thus increasing the value of existing shares, or whether these are kept apart and formed into additional stock divided into shares. I cannot see that such a circumstance affects the interests of liferenter and fiar, or of any person holding a qualified interest in shares. The views stated by your Lordship seem to me sufficient for the decision of the case, and I would only add that it would be difficult to apply any other rule by attempting to go outside the determination of the company. I may suggest, by way of illustration, the case of a company which every year sets apart a portion of its profits—not into a reserve fund, but as irrevocably applied to capital or extension of its business; everyone must admit that such money cannot be regarded as anything but capital, and so, too, if there is such application at regular intervals of two or three years. But it would be vain to seek for any criterion distinguishing between additions made to capital at regular and at irregular intervals. Another difficulty in a different relation would be to distinguish between company law and what might be done in private partnerships, because in the first case the powers of the company are regulated by their articles of association, while in the second there is a greater latitude given to the partners in dealing with their shares. I do not, however, elaborate that point. I do not think that our decision necessarily determines the case of bonus dividends. I desire to reserve my opinion on that point, because in an English decision the two cases are apparently treated as illustrating each other. If a bonus means an extraordinary dividend, our decision would not be in point.

LORD ADAM and LORD KINNEAR concurred.

The Court answered the first and second questions in the negative and the third in the affirmative.

Counsel for the First Parties—Edwin. Adam. Agent—Arthur Adam, W.S.

Counsel for the Second Party—Lorimer—Younger. Agent—Arthur Adam, W.S.

Counsel for the Third Parties—Clyde. Agents—Webster, Will, & Co., S.S.C.

Friday, November 30.

SECOND DIVISION.

[Sheriff of Lanarkshire.

STEVENSON *v.* SNEDDON.

Expenses—Dominus Litis.

A, a feuar, obtained decree in an action of interdict against B, an adjacent feuar, on the ground of certain encroachments by B upon his feu, and was found entitled to expenses. B having become bankrupt, A brought an action against C, their common superior, to recover the expenses in the original action, on the ground that C had been the true *dominus litis* therein. It was proved that B did not wish to defend the action, but was urged to do so by C, who agreed to pay his expenses; that in respect of this undertaking B appeared in and defended the action; that the defence in the Sheriff Court was conducted for B by C's law-agent, who kept C duly informed of all the proceedings; that after interdict was granted in the Sheriff Court, C, without the authority and against the wish of B, caused an appeal to be taken to the Court of Session, which was conducted entirely on his instructions; and that C paid the whole expenses of the defence both in the Sheriff Court and in the Court of Session.

Held that C was the true *dominus litis* in the appeal to the Court of Session, and that he was accordingly liable for the pursuer's expenses therein, but that he was not liable as *dominus litis* for the expenses of the proceedings in the Sheriff Court — *diss.* Lord Young, who was of opinion that no liability as *dominus litis* had been established against the defender.

This was an action brought in the Sheriff Court at Airdrie at the instance of William Stevenson junior, ironmonger, Dykehead, Shotts, against Robert Sneddon, coalmaster, Hillhouseridge, Shotts, concluding for payment of £82, 9s. 1d., being the taxed expenses found due to the pursuer in a previous action at his instance against Alexander Bennett, miner, Dykehead, Shotts.

In 1894 the defender feued to Bennett a piece of ground which was adjacent to certain ground previously feued to the pursuer. Bennett proceeded to make erections upon his feu, and in so doing he, as Stevenson maintained, encroached upon his, Stevenson's, property. Stevenson thereupon brought an action of interdict against Bennett, in which he was successful, both in the Sheriff Court and on appeal to the Court of Session, and he was found entitled to expenses. Thereafter Bennett became bankrupt, and Stevenson raised the present action.

He averred—"(Cond. 5) In that action the said Alexander Bennett was not the real defender. The real *dominus litis* was the said Robert Sneddon. He acted as principal, and the said Alexander Bennett acted as his agent. Although directed only against the said Alexander Bennett, the said action seriously affected the said Robert Sneddon. It decided whether or not it was *ultra vires* of him to grant a disposition such as he did to the said Alexander Bennett. Accordingly when said action was raised, the said Alexander Bennett requested the defender to free and relieve him of all expenses connected therewith. This the defender did by granting to the said Alexander Bennett a letter of guarantee. In so doing he authorised the said Alexander Bennett to defend said action, and during the whole period of its dependence defender's real attitude to it

was that of *dominus litis*. Through his interest in it he had the full control and direction of said action, and therefore power to retard or push it on, or put an end to it altogether. Never during its dependence did he abandon the attitude of *dominus litis* which he had taken up, or quit himself of the responsibility he had incurred in granting said letter of guarantee. Had he done so, his agent, the said Alexander Bennett, would have ceased to defend said action."

The pursuer pleaded—"(2) The defender being the real *dominus litis* in said action, and as such liable to pursuer in the sum sued for, decree therefor should be granted against him, with expenses as craved."

The defender pleaded—"(2) The pursuer's statements so far as material being unfounded in fact and law, the defender is entitled to absolvitor, with expenses."

Proof was allowed and led.

