the professional body of which the respondent is a member.

LORD KINNEAR—I quite agree; and I only desire to add that it does not appear to me necessary to decide whether a person who has sustained injury from the misconduct of a law-agent may or may not have a title to complain. But there is no relevant averment in this petition that the petitioner has sustained injury through the respondent's misconduct. What the petitioner says is, that he made an offer which was concealed by the respondent from his clients. The respondent has given a perfectly intelligible reason for withholding the petitioner's offer from his clients, and an account which does not imply misconduct on the part of the respondent. But I agree that we must take the petitioner's account of the matter in considering a question of relevancy, and the petitioner says that the reason for concealing the offer was not a good one, but that he intended to benefit another client at the expense of the trustees who were selling. Now, that might raise a question between him and the trustees who employed him, but it does not appear to me that the petitioner has anything to do with it. But even if he had, the petitioner suffered no prejudice, because he goes on to say that before the vendors considered the offers, and before they made up their minds as to what offers were before them, the respondent confessed that he had concealed the petitioner's offer, and laid the whole facts before them before the final offer was accepted. I cannot see that any injury was done to the petitioner by the delay in laying his offer before the vendors, because, according to his own statement, they knew all about it before they made up their minds which offer to accept. The petitioner goes on to say that the respondent and one of the trustees tried to get him to raise his offer, and if that is so, it only shows that he did not suffer by the delay in reporting his original offer. It seems to me, therefore, that there is no averment of injury done here, even if injury sustained from misconduct is sufficient to support a title to present an application. Whether such injury is sufficient or not I do not think it necessary to decide. On all the other points I agree with Lord M'Laren.

LORD ADAM—I have a little difficulty in this case, because I think the case put before us is one of moral delinquency, and I doubt whether in such a case injury suffered by the petitioner would be necessary to gain a title. However, I do not differ from your Lordships. If I had thought the petitioner had a title to present an application, I should not have been disposed to decide the case without intimation to the Law Agents' Society. I think they have an interest in reference to the matter of removing a person from the roll of Law Agents.

The Court dismissed the petition.

Counsel for the Petitioner — Salvesen. Agents—Miller & Murray, S.S.C.

Counsel for the Respondent — Clyde. Agents—Macpherson & Mackay, W.S.

Wednesday, November 1.

FIRST DIVISION.

SPROLL *v.* WALKER.

Expenses—Slander—Tender—Sufficiency of Apology.

The defender in an action of damages for slander, the slander consisting in the use of the expression "swindler" during a quarrel, tendered on record to the pursuer the sum of one guinea with expenses, and offered to retract any language of an offensive nature which he might have used. He further wrote to the pursuer a letter in which he expressed regret for having used the expression, if he did use it—while denying that he had used it. The pursuer rejected the tender, and the case was tried before a jury, who found a verdict in his favour, but awarded him only one farthing damages.

The presiding judge refused to grant to the pursuer the certificate necessary to entitle him to recover expenses where the damages are below £5.

Held that the defender was entitled to expenses from the pursuer.

An action was raised by James Sproll, confectioner, Leith, against John Walker, wine merchant, Uphall, Linlithgowshire, concluding for payment of £500 as damages for slander. The ground of action averred by the pursuer was, that while he was engaged in transacting business in the shop of Mr Fleming, one of his customers, the defender entered, and, in the presence of Mr Fleming, said of the pursuer, "That man is a damned swindler." The pursuer further averred that the defender made this statement intending to represent that the pursuer was a dishonest person, and that his business had suffered in consequence of the statement.

The defender averred that there had been a quarrel between the pursuer and himself over a trade transaction. He admitted having used strong language to the pursuer, but denied that he had intended to reflect in any way on his honesty. The defender further stated—"Defender without prejudice to his pleas, hereby offers to retract any language he used on the said occasion of an offensive nature, and to apologise for the same, and he also tenders the sum of one guinea sterling in full of the pursuer's claims against him, with the expenses of process to date as these may be taxed. Moreover, since the defences were lodged, the defender, with the view of ending the dispute between them, wrote a letter, of date 25th April, a copy of which is produced, apologising for what occurred on the occasion in question. Reference is made to said letter."

