sented, namely, helpless and unable to take any further step. It is quite clear from the documents referred to on record that if he served he would at all events be in a position to make renewed application, and that his services, if tendered, would certainly be considered by the Secretary of State in the first instance, who might refer it to the Privy Council. If the pursuer wants to take any further step he has this course clearly open to him. Whether it would advantage him or not in the end it is not for us to say.

LORD DEWAR concurred.

The LORD JUSTICE-CLERK was absent, and LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for the Pursuer and Reclaimer—A. J. P. Menzies—Maclaren. Agents—Bruce & Black, W.S.

Counsel for the Defenders and Respondents — Lyon Mackenzie, K.C. — Gillon. Agent—Sir W. S. Haldane, W.S.

Saturday, January 17.

SECOND DIVISION.

[Lord Anderson, Ordinary.

EDGAR *v.* LAMONT.

Reparation — Negligence — Title to Sue — Husband and Wife — Medical Man — Action by Married Woman against Medical Man Called in by Husband to Attend to her.

In an action at the instance of a married woman, against a medical man who had been called in by her husband to attend to her, in which she claimed damages for the loss of a finger, which she averred was due to improper professional treatment, *held* that as the action arose *ex delicto* and not *ex contractu* the pursuer had a title to sue.

Mrs Jessie M'Intosh or Edgar, wife of Peter Edgar, J.P., property agent and valuator, Glasgow, with the consent and concurrence of her husband as her curator and administrator-in-law, *pursuer*, brought an action against Alexander Lamont, M.B., C.M., Chryston, Lanarkshire, *defender*, in which she claimed payment of £500 damages for the loss of a finger through the failure of the defender to render proper professional treatment.

The pursuer pleaded — "(1) The pursuer having suffered loss, injury, and damage in the manner condescended on, through the gross fault of the defender, is entitled to reparation therefor from the defender. (2) The loss of the pursuer's finger having been caused by the gross fault, incompetence, and negligence of the defender, in consequence of his failure to afford proper and sufficient professional treatment and attention, the defender is liable in reparation therefor to the pursuer."

The defender pleaded — "(1) No title to sue."

The *facts* of the case appear from the opinion of the Lord Ordinary (ANDERSON), who on 17th December 1913 approved of the issue proposed by the pursuer as amended as the issue for the trial of the cause.

Opinion.—"This is an action of damages which is brought at the instance of a lady named Mrs Edgar, who is the wife of Mr Peter Edgar, J.P., property agent and valuator in Glasgow, and the defender is a medical gentleman, Mr Alexander Lamont, M.B., C.M., who resides at Chryston and practises there. The basis of the claim which the lady makes against the defender is to be gathered from the terms of the issue which has been submitted by her, and which is in the following terms:—'Whether the defender, in violation of his duty to the pursuer, by negligence and incompetence, failed to give sufficient and proper care and skill to the pursuer as his patient, in consequence of which the pursuer suffered much pain, her left hand was injured, and one finger had to be amputated, to the loss, injury, and damage of the pursuer?'

"The ground of the action accordingly is that the defender was professionally negligent and unskilful when the pursuer was his patient. I shall have to examine the averments of the pursuer in some detail when I come to consider the second point which was debated before me. But at the outset I deal with the first point that was argued, namely, whether or not the lady has a title to sue the action. It was maintained by Mr Wilson for the defender that she had no title to sue the action, inasmuch that it was not she who made the contract with the defender, and it was contended that as the contract was the husband's he alone had the title to sue under the contract for any remissness on the part of the defender in executing that contract. I was referred to a number of cases in different branches of the law, such as the case of *Cameron* v. *Young*, 1907 S.C. 475, and in the House of Lords, 1908 S.C. 7, and the case of *Kennedy* v. *Bruce*, 1907 S.C. 845, which were cases of landlord and tenant. I was also referred to the cases of *Raes* v. *Meek*, 16 R. (H.L.) 31, and *Tully* v. *Ingram*, 19 R. 65, which are cases where the conduct of a law agent was involved, and I was asked on these authorities to hold that the pursuer had no title to sue the action. On the other hand, Mr M'Laren for the pursuer referred me to a number of English cases, such as the case of *Pippin* v. *Sheppard*, 1822, 11 Price, Exch. 400, where it was decided that the wife alone, who had been injured by the negligence of the medical man, was entitled to sue him for damages, and the case of *Gladwell* v. *Steggall*, 1839, 5 Bing. (new cases), 733, where the injured individual was a young girl of the age of ten years, and where the doctor had been instructed to attend her by the mother, but where nevertheless the Court held that the injured girl was the proper person to sue the action, and Chief-Justice Tindell laid it down as the law of England that in a case like that the claim of the injured person was not *ex contractu* but *ex delicto*—*Longmeid* v. *Holliday*, 1851, 6 Exch. 761, and in our own Courts *Far-*

quhar v. *Murray*, 1901, 3 Fr. 859, in which the opinions of the Judges indicate that the foundation of the action was really delict and not contract. It seems to me that this is according to the right reason of the thing, because if the injured woman here is not entitled to sue this action and recover damages for personal injuries, it seems to me that there are no legal means whereby compensation may be recovered in respect of those injuries. The husband certainly could not sue and make as the ground of damages claimed the fact that his wife had sustained those personal injuries. I do not know that he could sue in respect of loss of her services of which he was deprived for a certain time. That is the law in England, but I am not aware that there is any case in this country in which a husband has maintained his right to obtain reparation in respect of loss of service on the part of his wife.

