Wednesday, November 8.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ROBERTSON *v.* ROBERTSON'S EXECUTORS.

Process—Expenses—Withdrawal of Reclaiming-Note.

A reclaiming-note in a case involving the printing of a large number of documents was boxed on April 6th. Notice of its withdrawal was given to the respondent in November, before the case had appeared on the roll for discussion, and before counsel had been instructed. *Held* that the respondent was not entitled to an award of expenses exceeding £2, 2s.

The Rev. J. J. Robertson, minister of the Presbyterian Church, Adelaide, South Australia, brought an action against the executors of the late Mrs Isabella Milne or Robertson. On 16th December 1898 the Lord Ordinary (KYLLACHY) dismissed the action, and on 10th March 1899 found the pursuer liable in expenses as taxed. On April 6th 1899 the pursuer reclaimed. On November 8th 1889, before the case appeared on the roll for discussion, he presented a note of withdrawal of the reclaiming-note, and prayed the Court to find the respondents entitled to two guineas of modified expenses. The respondents moved that the expenses be increased to £4, 4s., in respect of the long interval which had elapsed since the date of reclaiming, and the expense incurred by them in considering whether it was necessary for them to print any of the documents in the proof, which were very numerous—*Little Orme's Head Limestone Company, Limited* v. *Hendry & Co.*, November 25, 1897, 25 R. 124. They admitted that they had received intimation of the withdrawal before they had instructed counsel or actually printed anything.

The reclaimer argued that it was his duty and not that of the respondents to print the documents, and that there was therefore nothing to take the case out of the general rule of awarding £2, 2s.—*Davidson* v. *Allen*, March 14, 1878, 5 R. 763.

LORD ADAM—The motion is that the ordinary sum of £2, 2s. of expenses, which is awarded when a reclaiming-note is withdrawn after being sent to the roll, but before being put out for hearing, should be increased to £4, 4s., and the sum at stake is therefore not very large. I am of opinion, however, that no cause has been shown for increasing the usual award. It is the duty of a reclaimer to print the necessary documents, and I do not see why the respondent should not wait until the reclaimer's print is issued and see what he wants to print in addition. I think therefore that in the circumstances I am not prepared to grant more than the usual amount of expenses.

LORD M'LAREN—*Prima facie* it is the duty of the reclaimer or appellant to print all the documents which were before the Court whose decision is under review. The documents put in evidence are just as much a part of the proof as the parole proof itself, and it is the duty of the reclaimer to print them. No doubt, if he fails to do so, the respondent is entitled for his own benefit to put in a supplementary print, but he is not entitled to assume that the reclaimer will fail in his duty. I do not think there is any reason here for departing from the usual practice.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court awarded £2, 2s. of modified expenses.

Counsel for the Pursuer—Cullen. Agent—F. J. Martin, W.S.

Counsel for the Defender — Grainger Stewart. Agents — Boyd, Jameson, & Kelly, W.S.

Wednesday, November 8.

SECOND DIVISION.

JACOBS *v.* M'MILLAN.

Agent and Client—Action for Business Account—Averment of Special Agreement as to Remuneration—Proof—Parole or Writ or Oath.

In an action by a law-agent for his business account his client averred a special agreement as to remuneration in lieu of the ordinary professional charges. *Held* (by the Lord Ordinary) that such agreement might be proved by parole evidence, and was not restricted to proof by writ or oath, but that the onus of proving the special agreement was on the defender, and on the facts that the agreement had not been proved. On a reclaiming-note the objection to parole proof was withdrawn, and the Court *adhered* to the interlocutor of the Lord Ordinary.

This was an action at the instance of Thomas R. Jacobs, Solicitor in Greenock, against James M'Millan, a carriage hirer in Rothesay, for payment of his business account incurred, as he averred, on the employment of the defender. The pursuer stated that he had on several specified occasions attended the Burgh Court at Rothesay, on the instructions of the defender, for the purpose of defending drivers in the latter's employment. These instructions were admitted by the defender subject to the following explanation, viz.—"(Ans. 2) Explained and averred that the defender agreed to pay, and the pursuer to accept, in full of all his charges for the preparation and conduct of said cases, the sum of 10s. for each day's attendance in Court, and these sums were on each occasion paid to the pursuer

at the time." This averment was denied by the pursuer.

