

cause in order to allow the defenders, if so advised, to make arrangements for obviating injury to the pursuers.

On 12th July 1898 Young's Collieries, Limited, was incorporated, and acquired the business of Young & Company, including the lease of the coal mine from which the water had been pumped into the burn.

On 24th June 1899 the Bankier Distillery Company lodged a minute in which they averred that, in spite of the judgment of the Court, neither Young & Company nor Young's Collieries, Limited, had taken the necessary precautions to obviate injury to them, and that consequently water was still finding its way from the coal-workings into the burn in question. They therefore moved the Court, *inter alia*, to have the cause transferred against Young's Collieries, Limited, and for interdict against Young & Company and Young's Collieries, Limited, as craved in the original action.

Young's Collieries, Limited, lodged answers, submitting that the complainer's averments were irrelevant and unfounded, and that the application for interdict was premature and unnecessary.

Argued for the complainers—The complainers had an absolute right to interdict, whether the wrongdoers were taking steps to mitigate the injury or not—*Seafield v. Kemp*, Jan. 20, 1899, 1 F. 402. Unless the action were transferred against Young's Collieries, Limited, and interdict granted, the complainers would be deprived of their remedy, and would have to fight their case through again from the beginning.

The argument for the respondents sufficiently appears from the opinion of the Lord President.—*Stair*, iv. 34, 3; and Act 1693, cap. 15, referred to.

At advising—

LORD PRESIDENT—The petition in the action in which this present question arises originally contained a conclusion for payment. That conclusion was exhausted by the interlocutor of 20th July 1892; and the action is now solely an action for interdict. The ground upon which interdict was sought in the action was certain acts of pollution committed by the original defenders years before the present defenders acquired or had anything to do with the collieries. The Court, by a finding in the interlocutor of 20th July 1892, negatived the right of the defenders to discharge into the burn in question water pumped from their coal-workings to the injury of the pursuers. Instead, however, of pronouncing interdict, the Court, according to a well-established practice, continued the cause in order to allow the defenders, if so advised, to make arrangements for obviating injury to the pursuers. The pursuers now complain that the arrangements made are not effective; and they in their minute state that Young's Collieries, the new proprietors, who came into possession in 1898, are now polluting the stream. The important point is, that the pursuers' demand is for interdict against the new proprietors, and indeed it could be nothing else if the

action is to be transferred against them, and a decree taken under the existing petition.

I am of opinion that the action cannot be transferred against Young's Collieries, the new proprietors. The action is rested not on pollution by them but on pollution by their predecessors, to whom they are singular successors, and according to our law interdict is only granted against any person on the ground of acts done by him constituting an infringement or menace of the rights sought to be protected. The fact that the pollution complained of was done from the property now belonging to Young's Collieries does not subject them to be interdicted—interdict being a purely personal remedy directed against the person who is said in the action to have violated or threatened the pursuers' rights. The new company is not the heir of its predecessors, and did not by acquiring the collieries subject itself to liability for illegal acts done by its authors. Nor can the pursuer now ask the interdict concluded for in the action because of acts done by Young's Collieries years after the record was closed. If they have any case of this kind it must form the ground of a separate action.

I am for refusing the motion to transfer the cause.

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

The Court refused the motion to have the cause transferred against Young's Collieries, Limited.

Counsel for the Complainers—Campbell, Q.C.—J. Wilson. Agent—G. Monro Thomson, W.S.

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

Thursday October 26.

## SECOND DIVISION.

[Lord Stormonth Darling.

MACKIE & COMPANY v. GIBB.

*Expenses—Fees to Counsel—Jury Trial—Case Settled before Trial Begun.*

An action of damages for slander, which stood second upon the roll of cases set down for trial upon a particular day, was settled upon the day of the trial, while the case before it upon the roll was proceeding, and in consequence the trial did not go on. By the terms of settlement the defenders agreed to pay the pursuers' expenses. Upon taxation of the account the Auditor reduced the counsel's fees for the trial from twenty and fifteen guineas to fifteen and twelve guineas respectively. The pursuers objected to this reduction, and the defenders did not appear to support it. *Held* (*diss.* Lord Young) that the Auditor ought not to have reduced the fees in

respect of the trials not having gone on under the circumstances stated, and that accordingly the objection must be sustained, and fees allowed as originally charged.

