pay with interest, if there is an obligation to repay at all.

Agents for Pursuers—A. G. R. & W. Ellis, W.S.
Agent for Defenders—John Thomson, S.S.C.

Thursday, February 13.

FIRST DIVISION.

WHITE *v.* CALEDONIAN RAILWAY COMPANY AND CRIEFF JUNCTION RAILWAY CO.

Prescription—1579, *c.* 83—*Stock Broker—Current-Account—Ordinary line of business—Writ or Oath—Proof.* A party designing himself "stock broker" sued a railway company for payment of work done by him for the promoters of the line, in the way of helping to start it, by obtaining subscriptions and otherwise. *Held* (1) that looking to the nature of the work done by him, as disclosed on record, the triennial prescription applied: and (2) that the documentary evidence founded on by him did not amount to a constitution of the employment, but was merely evidence of authority to do certain particular acts, given to a person who had already begun to be employed.

The pursuer of this action was James White, stockbroker, Edinburgh, and he sued the defenders for a sum of £347, conform to account commencing 24th September 1852, and ending 2d April 1855. The action was raised in January 1866. In the first article of the condescendence it was alleged, "the pursuer, who is a stock and share-broker in Edinburgh, and well acquainted with railway matters, and as such was employed on or about the day of September 1852, by or on behalf of the promoters and provisional committee of a proposed or projected company for making a railway from Crieff to join the Scottish Central Railway at Loaninghead, near Auchterarder, in the county of Perth." The pursuer went on to allege that the promoters and provisional committee had great difficulty in obtaining the requisite amount of subscriptions and number of subscribers to the contract, required by Parliament as a necessary preliminary to obtaining an Act, and accordingly were in danger of not being in a position to go to Parliament in the said year, and of being too late with the necessary arrangements for introducing a Bill, and obtaining an Act for the construction of the said intended railway. "In this emergency the pursuer was applied to, and employed by and on behalf of the said promoters and provisional committee, to get the stock or shares of the said proposed company brought out in the London, Liverpool, and other Exchanges, and to get advertisements and notices inserted in various papers and publications, and to assist them with advice, and to conduct various matters of detail connected with the carrying through of their subscription-contract and bill, in order to obtain an Act of Parliament authorising the formation of the intended company, and construction of the said intended railway. The pursuer acted on the employment so given, and conducted a voluminous correspondence with the solicitors of the promoters, and with brokers in London, Liverpool, Glasgow, and elsewhere, in obedience to the instructions of the promoters and their secretaries and solicitors acting for them, and with their authority. The pursuer gave the accommodation and use of his office for the purpose of obtaining signatures to the subscription contract, and he attended various meetings of the promoters and subscribers personally at Crieff and in Edinburgh. He also obtained a large number of subscribers to the contract, without whom it would have been impossible for the company to have succeeded with their bill.

"A committee of the promoters was appointed with powers to give instructions to carry out the purposes of the promoters, and to give instructions and directions to the secretaries and solicitors. The committee had full power to act for and bind the whole promoters. On or about the 30th September 1852, a meeting of the committee was held, at which instructions were given regarding the employment of the pursuer in the various matters connected with the formation of the company and the obtaining of its Act, and this minute was duly communicated to the pursuer by the solicitors on 30th September 1852. Farther, the pursuer was employed in the various matters relating to the intended company by the said secretaries and solicitors of the promoters, in virtue of powers granted them to that effect by the promoters and the committee thereof. On or about the 6th November 1852, a sub-committee of the promoters of the said Crieff Junction Railway Company authorised the said secretaries to employ the pursuer to carry out certain suggestions "for effectively bringing out the scheme in the London market." This was communicated to the pursuer by the said secretaries, or one of them, and the pursuer acted upon the instructions so given."

