more than a general reference to the evidence may be necessary. It is for the Court to say whether the present is to be regarded as an exceptional case or not. Parties are not agreed that the argument was delayed in order that copies of the proof might be furnished to counsel; but it is admitted that copies were made for the counsel on both sides.

"If the Court shall be of opinion that the auditor is right in disallowing copies of proofs under the Evidence Act as a rule, he would respectfully suggest, that when an exception is to be made, the making of copies should be sanctioned by a marking on the interlocutor sheet to that effect at the debate.

"The sums of £41, 16s. 9d. and £10, 5s. 4d., are included in the sum of £361, 8s. 1d. reported as the taxed amount of expenses."

HALL for pursuers.

SCOTT for defenders.

LORD PRESIDENT.—As regards the first point reserved by the auditor, viz., the charge of £41, as being the expense of the case from 8th December 1865 to 21st February 1866, the question comes to be simply this, whether in that part of the litigation the defender was unsuccessful. Now it seems to me impossible to hold that. The object of that part of the litigation was to urge objections to the pursuer's title. That question was reserved, but it came in the end to be disposed of in the defender's favour. The result was to find that the pursuer had not a title, the missives of 10th March having been found insufficient, because the pursuer had failed to prove their existence anterior to the 18th May. The defender was obliged to state that preliminary defence, otherwise he would have been cut out of it entirely, and therefore he was right in lodging these pleas, and right in urging them. It was never proposed until the case came here on a report on issues, to have that point reserved. We must assume that if that had been proposed the defender would have assented, for when it was proposed he offered no objection. On the other hand, it is open to observation that the pursuer was very far wrong in that part of the case, for he proposed a most absurd issue, adapted to try, not the question of title, but the whole merits of the case, on which no record had been made up. I think, therefore, that the defender is entitled to that part of the expense.

"As to the second question, it relates to a small amount of money, but in one point it might be a very important question, if the allowing of this expense was to be taken as laying down the rule, that the proper course under the Act is to adjourn the case after the evidence is led, and to have copies of the evidence made in writing or print for counsel to discuss the question. That is against the spirit of the Act, for the Act means that the whole proceedings shall go on just as in a jury-trial It is a jury trial to all intents and purposes without a jury, and therefore it is the duty of counsel to address the Judge forthwith, as in the case of a proper jury trial to address the jury. But it would not do to lay down an inflexible rule, which would prevent the Lord Ordinary from taking a different course in certain special cases. For if a case is so complex, or the proof is of such a nature that it would be difficult for the Lord Ordinary or for counsel to digest it on the spot, it may be for the interest of the parties, and conducive to the ends of justice, that an adjournment should take place. And this is just a case of that description. We all know from painful experience that this is a very difficult case to digest, and cost an unusual amount of trouble. Therefore, on the whole matter, I think it would not be fair to disallow the charge in the present case. It may be justified here, but only in respect of the very special nature of the case.

LORD CURRIEHILL concurred.

LORD DEAS—I am of the same opinion, and on both grounds. As to the first point, the defender could not have avoided these preliminary defences, and even at that stage he seems to have been wiling to avoid expense, and to have suggested that the proof might be taken on commission or before the Lord Ordinary, but the pursuer declined to adopt that course. The plea as to title might have been reserved. Whenever that was suggested the defender agreed to it. As to the second point, I quite agree with your Lordship both as to this particular case and as to the general rule. Generally the discussion ought to follow the evidence, as in the case of a jury trial, but there may be cases in which that is not expedient. Suppose the Lord Ordinary saw from the proof that the case could not be done justice to in that way, and adjourned the the case for a day or two, it would not do to say that copies of the evidence might not be allowed in that case. We know very well that although there are advantages in jury tials, one of their disadvantages is the speed with which the argument and other portions of the case follow after the proof, and that sometimes leads to a new trial, with its resultant delay and expense, which would have been avoided if the proceedings could have been conducted in a more deliberate way. This new form of proceeding has the advantage of being satisfactory in that respect, for there are no proceedings going back on it, and opening it up by a new trial.

LORD ARDMILLAN concurred.

Agents for Pursuer—Crawford & Guthrie, S.S.C.
Agents for Defenders, Watt & Marwick, S.S.C.

Friday, February 14.

YEO *v.* WALLACE AND OTHERS.