From the proof it appeared that Sneddon was the proprietor of certain lands in the neighbourhood of Shotts, part of which he had feued to Stevenson, with a right of access to his feu over a certain road "to the extent of 11 feet in breadth and 65 feet backwards from off the public road." Sneddon subsequently granted a feu of part of his lands in favour of Alexander Bennett. Prior to this, however, a question had arisen with regard to Stevenson's access. Stevenson had placed his gate in such a position that it could not be reached without passing over a certain small piece of ground about 12 feet in length, which Sneddon maintained was more than 65 feet backwards from the public road, but which Stevenson contended was within the 65 feet over which he had right of access. Bennett's feu included the road over which Stevenson's right of access lay, but that right was reserved to the extent of 11 feet in breadth and 65 feet backwards from off the public road." Bennett proceeded to make erections upon his feu in such a way as to block up Stevenson's gate. He had personally no desire or interest to do this, but when objection was taken by Stevenson to his doing so, Sneddon, acting upon the view entertained by him that the piece of ground from which Stevenson's gate opened was not included in the part of the road over which Stevenson had right of access, incited Bennett to persist in the encroachment. Stevenson thereupon brought an action of interdict against Bennett in the Sheriff Court at Airdrie. When the petition was served upon him Bennett took it to Sneddon. Bennett did not desire to defend the action, but was urged and incited to do so by Sneddon, who agreed and undertook that he would pay any expense incurred in so defending the action. In respect of this undertaking Bennett appeared in the action and defended it. Sneddon received the petition from Bennett and took it to his own agent, and told him to enter appearance in the action. He deponed that in doing so he was acting as Bennett's messenger. The agent deponed that when receiving instructions from Sneddon he looked upon Sneddon as a medium of conveying instructions from Bennett to his firm. This law-agent had previously done some business for Bennett. Appearance having been entered for Bennett the action proceeded. During its progress in the Sheriff Court Sneddon was informed of, and consulted as to, the different steps of procedure which were taken. He was consulted as to the witnesses to be examined, but he did not himself attend at the proof. Bennett was present and gave evidence. After the Sheriff-Substitute had given his decision the law-agent had a meeting with Bennett, and as the result of that interview he took an appeal to the Sheriff. After the Sheriff, on 19th March 1897, had affirmed the interlocutor of the Sheriff-Substitute, the law-agent, before he had written to Bennett on the subject, wrote a letter to Sneddon dated 23rd March advising an appeal to the Court of Session. Thereafter on 31st March he received instructions from Sneddon to mark an appeal to the Court of Session. This was accordingly done on 1st April. In doing so the law-agent acted upon the instructions of Sneddon and without any authority from Bennett, who, indeed, was not informed that the case was being appealed until after the appeal had been marked, and who in fact did not desire that an appeal should be taken at all. When Bennett on 7th April was informed as to what had been done, he insisted upon a written guarantee as to expenses. Up to that time he had no writing from Sneddon on that subject

The law-agent thereafter wrote a letter to Bennett in the following terms:—"We have now seen Mr Sneddon as to the expenses of this action, and he instructs us to write you and state that, on the understanding that you allow him to appeal the case in your name to the Court of Session, he will relieve you of all the expenses of the action and of all expenses for which you may be found liable in the event of the case being decided against you. We have accordingly instructed the appeal, and will let you know what the judgment is, when received." This letter of guarantee was given up by Bennett to the defender in June 1897 prior to the hearing of the appeal in the Court of Session.

The appeal proceeded, and was conducted throughout upon the instructions and under the control of Sneddon and in his interest, and without interference on the part of Bennett. Sneddon attended at the hearing. He ultimately paid the whole expenses of the defence both in the Sheriff Court and in the Court of Session.

Certain letters bearing upon the case which were produced, and also certain other facts with regard to the origin of the dispute, as well as certain quotations from the evidence led at the proof, will be found in the opinion of Lord Moncreiff, *infra*.

On 17th January 1900 the Sheriff-Substitute (MAIR) pronounced an interlocutor finding that the defender was the *dominus litis* of the defence in the original action,

and decerned against him for the expenses therein found due to the pursuer.

The defender appealed to the Sheriff (BERRY), who on 24th May 1900 adhered to the Sheriff-Substitute's interlocutor.

The defender appealed to the Court of Session, and argued — The pursuer had failed to establish that the defender had such a degree of interest in and control over the suit as was necessary to render him liable as *dominus litis*. The suggestion that he had an interest as having granted a disposition to Bennett which was *ultra vires* was unfounded, and no other interest was suggested. If he had no interest he could not be *dominus litis*, however much he might control the action —*Mathieson* v. *Thomson*, November 8, 1853, 16 D. 19; *Fraser* v. *Malloch*, February 8, 1896, 23 R. 619; *Kerr* v. *Employers Liability Assurance Corporation*, October 20, 1899, 2 F. 17; Cujacius ix. 1065. There was no authority for holding one who guaranteed the expenses of a litigant liable as *dominus litis*, and in the present case the guarantee was in force for only two months, during which time no expense was incurred. It was withdrawn before the appeal was heard, and Bennett alone had the power to abandon or press on the action.

Argued for the respondent — The real test was whether the person sought to be made liable as *dominus litis* had control of the action, and it was clearly proved that the defender had entire control of the proceedings both in the Sheriff Court and in the appeal. It was clear that the defender regarded the dispute as his own affair, and that Bennett would not have defended the action but for the defender's interference. He instructed his own agents to conduct the defence, and guaranteed and paid the expenses; and he instructed them to appeal to the Sheriff, and thereafter to the Court of Session. He directed the proceedings throughout the litigation without even consulting Bennett, who was anxious to withdraw. It was also shown that the defender had or thought he had an interest in the matter, viz., the interest of a superior to protect his feuars in their rights. In any view, it was sufficient to establish liability against the defender that he had by his interference caused expense to the pursuer in vindicating his rights against a man who had no wish or interest to litigate, and from whom he could not recover the expenses—*Bradlaugh* v. *Newdegate* (1883), 11 Q.B.D. 1; *Kerr*, *supra*; *Fraser* v. *Cameron*, March 8, 1892, 19 R. 564; Gaius iv. 101.

