

Thursday, March 20.

SECOND DIVISION.

[Lord Blackburn, Ordinary.]

NOBEL'S EXPLOSIVES COMPANY,
LIMITED v. THE BRITISH DOMINIONS
GENERAL INSURANCE COMPANY,
LIMITED.

(Reported *ante*, March 2, 1918, 55 S.L.R. 296,
and 1918 S.C. 373.)

Expenses—Abandonment—Minute of Abandonment—“Full Expenses or Costs”—Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 10.

The Judicature Act 1825 (6 Geo. IV, cap. 120) provides (section 10) that a pursuer may “abandon the cause on paying full expenses or costs to the defender.”

An insurance company was sued for payment of claims under certain policies of insurance, and the Lord Ordinary dismissed the action as irrelevant. The Court on a reclaiming note recalled the Lord Ordinary's interlocutor and allowed a proof before answer, finding the pursuers entitled to the expenses of the reclaiming note, and, on a petition being subsequently presented, refused the defenders leave to appeal to the House of Lords. The pursuers subsequently lodged a minute of abandonment in ordinary form. *Held (dis. Lord Dundas)* that the defenders were not entitled to the expenses of the reclaiming note, consisting of their own expenses and the expenses paid by them to the pursuers, or to the expenses of the application for leave to appeal.

Observations per curiam on Stewart v. Stewart, 1906, 8 F. 769, 43 S.L.R. 522.

The Judicature Act 1825 (6 Geo. IV, cap. 120), section 10, is quoted *supra in rubric*.

Nobel's Explosives Company, Limited, *pursuers*, brought an action against The British Dominions General Insurance Company, Limited, *defenders*, for payment of claims under certain policies of insurance entered into with the defenders (see 55 S.L.R. 296). After the action had been proceeded with through several stages the pursuers lodged a minute of abandonment in terms of section 10 of the Judicature Act 1825, and the defenders' account of expenses was remitted to the Auditor of Court for taxation. The defenders lodged a note of objections to the Auditor's report.

The *facts* of the case are set forth in the opinion of the Lord Ordinary (BLACKBURN) *infra*.

On 26th February 1919 the Lord Ordinary repelled the defenders' objections to the Auditor's report.

Opinion.—“In this action the pursuers lodged a minute of abandonment in terms of section 10 of the Judicature Act 1825, and in respect thereof the Lord Ordinary (Lord Cullen) pronounced an interlocutor on 15th October 1918 appointing the defenders to give in an account of expenses, and

remitting the same to the Auditor for taxation. In terms of the above section the defenders are entitled to their ‘full expenses and costs,’ and a question of some difficulty is raised as to whether this statutory direction entitles them to certain charges which they included in their account and which the Auditor has disallowed.

“Prior to the lodging of the minute of abandonment the following procedure had taken place. On 9th November 1917 the Lord Ordinary dismissed the action as irrelevant, and thereafter the pursuers reclaimed to the Second Division. On 2nd March 1918 the Lord Ordinary's interlocutor was recalled, a remit made to him to allow a proof before answer, and the pursuers were found entitled to their expenses from 9th November 1917. On 19th March 1918 the Lord Ordinary decerned against the defenders for the sum of £41, 14s. 2d., being the taxed amount of these expenses. On the 20th March 1918 the Second Division refused a petition by the defenders for leave to appeal to the House of Lords against their interlocutor of 2nd March 1918.

“The defenders now claim that the ‘full expenses and costs’ which they are entitled to recover from the pursuers should include (1) their own expenses in opposing the reclaiming note to the Inner House, which have been taxed at £26, 10s. 5d.; (2) the sum paid by them to the pursuers as the expenses of the reclaiming note, which was £41, 2s. 8d. instead of £41, 14s. 2d. decerned for by the Lord Ordinary; and (3) the expenses of the application for leave to appeal to the House of Lords, amounting to £13, 14s. 2d.

