here dealing are similar to those which arose in *Latham's* case—that is to say, the danger was of an obvious kind, and did not involve any allurement or any of the elements that are held in law to constitute a trap.

Accordingly I agree with your Lordship in the chair that this is a case where we cannot allow the pursuer to go to proof. I assume all that he says to be true, and there does not appear to me to be anything that could be more fully explained on an inquiry than he has explained it. If the pursuer had alleged that the well constituted a concealed danger of which he was unaware, but of which the owner was aware, the case would have been a totally different one. But he has perilled his case upon its being a danger to which he was fully alive and of which he had complained; and I cannot think that the duty which was incumbent upon him to take care of his children can be transferred by him to the landlord, who had, impliedly at least, repudiated any obligation to make the well safer than it was at the date when the complaints were made.

LORD GUTHRIE—I concur with your Lordship in thinking that the Sheriff-Substitute in his very careful judgment has come to a sound result, but I think with your Lordship in the chair that in reaching that conclusion we do not require to adopt some of the views which he has expressed. It does not seem to matter what was the precise legal position of the child in this case—whether he was a licencee or was on the ground by the implied invitation of the proprietor. But the Sheriff-Substitute in one passage seems to think that, altogether apart from the question of the parents' knowledge, it is possible to say that the case should be dealt with on the footing that this was an obvious and patent danger from the description given by the pursuer of the depth of the well, the size of it, and the distance of the water from the surface of the ground.

I should have doubted whether, if the case had turned on that, it could have been safely disposed of without inquiry. But it does not turn on that. Statement 4 is perfectly distinct as to the pursuer's knowledge. No doubt the pursuer has led to the result which your Lordship proposes by his own pleadings, because the defenders deny what is necessary for your Lordship's judgment, namely, that a complaint had been made, and that the pursuer was in possession of the knowledge which he alleges. But we must take here his own pleadings, and they simply come to this, that he was in the position of knowing this ground to be dangerous for this particular child—he being too young to apprehend the danger or know how to avoid it unless accompanied by an adult.

In that state of his knowledge the pursuer took no steps to terminate the tenancy; he took no steps to make the place less dangerous by covering it up, and he did not prevent this child from going into that dangerous place. The Sheriff-Substitute, who clearly apprehended the issue, recited the law as laid down in *Latham's* case [1913], 1 K.B. 398, at p. 407, by Lord Justice Farwell, in *Stevenson* v. *Corporation of Glasgow*, 1908 S.C. 1034, at p. 1043, by Lord Kinnear, and in the *Lochgelly* case—*Johnstone* v. *Magistrates of Lochgelly*, 1913 S.C. 1078, at p. 1090. The case seems on the pursuer's own statements to fall within the express dicta of these Judges—dicta which were necessary for the decision of the respective cases—especially that of Lord Justice Farwell—"If the child is too young to understand danger the licence ought not to be held to extend to such a child unless accompanied by a competent guardian."

The Court recalled the Sheriff's interlocutor, and, reverting to that of the Sheriff-Substitute, dismissed the action as irrelevant.

Counsel for the Defenders and Appellants—Horne, K.C.—D. Jamieson. Agents—Drummond & Reid, W.S.

Counsel for the Pursuer and Respondent G. Watt, K.C.—W. Mitchell. Agents—Steedman & Richardson, S.S.C.

Saturday, October 28.

FIRST DIVISION.

RUSSEL, PETITIONER.

Husband and Wife—Succession—Jus relicti—Deductions from the Wife's Moveable Estate for the Purpose of Calculating the Jus relicti.

A husband claimed *jus relicti* out of the estate of his wife, who had died in England. Pending the decision of questions relating to the estate, the wife's executor and trustee ingathered the major portion of the moveables, which by order of the Court in England, not opposed by the husband, he invested in certain stocks which thereafter depreciated considerably in value. The husband's claim to *jus relicti* was not admitted by the executor, who, however, entered into a conditional agreement effecting a compromise, but this agreement was to be subject to the sanction of the English courts, and an application by the executor was made for this purpose by summons to the English courts. This application was supported by the husband, who had been called as a defendant, but was opposed, *inter alios*, by the Attorney-General (as representing the interests of charities, the wife having bequeathed her estate for charitable purposes), with the result that the English courts refused to sanction the agreement, and ordered the costs of all parties to that application to be paid out of the estate. Thereafter another summons was brought by the executor, in which the Attorney-General was called as defendant. The husband entered appearance in that action, and an inquiry was ordered as to what, if any, interest the husband took in his wife's

