which Lord M'Laren expressly concurred, and from which I do not think that any of the other Judges dissented; and Lord Kyllachy's judgment (which was acquiesced in) in the case of *Wylie's Trustees* (8 F. 617)—the circumstances of which are substantially the same as those with which we are now dealing.

In regard to the dicta to which I have referred, and which might be regarded as favouring the view that the destination to issue entirely suspended vesting, I have only a few words to add.

There is in the first place Lord Davey's opinion in the case of *Bowman*, where he said that he was unable to see "why a different construction as regards the time of vesting should be given to a conditional limitation in favour of persons unnamed but described as heirs, issue, or the like of the first legatee, and to one in favour of named persons." No doubt his Lordship there put a destination to issue in the same category as a destination to heirs, but it seems to me that that is explained by the nature of the question which was raised in the case. The question was whether a fund had vested *indefeasibly a morte testatoris*, or whether vesting was altogether *suspended* until the period of payment, and I do not think that the passage from Lord Davey's opinion can fairly be read as meaning more than that a destination to issue equally with a destination to heirs prevents *indefeasible* vesting in the first legatee *a morte testatoris*.

I think that very much the same thing may be said in regard to the proposition in law formulated by Lord M'Laren in giving judgment in the case of *Parlane's Trustees* (4 F. 805), especially as his Lordship expressly accepted Lord Kyllachy's view of the effect of a destination to issue in *Thompson's Trustees*.

I confess, however, that the decisions of the First Division in *Parlane's Trustees*, and also in the subsequent case of *Forrest's Trustees* (6 F. 616), would be somewhat embarrassing if it were not for the fact that no one in either case appears to have maintained that vesting, subject to defeasance, had taken place, the only question upon which the Court was asked to pronounce being whether an *indefeasible* right to the fee had vested prior to the period of payment.

The Court answered the first and second questions in the negative and the third question in the affirmative.

Counsel for the First and Third Parties—Spens. Agent—John Wm. Chesser, S.S.C.

Counsel for the Second Parties—Irvine. Agent—John W. S. Wilson, Solicitor.

Friday, October 26.

FIRST DIVISION.

[Lord Dundas, Ordinary.

CRAIG *v.* CRAIG.

Expenses—Taxation—General Finding of Expenses—Disallowance of Expenses in Branch of Case where Unsuccessful—"Particular Part or Branch of the Litigation"—Act of Sederunt, July 15, 1876, *General Regulation* 5.

A served a summons on B, in which he sought to recover (1) and (2) certain sums as assignee of C, such sums being the expenses found due to C in proceedings against him by D, and (3) as an individual a sum of damages for injury done to him by B. He averred that B had conceived ill-will towards him and the intent to unlawfully molest and injure him in his professional career, and he gave numerous instances of alleged injury, and as having been part of the same course of conduct, the proceedings against C by D, of which he averred B, not D, was *dominus litis*. After a proof the Lord Ordinary gave A decree for a certain sum "in full of the conclusions of the summons," and found him "entitled to expenses." In his opinion his Lordship stated, *inter alia*, that A had failed to prove that B was *dominus litis* of the proceedings by D against C. The Auditor having taxed off the expenses effeiring to this part of the case as being a "particular part or branch of the litigation" in which A had been unsuccessful, A took objection, and his Lordship remitted of new to the Auditor, expressing his opinion as being and having been that the action was "in substance an action of damages in respect of one wrong done."

Held, on a reclaiming note (*rev.* Lord Ordinary Dundas), that the Auditor was right.

The Act of Sederunt for Regulating Fees and Charges in the Supreme Courts of Scotland, of date July 15, 1876, in General Regulation 5, provides—"Notwithstanding that a party shall be found entitled to expenses generally, yet if, on the taxation of the account, it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings."

On 11th July 1905 Robert Archibald Craig, C.A., Edinburgh, "for himself and also as assignee of Messrs James Aikman & Sons, leather and boot factors, Jeffrey Street, Edinburgh," raised an action against James Craig, C.A. there, in which he sought to have the defender ordained "to make payment to the pursuer, as assignee foresaid of (first) the sum of £95, 19s. 5d. sterling, and (second) the sum of £46, 18s. 9d.

sterling, with interest on both of said two last-mentioned sums at the rate of £5 per centum per annum from the date of citation to follow hereon until payment; and to the pursuer as an individual the sum of £1000 sterling, with interest as aforesaid, from the date of citation to follow hereon till payment. . . ."

