

combined issue alternative to the first. All the issues deal with the same wrongful act and the damage flowing from it, and there is no room for the view that separate damages may be awarded under each of the proposed issues as for separate wrongs."

The defenders, the National Furnishing Trades' Association, reclaimed against the interlocutor approving of issues.

Argued for the reclaimers (defenders)—The action should be dismissed as against these defenders. There was no relevant averment that Holmes and Cummings were agents of the Association, or had authority to bind it. In fact, the rules of the Association which were referred to on record showed that shop-stewards were not to act as agents. There was no averment from which it could be inferred that the Association had authorised shop-stewards to do the acts alleged. There was no averment that the Association had conspired, or had authorised the shop-stewards to combine with others, to effect the dismissal of the pursuer. If, however, there was to be inquiry, it should be by proof before a judge, as difficult questions of law were sure to arise.

Argued for the respondent — His averments were relevant to infer liability on the part of the Association. The discretion of the Lord Ordinary as to the mode of inquiry should not be interfered with. On the questions of relevancy, agency, and conspiracy the following cases were referred to—*Allen v. Flood*, [1898] A.C. 1; *Quinn v. Leatham*, [1901] A.C. 495; *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600; *Fraser v. Younger & Sons*, June 13, 1867, 5 Macph. 861, 4 S.L.R. 90; *South Wales Miners' Federation v. Glamorgan Coal Company*, [1905] A.C. 239; *Denaby and Cadeby Main Collieries, Limited v. Yorkshire Miners' Association*, [1906] A.C. 384; *Taff Vale Railway Company v. Amalgamated Society of Railway Servants*, [1901] A.C. 426.

LORD JUSTICE-CLERK — I should have great difficulty in sending this case to a jury, because that would almost imply that the pursuer had well stated a relevant case, and I am not prepared to give any opinion on that question. I think it is a case for having an inquiry into the facts before giving any decision on the matter of the Union's liability. I say so without in any degree throwing doubt on the general rule that the discretion of the Lord Ordinary is to be respected in the matter of ordering a proof or a jury trial. But while the Lord Ordinary's discretion is to be respected it is not absolute, and I think this is a case for removing the question from a jury and allowing a proof before answer.

LORD STORMONTH-DARLING—I agree.

LORD LOW—I am of the same opinion.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the reclaiming note

against the interlocutor of Lord Salvesen dated 13th November 1906, Recal the said interlocutor and disallow the issues approved by it: Before answer allow the parties a proof of their averments on record, and remit the cause to Lord Salvesen to proceed therein: Reserve the question of expenses, and grant power to the said Lord Ordinary to decern therefor."

Counsel for Pursuer and Respondent—Morison, K.C. — MacRobert. Agents—Laing & Motherwell, W.S.

Counsel for Defenders and Reclaimers—Hunter, K.C.—C. D. Murray. Agents—Fyfe, Ireland & Co., S.S.C.

Thursday, January 10.

SECOND DIVISION.

THOMS v. THOMS' TRUSTEES AND OTHERS.

Expenses—Proof—Jury Trial—Watching Fee—Copies of Precognitions and Correspondence.

Charges for copies of precognitions and correspondence for counsel and agent "watching" a proof or jury trial are rightly included under the expenses of "watching" the case, as without such copies the duty can not be adequately performed.

Expenses—Proof—Jury Trial—Witnesses Called but not Examined.

Whether fees to and cost of precognitions of witnesses not actually examined at a proof or jury trial form a proper charge against an unsuccessful party, is essentially a matter for the Auditor's discretion.

The Auditor's allowance of such expenses approved where witnesses came from Orkney, and could not have been hastily summoned.

Alfred Patrick Macthomas Thoms and others, being the heir-at-law and certain of the next-of-kin of George Hunter Macthomas Thoms, who had been Sheriff of Caithness, Orkney, and Shetland, brought an action for reduction of his trust-disposition and settlement, dated 16th March 1903, and of nine testamentary writings, ranging in date from 7th December 1896 to 29th July 1901, in respect (1) that the testator was not at the respective dates thereof of sound disposing mind, and that the documents were not his deeds; and (2) that the said testamentary writings were impetrated from him when weak and facile. William Alexander Wood, his trustee and executor, and the beneficiaries under his wills, were called as defenders.

