not by that of the writer's country, and in which he wrote it and despatched it, is to my mind so novel, and *prima facie* so questionable, that when it presents itself again, and under circumstances requiring a decision, I venture to think that it will deserve very careful consideration. I have no occasion now to decide it, being of opinion that according to the law of Scotland the libel before me is not relevant.

Counsel for Panel—Jameson.

Counsel for H. M. Advocate—Innes, A.-D.—Guthrie.

COURT OF SESSION.

Friday, February 25.

OUTER HOUSE.

[Lord Fraser.

VISCOUNT STRATHALLAN, PETITIONER.

*Entail—Charging with Debt—*41 *and* 42 *Vict. cap.* 51 (*Roads and Bridges* (*Scotland*) *Act* 1878), *sec.* 70—43 *Vict. cap.* 7.

A Local Road Act empowered persons interested in the roads to be made under its provisions to raise the sums necessary for making the same "by voluntary subscriptions, contributions, or obligations of credit" to be granted by them, and further provided that in the event of its being found impossible to raise the money in that way it might be raised by an assessment imposed upon proprietors whose lands were to be benefited by such roads, and in the event of the money being so raised by assessment it was made lawful for entailed proprietors to charge their estates with the sums assessed. A proprietor succeeding as heir of entail and as general representative to a predecessor who had borrowed money on his bond for the construction of certain roads under that Local Act, and had by the terms of the bond bound his heirs, executors, and successors, *held* entitled to charge the sum so borrowed on his entailed estate under the 70th section of the Roads and Bridges Act 1878, and the Act 43 Vict. cap. 7, as being "personally liable for payment of" the debts.

James, Viscount Strathallan, heir of entail in possession of the entailed estates of Uchter Machany and others in Perthshire, along with various other proprietors in Perthshire, in exercise of the powers conferred by a Local Act passed in 1811 (51 Geo. III. cap. 198), entitled "An Act for more effectually repairing and maintaining certain roads and bridges in the county of Perth," constructed various turnpike roads in Perthshire, and among others "the road from the confines 'of the county of Clackmannan, near Blairngone, through Gleneagles, and from thence to Muthill to the bridge of Kinkell, and by the bridge of Auchlone or by the bridge of Dollerie to the road from Perth to Crieff, and from the bridge of Kinkell by the Abbey bridge to the said road,' and personally incurred large liabilities for the sums of money used for these purposes. Power was given to borrow the moneys necessary for constructing and maintaining the roads by borrowing upon the credit of the tolls, and by section 46 it was enacted—"That in case the money required for making or repairing the said roads . . . . cannot be raised, or in case it shall be inexpedient to raise the same upon the credit of the tolls and duties by this Act granted, or by the voluntary subscriptions, contributions, or obligations of credit of persons interested therein, it shall and may be lawful to and for the proprietors or liferenters vested with the right of property or enjoyment of the *dominium utile* of lands within the county of Perth, and qualified to vote at the meetings hereinafter mentioned, or the guardians, trustees, or commissioners of any such proprietors or liferenters, to determine which lands in their opinion would be benefited by the making or repairing of any of the said roads . . . and they or any three of them" were authorised to call a meeting of such proprietors, and to take measures specified in the Act for meeting the expenses by the imposition of an assessment. And by the 54th section it was provided that "all persons being proprietors of entailed lands so assessed shall be entitled to borrow and charge the sums assessed on the credit and security of the said lands until repaid in manner before mentioned."

