months after the marriage, a husband brought an action of nullity against the wife on the ground of her impotency. The spouses had separated three and a-half months after the marriage, but prior to that date the husband, who was able and anxious to consummate the marriage and had had sufficient opportunities, had used every means to that end short of physical violence, but without attaining his object. There was no structural incapacity in the wife. No reason was suggested for a wilful refusal on her part.

Held (1) (*aff.* Lord Ordinary Johnston's opinion) that incapacity on the part of the woman was not restricted to cases where some structural incapacity existed, but included cases where consummation was impractical, an inference to be drawn from the facts; and (2) (*rev.* Lord Ordinary Johnston) that in the circumstances of the case incapacity on the part of the woman was to be inferred, and consequently that the man was entitled to decree.

On 3rd January 1905 A B (the man) brought an action against C B (the woman) to have it declared that a marriage between them, which had been celebrated on 10th June 1904, was null, on the ground that the defender was at the time of the marriage, and was still, impotent.

The facts proved and the circumstances of the case are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who on 22nd November 1905 pronounced this interlocutor—"Finds that the pursuer has failed to adduce evidence by which the alleged impotency of the defender is established, or from which it can be inferred; therefore dismisses the summons and decerns: Finds the defender entitled to expenses down to and including 17th March last, under deduction of £5, 5s. paid *ad interim* under the interlocutor of 17th February last, and of £5 paid voluntarily on 17th March last; allows an account to be given in," &c.

Opinion.—"The pursuer A B seeks to have his marriage with the defender C B, which was solemnised on 10th June 1904, annulled on the ground of her impotency. The parties lived together until 24th September 1904, and the summons was signeted on 3rd January 1905, less than seven months after the marriage.

"The evidence is so narrow and the case so complicated by the briefness of the period of cohabitation, and by the conduct of the wife towards the litigation, that it is necessary to deal with it with care.

"The pursuer necessarily undertakes the onus of showing, as the ordinary form of summons sets forth, 'that the defender was at the time of the pretended marriage between her and the pursuer, and still is, impotent and unable to consummate marriage by carnal copulation:' Has he satisfied that onus?

"His averment is the general one, that 'the defender is impotent and unable, either from malformation or from functional or nervous defects in her constitution, or from some other cause or causes to the pursuer more particularly unknown, to have connection with the pursuer.'

"I may premise that I am satisfied that there is no collusion in the case, and also that there is no reason for entertaining the suggestion that, as alleged by the defender, but not attempted to be proved by her, there had been any antenuptial intercourse. Further, there is nothing to suggest impotency on the part of the pursuer.

"Otherwise the evidence is as follows:—The marriage took place at Perth on Friday, 10th June 1904, in the evening. The pursuer swears that he sought intercourse that night, but desisted on his wife pleading fatigue. The parties went to Dollar on Saturday, 11th June, and the pursuer swears that he attempted intercourse that night, but that his wife would not allow him to effect penetration. On Tuesday, 14th, the parties were at Stanley, and the pursuer swears that he again attempted intercourse that night, but was again unsuccessful. The pursuer being an engine-driver in railway employment was on the night shift from Thursday, 16th. But he swears that on coming home on Sunday, 19th, at 4 a.m.—'I went to bed beside my wife. I attempted to have connection with her, but was unsuccessful. She refused me.' From this date on the pursuer does not speak to particular dates. But he puts the facts thus—'(Q) On the night of the Monday of the following week' (*i.e.*, either 20th or 27th June) 'did you attempt to have connection with her?—(A) I attempted it occasionally before I was told I should have had "better luck," but I do not remember the dates. I cannot tell how many times I attempted it. I tried it until I was tired. I did not succeed at any time. She would not let me do it at all. I never succeeded in penetrating her private parts. She always kept her legs close, bar once. I believe that would be the third week, but when I got a certain length she refused altogether, and when I said she was no use to me she said I should have had better luck. Her legs were open on that occasion, but I did not succeed in penetrating. I never attempted to use force. I left her about the 24th September. I cannot say how many times I attempted to have connection with her. (Q) Very often?—(A) Yes, I tried until I was tired of it any way.' And in cross he adds—'I began to despair and give it over about a month or six weeks after the marriage.' And in answer to the Court—'After I made the last attempt to have connection with her we always slept in separate rooms.'

