

dents are entitled to something for certain damage which they have proved, to wit, trouble, outlays on telegrams, and the like; and in the Court of Session this has been fixed at £33, 1s. 3d. They have been also held entitled to the expenses incurred by them in the action against Messrs Irelands down to the closing of the record, and I think that they are entitled to this; but this limitation of those expenses to the period before closing the record is not specified in the interlocutor of the Lord Ordinary although it is in his judgment, and it should perhaps, therefore, be now declared.

Ordered that the interlocutor of the Lord Ordinary should be varied by the substitution of the sum of £33, 1s. 3d., and *quoad ultra* it should be affirmed, and that the respondents should pay the costs of this appeal.

Counsel for the Appellants—The Lord Advocate—The Solicitor-General (Salvesen, K.C.)—Murray. Agents—Beveridge, Sutherland, & Smith, S.S.C., Leith—Botterell & Roche, London.

Counsel for the Respondents—Scrutton, K.C.—Spens. Agents—Maclay, Murray, & Spens, Glasgow—J. & J. Ross, W.S., Edinburgh—Hollmes, Sons, Coward, & Hawksley, London.

COURT OF SESSION.

Tuesday, May 23.

FIRST DIVISION.

(Sheriff Court of Lanarkshire
at Glasgow.)

RIDLEY v. KIMBALL & MORTON,
LIMITED.

Expenses—Modification—Appeal for Jury Trial—Small Amount Awarded by Jury—Employers' Liability Act 1880 (43 and 44 Vict. c. 42), sec. 6—Sheriff Courts (Scotland) Act 1877 (40 and 41 Vict. c. 50), sec. 9—Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 73.

In an action of damages for personal injuries brought in a Sheriff Court and appealed for jury trial under the Judicature Act the jury awarded £35. Held that, while the Court has power to deal with expenses according to its discretion in each particular case, the ordinary rule that a successful pursuer is entitled to his expenses should not be departed from, the case being one which in its nature was quite appropriate for jury trial.

William Ridley, metal polisher, 91 Glebe Street, Glasgow, raised an action in the Sheriff Court of Lanarkshire at Glasgow against Kimball & Morton, Limited, machine makers, 11 Bothwell Circus, Glasgow, in which he sought to recover reparation for injuries received while in their employ-

ment, and claimed the sum of £500 at common law, or alternatively £249 under the Employers' Liability Act 1880.

He averred that while in the defenders' employment and working in conformity with the orders of their foreman at a large buff (*i.e.*, a wooden wheel covered round the circumference with leather) which was driven by machinery and revolving at great speed, he was injured by the leather on the buff coming loose and hitting him on the head. He also averred that the machinery plant, *viz.*, the buff, was defective, and that this was known to the defenders' managing partner. He further averred—" (Cond. 6) By the force of the blow the pursuer was rendered unconscious. The buff continued revolving while the pursuer's head was in contact with it. While still unconscious the pursuer was carried to the Western Infirmary, Glasgow, where he was seen by Sir William MacEwan, who pronounced him suffering from a large concussion of the brain. He remained as a patient there until 26th June 1903. He did not recover consciousness until the afternoon of the day following the accident. He has in consequence of the accident sustained severe injuries. His head has been severely cut and bruised, and the disfigurement thus caused will be permanent. He is troubled with nervousness and sleeplessness, due, it is believed, to concussion of the brain caused by the accident. His vital energy has been greatly reduced, and he has not since the accident been able to follow any employment. After he left the Infirmary he was treated as an out-patient for some time. The injuries sustained have left his health permanently impaired."

The Sheriff-Substitute (BOYD) on 21st April 1904 allowed a proof before answer. The pursuer appealed for jury trial.

The cause was tried on March 29, 1905, before Lord Kyllachy and a jury. The jury gave an award of £35.

On the pursuer's moving to apply the verdict and for expenses the defenders moved that the expenses should be modified.

Argued for the defenders and respondents—Expenses should be modified. Though the pursuer was successful, the sum awarded as damages was a mere fraction of that claimed, and was under £40, and the action would have been more properly retained and dealt with in the Sheriff Court. The defenders should not have been subjected to the greatly increased expenses of jury trial when an equally appropriate and much cheaper course was available. The case was stronger for modification of expenses than many previous cases—*Jamieson v. Hartil*, February 5, 1898, 25 R. 551, 35 S.L.R. 450; *Shearer v. Malcolm*, February 16, 1899, 1 F. 574, 30 S.L.R. 419; *Brennan v. Dundee and Arbroath Joint Railway*, May 26, 1903, 5 F. 811, 40 S.L.R. 383, 622, following *Shearer, ut supra*, and distinguishing *Fraser v. Caledonian Railway Company*, February 20, 1903, 5 F. 476, 40 S.L.R. 43, 373; *Lafferty v. Watson, Gow, & Company, Limited*, June 3, 1903, 5 F. 885, 40 S.L.R. 622.

