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

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