have spoken to are of a nature to render Mr Wason or the Board responsible, I would likely look to them.'

"On reviewing the whole facts of the case, the Sheriff is satisfied that the Inspector and Mr Rowan raised and carried on the case in order to relieve the Board of aliment already advanced, and of the obligation for further aliment, and that Sarah Hepburn was a mere puppet set up by them for carrying out that object. They are both silent as to the reasons for raising the action in her name rather than that of the Inspector. If there was any other reason than that already hinted at, it would probably have been given.

"The Rev. Mr Little, the chairman of the Board, or Mr Wilson, a member of it, who were both cited as witnesses for the defender, might possibly have been able to throw some light on this matter, and also on various other matters which have been already touched upon; for the members of the Board, especially the chairman, must be presumed to have some knowledge of matters with which they themselves and their officers have been dealing, and which may materially affect the interest of the ratepayers. But neither of them has chosen to appear, and the reasons given for absenting themselves are not in the least satisfactory.

"The Sheriff regrets that he has been obliged to dismiss the case. If there is any foundation for the statement that the defender is the father of the child, it may be made the subject of another action, an action raised on proper authority, and in such a manner as not to be unfair to the defender."

Cases cited—*Potter*, 8 Macph. 1064; *Crawford*, 22 D. 1068.

At advising:—

Lord Justice-Clerk—I am clear the Sheriff has gone wrong here. He has dismissed the action as unauthorised, and this has not been maintained in argument, and is quite untenable. The other question is—Whether the pursuer is entitled to proceed unless the Board is sisted. I think they are the true *domini litis*, and it is for them to consider their position. Effect has been given to the plea of *dominus litis* in two ways:—1. After conclusion of the suit, by making the true *dominus* responsible in damages. 2. By requiring the pursuer to find caution if he is not the real pursuer, as in the *Elgin* case; but no other remedy has been applied, and in no case has pursuer been sisted. I think it is not reasonable that the action should be stayed in order to sist the Board as pursuers.

Lord Benholme—I concur.

Lord Neaves—I concur. I think if the action is well founded in fact, and can be proved, there is quite a good right of action. It is said the Board have insisted on the action, and supplied the funds and credit which are now withdrawn. Suppose it is so, will that force the pursuer to withdraw from the action or find caution? I am aware that in certain popular actions, where a man of straw has been put forward as pursuer, the Court has interfered, but not in such a case as this. I doubt if the Board could bring this action. If it is shown that the Board supplied funds and credit, they will be liable to action at the instance of the defender. The law of *dominus litis* would be most imperfect if it could not be put into operation after the action had ended.

Lord Ormidale—I doubt if the Board could have pursued this action; it had no interest so far as I see. The proper pursuer is the one we have here. It is said the Board is *dominus litis*. If defender gets absolvitor with expenses he has his action against the Board, and his claims can be reserved.

The Court pronounced the following interlocutor:—

"Find it established by the proceedings that the pursuer attended a diet of Court along with her agent as the party in the cause, and further, find that a mandate has now been produced, dated January 1874, executed by the pursuer before witnesses, authorising the action: Find that the allegations of the defender on the record in regard to the Parochial Board, are not relevant to exclude the pursuer's title and interest to sue this action; find that the defender has failed to prove that the pursuer is insane; and Repel the preliminary pleas stated by the defender, but reserving all questions as to the liability of the Parochial Board, as *dominus litis*, for the expenses of this action: Recal the interlocutor of the Sheriff appealed against, and the interlocutor of the Sheriff-Substitute dated 1st July 1873, and remit to the Sheriff to allow both parties a proof of their respective averments and to the pursuer a conjunct probation, and to proceed with the cause: Find no expenses of the appeal due to either pary."

Counsel for Pursuer—Jameson and Watson. Agents—Fyfe Miller & Fyfe, S.S.C.

Counsel for Defender—Asher. Agents—

Wednesday and Thursday, May 13 *and* 14.

FIRST DIVISION.

