

supposed to hint that it is not), and if there is no specialty in the position of any one or more of the group of pursuers which distinguishes his or their relation to the process from that of the others, then the present defenders will—without having the words “jointly and severally” inserted in the decree—be in no other position, either for better or for worse, than the party in the *Countess of Sutherland* was. They will have the benefit (such as it is) of a decree conform to the finding they asked and obtained, which is joint and several by implication though not expressly.

The point raised is one of practice purely. It is plainly much more convenient that a question which depends on the nature of the action and the relation in which the various pursuers stand to it and to the grounds on which it is supported, should be raised and decided when the motion for expenses is made immediately after delivery of judgment. The circumstances of the case are then fresh in the minds of the Court and of parties alike, and a question concerning the form in which expenses should be awarded, and to which according to ordinary practice the later operative decree will be made to conform, ought therefore to be raised at the earlier stage. This view is consonant with that which was taken in *Warrand v. Watson* (1907 S.C. 432) and with the rule laid down there. It is true that the circumstances to which the rule was made to apply were not completely on all fours with those presented in this action inasmuch as the case of the respondents in *Warrand* was not covered by any such principle as that which, under the *Countess of Sutherland*, applies to the case of the joint pursuers here. It may be said in the present case that the Court is only asked to make express, in the decree, that which was implicit in the finding; while in *Warrand v. Watson* the Court was asked to make for the first time the liability for expenses a joint and several one at the stage of approval and decerniture. The complete discretionary power of the Court in the matter of expenses, however, makes this distinction of but little moment from the point of view of practice. It seems to me that the best course in cases such as the present is to apply the rule so recently laid down in *Warrand v. Watson*, even though that course may involve a slight extension of the rule. If therefore a successful defender wishes a decree which is in terms a joint and several one for expenses against a group of pursuers, he must in moving for the award of expenses ask that the award be against the pursuers jointly and severally.

I think therefore that the defenders' motion should be refused, and that the decree must conform to the finding for expenses.

LORD SKERRINGTON—I concur.

LORD CULLEN—The making of an award of expenses in general terms against a plurality of litigants, without mention of joint and several liability or *pro rata* liability on their part, and of a corresponding general decerniture following thereon, is, I

think, quite in accordance with the practice of the Court where a finding in general terms is all that is asked for, as was the case in *Countess of Sutherland v. Cuthbert*, 5 Br. Supp. 439. In the case of *Warrand v. Watson*, 1907, S.C. 432, a considered general rule was laid down by the Court to the effect that if it be desired to have a plurality of litigants not merely made liable in expenses generally, but explicitly made liable jointly and severally, the proper stage to ask for this is when the motion for expenses is made, and that it is too late to ask for it at the subsequent stage when the Auditor's report comes up for approval. This rule, as a rule of procedure, may not perhaps fall to be regarded as absolute and inflexible, but, be it so, I can see no stateable grounds on which the present case can be represented as an exceptional case to which it ought not to be applied. It is just the plain case of a party ignoring or neglecting the rule. I accordingly agree with your Lordships in thinking that the defenders' motion should be refused.

LORD SANDS—I concur.

The Court refused the defenders' motion.

Counsel for Pursuer—Duffes. Agents—Bruce & Stoddart, S.S.C.

Counsel for Defenders—Patrick. Agents—Alexander Morison & Co., W.S.

Saturday, May 26.

## FIRST DIVISION.

[Lord Murray, Ordinary.]

### NAKESKI-CUMMING v. GORDON'S JUDICIAL FACTOR.

*Expenses—Caution for Expenses—Motion that Pursuer be Ordained to Find Caution—Motion Based on Expired Charge, Four Years Old, and on Parties' Relation to Past Litigation—Necessity for Statement of Grounds of Motion either on Record or by Minute.*

Where a motion for an order upon a pursuer, who was conducting his own case, to find caution for expenses was based upon the expiry of a charge upon a decree for expenses executed four years previously, and upon circumstances arising out of a former litigation between the parties, held that some formal and definite statement of the grounds of the motion, either on record or by way of minute, was necessary.

Michael Nakeski-Cumming, Edinburgh, pursuer, brought an action against J. Harold Macdonald, W.S., judicial factor upon the estate of the late Charles Gordon of Halmyre, defender, for payment of £960.

