2. The certificate of the Lord Ordinary did not affect the rate of allowance to be made for attendance at the trial, but applied only to allowance for preliminary investigations —*Ferguson* v. *Johnston*, February 27, 1886, 13 R. 635. It was the ordinary rule to allow £2, 2s. *per diem* for attendance at the trial to professional gentlemen, and it was only in very exceptional cases that the rule was departed from, such as occurred in *Stewart* v. *Padwick* and *Parnell* v. *Walter*.

At advising—

LORD PRESIDENT—Of the two objections which we have now to dispose of, the first is in my opinion well founded.

Certain of the witnesses necessary at the proof were resident in Wales. According to our practice the losing party can only be charged with the cost of having witnesses resident away from the seat of the Court precognosced by a local solicitor, this being less expensive than sending the Edinburgh law-agent to do this work. The present objectors employed in this instance a local solicitor, who, of course, was an English solicitor, and they assert without contradiction (and their present objection is made on this footing) that the remuneration of this gentleman, according to the rules of his profession, amounts to less than the expense of sending a Scotch solicitor to take these precognitions. Upon this assumption the employment of the English solicitor was the proper course for the objectors to take, and his remuneration is a good charge against the losing party.

But then the defenders propose—and the Auditor has acted on this view—that the account of this English solicitor should be taxed according to Scotch rules. This position seems to me untenable. Assuming that the objectors were entitled, as in a question with their opponents, to employ an English solicitor, they could only employ him on the terms of his profession, and that means according to an English scale of remuneration. They were not bound to propose, and he could not be expected to accede to, a bargain that he should be paid according to a scale foreign to his country, and therefore to his profession. Accordingly, it seems to me that this account must be taxed according to English rules. Probably the parties can arrange for this being done, but if necessary we can make a remit.

The second objection is to the Auditor having cut down, to the customary two guineas, the allowance *per diem* claimed for the attendance of certain mining engineers at the proof. It is represented, and I shall assume, that these gentlemen are eminent in their profession, and that they gave evidence both as to personal observation of the place in dispute, made professionally in time past, and also as to matters of skill in relation to the working of collieries generally. (In the case of one of the gentlemen his evidence seems to have been solely on matters of skill.) Now, the Table of Fees does not distinguish between evidence as to facts seen and heard and evidence as to art and skill, except in that passage in which the table allows remuneration for preliminary examinations made by skilled persons previous to a proof, and qualifying them to give evidence thereat, where the judge certifies that the case was a fit one for such allowance to be made. That, however, is a matter entirely distinct from this, which we have to deal with under the present objection, and the judge's certificate does not affect the rate of allowance to be made for attendance at the trial. For attendance at the trial the two guinea rule is the part of the table which applies. We have ascertained that in the practice of the Auditor's office that rule is applied alike to professional men who come to speak to matters of skilled opinion as to professional men who come to speak to matters of fact pure and simple, and that this rule has never been departed from except in rare and exceptional cases, such as the two cited (*Murthly* and *Parnell*), in which the Court has authorised special allowances. There is nothing in the present question to assimilate it to such cases; and accordingly, founding on the Table of Fees and the established practice, I am for repelling this second objection.

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

In respect that the terms of payment of the account were adjusted by the parties, no interlocutor was pronounced by the Court.

Counsel for the Appellants—Salvesen. Agents—Bell & Bannerman, W.S.

Counsel for the Respondents—J. Wilson. Agents—Millar, Robson, & M'Lean, W.S.

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*Tuesday, June 7.*

## SECOND DIVISION.

[Lord Kincairney, Ordinary.

## A *v.* B.

*Reparation — Slander — Charge against Members of a Family—Disclaimer.*

In the course of correspondence between two law-agents with reference to a pending litigation between two clients, in which the pursuer sought damages for breach of promise of marriage and seduction, the defender's law-agent in a letter to the pursuer's law-agent, after specifying certain entries in the register of births, deaths, and marriages, wrote with reference to them—"This last entry shows that the writer had been misinformed as to the particular child with which your client was to be credited, but this is not surprising in view of the fecundity of the maidens of this family, and of their matrimonial and other relationships as disclosed by the above and sundry other entries in the registers."

In an action of damages for slander by an unmarried sister of the pursuer

in the former action against the defender's law-agent, *held* that the expression "maidens of the family," naturally referred only to those whose names appeared in the register, and could not be innuendoed as applicable to the pursuer, whose name did not appear there, and of whose existence the defenders disclaimed all knowledge when the letter was written.

