title by the defender, but said to be so held by him in trust for the deceased.

The pursuer's allegation was, that in November 1856 the defender and the deceased purchased, as a joint adventure, certain house property in Richard Street, Glasgow, the price being paid betweeen them in certain proportions; that when this purchase was made, Robert Speirs was to some extent involved with certain parties in Glasgow, who were engaged in building speculations attended with considerable risk; and that, for the fraudulent purpose of keeping the property from the creditors of the said Robert Speirs, in the event of his becoming bankrupt, it was arranged between him and the defender that the title should be taken in the meantime in the defender's name.

The defence was a denial of the pursuer's statement; an allegation that the money paid by Robert Speirs toward the purchase was a loan which had been long since repaid; and pleas, *inter alia*, to the effect that the pursuer's averments could only be proved by the writ or oath of the defender.

The Lord Ordinary (JERVISWOODE) held that, although in the general case an averment of latent trust could only be proved by writ or oath, as required by the statute of 1696, yet that where fraud was alleged, proof *prout de jure* was competent. His lordship, therefore, ordered issues.

The defender reclaimed.

YOUNG and SCOTT for him.

CLARK and SHAND in answer.

The Court adhered, substituting, however, an order for proof under the Evidence Act for the order for issues.

Their Lordships thought that, while the Act of 1696 was effectual against one of the parties to a latent trust who sought to prove that trust otherwise than by writ or oath, it was not effectual against creditors of such a party alleging that the trust had its origin in a conspiracy entered into for the purpose of defrauding them or their predecessors.

Lord COWAN dissented, holding that the Act of 1696 would have limited the proof in a question with the party himself; that creditors could have no higher right than their author in such a matter as the mode of proof; and, at all events, that whatever might be the rights and privileges of creditors at the time of the transaction, their rights and privileges could not extend to parties who did not become creditors till long afterwards.

Agents for Pursuer—Ronald & Ritchie, S.S.C.
Agent for Defender—James Webster, S.S.C.

Wednesday, December 4.

FIRST DIVISION.

WHITE *v.* GRIEVE.

Auditor — Counsel's Fees — Agent — Jury Trial— Postponement of Trial—A. S. 16th Feb. 1841. Where a trial was postponed on payment by defender of expenses incurred by pursuer in consequence of delay of trial in terms of A. S. 16th Feb. 1841, sec. 25, the Court allowed, as a proper expense—(1) consultation fee to counsel; (2) agent's fee for attending consultation; and (3) half fee to agent for preparing for trial.

This was a note of objections to the auditor's report on the pursuer's account of expenses incurred in consequence of the delay of the trial by the defender. The case was set down for trial on 8th April 1867. It was called on 12th April, on which day this interlocutor was pronounced:—

"The Lord President having heard counsel for the parties on the defender's motion to postpone the trial in this cause, in respect the defender, from the absence of a material witness for him, cannot go on with the trial this day—Of consent of the pursuer's counsel postpones the trial, and discharges the notice of trial for the present sittings, upon payment by the defender to the pursuer of such expenses as shall have been incurred by him in consequence of the delay of the trial, in terms of the 25th section of the Act of Sederunt, 16th February 1841."

An account of expenses was given in by the pursuer, and was taxed by the Auditor. The pursuer gave in a note of objections to the Auditor's report in so far as he had taxed off and disallowed —(1) a charge of 10s. on 26th February and 6th and 8th of March for informing the local agents of the notice of trial, &c.; (2) signed copy of the letters of first and second diligence to cite witnesses, 3s.; (3) letters to local agents and attendance on counsel as to consultation previous to trial, 10s.; (4) borrowing process to prepare for trial, and agent's fee for preparing for trial on 5th April, £3, 7s.; (5) the fees for instructing counsel for consultation with a view to trial, the fees sent them for consultation, and relative letters to local agents, £17, 9s. 8d.; (6) the fees for attending consultation, 13s. 4s., attendance in Court on 8th April and subsequent days, &c., in all, £2, 3s. 4d; (7) fees to counsel for second consultation in respect of counsel returning papers and new counsel having to be instructed £16, 17s. 8d.; and (8) sums struck off fees sent to counsel for trial, £7, 14s. 3d. Objections were also taken to the disallowing of items connected with certain letters and payments to witnesses.

The Court, after hearing counsel for the pursuer on his note of objections, remitted to the Auditor to consider the note of objections and to report thereon, particularly with regard to any practice of allowing or disallowing such charges as are therein set forth.

The Auditor reported, *inter alia*, as follows:—

"4. *Agent's fee for preparing for trial, including borrowing process,* . . £3 7 0

"This charge has been disallowed *in toto*, on the ground that it must (according to the practice which has prevailed) be regarded as still available for the trial when that shall take place. It may be that if the trial be long delayed, the agent may require to some extent to renew his preparation; but were the Auditor taxing the expenses of process under a general finding of expenses, he could allow only one charge for preparing for trial at whatever stage the same might be entered. The charge in the table is:—"Perusing record, productions, and precognitions, &c., before trial, and preparing for same from 13s. 4d. to £3, 3s., according to the time occupied and importance of the case." As a matter of taxation, the Auditor may remark that he does not regard this as a case for the highest charge which the agents have adopted.

