am not satisfied either, in the second place, that there has been an attempt on the part of the proprietor to maintain any such salmon fishing as can be held to be fishing in the exercise of his right, and having carried it on for the prescriptive period, to have the word "fishing" in his title read as salmon fishing. In the earlier period dealt with in the proof the rod and line fishing seems not to have been treated as of much consequence, and I do not think, so far as I can judge after reading the proof, that there is any evidence whatever of a satisfactory nature to show that such rod fishing was carried on by the proprietor of Dale as in the exercise of a right at all. It seems to have been rather the case that along this stretch of water for a considerable time there were no restrictions at all, and that many people did fish who had no right of fishing at all; it was left very much open. But I presume in consequence of the immense change that has taken place on the productiveness of salmon rivers—I suppose owing to precautions now taken to protect the fish in the spawning season, and to prevent acts which are destructive of the fish altogether—the salmon fishing on that river has become of such enormous value that a rod on this stretch is let for as much as £250. It is now a very valuable subject indeed, and if it had been proved to our satisfaction that for the prescriptive period rod and line fishing had been carried on in the exercise of a right—an asserted right—and carried on peaceably and without interruption, and if it had been further proved that either in the circumstances of the particular side, or from the nature of the banks and bottom of the river, net and coble could not be fished or would not be in ordinary circumstances practicable, then I would have had no difficulty in holding the right established by rod and line. But there is no evidence to satisfy me on that point, and therefore on the whole matter I agree with the interlocutor of the Lord Ordinary by which he has decerned and interdicted the defender.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—I also concur in thinking that the interlocutor of the Lord Ordinary is right. I do so on these grounds—I think the pursuer by his title and possession has shown that he has property in the entire fishings as a whole, and I think the defender has not shown by his possession that he is proprietor of the salmon fishings *ex adverso* of the lands of Dale.

LORD LEE.—Not having heard the argument I give no opinion.

The Court adhered.

Counsel for the Pursuer and Respondent—D.-F. Balfour, Q.C.—R. Johnstone—Low. Agents — Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Defender and Appellant — Graham Murray — Dickson. Agents — Mackenzie, Innes, & Logan, W.S.

Wednesday, March 5.

FIRST DIVISION.

PARNELL *v.* WALTER AND ANOTHER.

(*Ante*, p 1.)

Expenses—Reserved Expenses.

Special circumstances in which it was *held* that the general rule that reserved expenses were carried by the general finding of expenses in favour of the successful party should not be followed.

Expenses—Skilled Witness—Fees to English Counsel.

In an action for £50,000 as damages for slander, English counsel were brought by the defenders from London to give evidence on certain questions of English law. The proof lasted one day.

In the account of the defenders, who were found entitled to expenses, the fees charged were £322, 17s. 6d. for the senior, and £275 for the junior counsel (exclusive of consultation fees and travelling expenses). The Court *allowed* fees of 100 guineas for the senior, and 70 guineas for the junior (exclusive of consultation fees and travelling expenses).

In this action the Lord Ordinary (KINNEAR) on 6th November 1888 allowed the parties a proof of their averments on the question of jurisdiction.

The defenders having reclaimed, the Court on 24th November refused the reclaiming-note and reserved the question of expenses.

The case then went back to the Lord Ordinary, and the proof, which lasted one day, was taken, and on 5th February 1889 the Lord Ordinary sustained the first plea-in-law for the defenders, dismissed the action, and decerned; found the defenders entitled to expenses, allowed an account thereof to be lodged, and remitted the same to the Auditor to tax and report.

The pursuer reclaimed, but did not insist in his reclaiming-note, and on 26th February 1889 the Court, in respect that the reclaimer did not insist in his reclaiming-note, refused the same, found him liable in additional expenses, and remitted the account thereof to the Auditor to tax and report.

The Auditor taxed the defender's account at £439, 19s. 10d. sterling, "reserving for the determination of the Court the question of liability of the pursuer for the expenses of the reclaiming-note by the defenders against Lord Kinnear's interlocutor of 6th November 1888, amounting (after taxation) to £18, 16s. 2d. included in the taxed amount now reported." . . .

"*Note.*—The reclaiming-note referred to was wholly unsuccessful, but the interlocutor of the Court refusing it reserved the question of expenses. The final interlocutor of the Court, pronounced on 26th February 1889, refusing the pursuer's reclaiming-note against Lord Kinnear's interlocutor of 5th February 1889, and finding him liable in additional expenses, takes no notice of the

reserved expenses; but at the audit of this account it was stated by the pursuer's agent, and admitted by the agent of the defenders, that the question as to these expenses was brought under the notice of the Court when the remit to me to tax under that interlocutor was pronounced, and that parties were informed that the question would be dealt with when my report was submitted to the Court. . . .