TOUGH'S TRUSTEES *v.* THE DUMBARTON WATER WORKS COMMISSIONERS.

(*Ante*, vol. x., p. 160.)

Expenses—Proof before Lord Ordinary — Fees to Counsel.

In a proof before the Lord Ordinary which lasted three days, and in which only one counsel was employed, and where it appeared that counsel was acting gratuitously unless expenses were recovered from opposite party, fees of £12, 12s. for the first day, and of £10, 10s. a-day for the second and third days, *allowed.*

Expenses—Witnesses, Payment of—Act of Sederunt of 10th July 1844*—Jury Trial—Proof before Lord Ordinary.*

Held that the Act of Sederunt of 10th July 1844, regulating the allowances to witnesses in jury trials, applied to proofs before the Lord Ordinary, in so far as it provides that charges in addition to the ordinary allowance for scientific persons qualifying themselves to give evidence shall be sustained, "provided the Judge shall certify that it was a fit case for such additional allowance."

In an action brought by the trustees of George Tough, contractor, the original pursuer of the action, against The Dumbarton Water Wor

Commissioners, the Lord Ordinary gave judgment in favour of the pursuer, and the Inner House adhered.

The case now came before the Court on the Auditor's report of the pursuer's account of expenses, and two objections were stated for the pursuer.

In the first place, the pursuer had charged fees to counsel for the proof before the Lord Ordinary, which lasted three days, and in which only one counsel was employed, at fifteen guineas for the first day, and twelve guineas a-day for the two following days. The Auditor allowed twelve guineas for the first day, and ten guineas a-day for the two other days. The pursuer objected to this decision.

In the second place, the pursuer had charged for two engineers, Messrs Martin and Dunlop, who had made certain measurements and calculations, and had been examined as witnesses, the sum of £216, and the Auditor allowed £10, 10s. or £5, 5s. for each of these witnesses. To this also the pursuer objected.

It appeared that on account of the bankruptcy of the pursuer, counsel had agreed to conduct the case gratuitously, fees to be recovered only in case of success, and that it was not a case involving difficult points of law or technical matters, although involving considerable detail. It further appeared that Messrs Martin and Dunlop had acted as advisers to the pursuer, and had been employed by him all through the proceedings, and that the £216 charged in the pursuer's account of expenses was their account for all work done. Further, there was no certificate from the Lord Ordinary in terms of the Act of Sederunt of 10th July 1844, certifying that it was a fit case for additional allowances to scientific witnesses for qualifying to give evidence.

In regard to the first point, the pursuer argued that the fees charged should be allowed, as they were only charged upon the scale fixed for junior counsel in jury trials by a series of decisions, and there was no good reason why the fees in proofs before the Lord Ordinary should not be as large as in jury trials. Even if it was otherwise, the fact that one counsel conducted the whole proof entitled him to full fees. As to the payment of the engineers, the full amount of their account was undoubtedly not chargeable against the opposite party. But they were entitled to remuneration for preparing to give evidence, as the evidence which they gave was such as necessarily presupposed preparation. The want of the Judge's certificate did not matter, as the Act of Sederunt only applied to jury trials.

Cooper & Wood v. *North British Railway Co.*, Feb. 28, 1863, 2 Macph. 326; *Hubback* v. *North British Railway Co.*, 2 Macph. 1291; *Campbell* v. *Ord & Maddison*, Nov. 28, 1873, 1 Rettie 154.

The defender argued that as the case had been conducted gratuitously, it was left for the auditor to fix the fees to counsel. He had done so fairly and reasonably, for it had been decided (*Wilson* v. *The North British Railway Co.*, 13th Dec. 1873, *ante*, p. 155) that the remuneration to counsel in proofs before the Lord Ordinary was not to be so large as in jury trials. In regard to the allowance to the engineers, the Auditor had acted rightly. For, 1st, these witnesses had, in the course of their actings as agents for the pursuer, acquired all information as to the facts upon which they were required to give evidence, and so did not need any special preparation; and 2d, there was no certificate from the Lord Ordinary in terms of the Act of Sederunt of 1844, which, as construed by practice, applied to proof before the Lord Ordinary as well as to jury trials.