The letter in question was in the follow-

ing terms:—"*Holmes, Uphall, 24th April 1899.* — Sir,—Referring to what passed on the evening of Thursday 16th February last between you and me on my premises and those of my neighbour and tenant Mr Fleming, I hereby express regret to have lost my temper with you and engaged in an interchange of abusive epithets. I don't believe I called you a swindler. If I did I am sorry for it. I thought myself wronged in the lozenge transaction we were discussing, and about which you called on me, and in the heat of the moment I went further with you than I intended or meant. Considering the provocation you gave me you had little ado to take the matter into Court. However, as much in justice to myself as to you, I repeat my regret for the use of unbecoming language towards you.—Your obedient servant. (Signed) JOHN WALKER."

The defender's agents had previous to the closing of the record written the following letter to the pursuer's agent:— "Dear Sir—*James Sproll* v. *John Walker*. . . . .—There had been a deal between pursuer's firm and defender in lozenges. Defender thought himself overcharged. He wrote about it and pursuer called for him on the subject. A discussion ensued, which soon became an abusive altercation. On defender's part I express his willingness to withdraw and apologise for his share of that altercation, as also to pay pursuer's expenses of the action. As defences are not due till to-morrow, these expenses can only amount to between £3 and £4, say that the sum be fixed at £5. Of course, defender maintains he made use of no such words as pursuer has libelled, but in any case he withdraws any hint of charging pursuer with being a swindler. . . .—Yours truly (Signed) JAMES F. MACDONALD."

The case was tried before a jury on the following issue:—"Whether, on or about 16th February 1899, and within or near the premises occupied by Mr Alexander Fleming, grocer, Holmes, the defender, in the presence and hearing of the said Alexander Fleming, falsely and calumniously said of and concerning the pursuer that he was 'a damned swindler,' or used words of the like import and effect, to the loss, injury, and damage of the pursuer? Damages laid at £500."

The jury returned a verdict for the pursuer on the issue, and assessed the amount of damages at one farthing.

LORD M'LAREN refused to grant the pursuer the certificate which under section 40 of the Court of Session Act 1868 (31 and 32 Vict. cap. 100) is necessary to enable the pursuer to recover his expenses where the sum awarded by a jury in an action for defamation or libel is less than £5.

On the motion to apply the verdict the defender moved the Court to find him entitled to his expenses against the pursuer, on the ground that he had in the letters quoted above offered an ample apology to the pursuer, and had tendered to him a sum substantially greater than that awarded by the jury.

The defender founded upon the cases of *Mitchells* v. *Nicoll*, May 24, 1890, 17 R. 795, and *Bonnar* v. *Roden*, June 1, 1887, 14 R. 761.

The pursuer opposed the motion, on the ground that the defender had never offered a proper apology inasmuch as he had never actually withdrawn the offensive expression—*Faulks* v. *Park*, December 22, 1854, 17 D. 247.

LORD M'LAREN—I have already exercised the power which is conferred by statute on the presiding Judge of refusing the pursuer his expenses by withholding the certificate which would entitle him to expenses when the damages awarded are less than £5. I cannot say that I had any difficulty in taking that course, because the sum awarded as damages was the smallest possible. It appeared to me that the action was of the most trivial character, and ought not to have been persisted in after the explanation offered.

I should have been pleased to concur in any judgment proposed by your Lordships as to the defender's expenses. My opinion, however, is, that in the circumstances the defender is entitled to his expenses, because, while the Court of Session Act gives power to the presiding Judge as to the pursuer's expenses, I understand that when the defender moves for expenses the question must be dealt with in the same manner as before the passing of that Act. Now, in an ordinary case of an action for damages, if the sum awarded is less than the sum tendered, the defender is entitled to expenses. This rule is modified in the case of actions for slander where character is involved, because a tender is not deemed sufficient unless it is accompanied by an apology. Having regard to the trivial character of this action, I am of opinion that the apology offered was sufficient. The kind of apology required depended on the nature of the imputation, and as the case is merely one of the use of an offensive expression in the circumstances described, I think the apology offered was sufficient, that it ought to have been accepted, and that the pursuer was in the wrong in carrying the case to trial.

LORD KINNEAR—I agree, and would only add that I am very far from saying that, where an action is brought for the vindication of character from a serious slander, a tender in money is sufficient to relieve the defender from liability for expenses if it be not accompanied by such an apology as by its terms vindicates the character of the pursuer as effectively as would the verdict of a jury. That is the law laid down in *Faulks* v. *Park* (17 D. 247), and I see no reason to dissent from it, but it has no application to a case of this kind, which is obviously an action of a trivial and unreasonable character and such as a reasonable man would not have brought into Court, and which the presiding Judge has refused to say was necessary for the vindication of the pursuer's character.

