ment of a man of business by the debtor, and another by the creditors, each of these gentlemen with the interest of his own employer in his care, the result being an arrangement for a compromise by which the debtor got his discharge.

Now, I think it would be a fair matter of arrangement that the creditors should stipulate that the debtor should pay the expense incurred by them in looking into his affairs. But I do not think that was done here. How the proposal would have been received if made we do not know. In the absence of any such bargain I think Mr Gourlay must look for payment to those who employed him for their interest. They might have been satisfied with the examination of the debtor's affairs by his own man of business, and if so, they would have had no other expense. It is no blame to them that they were not, and they seem to have got a better composition because they were not. But I concur with the Sheriff-Substitute in thinking that the person they employed has no action against anyone but them, and that he cannot maintain an action against the defender on the suggestion that but for his services no composition would have been arrived at.

LORD RUTHERFURD CLARK—I have felt a good deal of hesitation in this case, and all the more because I know that I stand alone. I incline to think, however, that the pursuer is entitled to our judgment on the simple ground that all the expenses necessarily incurred in carrying through the composition arrangement should be paid by the defender. In my opinion such expenses should all be charged against the debtor.

It appears to me that the composition contract was effected by means of the pursuers' services, and by means of them alone. Being services which were necessary to the end which the defender had in view, and which were successfully attained, I think that he should pay for them. He has had the benefit of them, and in such a case, when he obtains a discharge on a composition, I think that it may be fairly said that he alone has had the benefit of them.

It is said that the defender employed another person. It is true that at first he did. But the services of this person were of no use, and gave no aid in effecting the composition contract. The chief, if not the only thing which he did, was to prepare a state of affairs; but it was so defective that the creditors would not consider it.

LORD LEE—I do not doubt that in the general case it is reasonable that the expenses properly incurred in carrying through a composition arrangement should fall on the debtor. But I think the question here is whether any arrangement to that effect has been proved? The pursuer was employed by the creditors and not by the defender. In that state of the facts I think that if it was intended to throw the expenses incurred under that employment on the defender, this ought to have been intimated to and should have been made a condition of the acceptance by the creditors of the composition. That might have been quite a reasonable arrangement, and my impression is that it is quite a common one, but in this case I find no trace of such an arrangement. I concur in the opinion of Lord Young. I think there is no proof of the ground of action.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Young. It is unfortunate that the pursuers did not accept the offer of £30 which appears to have been made in the original defences. Mr Gourlay, it is certain, was in the first place employed not by the defender but by the creditors. I cannot find evidence to show that he afterwards became the agent of the defender, or that it was ever suggested to the defender that he was to be held liable to pay for Mr Gourlay's services. It would have been easy to bring to the defender's knowledge that Mr Gourlay's services were to be understood as rendered to him, and I think it would be dangerous to hold that a professional man who was originally employed for one party should without some clear change in his position obvious to the other party be held to have become entitled to claim remuneration from the other whose interest is altogether different from that of the original employer.

The very fact that Mr Gourlay was employed by the creditors leads to the inference that he was to endeavour to come to an arrangement as favourable as possible to them. Now, if he was afterwards to act for both, or for the debtor Lochhead alone, the change ought to be made perfectly clear. Lochhead ought, if he was to be expected to pay for two professional men—both his own agent and Mr Gourlay—to have had that put before him. It is quite clear that if we gave the pursuers decree the result would be that the defender would have to pay for the services both of Mr Gourlay and of his own agent, and there is no ground for supposing he intended to incur double costs. On these grounds I agree with Lord Young.

The Court pronounced this interlocutor:—

"Find in fact that the pursuer Mr Gourlay was employed by the creditors of the defender and not by the defender: Find in law that the defender is not liable in payment of the sum sued for: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-Substitute; of new, assoilzie the defender from the conclusions of the petition," &c.

Counsel for the Pursuers—Ure. Agents—Davidson & Syme, W.S.

Counsel for the Defender—Wilson. Agents—Wishart & M'Naughton, W.S.

Tuesday, January 29.

FIRST DIVISION.

[Lord Fraser, Ordinary.

BROWNE AND OTHERS *v.* M'FARLANE.

Reparation—Slander—Issues—Evidence in Mitigation of Damages without Issue in Justification.

An action of damages for written slander was brought against the proprietor of a newspaper published in Scotland, in which it was represented that one of the pursuers had planned an outrage on himself in order to

make it appear that his political opponents had been guilty of a crime; that he had made his sons parties to the fraud; and that they had become privy to their father's design. The article, which was contributed by a correspondent of the newspaper in Ireland, was admitted, and it was stated in defence that upon the occasion in question, and about the time when the aforesaid pursuer and a companion were expected to reach home, two police constables were attacked with stones near the pursuers' house; that the police captured the assailants, who proved to be the pursuer's sons, and who stated that they had mistaken the police for their father.

