piers of premises give the use of their plant for the purpose." Except that he uses the words "custom of trade," that statement does not seem to me to aid the pursuer. That it is quite common for the occupiers of premises to give the use of their plant if necessary or advisable for the purpose of removing machinery which is to be repaired, no one can doubt for a moment. But it surely must be a matter of arrangement between those who own the premises and machinery and those who do the work. To bring such a thing under custom of trade would be very difficult; it must depend on what is arranged between the repairers and those to whom the premises belong. I therefore think we ought to dismiss the action as irrelevant.

LORD STORMONTH DARLING—I am of the same opinion, and on the same grounds.

I think the case must be governed by substantially the same principles as were given effect to in *Donovan* v. *Laing Construction Syndicate*, [1893] 1 Q.B. 629, which is a decision of high authority by a Bench consisting of Lord Esher, M.R., Lord Lindley, then Lindley, L.J., and Lord Bowen, then Bowen, L.J. It was a pure case of the loan of a crane and a workman to work it by one employer to another employer who was engaged in a work on the premises of the first. So is this, except that there is no averment here, as there was in *Donovan's* case, that the lender's plant was included in the loan, or that there was any arrangement for the workman using that plant in the work of the person to whom his services were lent.

I think therefore that the case lacks the essential elements for raising liability on the part of the defenders.

LORD LOW—I am of the same opinion. I should have been prepared to hold that the action was irrelevant even if there had been no authority on the question. But I agree that the case of *Donovan* v. *Laing Construction Syndicate*, [1893] 1 Q.B. 629, is practically indistinguishable, and that it is a case of very high authority indeed. I observe that Lord Bowen, then Bowen, L.J., there stated the law with his accustomed precision. He said—"The question is not who procured the doing of the unlawful act? but depends on the doctrine of the liability of a master for the acts of his servant done in the course of his employment. We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act. That was the test laid down by Crompton, J., nearly forty years ago in *Sadler* v. *Henlock*, 1855, 4 E. & B. 570, in the form of the question—"Did the defendants retain the power of controlling the work? Here the defendants certainly parted with some control over the man, and the question arises whether they parted with the power of controlling the operation on which the man was engaged. . . . It is clear here that the defendants placed their man at the disposal of Jones & Co., and did not have any control over the work he was to do."

Now, if for Jones & Co. we substitute the Harvey Engineering Co., it seems to me that these remarks are directly applicable to the present case.

As to the use of the winch, it is no doubt common enough for a party upon whose premises work is being done by another to supply any plant which is required if he has plant suitable for the purpose. In some cases where the work cannot be done without plant, it may be the custom of trade that the employer shall supply what plant is necessary. For example, I rather think that where stevedores are employed to load a ship it is generally understood that the ship shall supply the necessary ropes and windlass. But the present case is clearly not of that description. It is not said that any plant was required, and as I read the pursuer's averments, the winch was used simply because it occurred to Hill that the operation would be thereby facilitated. That action on Hill's part can, in my judgment, in no way render the defenders liable.

The Court recalled the interlocutor appealed against and dismissed the action as irrelevant.

Counsel for the Pursuer (Appellant)—Constable—Hendry. Agents—Cowan & Stewart, W.S.

Counsel for the Defenders (Respondents)—Morison, K.C.—Paton. Agents—Wallace & Begg, W.S.

Wednesday, January 9.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

DUNN *v.* THE NATIONAL AMALGAMATED FURNISHING TRADES' ASSOCIATION AND OTHERS.

Process—Proof or Jury Trial—Discretion of Lord Ordinary Overruled—Action of Damages for Procuring Wrongful Dismissal—Disputed Relevancy of Averments—Proof.

In an action by a workman for damages, for having procured his wrongful dismissal from his employment, brought against (1) A and B, two members of a trade association, as individuals, and (2) the trade association and certain of its officials as representing the association, the latter defenders maintained, *inter alia*, that the record contained no relevant averments from which it could be inferred that the association was responsible for the acts of A and B, by whom the pursuer alleged his dismissal had immediately been procured.

The Lord Ordinary (Salvesen) having allowed issues for the trial of the case by jury, the Court, in the circumstances, recalled his interlocutor, disallowed the

issues, and allowed parties a proof before answer.