The pursuer averred—"(Cond. 1) The pursuer and defender were formerly associated in business as partners of the firm of J. & R. A. Craig. Since the dissolution of said firm the defender has entertained the greatest ill-will and hatred towards the pursuer, and has sought every occasion to unlawfully molest and injure him in his business, and to interfere with him in the practice of his profession, which is his (pursuer's) means of livelihood. . . . (*There followed specific instances of injury alleged to have been done*) . . . (Cond. 6) In or about January 1904, one William Simpson, bootmaker, Leith and Loanhead, finding himself in embarrassed circumstances, placed his affairs in the hands of the defender, in whose favour he granted a trust deed. Messrs James Aikman & Sons, leather merchants, Edinburgh, were creditors to the extent of £89 odds of the said William Simpson, and the pursuer had for a long time acted and still acts, as the defender well knew, as their agent and accountant. The defender, in looking into the insolvent's affairs, discovered that the pursuer had carried through a settlement with the insolvent's creditors in 1901, and he seized the opportunity of attacking the pursuer in reference to said settlement, although he well knew that the raking up of the 1901 settlement could do the insolvent's creditors no good, and did not, in point of fact, have any bearing whatever on the business in question. He thereupon set himself to cause the pursuer loss and injury. . . . (Cond. 7) In pursuance of the said scheme to damage and hurt the pursuer, and to unlawfully interfere with him in the practice of his profession, the defender, having the entire control and management of the insolvent's affairs and estate, on or about 22nd January 1904, maliciously raised, at his own hands, an action in the insolvent's name against Messrs Aikman & Sons in the Court of Session, craving for decree for a sum of £28, 18s. 3d., on the narrative that they had, under an arrangement of the said William Simpson's affairs in 1901 (in connection with which the pursuer had been employed in his professional capacity of accountant), fraudulently, and mainly through the alleged fraudulent actings of the pursuer, obtained a larger dividend to the extent sued for than the other creditors. The defender had throughout the sole control, management, and direction of the said action. The defender framed the statements in said action, knowing them to be untrue, and carried on the said action till the diet of proof, when he allowed it to drop, well knowing it was impossible to prove said statements, which he knew were false. Messrs Aikman & Sons were assoilzied in respect of no appearance of their adversary, and with expenses. The defender represented falsely and fraudulently throughout the case to his advisers that said statements were true, and he thus caused them to be represented to the Court as true, though he knew them to be false, solely with the view of injuring the pursuer. The expenses in said action amounted as taxed to £46, 18s. 9d. Said expenses, which were irrecoverable against Simpson, whose entire estate was in the defender's possession, were incurred through the defender raising and carrying on said unfounded action, well knowing it to be unfounded. . . . The defender had the whole interest in and control over the case. The insolvent's whole estate and moneys were in the defender's possession and under his control. The insolvent had no interest in and no control over the action. . . . (Cond. 8) Furthermore, to injure the pursuer, defender maliciously raised, at his own hands, in said insolvent's name, a suspension in the Bill Chamber of three bills for £5 each, drawn by Messrs Aikman & Sons on the insolvent, on the narrative that said bills, and all others in Messrs Aikman's possession, were fraudulently impetrated by Messrs Aikman & Sons in 1901, when the insolvent was in embarrassed circumstances. The defender, notwithstanding that he had treated and admitted Messrs Aikman to be creditors, as he knew they were, in point of fact, framed the statements in said suspension, well knowing them to be false, and that the truth was that the bills in question were for goods supplied to the insolvent by Messrs Aikman & Sons after the arrangement of his affairs in 1901. Nevertheless, the defender conducted and carried on said suspension against Messrs Aikman & Sons, and managed and controlled it until the diet of proof, when he dropped it. . . . Messrs Aikman & Sons were assoilzied in respect of no appearance of their adversary at the proof, with expenses. These expenses, which were irrecoverable against Simpson, amounted as taxed to £95, 19s. 5d., and were incurred through the defender raising and carrying on said action, well knowing it to be unfounded and the statements in the note of suspension to be untrue. . . . The defender had the whole interest in said case. The insolvent's whole affairs, estate, and moneys, were in the defender's possession and under his control. The insolvent had no interest in the action, and no control over it. . . . (Cond. 10.) The said actions were raised, managed, and controlled entirely by the defender, and he was the true *dominus litis* of each of them. They were inspired and carried on by defender under the cloak of insolvent's name with the view of concealing his identity with them. They were the outcome of the defender's hatred of and ill-will towards the pursuer, and were brought and insisted in with a view to damage the pursuer's reputation as a professional man. In order to vindicate his character it was essential, in the interests of his reputation as a professional accountant, that the said actions should be resisted. The pursuer accordingly