"This is the whole direct evidence to the facts, and it must be accepted, on the defender's admission to the doctors who examined her, that the marriage never was consummated. But it must be remarked, before going to the medical evidence, that the wife's mother was alive and readily accessible to the parties, and that so far as the pursuer was concerned no attempt was made to interest her in the defender her daughter, or to get her or any other discreet and experienced married woman to advise the defender, nor did the pursuer communicate his difficulty either to a medical man or, so far as appears, to anyone else, until after he had left his wife. So far as the defender is concerned there is no suggestion that she consulted anyone either.

"The medical evidence was that of Drs Carruthers and Bisset of Perth. They did not examine the defender on any remit from the Court, but she voluntarily submitted to their examination within a month of the separation, at least on 25th October 1904. We are left in doubt whether it was prearranged or not, but I understood it was, as she was found in bed at the doctors' coming. The gist of Dr Carruthers' evidence is that the condition of the hymen was consistent with connection having taken place at some time, but not proof that it had ever taken place; that the vagina was normal in size; but that in passing two fingers gently up there was a slight spasmodic action causing a distinct grasp of the fingers in the passage, which would be increased in the act of sexual connection; that the passage of the fingers caused appreciable pain; and that there would be an increase of pain in the course of the sexual act. Dr Carruthers further stated:—'There was nothing in the physical appearance to account for her declining. There was really nothing to hinder connection if it had been forced'; and in cross, 'I asked her if she refused, and she said no; she was willing. I said "Can you explain, if you were both willing, how no connection took place?" and she said she could not. . . . Of course the spasm was there and there would be extreme pain in connection. (Q) Is not that quite usual?—(A) Not always; not so bad as this. We sometimes come across women who are nervous and excitable for a little while, and who gradually reconcile themselves to the duty of a wife, but this spasm is a matter of unconsciousness. I have had no experience of a woman refusing her husband to have connection for a time and then getting over that. It may be medically true that such is the case. I strongly recommended reconciliation between the parties. The defender said she thought it was impossible.' And in answer to the Court he added:—'Supposing I had been told that the attempts had been, say, a dozen times, and had been unsuccessful, I would have recommended that they should have been continued further if the parties were both willing. I have seen the spasm frequently in other cases. It did not amount to an abnormality, but it rather exaggerated the pain more than usual. The defender said she was anxious to do her duty as a wife, and said it was an extraordinary thing that they were both willing and yet never had been able to have connection, which I could not understand.'

"Dr Bisset corroborates Dr Carruthers regarding the physical condition ascertained by their examination, viz., that he 'found a slight constriction of the orifice—a spasm.' But in cross he adds, 'I did not see anything to prevent the defender having connection with her husband,' and in answer to the Court, 'I saw nothing to prevent connection that could not have been overcome. The spasm I noticed was more than is usually found to exist in a newly married

woman. It did not amount to malformation or an unhealthy condition.'

"Now, the whole of this evidence must be taken in the light of the facts that the pursuer and the defender commenced their married life with the ordinary natural affection of a newly married couple, that there is nothing on which to base the suggestion that the defender might be impotent *quoad* her husband though not *quoad* another man, *i.e.*, that it was a personal matter; and that there is no suggestion that the failure to consummate the marriage was due to excitability on the part of the defender, still less to anything that could be denominated hysteria.

"In these circumstances I confess I think the evidence comes short of what is required to satisfy the Court of the defender's inability to consummate the marriage. I would even go the length of saying that the medical evidence rather goes to establish the contrary. But it was ably argued on the authorities, that I must accept it as proved in the absence of rebutting evidence that there had been continued refusal to permit intercourse, and that such a state of facts entitled, and if entitled I suppose bound, the Court to infer practical incapacity.

"The term 'practical incapacity' has been used in England. But though I take no exception to it on matter of principle I think it requires to be applied with very great caution.

"The received doctrine on which the power of the Court to annul a marriage on the ground of the impotency of one of the spouses rests is that marriage is a consensual contract, completed by the consent of the spouses, whether there exists impotency or not, but that the consent is given on the implied condition on each side that the other side is capable of marital intercourse, which condition is resolutive of the marriage if the capacity be found not to exist. And as in the case of other resolutive conditions the nullity requires to be declared. The contract, that is the marriage, stands, unless the spouse to whom the condition is not implemented takes steps to set it aside.

