COURT OF SESSION.

Thursday, June 2.

FIRST DIVISION.

EBBW VALE STEEL, IRON, & COAL COMPANY, LIMITED *v.* MURRAY (WOOD'S TRUSTEE) AND OTHERS.

(*Ante*, January 14, 1898, 35 S.L.R. 329; 25 R. 429.)

Expenses—Proof—Precognition—Witnesses Resident in Wales—Table of Fees V. 1.

In a case where it was necessary for the successful party to obtain the evidence of certain witnesses resident in Wales, he employed a firm of English solicitors in the locality to take the precognitions, whose remuneration amounted to less than the expense of sending a Scotch solicitor to take them. The Auditor having taxed the solicitors' account in accordance with Scotch rules as to fees for obtaining precognitions, the party objected to the Auditor's report on the ground that he could only employ the solicitors on the terms of their profession, *i.e.*, according to an English scale of remuneration.

Held that the account must be taxed according to the English scale.

Expenses—Skilled Witnesses—Expenses of Attending Proof—Certificate of Judge—Table of Fees V. 3 (1) *and* (2).

The certificate granted by a Judge, that a case is a suitable one for an additional allowance to be made to professional or scientific persons in respect of preliminary investigations made to qualify them to give evidence at the proof, does not affect the rate of allowance to be made to them for attendance at the trial. The Court will not, except in rare and exceptional cases, depart from the rule contained in the table of fees, which allows £2, 2s. *per diem* for such attendance.

The Ebbw Vale Steel, Iron, and Coal Company, Limited, were lessees of mineral property near Pontypool, Monmouthshire. In March 1891 the company entered into an agreement with Messrs Wood, coalmasters, Glasgow, for a sub-lease to them of the minerals. The sub-lease provided that the sub-tenants should pay an annual dead rent, and should be bound to keep the mines drained, an obligation which the principal lessees were bound to fulfil by their lease.

The sub-tenants were sequestrated, and the trustee on the sequestrated estate declined to take up the sub-lease. The principal lessees re-entered the subjects for the purpose of fulfilling the obligations of their own lease, and lodged a claim in the sequestration for the capitalised value of the dead rent for the unexpired period of the sub-lease, and for the expense of keeping the mines drained.

The trustee rejected the claim, and the Ebbw Vale Company appealed to the Lord Ordinary on Bills.

A proof was allowed by the Lord Ordinary, and evidence was led by the appellants to instruct the damages which they had sustained by the termination of the sub-lease.

The Lord Ordinary (PEARSON) on 20th March 1897 pronounced an interlocutor whereby he sustained the appeal, recalled the deliverances appealed from, and found the appellants entitled to expenses.

The respondents reclaimed, and the First Division on 14th January 1898 adhered to the Lord Ordinary's interlocutor (January 14, 1898, 35 S.L.R. 329, 25 R. 429).

On the case being brought up for approval of the Auditor's report, the Ebbw Vale Company stated objections to the report in respect (1) that he had disallowed the sum of £119 out of an item of £165, being the charge of a firm of English solicitors for taking precognitions of witnesses resident at Pontypool, Monmouthshire; and (2) that he had only allowed payment at the rate of £2, 2s. each per day for attendance at the trial of three mining engineers, who, attending in the capacity of skilled witnesses, had claimed payment, two at the rate of £7, 7s., and one at the rate of £5, 5s. per day.

Argued for appellants—1. It had been necessary to obtain the precognition of these witnesses who were resident in Wales, and they had taken the course of employing an English solicitor, because that was less expensive than sending a solicitor from Edinburgh. The Auditor, however, had taxed the account according to Scotch rules. But if the appellants were entitled to employ an English solicitor, they must pay him upon the English scale of remuneration, which was higher than the Scotch, and they were willing to have his account taxed according to English rules—*Owners of "Hilda"* v. *Owners of "Australia,"* January 21, 1885, 12 R. 547; *Williamson* v. *Corrie*, February 25, 1834, 12 S. 488. 2. The Lord Ordinary had certified that this was a fit case for an additional allowance to these witnesses, and it was only reasonable that in addition to the fee given for their preliminary investigations, they should have a reasonable fee for attendance at the trial in addition to their travelling expenses, which was all the Auditor had allowed—Table of Fees, V. 3 (2)—*Stewart* v. *Padwick*, February 26, 1872, 11 Macph. 467; *Parnell* v. *Walter*, March 5, 1890, 17 R. 552; *A B* v. *C D*, December 13, 1894, 22 R. 180.

Argued for respondents—1. The Table of Fees only allowed certain fees known as "Instructions for Precognition," and the ordinary drawing fees of precognition, with some travelling expenses. All this had been given by the Auditor, and as the table did not go into the point of the difference in the English scale of fees, he was not entitled to take that into consideration. The case of *The "Hilda"* had no application, for it dealt with the expenses of a commissioner.

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.

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