did so, and has paid the legal expenses Messrs Aikman & Sons have been put to in defending said two actions, and has procured an assignation thereof from Messrs Aikman & Sons, which is herewith produced. . . . (*There followed other instances of alleged injury.*) . . ."

The pursuer pleaded—"(1) The defender in the circumstances libelled having caused the pursuer loss, injury, and damage through his fraudulent, illegal, and malicious actings as condescended on, is liable to the pursuer in reparation. (2) The defender having made the false and fraudulent representations condescended on with the sole view of causing pursuer loss and damage, and the pursuer having in consequence suffered loss and damage as libelled, the defender is liable therefor as concluded for. (3) The defender having unlawfully and maliciously interfered with pursuer in the practice of his profession, and to his loss, injury, and damage, all as libelled, is liable to pursuer in damages and solatium. (4) The defender being the true *dominus litis* in the actions before mentioned, the pursuer as assignee foresaid is entitled to decree in terms of the first and second conclusions of the summons with expenses."

On 20th February 1906 the Lord Ordinary (DUNDAS) pronounced the following interlocutor:—"Decerns against the defender for payment to the pursuer of the sum of £130 sterling with interest as concluded for, in full of the conclusions of the summons: Finds the pursuer entitled to expenses," &c.

Opinion.—"This is a distressing case. The pursuer (aged thirty-four) and the defender (aged forty-one) are brothers. Both are chartered accountants. They were partners under the firm name of J. & R. A. Craig from 1894 to 1897, when the partnership was dissolved. Since then they have carried on separate businesses in premises which are situated in the same street in Edinburgh. The pursuer's ground of action is thus set forth by him on the record (condescendence 1)—[*quotes cond.* 1, *ut sup.*] Both parties courted the fullest inquiry. I allowed an unusually wide recovery of documents, and the oral and written evidence constitute a proof of formidable dimensions. I have considered the case with great care and anxiety. It would be impossible within reasonable limits to analyse the whole evidence in detail, or to advert to every point which makes in favour of one party or the other. I shall content myself with dealing as concisely as I can with each of the episodes upon which the pursuer founds, in the order in which he has set them out upon the record, and stating for the benefit of the parties a sufficient outline of the reasons upon which my conclusion in regard to each episode is based.

"With regard to the law of the matter, counsel for the parties were substantially at one. Competition between members of a profession or a trade is of course within limits lawful, though it may result and be intended to result in loss or injury to one of them and corresponding benefit to another. But competition must be carried on by legal and not by illegal methods. The law does not in such questions regard motive. An act lawful in itself is not, I apprehend, converted by a bad or malicious motive underlying it into an unlawful act so as to render the doer of it liable in an action of damages. It would not in my judgment be sufficient for the pursuer in order to recover damages, to show that the defender had acted towards him *malo animo*. He must, I think, establish that the injurious result to him of the defender's actings in all or in some one or more of the instances alleged was achieved by means which were in themselves illegal, and that representations made by the defender to third parties resulting in loss and injury to the pursuer, were untrue in fact to the knowledge of the defender, or at all events made by him recklessly and without sufficient justification.