Defenders accordingly *assoilzied.*

This was an action in which the pursuer concluded for payment of the sum of £1000 as damages for slander in the following circumstances.

In 1897 the pursuer's sister had raised an action of declarator of marriage, or alternatively for damages for breach of promise of marriage and seduction. The present defenders were the defender's law-agents.

On 5th March 1897, some months before the summons in that action was signeted, in the course of correspondence with regard to that case, they wrote a letter to the law-agent acting for the present pursuer's sister, which, in so far as of importance for the purposes of this report, was in the following terms—. . . "You were formerly quite convinced that your client was what we represented her to be, and you so expressed yourself, not only to the writer, but to several of the parties whom you met in this office. Nothing has occurred to justify any change in that conviction, and a perusal of the register of births, &c., would satisfy you that our client's defence is both legally and morally complete, even apart from the conclusive evidence already submitted to you. In justification of this, and in illustration of the liberty which your client and her friends think proper to take with the Registration Acts, we refer you" —[*then followed references to certain entries in the Registers of Births and Deaths*]. "This last entry shows that the writer had been misinformed as to the particular child with which your client was to be credited, but this is not surprising in view of the fecundity of the maidens of this family and of their matrimonial and other relationships as disclosed by the above and sundry other entries in the registers." . . .

In the present action the pursuer averred that on 5th March 1897 there were living five daughters of the marriage between her father and mother, three of whom were married, and two of whom were unmarried, viz., the pursuer in the former action, and the pursuer in the present action. With regard to the letter complained of, she averred as follows—"(Cond. 4) The said letter contains statements which are of and concerning the pursuer, and are false, calumnious, malicious, and are made without just occasion. Among other statements of and concerning the pursuer in said letter the following are of and concerning her, viz."—[*then followed the paragraph in the letter complained of beginning "This last entry," and ending "other entries in the registers," which is set forth* supra]. "These statements were made by the defenders falsely, calumniously, and maliciously, and without probable cause. The said statements were not only untrue, but were made without any just occasion. They imply and represent, and were intended by the defenders to imply and represent, that the pursuer was unchaste, and was a woman of loose and immoral character. The explanations in answer are denied." She also averred (Cond. 6) that the defenders had not withdrawn and retracted the statements complained of, and that they refused or delayed to do so, although this had been repeatedly required of them.

With reference to the averments in article 4 of the pursuer's condescendence the defenders averred—"(Ans. 4) Denied. None of the statements in said letter are of or concerning the pursuer. When the said letter was written the defenders had never heard of the pursuer and were in ignorance of her existence." They explained that in the course of their inquiries in reference to the action at the instance of the pursuer's sister they had discovered certain facts regarding members of the pursuer's family other than the present pursuer, and that the statements contained in the letter had reference to these facts, and did not concern the pursuer in the present action.

The defenders had previous to the raising of the action written to the pursuer's law-agents disclaiming all intention of making any charge against the pursuer, and explaining that at the time the letter was written they were not aware of her existence.

Certificates of the entries mentioned in the letter of 5th March 1898 were produced. None of them contained any reference to the present pursuer. They bore upon the matters to which the defenders explained they were referring when writing that letter. It was not alleged that there were any other entries in any register of an incriminating character which concerned the present pursuer.

The defenders pleaded, *inter alia*—"(1) The pursuer's statements are irrelevant, and insufficient in law to support the conclusions of the summons. (3) The statements complained of not being of or concerning the pursuer the defenders are entitled to absolvitor. (4) The defenders not having slandered the pursuer ought to be assoilzied."

By interlocutor dated 15th March 1898 the Lord Ordinary (KINCAIRNEY) approved of an issue for the trial of the cause by jury.

The defenders reclaimed, and argued—No issue should be allowed. Immediately upon complaint being made to them, the defenders had disclaimed any intention of referring to the pursuer. They averred that they had never heard of her before, and the pursuer did not allege that this was untrue. No complaint was made of this letter for nearly a year after it was written, and the only publication was to a law-agent to whom it was sent in the course of business. The statement in the letter would not bear the innuendo suggested. The object which the defenders had in making it was to explain and excuse a mistake they had made, and it clearly appeared from the context that the only persons referred to in it were

those members of the family whose names appeared in the registers. It was not alleged that the pursuer came within that description, and none of the entries referred to concerned her. Authorities cited —*Caldwell* v. *Monro*, May 21, 1872, 10 Macph. 717; *M'Fadyen* v. *Spencer & Company*, January 7, 1892, 19 R. 350; Folkard on Slander and Libel (6th ed.), 823, and *in re Lord Ronald Gower and "The Man of the World,"* January 12, 1879 (not reported), there referred to.