"The payments to witnesses include fees to two English counsel for attendance at the proof before Lord Kinnear, giving evidence as to the law of England on certain questions. The proof occupied one day. The payments to the English counsel are thus stated (exclusive of consultation fees and travelling expenses):—Senior, £322, 17s. 6d.; junior, £275—£597, 17s. 6d.

"I have felt considerable difficulty in dealing with these items. As a charge against the unsuccessful party in the litigation, they are clearly inadmissible as stated. Although in a case in the Court of Session English law may be regarded as a fact to be proved by witnesses, it was out of the question to deal with the witnesses simply as witnesses to fact in respect that their attendance to speak to the fact could not be compelled. On the other hand they were not certified, and could not be certified, as skilled witnesses, who required to make investigation to qualify them to give evidence. After careful consideration, it appeared to me that I might with propriety follow the rule adopted by me in the case of *Douglas Stewart* v. *Padwick and Steuart*, February 26, 1873, Session Cases, 3rd series, vol. 11, p. 467. There the witnesses were not lawyers but medical men of eminence, and the fees paid to them were £126 to each. These I sustained only to the extent of £10, 10s. for each day the proof lasted. In giving judgment in that case the Lord President is reported to have said—'Mr. Grainger Stewart and Mr Watson were called merely as experts, and I do not think it safe to exceed the allowance fixed by the Auditor. There is no doubt that the highest class of evidence cannot be got at this rate, and in a case of such importance as this is parties will have the best evidence; and it is desirable that it should be so. But is the winning party entitled to charge the whole of his expenses against the loser? It is against the spirit and practice of the Court that he should. If we exceed the sum fixed by the Auditor I do not see where we are to find a limit to such charges.' Following the rule adopted in that case I have sustained for the Senior English Counsel—1. Fee entered in the account, under date 18th December 1888, £10, 17s. 6d.; 2. Three days' travelling and attendance at proof, at £10, 10s. £31, 10s.; 3. Travelling expenses, £7—£49, 7s. 6d. And for the Junior, £8, 15s. 6d. £31, 10s., and £7, together £47, 5s. 6d.

"I have thought it necessary to state these details, understanding that the defenders are to object to what I have done."

The defenders objected to the amount taxed off the fees paid to the English counsel employed by them.

The pursuers objected to the following items being allowed the defenders—(1) The £18, 16s. 2d. of reserved expenses referred to. (2) The fees charged for instructing English counsel, and the consultation fee paid them. (3) The witnesses' fees in so far as £10, 10s. per day for three days was allowed to each of the English counsel employed.

The defenders argued—(1) That it was settled by the case of *The Caledonian Railway Company* v. *Chisholm*, March, 19, 1889, 16 R. 622, that a general finding of expenses carried reserved expenses, and that the Auditor had no power to deal with these reserved expenses. It was too late to move for these expenses after the abandonment of the reclaiming-note. (2) The case of *Stewart* v. *Padwick and Steuart*, relied on by the Auditor, did not support the taxation he had made. A larger proportion of the fees paid had been there allowed, and the skilled witnesses were in that case both resident in Edinburgh, so that there private business was not necessarily so much interfered with.

The pursuer argued—(1) That this case was taken out of the rule laid down in *Chisholm's* case by the fact that counsel for the pursuer had only refrained from arguing the question of the reserved expenses under the last reclaiming-note on an intimation from the bench that that question might be argued after the account had been reported on. (2) The payments to the English counsel should be taxed at the usual rate of payments allowed to ordinary witnesses under the Act of Sederunt. The only reported case in which the Court had dealt with such fees to counsel was *Whitehaven and Furness Junction Railway Company* v. *Bain*, March 11, 1851, 13 D. 944.

At advising—

LORD PRESIDENT—As regards the first point referred to the Court by the Auditor the facts stand thus: An interlocutor was pronounced by the Lord Ordinary on 6th November 1888, in which the parties were allowed a proof of their averments on the question of jurisdiction, and the defenders presented a reclaiming-note against that interlocutor which was refused by the Court on 24th November, and in refusing it the Court reserved the question of expenses, that is, the expenses of the reclaiming-note. The case then went back to the Lord Ordinary, and the proof was taken, and then the Lord Ordinary pronounced the interlocutor of 5th February 1889, which is quoted by the Auditor in his report, in which the Lord Ordinary sustained the first plea-in-law for the defenders, dismissed the action and decerned, and found the defenders entitled to expenses.

That interlocutor made no reference to the expenses reserved, but a reclaiming-note was presented against that interlocutor of 5th February, and came before us for discussion on 26th February, but it was not insisted in and was refused with additional expenses.

