although there was only one child claiming legitim. But that is not so. *Skinner* was a case of intestate succession and both the pursuer and defender claimed legitim. In *Douglas* it is clear, both from the interlocutor of the Sheriff-Substitute which was affirmed, and from the note of the Sheriff-Principal, that the case was treated as if the defender was claiming legitim as well as the pursuer. I do not quite see why he should have made any such claim, because he was executor and universal disponee under his father's will, but apparently he did make it, and the argument in the Court of Session seems to have conceded the obligation to collate, the only question being whether the gifts made by the father were proper subjects for collation. I am not myself aware of any case except *Nisbet* in which the plea of collation has been sustained at the instance of anyone but a child claiming legitim or his representatives. I view that case as a solitary decision inconsistent with prior judgments of this Court and the House of Lords, and irreconcileable with a later judgment of the same Division of this Court. The authorities against it being thus both higher and later, I think it is my duty to disregard it and to hold that the pursuer is not bound to collate as in a question with the defenders."

Counsel for the Pursuer — D.-F. Asher, Q.C.—Cook. Agents—Traquair, Dickson, & MacLaren, W.S.

Counsel for the Defenders — Sol.-Gen. Dickson, Q.C.—R. E. M. Smith. Agents—Beveridge, Sutherland, & Smith, W.S.

Friday, January 14.

OUTER HOUSE.

[Lord Kincairney.

SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, LIMITED *v.* GLASGOW FLESHERS' TRADE DEFENCE ASSOCIATION AND OTHERS.

Reparation—Relevancy—Combination in Restraint of Trade—Sale by Auction—Conditions in Article of Roup—Competency.

If A informs B that he will not deal with him unless he cease to deal with C, and C thereby loses the custom of B, C has no action against A, although he may, in fact, have suffered loss through his interference.

An auctioneer is entitled, on giving due notice, to refuse the bids of any individual or class of persons.

An association of the butchers in a particular locality intimated to the cattle salesmen in a particular market that they would not in future bid at the auction sales in that market unless the salesmen declined to receive bids made by the co-operative stores. In consequence the salesmen inserted a notice in their conditions of roup to the effect that they would not accept bids from anyone representing the co-operative stores, and, in pursuance of such notice, refused such bids. The market in question was held on a public wharf, where anyone was entitled to transact business or to act as salesman, but it was for the time being the only place in Scotland licensed for the landing of American and Canadian cattle. The co-operative stores brought an action against the salesmen and against the butchers, concluding against the salesmen for interdict against the insertion of the condition above referred to in their articles of roup, and against the butchers for damages for the loss which they alleged they had sustained through the action of these defenders in inducing the salesmen not to sell to them. *Held* (*per* Lord Kincairney) (1) that it was competent to sue both sets of defenders in the same action; but (2) that the action was irrelevant, in respect (*a*) that the salesmen were entitled to insert the conditions of sale complained of; and (*b*) that the butchers were not liable for damages for inducing the salesmen to do an act in itself lawful by means which they were entitled to adopt.

The facts of this case and the arguments of the parties are fully set forth in the opinion of the Lord Ordinary.

On 14th January 1898 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Repels the plea to the competency of the action stated by the defenders other than the Glasgow Fleshers' Trade Defence Association and others: Repels also the plea to title as a plea to exclude the action: Finds (1) that it is not relevantly averred that the defenders, the Glasgow Fleshers' Trade Defence Association, in so far as they may have induced the defenders, Edward Watson and Ritchie, and other cattle or meat salesmen, to refuse bids on behalf of the pursuers for cattle exposed by them for sale at the Yorkhill Wharf or Market in Glasgow, and in so far as they may have induced Robert Ramsay & Company and Thomas MacQueen mentioned on record to refrain from purchasing hides, tallow, and other articles from the pursuers, did so wrongfully or illegally, or incurred liability in damages therefor: Finds (2) that the conditions set forth on record inserted by the said Edward Watson and Ritchie and others in their conditions of sale or articles of roup used by them in their sales of cattle at the said Yorkhill Wharf or Market are not illegal or invalid; and (3) that there are no relevant grounds for subjecting the said Glasgow Fleshers' Trade Defence Association in damages to the pursuers: Therefore repels the pleas-in-law for the pursuers, assoilzies the whole defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses," &c.