The pursuer pleaded—"The defender being justly due and resting-owing to the pursuer in the sum sued for, decree should be granted therefor with expenses. (2) The alleged agreement between the pursuer and the defender to modify or restrict the pursuer's professional charges can only be proved by the writ or oath of the pursuer."

The defender pleaded—"(1) The sum sued for not being due or resting-owing to the pursuer, the defender is entitled to absolvitor with expenses."

The Lord Ordinary (KINCAIRNEY) allowed a proof, and thereafter issued the following interlocutor:—"Finds (1) that on or about 8th July 1896 the pursuer was employed by the defender to appear on his behalf at the Police Court of Rothesay, and conduct his defence against certain prosecutions directed against him in that Court at the instance of the public prosecutor; (2) that the pursuer on said employment conducted the defence of the defender, and appeared on his behalf on various occasions at said Police Court; (3) that it is not proved as averred by the defender that the pursuer agreed to perform the said work for a fee of 10s. per day, or that he was paid that fee: . . . Therefore finds that the pursuer is entitled to recover the sums charged in the account so far as consistent with the previous findings, subject always to the taxation thereof," &c.

Opinion.—"This is an action by a law-agent for his account. It arises out of certain prosecutions brought before the Magistrates of Rothesay against the defender, who is a carriage hirer and bus driver there, for contravention of police regulations as to driving public carriages. These prosecutions were numerous, and several of them resulted in convictions, one of which, regarded as a test case, was set aside by the Justiciary Court on 2nd November 1896—*Drummond* v. *M'Millan*, 24 R. (J. C.) 1. The items in the pursuer's account may be classified as (1) charges for conducting the defence in the various prosecutions at Rothesay Police Court; (2) . . .

"The defender has a different answer to each group of charges. He alleges (1) that the pursuer agreed to undertake the conduct of his defence in the Rothesay Police Court for a fee of 10s. per day, and that he, the defender, had paid that fee. . . .

"In considering the first of these questions, namely, whether the pursuer agreed to conduct the defences in Rothesay Police Court for 10s. per day and had been paid, it is important to keep in view the exceptional character of a contract between agent and client. It is a familiar and common contract; but it has this specialty, that the obligations arising out of it are fixed by the law without special agreement. The client comes under an obligation to pay the law-agent's account; but he is protected from an overcharge by his right to insist that the account shall be taxed in accordance with the statutory table of fees. He can only be charged what the law holds to be a reasonable remuneration to the agent, so that when an agent seeks only to recover his taxed account, as here, he has nothing to prove but employment. The law proves the rest. The defender, however, alleges that his agreement with the pursuer was totally different from what is usual and what the law recognises, and it is obvious that the burden of proving that deviation from ordinary practice must fall upon him; and so strong is the favour of the law for the settled practice on this point that in *Taylor* v. *Forbes*, 13th January, 1853, 24 D. 21, it was held that a contract, not precisely the same as in this case, but similar, could not be proved by a client except by the writ or oath of the agent; and in *Forbes* v. *Caird*, 20th July 1877, 4 R. 1141, Lord Deas observed—'It is so unusual and out of the common course for a law-agent to work for nothing that a contract to do so will only be allowed to be proved by his writ or oath'; and I rather think that, if a law-agent were to attempt to enforce a special contract, his claim would be disallowed, and he would be confined to an account stated and audited in the regular way. The averment of the defender, however, is not that the law-agent agreed to work for nothing, which Lord Deas thought incredible, but that he was to be paid a fixed amount, and in a special manner; and I think that, having regard to other cases, and, in particular, to *Scotland* v. *Henry*, 18th July 1865, 3 Macph. 1125, and *Moscrip* v. *O'Hara*, 23rd October 1880, 8 R. 36, the point cannot be held to be finally determined by *Taylor* v. *Forbes*; but that on the contrary the weight of authority is rather in favour of the admission of parole evidence. The contract between agent and client is a very common one, and modifications of it are very common also. It is not at all unusual, for example, that an agent should take up a case on the chance of recovering his fees from the opposing litigant; and I see no sufficient reason why, when an agent seeks to enforce the obligations resulting from his contract with his client, in this case, and frequently, constituted by parole, the client should be debarred from proving modifications of that contract by parole also.

"I am of opinion, therefore, that the defender's averment that the pursuer agreed to do the work at the Rothesay Police Court for 10s. a day and was paid, may be competently proved by parole; but I am also of opinion that the *onus probandi* lies on him, and that the decisions show that it is not an onus which will be easily discharged.