estate. Various costs were incurred with respect thereto, and in the course of that action the English courts ordered a case to be presented to the Inner House to ascertain the Scots law on the matter. The questions in the case were whether for the purpose of ascertaining the husband's *jus relicti* there fell to be deducted from the wife's moveable estate (*a*) the costs of the executor and the husband relative to the conditional agreement; (*b*) the costs of the executor, the husband, and the Attorney-General relative to the summons for sanction of the conditional agreement; (*c*) such of the costs of the same parties relative to the later action as might be directed by the English courts to be paid out of the wife's estate; and (*d*) any other, and if so, what costs, charges, and expenses of administration of the wife's estate; and further, whether and, if so, in what manner and to what extent the amount of the *jus relicti* was affected by the depreciation of the estate. *Held* (1) that the costs referred to in (*a*), (*b*), and (*c*) did not fall within the category of expenses incurred by the executor in making up a title to and realising the wife's estate, and consequently were not deductible therefrom for the purpose of fixing the free succession for the purpose of *jus relicti*, and (2) that the amount of the *jus relicti* was fixed by the value of the wife's estate as at her death, and was not affected by the subsequent depreciation.

James Russel, *petitioner*, presented a petition narrating that in a suit presently depending in the High Court of Justice in England between James Thomas Jones, executor and trustee under the will, dated 24th February 1910, of the deceased Mrs Kate Minnie Parkes or Russel, wife of the petitioner, plaintiff, and His Majesty's Attorney-General, defendant, an order was pronounced on 14th May 1915 directing the preparation of a case and its remit to the Inner House, under the British Law Ascertainment Act 1859 (22 and 23 Vict. cap. 63), for the ascertainment of certain questions of Scots law which had arisen, and craving the Court to pronounce an opinion on the questions of law in the Case.

The Case stated, *inter alia* — "1. Kate Minnie Russel, formerly Kate Minnie Parkes, spinster, and since deceased (hereinafter called 'the testatrix'), was on the 17th day of December 1892 lawfully married to James Russel (hereafter called 'Mr Russel'), who is still living. The marriage took place at Islington in the county of London, and in the marriage register Mr Russel was described as of Roehampton Lodge, Roehampton (near London), and the testatrix as of Islington. There was not any issue of the said marriage.

"2. During the subsistence of the marriage Mr Russel made certain gifts to his wife of the character known according to Scotch law as donations *inter virum et uxorem*.

"3. In the year 1909 Mr Russel commenced proceedings in England against the testatrix for judicial separation. Such proceedings were compromised, and terminated by a deed of separation in English form dated the 17th of April 1909, under which Mr Russel and the testatrix continued until the testatrix's death to live separate and apart. The said deed of separation provided for the payment to the testatrix of a substantial annual allowance, and also that if the testatrix should die in the lifetime of Mr Russel he should permit her will to be proved or administration to her estate to be taken out by the person or persons who would have been entitled to do so had Mr Russel died in her lifetime. . . .

"4. The testatrix by her will dated the 24th of February 1910 appointed the above-named plaintiff James Thomas Jones to be the executor and trustee thereof, and after specifically devising certain real estate in England, and making various specific and pecuniary bequests, the testatrix devised and bequeathed all the residue of her property both real and personal to her executor upon trust to sell the same at his discretion, and out of the proceeds of sale to pay her funeral expenses and debts and the legacies bequeathed by that her will, and to hold the residue upon trust for such charitable objects as he should in his discretion think fit.

"5. The said will is in English form, and was duly executed by the testatrix in England.

"6. The testatrix died in England on the 13th of March 1910 without having revoked or altered her said will, and the same was duly proved by the above-named plaintiff on the 11th of April 1910 in the principal Probate Registry of the High Court of Justice in England.

