allowed to the successful party—*Cargill* v. *Forrest*, February 27, 1856, 18 D. 662. The general rule was laid down in *Walker* v. *Waterlow* (cited *supra*) that the principle of taxation as between agent and client was not the same when the unsuccessful party had to pay as when the client had to pay. In that case only two counsel had been allowed, and the same rule had been followed in the case of *Lockyer* (Wigtown Burghs—unreported). The same rule had been followed in England—*Tillet* v. *Stracey*, January 31, 1870, L.R., 5 C.P. 185. There was nothing in the present case to take it out of the general rule.

At advising—

LORD KYLLACHY — I see no reason to doubt that the principle which we must follow in this case is that established in the case of *Walker* v. *Waterlow*, and also in the case of the *Wigtown Burghs*. That principle is, that while the taxation must, as prescribed by the statute, be as between agent and client, yet, as the expenses in a case like this have to be paid, not by the client but by a third party, the principle of taxation, though not indeed identical with that between party and party, must yet be different from that applied in the ordinary case of agent and client. That being the principle, I think it can hardly be disputed that, except as between agent and client in the ordinary sense, fees to three counsel are not as a rule allowed. There may indeed be cases in which three counsel are allowed,—cases in which it would be reasonable for an agent, without any authority from his client, to employ three counsel. But except in such exceptional cases, the rule both in England and Scotland is that two counsel only should be allowed.

Now, I do not consider that the present case was so exceptional as to justify a departure from the general rule, and I am therefore of opinion that the report of the Auditor, with the deductions he has made, should be approved.

LORD M'LAREN—I agree with your Lordship that we ought to follow the practice established by the Courts in England, especially when it is considered that there has necessarily been a much larger experience of the working of this statute in England than in Scotland. On the merits of the question, my view is that when a statute authorises the taxation of expenses as between agent and client, what is given is the expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that his account would be taxed. Now, I do not think that a prudent man of business, dealing with a case which presents no special features of difficulty or importance, but which is very like the ordinary run of cases that are sent to proof in the ordinary jurisdiction of the Court, would take on himself the responsibility of employing three counsel, especially as he can always protect himself by employing two of the most eminent counsel who may be willing to undertake the duty. I therefore agree with your Lordship that the Auditor's report should be approved.

The Auditor's report was approved.

Counsel for the Respondent—J. Wilson. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Petitioners—Ure—Dewar. Agent—James Falconer, W.S.

COURT OF SESSION.

Thursday, March 19.

FIRST DIVISION.

(Without Lords Adam and M'Laren, and with Lord Kyllachy).

KINCAID AND ANOTHER *v* QUARRIER.

Minor and Pupil — Custody of Pupil Children—Religious Views of the Father —Orphans—Mora.

Circumstances in which a petition for the custody of pupil children presented by their nearest male agnates *refused.*

Observed (*per* Lord Kyllachy) that if the guardian of a pupil child arranges for that child being brought up in a religion different from that of the father, and if the interference of the Court be invoked to control his action, that interference must, unless in exceptional circumstances, be invoked timeously.

On the 15th of October 1895 Alexander Kincaid, labourer, Neilston, and Alexander Kincaid, painter, Neilston, presented this petition to the Court for the custody of Alexander, John, and Hugh Kincaid, born respectively in 1883, 1884, and 1886, grandsons of the former and nephews of the latter petitioner.

The petitioners averred that Hugh Kincaid, the father of the said children, who died in 1892, lived and died a Roman Catholic, and was sincerely attached to his religion; that his wife, who survived him, and died on 26th May 1893, though originally a Protestant, had before her marriage become a Roman Catholic, and ever since had appeared to be zealous and sincere in her attachment to that form of religion; that both parents had showed great anxiety that their children should be instructed in the tenets of their religion and brought up in the practice of its observances; that up to 24th April 1893 the children had attended Roman Catholic schools; and that shortly before that date the mother received the last sacraments from a Roman Catholic priest, and expressed herself to him and to others as most anxious that the children should be brought up as Roman Catholics.

The petitioners further averred—"After the death of Mrs Kincaid the petitioners discovered that the three youngest children had been illegally removed to Mr Quarrier's Homes on or about 24th April 1893, and

were there being brought up as Protestants. The petitioners repeatedly applied to Mr Quarrier for delivery of the said children, but without success. They were not in a position to take legal proceedings at that time, but they subsequently, in March 1895, instructed an agent to write to Mr Quarrier, calling upon him to deliver up said children. Mr Quarrier, in reply, sent copies of two documents to the following effect:—

'*Barrhead*, April 24, 1893.