Reparation—Slander of Title—Relevancy. An action of damages founded on certain statements made at a sale by auction, which were said to be false and to have deterred parties from bidding, and so injured the sale, *dismissed* as irrelevant, in respect (1) the statements alleged had reference to the legal right of the pursuer to sell the articles; and (2) there was no averment of malice.

This was an action of damages at the instance of Doctor Daniel Yeo, painter and oil and colour merchant in Greenock, against William Wallace, shipmaster in Greenock, the firm of Alexander Agnew & Son, house-factors in Greenock, David Agnew, house-factor there, and George Williamson, writer there.

The pursuer was for some years tenant of a dwelling-house in Greenock belonging to the defender Wallace. In February 1865, he retook the said dwelling-house from the defenders Alexander Agnew and Son, for the year from Whitsunday 1865 to Whitsunday 1866, at the rent of £15. In February 1866, he again retook from said firm the

said dwelling-house, for the year from Whitsunday 1866 to Whitsunday 1867, at the increased rent of £21. In both these transactions the defenders Alexander Agnew and Son acted as factors for and as representing the defender Wallace.

The pursuer averred in his condescendence that he occupied said dwelling-house up to the month of May 1866, when he resolved to break up his household establishment in Greenock, and, after selling his furniture, to go into lodgings for a time. He further averred:—

"Cond. 3. Accordingly, in the beginning of May 1866, the pursuer employed Mr Rowland Field, auctioneer in Greenock, to sell his household furniture. The sale was advertised in the local newspapers, and by handbills circulated throughout the town, to take place on the 10th of May. Sometime prior to the day of sale, the pursuer paid and accounted for to Alexander Agnew and Son, as factors for Captain Wallace, the rent of the said dwelling-house for the year ending Whitsunday 1866, partly by *contra* account which he had against Captain Wallace, and partly in cash, and in return obtained receipts and discharges in full for the rent up to said term. It was the intention of the pursuer to sublet the house for the year from Whitsunday 1866 to Whitsunday 1867, and this he did with the entire approval and consent of Messieurs Agnew and Son, who adopted the tenant, and obtained security for the payment of the rent.

"Cond. 4. The pursuer's furniture was exposed to public view on the 9th May 1866, when a number of persons inspected it. The sale took place on the 10th May as advertised. A very short time after it had commenced, and whilst the sale was going on in the kitchen of the house, the defender David Agnew, who is a partner of the said firm of Alexander Agnew and Son, and the defender George Williamson, as the law-agent of or as otherwise representing the defender Captain Wallace, and acting by his instructions, or by the instructions of the other defenders, appeared in the kitchen, and, after crushing their way through the crowd, the defender Mr Williamson, who acted as spokesman, addressing Mr Field, the auctioneer, said in the presence and hearing of numerous persons assembled, that they had come to stop the sale—that he had a sheriff's warrant, or was about to apply for such warrant to stop the sale—that if Mr Field proceeded therewith it would be at his own risk, and that the purchasers would not be allowed to remove articles, and would be held responsible for anything they removed. The defender Mr Williamson having expressed himself in these or in similar terms, further stated that he desired either security for or payment of the next year's rent, being for the year to Whitsunday 1867. In reply to the said demand that the sale should be stopped, Mr Field stated to Mr Williamson that the rent for the then current year had all been paid, and, producing the receipts therefor, he called upon the said defenders to exhibit their warrant for putting a stop to the sale. This the said defenders failed to do, and the pursuer believes and avers that no such warrant had been obtained or even applied for.

"Cond. 5. The foresaid proceedings, taken by or on behalf of the defenders, were wrongful, illegal, and oppressive. The defenders had no ground or warrant whatever for their actions, and the said sale of the pursuer's furniture was most unwarrantably interfered with. In consequence thereof, various persons were deterred from bidding and from purchasing. Some left the sale altogether, and although it was proceeded with, the amount realised was greatly below what it would have been but for the defenders' said actings. The foresaid conduct on the part of the defenders has deeply wounded the pursuer's feelings, and the same was calculated seriously to injure, and has seriously injured his reputation and credit. The loss and damage which the pursuer has sustained amounts to not less than £300, but althought the defenders have been desired and required to make reparation to the pursuer in the premises, they refuse to do so, whereby the present action has become necessary."