*Observations upon the propriety of interfering with the Auditor's decisions upon such matters.*

This was an action at the instance of Richard Mackie & Company, steamship owners, Leith, and the individual partners of that firm, against Robert Shirra Gibb, the registered proprietor of the *Scottish Critic* Journal, and Hay, Nisbet & Company, Limited, Glasgow, printers and publishers of the said journal, in which the pursuers concluded for payment of the sum of £1000 as damages for slander.

The case was set down for trial by jury on Monday, 17th July, and it was No. 2 in the roll of cases for that day. Counsel were instructed for the trial. The case which stood No. 1 upon the roll lasted until about twelve o'clock noon. While it was proceeding negotiations took place with regard to the present case, the result of which was that the defenders agreed, *inter alia*, to retract the allegations complained of, to pay a sum in name of damages, and to pay the pursuers' expenses. The case was accordingly settled upon these terms, and consequently did not go to trial. The defenders had not previously made any offers of settlement. The statement complained of by the pursuers contained allegations seriously affecting the pursuers' commercial reputation, and the defender pleaded *veritas*.

In taxing the pursuers' account the Auditor reduced the fees to senior and junior counsel for the trial from twenty and fifteen guineas respectively to fifteen and twelve guineas respectively. The pursuers lodged a note of objections against this reduction.

The defenders did not appear to support what the Auditor had done.

Argued for the pursuers—The fees charged were the ordinary and usual fees for a jury trial lasting one day, and in the circumstances of this case were not excessive. The only ground which could be suggested for the reduction was that the case did not in fact go on owing to the settlement, and that was not sufficient to justify it, because here counsel had prepared for the trial, and had made their arrangements upon the understanding that this case was to go on.

LORD JUSTICE-CLERK—As an ordinary rule we would not interfere with the discretion exercised by the Auditor; but here I think the Auditor was plainly wrong. This case, which was to have been tried before me, was certainly an important one for the pursuers, and required care and skill in handling. Only the usual and customary fees for a jury trial were sent. There was nothing here to take the case out of the ordinary rule as to jury trial fees except that the case did not go on. If that is the ground upon which the Auditor has made the deduction objected to, and no

other has been suggested, I think it is a wrong ground. When counsel are instructed they have to prepare, and they have to practically give up all other work. Whether the trial goes on or not their professional day is gone. The fees sent here were not extravagant, and as no sufficient ground has been stated for reducing them, I think we should restore the fees originally charged, and give decree for the amount of the account as taxed, with the addition of the sums taxed off their fees by the Auditor.

LORD YOUNG—The only specialty in this case is, that notice of their objections was given to the other side, and that they have notified the objectors that they will not appear. Even in view of that I am not inclined to interfere with the Auditor's decision. We know nothing of the case or its circumstances. The Auditor is the proper person to inquire. We have usually followed the rule observed in England, where they have infinitely more experience of such matters than we have, of never interfering with the decision of a taxing-officer. I think we ought to follow that rule here. What the Auditor has done here is to reduce the counsels' fees for the trial from twenty guineas and fifteen guineas to fifteen guineas and twelve guineas. We do not know what were the circumstances. We have had no communication with the Auditor. I do not think we ought to have communicated with him as to such a case as this. The only specialty here is that there is no opposition to the objections; but I think a party is entitled to rely upon our following the rule that the Court will not interfere with what the Auditor has done in such matters, and not to incur the expense of appearing. I think, therefore, that there is no reason for interfering here, and that we should refuse to sustain the objections.

LORD TRAYNER—I agree with your Lordship in the chair. I think the action of the Auditor now objected to was quite wrong, and I have no hesitation in saying so, and I would add that we are just as able to judge of this matter as the Auditor, who could know nothing more about the case than we have now learned from the statement of the objectors' counsel. The Auditor has struck off part of the fees sent to counsel—fees quite warranted by the practice and the decisions of the Court—because the case was settled by the parties before the jury were empanelled, and the counsel was accordingly not engaged in the case for the whole day as had been expected. But the Auditor overlooks or disregards the fact that counsel had arranged to devote their day to the case, and in all probability had given up other engagements to enable them to do so. There is no principle to justify what the Auditor has done. If he strikes off so much of a fee because the case is settled before the jury is empanelled, how much will he strike off if the case goes to the jury but is settled after the examination of the first or second witness? The whole day (for which the fee is given when

sent by the agent) is not occupied in the one case more than the other. I have now, and have always had, the view that the Auditor should not interfere with the fees actually sent to counsel, unless in very exceptional cases. The agent who sends the fee knows better than any other person can, what is a proper honorarium to send—he best knows the amount of labour involved in preparing for and conducting the case.