"7. The estate of the testatrix was of considerable value, the greater portion thereof consisting of or representing personal or moveable property situate in England, and the remaining portion thereof consisting of or representing real estate situate in England. The residue of the estate being given by the said will upon a general charitable trust the beneficial interest therein is represented by the Attorney-General on behalf of the Crown as *parens patriæ*.

"8. Shortly after the death of the testatrix, namely, on the 18th April 1910, Mr Russel claimed to be entitled according to the law of Scotland to one-half of the personal or moveable estate of the testatrix, or to some other interest in her estate as *jus relicti*, on the ground that at the time of the marriage between the testatrix and himself, and thenceforward until the death of the testatrix, his domicile, and consequently the domicile of the testatrix, was Scotch, and that the personal or moveable estate of the testatrix ought to be distributed and administered according to the law of Scotland.

"9. The said claim of Mr Russel was not admitted by the plaintiff, but a compromise was arranged between them, and by a conditional agreement dated the ninth of January 1911, and made between Mr Russel of the one part and the plaintiff of the other part, and subject to the sanction of the High Court of Justice, Chancery Division, being obtained as

thereinafter provided, the plaintiff agreed to pay and Mr Russell agreed to accept the sum of £28,750 in full satisfaction and discharge of all claims and demands whatsoever of Mr Russel, whether under the law of Scotland or the law of England, or otherwise howsoever, in respect of the real and personal estate of the testatrix, and it was further agreed that the plaintiff should forthwith make an application to the said Court for the sanction thereof to that agreement, and in case such sanction should not be obtained on or before the 25th of March 1911, then that agreement should become void.

"10. On the 11th of January 1911 an originating summons, 1911, R. No. 46, was issued in the Chancery Division of the High Court of Justice, England, intituled, in the matter of the estate of the testatrix, wherein the present plaintiff was plaintiff and the Attorney-General and Mr Russel were defendants, and whereby it was asked that the said conditional agreement of the 9th of January 1911 might be sanctioned by the Court. The said application, which was supported by Mr Russel, was not assented to by the Attorney-General on the ground, first, that the Scottish domicile of the testatrix and her husband had not been proved, and secondly, that even if such domicile were proved, then in view of the provisions of the said deed of separation of the 17th of April 1909 Mr Russel had lost any right he might have had to *jus relicti*. In the result the Court declined to sanction the said conditional agreement, and no order was made upon the said application except that the costs of all parties of the application be paid out of the testatrix's estate. Thereupon the said conditional agreement became void.

"11. This action was commenced by originating summons dated the 15th of June 1911, and by an order dated the 24th of July 1911, made after reading the will of the testatrix and the evidence filed on the former application, the Judge declared that the trusts of the testatrix's will ought to be performed and carried into execution, and ordered and adjudged the same accordingly. The said order then directs that the executor's accounts of the estate are to be taken, and also directs accounts of the testatrix's debts and funeral expenses, and an inquiry as to her outstanding personal estate. The following special inquiry was also directed to be made, viz.—'6. An inquiry whether having regard to the domicile of the testatrix and her surviving husband James Russel at the date of her death, and at any other material date, if any, and in view of the provisions of a deed of separation dated the 17th day of April 1909"—meaning the deed of separation already mentioned—"the said James Russel is entitled to any and what interest in the testatrix's moveable property as her surviving husband and by virtue of the Scotch law relating to the *jus relicti*.'

"12. The said order of the 24th July 1911 was on the 27th of October 1911 duly served on Mr Russel, and on the same day he duly entered an appearance in the action. He thereupon became in effect a party to the action, and he has in fact ever since attended all the proceedings therein.

"13. By the month of June 1911 the plaintiff had in the ordinary course of administration realised and got in the whole of the testatrix's moveable estate not specifically bequeathed except one item thereof of no value, and in December 1911 he had in his hands the sum of £56,906, 13s. 6d. cash in respect of such estate and of the income which had accrued before and subsequently to realisation. The estate was realised by the plaintiff as hereinbefore mentioned with the knowledge and assent of Mr Russel.