Argued for the pursuer—An issue should be allowed. The purpose of the letter was to show that the pursuer's whole family were of bad character, and in particular that the maidens belonging to it were loose and immoral. The pursuer in the present action and the pursuer in the former action were the only unmarried women in the family, and the defenders' slanderous statement therefore clearly applied to the present pursuer. It did not matter what the defenders said they meant. They had uttered a slander in terms which were such as to apply to the pursuer, and she was entitled to reparation for that slander. The cases referred to had no bearing on the present.

LORD JUSTICE-CLERK—This case is very peculiar. It affords an illustration of the error of writing letters on matters of business which deal in suggestions and innuendo unnecessary to a plain statement of the matter of business in hand. This letter was written with a legitimate occasion. It was the letter of a man of business referring to a particular piece of business. It contained somewhat loose language. The writer found it necessary in one paragraph, being that in which he speaks of the fecundity of the unmarried women to whom he refers, to explain a mistake into which he had fallen by imputing wrongly to a particular woman that she was the mother of a particular illegitimate child. He is referring to certain disclosures which he had made to the agent for the pursuer's sister who had recently made a claim for breach of promise of marriage against a client of his. The disclosures were that certain members of the family of that woman were shown by the registers of births to be women who were not of good character. Now, was that an allegation against the character of all the unmarried women of that family, of which the present pursuer can take hold so as to raise this action of damages for slander? I think it must when read be read as referring to those of the family whose matrimonial and other relationships were disclosed by the register to be of a particular kind. I think that the pursuer does not state a relevant case.

I may add that this does not seem to me a very favourable case for an action. It was a letter, as I have mentioned, by an agent to an agent upon a question between their clients, and when, even at an interval of nine months after the letter, the pursuer complained of it, the defenders who had never heard of her (if their statement be true) disclaimed altogether any intention of referring to her. That confirms me in the view which I have expressed.

LORD YOUNG—I think that the defenders might have excused the error into which they had fallen as to the child of the pursuer's sister without giving any offence to another person. But I agree in thinking that their letter contains no matter for an action at the instance of the present pursuer. I do not believe that she thought it did, and I think that this is not a *bona fide* action to clear her character or to repair her feelings. The fair meaning of the letter seems to me to be—"If you refer to the registers of births to which I have called your attention, you will see that our mistake was excusable," and that the only maidens referred to are "those disclosed by the above and sundry other entries in the registers." I agree with your Lordship that the action should be dismissed.

LORD TRAYNER — I agree. The letter complained of was written in the ordinary course of business by the defenders to a law agent with reference to a threatened litigation between parties for whom they respectively acted as law-agents. With that litigation the pursuer had no concern, and one would not expect to find the pursuer referred to in connection with it. The letter does, however, refer to "the maidens of this family," to which the pursuer in the former action belonged, and referred to them as persons who appeared from certain entries in the register of births to be or to have been unchaste. The pursuer says the reference was of and concerning her; the defenders disclaim that, and say they were ignorant of the pursuer's existence when the letter was written. It further appears from the letter itself why the defenders referred to "the maidens" of the family at all. While I think it would have been better to have omitted such a reference altogether, I am of opinion that it does not refer to the pursuer. The reference is exclusively to those maidens of the family whose names appear on the register of births in connection with a child or children borne by her or them. The pursuer was not one of them. If so, then the statement complained of was not of and concerning the pursuer. On that ground, I think the issue proposed by the pursuer should be disallowed, and the defenders assoilzied.

LORD MONCREIFF—I own that at first I had some difficulty with regard to this case owing to the loose and reckless nature of the expressions complained of. The writer refers generally to "the maidens of the family,' and also refers to "other entries" in the register of births than those which he specifies, both of which expressions might be held to apply to the pursuer if the context permitted. But I have come to the conclusion that the words will not bear the innuendo suggested. Their fair meaning is that the characters of those maidens of the family whose antecedents are revealed in the specified entries in the

register would not bear investigation. The pursuer does not come within the meaning of the words if so interpreted; and the result is that she has not stated a relevant case.