In order to meet the expense of constructing certain of the roads whose construction was contemplated by this Act, James, Viscount Strathallan, along with other parties interested, voluntarily raised the necessary sums of money by way of loan from the Perth Banking Company and other parties, granting bonds therefor, by which they bound themselves individually and personally, their heirs, executors, and successors whomsoever. The petitioner William Henry, Viscount Strathallan, succeeded his father Viscount James as heir of entail in 1851, and as his general representative became liable for his proportion of the sums of money still due under the said bonds. These, so far as the purposes of the present application were concerned, consisted of two sums of £1400 and £1750 respectively, and the prayer of the petition craved authority to charge these sums on the entailed estates under the provisions of the 70th section of the Roads and Bridges Act of 1878. Upon the "narrative that it is enacted by section 68 of an Act passed in the 1st and 2d years of the reign of his Majesty King William IV. chap. 43—'That it shall and may be lawful for any proprietor, or heir of entail in possession of any entailed estate, or the tutor or curator of such proprietor or heir of entail, who may be desirous of advancing or lending any sum or sums of money for the purpose of making or maintaining any turnpike road, or building any bridge on the same, to be made or built subsequent to the passing of this Act, either to bind himself personally as a trustee of such turnpike road, and also to bind the succeeding heirs of entail for the repayment of any such sum or sums of money to any person or persons who may advance the same to the trustees of such turnpike road, or to advance such sum or sums, and to render the same a burden upon the said entailed estate and the succeeding heirs of entail, or having advanced such sum or sums, to borrow the like

sum or sums, and to bind himself and the said estate, and the heirs of entail succeeding thereto, for the same; and all bonds and obligations for money so to be advanced or borrowed and applied shall be held to bind such proprietors in cases where they have personally bound themselves, and also the heirs of entail in such estates, for the repayment of such money, and such bonds and obligations shall be valid and effectual against the granter of the same, and also against the heirs of entail succeeding to them in such entailed estates, and such sums shall be and continue to be a real burden on such estates till repaid out of the tolls and duties levied on such turnpike road: Provided also, that the share or proportion of such sum or sums of money so to be advanced or borrowed, affecting such succeeding heirs of entail, shall not exceed one year's free rent of the entailed lands of such proprietor, situated in each parish respectively, through which any such turnpike road or any part thereof shall run, or on which such bridge or any part thereof shall be built, and that the heir of entail in possession of such entailed estate shall be obliged to keep down the interest of such sum or sums of money so advanced or borrowed: Provided also, that it shall not be lawful to the creditor or creditors in right of any such debt, to adjudge or otherwise evict the entailed estate for payment thereof, or any part thereof, but it shall and may be competent to such creditor or creditors to prosecute such remedy or remedies against the rents thereof as are given and allowed by the law of Scotland to heritable creditors:' And also upon the narrative 'that the obligations for such debts were incurred in reliance upon the continuance of a right to levy tolls, which right will be abolished after the commencement of this Act; and whereas it may happen that under the provisions of this Act the full amount of such debts for which such heirs of entail became liable may not be found included in the amount for which certificate of debt is hereinbefore directed to be granted to the creditor or creditors therein,' agreeably to the form prescribed by said section 68 of said Act (41st and 42d Vict. chap. 51), it is enacted by section 70 of said Roads and Bridges Act—'That the heirs of entail personally liable for payment of such debts, or for the portion thereof not included in such certificate, shall have all the like powers of charging the fee and rent of the entailed estate, or any portion thereof other than the mansion-house, offices, and policies thereof, with the full amount of such debts not included in such certificate; and of granting, with the authority of the Court of Session, bonds and dispositions in security for the full amount of such debts as aforesaid, as by the Act passed in the 31st and 32d years of the reign of Her present Majesty, chap. 84, section 11, are conferred with reference to entailer's debts; and such bonds and dispositions in security may be granted in favour of any parties in the right of such debts at the date when such bonds and dispositions in security are executed.'" And by an Act passed in 1880 (43 Vict. cap. 7) the power so given to heirs of entail is extended to cases where the roads were constructed prior to the passing of the Act 1 and 2 Geo. IV. cap. 43.

The Lord Ordinary (LEE) remitted to Mr W. J. Dundas, C.S., to "examine whether the provisions of the statutes and Acts of Sederunt have been complied with, and also to inquire into the facts and circumstances set forth in the petition, and to report."