"But there is this anomaly in the law—the end of marriage, besides conjugal association, is the procreation of children, and conjugal intercourse is the means to that end. Impotency is properly incapacity *procreandi* and not merely *copulandi*. Yet the law does not inquire into the capacity *procreandi*, but merely into the capacity *copulandi*. So long as sexual intercourse is possible the husband may be incapable of generating, the wife may be sterile. This may not be logical, but it is defended on the ground that capacity for intercourse is a fact that can be ascertained by evidence; capacity to procreate, unless in exceptional cases, is rather matter of speculation. The sole question for the Court, therefore, is not potency or impotency in the proper sense, but the capacity or incapacity of the spouse in question to have sexual intercourse with the other. The Courts have discriminated between structural incapacity, or incapacity arising from malformation, and practical incapacity where there is no malformation. On the evidence it cannot be suggested that the defender suffers from any structural incapacity. It is necessary, therefore, to ascertain what is meant by practical incapacity.

"There have been few cases in Scotland on this subject for a long time past, except two or three which have not gone beyond the Outer House, and these latter have rested for authority upon English decisions. But there is one Scottish case to which I may refer, *A B* v. *C B*, 12 R. (H.L.), 36, because of what is said on the subject of length of cohabitation, a point to my mind of great importance here. The rule of the canon law, adopted to some extent in England, was that three years' cohabitation without consummation raised a presumption of incapacity, where incapacity could not be practically proved at an earlier point of time.

"The rule is thus explained by Dr Lushington in a passage quoted by the Lord Chancellor (Selborne), at p. 41:—'I am of opinion that a triennial cohabitation is not an absolutely binding rule. It is a convenient and fitting rule, and one not to be departed from on slight ground. Still circumstances may arise, as in the present case, to justify the Court in dispensing with it. I am not aware that there is any magic in three years. I conceive that the object of the rule is to provide that sufficient time may be afforded for ascertaining beyond a doubt the true condition of the party complained of. If the Court can be satisfied by circumstances that the complaint of the promoter of the suit is well founded, it ought never to be driven *sine gravissima causa* after such a cohabitation as is proven in this case' (that was less than three years) 'to order a return.' Within recent times the canon law requirement of a triennial cohabitation has not been recognised in Scotland. But I venture to think that the object of the rule, as stated by Dr Lushington, viz., where there is no direct evidence, and the Court is driven to inference, to provide that sufficient time be afforded for ascertaining beyond a doubt the true condition of the party in question, should be recognised in Scotland, and that grave risk of miscarriage of justice is run if with insufficient time deductions are drawn from circumstances not absolutely conclusive, which the lapse of more sufficient time might subvert; and here I think in the circumstances the time has been insufficient safely to admit of the deduction.

"The term 'practical incapacity' is found I think first used by Lord Penzance in the case of *G.* v. *G.*, L.R., 2 Prob. Div. 287. He there says the basis of the interference of the Court is not structural defect but the impossibility of consummation. 'If, therefore, a case presents itself involving the impracticability (although it may not arise from a structural defect), the reason for the interference of the Court arises. The impossibility must be practical. It cannot be necessary to show that the woman is so formed that connection is physically im-

possible, if it can be shown that it is possible only under conditions to which the husband would not be justified in resorting.' But then in the case in which he applied these views there had 'been nearly three years' cohabitation, and therefore ample opportunity had been afforded for any mere temporary difficulty to pass away.'

"The same principle was applied by Sir James Hannan in *H.* v. *P.*, L.R., 3 Prob. Div. 126. But the parties had cohabited for more than three years, and any attempt by the husband to consummate the marriage resulted in either fainting or violent hysteria on the part of the wife. Sir James said—'The rule appears to be this: the impediment in the way of intercourse must be physical, and it must not arise from the wilful refusal of the wife to submit to her husband's embraces.' The husband's attempts brought on hysteria, 'so that he could not effect his purpose without employing such force as, but for the marriage, would have amounted to rape. Every feeling is arrayed against the idea of a husband having recourse to such violence. If, then, the husband finds it impossible to have connection with his wife, except upon such conditions, it is practically impossible for him to have any connection at all.'

"In a subsequent case—*S.* v. *A.*, L.R., 3 Prob. Div. 72—Sir James Hannan, after saying 'a wilful, wrongful refusal of marital intercourse is not in itself sufficient to justify the Court in declaring a marriage to be null by reason of impotence,' added this important statement of the law—'Recent cases only establish this in advance of previous decisions, viz., that when a woman is shown not to have had intercourse with her husband after a reasonable time for consummation of the marriage, if it appears that she has abstained from intercourse, and resisted her husband's attempts, the Court will draw the inference that that refusal on her part arises from incapacity.'