"14. By an order dated the 14th of December 1911 made upon the application of the Attorney-General, and after hearing the solicitors for the plaintiff and for Mr Russel, it was ordered that the plaintiff do lodge in Court the sum of £55,000 cash (being part of the said sum of £56,906, 13s. 6d). And it was further ordered that such sum when so lodged be invested as to one moiety in consols and as to the other moiety in London County Council Three per Cent. Stock. The said order was not opposed by Mr Russel. The said sum of £55,000 was duly paid into Court by the plaintiff and invested as directed by the said order.

"15. By an order dated the 7th of April 1913 made upon the application of the plaintiff, and after hearing the solicitors for the Attorney-General and for Mr Russel, it was ordered that the cash and money on deposit and interest thereon in Court representing income of the said consols and London County Council Stock be invested and accumulated by the Paymaster-General in India Three per Cent. Stock, also that the future interest on the consols be invested and accumulated in consols, and the future interest in London County Stock in like stock. The directions of this order have been in all respects duly carried out. The said investments mentioned in this and the preceding paragraphs have since depreciated considerably in value.

"16. The said sum of £55,000 when paid into Court passed wholly out of the control and administration of the executor. The said sum and the investments thereof directed by the Court became as from the date of the said payment into Court subject only to the order of the Court, which in due course will order payment or transfer direct to the persons entitled thereto.

"17. In view of the special inquiry No. 6 directed by the said order of the 24th July 1911 it was necessary to ascertain what was the domicile of Mr Russel and the testatrix. Accordingly the Court by an order dated the 11th of December 1912 directed an inquiry what was the domicile of the testatrix and her surviving husband Mr Russel at the date of her death. By the certificate of the Master dated the 3rd of February 1913 it was found that such domicile was Scotch.

"18. By a deed dated the 15th of November 1913 Mr Russel revoked, first, any gift, waiver, or renunciation in favour of the testatrix of his *jus relicti* in the testatrix's personal or moveable estate contained in or that might be implied in or inferred from the

said deed of separation and declared the same to be null and void, and second, all gifts or donations of whatever kind or nature made by him to the testatrix during their marriage, and declared the same to be null and void. The amount of the gifts or donations made by Mr Russel to the testatrix during their marriage has been agreed at £5000, which sum has been duly paid to Mr Russel out of the funds lodged in Court as aforesaid.

"19. Upon the production of the last-mentioned deed the Attorney - General offered no further objection to Mr Russel's claim to *jus relicti*. The Attorney-General does not dispute that in ascertaining the amount of the *jus relicti* proper credit will have to be given to Mr Russel in respect of the value of the chattels specifically bequeathed by the testatrix's will and in respect of any pecuniary legacies thereby given. Certain questions, however, still remain outstanding between Mr Russel on the one hand and the Attorney-General on the other hand in regard to the ascertainment of the extent of the benefit conferred by the *jus relicti*, and in particular as to what deductions should be made from the testatrix's estate in arriving at the same.

"20. The deductions which are admitted by Mr Russel as proper to be made from the testatrix's estate in arriving at the extent of the benefit of the *jus relicti* are as follows, namely, (1) the testatrix's separate debts, (2) her funeral expenses, (3) the expenses of obtaining probate of her will and the estate duty on her moveable property, (4) the said sum of £5000, (5) the costs properly incurred by the executor in ingathering and inventorying the estate, (6) the costs properly incurred by the executor in making and adjusting with the Inland Revenue authorities the valuations for the purpose of the estate duty, (7) the costs properly incurred by the executor in ascertaining the testatrix's debts and procuring their discharge, (8) the costs properly incurred by the executor in connection with the realisation in the ordinary course of the testatrix's assets.

"21. By an order made by Mr Justice Astbury on the 14th of May 1915 it was ordered that a case should be prepared setting forth the facts as regards the matters comprised in inquiry No. 6 directed by the said order of the 24th of July 1911, and that such case and the questions of Scots law arising thereout should be settled by the Judge 'on the basis that the domicile of the testatrix and her husband at the date of her death and at all other material dates (if any) was Scotch, and that there was no issue of their marriage, and that the said James Russel is entitled by virtue of Scots law to the benefit of the *jus relicti* as the testatrix's surviving husband and for the purpose of determining the extent of such benefit, and in particular what deductions should be made from the testatrix's estate in arriving at the same beyond' the deductions which are admitted by Mr Russel as proper to be made in arriving at the extent of the said benefit and set out in paragraph 20 of this case, 'and whether and if so in what manner the said benefit is affected by reason of the depreciation in the value of securities in which moneys representing the estate of the testatrix have since the realisation of the said estate been invested by order of this Court or otherwise.' And it was ordered that such case and questions when so approved and settled should be remitted to the Inner House of the Court of Session in Scotland, and the said Court was thereby requested to pronounce its opinion on such questions upon the law administered by such Court as applicable to the facts to be set forth in such case.