No issue of *veritas* was taken.

The defender proposed at the trial to prove the statements in defence as facts which affected the mind of the correspondent, but the evidence was disallowed by the presiding Judge.

On a bill of exceptions the defender maintained the competency of the evidence for the purpose of mitigating damages. *Held* that as the action was laid against the publisher of the newspaper, and not against the correspondent, evidence as to the state of mind of the latter when he wrote the article was not relevant, and had been properly excluded.

This was an action of damages for written slander by the Rev. John James Browne, County Antrim, Ireland, and his three sons, Arthur Browne, George C. Browne, and John James Browne, against John M'Farlane, Edinburgh, the proprietor, printer, and publisher of the *Scottish Leader* newspaper.

The libel complained of was contained in the issue of the *Scottish Leader* of 16th November 1887 under an article headed—"Affairs in Ulster," purporting to be written by the Belfast correspondent of the paper, and was to the following effect—"A very interesting and amusing episode has just come to light, which illustrates the growing tendency of the North toward Home Rule, and the desperate shift to which foolish people of 'Unionist' leanings are sometimes driven to alarm the Protestant population when they begin to manifest any signs of fraternising with the people of Ireland in prosecuting their just claim to self-government. Toome is a small place where the river Baun receives the waters of Lough Neagh before entering Lough Beg. It is a railway station, and the place is famous for its fishery. It is still more famous perhaps because here is a building called the 'Temple of Liberty,' erected by a Mr Carey, a wealthy man, who found that very often in bigoted neighbourhoods well-meaning people could not get a hall to have a meeting in. Here, accordingly, the Protestant Home Rulers have held several successful meetings, and it is plain the seed there sown is bearing fruit. At one of these meetings a Protestant rector attended, named Brown, and gave some little trouble, but declared himself a species of Home Ruler. Now, there is much fun over Rector Brown, whose sons have been brought up before the Magistrates at Toome Petty Sessions charged with throwing stones at a police patrol. When charged, the boys, who are young in knavish tricks, very artlessly let the cat out of the bag. They had been posted there by their father to throw stones at him by way of getting up an outrage for the papers, and for the Loyal and Patriotic Union, and had in the darkness mistaken the police for their reverend parent, who had that evening invited a Roman Catholic gentleman of the village to accompany him to the site of the forthcoming outrage by way of protection. The affair was of course hushed up, and the boys let off with a caution by the Magistrates. As it has not yet been, and could not be, reported in our local 'Unionist' papers, I thought it better to let it see the light in the *Leader*. I am sure your readers will appreciate it as they did the Dolamon incident."

The pursuers averred that the statements in this paragraph falsely and calumniously represented that the Rev. Mr Browne was guilty of planning an outrage on himself in a manner which would make it falsely appear that his political opponents had been guilty of a crime, that he had made his sons parties to the fraud, and that they became privy to their father's design.

The defender admitted the article complained of, but denied the pursuer's averments subject to the following explanation—"The pursuer, the Reverend John James Browne, has made several complaints to the police, all of which have turned out to be unfounded, and upon none of which the authorities have taken action. On the evening of the 3rd of August 1887 he left Toome for his own house accompanied by a gardener of the name of M'Astocker. Some delay occurred on their journey, but at the hour when they should have reached home, in ordinary course, the following occurred—Not far from pursuer's residence two police constables were attacked with stones. The police pursued their assailants, whom they secured and discovered to be the pursuers Arthur Molyneux Browne and George Capel Browne. On being challenged for their conduct they stated that they had mistaken the police for their father. The circumstances were reported by the police to their superiors."

On 9th August 1888 the defender published in the *Scottish Leader* a contradiction of the said paragraph, and apologised for the statements having been allowed to appear in his paper. The defender further upon record withdrew the said article, and repeated the apology and expression of regret already made, and that as regarded all the pursuers.

The following issues were adjusted for the trial of the cause:—

I.—Issue for the Rev. John James Browne.

"It being admitted that the defender is the printer, proprietor, and publisher of the *Scottish Leader* newspaper, published in Edinburgh: It being also admitted that in the number of the said newspaper which was published on 16th November 1887 there was printed the paragraph set forth in the schedule annexed hereto—Whether the said paragraph, or part thereof, is of and concerning the pursuer the Reverend John James Browne, and falsely and calumniously represents him as having been guilty of attempting to impose upon and deceive the public, to the loss, injury, and damage of the said pursuer? Damages laid at £500."

II.—Issues for Arthur Molyneux Browne and Mandatory.