The defenders all pleaded that the action was irrelevant, and each of them further pleaded that at all events, it was irrelevant as against him.

The Lord Ordinary (Barcaple) pronounced the following interlocutor, dismissing the action:—

"*Edinburgh, 12th March* 1867.—The Lord Ordinary having heard counsel for the parties, and considered the closed record—Finds that the pursuer has not set forth a relevant ground of action against any of the defenders: Sustains the plea stated for all the defenders against the relevancy, dismisses the action, and decerns: Finds the pursuer liable to all the defenders in expenses; allows accounts thereof to be given in, and, when lodged, remits the same to the auditor to tax and report.

"*Note.*—The wrong alleged, for which damages are asked, consists in words said to have been spoken by the defender Williamson. It will be for consideration whether there are averments against the other defenders relevant to infer responsibility by them for the statement made by Williamson, assuming that they amount to a wrong for which reparation is due. The first question, however, is, whether the pursuer has averred the commission of such a wrong as entitles him to reparation from Williamson at least, if not from the other defenders. The Lord Ordinary has come to the conclusion that there is not a relevant case set forth to found a claim for damages against any of the defenders.

"The alleged wrong consists in the statements said to have been made by Williamson in the presence of the persons who were attending the sale of the pursuer's furniture for the purpose of bidding. There was nothing actually done by Williamson on which the action can be founded. Nor were the words spoken by him of such a kind that they could have inferred damage, except in so far as they were spoken in the presence of persons whom they deterred from bidding. If they had merely been addressed to the auctioneer, who disregarded them, or to any persons not connected with the sale, and not in presence of intending bidders, they could not have founded an action. The case is therefore of a special kind, in which the words spoken do not constitute a wrong and ground of action in themselves, apart from specific damage, in the sense of damage consisting in pecuniary loss actually sustained as distinguished from loss which the law will presume. The case which the pursuer attempts to make is of the same description as the class of cases recognised in England as cases of slander of title. The English authorities on that subject are to be found collected in Addison on Wrongs, 2d edition, 711. It appears to be held in England that malice is an essential element of such a case, the statements not being in themselves a legal wrong when made by a person who has a natural interest to make them. In the present case, the pursuer himself avers that Williamson represented Mr Wallace, the

proprietor of the house, on the occasion. The Lord Ordinary thinks that on this ground it was necessary to aver malice, and that the action is irrelevant for want of that averment.

"But he is further of opinion that there is a peculiarity in the case which takes it out of the ordinary class of such cases, and altogether removes the ground of liability for damages. The substantial and important part of the statement said to have been made by Williamson did not refer to any matter of fact which could not be known to the parties in whose presence he spoke. It was merely a statement in regard to the legal rights of the landlord in the circumstances of the case, as to which circumstances he made no false or erroneous statement. If the landlord was not entitled to stop the sale, or bring back goods sold at it, unless the pursuer gave security for or paid the next year's rent, there was nothing stated to deter purchasers from bidding. It is not to be presumed that an erroneous statement of law in regard to the rights of parties will produce the same effect as a statement of fact invalidating the title to sell, as, for instance, that the articles exposed are stolen property. It was, according to the statement of the pursuer himself, made clear upon the spot that the rent for the current year had been paid, no statement to the contrary having been made by Williamson. The auctioneer was therefore warranted in going on with the sale, and the purchasers in bidding. If any persons were deterred from bidding, it was owing to their adopting an erroneous view of the law, by giving credit to a statement which, upon the face of it, was wrong. If injury resulted, it was not merely from the statement of Williamson, but from the undue effect which persons intending to purchase gave to that statement. There is an appearance of hardship in holding that there shall be no redress for the injury which may be caused by such interference. But parties are not to be prevented from stating what they maintain to be their legal rights. There would seem to be greater evil to be apprehended from the adoption of any principle which should induce them to lie by without stating openly and beforehand the claims at law which they mean to maintain, than from allowing them to proclaim their alleged rights, leaving it to all parties interested to inform themselves as to how the law really stands. If an opposite view were to be adopted, it is not easy to see at what point it could stop in holding parties liable for the open assertion of their legal claims, if they shall prove to be ill founded. In stating these conclusions to which he has come, the Lord Ordinary thinks it right to call attention to the case of *Philip* v. *Morton*, 18th Jan. 1816, Hume 865, not noticed in the debate, in which damages were found due for a protest served at a public sale, asserting legal claims which were held to be unfounded. There were, however, circumstances founded upon in the judgment as reflecting on the defender's good faith, and, on the whole, the Lord Ordinary has not felt that the decision can be taken as an authority applicable to the present case.