'To Mr Wm. Quarrier.

'Dear Sir,—I hereby request you to take my children under your care and guidance, and wish them to be brought up in the Protestant religion. Their names are Alex., John, and Hugh Kincaid, and they were left with you to-day by Robert M'Lean and Jeannie Connley. I also enclose the form of agreement signed by me.—Yours respectfully,

'Mary Cl. or Kincade.

'*Witness*, William Jack.
'*Witness*, James Baird.'

'Orphan Homes of Scotland and Destitute Children's Emigration Homes.

'Form of Agreement.

'I, Mary Kincaid, make application to have my boys, Alexander, Jno., and Hugh Kincaid, aged 9, 11, and 7 years, received into the above named Homes with the view of being emigrated to Canada, under the care of William Quarrier or his agents, or to be kept at home or otherwise disposed of as Mr Quarrier thinks best, in proof whereof I affix my signature.

'Mary Cl. Kincade.

'*Witness*, William Jack.
'*Witness*, James Baird.
'*Barrhead* 24th April 1893.'

Jeannie Connley, referred to in the first of the foregoing writings, was the sister of Mrs Kincaid, and is now dead. She was a Protestant. Robert M'Lean, mentioned in the said writing, is a working man, a religious enthusiast and a street preacher. He was in the habit of calling upon Mrs Kincaid, and, as the petitioners believe and aver, it was he who conceived the idea of sending the children to Mr Quarrier's Homes. He made all the arrangements with Mr Quarrier for this purpose, and removed the children from Barrhead to Mr Quarrier's Homes in Glasgow. Both he and the alleged witnesses are members of a body known in Barrhead as 'The Brethren;' their religious views are strongly opposed to Roman Catholicism. Although the second of the said writings is on one of Mr Quarrier's printed forms, the latter alleges that he knew nothing of the documents till they were delivered to him after completion. The petitioners believe and aver that the said documents, if signed by Mrs Kincaid, do not express her real wishes in regard to the said children. She was dying at the time she is alleged to have signed them, and was weak and facile in mind. She was also, as the petitioners believe and aver, indulging to excess in intoxicating liquors at the time. The witnesses to the said documents did not see Mrs Kincaid sign, nor did they hear her acknowledge her signature. The signatures were obtained by the said Robert M'Lean. The purport of the said documents is directly at variance with Mrs Kincaid's previous life and conduct. In any case, the petitioners submit that she had no right to alter her children's religion in violation of the wishes of her deceased husband, and in disregard of the religious training which they had received during the whole of their lives."

The petitioners accordingly, as the nearest relatives of the said children, the first named petitioner being also liable for their aliment, craved the Court to ordain the said William Quarrier to deliver the children to the petitioners or to any person having their authority; or alternatively, to find and declare that the children should be brought up in the Roman Catholic religion, and to approve of a scheme for that purpose; and to ordain the said William Quarrier to educate and bring up the children in terms of such scheme.

Mr William Quarrier lodged answers in which he averred—"On 24th April 1893 said children were brought to the respondent's City Orphan Home in Glasgow by their aunt Jane Connelly. She was accompanied by Mr Robert M'Lean, who is not, as stated in the petition, a member of the religious body known as 'The Brethren,' but is, and has all along been, a member of the Established Church of Scotland. It was explained to the respondent by said parties that the children's father was dead; that their mother was ill of consumption, and not likely to live many weeks; that the father had been a Roman Catholic, but that the mother was a Protestant, and wished, in prospect of her decease, to make arrangements for the maintenance of the children; that she was in receipt of parochial relief on behalf of the children; and that she wished them removed from the control of parochial authorities and brought up as Protestants. . . . The respondent previous to that date had no knowledge whatever of the children in question, and he has ascertained that the form of agreement which was filled up and duly signed by Mrs Kincaid had been obtained at his office on the previous Saturday, said form being that usually employed with reference to children admitted to the respondent's homes. In the circumstances the respondent agreed to receive the children into his home, and they have been under his care or control ever since."

The respondent further averred that the boys had more than once been visited at his Orphans' Home by the petitioners and by their own elder brother, James Kincaid, [fourteen years of age, who had always lived with his grandfather]; that in consequence of a wish expressed by the boys themselves, Alexander and John had been sent to Canada; that no complaint had ever been made regarding the treatment of the boys, but that, on the contrary, the first named petitioner had expressed himself highly satisfied with it.