In terms of this remit Mr Dundas reported— . . . "The petitioner is of full age, and not subject to any legal incapacity. The heirs of entail at the date of presenting the petition entitled to succeed after the petitioner to the said entailed lands and estate under the foresaid deed of tailzie, and whose consent would have been required to an instrument of disentail, are—1. The Honourable James David Drummond, Master of Strathallan, the petitioner's eldest son, presently residing at Morton Lodge, near Buckingham. 2. William Huntly Drummond; and 3. James Eric Drummond, both sons of the said Honourable James David Drummond, and both residing with him at Morton Lodge aforesaid. The said James David Drummond is above twenty-five years of age, and not subject to any legal incapacity. The said William Huntly Drummond and James Eric Drummond are both in pupillarity, and at the date of presenting the application had no legal guardian other than their father the said James David Drummond, who is their administrator-in-law. No tutor *ad litem* has been appointed to the two pupil respondents, and the reporter would respectfully suggest for your Lordship's consideration whether, in view of the facts to be afterwards mentioned, it might not be advisable to appoint a tutor *ad litem* to attend to their interests; otherwise the proceedings are in proper order, the provisions of the statutes and relative Acts of Sederunt having been complied with. . . . . The petitioner succeeded his father James, Viscount Strathallan, who was a substitute heir of entail, in the year 1851 as heir of entail in the said estates, and the petition proceeds throughout upon the assumption that the petitioner is in the position of an 'heir of entail personally liable' for payment of the debts to be afterwards referred to, being the sums mentioned in the petition. As the reporter, however, has been unable to adopt this view of his Lordship's position—upon which the whole question of the competency of the present application depends—it is necessary to state in some detail the terms of the bonds by which the debts in question were constituted." The reports then narrated the terms of the bonds whereby the debts were constituted, and then proceeded—"From the above narrative it will be seen that the late Lord Strathallan did not bind the heirs of entail succeeding to him in the said estate, nor take any steps for charging the sums due by him on the credit and security of the entailed estate, as he might have done had he wished to avail himself of the powers conferred on him by the provisions of the Act 51 George III. cap. 198, but he merely bound 'his heirs, executors, and successors.' The late Lord Strathallan being himself a substitute heir of entail, could not make the heirs of entail succeeding to him liable for the said debt except by exercising the provisions of the statute, which he has not done, and it appears to the reporter that the petitioner as heir of entail is not personally liable for such debts, and could not be made liable for them by the creditors. The debt is a personal debt of the late Lord Strathallan, and was payable in the ordinary course out of his move-

able estate. If his own estate were not sufficient to meet the debt, the creditors would have to bear the loss. From certain of the deeds produced it appears that the petitioner is the executor of the late Lord Strathallan, and has acknowledged that he is liable 'as executor' for the said debts. This appears from discharges in favour of the petitioner when paying off part of the debts, in which the creditors, in consideration of certain sums paid to them by the petitioner 'as executor of the now deceased Right Honourable James, Viscount Strathallan, his father,' &c., discharge the debt." He concluded his report thus—"The reporter is therefore humbly of opinon with regard to all the debts referred to in the application, that so far as they are still due they are proper personal debts of the late Lord's, now payable by his executors, with which the present Lord as heir of entail has no concern whatever, and that the present application is therefore incompetent. It has been very strongly represented to the reporter that the present Lord Strathallan being undoubtedly heir of entail, and being also (as executor of his father) liable for payment of the debts, is in the position of an 'heir of entail personally liable' for the debts in terms of the Roads and Bridges Act. But it appears to the reporter that this is not a sound or proper construction of the Acts, and that there is nothing in these Acts to make the rule of law laid down in the cases of *Breadalbane*, 8 D. 1062, and *Stewart*, 14 Scot. Law Rep. 238, inapplicable to the present case,"—and the reporter accordingly recommended that the petition should be dismissed.

In terms of the reporter's suggestion, Mr George Dunlop, W.S., was appointed tutor *ad litem* to the pupil substitutes of entail, and compeared in the petition, resisting the application on the grounds urged by the reporter.

