accomplices of the panels named in the indictment, and who had been already convicted in England, was a Fenian. The evidence of this very witness had been admitted by Stephen, J., in the trial of that accomplice at Liverpool Assizes, overruling a similar objection.

Lord Justice-Clerk—There has been some novelty and difficulty in the question here raised. It is proposed to examine a witness for the purpose of showing the objects of an alleged association or combination which is not libelled in this indictment. The charge under the indictment is twofold—first, under the statute, and second, under common law; and both of these charges set out in detail a conspiracy to alter the laws of this realm—to assail the power of Queen and Parliament—by means of certain acts of outrage and violence. That is the conspiracy which is alleged. It is alleged also that these acts were committed by means of lignine-dynamite, and that two persons—one called Featherstone, and the other called Dalton—had come from Ireland for the purpose of giving instruction in the mode by which to produce these acts, or in the way to be prepared how to produce them. The prisoners were in Glasgow, and the acts took place in Glasgow. Now, it is proposed by the Lord Advocate to show that there are some people in Ireland called Fenians, or the Fenian Brotherhood, and that the object of that Fenian Brotherhood is to alter the laws of the realm by the means alleged in the indictment. If it stood by itself, and without authority, I should doubt whether under this indictment, alleging a specific conspiracy entered into, the men here could be affected by the existence of another conspiracy in another part of the empire, for a purpose, no doubt, specific enough, but of which other association they are not alleged to be members. I think it is a matter of great doubt, but in one respect I think it is a matter of very little moment, because I fancy the objects of the Fenian Brotherhood are matters of history by this time, and that it was perhaps scarcely necessary to raise this question in law for the purpose of merely defining them. They have been the subject not only of great discussion but of judicial examination and a judicial verdict. On the other hand, the prosecution at Liverpool proceeded on the same grounds as in this case, on the same clause of the statute, and against two prisoners who were concerned in this same conspiracy; and I find that the evidence of the same witness as the Lord Advocate now wishes to examine was tendered and was admitted by the presiding Judge. I am not disposed to make any ruling inconsistent with that judgment, and am therefore, although not without difficulty, of opinion that this witness' evidence cannot be excluded.

Lord Mure and Lord Craighill concurred.

The Court admitted the evidence.

Counsel for Crown—Lord Adv. Balfour, Q.C. —Brand, A.-D.—Mackay, A.-D. Agent—Crown Agent.

Counsel for Panels—Rhind—Guthrie—Baxter —Kennedy—Orr—M'Lennan—Lyell. Agents—Jos. Shaughnessy, Writer, Glasgow.—A. S. & J. Drummond, Writers, Glasgow.

COURT OF SESSION.

Saturday, December 22.

FIRST DIVISION.

BROWN (M'INTOSH'S EXECUTOR), PETITIONER.

Writ—Informality of Execution—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 39.

In an application under sec. 39 of the Conveyancing (Scotland) Act 1874, to have it declared that a codicil which was informally executed had been subscribed by the maker and the witnesses by whom it bore to be attested, it was proved that the will to which the codicil was annexed was written on three pages of a sheet of paper, and part of a fourth, and was signed on each of the three pages and at the end, and that the codicil began on the fourth page and was completed on the first page of a separate sheet, and was signed on the separate sheet but not on the fourth page of the first sheet. The Court (following *M'Laren* v. *Menzies*, July 20, 1876, 3 R. 1151) *declared* that the codicil had been subscribed by the maker in presence of the witnesses by whom it bore to be attested.

Miss Ann M'Intosh died in Haddington on 29th June 1883, leaving a last will and settlement and relative codicil, dated respectively 19th and 30th September 1882, and registered in the Books of Council and Session 19th July 1883.

This petition was presented to the First Division of the Court of Session by William Brown, accountant, Edinburgh, sole executor under the said last will and settlement, under section 39 of the Conveyancing (Scotland) Act 1874, to have it declared that the codicil was subscribed by "the said Ann M'Intosh as maker thereof, and by the said James Mowat and John Clark as witnesses attesting the subscription of the said Ann M'Intosh."

Section 39 provides—"No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and that proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses."