The last-named defenders obtained their Act of Incorporation in 1853. After that date the pursuer was, he alleged, employed by these defenders to act for the company in the same way as he had done formerly for the promoters. The Scottish Central and Crieff Junction Railway Companies were amalgamated in 1865, and, later in the same year, the Scottish Central Company was amalgamated with the Caledonian Railway Company. The account libelled on commenced as follows:—

"*The Crieff Junction Railway,*
"*To James White, Stockbroker, Edinburgh.*
"1852.
"Sept. 24. Having received instructions from the secretaries and promoters of the Crieff Junction Railway Company to act for them—
"To commission on shares obtained and applied for through me, as broker to the Coy., p. my letter of 12 Nov. 1852, 510 shares, less 80 thought bad—viz. 430 shares, at 2s. 6d. per share . . . £53 15 0"

The other items of the account consisted of charges for travelling expenses, obtaining of signatures, correspondence, general agency, &c.

The defenders pleaded, besides pleas on the merits, "the account libelled is prescribed."

The Lord Ordinary (Ormidale) pronounced this interlocutor:—"*Edinburgh, 2d March* 1867.—The Lord Ordinary finds that the plea of triennial prescription founded on the Statute 1579, c. 83, is inapplicable to this case in respect of the nature of the employment alleged by the pursuer; and also separately in respect the debt sued for is, according to the pursuer's allegations, founded upon written contract or obligation; therefore repels said plea, and before farther answer, and under reservation in the meantime of all questions of expenses, appoints the case to be enrolled, that parties may be heard on the remaining points in the cause."

The Lord Ordinary referred in his note to the cases of *Walker* v. *M'Nair*, 10 S., 672; *Blackadder* v. *Milne*, 13 D., 820; *Barr* v. *Edin. and Glasgow Railway Co.*, 2 Macph., 1250.

The defenders reclaimed.

Johnston (Young with him) for reclaimers.

Gebbie (Gifford with him) in reply.

Lord President—I think we are all satisfied that the Lord Ordinary's interlocutor cannot stand. The previous cases require serious consideration. The case of *Blackadder* v. *Milne* was a case in which the Judges, who then composed the entire Court, were much divided in opinion, and there certainly was an impression that that was a case which went very far against the application of the Act of 1579, farther than had been anticipated, and that proceeded very much on an obscure series of cases—*Walker* v. *M'Nair* and others. In the subsequent case of *Barr*, which came before us in the Second Division, we all felt that we were bound by the case of *Blackadder* v. *Milne* to this extent, that if the work charged for, although charged in the account of a professional man, was clearly beyond the ordinary scope of his professional service, we must hold that the statute did not apply. But most of us carefully abstained from going farther than merely applying the rule of *Blackadder v. Milne*, and saying that if *Barr* had fallen one step short of the character of *Blackadder*, we would not have applied it, meaning that the case of *Blackadder* had gone quite far enough, and not being disposed to go any farther. That is my feeling here. I am not prepared to apply the rule of *Blackadder* and *Barr* to any case except a case of that kind. Now the nature of both these cases was this. In the one the party was an engineer, and in the other a contractor. That made no difference. Both were employed by companies to go to London for the purpose of being examined as witnesses, and giving evidence before Committees in Parliament, and it was held that that was not professional business either of an engineer or a contractor. It was a kind of business which they were both very well qualified to do from their skill in their professions, but it was not professional employment. Therefore that settled the question that when a party is asked in respect of his professional skill to go to London to give evidence as a witness, he is not employed professionally in the proper sense of the term, and when the work is charged for, even in an account, the statute of prescription will not apply. But this is not a case of going to London for that purpose, but of employment, according to his own statement, as a broker. He is by profession a stockbroker, and, as I read his record, he says he was employed in his professional capacity to do the work in respect of which he now sues. Therefore, on his own statement, I must condemn him, for the statute clearly applies to such a case. If it could have been shown that charges of a kind that brokers make, though made in a continuous account, are not struck at, that would have introduced a different plea. But it has been decided that commissions on transactions are under the Act, and therefore the pursuer's charges for brokerage would, if sued for as a running account after three years, be clearly struck at by the Act; brokerage in ordinary transactions would be liable to be cut off. If so, and the pursuer says he is a broker, and as such did the work in respect of which he now sues, can there be any doubt that the statute applies?

