in any particular case the arbitrator, instead of applying his mind fairly to the circumstances of the case before him, directed himself (as it were) that the question of expenses was governed by some supposed rule of law in favour either of the employer or of the workman, or some hard-and-fast principle which he evolved for himself, there would, I apprehend, be no doubt that his discretion would not have been exercised judicially, and his finding in regard to expenses could be successfully assailed.

But there is nothing of that sort disclosed in the present case. It was argued that very possibly, according to the general practice of this Court, the question of expenses might have been determined differently from the way in which the learned arbitrator disposed of it. But an arbitrator is not bound by the rules of practice which prevail in the Court of Session in a matter of this kind. On the contrary, the question of expenses is entirely in his discretion, provided, as I have said, he makes no mistake in law and honestly applies his mind to what he thinks would be fair and appropriate in the circumstances of the particular case before him. It was said that in the present case the workman's application was justified. So it was. He would have got nothing if he had not presented his application, and the argument was that having succeeded in getting something he was entitled to his expenses. On the other hand it is the case that the workman's claim was pled too high, and we do not know the history of the proceedings, or how far the expenses actually incurred were really incurred owing to the excessive claim which the workman made, and persisted in until the final stage of those proceedings was reached. In these circumstances I am quite unable to say that the learned arbitrator failed to exercise his unfettered discretion judicially and legally, even though his decision may not accord with the result which would probably have been reached in a similar case according to the usual practice of this Court. I am therefore for answering the first question put to us in the affirmative and the second question in the negative.

LORD SKERRINGTON — We were not referred to any finding of fact in the Stated Case justifying the inference that there were no materials before the arbitrator which entitled him to exercise a discretion in regard to expenses, and that he was therefore under a duty to award expenses to the appellant. Another way of stating the same proposition is to say that there are no findings in the Stated Case which entitle us to come to the conclusion that the arbitrator committed an error of law.

For these reasons I agree that the first question must be answered in the affirmative and the second in the negative.

LORD CULLEN—I am quite unable to see that in making the award of expenses which he did the arbitrator either failed to exercise judicially the discretion committed to him by paragraph 7 of the Second Schedule to the Act or committed any error in law. Accordingly I agree that the questions should be answered as your Lordships propose.

The Court answered the first question of law in the affirmative and the second in the negative.

Counsel for Appellant—Maclaren, K.C.—Burnet. Agent—John Baird, Solicitor.

Counsel for Respondents — Carmont — Marshall. Agents—W. & J. Burness, W.S.

Tuesday, October 24.

FIRST DIVISION.

[Lord Ashmore, Ordinary.

CORRIGAN *v.* MONAGHAN.

Reparation—Slander—Slander Consisting of Statement that Pursuer had had a Bastard Child—Averments by Defender Reflecting on Pursuer's Character—Averments of Specific Instances of Adultery—Admissibility — Relevancy of Defender's Averments in Mitigation of Damages.

In an action of damages for slander founded on an alleged statement by the defender that the pursuer had had a bastard child, *held* (1) that an averment in defence that the pursuer was well known in the neighbourhood in which she resided as a person of loose and immoral character and had suffered no damage as the result of the defender's statement was relevant; and (2) that averments of specific acts of adultery by pursuer at a date considerably later than the act alleged in the attack on her character fell to be deleted from the record; but (3) that these averments were sufficient notice to the pursuer to entitle the defender to cross-examine her as to the specific instances, although it was incompetent to lead substantive evidence in support of their truth.

Mrs Annie Dougan or Corrigan, wife of Edward Corrigan, raised an action against William Monaghan, in which she sought to recover £500 as damages for slander.

From the averments of the pursuer it appeared that she had not lived with her husband since 1904, when he left her and went to America. The slander complained of was an alleged statement by the defender on 1st December 1921 that the pursuer had had a child and that it was a bastard, being nine or ten years old.

In his defence the defender did not deny making the statement, but explained that it was made in the course of conversation with a man named William Docherty, and in reply to a question put to him by Docherty; that it was based upon a statement made by the pursuer; and that if it was untrue the pursuer had herself to blame. The defences also contained the averments quoted verbatim in the interlocutor of the Lord Ordinary.

The defender pleaded—"1. The defender having only repeated the statement that the pursuer herself originated is entitled to absolvitor. 2. The defender having probable cause for the remarks complained of through the statement of the pursuer herself is entitled to be assoilzied from the conclusions of the summons. 3. The pursuer being herself responsible for the remarks complained of is barred *personali exceptione* from succeeding in the present action. 4. In any event the pursuer has sustained no damage."