"Accordingly I decide that the pursuer here has a title to sue the action, and I repel the first plea-in-law for the defender.

"The second question is a question of much greater difficulty, namely, whether the pursuer has stated a relevant case here for further inquiry or not. It is conceded by the pursuer that he must set forth a case wherein he libels specific facts showing that the doctor has been guilty of *crassa negligentia* or has displayed *crassa ignorantia*. That is undoubtedly the law of the land, and the pursuer is bound to set forth at this stage specific facts from which the Court may *prima facie* infer that there has been such negligence or ignorance on the part of the medical man. At the outset the case rather struck me as disclosing nothing more than that there were here two methods of treatment, one adopted by the defender, and the method adopted by him not necessarily implying any negligence on his part at all, but the pursuer making a case of this sort, that he ought to have adopted a different method, which according to the pursuer's averments was a better method. Well, now, if the case discloses nothing more than that, of course obviously there would be no claim against the medical man, because all the law demands is reasonable skill in discharging his professional duties—not highly specialised skill, but only reasonable skill in the case of a general practitioner such as the defender is here. But when the averments are more closely scrutinised, I think they disclose a different case than that I have just suggested.

"This brings me to the history of the case as set forth in the pursuer's averments. The matter began with a very simple incident which occurred on 5th June 1913. While the pursuer was pruning in her garden she cut her little finger very deeply over the first phalanx on the dorsal surface. She immediately washed and dressed the wound, but as it was very painful on the following day she sent for the defender. The defender came on Saturday, 7th June 1913, to attend the pursuer. The pursuer avers that at that time, two days after she had received the initial injury, the wound was closed but the finger was much swollen and very painful. The treatment prescribed by the defender, who according to the pursuer's averments diagnosed that the finger was poisoned, was that it should be dressed with boracic acid, and he ordered the pursuer to bathe it at intervals in hot boracic water until further orders. The next thing was on Sunday 8th June. As the wound had got worse, and the finger and hand were much swollen, and also the arm up to the elbow, the defender was sent for by the pursuer's husband, and the condition of the wound was described by the pursuer's husband to the defender. The defender in reply told the pursuer's husband not to worry, that the swelling was only a development which would pass away in a day or two. The defender called again on 9th June, and the pursuer on this occasion suggested to the defender that he should give her chloroform and lance her finger, but the defender told her to continue bathing it as before. On 11th June the defender again called and saw the finger. According to the pursuer's averments he saw the poison streaks on the pursuer's arm as far up as the arm-pit, and felt the lumps which had formed on the arm from the wrist up to the elbow. The finger was discharging a little matter, and the swelling of the finger and the hand was very great. The defender seemed perfectly satisfied and said that the wound was getting on all right, and ordered the pursuer to continue the bathing as formerly. On 12th June the finger and hand and arm of the pursuer were still swelling and growing gradually worse. Notwithstanding this no change of treatment was suggested by the defender; his orders were to continue the bathing as before. On 13th and 14th the defender again called. The finger below the wound was bursting, matter was oozing out, the swelling was increasing, and the pain was evidently very great. But there was no change of treatment suggested by him; the orders were to continue bathing as before. On 16th June the defender's attention was directed by the pursuer to the state of her arm, and to a lump in her arm-pit. The defender expressed himself as quite satisfied and told the pursuer not to worry but to continue bathing. On 18th June the pain and swelling were as bad as before. The defender's directions were to continue the bathing. On 20th June he was asked to lance the finger; the orders were to continue the bathing. On 22nd June the pursuer's husband pleaded with the defender to lance the finger, or to do something to save it, but the defender declined to do so. The orders were to continue the bathing.

"Well, now, it seems to me that *prima facie* at all events, although the pursuer may have difficulty in establishing the liability of the defender, there is here disclosed a case which indicates professional unskilfulness. The wound was evidently getting worse and worse every day. The treatment which the defender had prescribed and persisted in, and which he had apparently made up his mind he would not deviate from, was producing rather a deleterious effect than a beneficial one, and yet he made no change. In addition to that he

was asked more than once to perform what seems to have been a very proper and simple operation, namely, to open the wound and allow the poisonous discharge to get away from it, but he refused to do that. I do not say that a doctor is bound to adopt any suggestion which the person whom he is attending, or anyone associated with that person, may choose to make, but when a suggestion of this sort, which *prima facie* was a reasonable suggestion, was urged again and again, I think it was his duty to carry out his instructions in that respect.

