Wednesday, July 16.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

WALKERS, PARKER, WALKER, & COMPANY *v.* HOGGAN.

Process—Expenses—Debts Recovery Act (30 *and* 31 *Vict. c.* 96), *sec.* 5—*Small Debt Act* (1 *Vict. c.* 41), *sec.* 36.

A defender in an action for a sum, which might have been brought before the Sheriff in the Debts Recovery Court, entered defences on the merits, and also pleaded that in any view no greater expenses should be allowed than would have been allowed in the Debts Recovery Court. Before the Lord Ordinary he did not insist in his defences on the merits. *Held* that though the Court had a discretion to allow only such expenses, the defender ought, in view of the conduct of his defences, to be found liable in full expenses.

This was an action at the instance of Walkers, Parker, Walker, & Company, Newcastle, against George Hoggan, painter, Edinburgh, for £37, 13s. 4d. for paint sold and delivered.

The defender lodged defences on the merits, in which he stated that he was entitled to twelve months' credit, and that that period had not expired with regard to some of the items in the account sued for. These defences he withdrew when the case was before the Lord Ordinary, but maintained this plea-in-law—"(3) In the event of the pursuers obtaining decree for any part of the sum sued for, they are not entitled to any greater expenses than the expenses that would have been incurred in obtaining a decree in the Debts Recovery Court."

The Small Debt Act (1 Vict. c. 41), sec. 36, provides—"That in all causes and prosecutions wherein the debt, demand, or penalty shall not exceed the value of £8, 6s. 8d. sterling, exclusive of expenses and fees of extract, which shall in future be brought or carried on before any Court not according to the summary form herein provided, it shall be lawful for the judge in such Court notwithstanding to allow no other or higher fees or expenses to be taken or paid than those above mentioned."

The Debts Recovery Act (30 and 31 Vict. c. 96), sec. 5, incorporates this section, providing that it shall be read and construed as if it expressly related to actions of the nature and value set forth in section 2 thereof, which section provides —"It shall be lawful for any Sheriff in Scotland, within his sheriffdom, to hear, try, and determine in a summary way, as more particularly hereinafter mentioned, all actions of debt that may competently be brought before him for house maills, men's ordinaries, servants' fees, merchants' accounts, and other the like debts, wherein the debt shall exceed the value of £12 sterling, exclusive of expenses and dues of extract, but shall not exceed the value of £50 sterling, exclusive as aforesaid."

The Lord Ordinary (M'Laren) on 8th July 1884 pronounced this interlocutor—"The Lord Ordinary having heard counsel for the parties in the procedure roll, decerns against the defender conform to the conclusions of the libel: Finds the pursuers entitled to expenses," &c.

The defender reclaimed, and argued that under the sections quoted the Court had a discretion with regard to the matter of expenses, and that when the action might have been brought under the Debts Recovery Act, as here, only the expenses allowed by that Act should be awarded—*Gibson* v. *Milroy*, March 20, 1879, 6 R. 890.

At advising—

Lord President—It was certainly quite competent for the Lord Ordinary in disposing of this case to have allowed the pursuer only such expenses as he would have recovered if the case had been brought under the Debts Recovery Act, but as it is his Lordship has awarded the pursuer full expenses in this Court. That he did in the exercise of a discretionary power which is vested in him, so that notwithstanding the terms of the Act I am not disposed to interfere with his judgment. I do not say that in all cases the Court would refuse to do so, but I cannot say that a sufficient reason for interfering has been made out here. It is quite clear that the defence of this action was not a serious one; I do not call it dishonest, but it was a defence to gain time merely. That being so, one cannot have much sympathy with the defender. Even if after the summons had been served the defender had tendered the amount due, along with the expenses to which the pursuer would have been entitled under the Debts Recovery Act, I think a very different question would have been raised. But the defender here has caused the greater part of the expense, for he came into Court and defended without any good reason; and therefore I think there is no good ground for applying the rule contained in the statute. I do not think that this case will form a precedent, for I am not disposed to encourage the idea that as a general rule full expenses will be given in an action which might have been brought under the Debts Recovery Act.

Lord Mure—The Debts Recovery Act gives a discretion to this Court in regard to expenses, if the Court thinks that the action would more properly have been brought under that Act, just in the same way as the Sheriff had power, under section 36 of the Small Debt Act, to allow only the expenses of a summary proceeding where the debt was under a certain amount. The question is, whether this is a case where we should apply the rule of the Debts Recovery Act? Now, I am satisfied that there is not sufficient ground for doing so here, though I quite agree that there may be cases in which it may be necessary to do so. In this case the party put in two pleas-in-law on the merits, and a special plea as to the question of expenses, and then when the case was before the Lord Ordinary, practically abandoned his defence on the merits. If the defender had wished to have the rules of the section applied, and had written offering to pay the sum sued for, with the expenses allowed by the Debts Recovery Act, then probably the defence which is now maintained would have been more favourably received.

