Wednesday, February 2.

SECOND DIVISION.

LORD ELPHINSTONE *v.* MONKLAND COAL AND IRON COMPANY.

Process—Expenses—Skilled Witness—Act of Sederunt, July 15th 1876—Notice of Motion for Certificate.

On a reclaiming-note against an interlocutor of a Lord Ordinary the Second Division allowed parties a proof before answer of their averments, and proof was taken before one of the Judges of the Division. More than eight days after the proof, but before the decision of the Court upon the cause with the proof, the party who was ultimately successful in the action obtained from the Judge who took the proof a certificate for an allowance for skilled witnesses. *Held*, in subsequently taxing his account of expenses, that the Act of Sederunt, 15th July 1876, which provides for such a certificate being granted if applied for at the proof or within eight days thereafter, did not apply to the case, but that the question was one for decision on its own circumstances, and that the expenses ought to be allowed.

Opinion that it is not indispensable to an application for a certificate for an allowance for skilled witnesses that notice of motion be given to the opposite party.

In this case (reported, *supra*, 23 S.L.R. 870) a reclaiming-note was presented to the Second Division against Lord Lee's judgment in the Outer House. The Second Division having remitted to Lord Rutherfurd Clark to take evidence, the proof was taken by his Lordship on 2d December 1884. On 20th March 1885 the pursuer applied to his Lordship and obtained from him a certificate for an additional allowance of expenses in respect of investigations made previous to the proof by four skilled witnesses. Provision for such certificate is made by the Act of Sederunt of 15th July 1876, quoted below. On 27th May 1885 the Court after having heard counsel on the proof and reclaiming-note dismissed the action and found the defender entitled to expenses. The pursuer appealed to the House of Lords, and on 29th June 1886 the judgment of the Court of Session was reversed and the pursuer found entitled to expenses. The Auditor taxed the pursuer's account of expenses at £309, 3s. 6d., reserving a sum of £85, 0s. 3d, as the expenses of the additional allowance to the skilled witnesses. The grounds of this reservation were stated by him in a note to his report in the following terms —"The reserved question is of importance, first, as involving a matter of general practice, and second as affecting a considerable amount of expenses in the present case. The table of fees of 1876 in the section dealing with allowances to witnesses, provides, that 'in cases where it is found necessary to employ professional or scientific persons such as physicians, surgeons, chemists, engineers, land surveyors, or accountants to make investigations previous to a trial or proof in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such persons shall be allowed as may be considered fair and reasonable, provided that the judge who tries the cause shall, on a motion made to him either *at the trial or proof, or within eight days thereafter if in Session*, or, if in vacation, within the first eight days of the ensuing session, certify that it was a fit case for such additional allowance.' The terms of this rule are very precise, and so far as my experience goes it has been strictly applied. I may add that in cases where skilled witnesses are engaged, the practice appears to be that the agents arrange for a meeting with the judge, when they are heard on their respective applications for certificates, and (if necessary) against the crave of the opposite party in whole or in part. At the audit in the present case it was objected on the part of the defenders that the pursuer was not entitled to any allowance for his skilled witnesses, in respect, *first*, that the application for certificate was not made within the time allowed by the regulation by the Court, and *second*, that it was made in absence of the defenders' agent and without any previous intimation. With regard to the first ground of objection, I have to state that the proof was taken before Lord Rutherfurd Clark on 2d December 1884 (when as appears from the account it occupied 4 hours), that the certificate was applied for and granted on 20th March 1885 and that the judgment of the Court, after hearing counsel on the proof, was pronounced on 27th May 1885. With regard to the second ground of objection, it is not disputed that the application was made without notice and in absence. The expenses of the defenders were taxed by me under the judgment of 27th May 1885, before the case was appealed to the House of Lords, and I then disallowed the claim of the defenders for an additional allowance to their only skilled witness on the ground that they had not obtained the necessary certificate."

The case having been enrolled for approval of the report, counsel for the pursuer submitted that the sum reserved by the Auditor ought to be included in his amount of expenses. He argued —If the Act of Sederunt applied, which was doubtful, the analogy must be followed of Outer House practice, where the hearing of counsel on the evidence was part of the proof in the sense of the Act of Sederunt. Now the certificate had been applied for and obtained before the hearing. But alternatively, the Act of Sederunt did not apply at all, and this was a question for the discretion of the Court. (2) There was no provision in the Act of Sederunt, assuming its application, nor was it usual in the practice of the Court for a party applying for such a certificate to give notice of motion to the other party.