I have no such feeling as has been expressed as to the inexpediency or impropriety of interfering with the Auditor. After all, the Auditor is an officer of Court, and if he errs the Court is bound to put him right, as it would any other officer. It is not without significance that the party pecuniarily interested in maintaining the Auditor's view had not appeared to support it. I suppose he felt satisfied (as he well might) that the Auditor's view could not be maintained.

LORD MONCREIFF—I entirely agree with the majority of your Lordships. The objection is one which is easily stated and as easily understood, and it is so formidable that the losing party whose interest it was to support the view of the Auditor does not appear to oppose.

The Court pronounced this interlocutor—

“The Lords sustain the objections by the pursuers to the Auditor's report on their account of expenses to the effect of adding £8, 16s. 6d. to the taxed amount thereof: *Quoad ultra*, approve of said report and decern against the defenders for the sum of £179, 18s. 9d., being the taxed amount of said account with the addition foresaid: Find the pursuers entitled to two guineas of expenses for discussing said objections, for which also decern.”

Counsel for the Pursuers—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Friday, October 27.

## SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

WINN v. QUILLAN.

*Reparation—Slander—Innuendo—“Informer.”*

An action of damages for slander was raised in which the pursuer averred that the defender had repeatedly designated him to others as an informer, thereby representing that he was “a man who for the sake of reward, and from sinister and disreputable motives had betrayed his fellows, and disclosed secrets or given information to the Crown or its executive against Irishmen and others.”

*Held (diss. Lord Young)* that the action was relevant, and an issue allowed with an innuendo in the above terms.

*Reparation—Slander—Issue Allowed as to Slander Uttered Ten Years Previously.*

In an action of damages brought in 1898 for verbal slander alleged to have been repeated on various occasions during a period of ten years, the Court allowed an issue as to whether the slander had been uttered on an occasion in 1888.

In October 1898 Peter Winn, cooper, Glasgow, raised in the Sheriff Court at Glasgow against James Quillan, also cooper there, an action for £500 as damages for slander.

The pursuer averred—“(Cond. 3) Some time ago pursuer learned that defender was in the habit of slandering him to various persons, and pursuer has recently learned that defender's slanders have been going on for a lengthened period. Pursuer has ascertained and avers that defender has repeatedly within the past few years, falsely, calumniously, and maliciously designated pursuer to his workmen, and his family and others, by the epithet of ‘informer.’ Pursuer is an Irishman, and the defender is of Irish extraction, both his parents having been born in Ireland. Many of the friends of both pursuer and defender belong to the Irish nation. Amongst Irishmen especially the designation of ‘informer’ has long been recognised as an opprobrious, degrading, and calumnious epithet applicable to a person of a base and treacherous disposition, and who is regarded by his fellow Irishmen and others as a person unworthy of trust, and capable of committing base and treacherous actions, and betraying his friends for the sake of reward, and from sinister and disreputable motives, to the Crown or its executive. A person designated as an ‘informer’ is regarded, especially by Irishmen, as a person to be treated as an outcast from society, and to be shunned and boycotted, and as a person whom no one should transact business with or be on terms of friendship with. It was in the above senses that the defender applied the epithet ‘informer’ to pursuer in the subsequent articles.” The pursuer then specified particular occasions between 1885 and 1898 on which the epithet was applied to him by the defender. “(Cond. 16) In using or applying said word ‘informer’ to pursuer, defender intended thereby to represent, as he did thereby represent, that pursuer was a man of a mean and treacherous disposition, who had been guilty of mean and treacherous acts, who was utterly untrustworthy, and who, for the sake of reward and from sinister and disreputable motives, had basely betrayed his fellows, and disclosed secrets or given information to the Crown or its executive against Irishmen and others.” . . . (Cond. 24) Owing to defender's said false, calumnious, and malicious statements, the pursuer has suffered greatly in his feelings, character, and reputation, and in his relations with his friends and the public generally. He believes that his business has likewise suffered, and he fears that for a long period to come his business prospects and his well-being and comfort, and his social relations, will be injuriously affected by said false statements.