“The defenders in support of their claim rely on the case of *Stewart v. Stewart*, 1906, 8 F. 769, 43 S.L.R. 522, in which the same question was discussed under somewhat peculiar circumstances. The action was one of divorce, the wife being pursuer. After a long and expensive proof on the question of jurisdiction, in which the pursuer was successful and obtained a decree for expenses, she came to the conclusion that a decree in an action of separation and aliment might be more suitable to her circumstances. It was assumed that the new action could not be raised till the action of divorce had been abandoned, and before taking this step the pursuer desired to ascertain whether the effect of a minute of abandonment under the statute would be to render her liable to the defender for the whole expenses of the proof on jurisdiction, including the sum already paid by him to her under the Lord Ordinary's decree, or whether these expenses would be treated as already disposed of. She accordingly lodged a minute of abandonment in the divorce action, containing a qualification so framed as to raise this question. The Lord Ordinary had no doubt that a minute in this form did not comply with the statute and that it ought to be refused, but at the request of parties, and after hearing argument, he consented to give an opinion on the question raised, and pronounced an interlocutor, dated 19th January 1906, finding that as a condition of abandonment all these expenses would require to be paid by the pursuer. In his

note the Lord Ordinary explained the circumstances, and stated his opinion that strictly speaking the minute ought to be refused. The pursuer reclaimed against his interlocutor and her counsel was heard in the First Division, when it was suggested by the Lord President that it might be competent to raise an action of separation and aliment without abandoning the divorce action, and the case was continued to enable the pursuer to consider this suggestion. An action of separation and aliment was raised on 15th February and the record closed on 6th March. It was thereafter verbally reported by the Lord Ordinary to the First Division on the question of competency. At the discussion which followed the argument was entirely confined to the question of competency, and as the Division arrived at a conclusion favourable to the pursuer on this point, and held that she did not require to abandon the divorce action at that stage, it became unnecessary to deal with the question raised in the Lord Ordinary's interlocutor of 19th January as to the expenses payable by her as a condition of abandonment. It was, however, necessary for the Division to dispose of the reclaiming note against the Lord Ordinary's interlocutor, and this they did by refusing it. I do not think that by so doing they can be held to have affirmed the Lord Ordinary's views, and on reading the opinions delivered I am satisfied that they did not intend to do so. The Lord President says—'As he' (the Lord Ordinary) 'has pronounced an opinion on what is the true effect of the minute under the statute, I see no harm at least in saying that I think his Lordship has taken completely the correct view.' Lord McLaren made no reference to the question at all. Lord Kinnear says—'I think the Lord Ordinary was absolutely right in holding that the minute of abandonment could not be sustained inasmuch as the statutory condition had not been complied with, and therefore as far as that question goes we can only adhere'; while Lord Pearson carefully protects himself from being held as in any way committed to the Lord Ordinary's view on expenses. It will be noticed that Lord Kinnear does not refer to anything contained in the interlocutor reclaimed against, but to a statement in the note attached to the interlocutor.

"I think the Auditor is justified in thinking that *Stewart v. Stewart* did not decide the point raised, and although the case is valuable for the opinions expressed by the Lord President and Lord Dundas, it appears to me that I must deal with the question as an open one.

"Apart from the case of *Stewart*, the only authorities to which I was referred at the debate were the cases of *Lockhart*, 1845, 7 D. 1045, and *The Mica Insulator Company v. Bruce Peebles & Company, Limited*, 1907 S.C. 1293, 44 S.L.R. 674. I have not succeeded in finding any others which appear to me to throw any light on the question at issue. The former of these cases established the rule that a pursuer abandoning an action under the statute is liable for expenses as between

