and of whom they were spoken. It was contended that they were not used with reference to the Glebe Sugar Refining Company at all, but with reference to four of the individual members of that company, who happened to be members of the Town Council of Greenock at the time when a certain arrangement was entered into relative to Ker Street, which the defender thought should have prevented them from afterwards acquiring the property which they did acquire on the bankruptcy of M'Kirdy & Steele. On the other hand, it was contended by the pursuers that the expressions were used as applicable to the company. From the evidence on both sides bearing on this point, it appeared that certain of the witnesses stated distinctly that the defender mentioned the Glebe Sugar Refining Co. by name, and the defender himself admitted that on one occasion he did mention the company, though he said that he used the expression with reference to the four partners of that company who had been members of the Town Council when the arrangement in question was entered into. It was for the jury to make up their minds as matter of fact whether the words were spoken with reference to the Glebe Sugar Refining Company, or with reference to the individuals, the Provost and Magistrates who happened to be members of it. If the jury were of opinion that the defender had not the company in view at all, but merely certain individual members of it, who had done something which he disapproved of, the case as at their instance as individuals is not before the jury under the form of the issue which had been sent for trial; because, though the names of the five partners of the company were mentioned in the issue, they were pursuing for the company as a company, and not for any individual interest which they might have. At one time the names of the individual partners were proposed to be put in the issue, but, on its adjustment by the Court, their names as individual partners were struck out, and it now only applied to the company as a company. The question, therefore, was not whether the words had caused loss and injury to the individuals, but whether they had done so to the company *qua* company. The charge was a very serious one. It charged a company of merchants with doing something which was most infamous, and there was not only no apology or retractation, but no issue was taken in justification, in other words, the defender did not undertake to prove that what he had said was true. It was perfectly settled in cases of libel or slander, that unless the defender took a counter issue to justify or prove the truth of the charge leading to the action, the charge must be held to be false. If it was false, there could be little doubt that it was calumnious, for to charge a company falsely with being most infamous, was, in law and common sense, a calumnious charge, which naturally created feelings of indignation in the minds of those who heard it. But there was a farther question to be considered, viz., whether the circumstances in which the defender was placed at the time when he used the words were such as to afford any palliation of the language, and warrant a mitigation of the damages which the jury might be inclined to award. Though it was incompetent for the defender to prove their truth, having taken no issue of justification, still it was quite competent for him to prove the surrounding circumstances of provocation or otherwise, leading to mitigation of the damages, and it was competent for the jury to take these into consideration. It was plain that although perfect freedom of comment was allowed in this country with reference to the conduct of public men, or even private individuals, if they chose to conduct themselves improperly, no one was entitled to make charges against them which were not justified, and therefore must be held to be false; but, in the question of damage, the surrounding circumstances were to be looked to.

The only further question for the consideration of the jury was the question of damages. The law did not recognise the giving of damages in the shape of *solatium* for injury done to the feelings of a company; and the jury must be satisfied that the charge made against them was such as to injure, or was calculated to injure, their credit and position as a company in the market, and in estimating the amount of damage they must consider to what extent the credit of a company charged publicly in a public coffeeroom with being guilty of infamous conduct, was injured by the accusation.

After the jury had retired,

WATSON, for the pursuers, stated that parties had compromised the case, and moved his Lordship to discharge the jury. This was accordingly done, and no verdict was returned.

Counsel for Pursuers—Mr Gifford and Mr Watson. Agents—Patrick, M'Ewen, & Carment, W.S.

Counsel for Defender—Dean of Faculty, Mr Young, and Mr Guthrie Smith. Agent—William Archibald, S.S.C.

FIRST DIVISION.

Saturday and Tuesday, Nov. 17, 20,

THOMS *v.* THOMS *(ante,* vol. 1. p. 254).

Expenses—Print of Documents—Third Counsel—Witnesses not Examined. Objections to an auditor's report *repelled.*

The pursuer objected to the auditor's report on the defender's account of expenses, in so far as he had allowed (1) a fee paid to counsel on 28th Feb. 1866, for attending in support of motion for diligence and relative charges, amounting to £2, 16s. 2d.; (2) the charges for print of documents, amounting to £66, 1s.; (3) a fee to senior counsel for consultation previous to the trial, in so far as it exceeds £10, 10s., £15, 15s. having been allowed by the auditor; (4) a fee to junior counsel for consultation, in so far as it exceeds £6, 6s., the auditor having allowed £9, 9s.; (5) the charges for instructing Mr Robertson, solicitor, London, to precognosce Jessie Menzies, including Mr Robertson's account, amounting to £5, 10s. 6d.; (6) the charges of £176, 9s. 2d. connected with the diligence for recovery of documents, which includes the sum of £76, 9s. 2d., the amount of the account allowed to Christopher Kerr as a haver, in so far as these charges exceed £100; (7) the charge of £71, 6s. 6d. reserved by the auditor for the consideration of the Court, being the amount included in the account as the expense of a third counsel at the trial; (8) the charges specially referred to in the report of the auditor for the precognitions of witnesses who were not examined at the trial—the fees paid to these witnesses and the other charges connected therewith; (9) the charge of £49, 2s. 6d. allowed in the account of Mr Charles Welch for copies of papers (other than the precognitions), in so far as it exceeds £25, or in the event of the Court sustaining the objection to a third counsel and only allowing two, the charge of £25, 19s. 10d. allowed to Mr Welch for copies

of papers, is objected to in so far as it exceeds £13.