At advising—

LORD JUSTICE-CLERK—The defender in this case is alleged by the pursuer to have been the true *dominus litis* in a litigation between the pursuer and one Bennett, which related to certain rights of the owners of feus given off by the present defender to the pursuer and to Bennett. The pursuer in this action was successful in the litigation in the Sheriff Court, and the case was carried on by appeal to this Court. While the case was in the Sheriff Court the defender gave Bennett assistance in carrying on the case by aiding him with funds, and it is clear upon the evidence that he took a great interest in the litigation, and assisted Bennett with funds to enable him to carry it on. Up to this point I do not think that he had taken up such a position as that it could be said of him that he was the *dominus litis* in the proceedings. Anyone is entitled to aid a litigant with funds to carry on his case, and as long as he confines himself to thus supporting with funds a litigant who is in truth carrying on the case himself, he incurs no responsibility to the opposite party. And therefore up to the date of the case being concluded in the Sheriff Court I am of opinion that the defender in this case cannot be made liable for the pursuer's expenses.

But a distinct change took place from that day forward. It appears from the evidence that Bennett, the party to the litigation, had never instructed any appeal to be taken, declined to take it, being satisfied that there was no case which he could successfully maintain. But the defender took up the case himself. He instructed an appeal to be taken out in Bennett's name, and took up and conducted the case, Bennett having nothing further to do with it, and indeed advising the defender to give up the appeal, being satisfied that it was untenable. The defender took the whole proceedings into his own hands. Although Bennett asked him to withdraw the appeal, he was resolved to go on, and did go on, and the only action taken by Bennett was the negative action of not interfering, and so allowing the case still to go on in his name. On the other hand, the defender instructed the appeal, being advised by his own agent that he had an interest in the case. He took the whole charge of the case without regard to Bennett, the party to the suit. But for his orders the appeal would neither have been taken nor carried on. In these circumstances I think that the defender was the actual litigant in the appeal, and that accordingly he is liable in the expenses of the respondent in the appeal, he having been unsuccessful in maintaining the appeal in this Court. In the language used in the judgment in *Kerr's* case, he was the person who caused the expense to be incurred in this Court. I would therefore propose that the interlocutors in the Court below should be altered, and the defender found liable to the pursuer in the expenses of the appeal to the Court of Session in the case at the present pursuer's instance against Bennett.

LORD YOUNG—I have from the first regarded this as an important case raising questions of law of considerable interest. The Sheriff-Substitute, disregarding the plea of irrelevancy, ordered a proof before answer, and his judgment proceeds on that proof. The Sheriff has simply affirmed the Sheriff-Substitute's judgment. At the commencement of the debate I called attention to the fact that both the Sheriffs have disregarded the Act of Sederunt, which requires every Sheriff, in giving judgment on a proof, to pronounce distinct and sepa-

rate findings in fact and in law, and I indicated my view that we ought to follow the course which we have taken in some cases, and remit to the Sheriff-Substitute to find the facts as he was prepared to find them on the evidence, and on which his findings in law were based. Your Lordships did not take that view, and I did not see any necessity to press it. So that we have a judgment proceeding without any findings in fact. Now, we are required by statute in dealing with the case to pronounce the findings in fact on which we arrive at the conclusion whether the defender was or was not *dominus litis*, for I do not suppose it to be doubted that this is a question of law depending on facts. I take the law on the subject from the decision in *Mathieson* v. *Thomson*, November 8, 1853, 16 D. 19, and from the judgment of Lord Rutherfurd in that case, where he says at p. 23 of the report:—"There may be some difficulty in defining exactly what is a *dominus litis*, but I confess that I very much agree with what has been laid down by your Lordships, and with the definitions quoted from the civil law by Lord Ivory, that he is a party who has an interest in the subject-matter of the suit; and through that interest a proper control over the proceedings in the action. Now, it will not make a person liable in the expenses of an action that he instigated the suit, or told a man that he had a good cause of action, and that he would be a fool if he did not prosecute it, or though he promoted it by more substantial assistance. It will not make him liable in the expenses of the suit, that while he does both of these things he shall have some ultimate consequent benefit in the issue of that suit. But when you go a step further and find a party with a direct interest in the subject-matter of the litigation, and through that interest master of the litigation itself, having the control and direction of the suit, with power to retard it or push it on, or put an end to it altogether, then you have a proper character of *dominus litis*, and though another name may be substituted, the party behind is answerable for the expenses."

I take that as a good definition of what facts will constitute *dominus litis*, and I do so all the more readily because it was taken as a good definition in the last case in this Court on this subject, which occurred in the other Division—I mean the case of *Kerr* v. *Employers Assurance Association*, 2 F. 17. All the Judges in that case adopted Lord Rutherfurd's definition as a good definition. Lord Adam says this:—"I have always understood the definition given by Lord Rutherfurd in the case of *Mathieson* v. *Thomson* to be the sound definition of what a *dominus litis* was, and I understood Mr Campbell to approve of that definition. In that case it is laid down that a *dominus litis* is a party who has an interest in the subject-matter of the suit, and through that interest a proper control over the proceedings in the action." In both these cases direct interest in the subject-matter of the suit was taken as the sound definition of what a *dominus litis* was. I further take that definition, not as stating a case in which you would have a *dominus litis*, but as stating those facts without which you cannot have a *dominus litis*. That being so, we have to consider whether there is a relevant case stated here, and if there is, whether the necessary facts are established by the evidence.

The first thing to notice is the suit against Bennett, the expenses of which the pursuer seeks in this action to have the defender made liable for as *dominus litis*. That suit was directed against Bennett as proprietor of the subjects there mentioned. The prayer was for interdict and removal of the obstructions. In that action the pursuer succeeded, but only partially. He got no judgment to remove the house. Now, what are the grounds on which he says here that the defender was *dominus litis* of that action? I proceed to consider the statements on record here with reference to the plea on which no judgment has been pronounced—the plea of irrelevancy. What are the statements? It is said that the defender was proprietor of the subjects conveyed to Bennett before the house was erected. I may begin by saying that on the averments in this case there is not a word said which implies that as a seller of the subjects to Bennett any liability attaches to the defender. The disposition is simply an ordinary disposition by a seller to a purchaser, and there is nothing in it which can affect the present question. It is the fact that the disposition was to hold of the seller as superior, but it is not suggested that the fact that Sneddon was superior has any bearing on the question. The case on which the pursuer relies is stated in Cond. 5—[*his Lordship read Cond.* 5, *ut supra*]. That contains the whole statement in support of the proposition on which this action is founded, that Sneddon was *dominus litis*.