"Accordingly on the whole matter, although I have found great difficulty on the question of the relevancy of the case, I am of opinion that there is here disclosed a case entitling the pursuer to an issue."

The defender reclaimed, and argued—The pursuer had no title to sue. The present action arose *ex contractu* and not *ex delicto*. A medical man had no duties to the general public. His duties depended solely on contract. A contract for necessaries supplied to the family was a contract with the husband, and medical attendance was a necessary. The contract in the present case therefore was between the pursuer's husband and the defender. The case of *Kennedy* v. *Bruce*, 1907 S.C. 845, 44 S.L.R. 593, quoted by the Lord Ordinary, had been overruled by the decision of the House of Lords in *Cameron* v. *Young*, 1908 S.C. (H.L.) 7, [1908] A.C. 176, 45 S.L.R. 410. There was a close analogy between such a contract as the present and a contract between a law agent and his client, against whom an action for failure to give proper professional skill only lay upon breach of contract—Begg on Law Agents, p. 259; *Fleming* v. *Robertson*, May 30, 1861, 4 Macq. 167; *Tully* v. *Ingram*, November 10, 1891, 19 R. 65, 29 S.L.R. 78. In these cases the ground of action was contract only. The English cases to the contrary, quoted by the Lord Ordinary, were decided long before *Cavalier* v. *Pope*, [1906] A.C. 428, and *Cameron* v. *Young* (*cit. sup.*), quoted by the Lord Ordinary, and were not now to be followed. The case of *Longmeid* v. *Holliday*, 1851, 6 Exch. 761, was not in point at all, and in the case of *Farquhar* v. *Murray*, June 4, 1901, 3 F. 859, 38 S.L.R. 642, the patient was the contracting party.

Counsel for the pursuer were not called on.

LORD SALVESEN—I think the Lord Ordinary has come to a right conclusion.

The first question is as to the pursuer's title to sue. The argument maintained by the defender is to the effect that this is a claim for breach of contract, that the only person with a title to sue is the person with whom the contract was made, and that the contract was made, not with the pursuer, who is a married woman, but with her husband, because although it was the pursuer who sent for the doctor, she did so as agent for her husband, and on the footing that he must pay for the doctor's services.

No doubt it is sometimes difficult to distinguish between liability arising from breach of contract and liability arising from breach of duty. We were referred to a landlord and tenant case, *Cameron* v. *Young*, 1907 S.C. 475, where it was held that the wife of a tenant could not maintain an action against the landlord for his failure to perform the contractual duty of making the house habitable. But that case is clearly distinguishable from the present; and there is a series of decisions in England to establish the proposition that a patient is entitled to a direct action *ex delicto* against a doctor for professional incompetence or negligence, and that no action lies in respect of the injuries so sustained at the instance of the person (other than the patient) who contracted for the doctor's services. I think that view is consistent with our own law and with common sense. To hold otherwise would lead to an entire denial of any remedy to a person who did not happen to be the person who had contracted with the doctor, and I should be very slow indeed to arrive at that result. It seems to me that the clear ground of action is that a doctor owes a duty to the patient, whoever has called him in, and whoever is liable for his bill, and it is for breach of that duty that he is liable—in other words, that it is for negligence arising in the course of the employment, and not in respect of breach of contract with the employer. That being so, I have no difficulty in reaching the same result as has been arrived at in England, and in sustaining the Lord Ordinary's view that the plea of no title should be repelled. [*His Lordship then dealt with questions with which this report is not concerned.*]

LORD GUTHRIE and LORD ORMIDALE concurred.

The LORD JUSTICE-CLERK was absent, and LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for the Pursuer and Respondent—D.-F. Dickson, K.C.—Maclaren. Agents—Sturrock & Sturrock, S.S.C.

Counsel for the Defender and Reclaimer—Horne, K.C. — D. M. Wilson. Agents—Fraser & Davidson, W.S.

HIGH COURT OF JUSTICIARY.

Friday, January 16.

(Before the Lord Justice-General, Lord Johnston, and Lord Skerrington.)

PAUL *v.* H. M. ADVOCATE.

KNOX *v.* H. M. ADVOCATE.

Justiciary Cases—Habitual Criminality—Plea of Guilty—Withdrawal of Plea of Guilty on Appeal after Sentence—Misconception—Criminal Procedure (Scotland) Act 1887 (50 *and* 51 *Vict. cap.* 35), *secs.* 31 *and* 41—*Prevention of Crime Act* 1908 (8 *Edw. VII, cap.* 59), *secs.* 10 *and* 17.

Two persons charged respectively with crime and with being habitual criminals