

Saturday, May 24.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

CASEY v. MAGISTRATES OF GOVAN.

*Expenses—Jury Trial—Appeal for Jury Trial—Small Sum Awarded by Jury—Motion to Modify Expenses.*

A pursuer in a Sheriff Court action of damages sued for payment of the sum of £100. The Sheriff having allowed a proof the pursuer appealed to the Court of Session for jury trial. The pursuer obtained a verdict for £25 only, and the defender moved that the pursuer should only be allowed expenses on the Sheriff Court scale.

*Held* that the pursuer was entitled to Court of Session expenses.

Miss Susan Casey, Govan Road, Glasgow, raised an action against the Magistrates and Town Council of Govan, concluding for payment of £100 as damages in respect of injuries sustained by her in an accident caused, as she alleged, by the faulty condition of the pavement in a street belonging to the defenders.

On 6th December 1901 the Sheriff-Substitute (BOYD) allowed a proof. The pursuer appealed to the First Division for jury trial.

After the case was appealed the defenders admitted liability, but maintained that the sum claimed as damages was excessive.

The case was tried before a jury, and the pursuer obtained a verdict for the sum of £25.

On the pursuer moving the Court to apply the verdict and for expenses, the defenders objected to the pursuer being granted expenses higher than on the Sheriff Court scale, in respect of the smallness of the sum awarded by the jury.

They founded upon the cases of *Shearer v. Malcolm*, February 16, 1899, 1 F. 574, 36 S.L.R. 419; and *Jamieson v. Hartil*, February 5, 1898, 25 R. 551, 35 S.L.R. 450.

LORD PRESIDENT—It appears to me that there is no ground whatever for modifying the expenses. The pursuer in exercise of a legal right under the Judicature Act appealed to this Court. Down to this point the Corporation denied liability and made a serious defence on that ground, but after the case was brought here they, on advice, admitted liability. That was an important gain to the pursuer obtained by coming here, but apart from that, unless it could be shown that there had been some abuse in the procedure in this Court, I do not see how we can deny the pursuer the expenses which she has incurred in the exercise of what was her legal right. Having tried the case, I may say that I am quite clear that there was no abuse or misconduct of any sort in the way of leading excessive evidence, or in any other way. If it had been thought by the Corporation, when they

saw their way to admit liability, that the case should go back to the Sheriff Court for the assessment of damages—that being the only question left—they might have made a motion to that effect. I do not say what the result of such a motion might have been, but they did not do so.

LORD ADAM—I am of the same opinion. Mr Fraser's objection is more applicable as an objection to the Judicature Act than to anything else. But the Legislature were of opinion that a jury was an appropriate tribunal for determining the amount of a pecuniary claim in a personal action for damages, and accordingly gave a pursuer the right to come to this Court to get his claims so settled by the verdict of a jury. It appears to me that the Legislature must have intended that the expenses of having this question so settled should follow as a necessary consequence. That is absolutely a different point from our power to modify expenses in a case where anything in the conduct of the case has not been what it should be, either by the calling of too many witnesses or in some other way. That is a proper question for discussion, but I agree with your Lordship that in the present case there is no possible ground for not allowing the pursuer the expenses of coming here, as he had a perfectly legal right to come.

LORD M'LAREN—I shall say nothing to the contrary of what has been proposed as the ground of judgment by your Lordships, because I agree that in the present state of the rules of Court it would not be fair to cut down the pursuer's claim for expenses. But I venture to say, speaking now from long experience of such cases, that there is a real hardship to public bodies, employers of labour, and others, when they have to contest claims which never could be valued at more than a few pounds under the penalty of paying a sum of expenses altogether disproportionate to the amount found due. I may add that this liability extends even to the case where the defender is successful, for in such cases he is unable to recover his expenses from the other party. It has been found practicable to establish two scales of taxation in the Sheriff Court, and I do not know of any insuperable difficulty in the way of doing the same thing in this Court. This has not been proposed; at all events it has not been done. As there is only the one scale of taxation it must be applied.

LORD KINNEAR—I agree with your Lordship in the chair and with Lord Adam. It may be that under the existing rule there are hardships in certain cases, but whether the enactment in question would involve hardship or inconvenience and what provisions should be made in consequence were questions for the Legislature when the Judicature Act was passed, and may be questions for the Legislature again if it is proposed to alter the law. But it cannot be altered by this Court. In the meantime we must follow the rule laid down for us. I can see no ground for modifying expenses,

and think that we have no alternative but to pronounce the judgment proposed.

The Court repelled the defender's objection.

