[17*th June* 1835.]

Sir WILLIAM BAILLIE and others, (Trustees and Executors of DAVID CLYNE, S. S. C.,) Appellants.—*Dr. Lushington.*

GAVIN STEWART, Respondent.—*Robertson.*

Implied Contract—Master and Servant.—Circumstances in which a solicitor in the Supreme Courts having offered to a young man from the country 30*l.* or 35*l.* a year to act as his clerk, which was declined; but the clerk entered on the solicitor's employment, and was paid for several years according to his writings, under deduction of sums varying from a half to less than a fourth of the usual fees—Held (affirming the judgment of the Court of Session), in an action at the clerk's instance for a balance due to him, that the course of dealing must regulate the settlement between the parties; and that the clerk was entitled, for the periods embraced in his two last notes of writings, to payment of the usual fees, under deduction of one fourth during the first, and of one fifth during the second of these periods, as it was to be presumed that the rate of deduction was to diminish with his increased experience, but that he was never to receive full payment.

2D DIVISION.
Lord Medwyn.

IN the month of March 1823 Stewart, who had served an apprenticeship of nearly three years to a writer in the country, called upon Mr. Clyne, S. S. C., accompanied by Mr. W. Murray, W. S., who stated that Stewart had come to Edinburgh to endeavour to obtain employment as a clerk in a writer's office. Mr. Clyne

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objected to give a large allowance, but as he was strongly recommended said he would allow him to come into his office, and would give him 30*l.* or 35*l.* a year, which he alleged was sufficient, considering his inexperience. This offer was declined by Stewart, who notwithstanding entered into the service of Mr. Clyne without any other agreement or understanding further than Mr. Clyne adding, that if he found Stewart's services of more value than he expected he might perhaps remunerate him to a farther extent, but this was to be entirely in his own option.

Mr. Clyne kept a private book in which he made entries of his terms of agreement with his clerks, in which all payments made to them were regularly entered. In that book the first entry respecting Stewart appears thus:—"Gavin Stewart from Cupar, 1823, April 4; paid "him a month's salary, 2*l.* 10*s.*" The second entry was, "1823, May 12, paid him do. to 6th current, 3*l.* 2*s.*;" both entries being at the rate of 30*l.* a year.

Stewart kept a note of his writings, and from time to time sent in a demand to Mr. Clyne for payment of the same, and received such farther allowance beyond his salary as Mr. Clyne considered his services to merit.

The sum paid to Stewart in the whole amounted in the year ending March 1824, to 51*l.* 14*s.*; for the year ending March 1825, 46*l.* 3*s.*; for the year ending March 1826, 63*l.* 13*s.*; for the year ending March 1827, 52*l.* 16*s.* 9*d.*; and from the 27th of March 1827 to September 1827, 31*l.* 13*s.*, at which period Stewart left the employment of Mr. Clyne. The payments so made to Stewart in respect of his notes of writings were considerably below the usual fees paid to clerks in the offices of writers to the signet, and the deductions did not appear to have been regulated by any fixed principle, sometimes

amounting to a half, and at other times to less than a fourth of the ordinary charges.

Stewart made various applications to Mr. Clyne for settlement of the amount which he alleged to be due to him, offering at one time to accept 100*l.* in full of all demands, and at another to refer every dispute regarding the accounts to any respectable practitioner or to the auditor of the Court, but receiving no answer to these communications, he commenced an action in November 1828 against Mr. Clyne for a balance of 161*l.* 7*s.*, alleging the same to be due to him, with interest from the 9th September 1828, together with 20*l.* 3*s.* of periodical interest previously due. A record having been closed, the following interlocutor was pronounced by the Lord Ordinary on the 6th November 1828:—"Finds "that the pursuer is not well founded in his claim for "full payment for his writings when acting as clerk in "the defender's office subsequent to the 4th April 1824; "but, in respect of the mode of dealing previously "betwixt the parties, finds that he is entitled to "remuneration for his labour according to a rate of "payment between what would be full payment and "after a deduction of a little more than one third; and "remits to Mr. Richard Mackenzie, joint deputy "keeper of the signet, to consider at what rate, within "the above range, the pursuer ought to be paid during "the period from April 1824 to September 1827; on "the one hand, taking into consideration the increased "value of his services from the additional knowledge "of business he may be supposed to have acquired; "and, on the other, that that knowledge was acquired "in the service of the defender."