Opinion.—"Co-operative societies have of recent years been formed in this country with the object of supplying the public with provisions at cheaper rates than are usually charged in shops. Their tendency is no doubt to reduce the trade, the prices, and the profits of the ordinary shopkeeper, and among them of the butchers. The co-operative societies and the butchers are therefore in a position of antagonism and competition; and the butchers of Glasgow, or some of them, have recently formed themselves into an association in opposition to the co-operative societies. It occurred to them that the co-operative societies might be put in a position of disadvantage if they could be excluded from the American and Canadian meat market, which, as it happens, is at present carried on at only one place in Scotland—the Yorkhill Wharf in Glasgow—and is conducted there by means of sales by auction. The association considered that they would attain their object if they could induce the cattle salesmen who were in use to sell the cattle at Yorkhill to refuse to sell to the co-operative stores, and with that view they approached those cattle salesmen and intimated that they would not buy at their auction sales unless they declined to sell to the co-operative stores. The cattle salesmen were thus placed in a dilemma, and put to choose between the Glasgow Fleshers' Trade Association as it is called, and the co-operative stores, and, judging (as I suppose) that the butchers were the better customers, they yielded to their pressure, and intimated in their conditions of sale that they would not accept the bids of persons connected with the co-operative stores, with the result that the co-operative societies have been cut out of the foreign meat market. The arrangement, it will be observed, is or seems to be doubly advantageous to the butchers, for it relieves them from the competition of the co-operative stores at the auction sales, so presumably reducing the prices when they, the butchers, buy, and also from their competition in the sale in their shops of American and Canadian meat, so presumably enabling the butchers to raise their prices when they sell. This action has been brought to try whether this arrangement can be supported in law.

"The Scottish Co-operative Wholesale Society, Limited, are pursuers, and there are two sets of defenders, (1) The Glasgow Fleshers' Trade Defence Association along with its chairman Roderick Scott, the vice-chairman, and members of committee, as representing the association, and as individuals; and (2) certain firms and individuals who are cattle or meat salesmen.

"The exact legal character of the Glasgow Fleshers' Trade Defence Association does not appear distinctly. It is not clear whether it is meant to represent it as a partnership; but no objection is taken to the manner in which it has been called.

"There is a conclusion which is only slightly connected with the others, in relation to the sale by the pursuers of hides, tallow, and other articles which it will be convenient to leave at present out of account. It will be noticed in the sequel.

"Otherwise the action relates, and relates solely, to the sale of cattle by public auction by the second defenders at the Yorkhill cattle wharf or market. I understand that only cattle from America and Canada are in use to be sold at that wharf, and that it is the only place in Scotland at which such cattle can at present be landed and sold, no other port having been defined for that purpose by the Board of Agriculture under the provisions of the Diseases of Animals Act 1894. The action has no relation to the sale of home-grown cattle.

"Omitting the conclusion about the sale of hides, &c., the action has five conclusions, two directed specially against the first defenders, and three directed specially against the second defenders. Roderick Scott, however, who is chairman of the Fleshers' Association, and is also himself a cattle salesman, is embraced in all the conclusions.

"The conclusions against the first defenders are first, (1) for declarator that they, as representing the association or as individuals, 'illegally conspired to induce and did illegally induce' the second defenders (the cattle salesmen) 'to refuse lawful bids or offers made by or on behalf of the pursuers to purchase cattle exposed for sale' by the second defenders 'at the Yorkhill cattle wharf or market;' (2) for £10,000 as damages.

"The principal conclusion directed specially against the second defenders, the salesmen, is for declarator 'that they were not and are not entitled to insert in the conditions of sale published and used or intended to be used' at the said sales 'conditions to the effect that persons connected, directly or indirectly, with co-operative societies, and all persons selling to or in any way dealing with co-operative societies, are excluded from bidding at the said sales, and that any bid made thereat by or on behalf of any such person or persons shall have no effect, and shall impose no obligation upon the exposer or auctioneer to deliver goods which may have been the subject of such bid, or conditions of the like import and effect, and that such conditions were and are illegal.' There is (2) a corresponding conclusion for interdict against the insertion of such conditions in the conditions of sale used at such sales; and then follows a third and separate conclusion which is of much wider scope, viz., that the second defenders, 'and all other cattle or meat-salesmen exposing cattle for sale at the said Yorkhill wharf or market were and are bound to accept the highest bid or offer made by or on behalf of any solvent persons, including the pursuers, for cattle exposed by them for sale there.'

"The pursuers' corresponding pleas are—'(1) The defenders having maliciously conspired to induce, and having maliciously induced, the cattle or meat salesmen at the said Yorkhill cattle wharf or market to close the said market against the pursuers, their action in doing so was and is illegal.

(3) The conditions of sale providing that co-operative societies are excluded from bidding at the Yorkhill cattle wharf or market, and that a bid from such a society shall have no effect, are illegal. (4) The auctioneers at the said public market are bound to accept the highest bid from any solvent person, the conditions of sale to the contrary being illegal and of no effect.'