But it is said that the statute is excluded, because it has excepted those debts which are founded on written obligation. It seems to me that the pursuer has not shown that he is within the exception. There are some writings, no doubt, to which the pursuer refers in his condescendence, in which his employment in regard to this matter is mentioned—some in which he is authorised to do particular things—but that is not his employment; on the contrary, these writings show that he had been employed before, and that this special authority was given to him as in the employment of the company already. His account itself is begun before there is any writing. It is not an account arising out of written mandate. There may be written evidence to prove that he was justified in doing what he did, but his employment does not depend on these writings. Farther, it may be said that the existence of his employment may be proved by these averments. But they do not constitute it. I am therefore compelled to differ from the Lord Ordinary, and to hold that the Statute 1579, c. 83, applies.

Lord Deas—I am of the same opinion. I am not aware that there is any doubt that brokerage, in the ordinary case, falls under the statute of prescription. This is not the case of a single transaction, but of a series of transactions, from 24th September 1852 to 2d April 1855, in which the charges are made under different dates. In the formal part of the summons the pursuer describes himself as a broker. In the first article of the condescendence he says [reads from article, *ut supra*] I can only read that as meaning that the pursuer—a broker in Edinburgh—who was well acquainted with railway matters, was employed in September 1852 by the defenders. There is no writing founded on earlier than 30th September 1852. The minutes of meeting of the sub-committee of that date bear, "the meeting having deliberated, resolved to authorise Mr James White, their broker, to bring out the line in the London market in such way as he shall think the speediest and cheapest, with a due regard to efficiency, recommending that it should be inserted once in the *Times* newspaper. Mr White making such arrangements with brokers in London, as he may consider necessary." On the face of that he is already their broker, and this is only the particular thing they authorise him to do. That is on 30th September, and the first item in his account is dated 24th September. There is no doubt, therefore, that, on his own showing, he was employed as a broker on a verbal agreement. This minute of 30th September authorises him to bring out the line in London. The only other written evidence of employment is a minute of 4th Nov. 1852, in which they request Mr White, the broker, to attend them on 6th November. There is that minute which bears that, with regard to the suggestion in Mr Grant's letter to Mr White for effectually bringing out the scheme in the London market, the meeting approves, and authorises the secretaries to arrange with Mr White to carry these suggestions into effect. And when we look at Mr Grant's letter of 3d November, we see what these suggestions are [reads from letter.] Anything we see here in addition to his being authorised to bring out the scheme in the London market is the way in which it is to be brought out. And I should have difficulty in saying that any action could lie for work of such a kind. On the face of the account this is obviously work of a broker, though of the peculiar kind I have mentioned, and for a great

part of it he charges a per centage. In all the cases of this kind where the statute has been held not to apply there are two elements, (1) that the work is not done in the line of the party's ordinary business, and (2) that it is done out of the country. Whether the same rule might apply to work done within the country, I do not say.

LORD ARDMILLAN—This action is brought by a party designing himself a broker, and he sues for work done according to an account commencing in September 1852 and ending in April 1855. The action is not brought until 1866. Against that action, a plea founded on the Act 1579, c. 83, is urged, and the Lord Ordinary has found the statute to be inapplicable, for two reasons, (1) because of the nature of the employment, and (2) because the debt is founded by written obligation. I think that, on both grounds, the Lord Ordinary's judgment should be altered. I think the statute does apply to this debt according to the manner in which the pursuer himself has stated the case. The cases of *Walker*, *Blackadder*, and *Barr* do not touch this question. Here the pursuer designs himself as a broker, and his first charge in his account is for commission on shares obtained and applied for through him as broker to the company. It cannot be doubted that the account opens with a clear admission that the work was done as by a broker, and throughout the rest of it, looking to the nature of the charges, and the evidence in support of them, it is plain that the pursuer acted throughout in his capacity as a broker. I think, therefore, that the first ground of the Lord Ordinary's judgment is not well founded,

On the other point, the account begins on 24th September, and commences with a reference to previous employment. No writing is suggested as being prior to 30th September. All the writings referred to are more reconcileable as instructions to a man already employed as broker, than as the original employment. This, therefore, is not a debt founded on written obligation. The statute has no effect but in limiting the nature of the proof. He may perhaps produce these documents and found on them as written evidence, or he may refer to oath. I suggest no opinion on that matter, but I see no reason to doubt that the statute here applies, and that the pursuer is limited in his mode of proof.