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A reclaiming note was put in by Mr. Clyne, craving " to alter the above interlocutor, sustain the defences, as- " soilzie the defender, and find him entitled to expenses;" on considering which the Court pronounced the following interlocutor on the 2d of February 1831:—" The " Lords having considered this note, with the other " proceedings, and heard counsel thereon, adhere to the " interlocutor of the Lord Ordinary, but with these " variations and additions, that the remit shall be to " the preses of the society of solicitors before this Court; " and that the report shall embrace, not only the rate " at which payment, if any, shall be made to the pur- " suer, but also what the amount of such payments " ought to be, regard being had to the payments al- " ready made by the defender: Quoad ultra, refuse the " desire of the note, and remit to the Lord Ordinary to " proceed accordingly, reserving all questions as to ex- " penses hinc inde."

A remit was accordingly made to Mr. Fisher, the preses of the society of solicitors, who eventually gave in a detailed report, which it is unnecessary to set forth farther than appears by several passages in a note subjoined to the following interlocutor pronounced by the Lord Ordinary on the 6th of July 1832:— " The Lord Ordinary having resumed consideration " of this case, appoints the pursuer to put in the state " mentioned in the subjoined note; and, upon the prin- " ciples there explained, also appoints him to lodge an " account of expenses, and remits the same to the " auditor to tax and report."—Note: " The Lord " Ordinary has had a good deal of difficulty in fixing " upon what would be a reasonable deduction in this

" case, so as to be equitable for both parties, and has " made several calculations on different principles. " The principle formerly laid down he perceives it " more difficult to apply than he expected; and indeed " the reporter truly states, as to the settlements " for writings previous to 10th April 1824, that " they 'are made on different principles. In some " ' instances one half of the usual charge for writings " ' is only allowed; in others a much less deduction " ' from the ordinary charge is made by the defender.' " In particular, it appears that in the last settlement, " which was for a sum of 63*l.* 18*s.* 9*d.*, only 14*l.* 18*s.* 9*d.*, " not quite one fourth, was deducted; and it may be " doubted whether they are made on any uniform prin- " ciple, but rather on a complex view of the profit " likely to be made by the defender from the particular " business in which the pursuer was employed. The " reporter states that the deductions prior to April " 1824 are, on an average, two seventh parts from the " ordinary rate, and if a settlement were made on this " footing, the deduction from the account claimed " should be 107*l.* 3*s.* 3*d.* But as the Lord Ordinary " observes that the greatest deduction was made at " first, which probably in part arose from the inexpe- " rience of the clerk, he still thinks the view he for- " merly took reasonable, that the deductions under the " subsequent settlements should always diminish; and " he knows no other rule, in a matter so purely discre- " tionary, as that they should decrease gradually, but " should never be so great as to give the pursuer full " payment. He is now satisfied, and it is also the " opinion of the reporter, that it ought not to be taken " into view that the improvement and additional expe-

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" rience of the pursuer was acquired in the defender's " office. There are five notes of writings (including " the trifle of 19*s.*) now claimed; and the Lord Ordi- " nary proposes beginning with a deduction of one " fourth, and making the deductions from the last one " fifth, to make a rateable deduction in the interme- " diate settlements, so that the deduction shall at every " settlement be something less than the preceding one, " within the above limits; and it will stand thus:—

	Sum claimed.	Deduction.
" 10 Apr. to 8 Nov. 1824,	£83 8 0	£20 17 0
" 8 Nov. 1824 to 6 Sept. 1825 - -	88 0 6	20 14 0
" 6 Sept. 1825 to 15 Apr. 1826 - -	55 17 6	12 8 0
" 15 Apr. 1826 to 14 Sept. 1827 - -	142 0 6	29 6 0
" 14 Sept. 1827 to 4 Jan. 1828 - -	5 15 0	1 3 0
	£375 1 6	£84 8 0

" The Lord Ordinary is thus inclined to hold that " the sum of 84*l.* 8*s.* should be deducted; and is of " opinion, that although the deduction is not so great " as in the hypothetical opinion of the reporter, when " he stated that no deduction should be allowed for " unprofitable writings, that the above sum should be " held to cover such a deduction.