At advising—

The Lord President—The points which we have to consider in this case are, first, as to the fees allowed to counsel; and second, as to the charges made by Messrs Martin and Dunlop.

In regard to the counsels' fees, there are certain peculiarities in this case. In the first place—and this is in favour of the extension of the fees—there was only one counsel in the Outer-House; but, in the second place, there is the fact, pointed out by Mr Asher, and in support of his contention, that the fees were not actually paid at the time, but are now charged, and will be paid to the extent recovered. So the Auditor, in reducing the fees charged, does not interfere with the discretion of the agent in sending fees to counsel, which is always a delicate matter. For, as a general rule, the agent is the best judge of what fees he should send to counsel, and if he incurs risk for himself and his client by expending a sum of money in counsels' fees, it is to be presumed that the money so expended is only reasonable remuneration. But no fees were paid in this case, and so the Auditor in fixing now what is reasonable remuneration is not interfering with the agent's discretion. Then it was pointed out that the fees allowed are less than would have been allowed if the case had been tried by Jury. That is quite true, but we have already approved of that practice, for in the case of *Wilson* v. *The North British Railway Company*, Dec. 13, 1873, we remitted to the Auditor to report upon the matter.

The Auditor's report was as follows:—

"In obedience to the remit of the Court, the Auditor begs to report that in dealing with the fees of counsel in proofs before the Lords Ordinary he has kept in view the rules laid down by the Court in the cases of *Cooper* and *Hubback*, as regulating the *maximum* fees to be sustained as against a losing party in cases which are not exceptional. There are from time to time proofs in which it humbly appears to the Auditor that the *maximum* fees are not more than adequate for the proper remuneration of the counsel who conduct them, and he has in such cases sustained the *maximum* fees. but in the great majority of cases he holds that fees in proofs should be sustained at rates somewhat lower than in jury trials. It seems to him that in jury trials the strain and responsibility upon those who conduct them are greater than in proofs. In a trial, any omission in preparation or absence of evidence may be fatal—the proceedings going on continuously to the verdict, while in a proof the danger is not so great, as adjournment may be and is occasionally permitted. Holding these views, the practice of the Auditor in regard to counsels' fees in proofs, when senior and junior are engaged, has been to sustain jury trial fees somewhat modified. He endeavours, in regard both to trials and to proofs, to satisfy himself, by examination of the record, precognitions, and productions, as to the nature and difficulty of each case, and, keeping in view the ruling of the Court in *Cooper* and *Hubback* and other cases, to fix the fees accordingly. He feels the delicacy of the duty committed to him, and anxiously endeavours to avoid undue interference with the discretion of the agents."

Now, in considering that Report, this Division expressed entire approval of the practice of the Auditor. That being so, I cannot think that the fees here fixed by the Auditor are unusually low, but, on the contrary, reasonable and fair.

As to the payment to the engineers, there is more difficulty; but it is my impression that this Court has held that the Act of Sederunt regulating jury practice in regard to scientific witnesses is also applicable to proofs before the Lord Ordinary. If that is so, then the absence of the Lord Ordinary's certificate is fatal to the contention of Mr Smith. Before determining anything judicially in this matter, however, I should like to know if I am right in supposing that there has been any such decision, and if there has not, what has been the practice followed.

As to the charge for the attendance of these engineers as witnesses, they were witnesses to fact, and could therefore have been compelled to attend and give that evidence, and so cannot be looked upon as experts, who cannot be compelled to attend. I therefore think that we should not interfere with the allowance of the Auditor in this respect.

If your Lordships are of the same opinion, we will allow the point as to payment of the engineers for qualifying to give evidence to stand over.

The other Judges concurred.

The case was adjourned until Thursday, the 14th May, in order that information might be obtained as to the applicability of the Act of Sederunt of 10th July 1844 to proofs before the Lord Ordinary.