party and party only, while the latter decided that the expression 'full expenses' used in the statute merely deprives the judge of the power of modifying the expenses. The opinions in *Lockhart's* case are short but make it quite clear that the Court intended that the expenses should be taxed on exactly the same footing as if the action had terminated at the date of abandonment with the success of the defender. Lord Jeffrey says the defender is not to be in a better situation 'than he would be if he had got a decree of absolvitor,' and Lord Mackenzie that the pursuer 'cannot be in a worse position than if he had gone on with the case' and failed. The decision in the *Mica Insulator Company* case appears to me to confirm the view that a rule to this effect is now well established. In that case the Lord Ordinary allowed a proof. The defender reclaimed, and the Division held that the pursuers' averments were irrelevant. They accordingly recalled the Lord Ordinary's interlocutor allowing a proof, but gave the pursuers an opportunity of amending. The pursuers availed themselves of this, and the case having been of new closed was remitted to the Lord Ordinary to proceed as accords. After a delay of nearly nine months, during which the pursuers made no motion to have a proof allowed of new, and the defenders incurred considerable expenses in preparing for a proof, the defenders enrolled the case for a new order of proof. Thereupon the pursuers immediately lodged a minute of abandonment. The defenders claimed that they were entitled to the expenses of preparing for the proof, as these were fairly part of the 'full expenses' incurred by them in the action. The pursuers on the other hand maintained that the expenses should not be allowed, on the ground that in ordinary taxation between party and party no expenses are payable for preparing for a proof unless there has been an allowance of proof, and that at the date of the abandonment no proof had been allowed. The Lord Ordinary (Lord Johnston) reported the case to the Division, indicating the opinion that the words of the Judicature Act were wide enough to entitle a defender to all justifiable preliminary expenditure, and that the rules applicable to party and party expenses under circumstances other than abandonment did not necessarily apply. The Division found the defenders entitled to the expenses, but on the special ground that the recalling of the Lord Ordinary's original order for proof was merely a matter of form. 'My view,' says the Lord President, who gave the judgment of the Court (p. 1301), 'is that when the case went back from the Inner House it was truly in the same situation as if an order for proof had been pronounced.' I read the judgment of the Court as tantamount to holding that the expenses in that case of preparing for proof would have been a proper charge against the pursuers even if the action had terminated at the stage it did by the defenders being assoilzied, instead of by the pursuers abandoning the action under the statute. As I have already stated, it was also held that the meaning of 'full ex-

penses' was only to deprive the judge of the power of modifying them, and I think this case is an express approval of the rule which appears to me to have been laid down in the case of *Lockhart*, and that reading the two cases together I am not entitled to consider the words of the statute from an equitable point of view, but am bound to hold that the only expenses in which a pursuer is liable as a condition of abandonment are those which would be awarded against him had the action terminated when it did by the defender being assoltzed. If that view is right, then it is not disputed that the objections to the Auditor's report in this case fall to be repelled.

"I may add that if I did not feel myself bound by these authorities, and thought that I was at liberty to construe the words of the statute, I should have reached the same conclusion as Lord Dundas did in *Stewart's* case. The limited construction which has been placed upon the words 'full expenses' does not seem to give fair effect to what appears to me to have been the intention of the Act, and the reasons given by Lord Jeffrey and Lord Mackenzie in their opinions in *Lockhart's* case are open to obvious criticism. If the defender is not to be in a better situation 'than he would be if he had got a decree of absolvitor,' it is at least somewhat hard that he should be placed in a worse situation, as is the fact, in respect that he has no decree of absolvitor to show for his money. Similarly with regard to the pursuer the present rule leaves him in a better position than he would have been had he failed, in respect that he is at liberty to raise a new action. Yet the provision in the statute appears to me to be expressly designed to reinstate the defender against the expense he has incurred by having been subjected to an admittedly abortive action. It may be that, as Lord Dunedin says in the *Mica Insulator Company* case in dealing with the view of Lord Johnston, 'any opposite rule would lead to inextricable confusion,' and there is a passage in Lord President Boyle's opinion in *Lockhart's* case which suggests that some such state of confusion existed prior to that decision which the Court desired to put an end to.

"The present case is, I think, an exceptionally hard one for the defenders. So far as I can judge from the opinions delivered in the case, the objection to the relevancy was by no means a frivolous one, and the debate probably convinced the pursuers that if they went further they would, in the words of the Lord Justice-Clerk, 'have the luxury of paying, which is the legitimate penalty of stating a case which they failed to prove.' That they were wise enough to take the hint is no consolation to the defenders for having to pay the expenses of convincing them, but as the expenses were disposed of instead of being reserved, and as I think that I am bound by the decisions referred to, to hold that the present account falls to be taxed strictly on party and party lines, I see no alternative, so far as I am concerned, to repelling the objections."

