Thursday, March 10.

OUTER HOUSE.

[Lord Kincairney.

WELSH *v.* COUSINS.

Process — Expenses — Agent and Client — Right of Agent to be Sisted as Party.

In an action of damages, and before the closing of the record, the parties settled the case without the knowledge of their agents, the pursuer accepting a sum greatly less than that which had been already judicially tendered. *Held* (*per* Lord Kincairney) that the circumstances did not entitle the pursuer's agent to be sisted as a party to the action in order to obtain decree for expenses in his own name against the defenders.

The facts of this case are fully stated in the opinion of the Lord Ordinary.

On 10th March 1898 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds that the pursuer's agent is not entitled to sist himself in order to obtain decree against the defenders for the expenses incurred to him by the pursuer," &c.

Opinion—"This is an action of damages for injury suffered by the pursuer by the fall of a brick from a part of the hotel which the North British Railway Company are in the course of erecting at the Waverley Station. The action has been compromised, and the pursuer has discharged the defenders. But the question now raised is, whether the pursuer's agent can receive his account as law-agent in the action from the defenders. Defences have been lodged in the action in which the defenders plead, *inter alia*, that the action is irrelevant. Before the record was closed, and while the case was in the adjustment roll, the defenders lodged a tender of £50 with expenses. It was not accepted, pursuer's counsel desiring time to consider it; and in order that he might have an opportunity of doing so, the adjustment was, by interlocutor dated 15th February, adjourned until the 22nd February. On the same day, 15th February, the defenders lodged a minute withdrawing their tender, and on the 18th they enrolled the cause and moved for absolvitor producing a receipt of the pursuer dated 15th February whereby he acknowledged receipt of £20 in full of all his claims, and undertook to withdraw his action (meaning no doubt this action) from Court.

"The pursuer's agent, Mr J. B. W. Lee, opposed this motion, and maintained that he was entitled to payment of the expenses incurred by the pursuer. By interlocutor of 28th February I appointed Mr Lee to state in a minute the grounds of his claim, and I appointed the defenders to answer the minute.

"What Mr Lee states in his minute comes, I think, to this, that he corresponded first with the defenders, and afterwards with their agents, about the pursuer's claim; that after the case was in Court, the defenders sent for the pursuer and offered him certain terms which he declined, referring the defenders to his agent. On 10th February Mr Lee wrote to them and to their agents asking that the defenders should not interfere, but should leave the business to be conducted by the law-agents. On 14th February the defenders' agents lodged their tender of £50 with expenses, but that before one o'clock of the following day the tender was withdrawn, and Mr Lee was then informed that the pursuer had intimated his willingness to accept £20, and that the defenders intended to settle with him direct; that on 15th February Mr Lee wrote that he held the defenders liable for his business account; that on that day the defenders' agents wrote intimating the settlement and sending a copy of the receipt, and that in the meantime the pursuer had disappeared. There is nothing in this statement except that the pursuer and defender settled the case without the assistance or knowledge of their agents, after the case had been put in their agents' charge, and that Mr Lee could not recover his account from his own client. The defenders in their answers state that they and the pursuer settled the case without their law-agents; thus they denied liability, but paid £20 to avoid the risk and expenses of litigation, and that they did not act in collusion with the pursuer with the view of depriving the pursuer's agent of his expenses.

"These are the circumstances in which the pursuer's agent moves to be sisted in the process, and to be found entitled to expenses. He (through his counsel) disclaimed, however, the wish to carry on the action in order to show that the pursuer would have ultimately succeeded, and been found entitled to expenses. He did not wish to be sisted unless he could be found entitled to expenses without further procedure.

"Mr Lee may have been unhandsomely treated, and may have a good deal to complain of, but I think his claim is not borne out by the authorities relative to the rights of law-agents when their clients settle their cases behind their backs.

"Mr Lee referred to and founded on *Tod & Wright* v. *Wilson & M'Lellan*, March 7, 1822, 15 D. 381; *M'Lean* v. *Auchinvole*, June 29, 1824, 3 S 190; *Murray* v. *Kidd*, February 14, 1852, 14 D. 501; *Macqueen* v. *Hay*, November 19, 1854, 17 D. 107; *Cornwall* v. *Walker*, March 1, 1871, 8 S.L.R. 443. The most important of these cases are certainly *Murray* v. *Kidd* and *Macqueen* v. *Hay*, especially the latter, in which all the prior cases are quoted and most are reviewed.

