

fering with the judgment of the Lord Ordinary.

The Court adhered.

Counsel for the Pursuers (Respondents)—  
 C. N. Johnston, K.C.—Constable. Agents  
 —Oliphant & Murray, W.S.

Counsel for the Defenders (Reclaimers)  
 —George Watt, K.C.—Horne. Agents—  
 Anderson & Chisholm, Solicitors.

*Friday, March 15.*

FIRST DIVISION.

BANNATYNE, KIRKWOOD, FRANCE  
 & COMPANY, *Minuters.*

GOODWINS, JARDINE & COMPANY,  
 LIMITED v. CHARLES BRAND &  
 SON.

(Reported *ante*, July 19, 1905, 7 F. 995,  
 42 S.L.R. 806.)

*Expenses—Taxation—Agent and Client—  
 Attendance in Court of Session of Local  
 Law Agents.*

The liquidator of a company which was being wound up under the supervision of the English Court raised an action in the Court of Session for a balance alleged to be due by the defenders on a settlement of accounts, and obtained decree for certain sums. The questions at issue had involved inquiry over a series of years, and there had been a great deal of procedure. The law agents in the liquidation, a Glasgow firm, had attended in the Court of Session. In taxing their account of expenses as between agent and client, on a remit from the registrar in London, the Auditor disallowed the charges for these attendances on the ground that they were unnecessary, the Edinburgh agents having been in attendance and their charges having been allowed.

An application for a charge under the Law Agents and Notaries Public (Scotland) Act 1891, section 6, having been made, *held* that as the proper conduct of the cause had necessitated the attendance of the local agents, the charges should have been allowed, and application granted.

*Expenses—Agent and Client—Charging Order—“Law Agent Employed to Pursue or Defend an Action”—Local Agent Attending Case in Court of Session—Law Agents and Notaries Public (Scotland) Act 1891 (54 and 55 Vict. cap. 30), sec. 6.*

Where the conduct of a litigation in the Court of Session requires the attendance of the local agent as well as that of the Edinburgh agent, the former equally with the latter is “an agent employed to pursue or defend an action” within the meaning of section 6 of the Law Agents and Notaries Public (Scot-

land) Act 1891, and entitled to apply under that section for a charging order. (The case is reported, at a preliminary stage, *ante ut supra*.)

The Law Agents and Notaries Public (Scotland) Act 1891 (54 and 55 Vict. cap. 30), section 6, provides:—“*Payment of law agent's costs out of property recovered or preserved.*—In every case in which a law agent shall be employed to pursue or defend any action or proceeding in any court, it shall be lawful for the court or judge before whom any such action or proceeding has been heard or shall be depending to declare such law agent entitled to a charge upon and against, and a right to payment out of, the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved on behalf of his client by such law agent in such action or proceeding, for the taxed expenses of or in reference to such action or proceeding, and it shall be lawful for such court or judge to make such order or orders for taxation of, and for raising and payment of, such expenses out of the said property as to such court or judge shall appear just and proper; and all acts done or deeds granted by the client after the date of the declaration, except acts or deeds in favour of a *bona fide* purchaser, shall be absolutely void and of no effect as against such charge or right.”

On 24th October 1902 Goodwins, Jardine, & Company, Limited, 19 St Swithin's Lane, London, in liquidation, and James Watson Stewart, C.A., Glasgow, the liquidator thereof, raised an action against Charles Brand & Son, contractors, 172 Buchanan Street, Glasgow, in which they sued for a balance alleged to be due by the defenders on a settlement of accounts relating to the supply of material for certain contracts incidental to the formation of the Glasgow Central Railway. On 26th March 1906 the Lord Ordinary (DUNDAS) after a proof pronounced findings, and on a reclaiming note the Division adhered, varying one finding.

Messrs Bannatyne, Kirkwood, France, & Company, writers, Glasgow, now (15th March 1907) presented a minute in the cause, —it being in the roll for the adjustment of the sum found due—seeking a charging order for their expenses as law agents.

The cause had been one of considerable magnitude, involving a great deal of procedure, there being two reclaiming notes, a proof before one of the Judges of the First Division, and an extensive proof on the merits before the Lord Ordinary, the questions at issue being mainly as to the rates which the pursuers were entitled to charge, and as to whether the work done was or was not to be paid for as extra work. The inquiry had extended over a series of years. The liquidation of Goodwins, Jardine, & Company had been placed under the supervision of the High Court of Justice in England. The accounts of the liquidator therefore had had to be submitted to the registrar in London. These accounts included the business accounts of the minuters as law agents in the liquidation.