The defenders reclaimed, and argued—

The defenders' objections to the Auditor's report ought to be sustained. The words "full expenses and costs" contained in section 10 of the Judicature Act 1825 (8 Geo. IV. cap. 120), covered all the expenses incurred by the defenders throughout the progress of the action, and included any expenses paid by them to the pursuers on account of the defenders' failure to succeed on a minor point in the case. The pursuers being the raisers of the action were originally responsible for all the expenses that had been incurred, and having now seen fit to abandon the case ought to pay the penalty of their ill-considered action. * The present case was governed by that of *Stewart v. Stewart*, 1906, 8 F. 769, 43 S.L.R. 522. The case of *Lockhart v. Lockhart*, 1845, 7 D. 1045, was distinguishable from the present one, the terms of the remit there having been for taxation as between party and party. So also was the case of *Mica Insulator Company, Limited v. Bruce Peebles & Company, Limited*, 1907 S.C. 1293, 44 S.L.R. 674, where the point in the present case was not raised.

Argued for the pursuers—The defenders' objections to the Auditor's report ought to be repelled. The provisions of the Judicature Act 1825 did not entitle defenders to restitution on the abandonment of their action by pursuers. The case of *Stewart v. Stewart* could not be considered to have decided the point, as only two out of the five Judges there expressed their opinion on it, whilst two did not do so, and one expressly reserved his opinion. The Act did not contemplate that defenders were to get more by way of expenses than would have fallen to their share if the case had been ultimately unsuccessful and absolvitor had been pronounced in their favour with expenses. Restitution or reinstatement in the latter eventuality was unknown. The Act only served to deprive the Court of the power to modify expenses. On the abandonment by a pursuer of his action a defender was merely entitled to receive an award of expenses as between party and party—*Mica Insulator Company, Limited v. Bruce Peebles & Company, Limited (cit.)*, per Lord President Dunedin at p. 1299. The case of *Lockhart v. Lockhart* had decided the point here raised in favour of the pursuers, and had been followed in practice ever since.

At advising—

LORD JUSTICE-CLERK—In my opinion the Lord Ordinary has rightly decided this case, and we should accordingly refuse the reclaiming note. The case, however, raises an important point of practice, and in view of the case of *Stewart*, and of the fact that I am differing from the judgment of Lord Dundas and the opinion expressed by Lord Dunedin in that case, I feel that I ought to explain the grounds on which I reach the result at which I have arrived.

The question turns on the interpretation to be given to the words "full expenses" in section 10 of the Judicature Act.

So long ago as 1845 these words were judicially construed in the case of *Lockhart*, 7 D.

1045, when, as Lord President Boyle put it, the judgment was given "in order to put an end to all question as to the interpretation of the statute in future." The grounds for the decision were variously expressed—"A defender," Lord Jeffrey said, is not to be put in a better position "than he would be if he had got a decree of absolvitor." He is not to have more expenses than he would have got had he been victorious in the suit. "Expenses" in such cases (it was said) "shall be taxed and allowed only as between party and party." Again, "a defender may, from over-anxiety, incur a great deal of unnecessary expense to his agent, but it would be very hard to make the pursuer pay for that." A pursuer "cannot be in a worse position than if he had gone on with the case and a decision had been pronounced finding that he was in the wrong" (Lord Mackenzie). The interlocutor bears that "the pursuers are not liable for any charges which are not proper charges as between party and party in a suit." I think that decision covers the present case, and we are told that the Auditor says that ever since it was decided the statute has been construed in accordance with what he has done in this case. "Full expenses" means no more than that the expenses are not to be subject to modification.

On principle I cannot see how we are entitled to go back on what we did when we sustained the reclaiming note and find the pursuers bound to repay the expenses which were then awarded to them. Nor do I see how the defenders can be found entitled to the expenses which they caused by insisting in a plea which we found to be bad in so far as it was sought to exclude a proof.

As to the case of *Stewart v. Stewart*, 1906, 8 F. 769, 43 S.L.R. 522, it is not easy to follow the course of debate in that case, but I cannot distinguish what Lord Dundas did there from what we are asked to do here. Lord Dunedin expressed the view that Lord Dundas was right. I need not say how unwilling I am to differ from their views. But having given the best attention to the argument submitted to us and the authorities to which we were referred, I can only say that I think the views of these two eminent Judges were wrong.