"The statement of the present position of the law may, I think, well rest there, and the question must always be: From the circumstances, can the Court draw the inferences that something more than seemingly wilful refusal must have animated the spouse complained of? In the circumstances, is it to be inferred from the lapse of time that has occurred that that something more cannot be overcome, but amounts to practical incapacity?

"In the circumstances of this case, if I were driven to a decision as at 24th September 1904, when the husband left his wife after barely three months and a half of married life, during the first six weeks of which only there had been proper conjugal cohabitation, I could no more satisfactorily conclude that there was incapacity on the part of the wife than that there was wilful, wrongful refusal. I do not in fact think that either has been proved. My view of the facts is this—

"There has been no consummation of the marriage. The defender is capable of intercourse. But she must endure some pain, at least at first, in the sexual act. There is nothing approaching hysteria or incapacity to control herself in her case. There has been no attempt to obtain advice, explanation, and encouragement for her, and the husband has not recognised that it may even be possible that he himself might take advice with good results. In these circumstances, in my opinion, the time and opportunity has not been sufficient to infer practical incapacity from the failure so far to consummate the marriage. The case is a very different one from *B.* v. *B.*, L.R. (1901), Prob. 39.

"The Outer House cases which were referred to were *AB* v. *YZ*, 8 S.L.T. 253, *AB* v. *CD*, 38 S.L.R. 559, *M.* v. *G.*, 10 S.L.T. 264, and *AB* v. *CD*, 10 S.L.T. 266. They go further in readiness to draw the presumption than any of those which have occurred in the English courts. But none of them come up to the present.

"The case is made more difficult owing to the conduct of the defender towards the litigation. Lord Stormonth Darling, who took the proof, stopped it at the close of the pursuer's evidence, and on 17th March 1905 pronounced an interlocutor, based I understand on an undertaking by the parties, given on his advice, by which, on their agreeing to resume cohabitation, he sisted further procedure till 18th July next.

"On 13th July the pursuer lodged a minute stating that notwithstanding the agreement to resume cohabitation, the defender had not done, and persistently refused to do, so, and therefore craved a renewal of the sist for such period as might be deemed expedient, that the defender might have a further opportunity of resuming cohabitation with him. But this suggestion was not accepted by the defender, and on 18th July 1905 I found myself obliged to appoint the proof to be resumed on 10th November 1905. The defender, however, prior to the diet fixed, lodged a minute in which she stated that 'the pursuer has taken no interest in, or shown any affection or regard for the defender, nor has he made any reasonable provision for resuming cohabitation with her. The defender is now satisfied that the pursuer does not desire her to reside with him, and does not intend to treat her as his wife. In these circumstances, while the defender adheres to her defence as stated on record, she respectfully desires to intimate that it is not her intention to appear at the diet of proof fixed for 10th November unless otherwise ordered by the Court.'

"Accordingly when the proof was called on 10th November the defender did not appear except by counsel, who intimated that he was instructed merely to watch the case, but not otherwise to intervene. I intimated that the pursuer would be allowed in these circumstances to supplement his proof on any point he thought desirable and even to call the defender. But he elected to stand on his proof as led and I thereafter heard counsel for him.

"The result is most unsatisfactory. In any other class of case I should, I think, have been bound to hold the defender confessed. But in a matrimonial cause the

Court is in a peculiar position. And I think that it would be against public policy were I to pronounce decree of nullity of marriage practically by default, or by reason of the contumacy of the defender.

"The question which I now have to determine therefore is—Can I accept the conduct of the defender as an admission on her part of the impotency alleged, or as evidence from which I can draw the inference of practical incapacity, which I cannot draw from the evidence? Or must I regard her attitude as virtually wilful, wrongful refusal. I experience the utmost difficulty in deciding this point. And if I had had any evidence of provision made for cohabitation and advances made by the pursuer with a view to resumption of cohabitation on anything like proper and generous terms, and rejected, I should possibly have been able to reach the inference required. But left as I am to judge on the evidence as led, and on the minutes of the parties, I feel unable to overcome the conclusion at which I had arrived, that the medical evidence was affirmative of the possibility of consummation, and that in the circumstances there had not been sufficient opportunity. After what has come and gone since 24th September 1904 the attitude of the defender is not perhaps altogether to be wondered at, but regarding it judicially I think it now amounts to wilful, wrongful refusal. If this is continued the pursuer may have his remedy by divorce for desertion, but I do not think that he has proved his case for decree of nullity of the marriage.