"22. The Attorney-General and Mr Russel agree that Mr Russel is entitled to the income or interest which has been earned by his share of the estate as from the date of the testatrix's death down to the date of payment, and that such income or interest is to be calculated at the rate per cent. per annum at which during the same period the testatrix's moveable estate as a whole has actually brought in income or interest. But this agreement is without prejudice to the question whether and if yea in what manner and to what extent the income or interest to which Mr Russel is entitled as aforesaid is affected by the depreciation of such part of the investments in Court as represent the investments of income or interest.

"23. Mr Russel *contends* that the benefits of his *jus relicti* and of the interest or income thereof are not nor is either of them affected by reason of the depreciation of the investments in Court as hereinbefore mentioned. But he admits that in ascertaining such *jus relicti* regard should be had to the net proceeds of the realisation of the testatrix's moveable estate not specifically bequeathed, and not to the valuations made thereof at the testatrix's death.

"24. The testatrix's personal or moveable estate now consists of (1) the funds in Court, viz., £31,662, 0s. 10d. consols, £36,186, 8s. 0d. London County 3 per cent. Consolidated Stock, and £2940, 11s. 11d. India 3 per cent. Stock, and (2) £203, 10s. 11d. cash in the hands of the plaintiff. Each of the two first named investments includes some accumulations of income, and the third named investment consists entirely of such accumulations. Each of the three will be further increased as further income accrues and is invested under the said order of the 7th of April 1913.

"25. The opinion of the Inner House of the Court of Session in Scotland is desired on the questions hereinafter submitted upon the law administered by the said Court as applicable to the facts hereinbefore set forth."

The *questions* on which the opinion of the Inner House were desired were as follows, viz.—"(1) Whether for the purpose of ascertaining Mr Russel's *jus relicti* there should be deducted from the proceeds of the realisation of the testatrix's moveable property not specifically bequeathed (in addition to the deductions mentioned in paragraph 20 hereof)—(*a*) The costs of the executor and Mr Russel of and incidental to the said conditional agreement of the 9th of January 1911. (*b*) The costs of the

executor Mr Russel and the Attorney-General of and incidental to the originating summons mentioned in paragraph 10 hereof, which costs were dealt with in manner therein appearing. (*c*) Such of the costs of the executor, the Attorney-General, and Mr Russel of the present action, and the costs of Mr Russel in establishing his domicile and the right to his *jus relicti* as may be directed by the Court charged with the administration of the testatrix's estate to be paid out of such estate. (*d*) Any other and if so what costs, charges, and expenses of administering the estate of the testatrix other than those included under (*a*) or (*b*) or (*c*) of this question, or mentioned in paragraph 20 hereof. (2) Whether and if yea in what manner and to what extent the benefit of Mr Russel's *jus relicti* or the interest or income thereof is affected by reason of the depreciation in the value of the aforesaid investments in Court, and in particular how such depreciation ought to be borne as between Mr Russel and the rest of the testatrix's moveable estate."

