

If that be so, there is, I think, an end of the case. As matters stand there is no proof of any special terms in the contract, and therefore we must take the case on the footing that the pursuer was employed as agent by the defender in an action, and the account for work done in that process is the account which must now be taxed.

**LORD M'LAREN**—I concur. The Sheriff-Substitute and the Sheriff are certainly well-founded in their observations to this extent, that it is not enough to establish by proof or admission that the pursuer was employed as agent. It must further be shown that the work was done. But the error into which they have fallen is in overlooking the rule of practice that in the case of a law-agent's account against his client, the fact that the work was done is to be established, not by evidence adduced to the Judge, but by vouching the account before the Auditor.

I would only add that this is not a rule which lawyers have made for their own benefit, but that it results from the nature of the contract of agency, in which the proof must depend almost always upon documentary evidence. In the case of mercantile agency the practice is substantially the same, for the accounts are generally sent to an accountant whose duty it is to see that they are properly vouched and to report. Unless in very exceptional cases no further evidence is requisite.

**LORD SHAND** was absent on circuit.

The Court pronounced this interlocutor:—

“Recal the interlocutors of the Sheriff-Substitute and of the Sheriff dated 17th December 1889 and 6th January 1890 respectively, and in respect that the defender does not desire that the account sued for should be audited, dispense with a remit to tax, and decern against the defender in terms of the conclusions of the summons,” &c.

Counsel for the Pursuer—Wilson, Agents—Henry Wakelin & Hamilton, S.S.C.

Counsel for the Defender—Baillie, Agents—Sang & Moffat, S.S.C.

Saturday, February 22.

## SECOND DIVISION.

### WRIGHT v. KERR.

*Poor's Roll—Admission Refused where Action should have been brought in Small Debt Court.*

With a view to the reduction of a certain trust-disposition and settlement, a person obtained a precognition from one of the trustees, and deeming the statements therein to be slanderous, he applied for admission to the poor's roll in order to raise an action for damages. *Held* that the action should have been brought in the Small Debt Court and the application refused.

In 1886 the pursuer Wright wished to reduce the trust-disposition and settlement of the late James M'Ewan. The agents for the pursuer wrote to a Mr Kerr, one of the trustees under that trust-disposition and settlement, asking for a precognition, which was given. Wright considered that some of the statements made in the precognition were slanderous. He accordingly presented a petition to the Second Division for admission to the poor's roll. He stated that he was married and had seven children, none of whom however were dependent upon him. His wife did not live with him and it did not appear that he paid her alimony. He was a working engineer and could earn 30s. a-week, and could obtain employment at any time. He left his occupation about three months ago in order to superintend this case.

Cases cited—*Paterson v. Linlithgow Police Commissioners*, July 4, 1888, 15 R. 826; *Peter Robertson, Applicant*, July 8, 1880, 7 R. 1092; *Stevens v. Stevens*, January 23, 1885, 12 R. 548.

At advising—

**LORD JUSTICE-CLERK**—This is the case of a person seeking admission to the poor's roll who is earning fair wages and who has no serious burden upon him in the shape of persons whom he is bound to maintain. He has raised an action for damages for a slander, alleged to have been uttered upon a precognition of the trustee taken at his own desire. I think the case is a hopeless one, but what I proceed upon is the fact that there is no reason why the action should have been brought in this Court. It might quite well have been brought in the Small Debt Court, which is the only Court I think he would have had a chance of recovering anything if he has a case at all. I think that we should not remit this case to the reporter on the *probabilis causa litigandi*.

**LORD RUTHERFURD CLARK** and **LORD LEE** concurred.

The Court pronounced this judgment:—

“The Lords having heard counsel for the parties on the note for the applicant W. L. Wright, craving a remit to the lawyers and agents for the poor to report on his application for admission to the benefit of the poor's roll, Refuse the note.”

Counsel for Applicant—Cosens.

Counsel for the Respondent—Guthrie, Agents—Dalmahoy & Cowan, W.S.