Counsel for the Second and Third Parties —C. H. Brown. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Fourth Parties—W. A. Ramsay. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Fifth Parties — D. P. Fleming. Agents — Mackenzie, Innes, & Logan, W.S.

Counsel for the Sixth Parties—D. Anderson. Agents — Macpherson & Mackay, S.S.C.

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*Wednesday, March* 19.

## FIRST DIVISION.

[Sheriff Court at Glasgow.

## M'CLYMONT *v.* GLASGOW CORPORATION.

*Expenses — Taxation — Preparation for Proof—Tender—Acceptance of Tender—General Regulation (No.* 3) *Appended to A.S.* 15*th July* 1876.

An action raised in the Sheriff Court was, after proof had been allowed, appealed to the Court of Session for jury trial. An order for issues was thereafter pronounced, but before further procedure a tender was made by the defenders and accepted, the sum tendered being decerned for with expenses.

*Held* (after consultation with the Judges of the Second Division) that the defenders were liable for the expenses of precognitions and medical reports obtained by the pursuer while the case was still in the Sheriff Court, and charged on the Sheriff Court scale.

*Church* v. *Caledonian Railway Company*, December 22, 1883, 11 R. 398, 21 S.L.R. 268, *overruled.*

No. 3 of the General Regulations appended to the Act of Sederunt 15th July 1876 provides—"The expenses to be charged against an opposite party shall be limited to proper 'expenses of process,' without any allowance (beyond that indicated in the table) for preliminary investigations, subject to this proviso, that precognitions (so far as relevant and necessary for proof of the matters in the record between the parties), although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor shall be pronounced either approving of issues or allowing a proof."

Mrs E. Aitken or M'Clymont, wife of John M'Clymont, 733 Garscube Road, Glasgow, *pursuer*, with the consent of her husband as her curator and administrator-in-law, brought an action against the Corporation of Glasgow, *defenders*, in which she claimed £250 as damages for personal injury which she alleged she had sustained through the fault of one of the defenders' servants while in the course of his employment as a tramway conductor, the pursuer's allegation being that he (the conductor), while attempting to remove the pursuer's grandson from a tramway car, pushed him against the pursuer, who was in the act of boarding the car, with the result that she was thrown to the ground and injured.

On 31st October 1912 the Sheriff-Substitute (FYFE) allowed a proof. Thereafter, on 1st November, the cause was remitted, on the pursuer's request, to the First Division, and on 13th November their Lordships ordered issues. On 19th November the defenders lodged a minute of tender in which they offered £50 with expenses as taxed on settlement of the action. On the following day the pursuer lodged a minute accepting the tender, and on the same date the Court pronounced an interlocutor decerning against the defenders for payment to the pursuer of the said sum with expenses, as the same should be taxed by the Auditor.

The Auditor having lodged his report the defenders, on 27th January 1913, lodged a note of objections thereto, in respect that he (the Auditor) had allowed various items therein specified, amounting in all to £12, in respect of precognitions and medical reports taken while the case was still in the Sheriff Court and charged on the Sheriff Court scale.

The note was heard in the Single Bills of 6th February before a Court consisting of the LORD PRESIDENT, LORD JOHNSTON, and LORD MACKENZIE.

Argued for defenders—Where, as here, issues had not been adjusted prior to the acceptance of the tender these expenses should be disallowed — *Church* v. *Caledonian Railway Company*, December 22, 1883, 11 R. 398, 21 S.L.R. 268.

Argued for pursuer—Where, as here, an order for proof had been pronounced in the Sheriff Court and an order for issues in the Court of Session the pursuer was entitled to the expenses incurred by her in preparing for the proof — *Boyle and Others* v. *Olsen and Others*, November 15, 1912, 50 S.L.R. 67. [LORD PRESIDENT—We shall consult with the Judges of the Second Division before disposing of this.]

At advising, the opinion of the Court was delivered by the

LORD PRESIDENT—In this case an action of damages was raised in the Sheriff Court, and a proof was allowed in respect that a plea to the relevancy was not insisted in by the defenders. The pursuer then appealed for jury trial, and there being no question of relevancy issues were ordered. On the day that issues were to be adjusted a tender was put in, and, the pursuer having accepted it, the sum tendered was decerned for with expenses.