"It is to be observed that no consigners of cattle are called as defenders, and on the other hand that the cattle salesmen do not plead that the conditions in their articles of roup were or are inserted in compliance with the orders of any consigners. Indeed, it is not said throughout the record whether the salesmen sell as principals or as agents. It may be noticed that neither set of defenders complains of the other. The salesmen do not resent the interference of the Fleshers' Association, nor say that they act under constraint, and on the other hand that association is content with the action of the salesmen.

"The action is framed in the view that the first defenders conspired to induce the second defenders to insert illegal conditions detrimental to the pursuers in their articles of roup, and that the second defenders under the pressure of the first parties inserted them.

"Thus far the two sets of defenders seem sharply defined and separated. But there is one averment which links them together in a complicated and perplexing way, viz., that all the defenders are now members of the association, an averment admittedly true as to Macdonald, Fraser, & Co.

"All the defenders plead that the pursuers have no title. I have not been able, however, to understand the ground of this plea as a plea to exclude the action or as distinguishable from the merits.

"The defenders other than the Fleshers' Association plead that the action is incompetent because it is brought against two unconnected or insufficiently connected defenders. The cases of the *Duke of Buccleuch* v. *Cowan & Sons*, February 13, 1864, 2 Macph. 653; *Barr* v. *Neilson*, March 20, 1868, 6 Macph. 651; and *Taylor* v. *M'Dougall & Son*, July 15, 1855, 12 R. 1304, were quoted in this connection. It was not maintained that it was absolutely incompetent to sue two defenders who had interests which could be separated and distinguished, or that this action was absolutely incompetent; but only that it would in the conduct of it be so intricate and inconvenient, and would be so unjust to cattle-salesmen against whom no pecuniary claim was made, that it ought not to be entertained. I am of opinion that this plea should be repelled, and that the action is such as this Court is in use to entertain. I think the defenders are closely connected. Perhaps it might have been possible to try the pleas and conclusions directed against the cattle-salesmen without calling the Fleshers' Defence Association, although that seems doubtful, seeing that the persons chiefly intended to be affected by these conclusions are the Glasgow fleshers rather than the salesmen, who cannot be supposed to have any particular regard for the objectionable conditions on their own account. They have merely taken the side of the stronger customers. But the Glasgow fleshers as a body do not take this objection. Roderick Scott, who is one of them, does so, but he defends in a double capacity.

"The pursuers were minded to try the questions which existed between them and (1) the Fleshers' Association and (2) the salesmen, and had to consider whether in order to try these questions they should raise one action or two. Their case against the fleshers is that they induced the salesmen to do something which was illegal, not something which was legal; and I think that the pursuers could not or at least would not conveniently conclude that the act of the salesmen procured by the fleshers was illegal without calling the salesmen at least for their interest. That is really what they have done in this case, because they do not conclude for expenses against the salesmen unless they defend. I am therefore of opinion that this action is well laid, and that the plea of incompetency should be repelled.

"That opens up the important questions of relevancy and law; and while it is hardly possible to treat these matters shortly, I desire to confine myself strictly to the questions of law, and to avoid all reference to questions of expediency or of public policy.

"Shortly and generally stated the pursuers' averments amount to this—that the Fleshers' Trade Defence Association is a combination or conspiracy, the object of which is to destroy the fleshers' business carried on by co-operative societies; that the mode in which the association and its members effected and effect that object—or the principal mode—was and is by inducing the second defenders to refuse the bids of the pursuers, and to publish at their sales conditions to the effect that the pursuers' bids will not be received; that their method of influencing these salesmen was by announcing to them a resolution adopted at a meeting of the defenders' association—'that retail fleshers, cattle-dealers, wholesale meat and pig salesmen of Glasgow and surrounding districts pledged themselves to support only those live-stock agents who decline to support co-operative societies;' and by calling on the second defenders to insert said condition in their articles of sale on peril of the loss of the custom of the association. It is averred that this resolution of the Fleshers' Association was extensively published; certain sales are then mentioned on the record and the refusal to accept bids of the pursuers is averred; and it is averred that in consequence of the action taken by the first defenders, the second defenders 'all one by one gave way to the demand of the' first defenders, 'and intimated at their sales, first verbally and afterwards by printed conditions, that no bids would be accepted thereat from co-operators or from anyone representing them.' It is not said that any contract was made between the

first and second defenders, but only that the second defenders conceded the demands of the first. The ultimate result of the combination or conspiracy is said to have been that the pursuers have been excluded from the Yorkhill Cattle Mart and have suffered serious damage 'by the illegal and malicious conspiracy carried into effect as aforesaid.'