"I shall therefore dismiss his action, finding the defender entitled to expenses only down to 17th March last, under deduction of five guineas of interim expenses allowed by the interlocutor of 17th February last, and of a further sum of £5 voluntarily supplied on 17th March last."

The pursuer reclaimed, and argued—The pursuer was willing and anxious to consummate the marriage, and had made repeated attempts to do so. These had been unsuccessful because of the defender's refusal to permit consummation. The defender's refusal was due (*a*) to physical causes, (*b*) aversion to the husband, or (*c*) aversion to the act. From the refusal of the defender after sufficient time and opportunity the Court would infer impracticability or impotency—*G.* v. *G.*, 1871, L.R. 2 P. & D. 287, 25 L.T.R. 510; *S.* v. *A.*, 1878, L.R. 3 P. Div. 72, 39 L.T.R. 127; *F.* v. *P.*, 1896, 75 L.T.R. 192; *E.* v. *E.*, 1902, 87 L.T.R. 149; *B.* v. *B.* [1901], P. 39; *M.* v. *G.*, 10 S.L.T. 264; *A B* v. *C D*, 10 S.L.T. 266; *A B* v. *G Z*, 8 S.L.T. 253; *C B* v. *A B*, March 5, 1885, 12 R. (H.L.) 36, 22 S.L.R. 461. There had been sufficient time and opportunity here. The fact that there was no structural defect on the part of the defender did not overturn the inference from the other facts proved—*G.* v. *G.*, *cit. supra*, *per* Lord Penzance, p. 291.

Counsel for the defender watched the case but did not address the Court.

At advising—

LORD PRESIDENT—This is an action of declarator of nullity of marriage at the instance of a husband against a wife, on the ground of impotency. The case is important in this respect, that the class of facts which we find here does not seem to have been the subject of decision in the Inner House, though facts nearly, although not identically, the same in their complexion have been adjudicated upon in the Outer House and in England. I do not think it necessary to investigate the history of the law. It has long ago been settled that impotency on the part of one spouse at the time of the marriage continuing thenceforth is a ground for the voidance of the marriage at the instance of the other, which will be given effect to unless there is a personal bar to be drawn from the solemnisation of marriage in the knowledge of both parties of the defect, or to be inferred from the extreme age at which the marriage is contracted. Further, it is now well settled that a person is in law impotent who is *incapax copulandi*, apart from the question of whether he or she is *incapax procreandi*. The only difficulty therefore that arises is in the proof—a proof as to which the Court is bound to be satisfied, lest marriages should be avoided either by collusion or in cases where the fact that there has been no copulation is due to wilful refusal.

The primary fact as to which the Court must be satisfied is that the marriage has never in fact been consummated. As to this no general rule can be laid down, yet it is here that I think we have the greatest safeguard against the abuse of this remedy. For it is certain, as a matter of ordinary experience based on observation of human nature, that however unhappy in the sequel marriage may become, and however strong the motives which may prompt the desire of one or other or both of the spouses to part company, in the vast majority of cases consummation will follow marriage at no distant interval. In the present case, without quoting the evidence, I may say I am thoroughly satisfied that consummation never did take place, and the Lord Ordinary is of the same opinion. But then comes the question, was the non-consummation due to impotency or to some other cause. Now, the proof that is available in such a question evidently differs according to the sex of the spouse complained of. Nature has arranged that in a certain sense man shall be the active and woman the passive participant in the sexual act. It results that medical evidence will in most cases be directly available to prove incapacity in the case of the man, in comparatively few in the case of the woman. That being so, the question that arises in the present case, and is I think undecided by this Court, is whether incapacity in the woman is to be confined to those cases, admittedly rare, where there is what has been termed structural incapacity. I see no reason so to confine it, and I am content to adopt in terms the words of a very great authority on such subjects, the late Lord Penzance, in the case of *G.* v. *G.* (L.R. 2 P. & D. 287).