Now, I must say that I am clearly of opinion that there is no relevant case here. There is no distinction drawn or attempted to be drawn in the pleadings between the case before it was appealed to the Court of Session and after it was appealed to the Court of Session. Your Lordship in the chair is of opinion that Sneddon was not *dominus litis* before the case came to the Court of Session, and I am of that opinion also. But I further think that there is no relevant statement that he was *dominus litis* even after the case was appealed to the Court of Session. He had not a direct interest, and through that interest a proper control of the action. Lord Rutherfurd and Lord Ivory pointed out that there may be very substantial interests which do not amount to giving a control of the action. A speculative agent has an interest in an action, but that does not constitute him *dominus litis*. In the same way an action is frequently taken up by a trade or profession, who promise to see the pursuer or defender, as the case may be, through with it until the very end, to pay all his expenses, from the Sheriff Court or Outer House to the House of Lords if need be; but that

does not constitute that trade or profession the *dominus litis* of the suit. The interest in the subject-matter of the suit does not mean an interest in having the case decided in one way or another—it means an interest in the suit itself.

Now, are there any averments here showing that Sneddon was interested in the subject-matter of the suit? I do not think so. What is required is not a mere general averment that Sneddon was interested. It will not do just to say that. You must point out in detail what the nature of his interest is, and how he came to have it. I put the question more than once—was Sneddon interested as seller or superior, and the answer I got was that he was not, and your Lordship is of opinion that he was not interested up to the date of the appeal. I should imagine that it was only Sneddon's anxiety to prove his *bona fides* in believing that Bennett had a right to build, which made him desirous that the case should be appealed, and caused him to give Bennett a helping hand in prosecuting his suit. He wished to show that it was his belief that Bennett had the right on his side, and that Bennett being a man in poor circumstances he could not do him a better turn than paying the expenses of his suit. There was, no doubt, an undertaking to pay expenses; but I do not think that such an undertaking is a good ground for holding him to be *dominus litis*. In this case there is no direct interest, for direct interest must be such control of the action through an interest in the subject matter of the suit as will enable a litigant to continue or terminate it without any reference to a third party. I am therefore of opinion that we should sustain the plea that this action is not relevant.

LORD TRAYNER—I think it may fairly enough be represented that, according to some authorities in our law, the distinctive marks of a *dominus litis* are, an interest in the subject-matter of the suit, and control of the action. It has not been determined, so far as I know, how much or how little interest in the subject-matter of the suit is necessary or sufficient to constitute the *dominus litis;* and as to the control, I think it is settled that that need not be absolute. But I think the later authorities have countenanced a somewhat wider view, and laid down a principle or rule upon the subject which is easier of application and altogether less technical than the rule which I have said is that recognised in the older cases. I shall advert to this, the newer principle, immediately; but think it right first to notice shortly the facts out of which the present question has arisen.

The defender is the proprietor of lands in the neighbourhood of Shotts, part of which he feued to the pursuer with a right of access to his feu over a certain road or footpath. The defender subsequently granted a feu of part of his lands in favour of Alexander Bennett, which included in its measurement the foresaid road or footpath, but declared that notwithstanding, the footpath "must be left open in all time coming for the use of the public." The pursuer, having some reason to believe that Bennett proposed in his building operations to encroach upon the footpath, intimated to the defender that such a proceeding, if adopted, would be an invasion of his rights, and that he would, if necessary, bring an interdict to prevent it. The defender's reply to this practically was that what Bennett proposed to do was within his right, and that the road or footpath to which the pursuer's complaint referred was not the road reserved to the pursuer; but that the pursuer had himself encroached on the defender's rights by placing his gate in such a position as to increase the length of the road in question, an encroachment which the defender said he would take steps to prevent by having the pursuer's gate removed from where it then stood. The result was that the pursuer brought his action of interdict against Bennett, in which he was successful, and Bennett was found liable in expenses. That action was appealed to the Court of Session, where the inferior Court's judgment was affirmed, and Bennett again found liable in expenses. It is for the expenses in that action that the pursuer now seeks decree against the defender. I think the following facts have been clearly established—1. That Bennett personally had no desire or interest to encroach upon the road. 2. That he was incited to persist in his encroachment by the defender. 3. That the defender undertook to keep Bennett free of expense in connection with the encroachment, and the action of interdict. 4. That the defender was kept duly informed of the different steps of procedure which were taken in the action in the inferior Court by the agent therein, who acted for and in name of Bennett, who was also the defender's law-agent. 5. That when the decision in the inferior Court was pronounced, the defender, without the authority of Bennett, and contrary to his desire, instructed an appeal to this Court, where the appeal was conducted entirely on the instructions and at the expense of the defender; and 6. That he paid the expenses of the appeal, as well as the expenses incurred in the Inferior Court, to the agents who acted for him, although acting nominally for Bennett. Now, if to this state of facts be applied what I have referred to above as the later or newer doctrine, there can be no doubt of the defender's liability for the claim now made upon him by the pursuer, at all events to some extent. In the case of *Kerr* the Lord President said—"What is the ground on which a *dominus litis* is made liable in expenses? As I take it, it is simply the ground on which everybody is made liable in expenses, and it is stated thus by Lord Jeffrey in *Irvine* v. *Kilpatrick*—'If any party is put to expense in vindicating his rights, he is entitled to recover it from the person by whom it was created'—that is to say, by whom the expense was created. The person who ulti-

mately holds a judgment in his favour is held to be the person who has the right, and if that right is challenged by anybody, and expense caused by the challenge, against the person causing the expense is the right to recover expenses." In like manner Lord Adam — "The principle, I think, is that the party who has occasioned the expenses in the proceedings must refund these expenses." The other Judges in the Division concurred. I find the same views indicated, although not expressed with the same precision, in the case of *Hepburn* v. *Tait* (1 R. 875). No doubt the cases of *Kerr* and *Hepburn* were different in many respects from the present; but the opinions I have referred to were delivered as expressing a general principle, not affected by the specialties which distinguish those cases from this one. I concur in the opinions so delivered. The person who without just cause puts another to expense in vindicating his rights, is the person who ought to pay the expense.