When the pursuer's account of expenses was presented it included charges for precognitions which were necessary for the case if it was to go on, and they were charged at the Sheriff Court scale. The Auditor having allowed the charges for these precognitions, they were objected to, the objection being based on the deci-

sion in the case of *Church* v. *Caledonian Railway Company* (1883, 11 R. 398), where such expenses were disallowed. There is a familiar rule that expenses of taking precognitions are only allowed where an action has reached the stage of an interlocutor allowing proof. The argument in that case, which was successful, was that when the case was appealed to this Court for jury trial it became a Court of Session case and not a Sheriff Court case, and that as a compromise took place when a tender was accepted before adjustment of an issue, prior to which no proof was allowed in the Court of Session, therefore the expenses of precognitions could not be allowed. There is no doubt that was what was decided in the case of *Church*.

After hearing counsel in the present case we were of opinion that we could not deal with the matter without consulting the Second Division. Having done so we are of opinion that, notwithstanding the case of *Church*, the expenses here charged on the Sheriff Court scale were rightly allowed by the Auditor. The precognitions were taken while the case was still in the Sheriff Court, and if it had remained there and the tender had been put in and accepted after proof had been allowed in that Court, undoubtedly the expenses would have been allowed. The case having come to this Court and followed the procedure necessary to attain the same stage as it had already attained in the Sheriff Court, because an order for issues is tantamount to an allowance of proof, we are of opinion that that ought not to prevent the expenses being recovered. We shall therefore disallow the objection and approve of the Auditor's report.

The Court repelled the objections, approved of the Auditor's report, and decerned against the defenders for payment of the taxed amount of the pursuer's account.

Counsel for Pursuer—Lippe. Agents—Scott & Glover, W.S.

Counsel for Defenders—Russell. Agents—St Clair Swanson & Manson, W.S.

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*Wednesday, March* 19.

## FIRST DIVISION.

[Lord Ordinary on the Bills.

## LOCHABER DISTRICT COMMITTEE OF INVERNESS-SHIRE COUNTY COUNCIL AND OTHERS *v.* THE INVERGARRY AND FORT AUGUSTUS RAILWAY COMPANY.

*Railway—Abandonment—Power of Directors to Dismantle whole Undertaking and Sell the Plant—Invergarry and Fort Augustus Railway Act* 1896 (59 *and* 60 *Vict. cap. ccxl*).

The directors of a railway company have no power at their own hand to dismantle the whole undertaking and convert the plant into money.

The directors of a railway company having proposed to dismantle the line and to sell the plant, objection was taken thereto by, *inter alios*, one of the shareholders (who was also a debenture holder) on the ground that the proposal was *ultra vires* and illegal.

*Held* that the directors had no power to dismantle the line, and interdict granted as craved.

The Fourth or Lochaber District Committee of the County Council of Inverness-shire and others, *complainers*, presented a note of suspension and interdict in the Bill Chamber in which they craved the Court to interdict the Invergarry and Fort Augustus Railway Company, incorporated under the Invergarry and Fort Augustus Railway Acts of 1896 (59 and 60 Vict. cap. ccxl) and 1897 (61 and 62 Vict. cap. ccxvii), *respondents*, from selling or otherwise disposing of the steel rails, &c., comprising the material of the permanent way of the railway, or from otherwise taking any steps to dismantle the line.

The following *narrative of the facts* is taken from the opinion (*infra*) of the Lord President—"The history of the matter is this. The respondents, the railway company, are incorporated under the Invergarry and Fort Augustus Railway Act 1896, which provided for the making of a railway and pier in the county of Inverness to be called the Invergarry and Fort Augustus Railway, and for other purposes. The works authorised by the Act consisted of, besides the pier, a railway 24 miles roughly in length, which began by a junction with the West Highland Railway near Spean Bridge and terminated near the centre bridge carrying the public road from Invermoriston to Fort Augustus over the river Oich. The railway was constructed and was for some time worked by the Highland Railway Company under an agreement. At the expiry of the agreement the Highland Railway Company refused to renew it, and the railway was then worked by the North British Railway Company under another agreement up till 31st October 1911. Since that agreement terminated the respondents have been entirely unable to work the railway. They cannot get any of the Scottish railway companies to work it. They have no money to work it themselves, and having come to the conclusion that it was hopeless to suppose that the railway could be worked, they resolved to sell off the whole of the railway plant, and accordingly they inserted an advertisement in the papers on 16th December 1912 to the following effect —'Invergarry and Fort Augustus Railway. Permanent way material, steel girders, and station equipment for sale.' And they then say that they are prepared to sell the rails, chairs, &c., &c., comprising the material of the permanent way of the railway situated between Spean Bridge and Fort Augustus, together with the steel bridge work, turntables, &c., &c., the length of the single line, exclusive of loops and sidings, being about 24 miles."

The complainers averred—"(Stat. 8) In connection with the construction of the