I find that Lord Dunedin in the *Mica Insulator Company, Limited v. Bruce Peebles & Company, Limited*, 1907 S.C. 1293, 44 S.L.R. 674, expressed a view with which I entirely agree, and which seems to me to coincide with the opinion which I have just given. He says—"Now, on the argument we have had addressed to us, really three different questions arise. The first question is whether the expenses—'full expenses'—which are imposed statutorily by the Judicature Act as a condition of sustaining a minute of abandonment mean anything different from expenses. In one sense I do not think they do, but in another sense the words are not pleonastic. I think the meaning of 'full expenses' as used in the Judicature Act is this, that it took away by statute from the judge the power which

the judge would otherwise have of modifying expenses. The minute of abandonment can only be sustained if full expenses are paid and not modified expenses. But then 'full expenses' means, I think, expenses as between party and party, and does not admit of any other plan of taxation, such as *exempti gratia*, between agent and client. And accordingly, for practical purposes, 'full expenses' in a minute of abandonment means precisely the same thing as 'with expenses' when expenses without any qualification are awarded in an ordinary action. In other words, you are remitted to the ordinary rule of taxation." I think that Lord Dunedin's opinion is not confined merely to taxation, but that it goes the length of saying that in cases like the present "full expenses" just means "with expenses." That seems to me to support the view at which the Lord Ordinary arrived.

LORD DUNDAS—Though the pecuniary amount here involved is not large, the point raised is one of general importance.

I remain of the opinion which after due consideration I expressed in *Stewart's* case (1906, 8 F. 769, 43 S.L.R. 522). It was embodied in a finding "that the pursuer is liable as a condition of abandoning the cause in terms of the statute to make payment to the defender of the taxed amount of the expenses incurred by him in the cause, including repayment to him of the expenses already paid by him to her under" a preceding interlocutor. In the Inner House Lord President Dunedin expressed the opinion that this was "completely the correct view, and accordingly if there was to be a minute of abandonment here, it would have to be in the absolute terms of the statute, which would carry the whole expenses." Lord M'Laren and Lord Kinnear did not expressly deal with the point, and Lord Pearson reserved his opinion upon it, but the interlocutor of the Court bore to "adhere to the said interlocutor, refuse the reclaiming note . . . and decern." I should have thought, though the contrary was argued by the Lord Advocate, that the First Division thus intended to express their approval of the finding reclaimed against as being correct in law, and I have heard no other feasible explanation to account for the terms of their interlocutor. But whatever view may be taken of that interlocutor, I retain the opinion I expressed in *Stewart's* case (in which Lord Dunedin concurred) as matter of construction of the statute, and as being in accordance with the equities in such a case. I think that "full expenses or costs" ought to cover the expenses here in question, which the defenders obviously would not have incurred if the pursuers had not thought fit to launch against them this action, now confessedly futile from its inception. If the expenses of the reclaiming note had been made expenses in the cause, as perhaps they should have been, the defenders would have recovered them on the abandonment of the action. I should add that I am unable to appreciate the difficulties which the Lord Advocate represented would or might arise

in practical working if the rule of *Stewart's* case be sound.

I do not think that the point now raised has been decided or even considered in any case except in *Stewart*, where opinions at all events were expressed upon it. The point was not, in my judgment, present in or even touched by the subsequent case of *Mica Insulator Company, Limited*. I am confirmed in this view both by the fact that so far as the report bears neither *Stewart* nor *Lockhart* was cited to the Court, and by the character of the cases which apparently were referred to. I cannot suppose that Lord Dunedin in anything he then said intended to reverse or renounce *sub silentio* the opinion he had distinctly expressed only the year before in *Stewart's* case. When his Lordship observed (1907 S.C. 1299, 44 S.L.R. 678) that "for practical purposes 'full expenses,' in a minute of abandonment, means precisely the same thing as 'with expenses' when expenses without any qualification are awarded in an ordinary action," he had not to consider any question of the repayment of expenses, as he necessarily had to do in *Stewart*.