The minute was in these terms—"Black for the above-named minuters stated that they had been employed by the pursuers and by the liquidator as law agents throughout the whole course of the liquidation which commenced in the year 1891; that they had advised the liquidator in regard to the carrying out of the contract which was the subject of dispute in the present action; that upon the liquidator's express instructions and by reason of the special knowledge and information they had acquired in relation to the matters in dispute, which involved numerous details, they had attended the proof which was allowed by your Lordships' interlocutor of 2nd July 1904 and subsequent hearing before your Lordships, and also the proof and hearing on evidence before the Lord Ordinary and the recent hearing before your Lordships; that the Auditor of the Court of Session, to whom the registrar in London had recently remitted the business accounts of the minuters for taxation as between agent and client, had disallowed the charges for the minuters' attendances at the proof and hearing before your Lordships, and also at the proof and hearing before the Lord Ordinary, and, the minuters were apprehensive, would also disallow their charges for attendance at the hearing before your Lordships, and he accordingly craved the Court to declare the minuters entitled to a charge upon and against and a right of payment out of the sum decerned for in the action for their taxed expenses of or in reference to the action, including their attendances at the two separate diets of proof before mentioned and subsequent hearings in the Outer House and before your Lordships, as well as the hearing upon the reclaiming note which has just been disposed of by your Lordships. . . ."

There was no opposition to the minute.

Argued for the minuters—(1) The Auditor was clearly wrong in disallowing the expense of the local agent's attendance. This was not a question between party and party but between agent and client. The attendance of the local agent was absolutely necessary for the proper conduct of the case. The decision of the Auditor could not be brought up directly, as he was taxing accounts in an English liquidation, and the minuters had accordingly made this application under section 6 of the Law Agents and Notaries Public (Scotland) Act 1891. (2) Under the Law Agents Acts the position of the local agents and the Edinburgh agents was practically the same. The statute was equally applicable to both.

LORD PRESIDENT—This application is a novel one under the 6th section of the Law Agents Act 1891 (54 and 55 Vict. c. 30). In the conduct of this litigation, which was by the liquidator of this company to recover money from Messrs Brand & Company, and in which he has been successful, the liquidator was quite entitled to be assisted by the agent in Glasgow, who really was the person who in ordinary

parlance "got up the case." When the case came here of course there had to be an Edinburgh agent as well. But looking to the magnitude of the proof and the frequent occasion that there must have been during the conduct of such a proof to ask questions about things that had happened during the period of years over which this inquiry extended, I do not hesitate to say that it would have been utterly impossible to conduct the proof without the presence of the Glasgow agent, who knew all about it. Therefore I am bound to say that I am entirely at a loss to understand how in a question as between agent and client the Auditor has disallowed the expenses of the Glasgow agent as he seems to have done. He seems to have made an entire mistake. In a question between party and party it might have been otherwise, but as between agent and client the ordinary course should be followed. However, that mistake has been made. It was impossible of course in the circumstances, as the Auditor was taxing accounts in an English liquidation, to bring up the matter directly to us, and accordingly the agent has now made an application under the 6th section of the Act of 1891.

The only doubt that lay in my mind was whether the country agent could come under the provisions of this section, but on further consideration I think he may well be able to do so, because after all it is only one litigation, and he is just as much agent in it as the Edinburgh agent. The section of course must be capable of construction, because the words read absolutely strictly are not applicable to law agents at all. The words of the section are—"In every case in which a law agent shall be employed to pursue or defend any action." In the strict sense a law agent does not pursue—it is the pursuer—nor does he defend—it is the defender. It really means "in conducting any litigation that is going on for the pursuer or the defender." I think the Glasgow agent here was in every proper sense of the word employed in the conduct of the litigation, no doubt along with an Edinburgh agent. Therefore I think your Lordships should grant this motion.

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

The Court pronounced this interlocutor—

[After decerning for the sums found due to the pursuers]. . . "Upon considering the minute for Messrs Bannatyne, Kirkwood, France, & Company, writers, Glasgow, find and declare the minuters entitled to a charge upon and against and a right of payment out of the sums above decerned for, for their taxed expenses of or in reference to the action, including their attendances at the two separate diets of proof in the case and the subsequent hearings in the Outer House and Inner House, as well as the hearing upon the reclaiming note, and direct the Auditor to tax the same accordingly." . . .