In the case of *Fraser* v. *Malloch*, Lord Kyllachy, in an able and very interesting judgment, arrives at the conclusion that the liability of a *dominus litis* depends upon whether it can be affirmed that the nominal pursuer or defender was merely the agent acting for an undisclosed principal. I reserve my opinion upon this view. But assuming it to be sound, I think the application of that rule also would involve the defender in liability for the expense, at least, incurred by the appeal to the Court of Session. For in that appeal Bennett simply lent his name to the defender at the defender's request. Bennett thought that in the case with the pursuer he (Bennett) was in the wrong, and wanted to give up the case before judgment was pronounced by the Sheriff. He certainly never appealed against that judgment. So entirely did the pursuer know this, that after he had (without authority) taken the appeal, he asked his agent to apply to Bennett for leave to use his name as appellant, as Bennett (in his opinion) was more likely to give his consent if asked by the agent than if asked by himself (the defender). Bennett did consent to his name being used on being guaranteed that the present defender would keep him free of expense as well as relieve him of any expense for which he might be held liable. That guarantee the defender gave. I think, therefore, it cannot be doubted that in the appeal to this Court Bennett was merely a nominal appellant acting merely as agent for and at the request of the present defender.

But even applying the old and narrower ground of liability, I think the defender has incurred some liability for expenses as *dominus litis*. The old requirements were, as I have stated, interest in and control of the suit. Had the defender no interest in the action between the pursuer and Bennett? His law-agent (examined as a witness in the case) says that the defender had a "real interest in the action," and explains this to consist in questions which might arise on his warrandice to one or other of his vassals. If the law-agent had that opinion, he doubtless so advised the defender, and the defender therefore had, or thought he had, a "real interest" in the question which the pursuer's application for interdict raised. That he did think so appears from his statement in this case, where he explains (Stat. I.) that he assisted Bennett from a desire to protect "his feuars." I do not suppose he came to Bennett's assistance merely because Bennett was being oppressed by a neighbouring feuar. He would probably have allowed Bennett to fight his own battle had there not been behind his own interest as superior to look to. He had not only interest in the case, but he had also the control—and the entire control of the appeal. He instructed it, he called it his appeal, was present at its discussion, paid for it, and could certainly have departed from it just as he had taken it, without consulting Bennett or any other person. It was remarked in the course of the debate that he had not the control of the appeal because Bennett could at any moment have disclaimed or withdrawn it. Well, perhaps he could. So could any nominal pursuer or defender. But so long as that is not done the control lies with the *dominus*—and it remained in fact with and was exercised by the defender in this case down to the final judgment of this Court.

On any of the views, therefore, whether the older or more modern, on which the liability for expenses as *dominus litis* may be founded, the liability of the defender here seems to be made out. I have had no difficulty in coming to that conclusion. The only difficulty I have felt is, whether the defender's liability is for the whole expenses incurred, or only the expenses of and connected with the appeal to the Court of Session. I think there is room for holding as I do (although I have reached that conclusion with some difficulty), that while the action was pending in the Sheriff Court, the connection which the defender had with it, although he had then as later a real interest in the case, was or might be thought to be that only of encouraging Bennett to resist the pursuer, and assisting him to do so by agreeing to pay the expenses incurred to his own agent. On that ground I am of opinion that the defender is not liable to the pursuer in the expenses incurred to the pursuer in the Sheriff Court. But in regard to the appeal the case stands in a very different position. In the appeal the defender was the true *dominus litis*, and for the reasons I have already given, I think he is liable to the pursuer in the whole expenses of and connected with that appeal. To that extent and effect I would affirm the interlocutor appealed from.

I have not adverted at all to the terms of the guarantee given by the defender to Bennett after the appeal to the Court of Session was taken, because in my opinion the defender's liability to the extent I have mentioned seemed sufficiently established without reference to the guarantee. I may just add, however, that the terms of that guarantee afford important evidence of

the fact that in the appeal the defender was the true *dominus litis*, and Bennett in the strictest sense a mere mask or name under cover of which the defender acted.

LORD MONCREIFF—I agree with the Sheriffs that in the former process between the pursuer and Alexander Bennett the present defender Sneddon was the true *dominus litis*. He caused the litigation; he instructed the defence; he financed it; he controlled it from first to last; and in consequence of his persistence, both in the Sheriff Court and in this Court, the pursuer, although successful in both Courts, has been saddled with expenses amounting to upwards of £80, which he is unable to recover from Bennett, who is bankrupt.

The facts which I have summarised are fully established by the proof and correspondence; but as the case is somewhat special I shall advert in some detail to one or two points which seem to me to be of importance.

It is of importance to note that the dispute arose between the pursuer and the present defender before the feu was granted to Bennett. In January 1894 the pursuer suspected, and suspected rightly, that Sneddon intended, by himself or under cover of a feuar, to encroach upon an access to the pursuer's ground to which the latter is entitled under his feu-disposition. The access is described in his title as being "a road or entrance into Dykehead farmsteading to the extent of 11 feet in breadth and 65 feet backwards from off said public road." Accordingly, by letter of 18th January 1894, the pursuer's agents intimated to Sneddon that if any attempt were made to build on or otherwise block up this road an action would be raised.