"If the Lord Ordinary should be wrong in holding that no revelant claim for damages can lie in such a case, he is of opinion that, at all events, there must be an averment that the erroneous statement of legal right was malicious. There is no such averment on this record.

"If it should be held that the allegations on record amount to a relevant averment of wrong to entitle the pursuer to damages, it would be necessary, in order to found the action against the defenders, other than Williamson, that there should be distinctly set forth grounds for holding them responsible for the statement made by him. The Lord Ordinary thinks that the summons on which the record has been closed is quite defective in this respect.

"As regards the defender Wallace, the pursuer's landlord, it is to be kept in view that the wrong complained of is not like diligence or any other legal process, which must proceed in name of the client, and bear to be with his authority. Mr Wallace can be no way responsible, unless he allowed Williamson to take the course which he did. It is said that Williamson came to the house 'as the law-agent of or as representing the defender Captain Wallace.' But that cannot be taken as equivalent to an averment that Wallace authorised him to represent or act for him on the occasion, or knew anything about the matter. If Williamson chose to go to the sale as representing Mr Wallace in his absence merely in respect of being his law-agent, but without his authority, or even his knowledge, that could not involve his client in responsibility for his ultroneous proceedings. And the Lord Ordinary does not thing that the averments now under consideration go beyond that. The statement, however, proceeds—'and acting by his instructions, or by the instructions of the other defenders.' Not only is this not a direct statement that Wallace gave instructions to Williamson to do what he did, but from this alternative form it is not a relevant and available statement to attach responsibility either to Wallace or to the other defenders. It may or may not be of importance as against Williamson to say that he acted by instructions of one or other of those parties; but it cannot support an action against Wallace to say that Williamson acted either by his instructions or by instructions of the defenders Agnew, there being no statement of any ground of responsibility by Wallace for instructions in such a matter given by the other defenders.

"The only statements intended to connect Messrs Agnew & Son with the alleged wrong are that just referred to, where it is said, alternatively, that Williamson acted by the instructions of Wallace or of the other defenders, and the statement that David Agnew, one of the partners, went along with Williamson on the occasion in question. As already stated, the Lord Ordinary thinks that the form of the averment in regard to Williamson acting by instructions of the other defenders is quite defective. If it had been otherwise, he does not think there is a relevant case set forth for holding Agnew & Son liable for the consequences of Williamson acting upon instructions received from them. Nothing is set forth to show that they had any right to give instructions to Mr Williamson in the matter, or that he was entitled to take instructions from them, as he might have been to take them from his client, the proprietor of the house. The allegation against Agnew & Son seems just to resolve into a charge that they instructed, or in other words, desired Williamson to commit a wrong in which they had no interest. The matter is not one in which the personal act of an individual partner could involve the firm in responsibility, except on some specific ground which is not averred in this case.

"It appears to the Lord Ordinary that the case of David Agnew is not substantially different. He is said to have come to the house along with Wil-

liamson, and was personally present when he made the statements complained of. But these facts do not import a wrong in themselves, nor do they imply that he took part with Williamson in the statements which he made, and nothing else is alleged against David Agnew individually."

The pursuer reclaimed, but before his reclaiming note came to be advised, his estates were sequestrated, and the trustee having, after intimation made to him, failed to sist himself as pursuer, the reclaiming note was refused.

Counsel for pursuer—Mr Watson. Agents—Graham & Johnston, W.S.

Counsel for defender Wallace—Mr Pattison and Mr Burnet. Agent—William Mason, S.S.C.

Counsel for the defenders Agnew—Mr Young and Mr Burnet. Agents—M'Ewan & Carment, W.S.

Counsel for defender Williamson—Mr Asher. Agents—Maconochie & Hare, W.S.

Friday, February 14.

HUNTER *v.* M'GREGOR.

Bill—Charge—Joint-Adventure—Signature of Firm. Charge on bill alleged to have been granted by a firm for money advanced to them for purposes of a joint-adventure, *suspended*, in respect of want of proof that the money was really so advanced.