Argued for the pursuer and appellant—It was impossible that the pursuer should proportion his claim to the sum which the jury were to award him; moreover he had the right of appeal by statute, and had merely availed himself of that right. There was no case for modification, for the case was quite an appropriate one for jury trial—*Casey v. Magistrates of Govan*, May 24, 1903, 4 F. 811, 39 S.L.R. 635; *Fraser v. Caledonian Railway Company, ut supra*; *M'Daid v. Coltness Iron Company, Limited*, November 4, 1904, 42 S.L.R. 50; *M'Gulp v. Caledonian Railway Company*, October 26, 1904, 42 S.L.R. 33.

At advising—

LORD PRESIDENT—The motion before the Court is to modify the expenses upon the ground that the sum which was recovered was £35, and, that being so, the pursuer ought not to have the full expenses of the jury trial. Such cases as this appear to have been dealt with in various ways. I do not think it expedient to lay down any rule that can be rigidly applied to them all, and I should not be disposed to do anything which might cast doubt on the power of the Court to deal with expenses according to its discretion in each particular case. But on the general question of procedure it seems to me that the Court ought to be guided by Act of Parliament; and where Parliament has dealt with the matter it is not for us to do something which is tantamount to altering the law. It would not be impossible to reconcile the decisions in the various cases which have been cited to us, although it might not be possible to reconcile some of the opinions which have been expressed in these cases. But judging, as I propose to do, each case by itself, it seems that here we are dealing with a case which in its nature was quite appropriate for jury trial. The pursuer having according to his statutory right asked for a jury trial I think we should give expenses in the ordinary way.

LORD ADAM concurred.

LORD M'LAREN—In this particular case I do not think that the circumstances are strong for the modification of expenses. I understand your Lordships wish to consider the question on general grounds, and with regard to the difference in practice between this and the Second Division of the Court I feel bound to say that in my opinion the Second Division are entirely within their powers in laying down the rule with respect to the numerous cases under the Employers' Liability Act, which are of small value and really not suitable for jury trial, that they should be kept within bounds by the application of the power of the Court to modify expenses. The Court has at common law complete control over expenses, and has established two scales of taxation in the Sheriff Court by Act of Sederunt. Without the formality of an Act of Sederunt I see no difficulty in treating questions of taxation in our own Court according to a definite rule provided we apply the rule consistently. We do not claim to exercise

an arbitrary discretion in the matter of expenses more than in any other matter.

I am the more inclined to think that the practice of the Second Division should be followed, since the Employers' Liability Act gives a strong indication of how appeals of small value are to be dealt with. That Act by its sixth section provides that any action brought under its provisions may be removed to the Court of Session at the instance of either party in the manner provided by and subject to the conditions prescribed by section 9 of the Sheriff Courts (Scotland) Act 1877 (40 and 41 Vict. cap. 50). It was held in the case of *Paton v. Niddrie and Benhar Coal Company*, 12 R. 538, that this enactment did not by implication exclude the right of appeal under the 40th section of the Judicature Act 1825 as re-enacted by the Court of Session Act 1868, section 73. I do not understand how that result was arrived at, for I should have thought that where an Act gives a power of appeal subject to a condition the power could only be exercised subject to that condition. I of course accept the case of *Paton*. But if it is provided by statute that in a certain class of statutory appeals there is this discretion as to expenses it would be consistent with sound principle that we should have a similar discretion to deal with expenses in cases which do not fall under the statutory power. I make these observations because it is consistent with my experience and that of your Lordships that many accident cases are brought up here from the Sheriff Court which ought never to have left that Court. That is the opinion, I believe, of the legal profession in Glasgow, and also to some extent here. I cannot think it right that the provisions of the Employers' Liability Act as to the conditions of the right of appeal should be reduced to a dead letter by bringing all appeals under the 73rd section of the Court of Session Act 1868 instead of under that Act. I think therefore that something ought to be done by way of modification of expenses towards suppressing this grave abuse.

LORD KINNEAR—I agree with all that the Lord President has said, and therefore in expressing my own opinion I need only say that in the circumstances of this case I see no sufficient ground for interfering with the ordinary rule.

The Court refused the defenders' motion for modification and applied the verdict with expenses.

Counsel for the Pursuer and Appellant—Orr, K.C.—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Respondents—Younger, K.C.—Melville. Agents—Mitchell & Baxter, W.S.