"While the pursuers aver that the object of the first defenders, the Fleshers' Association, was to ruin the trade of the co-operative societies as fleshers, and that their object and the means they adopted were alike illegal and malicious, they do not aver that the ruin of the pursuer's trade was their only object; and it would be absurd to shut one's eyes to the obvious fact that the ultimate aim of these defenders was, at least in part and probably wholly, the furtherance of their own interests by disabling or putting an end to the competition of the co-operative society fleshers firstly as bidders and secondly as retailers.

"That being the nature of the pursuer's case they ask a proof. Both classes of defenders ask a judgment on the relevancy without inquiry.

"I find it convenient, and indeed necessary, to consider in the first place the case against the salesmen. I have already quoted the pleas for the pursuers specially directed against them. The pleas for the salesmen are as follows:—'(4) The conditions of sale adopted by these defenders not being illegal, these defenders ought to be assoilzied.' . . . '(5) The defenders not being under any legal obligation to accept at said market the highest bid from any solvent person, and having adopted the conditions referred to for the protection of their business, ought to be assoilzied. (6) The conditions of sale adopted by these defenders not being contrary to the statutes or bye-laws or regulations relating to the said wharf or cattle-market, are legal and valid.'

"Macdonald, Fraser, & Company, Limited, have stated substantially the same pleas in somewhat different language—'The defenders ought to be assoilzied in respect (*a*) that the conditions established by the defenders for the regulation of their sales are in the legitimate interests of their business; and (*b*) that the said conditions are not contrary to the statutes or bye-laws or regulations relating to the wharf or cattle-market, and are legal and valid.'

"The question does not relate to the rejection of bidders without previous notice. The salesmen did not argue that they could do that; it is as to their right to reject after previous notice, and as to the validity of such notice.

"The declaratory conclusions and pleas for the pursuers in relation to the cattle salesmen, and also their counter pleas, are expressed in the form of abstract general propositions, and the question is whether they can be solved without inquiry. Can it be affirmed or denied that a condition in the articles of roup of these cattle salesmen excluding all persons connected with co-operative stores from bidding at their auction sales at Yorkhill is legal and effective?

"The pursuers argued the case in the first place as a general question relating to the law of sale by auction. They maintained the general proposition that conditions in articles of roup excluding the bids of a class of individuals were altogether illegal and ineffectual. Such conditions were, it was said, repugnant to the essential legal character of a sale by auction, which implied an offer of sale to all the public, and in which it was required that the articles put up for sale should be knocked down to the highest bidder, and should be sold at their fair market value, as ascertained by a free and unrestricted auction. An auctioneer, they maintained, is not the mere agent of the seller, but the judge of the roup is bound to see that justice is done to both parties, and that the competition is neither fictitiously augmented by the seller or his friends, or fictitiously depressed by a combination among the bidders. Thus all bids by whitebonnets or other representatives of the seller were held to be null—*Faulds* v. *Corbet*, February 25, 1859, 21 D. 587; and combinations among the bidders in order to restrict the biddings have also been held, the objection being taken by the seller, to vitiate the sale—*Murray*, February 28, 1783, and *Aitchison*, March 1, 1783, M. 9567; and it had even been said to be the duty of an auctioneer to lay his sandglass on its side so as to prevent the premature closure of a competition by the running out of the sand. It may be open to question whether these decisions would now be implicitly followed, although they are quoted by Lord Ivory (Ersk. ii. 3, 3) and Professor Bell (Pr. sec. 132); (see Bateman on Auctions, p. 151). But no doubt they illustrate the principles applicable to ordinary sales by auction when they are unconditional and without reserve. They do not, however, appear to bear on conditional sales by auction, the conditions of which are expressly and fully declared. Many conditions in sales by auction, such as a stipulation for a reserve bid, a requirement of a deposit in security by a bidder, and others are familiar in practice and are never questioned, and although a condition that a certain class shall not be received as bidders is necessarily unusual as being against the interests of the seller, there seems no sufficient reason to question its legality. No authority was quoted in which such a condition or indeed any condition, when distinctly imposed, was held to be illegal in ordinary sales by auction. There is truly nothing in the office of an auctioneer which can disentitle or disqualify him from carrying out a sale under such a condition. He is subject to no code of rules by common law or custom. There are no conditions of any kind attaching to his office except that he shall pay the licence-duty, which is required for purposes of revenue only. Anyone who pays for a licence may be an auctioneer. There seems nothing to debar an auctioneer from the ordinary right of carrying on his business as best suits him-

self and his clients, and no reason why a seller who chooses to sell by auction should not have as clear a right to nominate the conditions under which he chooses to sell and the persons to whom he chooses to sell as one who sells in any other way.