This was a suspension by William Hunter junior, of a charge at the instance of John M'Gregor, on a bill dated 20th November 1865. The bill bore the signature of the firm of Hunter & Dick, of which firm it was said Hunter was a partner, and the charger alleged that it was granted to him by Dick in respect of advances made by the charger to the firm, in order to enable them to carry on a joint-adventure into which Hunter and Dick had entered. The suspender, on the contrary, alleged that the bill was not signed by him, or with his knowledge or consent, or for any debt contracted in reference to the joint-adventure.

The Lord Ordinary (Mure), after a proof, found it not proved that the money for which the bill was granted was applied for the purposes of the joint-adventure, and accordingly suspended, and found the charger liable in expenses.

The charger reclaimed.

Cattanach (Scott with him) for reclaimer.

Trayner, for respondent, was not called on.

Lord President—The question here is, whether the money was advanced for the purposes of the joint-adventure; the Lord Ordinary has found in the negative, and I think rightly. It seems to me that the evidence makes this perfectly clear, but it is enough that the charger has failed to prove the affirmation. The joint-adventure is said by the charger to have commenced in June 1865. On the other hand, the suspender says it was not till he removed the machine from Hillington Farm on 30th August. It is alleged by the charger that the two persons, Hunter and Dick, entered into an agreement by which they became to a certain extent partners in June, agreeing that they should be bound by the firm of Hunter & Dick. It is said by the suspender that this was not agreed on until November. It seems to me that the suspender is right and the charger wrong. Dick had been in this line of business before communicating with Hunter; and after the machine was bought from Robertson, with an engine ready to work, Dick took the use of the machine during August. During that time Dick used the form of receipts he had used formerly, and used it down to September, when a new form of receipt with "Hunter and Dick" was used, indicating the point of time when the change took place. During June, July, and August, Dick reaped the profits, paid the wages, kept the receipts, and did not communicate with Hunter as to the position of thecharger. I cannot say that the charger stands very favourably. His whole conduct shows that he knew he had no one to look to as his debtor but Dick, and that the signature of Dick to the bill was not an honest proceeding on his part. But it is not necessary to go much on that, for the real question here is, whether it is proved that the money was *in rem versum* of the joint-adventure? I think it was not, and therefore I am for adhering.

The other judges concurred.

Agent for Reclaimer—A. Wylie, S.S.C.

Agents for Respondent—Duncan & Dewar, W.S.

Friday, February 14.

SECOND DIVISION.

STEWART *v.* M'CALLUM.

Sale—Consignation—Condition. On a sale of certain lands, a sum of £1500 was consigned by the purchaser, pending the determination of some disputed points between the superior and vassal, and particularly a right of relief alleged against the former on account of augmentation of teinds, and was to be paid to the seller on his establishing that right. Circumstances in which *held* by a majority of the whole Court, that the condition of the contract of sale had been satisfied, and that the exposer was entitled to uplift the consigned money.

By a feu-contract in 1705, between James Marquis of Montrose and David Graham, the Marquis conveyed the lands of Braco, and the teinds thereof, to Mr Graham in liferent, and his son James Graham, and his heirs therein set forth. The Marquis thereby bound himself, his heirs and successors, to warrant the teinds to be free to the vassals "from all ministers' stipends, future augmentations, annuities, and other burdens imposed, or to be imposed, upon the said teinds," beyond those then payable. The superiority or *dominium directum* of the subjects has descended through the representatives of the Marquis to the present Duke of Montrose. The *dominium utile* has passed through a series of heirs and singular successors to the pursuer, and from him to the defender. In the year 1846, when the pursuer, Sir W. D. Stewart, was the vassal, the superior, the Duke of Montrose, for the first time raised the question whether the right to enforce performance of the obligation of relief had passed to him as a singular successor of the original vassal? In that year a new augmentation of stipend was given to the minister of the parish, and it fell to be localled upon the teinds. The Duke from that time declined to perform the obligation of relief to the vassal, alleging that, although the liability to perform it was still incumbent on him as superior of the subjects, the right to exact performance of it had not been transmitted to the singular successors of the original vassal along with the right of property. On the other hand, Sir William maintained that that right had been trans-