He said—"The invalidity of the marriage, if it cannot be consummated on account of some structural difficulty, is undoubted, but the basis of the interference of the Court is not the structural defect but the impracticability of consummation." I understand the Lord Ordinary to agree also on this view of the law. He has, however, refused decree on the ground that the evidence falls short of satisfying him that the non-consummation was due to inability on the part of the defender. Now, I admit this is a question of fact, and each case must be judged on its own circumstances. But in so far as a general rule can be laid down, I am again content to take the standard laid down by Lord Penzance. "The impossibility," he says, "must be practical. . . . The question is a practical one, and I cannot help asking myself what is the husband to do? . . . Is he by mere brute force to oblige his wife to submit to connection? Everyone must reject such an idea." And the same rule was expressed in somewhat different language by Sir Francis Jeune in the case of *F.* v. *P.* (75 L.T. 192), when he said that if it be satisfactorily proved that repeated endeavours of a potent husband, who has tried all means short of force, had been uniformly unsuccessful, it was for the Court, in the absence of any alleged or probable motive for wilful refusal, to draw the inference that the non-consummation was due to some form of incapacity on the part of the wife.

I do not think it necessary to review the details of the evidence in this case. I content myself with saying that I am satisfied that the following facts have been proved:—(1) That the marriage never was actually consummated. (2) That the husband was able and anxious to consummate and had more than sufficient opportunities, free from any circumstances of a disturbing nature, either mental or physical, on which to attempt consummation. (3) That, short of physical force, he adopted all ordinary expedients to induce the wife to admit connection. (4) That no reason whatever is suggested for a wilful refusal on the part of the wife, and that the whole probabilities of the case point to an opposite conclusion. In the circumstances I think that the Court is entitled to draw the inference that there was here a practical incapacity on the part of the wife, and that the husband is entitled to the remedy he asks for.

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

The Court recalled the interlocutor of the Lord Ordinary of 22nd November 1905 save in so far as it dealt with expenses, and found, declared, and decerned in terms of the conclusions of the summons, finding the defender entitled to expenses since the date of the said interlocutor.

Counsel for the Pursuer and Reclaimer—Munro. Agent—Jas. Campbell Irons, S.S.C.

Counsel for the Defender and Respondent—Lyall Grant. Agents—Cowan & Stewart, W.S.

Tuesday, March 7.

SECOND DIVISION.

COUPER *v.* M'KENZIE.

Ship—Collision—Limitation of Liability—Fishing-Boat—Fishing-Boat Registered only in Fishing-Boat Register under Part IV of Merchant Shipping Act 1894 *Entitled to Limitation of Liability—Merchant Shipping Act* 1894 (57 *and* 58 *Vict. cap.* 60), *secs.* 2, 373, 503, 508.

Section 503 of the Merchant Shipping Act of 1894 limits a shipowner's liability in certain cases of loss of life, injury, or damage. Section 508 provides that this benefit shall not extend to any British ship which is not recognised as a British ship within the meaning of the Act. Section 2 provides, sub-sec. 1, that every British ship (with exceptions enumerated in sec. 3 not here in point) shall be "registered under this Act;" sub-sec. 2, that any such ship "not registered under this Act" shall not be recognised as a British ship.

Held that a British fishing-boat registered only in the Fishing-Boat Register under Part IV of the Act, and not under Part I, was a British ship registered under the Act within the meaning of sec. 2, and that its owner was entitled to the limitation of liability conferred by sec. 503.

Ship—Collision—Limitation of Liability—Fishing-Boat—Tonnage—Deduction of Crew Space—Surveyor's Certificate—Registration—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60).

In calculating the tonnage of a steam fishing-boat, registered only under Part IV of the Merchant Shipping Act 1894, for the purpose of the limitation of the owner's liability under sec. 503, *held* that the owner was entitled to deduct crew space which was certified by a Board of Trade surveyor, although neither the certificate nor any entries in connection with it had been registered in the register appointed to be kept under Part I of the Act.

Expenses—Ship—Collision—Petition for Limitation of Liability—Respondent Opposing Limitation Liable for Expenses Caused by Opposition—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 504.

In a petition for limitation of liability brought under sec. 504 of the Merchant Shipping Act 1894, the respondent, who opposed the petition, contending unsuccessfully that the petitioner was not entitled to the benefit of limitation, *held* liable to the petitioner in such expenses as had been caused by his contention.

Statute—Statutory Law—Interpretation—Previous Legislation.

Per Lord Kyllachy—"I should doubt much whether the courts of law are at liberty, in construing Acts of Parliament, to do so with reference to the