The Lord Ordinary (FRASER) after hearing parties pronounced this interlocutor:—"Finds that the procedure under the petition has been regular and in conformity with the provisions of the statutes and relative Acts of Sederunt; that the debts set forth in the petition are debts of a nature contemplated by the statutes; and remits the petition again to Mr Dundas to adjust the amount to be charged on the estate, and to report."

He added the following note:—"The Lord Ordinary is unable to concur in the opinion of the reporter. The Lord Ordinary considers that the whole debts specified in the petition may be charged upon the entailed estate under the Roads and Bridges Act of 1870 as extended by 43 Vict. cap. 7.

"The Act of 1 and 2 William IV. cap. 43, may be at once put out of consideration, because the 68th section of that Act applies only to roads made subsequent to the passing of that Act, while the roads in question were made many years before. The point raised under the petition must be determined upon the construction of the Local Road Act of the 51st of Geo. III. secs. 46 and 54, and of the General Roads Act of 1878, and 43 Vict. cap. 7. Under the Act of George III. sec. 46, there are contemplated various modes of raising money for the making of roads and bridges. There was, first, the raising of money on the credit of the tolls. But, if the funds could not be obtained in this way, the Act contemplated the raising of them by 'voluntary subscriptions, contributions, or obligations of credit of persons interested therein.' And if this source also failed, then the proprietors of estates were empowered to call a meeting of their number and impose an assessment. The 54th section then proceeds to deal with the parties who shall pay the assessment, the portion of the clause applicable to entail proprietors being as follows—'And all persons being proprietors of entailed lands so assessed shall be entitled to borrow and charge the sums assessed on the credit and security of the said lands; and the sums so borrowed shall become and continue a charge or burthen on the said lands until repaid in the manner before mentioned.'

"The roads referred to in the petition were made, not from money raised by assessment, but by means of 'obligations of credit' granted by parties interested, and amongst others by the late Lord Strathallan, who along with a number of other proprietors borrowed the money from the Perth Banking Company, granting their bond therefor. As the funds were thus not raised by assessment, no entail proprietor was entitled to take advantage of the above provision in the 54th section, by imposing a burden upon his entailed estate for the money borrowed and expended, and until the passing of the Roads Act in 1878 (extended by the subsequent statute) no heir of entail in possession had such power so far as regards the two bonds for £12,000 and £6000. . . . .

"The view of the reporter is that the obligations in these bonds being merely imposed upon the heirs, executors, and successors of the obligants, and not upon their heirs of entail, the present petitioner is not entitled to the benefit of the 70th section of the Roads and Bridges Act. Now, the Act of Geo. III. did not authorise the proprietors of entailed estates who raised money upon 'obligations of credit,' as was done in this case, to impose the obligation upon succeeding heirs of entail. The burden that could be put upon an entailed estate was limited to the case where the money was raised by assessment, and therefore if the granters of the bonds, being entail proprietors, had bound the heirs of entail as desiderated by the reporter they would have been outwith the statute. Is the petitioner therefore, because his father did not bind the heirs of entail, which he had no power to do, to be deprived of the provisions in the Roads Act of 1878, which enacts that 'the heirs of entail personally liable for payment of such debts, or for the portion thereof not included in such certificate, shall have all the like powers of charging the fee and rents of the entailed estate . . . with the full amount of such debts not included in such certificate, and of granting with the authority of the Court of Session bonds and dispositions in security for the full amounts of such debts?' The reason assigned for this enactment is that 'the obligations for such debts were incurred in reliance upon the continuance of a right to levy tolls, which right will be abolished after the commencement of this Act.' The late Lord Strathallan granted his bond in reliance on the tolls, and he bound his general representatives to pay the money which he borrowed because he could not bind his heirs of entail. The present petitioner is his general representative, and personally liable for payment of the debt, and he is

an heir of entail now receiving power for the first time to impose the burden upon the entailed estate. The prayer of the petition must therefore be granted.