Joseph Dunn, cabinetmaker, Govan, Glasgow, raised an action against (1) John Holmes, cabinetmaker, 12 Park Road, Glasgow, as representing and acting on behalf of The National Amalgamated Furnishing Trades' Association, registered pursuant to the Trades Union Acts 1871 and 1876, and having their registered office at 72 Finsbury Pavement, London, and one of their principal offices at 20 Brunswick Street, Glasgow, and as an individual; (2) John Cummings, residing at 85 Govan Road, Govan, Glasgow, as representing and acting on behalf of said Association, and as an individual; and (3) the said National Amalgamated Furnishing Trades' Association, and (*nominatim*) the general secretary, the general treasurer, the trade organiser, and the whole members of the executive committee of said Association, the general secretary of the Glasgow branches of said Association, and the secretary of the Govan branch of said Association, all as representing and acting for and on behalf of said Association—in which he claimed £150 as damages, on the ground that the defenders had wrongfully and maliciously procured his dismissal from his employment.

Defences were lodged for (1) John Holmes and John Cummings, and (2) The National Amalgamated Furnishing Trades' Association.

The facts of the case and the nature of the averments appear sufficiently from the opinion of the Lord Ordinary (SALVESEN) *infra*.

The pursuer pleaded, *inter alia* —"The defenders having illegally, and without justification, caused the said Fairfield Company to dismiss the pursuer from their service in breach of their contract with him, and the pursuer having suffered loss thereby, the defenders are liable in reparation."

The defenders, The National Amalgamated Furnishing Trades' Association, pleaded, *inter alia* —"The defenders Holmes and Cummings, and the said James Niven, not having acted, and not having had authority to act, on behalf of, or as representing these defenders in the matters libelled, these defenders should be assoilzied."

The defenders Holmes and Cummings pleaded, *inter alia* —"The defenders not having wrongfully or maliciously procured the dismissal of the pursuer from his employment should be assoilzied."

On 13th November 1906 the Lord Ordinary approved of the following issues:—"(1) Whether on or about 5th October 1905 the pursuer entered into a contract of service with the Fairfield Shipbuilding and Engineering Company, Limited, as a cabinetmaker, at a weekly wage of 36s. per week; and whether on or about 11th October following the defenders, the said Association, by John Holmes, John Cummings, and James Niven mentioned on record, or any of them, wrongfully procured a breach of the said contract by the said Fairfield Shipbuilding and Engineering Company, Limited, to the loss, injury, and damage of the pursuer? Damages laid at £150. Or alternatively, (2) Whether on or about 11th October 1905 the defenders the said Association, by John Holmes, John Cummings, and James Niven mentioned on record, or any of them, and the defenders the said John Holmes and John Cummings, or any and which of the said defenders, wrongfully combined to procure and did procure the dismissal of the pursuer from the said Fairfield Shipbuilding and Engineering Company's employment, to his loss, injury, and damage? Damages laid at £150."

Opinion.—"This action is directed against the National Amalgamated Furnishing Trades' Association and two of its members, both in their representative and individual capacities. The pursuer was at one time a member of that Association, but avers that he ceased to be so about May 1905, at which time the defenders allege that he was due them a sum of 7s. or 8s. as arrears of contributions due by him during the period of his membership.

"In October 1905 the pursuer says he obtained employment with the Fairfield Shipbuilding Company, Limited, as a weekly servant, at a wage of 36s. per week. That company employs a staff of about sixty men in the cabinetmakers' department, where the pursuer worked, most of these being members of the Association. The pursuer's averments are to the effect that the individual defenders demanded payment from him of the arrears which they alleged he was due to the Association; that he declined to pay these arrears; that they again on 10th October requested payment of the arrears, and told the pursuer that if he did not pay he would not be allowed to remain in his employment. On 11th October, as the pursuer still remained obdurate, the defender Cummings and a fellow-workman named James Niven had an interview with the foreman of the cabinetmakers, who had complete control of the men in the shop, and unlawfully threatened him that unless he instantly dismissed the pursuer all the employees who were members of the Association would at once be brought out on strike. The foreman yielded to these threats and dismissed the pursuer from his employment. The pursuer accordingly asks damages against the Association, and also against the two men John Holmes and John Cummings as individuals.

"The issues which he proposes for the trial are three in number, the first two being laid alternatively. The defenders do not dispute the proposition in law on which the first issue is founded, but they maintain that there are no relevant averments from which it can be inferred that the Association is responsible for the alleged acts of two of its members. They concede that if the averments are well founded the individuals who procured the breach of the pursuer's contract with his employers are personally liable, but that in the absence of express instructions from the Association they were *prima facie* acting beyond the scope of their authority, and would thus not involve

the Association itself in responsibility.