" The partial payments, amounting to 213*l.* 14*s.* 6*d.*, " are not disputed.

" The defender states a sum of 12*l.* 2*s.* 11*d.* of spe- " cific loss by a blunder of the pursuer's. The Lord " Ordinary has not been able to see any distinct evi-

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" imported an alteration to this effect of the principles " on which the Lord Ordinary had held that this case " was to be disposed of, which made it necessary to " consult the Court upon the import of their judgment. " Modified expenses will be found due, as the defender " has uniformly denied the claim in toto; and further, " it has been necessary to make many motions at the " bar, and orders against him, to get the cause brought " forward and prepared.

" The Lord Ordinary has to apologise to the Court " for stating the grounds of his opinion at so much " length; but the nature of the case, and the keenness " with which it is pleaded, seemed to require a distinct " exposition of his views."

Against this and several other interlocutors of the Lord Ordinary Mr. Clyne presented reclaiming notes to the Court, which were refused as unnecessary, and subsequently, on the 13th of February 1833, the following interlocutor was pronounced:—" The Lord Ordi- " nary having considered the objections to the state of " accounts given in by the pursuer, in obedience to the " interlocutor of 6th July last, and the views of the " Lord Ordinary expressed in the note subjoined " thereto,—repels said objections, approves of the state, " and decerns for the sum of 104*l.* 15*s.* 7*d.* with interest " till paid; and having also considered the process, " finds expenses due, subject to modification, and " modifies the same to the sum of 115*l.*, and decerns."

On the 15th of June 1833 the Lords of the Second Division adhered to the above interlocutor, and found Stewart entitled to additional expenses.[1]

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[1] 11 S. D. B. p. 727.

Mr. Clyne died on the 1st of November 1833, leaving a trust disposition and deed, by which he appointed the appellants his executors and trustees.

Appellants.—The claim of the respondent was, ab origine, founded on an erroneous principle, in so far as he attempted to charge Mr. Clyne in the account libelled on at separate rates for all his writings or copyings. He not only failed to show that there was any agreement to pay him at such rates, but the documentary and other evidence referred to by Mr. Clyne sufficiently established that the pursuer was admitted into Mr. Clyne's office on an agreement to give him a fixed sum of 30*l.*, or, at the utmost, of 35*l.* yearly.

The fact that Mr. Clyne did make this stipulation was averred by him, and virtually admitted by the respondent. He attempted only to qualify the admission by saying that the salary proposed was 30*l.* "or 35*l.*," and averring that he did not agree to accept it. He did not aver, and still less offer to prove, that any other terms were fixed.

The respondent was, therefore, in the same situation as a servant or functionary engaged for 30*l.* per annum, and for any additional gratuity which the master, ex voluntate, might please to give him. It is plain, that although such a clerk might sue for his salary, he could never make a claim in a court of law for the gratuity promised eo nomine; still less could he make the amount of the gratuity the subject of legal discussion, and make an appeal from the master to a court of law respecting the reasonableness of the gratuity allowed.

It is also important to keep in view, that the respondent never averred on the record in the Court below, that if

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Mr. Clyne had any discretion in fixing the extra gratuity to be given beyond the salary, he exercised the discretion improperly or unjustly. If it had been alleged that Mr. Clyne had evaded the exercise of a just discretion by giving sums purely or virtually nominal, in addition to the salary, it might possibly be competent for a court of equity to give redress against such evasion, if regularly brought before it. But independent of the summons not having been raised, or any plea stated on that ground, (which would exclude it from discussion under this action,) it is admitted, that so far from evading a fair exercise of the discretion, the sums paid to the respondent during the four years and a half he was in Mr. Clyne's service, in place of amounting only to 135*l.*, sufficient to extinguish the salary, amounted to 291*l.* 8*s.* 9*d.* The payments to account during the later part of his service, "amount-" "ing to 213*l.* 14*s.* 6*d.*, are not disputed." Instead of being restricted to 30*l.* per annum, he thus received on an average above 70*l.*, which was far more than Mr. Clyne's business could afford. In addition to these sums, he acquired the knowledge of practice as a solicitor before the Supreme Courts, which he had come to Edinburgh to acquire, and which enabled him, immediately on leaving Mr. Clyne, to commence business on his own account. He was also allowed, to the interruption of his office duties, to attend the necessary law classes, as the appellant offered to prove, and which was partially admitted.