"I think that the later of these cases are more unfavourable to the agent's claim than the former are—the highly exceptional nature of the agent's claim as not being founded on contract with the litigant against whom his demand is made, or on his delict, being brought into special prominence in the later cases. The soundness of the

policy on which the agent's right appears to be founded, viz., that legal assistance might be brought within the reach of poor litigants, being also questioned.

"I think it established by these cases that an agent's right to take up an action in order to recover expenses is admittedly only (1) when his client has obtained a decree for expenses, or (2) judgment necessarily leading to such a decree, or (3) where there has been collusion between the parties in order to defeat his claim. This case certainly does not fall under the first or second cases; although if the pursuer had accepted the tender of £50, I think that the principle of the second case might have applied because the right of the party to expenses would then have been certain. Neither do I think his claim can be maintained on the ground of collusion. It is by no means easy to say in what cases, if indeed in any, an agent's claim can be supported on this ground at all. I am disposed to think that it would not be allowed on that ground if the action were settled near the commencement of it. But I think that in this case there are no relevant averments of collusion. There is really nothing averred but the settlement. No doubt when a defender who had made a tender of £50 with expenses manages to induce a pursuer to accept £20 without expenses, some curiosity and suspicion are aroused; but the suspicion is not that the pursuer's agent is the person who has been overreached. It would have looked more like that had the payment made by the defender been £50 or a little above it. Then it might have been said that the only reason for settling the case out of Court was to defeat the agent's claim. But when a defender who has tendered £50 is informed by a pursuer that he is content with £20, it stands to reason that whether the pursuer's astounding moderation has been brought about fairly or not, the defender will accept the offer at once and will not allow any regard for the pursuer's agent to stand in his way for a moment. Of course in saying this I am assuming that the settlement was what the receipt expresses. Mr Lee does not aver the contrary. In truth there is nothing in this case pointing to collusion except the extrajudicial settlement itself, and in that respect the case is really substantially the same as *Murray* v. *Kidd*, or *Macqueen* v. *Hay*.

"Further, in the cases in which an agent is allowed to sue for his expenses because of the collusion to defeat his right, his claim must of necessity be founded on an implied assignation of the right of his client. His right to recover expenses cannot be higher than his client's right—consequently he cannot in such a case have any right unless he can show that the action would if carried not result in a decree for expenses in favour of his client. That could not be ascertained without carrying on the action. But that Mr Lee does not offer or desire to do; and that I imagine an agent will not be entitled to do at the commencement of an action. In this case I of course know nothing of the facts, and can form no idea about the result. And as in the present state of the process there is no ground for holding the pursuer entitled to expenses, there can be no good ground for decerning for them in name of his agent."

Counsel for the Pursuer—A. M. Anderson. Agent—J. B. W. Lee, S.S.C.

Counsel for the Defender — Hunter. Agents—Carmichael & Miller, W.S.

Thursday, March 10.

OUTER HOUSE.

[Lord Pearson.

DEMPSTER'S TRUSTEES *v.* DEMPSTER.

Trust—Marriage-Contract—Apportionment of Capital and Income—Rents of Heritable Subjects of which Trustees in Possession under Bond.

A wife who had conveyed her whole estate, including *acquirenda*, to marriage-contract trustees, became entitled to a one-seventh share of a certain trust-estate. Part of that estate consisted of heritable property which was not realisable, and the trustees accordingly entered into possession and paid to the marriage-contract trustees the one-seventh share of the rents and profits arising therefrom. In estimating the amount of such rents and profits which ought to be allocated to capital and income respectively, *held* that a sum should be ascertained, which, put out at a reasonable rate of interest at the death of the testator, would, with accumulation of interest, have equalled the amount ultimately realised, together with the rents and profits received, and that the sum so ascertained should be treated as capital and the residue as income. *Held* further, that when a liferent to the widow of the testator was provided, the sum should be ascertained as if invested at the date of the death of the liferentrix, and not at that of the testator.

By antenuptial contract of marriage Mrs Jessie Louisa Hickey or Dempster conveyed to trustees all and sundry lands and heritages, goods, gear, debts, sums of money, and generally the whole property, heritable as well as moveable, then belonging to her, or that should pertain to her during the subsistence of her marriage. One of the purposes of the trust was for payment to her of the free interest or annual proceeds thereof during all the days of her life. Part of the property thus conveyed consisted of Mrs Dempster's interest, to the extent of one-seventh, in the trust-disposition and settlement of the late Dr George Playfair. Dr Playfair died in 1846, and his widow, who had a liferent of his estate, in 1862. Part of this trust-estate consisted of real property in Calcutta,