

his farm by taking away from a farm which is principally pastoral the small portion of arable land which has been thought a suitable adjunct to the pasture. But the matter does not stop there, as the landlord is asked to pay compensation in money for this change in his property. He is subjected to the further hardship that instead of the questions of law which he asked the arbiter to state for the opinion of the Sheriff, three questions have been substituted which are difficult to interpret and which do not clearly indicate the points in dispute.

I agree with the way in which the Sheriff has answered the questions of law and also with the manner in which your Lordship has disposed of certain other points to which he does not refer in the note to his interlocutor. The appellant's counsel has failed to show that the arbiter is prevented by any principle or rule of law from making the proposed award. His argument was really directed against the arbiter's findings in fact, in regard to which the arbiter is final. The result is that the appeal fails.

LORD CULLEN—I entirely agree. With regard to the first question, the lease was to endure for five years from Whitsunday 1900, and also thereafter until one year's notice should have been given on either side. Therefore after 1905 it was not a case of the lease being renewed from time to time but of abstention on both sides from terminating it.

As regards the second question, I proceed upon the findings by the arbiter—(first) the claimant voluntarily, and not in fulfilment of any contractual obligation, laid down the temporary pasture in question; and (fourth) in laying down the said temporary pasture the claimant not only complied with the most approved rules of good husbandry but in addition made the improvement claimed for. A special point was taken that the arbiter may have reckoned too large an area in the improvement and may not have made due allowance for the area which the tenant would have left in grass if he had cultivated in a five-shift rotation. I see, however, no ground whatever for supposing that the arbiter did not duly apply his mind to the statutory problem, viz., what was the value obtainable by an incoming tenant in consequence of the improvement effected by the claimant which otherwise would not have been obtainable? And it may be pointed out that a course of cultivation under a five-shift rotation would not have imposed on the claimant an obligation to have in grass any part of the farm for more than two years.

Coming to the third question, the landlord maintains that by refraining from terminating the tenancy he somehow or other put £348 into the claimant's pocket which ought to be set against this claim. But I can see no evidence whatever in the facts as stated by the arbiter that the landlord gave or allowed any benefit to the claimant in consideration of the claimant executing the improvement either to the value of £348 or any other sum. Presumably the landlord under the lease which he was content with

received a rent which he considered an adequate return for the possession given under it.

LORD MACKENZIE did not hear the case.

The Court affirmed the interlocutor of the Sheriff and dismissed the appeal.

Counsel for the Appellant—Macphail, K.C.—Graham Robertson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent—Wark, K.C.—J. Stevenson. Agents—Guild & Guild, W.S.

Saturday, June 18.

FIRST DIVISION.

[Lord Hunter and a Jury.]

REEKIE v. M'KINVEN.

Process—Jury Trial—Application for New Trial on the Ground that it was "Essential to the Justice of the Case"—Vitiation of Verdict by Argument Addressed to the Jury—Alleged Representation that Verdict of £50 would Carry Expenses—Tender for £100 in Process—Verdict for £75—Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42), sec. 6.

In an action for breach of promise of marriage, concluding for £500 damages, the defender made a judicial tender of £100 and expenses. The jury having awarded the pursuer £75 she applied for a new trial on the ground that counsel for the defender had in his address to the jury used words which represented that an award of £50 would carry expenses. The Court refused to grant a new trial, holding that the words used did not necessarily bear the interpretation sought to be put upon them by the pursuer, and that the presentation of the argument complained of had not prevented the trial from being a fair one.

Observed (per the Lord President) that "it is illegitimate and wrong to present argument to a jury on considerations connected either with the probable result of the case in the matter of expenses, or with the effect on expenses of any tender which may have been put in process."

The Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42) enacts—Section 6—". . . In all cases in which an issue or issues shall have been directed to be tried by a jury it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue, for a new trial on the ground of the verdict being contrary to evidence, on the ground of misdirection of the judge, on the ground of the undue admission or rejection of evidence, on the ground of excess of damages, or of *res noviter veniens ad notitiam*, or for such other cause as is essential to the justice of the case. . . ."

Jemima M'Arthur Reekie, Rutherglen,

brought an action against Archibald M'Kinven, Kilmun, concluding for £500 damages for breach of promise of marriage. Before the date of the trial the defender made a judicial tender of £100 with expenses to date. At the trial the jury returned a unanimous verdict for the pursuer with an award of £75 damages. Thereafter the pursuer applied to the First Division for a new trial on the ground that it was "essential to the justice of the case," inasmuch as counsel for the defender had in his address to the jury used words which represented that an award of £50 would carry expenses to the pursuer.