In arranging the different notes of writings, and in the payments made, Mr. Clyne of course kept in view the stipulated salary. The discretion which he used beyond the amount of it, acknowledged and homologated by the respondent, is proved; and it is in vain for the pursuer

to contend that because he pressed Mr. Clyne for farther payment alleged to be due, and Mr. Clyne, from various causes assigned in correspondence, could not, consistently with his other occupations, immediately examine the course of accounts, and decide whether any or what additional payment he might be inclined to make, the respondent was entitled to bring his action on a principle repudiating the previously exercised discretion, and concluding that accounts should be adjusted as if it did not exist.

On these grounds, the interlocutor of the Lord Ordinary of 6th July 1830, by which a different mode of settlement from that which was stipulated and agreed upon, and under which the parties had acted, was appointed, ought to be reversed. The later interlocutors, both of the Lord Ordinary and of the Court, having ostensibly proceeded on that principle, must also fall.

Even on the principle fixed by the interlocutor of the Lord Ordinary of 6th July 1830, the sums which the respondent had received before the action came into Court extinguished any claim which he could legally make, and it was incompetent by any subsequent interlocutors to alter the rate of payment fixed by that final interlocutor.

The respondent presented no case.

LORD BROUGHAM.—My lords, this case gives rise, upon reconsideration, to a repetition and not to a retractation of the opinion I originally gave, that this cause ought never to have come here. When I found that the matter in dispute was 104*l.*, to which it was said you must add costs, making 230*l.* odd (I think the costs were

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about that), and when I said 150*l.*, being according to a most respectable solicitor's statement, in which I exactly concur, and, to my own recollection, that being the smallest costs at which these respectable appellants could have brought the case here, and therefore they ought not to have brought it here at all. Under those circumstances it was that the whole which is claimed would still leave somewhere about the amount of 80*l.* or 90*l.*; that would be the whole amount by which they could have bettered the estate. It would have been better far even after paying 150*l.*, providing there was any reversal of the position in which they stood, and which they had a right to expect; but that was upon the supposition that the matter in dispute between the parties was the whole 104*l.* and the costs of the suit. Suppose them to succeed entirely, and get a decree in conformity with the judgment below, there would be a loss to the estate, not only of 150*l.*, but all the costs. It now turns out, when we come to examine the whole accounts and statements of these appellants, that the sum really in dispute is not 104*l.* and the costs, but properly, truly, and strictly speaking, is not much more than 40*l.* without the costs. What do the whole arguments of the present appellants to which I have listened amount to? I shall presently show your lordships how much I listened to it. I think it was somewhat late in their argument that I came to the conclusion that the interlocutor of the Lord Ordinary was considerably wrong, and the Second Division of the Court were wrong in adhering to that interlocutor. It amounts to this, that the Lord Ordinary having first laid down (which I agree is in dispute), that there had been a right on the part of Mr. Stewart to obtain from Mr. Clyne a remuneration upon the

quantum meruit for work and labour, and that that remuneration should be assessed at a stipulated rate for what he had written, he then proceeds to lay down the quantum of remuneration in proportion to the rate at which he had written, and he finds that that should be the full payment at which another clerk, in ordinary circumstances, was to be remunerated for such writings, but subject to a considerable deduction; and taking the principle of deduction adopted by him to be correct in his first interlocutor in the absence of a contract (as it is formed in the absence of such a contract), according to the course of dealing between the parties;—that is the manner in which Mr. Clyne paid Mr. Stewart for his writings, which was not at the rate at which ordinary clerks are paid, but that rate is subject to certain deductions. His lordship, therefore, in my opinion, judiciously and soundly had regard to the dealing between the parties as to an implied contract, so as to substantiate the claim of which there is no direct evidence, and, secondly, to throw a light upon the terms of that implied contract, of which there is also some evidence. Now it turns out that the dealing between the parties affords evidence that there was to be a payment less than the ordinary course of payment of solicitors' clerks in Edinburgh, or with a certain sum to be deducted; but that sum was not given as of a certain, fixed, constant, and unvarying nature. It was what is called by mathematicians a variable quantity; and the question is, within what rule the rate of that quantity varied? The Lord Ordinary has found that it was never more than a half, and never less than a third, but that it varied and fluctuated from one half, or down to something more than one third. His lordship adds a reason for his varying that rate, and