"The case of *Eagleton* v. *The East India Company*, February 10, 1802, 3 Bos & Pullar, 55, was referred to. There it was held that the East India Company had unwarrantably refused a bid at a sale by auction of tea. The point decided was merely special, but opinions were indicated that the sales must be open to all the king's subjects, and probably conditions purporting to exclude classes of the community would not have received effect. But these were sales authorised by special statute by which the company were required to conduct their sales 'openly and publicly by inch of candle and not otherwise'—a provision which was thought to have been inserted in the statute for the special purpose of preventing preferences, and was held to restrict the power of the company. Except in such a special case, I can find no authority for holding that an auctioneer has not, as I have said, the ordinary right of carrying on his business as best suits himself and his customers. I think therefore that the general and abstract proposition of the pursuers cannot be supported.

"But the pursuers maintained with much force that a sale by auction at the Yorkhill wharf was in a highly exceptional position; and it was urged that it was necessary that there should be inquiry on that subject. I confess that I am unable to see to what such an inquiry would be directed, or what relevant information could be obtained from it. The pursuers' averments on the point are contained in Condescendence 3—'That market was established and is maintained under the Diseases of Animals Act 1894, by the Local Authority of the City and Royal Burgh of Glasgow, who have, with the consent of the Board of Agriculture, passed bye-laws for the market, a copy of which is herewith produced. The said market is a public one; it is the only one provided in Scotland where cattle brought from the United States of America and from Canada can be landed, and they must be slaughtered there within a period of ten days after their arrival. They cannot be removed alive.' Every point of this averment seems to be admitted except the words 'the said market is a public one,' to which a qualified answer is given. But that is not an averment which can be proved or disproved by parole evidence, but which must depend on the provisions of the Diseases of Animals Act 1894, the Markets Act 1845 incorporated with the Act of 1894, and perhaps the bye-laws under which the Yorkhill Wharfs were established and are regulated. The bye-laws are referred to on record and were alluded to in the argument; but they have not been produced, and no special rule has been referred to as supporting the pursuer's case. It was not said that any rule exists prohibiting conditions in sales. But there is no doubt at all, as I think, that the market at Yorkhill is a public market. That does not require any proof. It is as public as the Markets Clauses Act and the control of the local authority can make it. No other element of publicity is suggested. But does it follow that sales by auction conducted at it must necessarily be unconditional and open to all the public? That does not appear to me to follow. Nothing of the sort is expressed in either Act. The Market Act does not confer on a frequenter of a market a right to insist on any stallholder selling to him. The market is public, no doubt, and he is free to go there, but the stallholder is under no greater obligation to sell to him than a shopkeeper would be. In truth, neither Act says a word about sales by auction. The sales at Yorkhill might legally be by private bargain, and if an importer of cattle chose to sell by private bargain, he could, I suppose, select his buyer, and could, if he so pleased, prefer one offer to another, and even to a better. There would be nothing illegal in that. He might have his reasons. He would only have his principal to answer to. So, when the sale is by auction, I do not perceive any legal ground on which such conditions as are brought in question in this case can be objected to.

"Rules might perhaps have been framed by the Local Authority or the Board of Agriculture requiring that sales at Yorkhill should be open to all the public, and that no exclusive conditions should be allowed. It might be a question how far such a regulation would be *intra vires*, and there might be a question of general public policy. But no such rules have in fact been imposed by these authorities, and I do not see that such can now be imposed by the Court.

"It was urged in argument that the salesmen enjoyed at Yorkhill a monopoly of the sale of American and Canadian cattle, and it was argued that an obligation to serve the public was the usual counterpart of a monopoly. There is no averment on record that the salesmen have such a monopoly, and I do not think it is or can be so in any proper sense. It is true that Yorkhill is at present the only place authorised in Scotland for the reception of American and Canadian cattle, but there seems no reason why other such wharfs should not be established under the control of other local authorities. It is possible that the Board of Agriculture may have refused to sanction any other. That is not averred. If it has, such refusal would no doubt create or cause a monopoly in Scotland. But the monopoly would be in favour of the Local Authority, not of the salesmen. They have no monopoly of the Yorkhill market. There is no provision under which they have a preferable claim to any ring on the wharf. There is, as I have said, nothing whatever said about them or about auctioneers or sales by auction in the statute. If they have a practical monopoly, it is not given by the law, but it is a mere incident of their trade and consequence of their trade connection. That is not such a monopoly as can impose on them any exceptional duties.