After the case had been called the defender lodged in process a copy of an extract of a decree against pursuer for the taxed amount of expenses for which he had been

found liable in a previous litigation, dated 15th July 1919, and relative charge, dated 5th November 1919, which had expired, and intimated to the pursuer that a motion would be made to ordain him to find caution for expenses.

On 27th February 1923, after the record had been closed, the Lord Ordinary (MURRAY) ordained the pursuer to find caution to the extent of £25 sterling within fourteen days.

The pursuer having moved that a certain document should be accepted by the Court, as obtempering the order, his Lordship on 8th March 1923 refused the motion, and of new ordained the pursuer on or before the 15th day of March 1923 to find caution to the extent of £20 towards the expenses of the action, under certification that if he failed to do so, decree dismissing the action, with expenses against him, would be pronounced.

On 16th March 1923 the Lord Ordinary (MORISON), in respect that caution to the extent of £20 had not been found by the pursuer, dismissed the action.

The pursuer reclaimed, and the case was heard on 26th May 1923.

LORD PRESIDENT—This is a reclaiming note by the pursuer against an order upon him to find caution for expenses. It has been explained at the bar that the motion on which the order proceeded was based upon an expired charge, now some four years old, and upon certain circumstances arising out of former litigation between the parties. These grounds may be enough to justify the order for aught I know. But they are in dispute, and there is nothing in process—either by way of pleading on the record or by way of submission by minute—setting forth the special grounds on which the motion was supported. It is true that in the simple case of the sequestration of a pursuer the public notification of the sequestration is enough to justify the motion for intimation to the trustee, and the trustee's refusal to come in leads in ordinary course to an order for caution. But this simple procedure applies neither in practice nor in fairness (especially when the pursuer is conducting his own case) to a case which depends on circumstances so special as the expiry of a charge four years ago and the particular relations of parties to past litigation. In such a case some formal and definite statement of the grounds is necessary, either on record or by minute, which the pursuer can meet by an equally definite answer (if he has one), and on which the Court can proceed in disposing of the motion. In the present case the absence of any statement whatever leaves us in ignorance of the grounds on which the order was made, and without any means of deciding a dispute which is wholly unformulated. There is nothing for it, therefore, but to recall the interlocutors reclaimed against. And then the case must go back to the Lord Ordinary.

LORD SKERRINGTON—I concur.

LORD CULLEN—I concur.

LORD SANDS—I concur.

The Court recalled the interlocutors of 16th March and 8th March, and the interlocutor of 27th February so far as it dealt with the question of caution, and remitted to the Lord Ordinary to proceed.

Agent for Pursuer and Reclaimer—Party.

Counsel for Defender and Respondent—Mackintosh. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, May 26.

SECOND DIVISION.

[Lord Ashmore, Ordinary.]

BOYD v. GLASGOW IRON AND STEEL COMPANY, LIMITED.

*Reparation—Negligence—Ruinous Building Adjoining Public Road—Injuries to Children—Duty to Fence—Boy Climbing up on Insecure Building for Birds' Nests.*

A father brought an action against the proprietors of a disused pumping house, situated beside a public road and contiguous to dwelling-houses, for damages for the death of his son aged ten years, who was killed by a fall from the building, on which he had been climbing. The pursuer averred that the building was roofless and had breaches in the walls, and was an attractive playground for children; that the building was not securely fenced off from the public road; that there was no notice prohibiting persons from entering the building; that for many years, as was well known to the defenders, boys had been in the habit of bird-nesting in the building; that while searching for a nest the pursuer's son sat upon a stone that appeared to be securely embedded in the wall; that the stone fell to the ground and the pursuer's son with it; that it was the duty of the defenders, in the knowledge which they possessed, either securely to fence off the building or to have the building put into a safe condition; and that the defenders had failed to perform that duty and so caused the accident to the pursuer's son. *Held (rev. judgment of Lord Ashmore, diss. Lord Hunter)* that the pursuer had relevantly averred fault on the part of the defenders, and an issue for the trial of the cause *approved*.

John Boyd, steelworker, Motherwell, pursuer, brought an action against the Glasgow Iron and Steel Company, Limited, Glasgow, defenders, for £250 damages for the death of his son.

The pursuer averred—“(Cond. 1) The pursuer's son Robert Freeland Boyd, aged ten years, died on or about 9th July 1922 in consequence of injuries sustained by accident after condescended on. The defenders are a limited company, and are proprietors of an old pumping engine-house abutting on the road to Kirklea. Many years ago the engine-house was used to pump water