In reply Sneddon's agents wrote a letter dated 19th January 1894, which I quote in full, because it shows that at that time Sneddon maintained his right (wrongly, as appears from the subsequent decision), to encroach upon the pursuer's access—"Dear Sirs,—Mr Sneddon of Hillhouseridge has handed us your two letters of yesterday with instructions to reply. With reference to Mr Stevenson's feu we are to state that our client has no intention of building by himself or feuars on the 11-feet road running along the side of Mr Stevenson's feu. Mr Sneddon, however, informs us that the strip of ground on which Mr Stevenson under his title has right-of-way is 11 feet broad and 65 feet long. Instead of putting his gate, as he was bound to do, within 65 feet from the northern boundary, it appears that Mr Stevenson has gone 12 feet further back, thus making the road 77 feet long. Our client cannot permit this encroachment to continue, and unless you can assure us by Wednesday first that he will remove his gate from its position, and bring it northward within the 65-feet limit, our client will immediately take steps that will effectually prevent further encroachment. —Yours truly."

From this letter it will be seen that the dispute was not as to the width of the access, but as to its length, Sneddon alleging that the pursuer had encroached 10 or 12 feet beyond the 65 feet allowed by his feu-right. Off the piece in dispute the pursuer's only access opened.

In a letter dated 23rd January the pursuer's agents accurately described the pursuer's position, which was afterwards held to be well founded, that his gate was within the 65 feet, and on 24th January 1894 Sneddon's reiterated their contention, and added—"We must ask that your client desist from putting any gate beyond the limit of this 65 feet."

On 21st March 1894 Sneddon granted a feu to Bennett of the ground over which the access ran. The terms of the feu-disposition are unobjectionable, because in reserving the pursuer's right to the access it simply echoes the words in the pursuer's title—that is, it describes the right as being "a right to use the said road or entrance into Dykehead farm-steading to the extent of 11 feet in breadth, and 65 feet backwards from off said public road." But then—and this is the important matter—Sneddon instructed Bennett to build upon and obstruct the existing access so as to shut up the pursuer's gate. This is the account which Bennett gives—"Before the feu was actually granted, and before any buildings were commenced, the defender said to me to go on with the building, that he would see it all right, or something to that effect. He told me that he had received a letter from the pursuer's agents with reference to the entrance, and that they had threatened, in the event of that entrance being blocked up, an action for interdict would be raised. After this conversation the defender authorised me to go on with the building, as the ground was his, and he said that I would be all right, that he would stand responsible for anything that would happen between pursuer and me. He was aware that the buildings were being erected; he saw them every day. Besides erecting the buildings I laid down soil on the entrance in question, and while I was doing so the pursuer checked me for putting the soil down—that I encroached on his gateway. Pursuer told me that I was encroaching too far, and I stopped at that time. I told him that I was only obeying orders. He asked me who gave me the orders, and I told him that it was Mr Sneddon, the defender. In consequence of the amount of dirt which was laid down, it was not very easy for a cart to go in; it was nearly half-way over the gate. I remember of a lorry coming from the railway station to deliver goods. The lorry could not get in, and the dirt was shifted at the time. I sent word to the defender about this; I was still to continue putting on the dirt—that the ground belonged to me. This was shortly before I was served with a summons for interdict." I may here note that this account, as far as I know, is not contradicted by Sneddon in his evidence.

The pursuer's agents on 22nd September 1894 complained of Bennett's operations, stating that he was about to erect a fence which would prevent the pursuer

getting entrance to his feu, and adding, "We also find that notwithstanding your letter to us of 19th January last, your client (that is Sneddon) has allowed Bennett to build on the 11 feet road." They added—"Our client has no wish to adopt legal proceedings if these can be avoided, and we would suggest that a meeting upon the ground should take place *at once*, where we could more easily explain the position of matters, and when some arrangement might be come to."

The reply, 25th September 1894, is—"We are not prepared to make any arrangement in this matter." And on 3rd October, long after Bennett had obtained his feu-charter, Messrs Brown, Mair, Gemmill, & Hislop, as agents for Sneddon, write—"Referring to Mr M'Murdo's call to-day, we have seen Mr Sneddon, who says that he has undoubted evidence that the fence is on the line of the old hedge except at one point, where it slightly encroaches on the 11 feet of reserved ground. You had better therefore raise your action. We are," &c.

I have dwelt upon this part of the case because it shows that the dispute originated with the defender and not with Bennett; that Bennett acted on the defender's instructions, and that even after the feu was granted to Bennett, Sneddon accepted the position of being the real contradictor, and challenged an action. The truth is that Bennett had no real interest to encroach upon this disputed 10 or 12 feet of ground; while the effect of the encroachment was to deprive the pursuer of his existing and only access.

Accordingly, when the process of interdict against Bennett was raised, it is not surprising to find that it was Sneddon and not Bennett who instructed Brown & Company to defend the action (see entry in business account under date 11th October 1894). Bennett's account of his position after defences were lodged is this—"When I got the summons I took it to the defender. I told him about getting it, and he said, in regard to that, that the thing was right enough, that he would stand responsible, and fight the battle to the end. I would not have fought the action if I had known that I was to pay the expenses, and would not have interfered with anything of the kind. It was on the distinct understanding from the very beginning that he was to pay all expenses that I went on with the case. He told me that the case could only proceed in my name; that was in consequence of my desiring to have my name taken out of it; I did not want anything to do with it at all. I thought it was a matter I had nothing to do with. Mr Hislop, writer, Glasgow, took charge of the case; I suppose he was the defender's agent. It was not I who instructed Mr Hislop with reference to the defence in the action; I never gave him any instructions to go on with the case. I did not give instructions for the case being appealed to the Sheriff-Principal, Glasgow, after it was decided by the Sheriff in Airdrie; and after it was decided by the Sheriff-Principal I did not give any instructions for it being appealed to the Court of Session."