"There is nothing in the statutes, nor so far as I am aware in the rules and regulations, to hinder the pursuers from importing cattle to Yorkhill on their own account, or in selling them there either by private bargain or auction, or in removing them from the wharf unsold (though, no doubt, after they have been slaughtered).

"There are not wanting analogies in our law which lend some colour to the pursuer's contention. Thus there are cases in which grants of a monopoly by the Crown have been held to impose corresponding obligations to the public as in rights of ferry or port. In such cases the grantee cannot, speaking generally, exclude any member of the public, or refuse to afford him the accommodation of passage or harbour, and in the Piers and Harbours Act (25 Vict. cap. 19), section 13, it is expressly declared that all persons shall on payment of the harbour rates have unrestricted access to harbours. Such cases have depended ultimately on the effect of the Crown grants for the benefit of the public, and have no true bearing on the present question.

"The cases of innkeepers and carriers were also referred to. The former cannot, generally speaking, select his inmates (see *Ewing* v. *Campbell* (1877), 5 R. 230), or the latter refuse the goods offered for carriage, which he holds himself out as ready to carry. These disabilities, however, appear to depend partly on old statutes and partly on rooted custom and common law. The rules applicable to such cases cannot be transferred to other relations, and there is no trace of any analogous custom or understanding applicable to sales by auction.

"I am therefore of opinion that there is no such specialty in sales by auction at Yorkhill as to render the insertion of the conditions now in question in the articles of roup illegal or ineffectual. It appears to me that the salesmen have in inserting them invaded no right and infringed no duty.

"For these reasons it appears to me that the case against the salesmen fails, and that they are entitled to absolvitor. There seem to me to be no averments by the pursuers which, if proved or assumed, would support their case against these defenders.

"It is true that the pursuers represent that these conditions have not been inserted by the salesmen of their own accord or in the due course of their business, but at the instigation of the Glasgow Fleshers, made with the malicious object of destroying the trade of the pursuers, but it is not averred that the salesmen have been animated by any malicious motives against the pursuers. It is not possible to ascribe to them any such motives. They do not belong to or arise out of their position, and no case of that kind is attempted, although it is true, as already noticed, that they are alleged to have become members of the Fleshers' Association.

"It was not, I think, maintained that the insertion of these conditions, if legal otherwise, could become illegal because they were induced by the malicious conspiracy of the other defenders, and I suppose that no such view is possible. It has, of course, been often maintained, and also decided, that one who, with the malicious purpose and with the effect of injuring another, induced a third party to do an act which the third party had a right to do, acts wrongfully and may be liable in damages. The case of *Allen* v. *Flood* seems to displace these cases, but it has never been suggested that the third party who acts on his persuasion is liable. It remains, therefore, that what the salesmen were persuaded to do by the Glasgow fleshers was a lawful act. As it has appeared to me that both conclusions referring to the salesmen are ill-founded, I have not thought it necessary to distinguish between them. I have only to say that while the question raised by the first conclusion appears of much difficulty, I do not think the second conclusion raises a question of any difficulty, and I have no hesitation in repelling it.

"The next question regards the Glasgow Fleshers' Trade Defence Association, and the first conclusion, which is for declarator that the first defenders have illegally conspired to induce, and did induce, the second defenders to refuse the lawful bids of the pursuers—a conclusion introductory to the conclusion against these defenders for damages. The greater part of that conclusion must at this stage of the cause be assumed, if indeed it be not accepted, as undoubtedly true. There is, I suppose, no doubt that the second defenders refused the pursuer' bids, and that it was the first defenders who induced them to do so. Any suggestion that the salesmen would have refused the co-operative bidders of their own accord is out of the question. Further, it may be conceded that the pursuers' bids were legal bids. The expression is not a happy one. There could be nothing illegal about the bids, but that does not imply that the salesmen were not entitled to reject them. I have already reached the conclusion that they were entitled. The question is, whether what the first defenders did was an illegal conspiracy, or in other words a legal wrong, which rendered them liable in damages to the pursuers. As to the thing which they did there is no doubt at all. They informed the salesman that they would not deal with them if they continued to deal with the co-operative societies, and they called on them to refrain from dealing with the co-operative societies. They did nothing but that. It is averred that they induced the second defenders to comply with their requirements 'by means of threats and otherwise,' and that their actings were wrongful, illegal, and malicious, and amounted to an illegal conspiracy. But these averments are but vague general words. They really add nothing to the averments of substantial facts as above stated, and do not of themselves call for a proof.