At advising—

LORD JUSTICE-CLERK—My impression is that we ought to allow the charges to which objection is taken. No doubt the provisions of the Act of sederunt as worded have been applied and applied strictly in more than one case. But nevertheless the matter must be dealt with according to the fair and reasonable meaning of the words of the Act. The proof was taken before one of our own number, namely, Lord Rutherfurd Clark. That implies a report to the Court of the proof. It may be difficult to say whether the trial has taken place before the Judge who has acted as

commissioner to take the evidence, or before the Court who has decided the cause on that evidence, for the matter involves the conduct of parties at the trial, and matters evolved in evidence at the time. Lord Rutherfurd Clark gave the certificate beyond the eight days if they are counted from the end of the proof, and not from the trial of the cause in the sense of the cause being decided. On the whole matter I think it is so difficult to apply the strict words of the Act that I am not disposed to give effect to the defender's objections which have been reserved for our consideration by the Auditor.

Lord Young—I concur. It is no doubt very fitting that the practice in ordinary proofs and jury trials should continue to follow the Act of Sederunt strictly. The question for the Judge is simply, whether the evidence given by such and such a witness before him is such that it may be necessary and expedient that he should go and inspect the place where the question has arisen, and prepare himself previously to the trial. There is no provision for the exact case here, and therefore we must consider it on its proper merits, and I have no difficulty in thinking that the charges should be allowed.

Lord Craighill—I am of the same opinion. I do not think that in its terms the Act of Sederunt is applicable to this case, but in any case I think we should allow the charges objected to, because I cannot see that either the one or the other party to the action can be prejudiced. As regards the second ground of objection, I do not think notice was necessary. No doubt notice of the motion is convenient and proper from one side to the other, but I am not aware that there is any rule or practice in the Outer House which makes such notice indispensable to the success of the motion.

Lord Rutherfurd Clark concurred.

The Court gave decree for the amount of the pursuer's account as taxed, including the sum reserved by the Auditor for the consideration of the Court.

Counsel for Pursuer—D.-F. Mackintosh, Q.C. —Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Defenders—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Thursday, February 3.

SECOND DIVISION.

MACDONALD (CLERK TO THE POLICE COMMISSIONERS OF GOVAN) *v.* ARMOUR AND OTHERS.

Road—Assessment—Roads and Bridges Act 1878 (41 *and* 42 *Vict. c.* 51), *sec.* 54.

Section 54 of the Roads and Bridges Act 1878 enacts that the amount required for the purposes of the Act shall be levied by the local authority at such rates as may be necessary for the purpose by an assessment to be imposed and levied on all lands and heritages within the burgh, and such assessment shall be paid, except as otherwise expressly provided, one-half by the proprietor, and the other half by the tenant or occupier, of the lands and heritages on which such assessments are imposed. *Held* (*diss.* Lord Rutherfurd Clark) that under this enactment the Commissioners were to levy from the actual owners and occupiers severally liable such equal rate per pound as would produce the aggregate sum required, and that they were not to divide such aggregate sum into two equal parts, and levy the one part from the owners as a class equally, and the other from the occupiers as a class equally.

Galloway v. *Nicolson*, March 19, 1875, 2 R. 650, *distinguished.*

Road — Assessment — Exemption — Roads and Bridges (*Scotland*) *Act* 1878 (41 *and* 42 *Vict. c.* 51), *secs.* 54, 55, *and* 86—*General Police and Improvement* (*Scotland*) *Act* 1862 (25 *and* 26 *Vict. c.* 101), *secs.* 87, 88, *and* 89.

Held, on a construction of the above Acts, (1) that the occupiers of houses within a burgh, under the Roads and Bridges Act 1878, were entitled to the exemption provided to occupiers by the 87th, 88th, and 89th of the General Police and Improvement Act 1862, but that the owners of unlet and unoccupied houses were not so entitled; and (2) that the 86th section of the Roads and Bridges Act, in giving the local authority power to relieve occupiers of lands and heritages under the annual value of £4, does not derogate from the power given under the 88th section of the General Police and Improvement Act to remit payment of the assessment on the ground of poverty irrespective of the amount of rent.

This was a Special Case stated for the judgment of the Court upon certain questions relating to assessments for roads, &c., in the burgh of Govan, which was constituted in 1864 under the General Police and Improvement Act 1862, its affairs, including maintenance of roads, &c., being managed by the Commissioners of Police. Subsequently, under the Roads and Bridges Act of 1878, sec. 55, the burgh resolved that the rates and assessments for roads, &c., should cease to be levied under the Act of 1862, and they were in consequence levied under the Act of 1878 as provided by section 54 thereof.

Section 84 of the General Police Act 1862 provided that the Commissioners should "assess all occupiers of lands or premises within the burgh" according to the valuation roll in the sums necessary for the police purposes of the Act, such assessment being called the Police Assessment. Section 87 provided that in the case of lands and premises let at a rent under £4, the owners and not the occupiers should be assessed, but should be allowed a deduction of one-fourth; while section 88 provided that the Commissioners might give relief on the ground of poverty in whole or in part as they might think reasonable. Section 89 provided that "the assessments hereinbefore authorised to be imposed shall be levied from the occupiers of lands or premises, but deduction shall be allowed by the Commissioners of the assessment for any period during which any lands or premises shall