"1. (Cond. and Ans. 2.)— . . . Upon the whole matter I am forced to the conclusions that the defender was not really a candidate for this appointment [*as liquidator of a company*]; that he desired to deprive his brother of it; that with that end in view he made statements . . . which were in fact untrue, and which he had no ground for believing to be true; that the communication of these statements to the Court resulted directly in the pursuer losing the appointment which he would otherwise, as matter of course, have obtained; and that this loss is a matter which sounds in substantial damages to the pursuer.

"2. (Cond. and Ans. 3.)— . . . The story is a strange one, and I have had great doubt in arriving at my decision. But my opinion is that the only safe and proper conclusion, as regards this episode is to hold that the pursuer's contention is not conclusively proved.

"3. (Cond. and Ans. 4.)— . . . In regard, therefore, to the matters set forth in condescendence 4, I hold that the pursuer has failed to make out a case for damages against the defender.

"4. (Cond. and Ans. 5.)— . . . The result, then, of this matter is that I hold that the defender did in fact procure the deprivation of his brother, for the time being, of this trusteeship, and that he intentionally adopted illegal means to that end . . . It follows that the pursuer is, in my judgment, entitled to damages. It appears that [*the trustee*] during his brief period of trusteeship, obtained remuneration to the extent of £36, 15s., which would otherwise have found its way to the pursuer himself.

"5. (Cond. and Ans. 6 to 10 inclusive.)—The next topic is concerned with the affairs of William Simpson, bootmaker, Leith and Loanhead. . . . By the form in which the present summons and condescendence are framed, I think that the pursuer has definitely confined himself, as regards this part of the case, to the recovery, if possible, from the defender of the two sums of £95, 19s. 5d. and £46, 18s. 9d. respectively, for which he specially sues as assignee of the Aikmans, upon the ground that, both in

the said petitory action for £28, 18s. 3d. and in the said suspension, the defender was the *verus dominus litis*, and is therefore bound to recoup the pursuer in these sums, which he has had to pay to Aikmans. In my opinion the pursuer's case upon this point fails. . . .

"6. (Cond. and Ans. 11.)— . . . In regard, therefore, to the matters contained in condescendence 11, I find no legal ground for awarding damages against the defender, although, as I have said, these matters . . . are, to my mind, of a distinctly suspicious character, and indicative of a hostile attitude upon the part of the defender towards his brother.

"7. I think that I have now dealt with all the main issues which are raised upon the record and in the proof. The assessment of damages in such a case as this cannot, of course, be made upon any close and precise calculation. The damages must, I think, clearly be of substantial amount, but not of course of a vindictive character. Upon the best consideration which I can give to the matter, I believe that the justice of the case will be met by an award of £130, for which sum I shall decern in favour of the pursuer."

The Auditor having taxed the pursuer's account on the footing that he had failed on a particular part or branch of the litigation the pursuer lodged objections to the Auditor's report. In his objections he maintained that in disallowing the expenses connected with the *dominus litis* branch of the case the Auditor had acted contrary to the finding of the Lord Ordinary.

In answer the defender stated that the Auditor had taxed the pursuer's account rightly and in accordance with the directions in General Regulation 5 of the Act of Sederunt of 15th July 1876.

On 9th June 1906 LORD DUNDAS pronounced this interlocutor—". . . Remits the said account to the Auditor to reconsider and re-tax upon the footing and having regard to the opinions expressed in the subjoined note with reference to the first objection stated by the pursuer, and to report," &c.