"Now, I have come to the conclusion on the first part of the case that the second defenders were entitled to insert the conditions required in their conditions of sale,

and that they violated no right of the pursuers in doing so. Hence the question is whether the first defenders are liable in damages for inducing the second defenders to do a legal act. Apart from the question about conspiracy, that is the question which was decided in the negative in the House of Lords in *Flood* v. *Allen*, December 14, 1897, reported in the Times Law Report, vol. xiv. p, 125, and in S.L.T. vol. v. p. 166. I do not think it is for me to canvas the conflicting opinions expressed in that important case in its various stages. I think I ought to follow the final judgment. All the authorities referred to in the arguments before me on this part of the case were English decisions, and I can hardly be wrong in following the last and most authoritative. It is indeed a judgment in English law, and the dissenting opinions were of the highest importance, but I do not know of any case in the Scotch Courts which could justify me in questioning it. It has indeed appeared to me that in Scotland malice and motive have been more considered in some actions of damages than is consistent with the judgment of the majority in *Flood* v. *Allen*—as, for example, in questions about defamation, and questions about diligence, which are sometimes actionable or not according as the motives are malicious or not; and in some other matters. But perhaps there is no such difference, and I do not think it signifies much, for I think this case—apart from the element of conspiracy—is clearer than *Flood* v. *Allen*, and is more closely analogous to *The Mogul Steam Shipping Company, Limited* v. *Macgregor, Gow, & Company* [1892], App. Cas. 25, in which the Judges in the House of Lords were unanimously in favour of the defenders. In that case many of the facts were substantially the same as in this. It cannot, I think, be doubted that if A informs B that he will not deal with him unless he ceases to deal with C, and C thereby loses the custom of B, C has no action against A, although he may in fact have suffered loss through his interference; and if it should appear or be admitted that A made his request or demand for no other reason than because he disliked C and wished to injure him, that, according to the doctrine of *Flood* v. *Allen* would make no difference.

"Any single Glasgow butcher might resolve not to bid at the auctions of salesmen who received the bids of the co-operative societies. He would, of course, be free to bid or not bid as he pleased—nobody could compel him. Clearly also, he might inform the salesmen of his resolution, and he might go the length of asking them to exclude the co-operative store bidders. Such a man would, of course, be laughed at for his pains. But the case would be widely different if a number of butchers took that course; and here the question of conspiracy comes in, assuming that there was conspiracy. It was indeed suggested by the first defenders that there could not possibly be a conspiracy in this case because the salesmen were not implicated, and the Glasgow Fleshers' Trade Defence Association formed only one *persona*. But I think there is more subtlety in that argument. The Association is formed of a number of individuals competent to conspire; and I think it would not be a great abuse of words to speak of the Association as in itself a conspiracy. After all the name does not signify. A conspiracy, combination, or association, is, after all, nothing but a kind of contract. But, assuming conspiracy, it is not easy to see what the first defenders did which could subject them in damages. They were entitled to resolve to abstain from bidding at sales at which co-operative bids were received. It was entirely at their option to do that or not. They might also legally allow their resolution to that effect to become public, and probably that would have been all that was necessary. It is true that they went further—probably unnecessarily. They communicated their resolution to the salesmen specially; they called on them to yield to it; and in that manner they procured, and are no doubt responsible for procuring, the action of the second defenders of which the pursuers complain. In the *Mogul* cases the defendants being a combination or conspiracy intimated to certain shippers that they would not do business with them if they did business with the plaintiffs, and even that if they did so they would demand repayment of rebates previously allowed. But that was held to be legal. The distinction between the action of one and that of several has no doubt been taken by various judges in England in different cases, although it does not appear to be clearly established. But I confess I am not able to think that it matters here. It appears to me that the fleshers acted within their legal rights. It may be regrettable that they happened to have so much in their power. That is the accident of their position, and of the peculiar character of the foreign cattle market. In *Flood* v. *Allen* Lord Shand is reported to have said that a 'combination of different persons in pursuit of a legitimate trade occurred in the case of the *Mogul Ship Company*, and was there held to be lawful. Combination for no such object but in pursuit really of a malicious purpose to ruin or injure another would, I should say, be clearly unlawful.'

"That may be so; but I think that this case is strictly analogous to the case of the *Mogul*, and is not a case of mere malicious purpose—a case which indeed must occur seldom if at all in business transactions. I think I am entitled to regard this case as really governed by the case of the *Mogul*; although I propose to decide it without a proof, because I accept the pursuers averments and assume nothing against them except that the first defenders, an association of Glasgow fleshers, did not act wholly from malice, but at least in part from a regard to their own interest, protection, and defence, which is averred by the defenders and not denied by the pursuers. I observe that in the case of *Huttley* v. *Sim-*

mons and Others, December 18, 1897, 14 Times L.R. 150, Darling, J., decided a case in favour of the defender in accordance with *Flood* v. *Allen*, although the element of conspiracy was involved. I am therefore of opinion that the first defenders are not liable in damages for procuring the hostile action of the second defenders.