And again—"I asked him to withdraw the case and be done with it, even after the diet of proof in Airdrie. I told him when I went home that I thought he had the worst of the case, but he said he would not give it up, and that he was prepared to spend £100 on it, and more if required."

Although during the progress of the case in the Sheriff Court Sneddon kept in the background, he was in constant communication with the agents as to the conduct of the case, as the business account shows. I need not go over the items which instruct this. The most significant fact of all in judging who had control of the defence is that on the Sheriff affirming the Sheriff-Substitute's judgment we find Brown & Company writing to Sneddon—"We are much disappointed that the Sheriff has not reversed in the case of *Stevenson* v. *Bennett*, and would advise an appeal to be taken to the Court of Session. We have not written Mr Bennett, but perhaps you would communicate to him the nature of the Sheriff-Principal's judgment, and let us have *your* views in course as to what should be done;" and in their business account this entry appears under date 31st March 1897—"Attendance with Mr Sneddon, who instructed us to appeal;" and accordingly on 1st April 1897 an appeal was taken to the Court of Session without communicating with Bennett.

Of course it was necessary that Sneddon should have the use of Bennett's name, and that was obtained on Sneddon giving Bennett a guarantee that he would relieve him of all the expenses of the action, and of all expenses for which he might be found liable in the event of the case being decided against him.

The Sheriff's judgment against Bennett was pronounced on 19th March 1897. The appeal was noted on 1st April 1897. After the judgment, but before the appeal was taken, Brown & Company on 25th March 1897 wrote to their Edinburgh correspondents, Macpherson & Mackay, a letter in which they ask the latter to advise them as to the prudence of appealing to the Court of Session. It contains this very suggestive passage—"The action is born of feeling and concerns a trumpery piece of garden ground not worth 20s. in all, but the parties have fought it as keenly as if it concerned a large estate." It may fairly be asked between whom was the feeling and who were the parties who fought so keenly. As far as I can observe from the proof I can detect no signs of feeling or keenness on the part of Bennett.

I refer to, but shall not read, Brown & Company's letter to Sneddon of 7th April 1897, and their letter to Bennett of 9th April 1897, which contained the guarantee. From that time forward Bennett was not communicated with at all during the course of the appeal, and it was insisted in solely by Sneddon. So thoroughly did he identify himself with the case that when the appeal was dismissed he was anxious to bring a

declarator at his own instance in the Court of Session.

It only remains to add that before judgment was pronounced Bennett, as Sneddon well knew, was hopelessly insolvent. Bennett himself says that Sneddon "urged on me being a bankrupt to let the debt fall on me, and he said in these circumstances I would be clear of it. I was not bankrupt at the time the proceedings were going on in the Sheriff Court."

And Macpherson & Mackay writing on 1st June 1897 say—"Mr Sneddon has just been with us. He fears Bennett is on the eve of bankruptcy, and has urged us to press on the case." The reply is, "Yes, Bennett seems to be in difficulties, and we would like to see the decision before the smash comes."

I have said that Sneddon financed the defence. He did so by paying the agents' expenses in full. Mr Hislop, his agent, says—"So far as I was concerned I looked to the defender as my client and for payment of our account. The defender has paid not only our account, but also the Edinburgh agents' account in connection with the whole action."

These being the facts, I think it is clear that the defence was lodged and persisted in, not for the benefit of Bennett, who had no interest that has been suggested to shut up the pursuer's gate, but to enable Sneddon to justify the position which he took up at the outset, and to defeat the pursuer.

It remains to be seen whether the law of Scotland provides no remedy for the serious loss which has been inflicted on the pursuer through the defender's actings.

The decisions in our Courts on the question of *dominus litis* are neither numerous nor exhaustive. I agree with Lord Kyllachy in what he says on this point in the case of *Fraser* v. *Malloch*, 23 R. 619—"Coming next to the Scots authorities, there is no doubt that these recognise the proposition that a party outside an action may in certain circumstances become liable for the expenses awarded to the successful party, and may be sued for those expenses as here by separate action. There is also no doubt that this liability has been said to depend on the interest which the outside party has in the subject-matter of the suit, and on the control which he possesses and exercises over the course of the suit. But the practical question always is as to the kind and degree of interest and of control which shall be sufficient for the purpose. And I am afraid that none of the decided cases formulate or ascertain the principle on which that question must be decided."

I do not think that Lord Rutherfurd's definition of *dominus litis* in *Mathieson* v. *Thomson* (16 D. 23), "that he is a party who has an interest in the subject-matter of the suit, and through that interest a proper control of the proceedings in the action," is or was intended to be an exhaustive definition. His Lordship himself says there may be some difficulty in exactly defining what is a *dominus litis*; and I regard the definition and also the illustrations which his Lordship gives as being more illustrative than exhaustive. But it is of importance to note how widely different were the circumstances of the case in which Lord Rutherfurd's remarks were made from those of the present case. They will be found stated with great accuracy and detail in Lord Cowan's interlocutor (16 D. 20); but they are summarised clearly and shortly in the following passage in Lord Ivory's opinion:—"Now, keeping in view the principle to be gathered from these and other sources, I do not think the circumstances of this case establish such an interest in or control over either the suit or the subject-matter on the part of this person as to impose upon him a liability for the expenses of process. This is not an action for his benefit. It was begun for no end of his, nor at his instigation. The summons had been raised and an agent employed before he at all interposed. After he did interpose, it was to a very special limited effect, and entirely in the interests and for the objects and purposes of the pursuer. And his interference had altogether ceased long before the litigation came to an end, so that it stands a fact in the case that even the agent ultimately employed had not a claim against him for the expenses incurred by the pursuer." The facts in the present case differ in every particular from those noted by Lord Ivory. It cannot be said that the defence was not instigated by Sneddon; nor that it was begun for no end of his; nor that he did not interpose until the defence had been lodged and an agent employed; nor that when he did interpose it was to a limited effect and in the interests of Bennett; nor that his interference ceased long before the litigation came to an end. We have not the advantage of knowing what would have been the opinion of Lord Rutherfurd and Lord Ivory in such a case as we have here; but it will be seen that the facts with which they were dealing were widely different. The two points of importance, however, in all such cases seem to be, for whose ends was the litigation truly carried on, and who had the control of it? In most of the reported cases the alleged *dominus litis* was or was said to be the owner of, or the person having the sole interest in, the subject-matter of the suit, who clothed a man of straw with the formal title and put him forward to fight his battle. Those, though clear and typical cases, I regard as merely examples of the rule. It is only right that any more extended application of the doctrine of *dominus litis* should be carefully scrutinised so as to guard against interference with legitimate advice and assistance given to a poor or inexperienced litigant. Where there is an independent litigant, advice and pecuniary assistance given by an outsider will not be enough to infer liability for expenses. But where the ostensible litigant has no wish and no real interest to sue or defend, and no money to litigate with, and no real control of the suit, but simply allows the man behind him to use his name, in order, it may be, to gratify some personal grudge, why should the latter, if he is