"It being admitted that the defender is the

printer, proprietor, and publisher of the *Scottish Leader* newspaper, published in Edinburgh: It being also admitted that in the number of the said newspaper which was published on 16th November 1887 there was printed the paragraph set forth in the schedule annexed hereto—1. Whether the said paragraph, or part of it, is of and concerning the pursuer the said Arthur Molyneux Browne, and falsely and calumniously represents him as having been guilty of attempting to impose upon and deceive the public, to the loss, injury, and damage of the said pursuer? 2. Whether the said paragraph, or part of it, is of and concerning the said pursuer, and falsely and calumniously represents him as having been charged with a criminal offence, and as having admitted or been found guilty of said offence? Damages laid at £100."

Issues in similar terms to those last above quoted were lodged for the Rev. Mr Browne as tutor and administrator-in-law for the other pursuers George C. Browne and John James Browne.

No issue in justification was taken for the defender.

The defender obtained a commission and diligence for the examination of Samuel Kelly and James Mullan, both constables in the Royal Irish Constabulary, Toomebridge, County Antrim, Ireland, as witnesses for the defender, and in accordance with the appointment of the Court the witnesses were examined upon adjusted interrogatories, and the report of the commission was transmitted to the Clerk of Court to lie *in retentis.*

The trial took place on 24th December 1888 before the Lord President and a jury. Evidence was led by both parties, and in the course of the evidence for the defender his counsel proposed to read evidence, taken on commission as aforesaid, to prove the statement in answer 3 for defender, viz.—"Not far from pursuers' residence two police constables were attacked with stones. The police pursued their assailants, whom they secured and discovered to be the pursuers Arthur Molyneux Browne and George Capel Browne. On being charged for their conduct, they stated that they had mistaken the police for their father." The Lord President rejected the said evidence, and the counsel for the defender excepted to the said ruling.

The jury found for the pursuer the Reverend John James Browne, and assessed the damages at £100, and further found for the other pursuers Arthur Browne, George Browne, and John James Browne jun., and assessed the damages at one farthing for each of the said pursuers. The counsel for the defenders then proposed the foresaid exception, and requested the Lord President to sign a bill of exceptions, which was done on the 11th day of January 1889.

The defender argued in support of the bill—What was alleged in the articles was a conspiracy between the father and his sons for political purposes, and that was the point of the issue for the principal pursuer. The object of desiring the admission of the Irish evidence was in mitigation of damages. Its exclusion proceeded upon too rigorous a construction of the rules of evidence in such cases. This was not a case in which the defender, in order to have the evidence in question admitted, was bound to take an issue of *veritas*, all that he desired was to show that his information was true. He had proved how the information came to him, and he was entitled to show that it was reliable, and what was narrated actually took place—*Ogilvie* v. *Scott*, March 19, 1836, 14 S. 729; *Bryson* v. *Inglis*, January 15, 1844, 6 D. 363; *M'Neill* v. *Rorison*, November 12, 1847, 10 D. 15; *Craig* v. *Jex Blake*, July 7, 1871, 9 Macph. 973; *Paul* v. *Jackson*, January 23, 1884, 11 R. 460.

The pursuer argued—The evidence sought to be admitted was completely rejected; it was not part of the *res gestæ.* While the general circumstances in which an alleged libel was uttered ought to be laid before a jury; the evidence here which was rejected was not of a character to have affected the jury even if it had been admitted and no issue of *veritas* had been taken. Reference was made to the authorities above quoted, and to *Brodie* v. *Blair*, July 17, 1834, 12 S. 944; *Burnaby* v. *Robertson*, March 3, 1848, 10 D. 855.

At advising—

LORD MURE—This case raises an interesting and somewhat difficult question as to whether the presiding Judge was right in refusing at the trial to allow certain evidence which had been taken upon commission in Ireland to be submitted to the jury. That evidence related to the defender's statement in answer 3 of the record to the effect that upon the occasion in question certain police officers were assaulted with stones, and upon overtaking and arresting the offenders, who turned out to be the sons of the pursuer, they stated that they had been posted there by their father with instructions to throw stones at him, and that they had mistaken the police for their father.

Now, upon further reference to the record, there can I think be little doubt that the allegation that the boys so acted is just a part of the libel complained of, because in the report of the alleged outrage in the *Scottish Leader* this passage occurs—"They had been posted there by their father to throw stones at him by way of getting up an outrage for the papers and for the Loyal and Patriotic Union; and had in the darkness mistaken the police for their reverend parent, who had that evening invited a Roman Catholic gentleman of the village to accompany him to the site of the forthcoming outrage by way of protection. The affair was of course hushed up, and the boys let off with a caution by the magistrate." That is the libel, and in article 3 of the condescendence it is most distinctly averred that these statements falsely and calumniously represent that the pursuer, on purpose to deceive and falsely alarm members of the public against his political opponents, planned this outrage on himself.