The respondent went on to aver that the petitioner Alexander Kincaid senior

refused to do anything for the support of the children during their father's lifetime or after his death while the mother survived; that the mother had during all her married life been obliged to work for her own living and the support of the children, and had been compelled to apply for parochial relief while her husband was still alive; and that the petitioners' statements regarding Mrs Kincaid's relations to the Roman Catholic religion were entirely erroneous. He maintained the genuineness of the documents purporting to be signed by Mrs Kincaid, and contended that these constituted a sufficient nomination of a guardian under the Guardianship of Infants Act 1886, and that he "ought not to part with the children without judicial sanction on the application of persons who have hitherto taken little or no interest in the children and have done nothing for their support, but have allowed them to become chargeable to the parish."

The Court having, under the Conveyancing Act 1874 (37 and 38 Vict. cap. 94), sec. 39, allowed the respondent a proof as to the genuineness of Mrs Kincaid's subscription to the documents founded on by him, it appeared therefrom that they were improbative, in respect that one of the witnesses had not seen Mrs Kincaid sign either of them, but had nevertheless attested them some weeks after her death on M'Lean's invitation. It was admitted at the bar that the petitioners meant to place the children in a Roman Catholic orphanage.

Argued for the petitioners—It being now established that there was no formal appointment of a guardian by the mother in terms of the Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), sec. 3, Mr Quarrier had no title to oppose the petition, and the Court would not look favourably on his contentions in view of the irregular methods employed by his agent M'Lean in completing the documents founded on by the respondent. The present case was indistinguishable from that of *Reilly*, July 10, 1895, 22 R. 879, and the petitioners were entitled to the custody of the children. Alternatively, the Court should avail itself of the power conferred by the Custody of Children Act 1891 (54 Vict. cap. 3), sec. 4, and if it thought it better for the children to remain where they were, order them to be brought up in their father's religion.

Argued for the respondent—Though the documents were defective in formality, the petitioners did not seriously dispute that the signatures of Mrs Kincaid were genuine, and it was clear that the mother desired that the children should be placed with the respondent. No good reason had been averred for their removal from his custody, and the petition should be refused under the Custody of Children Act 1891, secs. 1 and 2, for the elder petitioner had deserted the children and allowed them to become dependent on parochial relief. The paramount consideration with the Court was the welfare of the children and not the father's religious beliefs — *Morrison* v. *Quarrier*, July 19, 1894, 21 R. 1071. No suggestion had been made that the children were badly treated.

At advising—

LORD KYLLACHY—The petitioners in this case are respectively the grandfather and uncle of three pupil children, who have since April 1893 been inmates of the respondent's homes, and two of whom have since February 1894 been brought up and educated in one of those homes situated in Canada. The children are aged respectively 13, 11, and 10. Their parents are both dead, the father having died in May 1892, and the mother in May 1893. The object of the petition is to obtain an order for delivery of the children with a view, as it appears, to their being placed in a Roman Catholic Seminary. There is an alternative prayer that the respondent shall be ordained to bring up and educate the children in the Roman Catholic religion.

In this case it does not appear to me that the circumstances are favourable to the demand of the petitioners. Their individual merits are not perhaps in question. But it has to be noted that while undoubtedly the nearest agnates, they have not taken up the office of tutory, nor do they propose themselves to undertake the maintenance and upbringing of the pupils. Their object, they admit, is to hand them over to a Catholic institution. For themselves they have not probably been in a position to act otherwise, but it is the fact that since prior to the father's death in 1892, they have not shared in the burden of the pupils' maintenance. It has also to be noted that the mother of the children, who on their father's death became their legal guardian, was the person by whom or at whose instance they were handed over to Mr Quarrier. She was at the time on her deathbed—within a month of her death—and it is impossible to doubt that what was done, was done with her cognisance, and that the motive must have been a strong one which induced her while still in life to part, and to part finally, with her young children. No doubt the proof led has failed to establish the probativeness of the writings by which she placed them in the respondent's charge, and these writings therefore cannot be held as constituting a nomination of guardian under the Act of 1886. Still the fact remains that the respondent derived his custody of the children from a lawful source. It is not admitted that the mother died a Protestant, although it is admitted that she had been so up to her marriage. But that question is not material. It is material that she deliberately placed the children in the respondent's charge.