Counsel for the defenders claimed that as the judgment of the Court was really a judgment on the merits, and involved sustaining the defenders' third and fourth pleas-in-law, the decree should be one of absolvitor.

The Court recalled the interlocutor reclaimed against, and assoilzied the defenders with expenses.

Counsel for the Pursuer and Respondent—Trotter. Agent—Robert Anderson, Solicitor.

Counsel for the Defenders and Reclaimers—Dundas, Q.C.—Cook. Agents—Simpson & Marwick, W.S.

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*Wednesday, June 8.*

## SECOND DIVISION.

## MELLIS' TRUSTEES *v.* LEGGE'S EXECUTRIX.

*Succession — Legacy — Objects of Gifts — Falsa demonstratio—Legacy to Trustees —Whether Gift Annexed to the Office of Trustee.*

A testator conveyed his whole estate to trustees named, "and to the acceptors or acceptor, survivors or survivor" of them in trust, directing them to hold for certain purposes; and lastly, upon these purposes being satisfied, providing as follows — "I direct my said trustees, the said A, B, C, and D" (naming them again), "to divide the free residue or remainder of my said means and estate equally amongst themselves, share and share alike, declaring that if any of my said trustees shall die before the said residue shall become payable as aforesaid, then such share or respective shares to which they would have been entitled if they were alive shall vest in and be payable to "their representatives." A predeceased the testator. In a competition between (1) A's executrix, with concurrence of his other representatives, (2) B, C, and D, who had acted as trustees and were still surviving at the period of payment, and (3) the representatives of the testator's next-of-kin—*held* (*diss.* Lord Trayner) that the gift of residue was only in favour of those of the trustees named who had survived the testator and accepted office as trustees (their representatives taking their share at the period of payment if they had predeceased that period), and that consequently the representatives of A had no right to any share of the residue; and (2) (*dub.* Lord Young, Lord Trayner giving no opinion on this question) that the share which would have been payable to A if he had survived was payable to B, C, and D equally.

John Mellis, farmer, Smallburn, in the county of Aberdeen, died on 22nd February 1892, leaving a trust-disposition and settlement whereby he conveyed his whole means and estate, heritable and moveable, in trust "to and in favour of William Legge, retired merchant, residing in Huntly; William Scott, farmer, Corsiestone, Drumblade; James Davidson, farmer, Newton, Cairnie; and John Scott, farmer, Bruntstane, Huntly, and to the acceptors or acceptor, survivors or survivor of them," and nominated and appointed his said trustees to be his sole executors. The first three trust purposes were, (1) payment of debts, (2) payment of the interest or annual produce of the estate, heritable and moveable, to the testator's sister Barbara Mellis, if she should survive him, during her life, with power also to pay to her such part of the capital and at such times as the trustees should deem necessary for her use and behoof, (3) on the death of Barbara Mellis, or in the event of her predeceasing the testator, payment of the interest or annual produce of the remainder of the testator's means and estate to Mrs Jane Mellis or Yeats, the testator's sister, during all the days of her life. The deed then provided as follows—"*Lastly*, That on the death of the longest liver of the said Barbara Mellis and Mrs Jane Mellis or Yeats, I direct my said trustees, the said William Legge, William Scott, James Davidson, and John Scott, to divide the free residue or remainder of my said means and estate equally amongst themselves, share and share alike; declaring that if any of my said trustees shall die before the said residue shall become payable as aforesaid, then such share or respective shares to which they would have been entitled if they were alive shall vest in and be payable to their several heirs, executors, and successors, and I appoint my said trustees to pay and deliver the same to them accordingly."

The testator left moveable estate amounting, before deduction of debts and expenses, to £1415, 3s. 7d. or thereby, and after deduction of debts and expenses to £388, 2s. 1d. or thereby.

The testator, who died unmarried, was survived by his sister Barbara Mellis, who was at the date of his death his sole next-of-kin. Mrs Jane Mellis or Yeats, named in the trust-disposition and settlement of the deceased, predeceased the testator, having died on 26th February 1889. Barbara Mellis received the liferent of the testator's estate until her death on 1st September 1897. She left a disposition and settlement dated 16th April 1889, under which certain persons were appointed her executors.

William Legge, one of the trustees and residuary legatees nominated by the testator in his trust-disposition and settlement, predeceased the testator, having died on 21st September 1891. He left a holograph settlement, dated 26th Septem-