Lockhart's case seems to me to have little if any bearing on the case before us. The Judges' opinions are briefly, perhaps inadequately, reported both in 7 D. 1045 and in 17 Sc. Jur. 534, and are as they stand open to obvious criticism, as the Lord Ordinary aptly points out. But it is clear from both reports and from the interlocutor pronounced that the sole point decided was that abandonment of an action in terms of the statute infers liability for expenses as between party and party only and not as between agent and client. This decision, whether strictly logical or not, has ruled subsequent practice and must be accepted. But it does not touch the point raised in *Stewart's* case and in the case before us.

For these reasons we ought, in my judgment, to recal the Lord Ordinary's interlocutor and give effect to the views expressed by Lord Dunedin and myself in *Stewart*, which are, as the Lord Ordinary intimates, also shared by him, although he did not consider himself free to put them into operation.

LORD SALVESEN—The point raised by this reclaiming note is one of general although infrequent application. It has never before been made the subject of formal decision. In the case of *Stewart v. Stewart*, 1906, 8 F. 769, 43 S.L.R. 522. Lord Dundas, after hearing a full argument, expressed an opinion that a pursuer could only abandon an action on paying the whole expenses incurred by the defender, and in addition repaying expenses already paid by the defender to the pursuer under a previous interlocutor pronounced during the dependence of the cause. The interlocutor in which he gave effect to the opinion thus expressed was reclaimed against, but owing to the fact that the pursuer in that case came to reconsider her position on the matter of abandonment no operative judgment was pronounced imposing upon her the liability to repay expenses of a separate part of the

cause on which she had been successful. Lord Dunedin, however, expressed a general concurrence in Lord Dundas's opinion, while Lord Pearson reserved his opinion on the subject. From the course which the case took Lord Dunedin's observation cannot be regarded otherwise than as *obiter dictum*, although, of course, it is entitled to the weight that attaches to anything said by that eminent Judge.

But for the case of *Stewart* I should have had no difficulty in affirming the decision of the Lord Ordinary, and after full consideration of the reasons alleged in support of the present reclaiming note I have come to be of opinion that it ought to be affirmed. We were informed that it was in accordance with the settled practice of the Auditor, which had never been challenged in any account remitted to him for taxation. Of course it would be quite open to us to reconsider the practice if we thought it contrary to the statute on the construction of which the whole matter depends. The Judicature Act 1825, section 10, provides that the pursuer shall have power "to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent." The mode in which this has been worked out in practice has been that on a minute of abandonment being lodged in terms of the statute the Lord Ordinary has remitted the defender's account of expenses for taxation, and on the taxation being approved and the amount paid has pronounced an interlocutor allowing the action to be abandoned. Such a remit cannot, in my judgment, give any warrant to the Auditor to include the amount of an account already taxed and paid by the defender to the pursuer. That is not taxation but reinstatement. In my opinion the defender can never be better off in the matter of expenses when the action comes to be abandoned than if he had obtained absolutor, and it is common ground that under a decree of absolutor with expenses he could only recover the expenses not already dealt with. I do not share the Lord Ordinary's view that there is any hardship in this, because while it is true that the bringing of a new action is competent after the original one has been abandoned in terms of the statute, and is incompetent when there has been a decree of absolutor, there is a compensating advantage in the circumstance that payment of the expenses is made a condition precedent to abandonment. Apart from this I think our decision is the only one consistent with principle and equity. Expenses are never decerned for during the dependence of a cause except in relation to a separate part of the proceedings on which the party decerned against has been unsuccessful. I can see no justice in allowing a party who has been penalised in respect of unnecessary procedure to be reinstated against what is his own mistake because a pursuer finds it necessary to abandon the action. This would undoubtedly have been the result in the case of *Stewart* had the tentative judgment of the Lord Ordinary received effect. The expenses which he had decerned the defender to pay resulted from a plea of no juris-

diction having been stated which the Lord Ordinary held to be untenable. As this judgment had become *res judicata* as between the parties it precluded the question being again raised in the proceedings which Mrs Stewart at that time contemplated bringing. I think it would have resulted in a serious injustice in that case if she had been forced to repay the expenses occasioned by an untenable plea put forward by the defender with regard to a preliminary matter which affected the competency of any new proceedings she might bring, and decided that matter in her favour. The same considerations necessarily apply where any interim award of expenses is made, as in the present case, because such an award implies that there has been unnecessary procedure due to the course taken by the unsuccessful defender. I think therefore that we must adhere to the judgment reclaimed against.