What is, however, to my mind the conclusive consideration in the case is this, that the children have now been for nearly three years in the respondent's hands, educated no doubt as Protestants, but well educated, and well cared for, and with the prospect, if left where they are, of obtaining a fair start in life. In these circumstances I cannot hold that it would be for their benefit that we should disturb arrangements which

have now lasted for so considerable a period. It may be—I express no opinion to the contrary — that, *prima facie,* the father's religion is the religion in which a child should be brought up. But if the guardian of the child, or those who are left to act as such, arrange otherwise, and the interference of the Court is invoked to control their action, it is not, I think, an unsafe rule that that interference must be invoked timeously, and not (unless in exceptional circumstances) after such lapse of time as occurred here. Extreme cases may of course occur, and they must be dealt with when they arise, but the question of creed is never the only question to be considered.

On the whole matter, and laying down no general rule, but having regard to the whole circumstances, and to the welfare of the pupils in the particular case, I am of opinion that the petition should be refused.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court refused the petition.

Counsel for the Petitioners—J. C. Thomson—W. Campbell. Agent—William B. Glen, S.S.C.

Counsel for the Respondent—H. Johnston—Salvesen. Agents—Dove, Lockhart, & Smart, S.S.C.

Friday, March 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ELLIOT *v.* SHEPHERD.

Expenses — Modification — Jury Trial — Reparation — Slander — Conduct of Successful Litigant.

The Court, while bound to accept a jury's finding of fact, and while slow to depart from the general rule that costs follow the event, is entitled in determining the question of expenses to take into consideration the conduct of the successful party either during the litigation or in the matter which gave rise to it.

Where the judge presiding at a jury trial awarded the successful party modified expenses on account of his conduct both before and during the litigation, the Court *adhered,* on the ground of the judge's superior knowledge of the facts of the case.

Circumstances in which *held* by Lord Kyllachy, Ordinary, and *affirmed* by the Inner House for the reason above stated, that the successful defender in an action of damages for slander was entitled only to modified expenses. *Harnett* v. *Vise,* L.R., 5 Ex. D. 307, *approved.*

Adam Shepherd, solicitor, Wick, raised an action of damages for slander against Samuel Elliot, doctor of medicine, Wick.

The pursuer averred that he had been on terms of intimacy and friendship with the defender until recently when the defender conceived an animus against him; that upon one occasion when in company with another person he had met the defender, who, addressing the pursuer's companion, said, "Good morning, I am sorry to see you in such company," meaning thereby that the pursuer was a man of such bad character as not to be fit to associate with respectable persons.

The defender admitted the meeting, but denied having used the words libelled.

The pursuer further condescended on two subsequent occasions, in the Caithness Club and in the defender's house, on which the defender had called the pursuer a "dirty, low, unprincipled fellow," and a "dirty low scum."

The defender denied having used the language attributed to him, and with regard to the first of these occasions explained that the pursuer, not being a member of the club, and having, contrary to the rules of the club, been there as the guest of a member, the defender had called the attention of the pursuer's host to these facts, whereupon an altercation had ensued.

Issues were adjusted appropriate to the pursuer's several averments, and the case went to trial before a jury.

The defender in evidence admitted that on the occasion first complained of he had said "Good morning, I am sorry to see the company you are in," but explained that he did not mean the statement in a slanderous or offensive sense. It further appeared that the pursuer's agents wrote to the defender detailing the alleged slanders and expressing their client's willingness to accept an apology; that this letter was unanswered for a fortnight, and that then the defender's agents wrote a curt note in reply stating that both the slanderous statements attributed to the defender were untrue. The defender also admitted that having gone into the club and found the pursuer and his host there he at once said, "I object to that person's presence in this room;" that he rang the bell and asked the club attendant to "remove this person;" and that he himself had frequently taken the pursuer into the club as his guest before he quarrelled with him.

The jury returned a verdict for the defender.

On 29th January 1896 the Lord Ordinary (KYLLACHY) pronounced an interlocutor applying the verdict, assoilzieing the defender, finding him entitled to expenses subject to modification, and modifying the same to half the taxed amount thereof.

Note.—"The defender has obtained absolvitor and is therefore *prima facie* entitled to expenses. But that question is always in the discretion of the Court both in jury trials and in proofs. In this case I am of opinion that the defender should have expenses, but subject to modification. It appears to me, in the first place, that the defender's pleadings in respect of the first issue were, to say the least, not candid; and I think the same observation applies to