"The mere fact that a servant or agent has acted wrongfully, and that he has had no express authority so to act, will of course not *per se* absolve the master or principal from responsibility for his acts. There are many reported cases in which employers or principals have been made liable for the wrongful and even criminal acts of others. But it is not sufficient that the delinquent shall have acted for the benefit of his principal if it is plain that what he has done was entirely outside the scope of his authority. The question in this case therefore comes to be, whether the pursuer's averments disclose that the wrongful acts of the individual defenders were so clearly beyond the scope of their authority as agents of the Association as to make the action against the Association unmaintainable.

"Now, the pursuer avers that the Association, one of whose objects is to establish and maintain funds for the protection of their members, and to support members when out of employment or in sickness, are represented at all large works by two workmen who are technically known as 'shop-stewards.' Their duties are 'to secure that all workmen in their shop join the Association, to inspect their cards of membership, and to collect the levies which the Association imposes on these members, and insist on payment of arrears.' He says, further, that the two defenders, in interviewing him and asking him for his card, acted on the express instructions of the Association's executive, or at all events in execution of their duty to the Association and in its interests. He further avers that it is one of the recognised modes by which the Association secures payment of arrears of contributions from its members to threaten a general strike amongst members of the Association if a fellow-employee declines to make payment of his contributions, and that in acting as they did the defender Cummings and James Niven acted on behalf of the Association, for its benefit, and within the scope of their authority as 'shop-stewards.' What adds point to these allegations is that it was conceded that contributions to a trade union cannot be recovered in the law courts, and that, accordingly, if a member leaves the Association in its debt there are no lawful means, other than peaceable persuasion, by which the debt can be collected.

"I am unable to hold these averments as irrelevant to infer liability against the Association. It might have been otherwise if this method of coercion had been originated by the two 'shop-stewards' whose conduct is complained of, but when the pursuer offers to prove that these men acted in accordance with a practice which the Association sanctions for the collection of arrears and for punishing workmen who refuse to be concussed into payment, I cannot withhold the case from the consideration of a jury so far as the first issue goes.

"The alternative issue proceeds on the assumption that the pursuer fails to prove that he had a contract with his employers which they were induced to break. It assumes, further, that an individual workman might lawfully complain to the foreman of the conduct of his fellow-workman, and thereby obtain his dismissal, without rendering himself liable in damages. Accordingly, it is framed on the footing that there was a combination or conspiracy of two or more individuals acting on behalf of the Association, whereby they induced the pursuer's employers, by threats, to dismiss him from his service. The case is thus differentiated from that of *Allan* v. *Flood* (App. Cas., 1898, p. 1), and assimilated to the case of *Quinn* v. *Leathem* (App. Cas., 1901, p. 495, and *Giblan* (1903 2 K.B. 600). The former case establishes the proposition that a combination of two or more persons, without justification, to injure a man by inducing his employer not to continue him in his employment, is if it results in damage to him, actionable, and will render the persons so combining personally responsible to the injured individual. The latter case decides that not merely are such persons themselves liable to the workman, but that the union or association for which they acted may also be liable. It also decides that such acts are not justified merely by the fact that their object was to enforce payment of a debt due by the injured workman to the union. The defenders argued that the two cases I have quoted are based upon a law of conspiracy in England, which is said to be founded upon ancient statutes applicable to that country alone, and nothing analogous to which exists in the law of Scotland. On referring, however, to the opinions in the case of *Quinn*, I find that they proceeded upon legal principles which are equally recognised in Scotland as in England. I refer to the collection of judicial dicta on p. 525 of Lord Brampton's opinion, and especially to the quotation from Sir W. Erle, which I think is a statement of the common law of Scotland as well as of England :—'Every person has a right under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labour or his own capital, according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction of the fullest exercise of this right which can be made compatible with the exercise of similar rights by others.'

"It is true that in the case of *Giblan* the persons whose acts, contrary to the rules of the Union, were nevertheless held to bind the Union, were the secretary and treasurer, and therefore superior officials to the two 'shop-stewards,' for whose actings the Association in the present case are sought to be made liable. That difference does not raise any question of principle, but may make it more difficult for the pursuer to establish that the 'shop-stewards' were acting within the scope of their authority. I am accordingly prepared substantially to approve of the second and third proposed issues. I suggest, however, that the pursuer should combine these two issues into one, and make the

combined issue alternative to the first. All the issues deal with the same wrongful act and the damage flowing from it, and there is no room for the view that separate damages may be awarded under each of the proposed issues as for separate wrongs."