"5. *Consultation fees, including counsel's and agents' fees, and communications with Glasgow agents,* . . . £17 9 8

"It is not usual to allow as against the unsuccessful party more than one consultation with counsel

as a preparation for trial. There may be room for some modification of this rule where, as in the present case, after the completion of preparation, a trial is put off for a considerable period, and at the taxation of this account the Auditor felt some difficuty in regard to this. In disposing of the matter, the Auditor had in view that to some extent both the consultation fees and the trial fees charged in this account should affect the amount of the fees for consultation (assuming an additional consultation to be necessary and allowable) and trial to be hereafter paid, and that only a portion of the fees paid at this stage of the cause should be regarded as not available for the actual trial. Having regard to the doubt whether a second consultation fee is allowable to any extent as against an unsuccessful party, it appeared to the Auditor to be his best course not to attempt to apportion the fees, but to allow full fees for the first day of trial without any deduction, and to disallow wholly the expense of the preparatory consultation. He has accordingly sustained the trial fees to counsel to the extent of £21 and £15, 15s., with corresponding allowances to the lawyers' clerks and agents' fees—in all, £39, 5s. 1d. The expense of the consultation disallowed is, £17, 19s. 8d. It is for the Court to determine whether the allowance made is sufficiently liberal or not.

"6. *Agent's fees for attending consultation, and for attendances in Court,* . £2 3 4

"As to the charge for attending consultation, being 13s. 4d., the Auditor refers to his remarks under the preceding head.

"The other charges for attending in Court on 8th, 9th, 10th April, and writing Glasgow agents as to position of prior cases (amounting to £1, 10s.), were certainly not expenses caused by the defender's motion for postponement on 12th April, but were incurred in consequence of the protraction of the prior cases, and are ordinary expenses of process."

Counsel were heard on the report.

A. Moncreiff, for pusuer, insisted principally on the 4th and 5th objections.

Gifford in reply.

Lord President—The only difficult questions are the 4th and 5th. As to the 5th—the consultation fee sent to counsel—I must say I think that ought to be allowed as part of the expenses which are rendered unavailable. Because, without taking into view the long time that may elapse between the time set down for trial, and the time when the case will actually be tried, there is a probability that the same counsel will not be employed, and no doubt this fee must just be repeated. Even suppose the same counsel are employed, I am not prepared to say that the subsequent fee should not be the same, for it is impossible that any counsel can carry in his mind the details of a case, even though it is well known to him at the time. It is almost inconsistent with counsel's proper performance of his duty to his client that he should carry the case in his mind, for he could not then do his duty to his other clients. Therefore the entire consultation fee is lost and unavailing, The 13s. 4d. follows as a matter of course. As to the agent's fee (4) for preparing for trial, there is more difficulty. If the case be entirely documentary, and the documents have to be adjusted and set in order for the trial, there will not be much to do in the second trial; but, on the other hand, if there is a good deal of parole evidence, and the agent is expected to act intelligently and usefully at consultation before the second trial, he will have to read over his precognitions and get up the details again which must to some extent, have gone out of his mind. If I were a counsel preparing for a second trial, I should be disappointed if I were to find the agent in such a state of mind as he would be in if he did not look at his case again. This is a case with which we must deal roughly. My notion is, that if the agent gets for preparing for the second trial one-half of the fee he is entitled to for preparing for the first, that will fairly represent his additional trouble, and the result here will be to allow the fourth charge to the extent of one-half, as being to that extent unavailable for the second trial. We shall therefore sustain the 4th objection to the extent of one-half, sustain the 5th entirely, and the 6th to the extent of 13s. 4d.

The other Judges concurred.

Agents for Pursuer—Wilson, Burn, & Gloag, W.S.

Agents for Defender—M'Ewen & Carment, W.S.

Wednesday, December 4.

ANSTRUTHER *v.* POLLOK, GILMOUR & CO., AND THE TRUSTEES OF PORT-GLASGOW HARBOUR.

Conjoined Actions — Supplementary Actions — Defences—Expenses. A party was called as defender in a supplementary action. He lodged no defences. The original and supplementary actions were conjoined. A record was made up and proof ordered. The party then proposed to lodge defences. The Lord Ordinary refused the motion. On reclaiming note, the Court remitted to receive the defences, and found the party liable in the expenses incurred by the pursuer in consequence of defences not being timeously lodged.

The pursuer is proprietor of subjects in Port-Glasgow, situated on the shore. Under his titles he claims right to form a harbour or basin on the shore opposite his property. The defenders, Pollok, Gilmour, & Co., having obtained a disposition to shore-ground, including the ground over which the pursuer claims a right to form a harbour or basin, recently erected a wall enclosing the shore-ground. The pursuer thereupon, in May 1866, brought an action against Pollok, Gilmour, & Co. —(1) to have it declared that he had the right of making a harbour or basin as above; and (2) to have Pollok, Gilmour, & Co. ordained to remove so much of the wall as is built *ex adverso* of the pursuer's property. Pollok, Gilmour, & Co. having pleaded *inter alia* that the Port-Glasgow Harbour Trustees ought to have been called as parties, these trustees were called in a supplementary action. The trustees not having lodged defences, the original action and the supplementary action were conjoined on 4th December 1866. Thereafter, a record was made up between the pursuer and Pollok, Gilmour, & Co., and a proof was ordered to be taken before the Lord Ordinary on the 19th (subsequently postponed till the 26th) November 1867. On the 20th, the Port-Glasgow Harbour Trustees craved the Lord Ordinary for leave to lodge defences, adopting the statements and pleas for Pollok, Gilmour, & Co. The motion was refused.