The issue proposed was as follows:—"Whether on or about 1st December 1921, and in or near the Royalty Bar, Paisley, the defender, in the presence and hearing of William Docherty, baker, Thomas Meeken, shoemaker, both of 8 Brick Lane, Paisley, and George Aitken, 7 Stow Street, Paisley, or one or more of them, stated of and concerning the pursuer that the pursuer had had a child and that it was a bastard, or used words of like import and meaning of and concerning the pursuer falsely and calumniously, to the loss, injury, and damage of the pursuer. Damages laid at £500."

On 22nd June 1922 the Lord Ordinary (ASHMORE) pronounced the following interlocutor:—"Finds that the following averments in answer 2 of the defences, viz.—'Since the raising of the present action the defender has ascertained and believes and avers that the pursuer and the said William Docherty have frequently committed adultery in said house at 8 Storie Street, Paisley. In particular, the pursuer and the said William Docherty committed adultery in said house in or about the beginning of January 1921. The said William Docherty, as pursuer well knew, was a married man, whose wife had left him on account of his cruelty to and maltreatment of her and misconduct with other women, to defender unknown, and the present proceedings have been instituted with a view to extorting money from the defender,' are irrelevant, and ought not to be remitted to probation. *Quoad ultra* approves of the issue, and appoints the same as now authenticated to be the issue for the trial of the cause: Appoints the said issue to be tried by a jury within a court-room of the Parliament House on Thursday, the 23rd day of November 1922, at ten o'clock forenoon, and authorises and appoints a jury to be summoned for that purpose in common form: Grants leave to reclaim."

Opinion.—"In this case the pursuer is suing for damages for verbal slander. The slander complained of is that nine or ten years ago the pursuer had an illegitimate child.

"The pursuer is a married woman, but she has not lived with her husband since he went to America in 1904 leaving her in this country.

"The defender in his defences does not deny making the statement complained of, but he explains (*a*) that he made it in the course of a conversation with a man called William Docherty, and in reply to a question put to him by Docherty, and (*b*) that the statement so made by him was based on what he had heard the pursuer herself say, and that if it is untrue the pursuer has herself to blame. The defences also contain the following averments, which, as they have given rise to the question now to be determined, I will quote verbatim:—'Since the raising of the present action the defender has ascertained and believes and avers that the pursuer and the said William Docherty have frequently committed adultery in said house at 8 Storie Street, Paisley. In particular, the pursuer and said William Docherty committed adultery in said house in or about the beginning of January 1921. The said William Docherty, as pursuer well knew, was a married man whose wife had left him on account of his cruelty to and maltreatment of her and misconduct with other women, and the present proceedings have been instituted with a view to extorting money from the defender.'

"The pursuer pleads (1) that he is entitled to absolvitor in respect that he only repeated the statement made by the pursuer herself, (2) that he had probable cause for making the statement, and (3) that in any view the pursuer has sustained no damage.

"I ordered issues for the trial of the case, and a proposed issue was lodged by the pursuer, to which no objection has been raised by the defender and no counter-issue has been proposed by the defender.

"At the diet for adjusting the issue, however, counsel for the pursuer contended that the averments above quoted are irrelevant, and moved that I should order them to be deleted from the record.

"Counsel for the defender on the other hand maintained that these averments are relevant in mitigation of damages and ought to be remitted to probation for that purpose.

"In my opinion the averments in question are irrelevant and ought not to be remitted to probation. I proceed to explain the grounds and to state the authorities on which my opinion is based.

"In the first place I think that the principle on which in slander cases it has been held competent for the defender without a counter-issue to attack the character of the pursuer in mitigation of damages has been limited in its application to the admission of evidence as to the general bad character or reputation of the pursuer.

"The series of early cases on the subject contained in Murray's Jury Reports seem to me to illustrate and demonstrate the limitation of the kind to which I have referred —*Hyslop* v. *Staig*, 1816, 1 Mur. 15; *Scott* v. *M'Gavin*, 1821, 2 Mur. 484; *Walker* v. *Robertson*, 1821, 2 Mur. 508; *Tytler* v. *Mackintosh*, 3 Mur. 236; and *Kingan* v. *Watson*, 1838, 4 Mur. 485.

"In each of these cases it was laid down that the evidence of character to be admitted was evidence of general character or reputation.

"I find nothing in the later cases which ought to be regarded as inconsistent with what was held in the cases above cited—*cf.* Lord M'Laren's opinion in *Bern's Executor* v. *Montrose Asylum*, 1893, 20 R. 859, at p. 863,

30 S.L.R. 748, and the opinions of Lord President M'Neill and Lord Curriehill in *Macdonald* v. *Begg*, 1862, 24 D. 685.

"I may add that the statements of the law given in the various text-books seem to me to require some qualification to make them square with the judicial decisions and opinions to which I have referred—Dickson on Evidence (Grierson's ed.), vol. i, sec. 8; Glegg on Reparation (2nd ed.), p. 121; Cooper on Defamation (2nd ed.), p. 256.