"The question, then, is not whether the proof preponderates on the side of the defender, but whether it preponderates so much as to overcome the *onus probandi*. I am disposed to think that the defender's evidence is not sufficient for this purpose. I do not require, and am indeed not prepared, to say that the defender and the witnesses adduced by him have given false evidence. I have only to consider whether the balance of evidence is sufficient to overcome the onus.

[*Having considered the evidence, his Lordship continued*]—Having in view all these considerations, and regarding the defender as the pursuer of this particular issue, I am not satisfied that the *onus probandi* incumbent on the defender has been discharged, or that he has proved his averment. If the defender's averment is not proved, it follows that the pursuer is entitled to remuneration on the ordinary footing." . . .

The defender reclaimed. At the hearing counsel for the pursuer stated that they did not desire to insist in their second plea-in-law, and the decision of the Court was therefore asked merely on the facts as shown in the proof.

The Court adhered.

Counsel for Pursuer — Baxter — Guy. Agent—A. C. D. Vert, S.S.C.

Counsel for Defender—Mackenzie—Findlay. Agents—Gill & Pringle, W.S.

Wednesday, November 8.

FIRST DIVISION.

SNODGRASS *v.* HUNTER.

Process—Jury Trial—Res Noviter—Confession of Perjury by Witness.

A party who had been found liable in damages for slander opposed a motion to apply the verdict on the ground of *res noviter*, in respect that one of the three witnesses for the pursuer had confessed that he had committed perjury at the trial. *Held* that the question whether the witnesses were telling the truth was a question for the jury at the trial, and that the defender's statement did not amount to *res noviter*.

Mrs Snodgrass brought an action for slander against Mrs Hunter, and on 21st July 1899 obtained a verdict with £250 damages. On 4th November 1899 a motion for a new trial on the ground that the damages were excessive was refused.

On 8th November Mrs Snodgrass moved to apply the verdict. Mrs Hunter presented a note in which she averred that one out of the three witnesses for the pursuer had confessed that he had committed perjury at the trial, and the criminal authorities were investigating the case. It was argued for her that this constituted *res noviter veniens ad notitiam*, and that the motion to apply the verdict should be opposed in the meantime.

Lord Kinnear cited *Lockyer* v. *Ferryman*, March 6, 1877, 4 R. (H.L.) 32, opinion of Lord Chancellor Cairns at p. 35.

Lord Adam—I am of opinion that the note for the defender here should be refused. I think this is an unprecedented application. We had this case before us on Saturday on a motion for a new trial, and we heard nothing of what is now put forward. It is now said that there is *res noviter*, but that *res noviter* is the very question which was before the jury—that is, whether the witnesses were telling the truth, or whether, as it was stated by the defender on record, this was a trumped-up case. According to the authorities and the case cited by Lord Kinnear that is not *res noviter*. I am for refusing this note.

Lord M'Laren—It is always competent for a defender against whom the verdict of damages has gone forth to move for a new trial on the ground that the verdict is contrary to the evidence, and when a motion for a new trial in this case was before us last week I should have thought that the defender, if she knew that the witnesses for the pursuer had committed perjury, would have moved for a new trial on that ground, but the only ground mentioned was that the damages were excessive. The present application is in substance nothing more than an application for a new trial on the ground that the verdict is contrary to the evidence because witnesses were not speaking the truth. As to the fact that one of the witnesses has made a statement to the procurator-fiscal, that I agree is not *res noviter*, and forms no ground for refusing to apply the verdict.

Lord Kinnear concurred.

The Lord President was absent.

The Court refused the note and applied the verdict.

Counsel for the Pursuer—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defender—A. M. Anderson. Agent—J. Knox Crawford, S.S.C.

Thursday, November 9.

FIRST DIVISION.

(Without the Lord President.)

PATERSON *v.* PATERSON.

Parent and Child—Custody of Children—Petition for Custody Superseded by Action of Divorce.

When a husband who was the petitioner in a petition for the custody of his children subsequently raised an action of divorce against his wife, the Court sisted the petition to await the result of the action of divorce.

Alexander Paterson brought a petition for the custody of the children of his marriage. Answers were lodged by Mrs Paterson, and in July 1899 the petition was remitted to the Sheriff of the Lothians to inquire into the whole circumstances of the case, and to report.

Thereafter Mr Paterson raised an action for divorce, containing conclusions for the custody of the children, and moved that the petition for custody should be sisted.