Argued for the petitioner—The claim for *jus relicti* was a claim of debt emerging at death. Its amount depended on the value of the free executry at the date of death—*Naismith* v. *Boyes*, 1899, 1 F. (H.L.) 79, *per* Lord Watson at p. 82, 36 S.L.R. 973. The amount of the claim fell to be determined as at the date of death, not as at the date when the claim was made—M'Laren's Wills and Succession, vol i, p. 125; *Gilchrist* v. *Gilchrist's Trustees*, 1889, 16 R. 1118, 26 S.L.R. 639; *Earl of Dalhousie* v. *Crokat*, 1868, 6 Macph, 659, *per* Lord Curriehill at p. 666, 5 S.L.R. 406; *M'Murray* v. *M'Murray's Trustees*, 1852, 14 D. 1048, *per* Lord President Colonsay at p. 1053. That question was really one of evidence—what was the proved value of the free executry at the date of death? The executor could not plead depreciation against the claim of an onerous creditor. A claimant for *jus relicti* could not force realisation, but if he delayed his claim too long he might be held to have acquiesced in the actings of the executor, but here the claim was timeously made, and the petitioner could not be held to have acquiesced. Further, the depreciation was the result of an order of the Court which the petitioner could not resist. The contention of the other parties would make the petitioner a residuary successor. As to the question of expense, the petitioner's expenses were to be paid to him. The other expenses could not be charged against his share, for that was a claim of debt and was not affected by an order of a court for payment of expenses out of the estate which were incurred after the date of death. *Connal* v. *Connal*, 1833, 5 S.J. 442, was a very special case, and was of no avail as authority for a general rule. An executor could always call upon a creditor to constitute a claim, which was generally done by obtaining decree in absence. The cost thereof was borne by the creditor. But if the executor resisted the claim then he must bear the expense if he was unsuccessful.

Argued for the executor and trustee James Thomas Jones—No order was made as to the expenses of the agreement, but the executor was entitled to his expenses out of the estate as he was entitled to be indemnified.

Argued for the Attorney-General—The statement of the general law by the petitioner was accurate, subject to the proviso that in special circumstances the general rule might be departed from. Modification of the general rule was allowable — *Gilchrist's* case (*cit.*), *per* Lord Adam at p. 1123; *Ross* v. *Masson*, 1843, 5 D. 483; *Stewart* v. *James Keiller & Sons, Limited*, 1902, 4 F. 657, *per* Lord Trayner at p. 678 and Lord Moncreiff at p. 685, 39 S.L.R. 353; *Connal's* case (*cit.*). Here the circumstances were very special—the depreciation resulted from an order of the Court. The petitioner offered no opposition thereto, and was now barred from claiming relief. In the general case *jus relicti* vested at death in the person entitled to it. Here the petitioner had to prove his domicile was Scottish and to revoke the deed of separation before his right emerged. These circumstances were sufficient to exclude the operation of the general rule and to bar the petitioner's claim for relief. The deed of separation was an express waiver till reduced, and the present circumstances were entirely due to the petitioner's actings. The depreciation should be shared equally. As regards the expenses in question, the expenses of the executor should come out of the estate before the *jus relicti* was ascertained, for they were an ordinary administrative charge—Fraser's Husband and Wife (2nd ed.), vol ii, p. 990; *Connal's* case (*cit.*). The costs referred to in questions 1 (*b*) (*c*) had been ordered by the English courts to be paid out of the trust estate, not half of it, and consequently fell to be deducted from whole estate, including the *jus relicti*.

At advising, the Court (consisting of the LORD PRESIDENT, LORDS JOHNSTON, MACKENZIE, and SKERRINGTON) returned the following opinion :—

> "The Lords of the First Division, having considered the petition of James Russel with case for the opinion of this Court and order by the High Court of Justice (Chancery Division) desiring the opinion of this Court on the questions of law there propounded, and having heard counsel thereon for the petitioner and also for the plaintiff James Thomas Jones and for His Majesty's Attorney-General, make answer to the said questions as follows, *videlicet*—(1) By the law of Scotland *jus relicti* is in the nature of a debt which attaches to the free succession after the claims of onerous creditors, including the expenses of the executor in making up a title to and realising the estate, have been satisfied. The costs referred to in (*a*), (*b*), and (*c*) of question 1 do not in our opinion fall within that category. We know of no expenses and charges other than those mentioned in paragraph 20. of the case which ought to be deducted in ascertaining the amount of the *jus*

relicti. (2) By the law of Scotland *jus relicti* is a certain share of the wife's estate, fixed so far as regards value as at the date of the wife's death. The estate having been reduced to cash by realisation, admittedly in due course and without undue delay, any question of valuation is obviated, and apart from specialties, which do not exist in the present case, no subsequent change in value, either of decrease or increase, which occurred in the course of the subsequent management of the estate by the executor will diminish or enlarge the value of the *jus relicti.* It follows that the amount of the petitioner's claim is not affected by reason of the depreciation in value of the investments referred to in the question."