The Court having continued the case in order to allow parties to lodge a minute (with answers) setting forth the precise words complained of, the pursuer lodged the following minute:—"That the statement complained of by the pursuer at the close of the address made by defender's counsel to the jury was—"I submit that if you give the pursuer an award of £50, carrying with it expenses, that will be ample."

The defender lodged the following answers:—"It is denied that in his closing address to the jury counsel for the defender used the words 'award . . . carrying with it expenses.' Explained that after representing to the jury that (1) the case could well have been disposed of in the Sheriff Court; (2) on the pursuer's own admission she would have been the wife of a working man had she married the defender; (3) her alleged purchases by way of trousseau were extravagant, and if made, could be used or sold by the pursuer; and (4) vindictive damages could not be awarded—the defender's counsel stated to the jury 'I submit that if you give her a £50 note, that with the expenses the defender will have to pay will be about all he can afford.' In making the said statement the defender's counsel had in view the extrajudicial expense to which the defender had been subjected by reason of the action being brought in the Court of Session, and also the possibility that if the defender were successful in the cause the judicial expenses incurred by him might never be recovered from the pursuer. The defender's counsel neither intended to represent nor did represent to the jury that an award of £50 would carry expenses to the pursuer."

Thereafter, having heard counsel for the pursuer on the motion for a rule, the Court granted the motion and forthwith heard counsel upon the rule.

The following authorities were referred to for the pursuer:—*Snare v. Earl of Fife's Trustees*, 1852, 14 D. 895, per Lord President (Colonsay) at p. 900; *Crawford v. Lusk's Trustees*, 12 R. 25, 22 S.L.R. 25; *Woods v. Caledonian Railway Company*, 13 R. 1118, per Lord Young at p. 1126, 23 S.L.R. 798; *Sutherland v. Prestongrange Coal and Fire Brick Company, Limited*, 15 R. 494, 25 S.L.R. 359; *Stewart v. Duncan*, 1921, 1 S.L.T. 292; *Wright v. Hearson*, [1916] W.N. 216.

Counsel for the defender referred to *Fullarton v. Caledonian Railway Company*, 10 R. 70, 20 S.L.R. 45.

At advising—

LORD PRESIDENT—The cause in respect of which the pursuer seeks a new trial is of the kind defined by the Jury Trials (Scotland) Act 1815 as a cause such as is essential to the justice of the case. I have no intention to attempt an exhaustive definition of this kind of cause. But it is safe to say that anything which occurs in the conduct of the case before the jury which is inconsistent with the conditions of fair trial, and displaces any reasonable confidence in the result arrived at, amounts to a cause essential to the justice of the case. The particular ground of the pursuer's complaint is that counsel for the defender in addressing the jury with regard to the assessment of damages represented that a verdict of £50 would carry expenses, although in point of fact there was in process a tender by the defender for £100 and expenses. The fact that a tender has been made is a fact which it is not admissible to communicate to the jury, just because it might distract them in the true assessment of the reparation due to the pursuer; and arguments based on the incidence of expenses are neither fair nor admissible, just because the award of expenses is not a matter for the jury at all, and is not necessarily made in favour of the party who secures a verdict.

I wish to make three things clear at the outset. However unfortunate the shape of the argument presented to the jury in this case may have been, it was not tainted by any deliberate intention to mislead or to trespass on forbidden ground. Secondly, we have before us in writing the words actually used by counsel who presented the argument, and we are entitled to place implicit reliance on his version of what was said. Thirdly—and most important of all—no shadow of doubt is cast on the inflexible rule of practice that it is illegitimate and wrong to present argument to a jury on considerations connected either with the probable result of the case in the matter of expenses, or with the effect on expenses of any tender which may have been put in process. In this matter, as in other matters germane to the fair conduct of judicial proceedings, it is the duty of everyone concerned not merely to avoid arguments of that kind, but to eschew loose or careless statements which may, however unintentionally, insinuate such considerations into the minds of the jury. There is no safe rule except to avoid even the risk of offence. If two courses are open, one of which may pass though ambiguous, while the other unmistakably maintains the highest standard of practice, the duty of everybody is of course to select the latter and reject the first.