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lessening the amount as the time advanced, that in all probability the services of the young man had become more valuable to his employer, and therefore he paid him nearer to the rate of ordinary clerks in the latter than the earlier part of his time, and then made a deduction from that rate of so much. I think that was a very probable proposition, and he well decided in taking that as the rule or canon as developing the principle upon which he deducted. That principle would leave three points to be ascertained; it being once laid down by the interlocutor, it would leave three matters or quantities to be ascertained; first, the writing done, that is, work and labour; secondly, how much had been paid to account; and, thirdly, how much had been deducted. In making that deduction, the person to whom it was referred (Mr. M'Kenzie, a respectable writer to the signet, who is a joint keeper of the signet, was to assess that amount of deduction, and he was to apply his mind to that point, and to give it in terms varying according to the time, or make it vary with the time, regard being had to the probable improvement of the young man, and consequently, according to that improvement, to diminish the deduction. If it had stood thus without limit, Mr. M'Kenzie, or whoever was substituted for him (Mr. Fisher ultimately) would have a scope of making a deduction to any amount; probably in the last year he might make it amount to nothing at all under the ordinary rate of charges; but that is not the footing upon which the Lord Ordinary puts it, for although he desires the referee to make the deduction variable, according to the time at which the account was opened, yet he prescribes two limits within which Mr. M'Kenzie is to confine himself in making out the

variation or fluctuation of deduction—it being never to be greater than one half, and never to be less than a third, and some little matter over. That is the first interlocutor, as I understand it. One would speak of it as a question of arithmetic, as I do on this occasion, not having heard any thing of it before stated by either party. That was the view I took of the first interlocutor of the Lord Ordinary, and I think Mr. Robertson's answer to my question does not materially shake or displace that view. Then that interlocutor is appealed from, and that appeal prevents that interlocutor from being final; and if there had been only an appeal, and the proceedings had gone on upon the footing of that first interlocutor, I should have said it was not final, to the exclusion of all modification. But what does the Court below do,—the Second Division of the Lords of Session? Contrary to the prayer of the reclaiming petition of the appellant Mr. Clyne, or his representatives, their lordships think fit to repel the reasons for altering the interlocutor, except in a very trifling particular, which is not to alter the principle. Their lordships order (and very correctly I think) that it should be referred no longer to Mr. M'Kenzie, but to Mr. Fisher, for this reason, as the one was a practising solicitor, and the other was a writer to the signet, and not a solicitor to the Supreme Court. It ought to have been sent as nearly as possible, in the Lord Ordinary's view, to one at the head of the profession, and the head of the college of solicitors; but as he had sent it to a writer to the signet, they altered that part of the order, and sent it to one at the head of the solicitors; but they take just the person who stands in relation to the solicitors as Mr. M'Kenzie stood, if the case had

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arisen to a writer to the signet and a writer to the signet's clerk. Then they alter it in one other respect, there having been no direction given by the Lord Ordinary to estimate the money paid to account. I do not recollect any other alteration that is made in the interlocutor of the Lord Ordinary. Then the question is, what do these alterations mean quoad the inquiries that they are to make? what do they amount to? There are no alterations as to fundamentals,—none as to principle,—none as to the findings of the Lord Ordinary. Those findings stand unimpeached; all the difference is as to the mode of working out the result of the interlocutor of the Lord Ordinary, it is only to make out the principle of the Lord Ordinary, and we are to take that decree as adopting and sanctioning the very ground established in the Lord Ordinary's interlocutor; and therefore it is the Lords of Session adopt the Lord Ordinary's interlocutor in every word, except the particular manner in making it out, and it is upon that ground they remit it to the Lord Ordinary to proceed upon the footing of his former finding, which now has become the finding of the Court; that is the way I view it. It is interlocutor seventh that is appealed from, and which is material. It is dated the 2d of February 1831, and it says,—" The Lords having considered this note, with the " other proceedings, and heard counsel thereon, adhere " to the interlocutor of the Lord Ordinary, but with " these variations and additions, that the remit shall be " made to the preses of the society of solicitors before " this Court, and that the report shall embrace not only " the rate at which payment, if any," (that must have got in by some inaccuracy) " shall be made to the

" pursuer." Can any one doubt that there was any? Was any thing said by Mr. M'Kenzie to the purpose, except as to the rate of payment?