"The view which I have expressed is confirmed by English law and practice.

"The statement in the case of *Scott* v. *Sampson* contained in the opinion of Mr Justice Cave (in which Mr Justice Mathew concurred) accurately represents, as I think, the law of Scotland as well as the law of England, and, *inter alia*, it was held in that case (on an examination of all the previous English cases) that evidence of particular facts tending to show the character or disposition of the plaintiff in a slander case is inadmissible even in mitigation of damages —*Scott* v. *Sampson*, 1882, 8 Q.B.D. 491.

"I refer also to the statement of the law and practice in England in the following text-books:—Odgers on Libel and Slander, 5th ed., (1911) pp. 393-4 and p. 401; Taylor on Evidence, 11th ed., (1920) vol. i, p. 263, sec. 355 (*a*); and Phipson on Evidence, 6th ed., (1921) p. 191.

"But secondly, I think that the averments in question are irrelevant and ought not to be remitted to probation, because evidence of the facts averred could not be distinguished from evidence in support of the truth of the slander complained of, or at least of the material part of that slander. Now in the words of Lord President Inglis (in *Paul* v. *Jackson*, 1884, 11 R. 460, 21 S.L.R. 304)—'Nothing is better settled in practice than that a defender is not entitled without a counter-issue to prove the truth of the statements complained of or any part of them in order to mitigate damages or for any other purpose whatever.'

"And thirdly, I think that the averments in question are irrelevant in respect that they refer to matters collateral to the issue in the case, involving the character and reputation of a man who is not a party to this action—*H.* v. *P.*, 1905, 8 F. 232.

"For the reasons (each and all) which I have given I shall find that the averments in question are irrelevant and ought not to be remitted to probation, and *quoad ultra* I shall approve of the issue proposed for the pursuer for the trial of the case."

The defender reclaimed. On 19th July 1922 the case was continued and the defender allowed to lodge a minute of amendment.

The defender proposed to amend the record by deleting the averments quoted in the Lord Ordinary's interlocutor, and by inserting in place thereof the following sentence:—"The pursuer is a person of loose and immoral character, and it is well known in the neighbourhood in which she resides that she has frequently during the years 1920 and 1921 cohabited and committed adultery with the said William Docherty at 8 Storie Street, Paisley."

The pursuer opposed the amendment, and argued — There was no real difference between the proposed amendment and the averments which the Lord Ordinary had refused to allow to go to proof. It was merely a substitution of a general averment in place of a specific one for the purpose of mitigating damage. Averments as to relations with third parties were irrelevant and could not be made the subject of substantive proof, although the defender might on giving sufficient notice be entitled to cross-examine the pursuer in regard to them—*A* v. *B*, 1895, 22 R. 402, 33 S.L.R. 412; *H.* v. *P.*, 1905, 8 F. 232, 43 S.L.R. 258. The proposed amendment should therefore be disallowed, but it might be sufficient notice for cross-examination. The cases referred to by the Lord Ordinary—*Hyslop* v. *Staig*, 1816, 1 Mur. 15; *Scott* v. *M'Gavin*, 1821, 2 Mur. 484; *Walker* v. *Robertson*, 1821, 2 Mur. 508; *Tytler* v. *Mackintosh*, 1823, 3 Mur. 236; and *Kingan* v. *Watson*, 1828, 4 Macph. 485—did not support the view that the defender could submit evidence to attack pursuer's character generally. Dickson on Evidence, secs. 2 and 8, and *Inglis* v. *National Bank of Scotland*, 1909 S.C. 1038, 46 S.L.R. 730, were referred to by the Court.

Argued for the defender — The amendment should be allowed. The defender was entitled to lead evidence as well as to cross-examine the pursuer in regard to her character in order to mitigate damages — Dickson on Evidence, sec. 8—*Macdonald* v. *Begg*, 1862, 24 D. 685. This case was different from that of *A* v. *B* (*cit.*), where the purpose of the averments was to support the defence generally. A continuation having been granted to consider a further amendment, an amendment in the following terms was proposed:—"The pursuer is well known in the neighbourhood in which she resides as a person of loose and immoral character, and she has suffered no damage as the result of the defender's statement."