Note.—"As regards the first of these objections a misunderstanding has arisen, for which I do not hold the Auditor at all responsible. He has taxed the account in the manner appropriate where there is a 'particular part or branch of the litigation' in which the party 'found entitled to expenses generally' has 'proved unsuccessful.' But the clause of the Act of Sederunt upon which the Auditor has proceeded is not, in my opinion, applicable in the present circumstances. As matters have turned out it would probably have saved some time, trouble, and expense if I had expressed more clearly on 20th February 1906 the view which I held and hold in regard to this case. I now explain that my opinion was, and is, that it is in substance an action for damages in respect of one wrong done, viz., a system of persecution or oppression or illegal interference inflicted by the defender upon the pursuer. Upon this general issue, which I regard as a very grave one, I found in favour of the pursuer, and I awarded him a substantial though I think a moderate amount of damages, and found him entitled to expenses. I intended that he should have his expenses not only in regard to those 'episodes' or phases of the case in which he was absolutely successful, but also in regard to the others, as to which my verdict was one of 'not proven.' The latter do not, in my opinion, constitute particular parts or branches of the litigation within the meaning of the Act of Sederunt. Further, although the first conclusion of the summons as framed—inartistically framed as I think—concludes only for payment of specific sums in name of expenses which the pursuer sought to recover upon the ground (which I held to be not sufficiently proved) that the defender was the *verus dominus litis* in the legal proceedings out of which the expenses arose, the conclusion does not, in my judgment, constitute a particular part or branch of the litigation in the sense of the Act of Sederunt. It is clear (articles 6 to 10 inclusive of the condescendence) that the averments upon this head of the case asserted a 'pursuance' of the 'scheme to damage and hurt the pursuer,' which in the main I have held to be proved, and I think that they were relevant in support of the general issue of the case. The pursuer is therefore, in my opinion, entitled to his expenses upon this part of the proof. The whole sense and justice of the matter would, in my judgment, be defeated if the pursuer was to be deprived of his expenses in the manner and to the extent which would result from the Auditor's taxation, which I think proceeded on a misunderstanding of my view in regard to the nature and substance of the case as now explained. The Auditor will be good enough to reconsider and re-tax the account in the light of the opinions which I have now expressed. . . ."

The defender, reclaimed, and argued—The Auditor was right in taxing the pursuer's account on the footing that he had failed in a separable part of his case. The claim as an assignee was definitely confined to the issue of *dominus litis* on which the pursuer had failed. That was a "particular part or branch of the litigation in which such party has proved unsuccessful," and the Auditor was bound to disallow the expenses effeiring thereto in taxing under a general finding of expenses—A.S., Regulating Fees, July 15, 1876, General Regulations 5. The Act of Sederunt was imperative in its terms. It was the Auditor's duty so to tax even where the expenses granted were subject to modification—*M'Elroy & Sons* v. *Tharsis Sulphur and Copper Company*, June 28, 1879, 6 R. 1119, 16 S.L.R. 683, or where only a portion, *e.g.*, two-thirds, of the expenses had been allowed—*Arthur* v. *Lindsay*, July 13, 1895, 22 R. 904, 32 S.L.R. 680. The Auditor had therefore acted rightly and in accordance with the remit to him in the interlocutor of 20th February, which contained a general finding of expenses. It was not open to the Lord Ordi-

nary subsequently to vary that interlocutor as he proposed to do by his interlocutor of 9th June. He was at the latter date *functus*, and assuming he had originally power to award pursuer full expenses although partially unsuccessful, that was not what he had done.

Argued for the respondent—The matter of expenses was in the discretion of the Lord Ordinary, who here allowed the pursuer his full expenses, and the Court would not interfere unless he had erred on some clear principle. There was no such principle here. On the whole circumstances his Lordship thought the pursuer entitled to expenses, being of opinion that the proof on the first and second conclusions of the summons threw light on the third, in which the pursuer had been successful. He was further of opinion that the defender's statements were false and inconsistent with the evidence of his own witnesses. Dealing, as here, with the circumstances of a case his Lordship's discretion was absolute. Even if the pursuer had entirely failed he might have got full expenses—*Barrie* v. *Caledonian Railway Company*, November 1, 1902, 5 F. 30, 40 S.L.R. 50, The general finding of expenses in the interlocutor of 20th February was quite sufficient to give the pursuer his full expenses. It was quite unnecessary to add "without deduction." That being so, the defender should have had an interlocutor pronounced to suit his views at that time. The objection came too late now. It ought to have been raised before the Lord Ordinary when judgment was pronounced and expenses moved for —*Murray* v. *Macfarlane's Trustees*, November 6, 1895, 23 R. 80, 33 S.L.R. 53; *Electric Construction Company, Limited* v. *Hurry & Young*, February 6, 1897, 24 R. 525, 34 S.L.R. 295; *Macfie* v. *Blair*, Dec. 12. 1884, 22 S.L.R. 224. In any case the Act of Sederunt was not imperative on the judge, but only on the Auditor, and it was open to the former to act as the Lord Ordinary had done.