The defender accordingly on that day produced the following Memorandum by the Auditor of Court:—

"MEMORANDUM by Auditor of Court as to Payment of Skilled Witnesses examined in Proofs.

"The Act of Sederunt of 10th July 1844, regulating the allowances to witnesses in jury trials, provides, *inter alia*, that when it is necessary to employ scientific persons to make investigations previous to trial in order to qualify them to give evidence, then fair and reasonable charges for so qualifying, in addition to the ordinary allowance, shall be sustained, "provided that the Judge shall certify that it was a fit case for such additional allowance." This rule has been uniformly applied by the Auditor to witnesses in proofs for a considerable time past, and, so far as he is aware, without appeal to the Court in a single case. It has been so applied in consequence of a judgment of the First Division of the Court (brought under the Auditor's notice at the time it was pronounced, but apparently not reported) to the effect that, in respect of allowance to witnesses for qualifying, proofs were not in a different position from jury trials. The Auditor regrets that he cannot fix the date of the decree referred to, but, to the best of his recollection, it was in 1871 or 1872. Prior to that decision, the practice of the Judges in the Outer-House had varied, some of their Lordships certifying scientific witnesses in proofs as in jury trials, and others leaving it to the Auditor to deal with the additional allowances claimed in proofs.

(Signed) "EDMUND BAXTER.
14th May 1874."

The Court repelled the objections stated for the pursuer, and approved of the Auditor's Report.

Counsel for the Pursuer — Campbell Smith. Agent—Thomas Spalding, S.S.C.

Counsel for the Defender—Asher. Agent—Macandrew.

Thursday, May 14.

SECOND DIVISION.

SPECIAL CASE—D. CURROR, S.S.C. (HENDERSON'S FACTOR), AND OTHERS.

Construction—Settlement—Annuity—Division.

Terms of settlement under which *held* (1) that the period of division of residue fixed by the truster could not be anticipated by a discharge of annuities burdening the estate, these annuities being alimentary; (2) that any surplus revenue arising year by year over and above the sum requisite to meet the annuities might be divided as it arose.

The parties to this Special Case were,—of the first part, David Curror, S.S.C. judicial factor on the trust-estate of the deceased John Henderson, builder, Edinburgh, and, of the second part, the liars and residuary legatees under the trust-disposition and codicil of the said John Henderson, dated 28th May 1857. The facts as stated on record were—The testator was survived by his two daughters mentioned in the said trust-disposition and settlement, viz., Mrs Margaret Henderson or Brown and Mrs Catherine Henderson or Nisbet, and by his daughter-in-law, also therein mentioned, viz., Mrs Caroline Graham or Henderson, the relict of the testator's deceased son John Henderson, all of whom are still alive. All of the testator's grandchildren mentioned in the said trust-disposition and settlement survived him, viz., (1) his said son John's children, John Henderson and Walter Henderson; (2) the said Margaret Henderson or Brown's children, Robert Brown (since deceased), Mrs Margaret Brown or Thomas Christina Brown (since deceased), Mrs Hellenore Brown or M'Gregor, Miss Lousia Brown, John Henderson Brown (since deceased), and Miss Mary Catherine Brown; and (3) Miss Margaret Wilhelmina Nisbet, daughter of the said Mrs Catherine Henderson or Nisbet, Miss Agnes Nisbet, who was born on the 11th August 1859, after the execution of the said trust-disposition and settlement and codicil, also survived the testator. The said Robert Brown died, without issue and testate, on or about 18th September 1869. The said Christina Brown died, without issue and intestate, on or about 21st November 1865. The said John Henderson Brown died, without issue and intestate, on or about 6th July 1865. There were thus eight of the testator's grandchildren who at the expiry of the period of ten years after the testator's decease were alive, as they still are. The said Margaret Wilhelmina Nisbet and Agnes Nisbet are minors, and are both above twelve years of age. The other grandchildren have all attained majority.

On the 4th May 1860, the said David Curror was appointed by the Lords of Council and Session judicial factor on the said trust-estate, in consequence of the trustees nominated in the said