It is stated for the pursuer, and not disputed by the defenders, that when the

reclaiming-note was refused in respect of the failure of the pursuer to insist in it, the matter of reserved expenses was mentioned, and it was said that that matter might be disposed of when the account was reported on by the Auditor. If that be so, I think it is clearly competent to dispose of the reserved expenses as may be just, because the pursuer in reclaiming against the Lord Ordinary's interlocutor would have been entitled to bring up the point then, and he did not do so because of what was said at the time. I think this is a speciality taking the case out of the general rule. On the matter of the reserved expenses, therefore, I am of opinion that the defender is not entitled to the reserved expenses which were incurred for a stage in the process in which he was not successful.

The second point is of importance, and refers to the fees given to English counsel who gave evidence as to the law of England. That is a matter on which the Court is entitled to exercise its discretion, and on which it is necessary to exercise some discretion. Very large sums are claimed on the one side, and on the other it is maintained that these gentlemen who were required to expound the law of England are to be treated as ordinary witnesses to a matter of fact. I do not accede to either of these views. I think there must be an allowance made for the examination of such witnesses, which may fairly represent the amount of skill and erudition necessary in order to clear up the law in the manner required; and taking a moderate view of the case, I think it will be quite sufficient if a hundred guineas are allowed for the senior and seventy guineas for the junior counsel.

It would be extremely difficult to lay down any general rule on this subject or to state fees—the sort of *ratio* to be allowed in taxing such fees. Everything, or at least a great deal, will depend on the magnitude of the cause for which the evidence is required, and it cannot be represented that the present is not a heavy case, being an action for £50,000 as damages for slander. I do not say that what is now determined will be a precedent for any other case except so far as it shows what the Court allowed in a heavy and important case.

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

The Court pronounced this interlocutor:—

"Find that the defenders are not entitled to the £18, 16s. 2d. of expenses reserved by the Auditor in his report: Sustain the objections for the defenders to the fees allowed by the Auditor for the witnesses Lumley Smith, Q.C., and William Graham, barrister-at-law, to the extent of allowing an addition of £115, 10s. to said fees: Repel the objections for the pursuer other than as regards the above-mentioned sum of reserved expenses: *Quoad ultra* approve of the Auditor's report and decern against the pursuer for the sum of £536, 13s. 8d. as the taxed amount of expenses of process after giving effect to the above findings."

Counsel for the Pursuer—D.-F. Balfour, Q.C.—Shaw. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Defenders — Graham Murray. Agents—J. & F. Anderson, W.S.

Thursday, March 6.

SECOND DIVISION.

M'DOUGALL *v.* MACALISTER.

Jurisdiction—Crofters Holdings (Scotland) Act 1886—Cottars—Permanent Improvements.

Held that an action by a cottar for compensation for permanent improvements under the Crofters Holdings (Scotland) Act 1886 is incompetent in the Court of Session, and that such claims fell to be dealt with by the Crofters Commissioners.

Neil M'Dougall leased the salmon fishing in the sea *ex adverso* of the lands of Cour in the united parish of Saddell and Skipness in Argyllshire from August 1880 till August 1887, when he renounced his lease. During that time he occupied, at an additional rent of £1, 6s. per annum, a piece of ground upon which he erected a kind of dwelling-house and built a sea wall. He was ejected from said dwelling by Charles Brodie Macalister of Glenbarr and Cour, the proprietor of the ground, under a decree of removing dated 12th June 1889, and thereafter brought an action against the said Charles Brodie Macalister in the Court of Session "to have it found and declared that he was a cottar within the meaning of the Crofters Holdings (Scotland) Act 1886, and was entitled to compensation for permanent improvements in terms of said Act. The sum concluded for was £300.

The said parish has been duly ascertained and determined to be a crofting parish under sec. 19 of the said Act.

The pursuer pleaded—"In respect pursuer is a cottar within the meaning of the said Act, he is entitled to compensation for improvements as concluded for."

The defender pleaded—"It is incompetent to claim compensation for improvements under the Crofters Holdings (Scotland) Act 1886 in the Court of Session."

The said Act provides as follows—"Sec. 8. When a crofter renounces his tenancy or is removed from his holding, he shall be entitled to compensation for any permanent improvements." . . . "Sec. 9. When a cottar . . . paying rent renounces his tenancy or is removed, he shall be entitled to compensation for any permanent improvements" . . . "Sec. 10. Improvements shall be valued under this Act at such sum as fairly represents the value of the improvements to an incoming tenant." . . . "Sec. 29. The Crofters' Commission may, subject to the approval of the Secretary of Scotland,