The petition set forth that the will and codicil were prepared by the petitioner on the instructions of the deceased, and that the will was signed and tested in proper form. "The codicil, after being read over and explained to the deceased by

the petitioner, was signed by her on the last page, and her signature was properly attested, the two subscribing witnesses being James Mowat, superintendent, and John Clark, attendant, District Asylum, Haddington, near which the deceased happened to be residing when the said codicil was executed. But owing to an oversight the first of the two pages on which the codicil was written was omitted to be signed by the testatrix. The codicil is contained in two pages, which are on separate sheets. The will occupies three pages and part of a fourth of a sheet of paper, and is signed by the testatrix on each of the said four pages. The codicil begins on the said fourth page of the sheet on which the will is written, immediately below the deceased's signature of the will, and ends on the first page of a separate sheet. The page of the codicil omitted to be signed is the first of the two pages on which it is written, and is thus the fourth page of the sheet on which the will is written."

A proof was led before Lord Mure, from which it appeared that the facts were as above narrated, and it also was proved that when the will was signed it was backed "Last Will and Testament of Miss Ann M'Intosh," and that no change was made on the backing when the codicil was added.

Argued for the petitioner—The case was ruled by *M'Laren* v. *Menzies*, July 20, 1876, 3 R. 1151.

At advising—

Lord President—The case of *M'Laren* v. *Menzies*, although carried by a bare majority of Seven Judges, yet settled the practice, and I think it applies here. We must therefore grant the prayer of the petition.

Lords Deas, Mure, and Shand concurred.

The Court granted the prayer of the petition.

Counsel for Petitioner — Guthrie. Agent — Andrew Urquhart, S.S.C.

Saturday, December 22.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CHURCH *v.* CALEDONIAN RAILWAY COMPANY.

Process—Expenses—A.S., 15th July 1876—*Expense of Precognitions in Action raised in Sheriff Court—Precognitions—Appeal for Jury Trial—*6 *Geo. IV. c.* 120, *sec.* 40.

The third general regulation of the Act of Sederunt of 15th July 1876 provides that the expenses to be charged against an opposite party shall be limited to proper "expenses of process," subject, however, to this provision, that, *inter alia*, the expense of precognitions taken before the raising of the action may be allowed where eventually there is an interlocutor approving of issues or allowing a proof.

An action was brought from the Sheriff Court, after a diet of proof had been fixed, to the Court of Session by an appeal for jury trial under sec. 40 of 6 Geo. IV. c. 120, and was there compromised before an issue was approved of or a proof allowed. *Held*, under the above regulation, that the pursuer could not charge against the defender the expense of precognitions taken before the raising of the action in the Sheriff Court, on the ground that the Act of Sederunt applied only to the practice of the Court of Session, and that in the Court of Session there had been no approval of issues or allowance of proof.

An action of damages for bodily injury was raised in the Sheriff Court of Lanarkshire at the instance of Adam Church against the Caledonian Railway Company, and a record having been made up, an interlocutor was pronounced on 4th October 1883, closing the record, allowing a proof, and fixing the diet of proof. Against this interlocutor the pursuer on 9th October appealed under sec. 40 of the Judicature Act 1825 (6 Geo. IV. c. 120) to the Court of Session with a view to jury trial. This appeal appeared in the Single Bills of the First Division on 31st October, and an order for issues was then pronounced. Immediately thereafter a tender was made which was accepted, and on 7th November the order for issues was discharged.

In taxing the pursuer's account of expenses the Auditor reserved for the consideration of the Court the question of the liability of the defenders for £8, 12s. 4d., being the amount of expenses incurred by the pursuer in taking precognitions before the raising of the action in the Sheriff Court.

In a note appended to his report the Auditor stated—"The pursuer contends that under the proviso in the third general regulation appended to the Act of Sederunt of 15th July 1876, which is in these terms: 'Precognitions, so far as relevant and necessary for proof of the matters in the record between the parties, although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor shall be pronounced either approving of issues or allowing a proof,' —he is entitled to the expense of precognitions in respect of the interlocutor of the Sheriff allowing a proof and fixing a diet. The defenders, on the other hand, maintain that the pursuer by his appeal set aside that order, and that their tender having been made and accepted before the approval of issues they are not liable for these expenses."

The case then appeared in the Single Bills for the approval of the Auditor's report, and the pursuer argued that the charge for precognitions should be allowed, on the ground that the action having been brought to the Court of Session by appeal must be held to have originated there. *Ewing* v. *Cochrane*, July 20, 1883, 20 S.L.R. 842.

At advising—

Lord President—By the third of the general regulations contained in the Act of Sederunt of 15th July 1876 it is provided in the main part of the section that "the expenses to be charged against an opposite party shall be limited to proper expenses of process, without any allowance (beyond that indicated in the table) for preliminary investigations." That general rule, however, is