LORD CURRIEHILL declined.

Agents for Pursuer—Macgregor & Barclay, S.S.C.
Agents for Defenders—Hope & Mackay, S.S.C.

Friday, February 14.

BIRREL *v.* BEVERIDGE.

(*Ante*, p. 154.)

Expenses—Preliminary Pleas—Unsuccessful Litigation—Evidence Act 1866—*Copies of Proof.* Circumstances in which a defender found entitled to expenses of litigating objections to pursuer's title, the objection being reserved, but afterwards sustained. Circumstances in which a defender who was found entitled to expenses of process, was held entitled to expense of copies of the proof taken before Lord Ordinary under the Evidence Act 1866. *Observed*, that as a rule the expenses of such copies could not be allowed, because the discussion should follow immediately after the proof, but in exceptionally difficult cases an adjournment after the proof, and before the debate, might take place, and copies of the proof be allowed.

The Court having, by their judgment of 10th January, found the pursuer, Birrell, liable to the defender in expenses, and the defenders' account of expenses having been lodged and taxed, the auditor reserved for the consideration of the Court the question of the pursuer's liability for—(1) the expenses incurred by the defender in closing a record on the preliminary defence (afterwards opened up of consent of parties), debate thereon, and attempted adjustment of issues, being the expenses from 8th December 1865 to 28th February 1866, amounting, as taxed, to the sum of £41, 16s. 9d.; and (2) the expense of copies of the proof taken before the Lord Ordinary for counsel, to enable them to address him on the evidence, charged under date 30th November 1866, and amounting to the sum of £10, 5s. 4d.

"*Note.*—(1) It was maintained for the pursuer at the audit that the expenses of closing a record on the preliminary defences, &c., above reserved, should be disallowed as unsuccessful litigation. The auditor was inclined to disallow these expenses, on the ground that they were occasioned by the defender's refusal to satisfy the production, and that the course ultimately adopted of satisfying the production, under reservation of his pleas, ought to have been proposed at the outset. On the other hand, the defender's preliminary pleas have never been formally repelled, and his defences have been sustained in general terms. In these circumstances the auditor has thought it best to reserve the questions of liability for these expenses for the determination of the Court.

"(2) The pecuniary amount involved in the other reserved point is not great, but the principle of the charge is of some importance, and the auditor takes this opportunity of requesting the direction of the Court in regard to it. Proofs under the Evidence Act of 1866 are now of frequent occurrence, and the policy of that Act as set forth in its preamble being the prevention of 'unnecessary expense' and delay, it seems to the auditor to be incumbent on him to keep carefully in view the direction of the Act of Sederunt of 19th December 1835, that (in taxing the expenses of a process) 'only such expenses shall be allowed as are absolutely necessary for conducting it in a proper manner, and with due regard to economy.' In many cases under the Evidence Act the discussion on the proof is taken immediately on its conclusion, without adjournment, and then, as in a jury trial, there is no room for making copies of the evidence. Sometimes, however, either from the lateness of the hour when the proof concludes, or other causes, an adjournment takes place; and the auditor finds that when an adjournment takes place, even for a very few days, there is a tendency to make copies of the proof for counsel, to facilitate the discusson upon it. This leads to considerable expense, and the auditor has hitherto adopted the rule of disallowing such copies as expenses of process. It seems to him that this is just one of the expenses which, in the general case, may be saved by leading the evidence, not before a commissioner, but before the judge himself. At the same time, the rapidity with which proof under the Evidence Act is taken down renders it more difficult for the counsel to take full notes, and there may be exceptional cases where