BALFOUR, for the pursuer, argued—(1) this objection is withdrawn; (2) the print of documents was unnecessary, and was not used at the trial. All the necessary documents were contained in the pursuer's print. Besides, by Act of Sederunt, 18th July 1850, the Lords "declare that in future they will allow, under the conditions aftermentioned, to the successful party the expense of printing the documents actually produced and used at the trial; but in order to check undue expense, direct the clerk at the trial to mark on the margin of the print, for the use of the auditor, the documents actually produced, and the auditor to examine such print with a view to see whether deeds have been unnecessarily printed at length, or accounts and other papers unnecessarily printed when nothing turned on the terms of the same; and, further, the Lords direct the party who means to claim such expense to apply for and obtain from the judge trying the cause, a certificate as to the extent to which such print was necessary, and direct the auditor to tax the account according to such certificate, so far as he finds that it rules the matter." The conditions here prescribed had not been complied with by the defenders; (3 and 4) these fees are excessive; (5) the witness referred to was not examined; (6) this charge is excessive; (7) the expense of three counsel should not be allowed against the pursuer (Campbell's Exrs. *v.* Campbell's Trs., 19th June 1866, vol. ii. p. 89); (8) the expense of precognoscing and paying witnesses not examined is not a fair charge against the pursuer; (9) the copies referred to were unnecessary.

SHAND, for the defender, replied—The print, though not used at trial, was necessary for instructing counsel, and is chargeable (Forbes *v.* Dunbar, 22 S. J. 582). The Act of Sederunt was not pleaded at the audit. If it had been, the diet would have been adjourned, that the necessary certificate might be obtained. The sums referred to in the 6th objection were all actually disbursed; the documents were very numerous. There is no absolute rule that three counsel are never to be allowed at a trial (Walker, 19th July 1862, 24 D., 1441). In this case three were necessary, and the pursuer himself had three. The expenses of witnesses not examined should be allowed. Although the only issue taken was fraudulent impetration, yet the record contained also averments of facility which the pursuer might have proposed to prove, and which it was necessary that the defender should have evidence to rebut. These averments were only withdrawn at the trial.

The LORD PRESIDENT — The first objection is not insisted in. The next is to the charge of £66, 1s. for a print. It is said this is not to be charged at all, the print for the pursuer having been sufficient, but there was no communication made to the defender of the pursuer's print. Then it is said the print is longer than was necessary. Lastly, it is said it was not submitted to the judge. The words of the Act of Sederunt no doubt make this a condition precedent to the expense being allowed, but it has not been the practice. I have only done it once. At all events, I don't think it is too late to look into the matter yet, and I will do so. The next objection is that the fees for consultation are too large. In such a matter there must be some discretion left with agents. I think we cannot sustain that objection. Then there is the account in regard to the execution of the diligence for recovering documents. The sum no doubt seems large; but the auditor has not interfered with the details. We are asked to allow a slump sum of £100; but assuming Mr Kerr's charge of £76 to be correct, that would leave only £24 for the other expenses. I don't think we can deal with the charges in that way. I think there is a great deal in the observation that there was an allegation of facility on record. I don't think, although this was not put in issue, that the defender could well have objected to it being made an element in the investigation; and if so, he was entitled to prepare to meet it in his defence. The next question is as to the expense of a third counsel. I hold it be a general rule that only two counsel are to be allowed as against the opposite party, and that it is always necessary to make an exceptional case in order to justify the expense of three. It is said that here there were three on each side. I don't think there is anything in that. In another branch of this case, I think I have seen five counsel on one side, but this expense of course cannot be charged. The question is, whether this was a case in which it was reasonable, looking to the nature of the allegations on record, to have three counsel; and I am of opinion that it cannot be regarded as otherwise than an exceptional case. Lastly, as to the witnesses not examined, it is the fact that their examination was rendered unnecessary by the course the pursuer took with his case, and I don't think we can sustain that objection either.

The other Judges concurred, and the case was continued till Tuesday, when

The LORD PRESIDENT stated that he had examined the print, and he was of opinion that the charge for it should be allowed.

The objections were therefore all repelled, with expenses.

Agent for Pursuer—Alex. J. Napier, W.S.

Agents for Defender—Hill, Reid, & Drummond, W.S.

Tuesday, Nov. 20.

LAMONT *v.* JOHNSTONS.

Bill—Acceptance. A bill accepted by an old woman, her hand being led by another, sustained as a good obligation, the holder having proved that she had authorised her hand to be led, and that she was at the time in full possession of her faculties.

Personal Bar—Act of Grace. A party was incarcerated on a Sheriff Court decree, and when in prison executed a disposition *omnium bonorum* in favour of his creditor. He thereafter raised a reduction of the decree. Plea that he was barred by the disposition *repelled.*

This was a reduction of certain interlocutors of the Sheriff-Substitute of Lanarkshire at Airdrie (Mr Logie), and of the Sheriff (Sir A. Alison).

The pursuer's wife was a daughter of the late Mrs Agnes Rankin or Brown residing at Chapelhall. The defender Mrs Johnston was her sister. By her settlement Mrs Brown conveyed to the pursuer and certain other trustees, who did not accept, her whole means and estate, with directions to divide the residue into five equal parts, one of which was to be paid to the pursuer's wife and another to Mrs Johnston.

In 1864 the defenders Mrs Johnston and her husband raised an action of count and reckoning against the pursuer in the Sheriff Court, in which they claimed £30 as Mrs Johnston's share of the residue. The pursuer averred that his whole re-