"The cases of *Breadalbane's Trustees* (8 D. 1062) and *Stewart* v. *Stewart* (14 Scot. Law Rep. 238) merely settled that a proprietor who had power to impose the burden of road debts either upon his executry or his heirs of entail did by the terms used in the particular bonds granted in these cases impose the burden upon his general representatives and not upon the heirs of entail. These decisions in no way conflict with the judgment now pronounced, which has relation solely to the construction to be put upon an Act of Parliament subsequent in date to them."

Thereafter, Mr Dundas having adjusted the amounts, the Lord Ordinary granted authority as craved, and this judgment was acquiesced in.

Counsel for Petitioner—J. P. B. Robertson. Agents—Murray & Falconer, W.S.

Counsel for Tutor *ad litem*—Darling. Agent—Party.

Tuesday, March 15.

FIRST DIVISION.

BRADY *v.* WATSON.

Expenses—Fees to Counsel—Where Case has Extended over more than One Day.

Held that the fact that a case has extended over more than one day is not a reason why an additional fee should be sent to counsel, unless the amount of time, trouble, and attention required more than fairly fall within the original fee.

In this case the facts sufficiently appear from the opinion of the Lord President, *infra*.

At advising—

LORD PRESIDENT—In this note objection is taken to the Auditor's report of taxation in respect of three items, the question, however, being just this, whether a certain fee was properly sent on February 17th. The state of facts is simply this—The case was called in the afternoon, and after a very short beginning of an opening speech on the part of the appellant the cause was continued. When the case again came on for hearing a fee of £2, 2s. was sent as a refresher, and the question is, whether this fee was properly disallowed? It was stated to us that this fee was sent and charged in accordance with precedent and invariable custom. Now we have communicated with the Auditor, and have ascertained that there is no such custom. On the contrary, the practice is, that if a cause is discussed in more days than one, and a greater amount of time, attention, and trouble is required of counsel than fall fairly within the original fee, then a refresher is allowed, but under no other circumstances. The mere fact that a case has extended over more than one day is no reason why an additional fee should be sent.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court approved of the Auditor's report.

Counsel for Appellant—Kennedy. Agent—John Macpherson, W.S.

Counsel for Respondent—Wallace. Agents—Smith & Mason, S.S.C.

Friday, March 18.

FIRST DIVISION.

BLACK *v.* MASON.

Expenses—Jury Trial—Fees to Counsel.

The usual rule in jury trials is to allow fifteen guineas to junior counsel for the first day, ten for the second, and seven for the third. Trial in which this rule was followed.

This was a note of objections to the Auditor's report in a jury trial, in which the defender has been successful. The trial related to an alleged right-of-way; it had lasted for three days, from 10 a.m. to 6·30 p.m. each day; and the question raised involved points of law as well as of fact. The fee which the defender sent to his senior counsel on the last day was fifteen guineas; to his junior he sent twenty, fifteen, and fifteen guineas on each day respectively. The Auditor taxed five guineas off the fee to the senior counsel, and reduced the junior's fees to fifteen, ten, and seven guineas. The defender then lodged this note of objections, and argued that the fees sent should be allowed, as the sitting each day had been so prolonged, and as the question was one of law as well as of fact.

The pursuer replied that the general rule was well recognised—*Hubback* v. *North British Railway*, June 25, 1864, 2 Macph. 1291; *Neilson* v. *Barclay*, July 19, 1870, 8 Macph. 1011; and that there was nothing in the present case to take it out of that rule.

At advising—

LORD PRESIDENT—As to the amount of fees to be allowed, I think that this has been just an ordinary jury trial, and therefore that we are bound to follow the rule laid down in the cases cited by Mr Campbell. The rule is very well understood in both Divisions of the Court, and I think it would be dangerous to interfere in any way with its application. I am for disallowing the objection.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court refused the note of objections.

Counsel for Objector (Defender)—D.-F. Kinnear, Q.C. Agent—A. Morison, S.S.C.

Counsel for Pursuer—R. V. Campbell. Agent—A. Wylie, W.S.