LORD PRESIDENT—In this case the pursuer asks for damages in respect of the harm done to her character by a slanderous statement alleged to have been made concerning her by the defender. It necessarily follows that she puts her character in issue; and therefore it is a relevant defence against her claim for damages to aver and prove that her character is such that it has not suffered any damage by the statement complained of. The point of such a defence is not that she *is* a bad character, but that she *has* a bad character. Accordingly it appears to me that the amendment which the defender proposes on answer 2 to the effect that "the pursuer is well known in the neighbourhood in which she resides as a person of loose and immoral character, and she has suffered no damage as the result of the defender's statement," is relevant and should be admitted. This amendment will provide a sufficient basis for evidence to the effect that the pursuer's reputation was a bad one, and has suffered either no damage or at any rate not so much damage as might otherwise have been the case. There are still standing on

record certain statements by which the pursuer is charged with specific acts of adultery said to have been committed at a date considerably later than the act alleged in the attack on her character which forms the subject of the present action. In the Outer House the Lord Ordinary found that those averments were irrelevant, and ought not to be remitted to probation; but I think the proper course to be taken with regard to them is to order them to be deleted from the record. The reason for adopting this course is that which was given by Lord President Robertson in *A* v. *B* ((1895) 22 R. 402), and approved by Lord President Dunedin in *H.* v. *P.* ((1905) 8 F. 232), namely, that it is neither legitimate nor expedient that an inquiry into the particular slander complained of should open the door to a roving inquiry into collateral issues which have but an indirect bearing on the case in hand. I add, however, that in a question of this kind—as indeed in any question where character and credibility are concerned—it is competent, if notice has been fairly given, to put to the pursuer in cross-examination such specific instances of conduct as those made in the averments to which I have referred, notwithstanding that it is incompetent to present substantive evidence in support of their truth. It is a delicate matter of policy for the party concerned to consider whether he is either safe or wise in hazarding such cross-examination. But the cases to which I have already referred establish that such questions in cross-examination of the pursuer are legitimate provided fair notice has been given of the subject-matter of the intended questions. With regard to the form in which fair notice should be given, it is enough to say that here sufficient notice has been given to the other side by the statements now ordered to be deleted. I think it is fair that as the expenses incurred in this reclaiming note are entirely due to the course which the defender has pursued those expenses should fall upon him.

LORD MACKENZIE—The course which your Lordship proposes should be followed in this case is one which has been settled by previous decisions, and therefore I concur in what your Lordship proposes.

LORD SKERRINGTON—I concur.

LORD CULLEN—I also concur.

The Court recalled the interlocutor reclaimed against, allowed the amendment, ordered the averments quoted in the interlocutor to be deleted from the record, and of new approved of the issue for the pursuer.

Counsel for the Pursuer—Morton, K.C.—Ingram. Agents—Mitchell & Baxter, W.S.

Counsel for the Defender—Maclaren, K.C.—Crawford. Agent—John Baird, Solicitor.

Friday, November 3.

FIRST DIVISION.

[Lord Sands, Ordinary.

WILSONS & CLYDE COAL COMPANY, LIMITED *v.* NORTH BRITISH RAILWAY COMPANY AND OTHERS.

Harbour—Rates and Charges—Composite Rate for Loading—Normal Incidents of Loading—Pier and Harbour Orders Confirmation (No. 1) Act 1883 (46 *and* 47 *Vict. cap. xliii*) (*Methil*), *secs.* 11 *and* 12, *and Schedule of Rates.*

A railway company in its capacity as a harbour authority charged certain coalmasters a composite rate for loading "duff," *i.e.*, coal reduced to a state of dust mixed with water, which rate included the use of a hoist for tipping the waggon-loads into a chute. The company was in the habit of "pokering" the duff, *i.e.*, loosening it by the insertion of a poker, steel rod, or shovel, in order to facilitate its descent from the waggons when tipped. The company having refused to "poker" waggon-loads of duff which had been forwarded in a wet and stiff condition unless on the basis of a special charge, the coalmasters brought an action for declarator that the company were bound to load without extra charge all coal consigned to them for shipment. *Held* that "pokering" was not a service included in the composite rate except in so far as it was merely incidental to attendance upon the hoist.

Contract—Railway—Harbour Authority—Agreement not to Increase Rates and Charges—Construction of Agreement—Composite Rate for Loading.

A harbour authority which had been in the habit of shipping quantities of "duff," *i.e.*, coal reduced to a state of dust mixed with water, for a composite rate, and in connection with its shipment to incidentally facilitate its descent from the waggon when tipped by "pokering" it, *i.e.*, loosening it by means of a poker, rod, or shovel, made an agreement with the consigners not to increase its rates and charges or impose new or additional rates and charges. The harbour authority subsequently declined to load certain waggon-loads of duff which arrived at the hoist in a moist and caked condition, rendering it difficult to work, unless on the footing of a special charge for pokering. *Held* that in the absence of any proof that the composite rate prior to the agreement was a contractual rate for, *inter alia*, the "pokering" or digging *de facto* performed, a bargain to perform these services for the composite rate could not be read into the agreement, and that accordingly the harbour authority was not bound to load the duff in question for the composite rate.

The Pier and Harbour Orders Confirmation (No. 1) Act 1883 (46 and 47 Vict., cap. xliii)