"There is an additional conclusion, the consideration of which, with a view to distinctness, I passed over. It is that it should be found and declared that the first-mentioned defenders illegally conspired to induce, and did illegally induce, certain hide-merchants to refrain from purchasing hides, tallow, and other articles from the pursuers. It is averred (Cond. 9) that the first defenders did this by threatening the hide merchants with a withdrawal of all their custom unless they agreed to decline to do business with co-operative societies; that is to say, that the first defenders intimated that they would not deal with these hide merchants unless they ceased to deal with the co-operative societies. That averment seems to state a case not materially different from the case in reference to the salesmen. It appears to me to be also ruled against the pursuers by the cases of the *Mogul Steam Shipping Company* and *Flood* v. *Allen*.

"On the whole, I have come, after anxious consideration, to the conclusion that, assuming all the pursuers' averments, except perhaps their averment, too vague for relevancy, about threats said to be employed by the first defenders, it does not appear either that what the salesmen were induced to do was illegal or in breach of the pursuers' rights, or that the acts of the first defenders in so inducing them or in inducing the hide merchants to cease their purchases from the pursuers were wrongful acts involving liability for damages; and that the defenders must therefore be assoilzied.

"I have experienced considerable difficulty in deciding the questions in this case, but I cannot think that any good could possibly result from allowing a proof. There is truly nothing to inquire about, and a proof would leave the facts substantially as they appear on record. I am by no means indifferent to the importance of the case, and it may be that the result at which I have arrived is not altogether desirable. It is a very serious matter that one of the gates of the country, so to speak, should be closed against a considerable class of the people, and that the trade in foreign cattle should be somewhat artificially diverted and confined. I do not know whether harm is caused or not; but if there be, I am unable to see that it can be remedied as matters stand except by legislation or (a point on which I express no opinion) by regulations of the Local Authority; unless, indeed, the fleshers' combination can be met by some counter plan, or can be checked by the force of public opinion."

Counsel for the Pursuers—Balfour, Q.C. —G. Watt. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders — Dean of Faculty Asher, Q.C.—Salvesen—W. Campbell—Wilson—Clyde—Hunter. Agents — D. L. Addison Smith, S.S.C.; Donaldson & Nisbet, S.S.C.; Reid & Guild, W.S.; Dalgleish & Dobbie, S.S.C.

Friday, February 2.

OUTER HOUSE.

[Lord Kincairney.

SHARP *v.* SOMERVILLE.

Burgh — Dean of Guild — Jurisdiction — Structural and Non-structural Alterations—Edinburgh Municipal and Police Amendment Act 1891 (54 *and* 55 *Vict. cap. cxxxvi*), *secs.* 48, 49, 56, *and* 59.

A party obtained warrant from the Dean of Guild Court for the execution of certain specified alterations on his premises conform to plans lodged. He was afterwards convicted, at the instance of the procurator-fiscal of that Court, of having deviated from the plans according to which he obtained his warrant, and fined £10. In a suspension of a charge for this penalty the procurator-fiscal alleged deviations in five particulars, four of which, though involving deviations from the plans submitted, were alterations of a non-structural character, for which no warrant had been asked or granted, while one was a deviation in the execution of an alteration for which a warrant had been obtained. *Held* (*per* Lord Kincairney) (1) that the suspender was entitled to make the alterations alleged, so far as non-structural, without warrant; (2) that he did not limit his rights by applying to the Dean of Guild Court for warrant to make other alterations, and by lodging plans in pursuance of that application; and (3) that with respect to the remaining alteration on a particular for which warrant had been obtained, it did not appear that the Dean of Guild would, in respect of that deviation alone, have inflicted a penalty of £10. The suspension was therefore granted.

Process—Suspension—Competency—Dean of Guild Court.

Question (*per* Lord Kincairney), Whether it was competent to bring a judgment of the Dean of Guild Court under review by a suspension of a charge for a penalty inflicted.

The facts of this case are fully stated in the opinion of the Lord Ordinary.

On 2nd February 1898 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds that the operations complained of by the respondent as Procurator-Fiscal of the Dean of Guild Court of Edinburgh, and enumerated in the third article of the statement of facts appended to the complaint by the said respondent against the complainer, were not deviations from the