Dr. Lushington.—That was as to the state of the accounts.

Lord Brougham.—That will not do. It is clear that it was to be as to the rate of payment, it is therefore inaccurate. Then it goes on to say, " if any, shall be " made to the pursuer, but also what the amount of " such payments ought to be, regard being had to the " payments already made by the defender: Quoad " ultra, refuse the desire of the note, and remit to the " Lord Ordinary to proceed accordingly." It is quite clear that the remit to the Lord Ordinary to adhere was to proceed upon the footing of the interlocutor he had formerly pronounced, and which had been affirmed, and refused to be altered by the Court of Session;—it was to be upon the principle he himself had laid down. Then the Lord Ordinary sends it to Mr. Fisher, the preses of the society of solicitors, instead of Mr. M'Kenzie, the joint deputy keeper of the signet. Then when Mr. Fisher makes his first report the Lord Ordinary is dissatisfied with it, and sends it back, in order to have a second report, and then comes the Lord Ordinary to make his second interlocutor; and he materially varies it from the principle of the first, or rather he makes his second interlocutor to vary upon a totally different principle from the first, to which the Lords had adhered; for instead of taking one half, or a little more than one third, as the payment within which the deductions were to be confined, he takes a proportion between one fourth and one fifth as the minimum of deduction, and his deduction accordingly varies, upon

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a new view of his first interlocutor, not between one half and one third, but between one fourth and one fifth. Now that is a totally different principle from that which he ought to have been bound to adhere to by the former interlocutor, which had been affirmed in that respect by the Court of Session. He was not entitled to take that principle, which makes a difference of 40*l.* or 41*l.* Suppose it be taken at one third, it makes a difference of 125*l.*, instead of which the deduction made is 84*l.*; is it not so, Dr. Lushington?

Dr. Lushington.—I doubt, my lord, if it is not a little more.

Lord Brougham.—I make it 41*l.*; it is not more—call it a little more, making it 45*l.* I will give the Lord Ordinary the utmost I can do to bring it within the interlocutor, but the fact is, it was barely more than one third. My opinion is, that he was bound to make it that at the least, just to turn the corner of that deduction, which would make the difference between the parties somewhere about 41*l.* or 45*l.* It is in vain to deny that the appellants have made no other case here. Their whole argument is, that there is not a shadow of doubt of the effect of the interlocutor of the Court below. I, however, hold that to be a substantial error in the Court below, from what the Lord Ordinary incautiously did; but then it may be asked how these appellants come here upon the sum of 40*l.* or 41*l.*, or of 45*l.*, taking it upon the outside? why do they come here to appeal this to your lordships, when they know the utmost they can gain is to be relieved from 40*l.* or 45*l.*, and to get that relief they must incur an additional expense for costs by spending 150*l.* of the funds under their trust? It is said they made an offer of 135*l.* to the respondent. To

be sure, that is saying, "If you will take 135*l.* instead of "230*l.* we will let you off;" but, according to this view of the case, it ought to have been 195*l.*

Mr. Robertson.—There is 115*l.* costs due, and then there is an additional sum of 12*l.* odd—making somewhere about 130*l.*

Lord Brougham.—That is to say, if you will be satisfied with taking 25*l.* or 30*l.*—or it was offering Stewart 5*l.*, or not above 10*l.* How much more was it than 10*l.*?

The Appellants' Solicitor.—It was about 10*l.*, and 115*l.* as the costs.

Mr. Robertson.—I calculated at about 130*l.* as the costs.