Counsel for the Pursuer—A. S. D. Thomson. Agents—Patrick & James, S.S.C.

Counsel for the Defenders—M. P. Fraser. Agent—M. J. Brown, S.S.C.

Tuesday, May 27.

## SECOND DIVISION.

[Sheriff Court of Renfrew and Bute at Greenock.]

### CONSTANT v. KINCAID & COMPANY.

*Bankruptcy—Effect of Bankruptcy—Claim against Bankrupt for Breach of Contract—Assignment by Trustee of Bankrupt's Claim against Sub-Contractor—Contract—Breach of Contract—Damages—Measure of Damages—Breach of Contract by Sub-Contractor—Principal Contractor Bankrupt—Sub-Contractor Liable for Whole Loss or only Dividend.*

A contracted with B for two tug-steamers, and B sub-contracted with C for the engines and boilers. The machinery and the tugs were in turn delivered and paid for. After the tugs were delivered the boilers were found to be defective, and had to be replaced by A. It was admitted that B had committed a breach of contract for which he was liable to A in damages, and that this breach of contract was due to a breach of contract on the part of C. Before any payments of damages were made B became bankrupt, and the trustee on his sequestrated estate assigned his claim of damages against C to A, and A discharged his claim against B's estate. A then, as the trustee's assignee, sued C for the amount of the loss he had sustained through having had to replace the defective boilers. It was admitted that the amount of the loss so sustained by A was £1350. *Held* that the fact that B's estate would have been unable to pay the damages in full, and that he had received the full price for the tugs, and had made no cash payment of damages, did not affect the trustee's right to claim the full amount against C, and that A was entitled to recover that amount as the assignee of the trustee.

This was an action of damages for breach of contract at the instance of Joseph Constant, shipowner, 11 Billiter Square, London, as the assignee of the trustee on the sequestrated estate of Carmichael, Maclean, & Company, shipbuilders, Greenock, against John G. Kincaid & Company, engineers, Greenock.

In August 1897 Carmichael, Maclean, & Company agreed to build for Constant two tug-steamers with their engines, and

Carmichael, Maclean, & Company sub-contracted with Kincaid & Company for the engines and boilers. Kincaid & Company sub-contracted again for the boilers, but it is not necessary further to notice this sub-contract.

Kincaid & Company in their contract agreed to relieve Carmichael, Maclean, & Company from all responsibility in connection with a six months' guarantee on their part for faulty material or workmanship so far as the machinery and boilers were concerned.

Kincaid & Company and Carmichael, Maclean, & Company in turn made delivery under their contracts, and the contract price in each case was paid.

Shortly after delivery of the tugs the boilers were found to be defective and had to be replaced by Constant, to whom Carmichael, Maclean, & Company thus became liable in damages, having themselves a corresponding claim against Kincaid & Company.

Before any payments of damages had been made Carmichael, Maclean, & Company became bankrupt, and a trustee was appointed on their estates, who granted to Constant an assignation of his claim against Kincaid & Company in exchange for a discharge by Constant of his claim against the bankrupt estate.

Constant then raised the present action in the Sheriff Court at Greenock, in which the defenders Kincaid & Company pleaded as follows—“(5A) The pursuer, as assignee of the trustee on Carmichael, Maclean, & Company's sequestrated estates, is entitled to claim to any extent against the defenders (which is denied) damages in respect of the alleged breach of contract, is not entitled to claim for more than the sum of any dividend or dividends which may be paid out of the sequestrated estates on the sum of such damages when and as the same may be lawfully ascertained. (8) The pursuer's cedent not having at the date of the alleged assignation suffered loss at the hands of the defenders, or of anyone for whom the defenders are responsible, the alleged assignation conferred on the pursuer no right which he can enforce against the defenders, and the action, so far as laid on the alleged assignation, is therefore irrelevant and unfounded. (11) No loss or damage in respect of the boilers in question having in point of fact been sustained by the pursuer's cedent, this action, so far as at the pursuer's instance as assignee foresaid, is unfounded, and none having been sustained by the pursuer in his individual capacity, or at all events in respect of any default of the defenders, or of any person for whom they are responsible, the action is unfounded, and the defenders are entitled to absolvitor.”

A minute of admissions was lodged for the parties, in which it was admitted, *inter alia*, as follows—“(2) The defenders admit that the boilers which were supplied to the screw tugs 'Lady Jackson' and 'Empress of India' by Carmichael, Maclean, & Company in pursuance of the contract between the pursuer individually and Carmichael, Maclean, & Company . . . were disconform