Counsel for the Minuters and the Liquidator—Scott-Dickson, K.C.—Morison, K.C.—Black. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Defenders—Dean of Faculty (Campbell, K.C.)—Solicitor-General (Ure, K.C.)—C. D. Murray. Agents—Alexander Morison & Company, W.S.

Tuesday, March 19.

### FIRST DIVISION.

[Lord Guthrie, Ordinary.]

#### MACKENZIE v. BAIRD'S TRUSTEES.

*Agent and Principal—Master and Servant—Recompense—Extra Services—Estate Factor—Quantum meruit—Averments—Relevancy.*

An estate factor on the termination of his appointment sued his employers, testamentary trustees, for alleged extra services extending over the last ten years of his tenure of office, (a) in having taken charge of unlet farms, and (b) in making up valuations and reports on a transfer of his then principal's business affairs to London, and on his death, in preparing a feuing plan for a village on the estate, and in representing the estate before the Crofters Commission, and preparing reports and valuations for the negotiations preparatory to a sale to the Congested Districts Board. He produced, as showing the terms of his appointment, an authority to collect rents, to attend local meetings, and to pay feu-duties, burdens, and local management expenses. No demand had been made for extra remuneration at the time when the alleged extra services had been rendered.

Held that as he did not distinctly aver (1) what his duties as factor were; (2) what were the alleged extra services not naturally falling within the scope of his employment as factor; and (c) what was to be the remuneration for the extra services, whether fixed or to be calculated by the value of the services, the action was irrelevant and fell to be dismissed.

*Latham v. Edinburgh and Glasgow Railway Company*, July 18, 1866, 4 Macph. 1084, 2 S.L.R. 208, approved and followed.

On 15th October 1906 John Mackenzie, Uig, Isle of Skye, at one time factor on the estate of Kilmuir, Skye, belonging to the defenders, raised an action against Walter Lumley, 41 St James Street, London, and another, as trustees of the late George Alexander Baird of Strichen and Stichill, in which he concluded for (1) £200 as damage for dismissal without due notice, and (2) and (3) for £250 and £100 as remuneration for extra work done and services rendered, which he alleged did not fall within his duties as factor.

The defenders, *inter alia*, pleaded—“(1) The pursuer's averments are irrelevant and

insufficient to support the conclusions of the summons. . . . (4) The other services condescended on being within the scope of his ordinary duties and employment as factor, the pursuer is not entitled to be specially remunerated therefor, and the defenders are entitled to be assolizied from the second and third conclusions of the summons.”

The pursuer, who had acted as factor under previous proprietors, had been continued in office by the late Mr Baird, at a salary of £150, with free house, coals, and light, and two cows' grass, and after Mr Baird's death in 1893 he had continued to act for the defenders at least until after the sale of the estate in 1904. He produced an appointment as factor by the defenders, and averred—“His [*i.e.*, the pursuer's] powers and duties as detailed in said appointment were ‘to collect, levy, and uplift, and if necessary to call, charge, and pursue for the rents, revenues, and proceeds of the said lands and estates, including the proceeds of the thinnings of the woods, and other income thereof, and to grant receipts and discharges therefor, and also full power when he shall consider it necessary or expedient to apply for sequestrations against tenants, and to take all necessary measures for removing tenants from their possessions, as also full power to attend and vote in our absence at all meetings of heritors in which we are interested, and of parochial boards, meetings of local authorities, and all other parochial meetings, and meetings of Commissioners of Supply and of Fishery Boards in the different parishes and districts in which said lands and estates are situated, and also to pay out of the said rents and others all feu and teind duties and public and parochial burdens exigible from and in respect of said lands and estates, and the wages to the ordinary workpeople employed thereon, and all expenses connected with ordinary or necessary repairs, and generally the whole expenses of local management of said lands and estates so far as necessary or proper, and to remit the balance of said rents and others to . . . our commissioner.’”

In support of conclusion (2) the pursuer averred:—“(Cond. 6) In the year 1892 the large farm of Duntulm, rented, at £400, became vacant, and as a tenant could not be got the pursuer was asked by the proprietor Mr Baird to take over the farm on his behalf. The pursuer did this, and worked it successfully until 1895, when a tenant was got. In 1898 Monkstadt, the largest farm on the estate, was in like manner taken over by the defenders, and was worked successfully for them, at their request, by the pursuer for seven years, until the termination of his engagement aforesaid. The pursuer has received no remuneration for managing these two farms—a duty entirely outside his factorial work—and as no rate of remuneration was agreed upon between the pursuer and defenders at the time the pursuer is entitled to such remuneration on the principle of *quantum meruit*. In respect of these services the pursuer claims £25 a-year for