Counsel for the Petitioner — Dean of Faculty (Clyde, K.C.)—Henderson. Agents —Melville & Lindesay, W.S.

Counsel for the Attorney - General — Lord Advocate (Munro, K.C.) — Solicitor - General (Morison, K.C.) — Pitman. Agents—Carmichael & Miller, W.S.

Counsel for James Thomas Jones—Wark. Agent—P. Morison & Co., W.S.

Tuesday, June 6.

SECOND DIVISION.

HENDERSON AND ANOTHER, PETITIONERS.

Poor's Roll—Senior Counsel—Authority to Act for Poor Litigant — C.A.S., 1913, *A*, *x*, 13.

It is unnecessary to obtain the authority of the Court to enable senior counsel to appear on behalf of a litigant who has obtained the benefit of the poor's roll.

C.A.S., A, x, 13, enacts—"No other advocate or agent than those appointed as herein provided shall be employed, or allow their names to be used in any stage of the cause, unless, on application to the Lord Ordinary or the Court by note, to be signed by the advocate or agent already appointed, the assistance of one of the other counsel or agents for the poor shall be specially authorised; . . ."

Mrs Janet Henderson and another, *pursuers,* brought in the Court of Session an action of damages for personal injuries against the Musselburgh and District Electric Light and Traction Company, *defenders.* The Lord Ordinary (ORMIDALE) having assoilzied the defenders, the pursuers lodged a reclaiming note, and thereafter applied for and were admitted to the benefit of the poor's roll. They then presented a note to the Lord Justice-Clerk, in which they stated that a senior counsel had offered to appear with Mr Inglis, to whom the case had been remitted as one of the counsel for the poor, and craved the Court to authorise the said senior counsel to act in the cause. On the note appearing in the Single Bills of the Second Division counsel for the petitioners referred to C.A.S., 1913, A, x, 13, and moved the Court to grant the prayer of the note. The Court having desired that the motion should be further heard, the case was put out for hearing in the Single Bills of 6th June 1916.

The DEAN OF FACULTY (CLYDE), who appeared at the Bar, having been requested to address the Court, *argued* that as under the Acts of Sederunt of June 16, 1819, and December 21, 1842 (which were in the same terms as C.A.S., 1913, A, x, 13), it had been decided that senior counsel were entitled to give their services in cases on the poor's roll without requiring the authority of the Court — *Garvie* v. *Hammermen of Perth*, 1832, 10 S. 755, at p. 758, *note; Bell* v. *Murray*, 1833, 12 S. 187—notwithstanding the re-enactment by the C.A.S. of the provisions of the earlier Acts of Sederunt which had been open to question, the same rule should be adhered to. He also stated that while it had been laid down that the senior acting for a poor litigant in a case on the poor's roll must do so gratuitously—*Robertson* v. *Finlay*, 1849, 12 D. 393; *Wark* v. *Russell & Wardrop*, 1850, 12 D. 1074—in more recent practice fees to senior counsel had been allowed.

The Court being of opinion that the authority of the Court was not required to enable senior counsel to appear in the cause, found it unnecessary to deal with the note.

Counsel for the Petitioners—E. O. Inglis. Agent—W. K. Lyon, W.S.

Tuesday, October 17.

SECOND DIVISION.

[Lord Dewar, Ordinary.

A B *v.* Y Z.

Reparation—Master and Servant—Slander — Privilege — Facts and Circumstances Inferring Malice — Averments — Relevancy.

A B and C D, two employees in the drawing office of an electrical engineering works, brought actions against Y Z, the manager. The pursuers averred that on a certain day they were talking in the afternoon in the lavatory adjoining the office in which they were working, when they heard some-one approaching; being unwilling to be found talking during business hours they entered a water-closet off the lavatory and closed but did not bolt the door; when they left the water-closet the defender summarily dismissed them, and in answer to a request for explanation replied, "When two men are discovered under those circumstances there is only one inference to be made from their conduct." Further, the pursuers averred that on the following day the defender went into the drawing office and addressed