unsuccessful, escape liability for expenses?

It is said that Sneddon had not control of the litigation, because Bennett could at any time have pressed it on or abandoned it. But the same might be said in any case in which the question of *dominus litis* arises. It is enough if the alleged *dominus* had, as here, the practical control of the suit.

In the case of *Bradlaugh* v. *Newdegate* (11 Q.B.D. 6) Lord Coleridge quotes with approval a passage from Chancellor Kent (adopting Blackstone's definition, which is founded on a passage in Hawkins) which seems to me peculiarly apposite. It is to the effect that it is "a principle common to the laws of all well-governed countries that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others"—that is, those whose rights they are—"are not disposed to enforce." And in dealing with the case in hand, Lord Coleridge says in regard to the defendant Mr Newdegate—"But, undoubtedly, he drove on to sue Mr Bradlaugh for a penalty, and he supported and maintained in involving Mr Bradlaugh in protracted and expensive litigation, a man who admitted that he would have never brought the action but for Mr Newdegate, who would never have gone on with it but for Mr Newdegate's bond, and who could himself pay no costs if the action failed."

The English doctrine of maintenance has no exact counterpart in our law, but it seems to me that the principle which underlies the passages which I have quoted is appropriate to this case and in accordance with the spirit of our law, which is, that where a man is obstructed and put to expense in vindicating his legal rights he should be reimbursed by the person who has truly caused the expense.

The matter therefore stands thus—if to involve liability an interest is essential, it is sufficient that this was Sneddon's own quarrel, begun at a time when he had the *plenum dominium* of the ground of which he is still superior.

If interest is not essential he is liable as an intermeddler in the dispute of another man who had no wish and no real interest to litigate.

In my opinion the defender has been most justly found liable in the pursuer's expenses. For myself I should not have been disposed to distinguish between the expenses of the appeal to this Court and those in the Sheriff Court. No doubt the defender's liability is clearer as to the former, because he granted a written guarantee for Bennett's expenses, and his control was no longer disguised, there being not even a pretence of consulting Bennett in regard to the conduct of the appeal; but even as regards expenses in the Sheriff Court I should have been prepared to hold on the evidence that Bennett had no real control, and that Sneddon could have made him abandon the defence at any moment.

At the same time I appreciate the difficulty which your Lordship in the chair and Lord Trayner feel in regard to that part of the case; and as the judgment proposed is, looking to the division of opinion on the Bench, the only one possible in the circumstances, I do not dissent.

The Court pronounced this interlocutor—

"Recal the interlocutors of date 17th January and 24th May 1900 appealed against: Find in fact (1) that in October 1894 the respondent raised an action in the Sheriff Court against Alexander Bennett, praying, *inter alia*, for interdict against the said Alexander Bennett laying down soil or other material, and from erecting a fence, all or part of which obstructed the free use by the respondent of a road or footpath by which he had by his title a right of access to his ground feued by him from the appellant; (2) that the said Alexander Bennett did not desire to defend said action, but was urged and incited thereto by the appellant, who agreed and undertook that he would pay any expense incurred in so defending said action, in respect of which undertaking the said Alexander Bennett did appear in said action and defended the same; (3) that the defence stated by the said Alexander Bennett was repelled and interdict granted in said action by the Sheriff-Substitute on or about the 13th day of August 1896, which was affirmed by the Sheriff on or about 19th March 1897; (4) that on or about 1st April 1897 the appellant, without the knowledge or authority of the said Alexander Bennett, appealed against the judgments mentioned in the preceding finding to the Court of Session, which appeal was ultimately dismissed and the appellant therein found liable in expenses; (5) that in taking such appeal to the Court of Session the appellant was acting in his own interest and had the entire control of the proceedings in connection with said appeal, and that the said Alexander Bennett had no interest in or control thereof; (6) that the appellant has paid the whole expenses incurred by Bennett in the Sheriff Court to his own agent, and has also paid the expenses incurred by himself to his own agent in connection with said appeal; (7) that the appellant was the true *dominus litis* in said appeal; and (8) that the respondent incurred expense in opposing said appeal to the extent of £42, 13s. 6d. as the same was taxed by the Auditor: Find in law that the appellant is bound to pay to the respondent the said sum of £42, 13s. 6d.: Therefore decern against the appellant for payment of said sum of £42, 13s. 6d. to the respondent with interest: Find the appellant liable in expenses both in this Court and in the Sheriff Court," &c.

Counsel for the Pursuer and Respondent — Vary Campbell — Horne. Agents — Drummond & Reid, S.S.C.

Counsel for the Defender and Appellant — W. Campbell, Q.C.—Chree. Agents — Alex. Morison & Company, W.S.