Defences were lodged for the trustee and for the Provost, Magistrates, and Council of the Royal Burgh of Kirkwall, who were the residuary legatees under the said trust-disposition and settlement, and these two sets of defenders were represented by

separate counsel and agents. Issues having been allowed, and the case tried before a jury, a verdict in favour of the defenders was returned, and on 22nd February 1905, the defenders having moved the Court to apply the verdict with expenses, the Court pronounced the following interlocutor:—"The Lords, on the motion of the defenders, apply the verdict, assolvie the defenders from the conclusions of the action, and decern: Find the defenders entitled to their expenses, reserving meantime any question of modification or disallowance of separate expenses incurred by the defenders the Provost, Magistrates, and Councillors of the Royal Burgh of Kirkwall, and remit the accounts to the Auditor to tax and to report."

The pursuers lodged a note of objections to the Auditor's report on the account of expenses incurred by the defender William Alexander Wood (Thoms' trustee), in which they, *inter alia*, objected to (1) fees allowed for drawing precognitions of witnesses not examined, twenty-eight in number, and (2) fees paid to witnesses not examined, twenty-nine in number.

The pursuers also lodged a note of objections to the Auditor's report on account of expenses incurred by the defenders, the Burgh of Kirkwall, in which they, *inter alia*, objected to the expenses of—"Two copies precognitions, 250 sheets each; two copies settlement correspondence, &c., 430 sheets each; two copies index to precognitions, 3 sheets each; two copies index to correspondence, 2 sheets each." With respect to the trustee's accounts the pursuers argued that fees should not be allowed to unexamined witnesses, nor for precognitions of unexamined witnesses. With respect to the accounts of the Burgh of Kirkwall they argued—Where two defenders had identical interests, it was not the custom of the Court to allow more than if there had only been one defender, with perhaps at most the addition of a watching fee to the other defender—*Stott v. Fender & Crombie*, October 17, 1878, 16 S.L.R. 5; *Rooney v. Cormack*, October 18, 1895, 23 R. 11, 33 S.L.R. 7. Moreover, it appeared from the report in 12 S.L.T. 736, that the motion for expenses on 22nd February 1905 had been limited "so that the total amount of expenses allowed should not exceed a full grant of expenses to one defender and a watching fee to the other." A watching fee did not include the cost of copies of precognitions. In any case, the two copies should not be allowed, because the other defender had three copies, and "where more than three copies of papers are necessary the same shall be printed, and if not printed the charges for three copies only shall be allowed by the Auditor."—Table of Fees as regulated by Act of Sederunt, 15th July 1876.

The defenders and respondents argued—The interlocutor of 22nd February 1905 left open the whole question of expenses. Two copies of precognitions were necessary to enable counsel and agent adequately to watch the case, and were included in the shorthand expression a "watching fee." In

the circumstances the charges were allowable, especially as most of the witnesses came from Orkney, and so could not have been brought in a hurry, and as it was necessary, in order to meet any case against the testator's testamentary capacity that might be made, to have in attendance witnesses to speak to different periods in the testator's life—*Gunn v. Muirhead*, October 19, 1899, 2 F. 10, 37 S.L.R. 9; *Campbell v. Paterson*, December 23, 1848, 11 D. 325.

LORD JUSTICE-CLERK—I think Mr Cooper said everything for the objections to the report that could be said, but I am satisfied that the Auditor in his taxation of the accounts has dealt with them fairly and indeed drastically as regards taxation.

It is objected that he has allowed copies of precognitions to the defenders, the Burgh of Kirkwall. It was stated that when the case was previously before us the motion for expenses was limited, so far as regards the Burgh of Kirkwall, to a watching fee, reference being made to the report in 12 S.L.T. 736, and it was maintained that a watching fee did not include the expense of precognitions. Whether or not the motion then made was so limited in expression I am not concerned to inquire. The report cannot be taken as conclusive on that matter. It does not bear to be a reproduction of any motion, but only the reporter's brief statement of what he understood was asked for. The interlocutor pronounced, finding the defenders entitled to their expenses, and reserving at that time any question of modification of the separate expenses incurred by the defenders, the Burgh of Kirkwall, makes no mention of a watching fee. But in any event a watching fee is a shorthand way of expressing expenses necessary for watching the case effectively, and must cover what is necessary for watching the case. It is inconceivable to me how a counsel could adequately watch a case without precognitions. In order to watch a case a counsel must necessarily have a knowledge of the case and is entitled to have precognitions to enable him to meet a case which may be made against him.