A good deal has been said as to the purport of the words which were actually used, accepting these according to the version given by counsel who used them. I think it is greatly to be regretted that they were used. They are not, however, unambiguous. While they do not by any means necessarily bear the meaning which the pursuer puts upon them, it must, I think, be admitted that they are capable of bearing that mean-

ing. Accordingly it is a possibility that some of the jurymen who heard them, if they paid attention to them and if they remembered them, may have formed from them a false impression. But the question of their effect must remain a speculative one.

It should be said that this case is the first of its kind. So far as I am aware it has never before been attempted to upset a verdict on the ground that it was vitiated by the arguments presented to the jury who pronounced it. The rhetorical javelins which opposing counsel employ sometimes overshoot the mark as we all know, and it can hardly be otherwise in the stress of debate. But while this is harmless in the case of an ordinary argument submitted on the merits, it is otherwise when the argument strays from the merits into topics which are not only irrelevant but illegitimate. The presiding judge can usually restrain or correct any such excess if such should occur. He was not asked to interfere in the present case, and the pursuer pointed out in the debate before us—with a certain amount of force—that the only effective counter to the suggestion carried by the words used would have been to disclose to the jury that that suggestion was inconsistent with the tender.

Now I think that if the incident founded on is to have the effect of upsetting the verdict it must be shown (on grounds supporting a reasonable conviction to that effect) that the presentation of the argument complained of prevented the trial from being a fair one. When it is kept in mind that in the present case there was no intention to mislead, that the words themselves are not unambiguous, and that their effect is at best speculative, I arrive at the conclusion that it would not be reasonable to treat the present case as being one in which a fair trial was prevented, or to grant the new trial which is asked for.

LORD SKERRINGTON—I concur.

LORD CULLEN—I also concur.

LORD HUNTER—I also agree with your Lordship that no ground has been made out for granting a new trial. As I was the Judge who presided at the trial I desire to make only one remark. When counsel for the defender made the reference to expenses I thought at the time it was unfortunate he should have done so. But it did not appear to me that it was so made or that the reference was couched in such words as to make it probable or even possible that it would endanger a fair determination by the jury. In those circumstances I did not think it was necessary for me to call attention to what had been said, and so far as the result reached by the jury is concerned, I do not think that anyone who was cognisant of all the facts in the case will say that the result was in any way contrary to the real justice of the case.

LORD MACKENZIE was not present.

The Court discharged the rule.

Counsel for Pursuer—Watt, K.C.—R. M. Mitchell. Agent—W. T. Forrester, Solicitor.

Counsel for Defender—Morton, K.C.—Scott. Agents—Alex. Campbell & Son, S.S.C.

Thursday, June 23.

SECOND DIVISION.

[Lord Ashmore, Ordinary.]

BENNETT v. SCOTTISH BOARD OF HEALTH.

Insurance—National Health Insurance—“Medical Treatment” — Complaint by Panel Patient—Insolent and Abusive Language—Jurisdiction of Medical Service Sub-Committees, Insurance Committees, and Scottish Board of Health to Decide Question—National Insurance Act 1911 (1 and 2 Geo. V, cap. 55), sec. 15 (5)—National Health Insurance (Medical Benefit) Regulations (Scotland) 1913, 45 (1) and 51.

The National Health Insurance (Medical Benefit) Regulations (Scotland) 1913, issued in virtue of power conferred under the National Insurance Act 1911, section 15 (5), provide—Regulation 45 (1)—“Every [Insurance] Committee shall constitute a special sub-committee (in the Regulations referred to as the ‘Medical Service Sub-Committee’) for dealing with any question arising between a person entitled to obtain treatment from a practitioner on the panel and the practitioner attending him in respect of the treatment (including the granting of certificates) rendered by the practitioner or the conduct of the insured person while receiving that treatment, and every question so arising shall stand referred to that Sub-Committee, and the Committee may, if they think fit, refer to that Sub-Committee any other question arising with reference to the administration of medical benefit or to the discharge by the practitioner of his duties under his agreement with the Committee.” Regulation 51—“Where . . . any question arising between the Committee and the practitioner . . . is referred, or any appeal from a decision of the Committee is made, to the Commissioners . . . any decision of the Commissioners . . . shall be final and conclusive.”

A complaint that a panel practitioner in the course of his official duties had used insolent and abusive language to his patient and the members of the patient's household was heard and determined against the practitioner by the Medical Service Sub-Committee, and on appeal by the Insurance Committee and the Scottish Board of Health, to whom the duties of the Insurance Commissioners had been transferred. In an action of declarator by the practitioner that the decisions of these bodies were *ultra vires* in respect that they had no power to decide the question raised, *held* that the question had been compe-