Lord Shand—I agree with your Lordships in holding that in this particular case the discretion of the Lord Ordinary should not be interfered

with, and your Lordships have said enough in the circumstances to show that the defender has caused some expense in stating the defence which he has abandoned. On the general question, I find that the Debts Recovery Act, section 5, incorporates the 36th section of the Small Debt Act, with the result that it is in substance enacted by the Debts Recovery Act that in all causes and prosecutions wherein the debt, demand, or penalty shall not exceed the value of £50, exclusive of expenses and dues of extract, which shall in future be brought or claimed on before any Court, not according to the summary form herein provided, it shall be lawful for the judge in such Court notwithstanding to allow no other or higher fees or expenses to be taken or paid than those above mentioned. Taking that as the general provision of the statute, it is clear that the Legislature intended that in certain cases which were brought in the Court of Session, or in the ordinary Sheriff Court, full expenses should not be allowed if the case should have been brought under the Debts Recovery Act. I will go even further, and say, that in the general case, where the action is proper to the Debts Recovery Court, the intention of the Legislature was that a higher rate of expenses should not be allowed than that fixed by the statute. It is a matter, however, which must be very much in the discretion of the Judge. There might be cases which raised difficult points of law, or where foreigners required to be convened, and which therefore the pursuer might be entitled to bring in the ordinary Sheriff Court, or even in the Court of Session. But in the absence of any specialties, the general rule is that the pursuer is limited to the expenses allowed by the Debts Recovery Act; although the conduct of the defender may make a difference. In this particular case, however, I think that we should adhere to the interlocutor of the Lord Ordinary.

Lord Deas was absent.

The Court adhered.

Counsel for Pursuer — Strachan. Agents — Mack & Grant, S.S.C.

Counsel for Defender — Goudy — Salvesen. Agent—Thomas M'Naught, S.S.C.

Wednesday, July 16.

SECOND DIVISION.

SPECIAL CASE—FLEMING AND ANOTHER (TRUSTEES OF THE KELVINSIDE ESTATE COMPANY) *v.* THE COUNTY ROAD TRUSTEES OF THE COUNTY OF THE LOWER WARD OF LANARK.

Road—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. c.* 51), *secs.* 32 *and* 119—*Duties of Road Trustees under Roads and Bridges Act in respect of Road formerly Regulated by Local Act—Great Western Road Act* (6 *and* 7 *Will. IV. c. cxxviii*)—*Lighting of Suburban Road.*

Trustees of a certain road, acting under a private Local Road Act, were prior to the Roads and Bridges Act of 1878 bound to light out of the tolls levied by them the road under their jurisdiction. That Act abolished tolls and placed the road under the County Road Trustees, who were declared to be liable in all the debts, liabilities, claims, and demands in which the trustees of the local Act were liable, and to be bound to expend their assessment in maintaining and repairing the highways under their jurisdiction. *Held* that they were bound to light the road.

Road—Roads and Bridges (Scotland) Act 1878—*County Road Trustees—Power to Light Roads under their Jurisdiction.*

Held (*dub.* Lord Rutherfurd Clark) that County Road Trustees may, where satisfied that it is desirable for the safety of the public using a much frequented road under their jurisdiction, lawfully provide for its being lighted out of their statutory funds.

This was a Special Case, the first parties to which were the trustees for the Kelvinside Estate Company, and as such proprietors of the lands of Kelvinside, lying within the county of the Lower Ward of Lanark; and the second parties, the road trustees of that county, in whom the roads therein were vested by the Roads and Bridges (Scotland) Act 1878. The first parties were therefore liable in the assessment for the maintenance of roads and bridges imposed by the second parties in respect of the roads on their property.

The Great Western Road, which extends from St George's Road in the city of Glasgow to where Anniesland Toll-Bar formerly stood in the county of the Lower Ward of Lanark, was at the date of this case partly within the jurisdiction of the city of Glasgow, partly within that of the burgh of Hillhead, and partly within that of the second parties. So far as within the jurisdiction of the second parties, that is, from the Botanic Garden Gate to the site of the Anniesland Toll, it extended 1 mile 4 furlongs and 200 yards. With the exception of about 250 yards, this portion of it extended entirely through the first parties' lands of Kelvinside.

For some years prior to the passing of the Roads and Bridges Act 1878, a part of that portion of the Great Western Road which lay within the jurisdiction of the second parties—and after its passing, but shortly before the Act came into operation, the remainder of the road within their jurisdiction—was lighted by the local trustees acting under The Great Western Road Act (6 and 7 Will. IV. c. 138), under the following provisions:—

Section 14 of the Great Western Road Act (6 and 7 Will. IV. c. 138) enacted—"That it shall and may be lawful to and for the said trustees, and they are hereby authorised and empowered, to cause the said main line of the Great Western Road from Anniesland to St George's Road to be watched and lighted after sunset and during the night, and to pay and defray the costs and charges thereof out of the tolls, rates, and duties, and other monies authorised to be levied and raised under and by virtue of this Act on or for the said road herein authorised to be made."

Section 23 enacted that the trustees should, *inter alia*, apply "the tolls to be levied as aforesaid towards the making, completing, and keeping in repair, and watching and lighting, the said roads