It appears to me to be plain that the defender's statement in answer 3 is part of the libel itself. It is part of what the boys are said to have done and said, and it has been repeatedly laid down that it is not admissible to prove part of the *veritas* in mitigation of damages unless an issue of *veritas* be taken. This was authoritatively laid down in the case of *Paul* v. *Jack*, 11 R. 460, and in other cases prior to it. In the case of *Craig* v. *Jex Blake*, a question similar to that we have now before us was raised, and an attempt was made to prove *veritas* without taking an issue

in justification, and this line of inquiry I as presiding Judge disallowed.

LORD SHAND—In argument the defender distinctly disavowed any intention of attempting to prove *veritas*, but it appears that at the trial it was proposed to read the evidence which was taken on commission in order to prove the statement in answer 3 for the defender, that the pursuer's sons on being challenged for throwing stones at the police, stated that they had mistaken them for their father. Your Lordship disallowed this evidence, which if it had been admissible would have gone in mitigation of damages. The question between the parties therefore comes to be this, whether this evidence should have been allowed in a question with the pursuer the Rev. John Browne himself. The information contained in the article complained of came to the defender from a correspondent in Ireland. But the action is not directed against the correspondent who supplied the news, but against the proprietor and publisher of the newspaper, and he has accepted any responsibility which may attach to the publication of the article in question. He at the same time admits he knew nothing of the facts of the case, but received all the information he has on the matter in the ordinary course of business. In such circumstances there is no room for letting in evidence as to the state of mind of the writer in order in any way to limit the responsibility of the owner of the paper. In considering as to the admissibility of this evidence, it is as well to have before us the terms of the issue for the pursuer the Rev. John Browne—[*His Lordship here read the issue quoted above*]. Now, upon this issue the point for the jury to consider was, whether Browne, in order to attain the position of a political martyr, had placed his sons outside his house with directions to throw stones at him. It is not now denied by the defenders that this allegation is false, and therefore it is calumnious. But it has been urged that the evidence which has been rejected should have been admitted in mitigation of damages, and that because the pursuer's sons are alleged to have said that in throwing stones at the police they mistook them for their father. But why should an allegation of that kind in any way mitigate damages? Even if the boys had, upon being challenged by the police, told such a story, it could have had no effect in a question like the present, and accordingly the evidence which his Lordship disallowed fell to be rejected.

It could only have been admitted in mitigation of damages provided the writer of the article or the publisher had known that the boys as a matter of fact had told this story. But the defender frankly admits he knew nothing whatever of the facts of the case, and accordingly this evidence was most properly disallowed.

A different question would have been raised if this had been an action directed against the writer of the article, but even then, in order to have got the benefit of this evidence, he would have required to have taken an issue of *veritas*.

In ordinary cases of actions of damages for slander I still hold that the jury ought to have before them every fact which can in any way affect their judgment. This does not, however, apply to the evidence sought to be admitted here, and I therefore come to the same conclusion in the whole matter as as has been arrived at by Lord Mure.

LORD ADAM—I concur in disallowing the evidence which the defender desires to have admitted. My opinion on the question is just this. We have here as defender not the writer of the article complained of, but only the proprietor and publisher of the newspaper in which the article was inserted. If the defender had been the writer of the article complained of, and if he had put in issue the state of his mind when he wrote it, and had appeared for examination and cross-examination, and if in these circumstances such evidence as was here disallowed had been tendered in order to show that he had not been actuated by malicious motives, I should have had great difficulty in refusing to admit it. The evidence in question would in such circumstances have been relevant; but if he had kept out of the box, and had proposed to prove this isolated fact, I rather think I should not have admitted the evidence. That question is, however, not before us, and I do not discuss it further. As the matter stands I have no doubt that it would be quite competent for the publisher of this newspaper to prove the state of his own mind when he admitted that article to the paper and published it. But I do not think it is competent for him to prove the state of mind of an anonymous correspondent who sent him the article, and that by proving a fact which may or may not have affected his mind at all. Upon that ground therefore I think this evidence was rightly rejected.

LORD PRESIDENT—I think this matter is well settled by authority. The points which have been determined have been very clearly stated by Lord Adam, in whose opinion I entirely concur.

The Court disallowed the bill of exceptions.

Counsel for the Pursuers—M'Kechnie—Stevenson. Agent—W. B. Wilson, W.S.

Counsel for the Defenders—J. Comrie Thomson—Shaw. Agents—Millar, Robson, & Innes, S.S.C.

Friday, February 1.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

MAXWELL'S TRUSTEES *v.* GORE AND OTHERS (GILL'S TRUSTEES).

Process — Multiplepoinding — Claim — Riding Claim.

In an action of multiplepoinding a person who is creditor of a creditor of the holder of the fund cannot claim to be ranked directly on the fund *in medio*, nor can a person who is creditor of a creditor of another claimant claim to be ranked as a rider upon the claim of that claimant.

In his trust-disposition and settlement Maxwell directed his trustees in certain events which happened, to realise the residue of his estate, and to pay one-half thereof to