LORD M'LAREN—This is a reclaiming note against an interlocutor of the Lord Ordinary applying the Auditor's report and giving decree for expenses. Such interlocutors are subject to review, although we are not often asked to deal with them.

I should not be in favour of giving encouragement to appeals on questions of expenses where such questions are within the discretion of the Lord Ordinary, because the judge who has decided the case is in a much better position to deal with questions of expenses than a court of review could be. Accordingly I asked counsel at an early stage of the case to confine the argument to the question of expenses applicable to the first and second conclusions of the summons in which the pursuer had failed. With regard to the third conclusion, which is for an arbitrary sum of £1000 in name of damages for wrongful interference with the pursuer's business, that claim is founded on a number of separate incidents, two of which the Lord Ordinary has held proved. The Lord Ordinary has awarded a sum in name of damages, which is certainly very much less than the amount claimed, and has given a general finding for expenses. So far the Lord Ordinary has dealt with the question of expenses in the usual way, namely, that where a pursuer in an action of damages has only obtained a partial award, and has not proved damage to the amount which he claimed, he is nevertheless entitled to a general finding of expenses.

With regard, however, to the expenses applicable to the first and second conclusions of the summons we are in a different region of law, for I am quite unable to see how these can be dealt with otherwise than as provided for in the Act of Sederunt. Under the first and second conclusions two specific sums are claimed, viz., £95, 19s. 5d. and £46, 18s. 9d. These are explained in article 6 and subsequent articles of the condescendence to be sums awarded to certain defenders as expenses in two actions against them at the instance of a man Simpson. The theory of these conclusions is that the pursuer, having bought up the *jus crediti* in these decrees, is entitled as assignee to recover the sums contained therein. If he had sought to recover the sums from Simpson, the party found liable in expenses, this would have been plain sailing. But he does not do so. What he says is that the defender James Craig was the true *dominus litis* in these actions, and that as such he is liable to pay the sums found due.

In disposing of the case on the merits the Lord Ordinary, by his interlocutor of 20th February, has given an award of damages under the third conclusion, but has said nothing about the first and second conclusions. It is true that his Lordship has not given a formal absolvitor as regards these two conclusions, but the decision is equivalent to absolvitor, as the pursuer takes nothing under these conclusions, and could not bring another action to enforce them. The result is that whether absolvitor is given or not the pursuer has not succeeded in his attempt to recover two definite sums of money from the defender. Looking to the Lord Ordinary's opinion (as the Auditor was entitled to do) it is evident that the issue of *dominus litis* has failed. It appears to me that this amounts to a separate branch of the case on which the pursuer has failed. The one conclusion is a claim for damages; the other two are for judgment debts. The one claim is a direct claim against the defender; the other is an indirect claim which has not been proved, and a claim of an entirely different nature. The one is a claim which requires constitution, while the other does not.

I quite follow the Lord Ordinary's reasoning in the note to his second interlocutor, where he says that the evidence led in support of the first and second conclusions threw light on the third, and on the question whether or not there was a systematic scheme to injure the pursuer in his business. But this is rather an incidental result of an inquiry, the proper object of

which was to establish that the defender was *dominus litis* in the litigation instituted by Simpson. It cannot be said that the Auditor has applied the Act of Sederunt in an inequitable way. He has allowed fees to counsel at the proof throughout, but he has disallowed the expenses of precognoscing and bringing such of the witnesses as were required to support the allegations of *dominus litis* made against the defender.

While therefore recognising in the fullest measure that in dealing with an auditor's report it lies with the Lord Ordinary to consider whether or not there is a separable branch of the case to which the provision of the Act of Sederunt can be applied, I am unable to agree with the Lord Ordinary in the present instance, as I think the first and second conclusions were entirely separate from the third and were rightly dealt with by the Auditor. The Lord Ordinary's interlocutor should be recalled, and I do not doubt that counsel will be able to agree as to the sum to be decerned for.