Lord Brougham.—In that view of the case the appellants were offering Stewart only about 5*l.* or 6*l.*, he being at that very time in possession of a judgment for 104*l.* He would have been very foolish if he had agreed to do so. He has done that which is a great saving to the appellants, in so far as there will be something to take off—the costs being entirely in your lordships' discretion; and as they are in no respect whatever abiding the event, these trustees have in this manner been applying the trust fund committed to their administration, and bringing this suit to an appeal, for forty odd pounds. Suppose they succeed to the utmost extent of the costs, the prospect of their prevailing must have cost the estate 100*l.* I therefore recommend to your lordships to alter the interlocutors—the seventh and eighth—complained of, to the principle of the finding of the Lord Ordinary's original interlocutor, increasing the amount of the sum due to the respondent to the extent of 45*l.*, and to give to the respondent in this case the full costs which the

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appellants have occasioned him to incur by the proceedings since the interlocutor—I mean by this appeal. In consequence of this principle of deduction having been adopted by a slip of the Lord Ordinary, one is unwillingly obliged to make that alteration as to the deduction. When I say unwillingly obliged to make that deduction, it is for this reason—I think the first interlocutor of the Lord Ordinary was wrong. I think the second interlocutor was also wrong, because he was bound by the first after the Court of Session had altered it, so that it ought to have been upon the principle of the first. I do not think we should be bound to decide upon that principle which he ingeniously suggests; for the deduction ought to have been smaller—the same principle ought to have led him to diminish the deduction year after year. It was certainly a slip in him not to do so; for if he held that Clyne was bound to make a deduction, he could not assume that deduction, but he ought to have diminished it more than a third, when, after two years, the respondent's services were more valuable. He ought not to have left Mr. Fisher to put it between those two extremes, namely, between one half and a little more than one third. Unfortunately, however, the Court did adhere to that, whereas they were bound to have altered it. I adhere to the principle which has been laid down at the bar, that a decree of the Court of Session ought not to be altered afterwards by the Lord Ordinary, when their attention is drawn to the principle of the second interlocutor as being more satisfactory than the principle of the first, and that he ought to take that principle which he laid down at first, as he was bound to adhere so far to his former interlocutor in consequence of the decree of the Court of Session

affirming it. It is still more unfortunate that this course should have been taken, as it diminishes the amount of the remedy which this young gentleman ought to have received. I think that your lordships ought therefore to alter the decree in the manner I have suggested, and giving the full costs to which the respondent is entitled—that is, the costs he has been put to in this litigation. Now, when we come to consider the costs, I do not see how we can avoid giving them, as the petition was presented when there was no answer before the House—that has been found. At the same time I am considerably inclined to reconsider that question; but that must be done in an appeal committee; I mean as to Mr. Robertson's petition against it, as I am inclined to think that it was incompetent on account of an answer being made, and in consequence of that it will diminish the amount of the remedy which Mr. Stewart has to get in this action. I should wish to have an opportunity to consult one of your lordships, whereas, if it has been regularly before the House, it might have been different; and therefore I shall say nothing about that at present, nor is it necessary.

Mr. Robertson.—May I, with great humility, say a word as to the interlocutor of the Lord Ordinary? The Lord Ordinary in that interlocutor seems to restrain it to a little more than one third; but the Court, when they affirm that interlocutor, say, "but with these "variations and additions, that the remit shall be to "the preses of the society of solicitors before this "Court; and that the report shall embrace, not only the "rate at which payment, if any, shall be made to the "pursuer, but also what the amount of such payment "ought to be, regard being had to the payments

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"already made by the defender." I read that to your lordships with great submission, to show that it was evidently intended that it was to be considered with reference to what they had paid at future times. Now, it appears in the Lord Ordinary's last interlocutor 63*l.* 18*s.* 9*d.*, which is not one fourth, is deducted.

Lord Brougham.—I read that with regard to money already paid to account. I find that is money already paid down—I wish I could put that construction upon it.

The House of Lords ordered and adjudged, That the said interlocutor of the 13th of February 1833, adhered to by the said interlocutor of the 15th of June 1833, be varied by allowing to the appellants a deduction of the sum of 45*l.* from the principal sum of 76*l.* 19*s.* found due to the respondent: And it is further ordered and adjudged, That the several other interlocutors complained of in the said appeal, except so far as the same are inconsistent with this variation, be, and the same are hereby affirmed: And it is further ordered, That the said cause be remitted back to the said Court of Session, to do therein as shall be just, and consistent with this judgment: And it is further ordered, That the appellants do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

RICHARDSON and CONNELL,—Solicitors.