LORD GUTHRIE—I agree with your Lordship in the chair. It may be that if in a case of abandonment full justice in all cases was to be done between the parties reinstatement would be required. But it is admitted that in cases of consent to absolvitor where the equity would be substantially the same no such element has ever been considered. I am of opinion that the rule must be the same in a case where a pursuer takes the course of abandonment of the action.

The Court adhered.

Counsel for the Pursuers (Respondents)—Lord Advocate (Clyde, K.C.)—Brown, K.C.—Black. Agents—Webster, Will, & Company, W.S.

Counsel for the Defenders (Reclaimers)—Sandeman, K.C.—R. M. Mitchell. Agents—Cumming & Duff, W.S.

HOUSE OF LORDS.

Friday, March 14.

(Before Lord Buckmaster, Lord Atkinson, Lord Shaw, Lord Parmoor, and Lord Wrenbury.)

CLARKE v. EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED.

Reparation — Negligence — Proof — Sufficiency of Evidence.

Observations per curiam on the importance to be attached by appellate courts in cases involving the determination of questions of fact, to the conclusion come to by the judge who saw and heard the witnesses.

Sarah Ann Clarke, widow, *pursuer*, brought an action against the Edinburgh and District Tramways Company, Limited, *defenders*, for £500 damages in respect of the death of her son, who was run down by a car belonging to the defenders.

On 20th February 1917 the pursuer moved for issues to be allowed. The Lord Ordinary

(ANDERSON) refused the motion and allowed a proof before answer, which was subsequently led. On 15th June 1917 the Lord Ordinary found the pursuer entitled to damages and assessed the same at £100. The defenders reclaimed to the First Division, and after the case had been heard by the Court (the LORD PRESIDENT, LORD JOHNSTON, LORD MACKENZIE, and LORD SKERRINGTON) a re-hearing before five Judges was ordered. The case was subsequently re-argued before the First Division with LORD CULLEN, and on 26th February 1918 the Court (LORD JOHNSTON and LORD SKERRINGTON dissenting) assolized the defenders.

The pursuer appealed to the House of Lords.

LORD BUCKMASTER—It is impossible to avoid regretting that this action, which involves no uncertain principle of law nor any complicated combination of facts, has been the subject of such prolonged and costly litigation. In saying this I find no fault with the parties, who have merely availed themselves of their indisputable rights. It is the change of system in removing this dispute from the forum of a jury which is responsible for what has occurred, for, in truth, this case is nothing but a simple claim for damages occasioned by a fatal street accident alleged to have been caused by the negligence of the respondents. Upon such an issue the verdict of a jury on the evidence furnished would have been beyond dispute. [*His Lordship then stated his reasons for holding that negligence on the part of the defenders—in respect that their car was in the circumstances being driven at an excessive speed—had been clearly established, and that they had failed on the evidence to make out their counter-case of contributory negligence on the part of the deceased.*]

I think for these reasons the learned Lord Ordinary was well justified in the conclusion to which he came, and I have only to add that though the finding in this case is open to review, yet when a case depends upon the simple determination of a plain question of fact it is not desirable that courts should seek too anxiously to discover reasons adverse to the conclusion come to by the learned judge who has seen and heard the witnesses and determined the case upon comparison of their evidence.

LORD ATKINSON—I concur, and especially in the concluding words of my noble and learned friend on the Woolsack. It is quite true that a judge who hears the witnesses has a great advantage in determining upon the question of their credibility, but when you have to deal with the inference which he draws from the evidence given before him I think before his finding should be disturbed it is absolutely necessary that the Court of Appeal should be clear that he has drawn a wrong conclusion from the evidence. I think that in this case the Lord Ordinary has drawn the right conclusion. [*His Lordship then dealt with the evidence, and stated his reasons for concurring with the judgment of the Lord Ordinary.*]