LORD KINNEAR—I am of the same opinion. I should be very reluctant to interfere with the decision of the Lord Ordinary in so far as he deals with the expenses applicable to the conclusion for damages due to the pursuer as an individual. I entirely agree with the general doctrine laid down by the Lord Ordinary, that it is impossible to treat every item which enters into a claim for damages as raising a separate issue on which a party must be held to have succeeded or to have failed in the same way as if the question had been raised in a separate action. I think further that with regard to the application of that general doctrine to the circumstances of a particular case, the Lord Ordinary is in a better position to judge than we, sitting as a Court of review, can be. He has the whole history of the case before his mind, and can appreciate the effect of the proceedings before him, and he alone can say what parts of the case entered into his judgment and affected the amount of damages which he awarded. I am, therefore, not inclined to interfere with his decision on that point.

I also feel considerable difficulty in interfering with the Lord Ordinary's decision even on the other point that has been discussed before us, for it seems to me that the Lord Ordinary's decision really depends on his determination of whether the distinction between the first and second conclusions of the summons and the third conclusion is a technical distinction or a real distinction. But as this question has been raised before us, we must form our own conclusions on the matter, and we can only do so on a consideration of the summons and the averments in support of it. So considering this matter, it seems to me that no two cases can be more separable and distinct than a conclusion for payment of a sum as assignee of a debt, and a conclusion for payment of a sum as damages for an injury alleged to have been suffered by the pursuer as an individual. The claim made by the pursuer here as assignee is for two separate sums, and it is based on the averment that in certain actions at the instance of third parties against the cedant, in which the cedant was successful and obtained decree for these sums as expenses, the defender in this action was the true *dominus litis*. The Lord Ordinary has found in effect that on that part of the case the pursuer has failed. I have no doubt that that is a "particular part or branch of the litigation" in which the pursuer has "proved unsuccessful."

The Solicitor-General urged that the facts proved on this part of the case, although they did not form the *medium concludendi*, yet were of value in estimating the measure of damages found due to the pursuer as an individual, and so entered into the decisions of that part of the case in which the pursuer was successful. But if they were of value for that purpose they could have been averred with regard to the general claim for damages, and the pursuer could have got all he was entitled to without raising these separate claims as assignee. That circumstance seems to me rather to emphasise the separable nature of the conclusions, and I agree that we must recall the Lord Ordinary's interlocutor and repel the objections to the Auditor's report so far as applicable to the expenses incurred under the first and second conclusions of the summons.

LORD PEARSON—I am of the same opinion. The Lord Ordinary remitted to the Auditor to re-tax the account, having regard to the opinions expressed in his note. As regards the first point, I think it was within the discretion of the Lord Ordinary, knowing the merits of the case, to find that the pursuer had been in substance entirely successful as regards that part of the case which deals with the conclusion for damages as an individual. The substance of the action was that there had been a scheme to injure the pursuer in his business and that damages had resulted. The Lord Ordinary affirmed the existence of such a scheme and awarded damages, though a smaller sum than was concluded for. I am unwilling to interfere with the discretion of the Lord Ordinary in awarding the pursuer full expenses in this part of the case.

As regards the other part of the case dealing with the first and second conclusions of the summons, I would agree with the Lord Ordinary if I could. But looking to the conclusions of the summons and the Lord Ordinary's opinion, it is clear that on this particular part or branch of the case the pursuer's failure was complete. I do not think it is sufficient in order to avoid the application of the Act of Sederunt to say that the evidence led on this part of the case, in which the pursuer failed within the meaning of the Act of Sederunt, had some indirect bearing on that part of the case in which the pursuer was successful. I agree that on this matter the Auditor took the right view in disallowing the expenses of that part of the

case in which the pursuer failed; and I do not think we should interfere with what he has done.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor:—

"Recall the interlocutor reclaimed against: Remit to the Auditor to re-tax the said account of expenses on the footing that he has already rightly disallowed the expenses incurred in relation to pursuer's averments in articles 6-10 inclusive of the condescendence" (*i.e.*, those relating to the issue of *dominus litis*) . . . "and to report," &c.

Counsel for Pursuer and Respondent—Solicitor-General (Ure, K.C.)—Trotter. Agent—Malcolm Graham Yooll, S.S.C.