[*After dealing with an objection to the allowance of fees to a clerk his Lordship proceeded.*]—It is also objected that the Auditor has allowed too much for unexamined witnesses. This is a matter essentially for the Auditor's discretion. I think, moreover, that if ever there was a case where it might be necessary for defenders to have in attendance, in case required, a considerable number of witnesses it is this case. For it must be remembered this was not a case where witnesses could be telegraphed for, or brought on short notice during the trial, if the pursuer's case made them necessary, for most of the witnesses came from Orkney.

On the whole matter I am satisfied that the Auditor has dealt rightly with the case.

LORD STORMONTH DARLING—I quite agree. The Auditor has allowed a watching fee, but he has allowed something without which a watching fee would have

been practically useless. He has allowed copies of precognitions and correspondence to enable counsel to watch effectively. It would have been impossible to watch effectively if counsel had not known the case which had to be met; and therefore what has been said about copies of precognitions and correspondence ought not, in my view, to outweigh the conclusion at which the Auditor has arrived that these were necessary and fair charges in the circumstances, and should be allowed.

I also agree as to the separate point of the mode of dealing with the expenses of witnesses who were not examined. I do not know what would be the use of a public officer, such as the Auditor of Court, if he could not be entrusted with the duty of ascertaining and deciding, with the aid of information supplied by the agents of the parties who are present before him, such questions as this which depend on the circumstances in which certain charges were made. I have never understood that it was the business of this Court, on objections to the Auditor's report, to go into matters of detail and an investigation of minute questions of fact. I have always understood that the sole ground of appeal is some question of principle. There is no such question here, and I am satisfied that the Auditor has applied his mind to the matter, and has reached a perfectly fair result.

LORD LOW—I am of the same opinion.

The Court approved of the Auditor's report on the accounts and repelled the objections.

Counsel for the Pursuers (Objectors)—Cooper, K.C.—Garson. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Defenders—M'Clure, K.C.—Jameson. Agents—Melville & Lindesay, W.S. (for Thoms' Trustee)—Simpson & Marwick, W.S. (for Burgh of Kirkwall and Others.)

Friday, January 11.

SECOND DIVISION.

SOMMERVILLE & SON, LIMITED
v. EDINBURGH AND DISTRICT
WATER TRUSTEES.

(Ante, 42 S.L.R. 410, and 43 S.L.R. 843.)

Expenses—Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61), sec. 1 (b)—Motion for Expenses in Outer House as between Agent and Client only Made after Judgment of House of Lords—Too Late.

The Public Authorities Protection Act 1893 (56 and 57 Vict. c. 61) provides as follows—Section 1. "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pur-

suance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:— . . . (b) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

In an action against certain Water Trustees incorporated by Act of Parliament, the defenders were successful in the Outer House, and obtained an award of expenses in ordinary form. The Inner House having recalled the Lord Ordinary's interlocutor the defenders appealed to the House of Lords, who restored the interlocutor of the Lord Ordinary. No motion was made by the defenders either in the Outer or Inner Houses or the House of Lords that their expenses should be taxed as between agent and client under the Public Authorities Protection Act 1893, but when the judgment of the House was being finally adjusted by the Appeal Committee the defenders made this motion. The Appeal Committee having intimated that this question fell to be decided in the Court of Session on the petition to apply the judgment of the House of Lords, held that the defenders' claim (restricted by them to Outer House expenses) was excluded by their omission to make their motion before the Lord Ordinary, or, at all events, by their failure to reclaim against, or to intimate in the Inner House their dissatisfaction with, that part of the Lord Ordinary's interlocutor which allowed them expenses only on the ordinary scale.

On 14th April 1903 William Sommerville & Son, Limited, brought an action of declarator and interdict against the Edinburgh and District Water Trustees. The action proceeded in the first instance before LORD LOW, who after proof on 13th July 1904 pronounced the following interlocutor—"The Lord Ordinary having considered the whole cause, assolvies the defenders from the conclusions of the summons and decerns: Finds the defenders entitled to expenses: Allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax and report."

The pursuers reclaimed, and on 10th March 1905 this interlocutor was pronounced by their Lordships of the Second Division—"The Lords having heard counsel for the parties on the reclaiming note for the pursuers against the interlocutor of Lord Low, dated 13th July 1904, Recal the said interlocutor reclaimed against: Find the defenders liable to the pursuers in damages, and assess the same at the sum of two thousand pounds (£2000) sterling, for which decern: Find the defenders liable in expenses, and remit the same to the Auditor to tax and to report."

Against this judgment the defenders appealed to the House of Lords, who sus-