Therefore it appears to me that looking to the fact that there is nothing in the case except that language was used by the defender which should not have used, and that the defender having an action brought against him expressed sorrow for having

used it, if he did use it—because he did not admit having used it—and tendered a sum of money, not indeed large, but substantial as compared with the sum which the jury has thought sufficient to award, if the pursuer had accepted the sum and apology offered he would have had all the advantage and more which the verdict of the jury has given him.

The Court pronounced this interlocutor—

"Apply the verdict found by the jury on the issue in this cause, and in respect thereof decern against the defender for payment to the pursuer of the sum of one farthing: Find the defender entitled to expenses since 6th April 1899, the date of lodging the defences, and remit," &c.

Counsel for the Pursuer—T. B. Morison. Agent—William Hamilton, S.S.C.

Counsel for the Defender—J. C. Watt. Agent—James F. Macdonald, S.S.C.

Wednesday, November 1.

FIRST DIVISION.

[Lord Pearson, Ordinary.

BANKES *v.* ANDERSON AND OTHERS.

(*Ante*, July 20, 1899, 36 S.L.R. 936.)

Appeal to House of Lords—Petition for Disentail—Interlocutory Judgment—Leave to Appeal.

In a petition for authority to disentail, the three next heirs refused their consent, and after consenting to the usual remits, they lodged objections to the report of the man of skill upon the valuation of the estate. The respondents further made averments as to the state of the petitioner's health, as affecting the value of her interest in the estate. The Lord Ordinary remitted of new to the man of skill to report upon the objections to his report, and remitted to a medical man to report on the state of the petitioner's health. The respondents reclaimed, and moved for a proof on both points. The Court having refused the reclaiming-note, the respondents craved leave to appeal to the House of Lords, on the ground that their case would be prejudiced if the remits were exhausted and the inquiry made before they could appeal. The Court *granted* leave to appeal.

A petition was presented by Miss Maria Ann List Bankes, heiress of entail in possession of Letterewe and Gruinard, for authority to disentail these estates. The three next heirs entitled to succeed to the estate were Mrs Ada Jane Bankes or Anderson and her two sons, all of whom were of full age and subject to no legal incapacity. They declined to give their consent to the disentail, and their expectancies accordingly fell to be valued under the Entail Amendment Act of 1875 (38 and 39 Vict. cap. 61). The respondents consented to the usual remits, suggested the name of the man of skill, and, represented by their local agent, accompanied him on his survey of the estate. They subsequently lodged objections to his report, maintaining that he had undervalued the property, specifying the particulars in which he had been mistaken, and moved for a proof.

The respondents further objected to the report of the actuary, and made certain averments with regard to the petitioner's health as affecting the value of her interest in the estate. These averments were all founded upon present symptoms, and did not involve the previous history of the petitioner.

The Lord Ordinary (PEARSON), on 29th June 1899, pronounced an interlocutor, by which he (1st) remitted of new to Mr Davidson to consider the objections to his report; (2nd) remitted of new to Mr Low to report with regard to the objections to his report; and (3rd) remitted to Dr Byrom Bramwell "to examine the petitioner and to inquire into the facts and circumstances averred . . . touching the petitioner's state of health, and to report whether and to what extent (if any) her expectation of life is thereby affected."

The respondents reclaimed, and moved for a proof, both as to the value of the property and as to the health of the petitioner.

The First Division, on 20th July 1899, adhered to the interlocutor reclaimed against.

The respondents moved for leave to appeal to the House of Lords.

Argued for the respondents—Their case would be prejudiced if the remit were exhausted before they could appeal to the House of Lords. The result would be to exclude them from all remedy, for it would be very difficult to persuade the House of Lords to allow a proof if they came there after an inquiry had already been made in terms of the remit.

The doctor who attended the petitioner had died since the judgment of the Lord Ordinary was pronounced, so it would be impossible for the doctor to whom the Lord Ordinary had remitted to obtain any information from him, and any information concerning her health must be proved by a different method than that allowed—*Macdonald* v. *Macdonalds*, March 15, 1880, 7 R. (H.L.) 41.

Argued for the petitioner—The question was merely one of convenience of procedure, and the respondents would suffer no prejudice if leave were refused. On the other hand, delay might lead to serious consequences for the petitioner. In an entail petition the Court would take this into account, and refuse leave to appeal, even if the respondents had very strong reasons for appealing—*Duke of Sutherland* v. *Marquess of Stafford*, Feb. 27, 1892, 19 R. 504. The usual procedure had been followed as to the mode of valuation, and the re-