The defenders, the National Furnishing Trades' Association, reclaimed against the interlocutor approving of issues.

Argued for the reclaimers (defenders)—The action should be dismissed as against these defenders. There was no relevant averment that Holmes and Cummings were agents of the Association, or had authority to bind it. In fact, the rules of the Association which were referred to on record showed that shop-stewards were not to act as agents. There was no averment from which it could be inferred that the Association had authorised shop-stewards to do the acts alleged. There was no averment that the Association had conspired, or had authorised the shop-stewards to combine with others, to effect the dismissal of the pursuer. If, however, there was to be inquiry, it should be by proof before a judge, as difficult questions of law were sure to arise.

Argued for the respondent — His averments were relevant to infer liability on the part of the Association. The discretion of the Lord Ordinary as to the mode of inquiry should not be interfered with. On the questions of relevancy, agency, and conspiracy the following cases were referred to—*Allen* v. *Flood*, [1898] A.C. 1; *Quinn* v. *Leathem*, [1901] A.C. 495; *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600; *Fraser* v. *Younger & Sons*, June 13, 1867, 5 Macph. 861, 4 S.L.R. 90; *South Wales Miners' Federation* v. *Glamorgan Coal Company*, [1905] A.C. 239; *Denaby and Cadeby Main Collieries, Limited* v. *Yorkshire Miners' Association*, [1906] A.C. 384; *Taff Vale Railway Company* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426.

LORD JUSTICE-CLERK — I should have great difficulty in sending this case to a jury, because that would almost imply that the pursuer had well stated a relevant case, and I am not prepared to give any opinion on that question. I think it is a case for having an inquiry into the facts before giving any decision on the matter of the Union's liability. I say so without in any degree throwing doubt on the general rule that the discretion of the Lord Ordinary is to be respected in the matter of ordering a proof or a jury trial. But while the Lord Ordinary's discretion is to be respected it is not absolute, and I think this is a case for removing the question from a jury and allowing a proof before answer.

LORD STORMONTH-DARLING—I agree.

LORD LOW—I am of the same opinion.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the reclaiming note against the interlocutor of Lord Salvesen dated 13th November 1906, Recal the said interlocutor and disallow the issues approved by it: Before answer allow the parties a proof of their averments on record, and remit the cause to Lord Salvesen to proceed therein: Reserve the question of expenses, and grant power to the said Lord Ordinary to decern therefor."

Counsel for Pursuer and Respondent—Morison, K.C. — MacRobert. Agents — Laing & Motherwell, W.S.

Counsel for Defenders and Reclaimers—Hunter, K.C.—C. D. Murray. Agents—Fyfe, Ireland & Co., S.S.C.

Thursday, January 10.

SECOND DIVISION.

THOMS *v.* THOMS' TRUSTEES AND OTHERS.

Expenses—Proof—Jury Trial—Watching Fee—Copies of Precognitions and Correspondence.

Charges for copies of precognitions and correspondence for counsel and agent "watching" a proof or jury trial are rightly included under the expenses of "watching" the case, as without such copies the duty can not be adequately performed.

Expenses - Proof—Jury Trial—Witnesses Called but not Examined.

Whether fees to and cost of precognitions of witnesses not actually examined at a proof or jury trial form a proper charge against an unsuccessful party, is essentially a matter for the Auditor's discretion.

The Auditor's allowance of such expenses *approved* where witnesses came from Orkney, and could not have been hastily summoned.

Alfred Patrick Macthomas Thoms and others, being the heir-at-law and certain of the next-of-kin of George Hunter Macthomas Thoms, who had been Sheriff of Caithness, Orkney, and Shetland, brought an action for reduction of his trust-disposition and settlement, dated 16th March 1903, and of nine testamentary writings, ranging in date from 7th December 1896 to 29th July 1901, in respect (1) that the testator was not at the respective dates thereof of sound disposing mind, and that the documents were not his deeds; and (2) that the said testamentary writings were impetrated from him when weak and facile. William Alexander Wood, his trustee and executor, and the beneficiaries under his wills, were called as defenders.

Defences were lodged for the trustee and for the Provost, Magistrates, and Council of the Royal Burgh of Kirkwall, who were the residuary legatees under the said trust-disposition and settlement, and these two sets of defenders were represented by