Counsel for Defender and Reclaimer—Scott Dickson, K.C.—Watt, K.C.—C. D. Murray. Agents—M. J. Brown, Son, & Co., S.S.C.

HIGH COURT OF JUSTICIARY.

Wednesday, November 21.

(Before the Lord Justice-Clerk, Lord Stormonth Darling, and Lord Low.)

SMITH *v.* DYKES.

Justiciary Cases—Police—Betting—"Street"—"Property Belonging to and Used by Railway Companies for Railway Purposes"—Burgh Police (Scotland) Act 1903 (3 *Edw. VII, c.* 33), *sec.* 51—*Govan Corporation Order* 1904, *sec.* 4, *sub-sec.* 3—*The Govan Corporation Order Confirmation Act* 1904 (4 *Edw. VII, c.* cxl).

The Govan Corporation Order 1904, sec. 4 (3), provides that in applying the Burgh Police (Scotland) Act 1903, sec. 51, to that burgh the word "street" shall have the meanings assigned to it in sec. 381 of the Burgh Police (Scotland) Act 1892, "and shall also include . . . any open place to which the public have or are permitted to have access within the burgh excepting any property belonging to and used by railway companies for railway purposes."

The Burgh Police (Scotland) Act 1903, sec. 51, makes it an offence to conduct the business of betting in "any street," which term includes under the Burgh Police (Scotland) Act 1892, sec. 381, "any harbour, railway station, . . . and all public places within the burgh."

A person was convicted under a summary complaint of street betting in the burgh of Govan. It was proved (1) that the offence was committed on ground belonging to a Harbour Company, forming a road or access to their docks; (2) that the Harbour Company were owners of the lines of rails laid along the roadways within the boundary of their property; (3) that such rails were used for the conveyance of traffic through the docks by several railway companies paying tonnage rates to the Harbour Company for the use thereof; and (4) that the spot where the betting took place was near but not actually on the line of rails. *Held*, on appeal, that the place in question was a "street" within the meaning of the Act, not falling within the exception, and that the accused had been rightly convicted.

The Govan Corporation Order 1904 [confirmed by the Govan Corporation Order Act 1904 (4 Edw. VII, cap. cxl)], section 4, sub-section 3, provides—"In the application to the burgh of section 51 of the Police Act of 1903 the expression 'street' shall include the meanings assigned thereto in section 381 of the Police Act of 1892, and shall also include any common stair or common passage, or any open place to which the public have or are permitted to have access within the burgh excepting any property belonging to and used by railway companies for railway purposes."

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), which by section 3 is to be read and construed as one Act with the Burgh Police (Scotland) Act 1892, in section 51 enacts—"If any person who conducts business of any kind in lotteries, betting, or gaming, shall in any street engage in lotteries, betting, or gaming, or do any act for the purpose of inducing or enabling any other person to engage in any lottery, betting, or gaming, he shall be liable to a penalty. . . ."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), section 381, enacts—"Every person who in any street (and for the purposes of this section 'street' shall include any harbour, railway station, canal, depot, wharf, towing-path, public park, links, common, or open area or space, the strand or sea beach down to low-water mark, and all public places within the burgh) commits any of the following offences shall be liable to a penalty. . . ." (*Then follows a list of offences.*)

On 19th May 1906 Nathaniel Smith, ironworker, Govan, was charged on a summary complaint in the Police Court of Govan, at the instance of Thomas Dykes, writer, Glasgow, Burgh Prosecutor. The complaint set forth that the accused "being a person who conducts business of the nature of bookmaking, in the making of bets on horse racing, did on the 16th day of May 1906, in the road or public passage at Princes Dock or Harbour, which does not belong to any railway companies, at a point on the east side of the gateway situated at the north-east corner of said dock or harbour leading to Old Govan Road, all in the burgh of Govan, such place being in the application to said burgh of section 51 of the Burgh Police (Scotland) Act 1903 a street as provided by section 4, sub-section 3, of the Govan Corporation Order 1904, confirmed by the Govan Corporation Order Confirmation Act 1904, between the hours of two and three o'clock afternoon, for the purpose of enabling two men, whose names and addresses are to the complainer unknown,