

with a view to revenge himself for a private grudge against the person slandered. This is the only case which the record discloses, and it seems to me that none of the cases cited, which have been fully commented on by your Lordships, support it. The pursuer's averments appear to me expressly to negative any case of mere recklessness or excess of zeal in the real or supposed interests of the employer.

The LORD JUSTICE-CLERK concurred.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for Defenders and Reclaimers—Blackburn, K.C.—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for Pursuer and Respondent—Watt, K.C.—Graham Robertson. Agent—Allan M'Neil, S.S.C.

Tuesday, November 12.

FIRST DIVISION.

(SINGLE BILLS.)

HURST, NELSON, & COMPANY,
LIMITED v. SPENSER WHATLEY,
LIMITED.

Expenses—Taxation—Counsel—Skilled Witnesses—Local Agent Giving Evidence

In counter-actions, afterwards conjoined, arising out of nine contracts entered into at different dates from 1898 to 1905 for the maintenance and repair of railway waggons belonging to the defenders, the pursuers were found entitled to one-half of their expenses in the Outer House. The proof, which was a heavy and complicated one, lasted twelve days, there being two adjournments—the first from 28th May till 19th October, and the second from 23rd October to 18th January following. Objection was taken to the Auditor's taxation of the account, inasmuch as he had allowed (1) to senior counsel a fee of thirty guineas for the first day of the proof, and similar fees for the first day of each of the adjourned diets; (2) as was maintained, excessive amounts to the skilled witnesses; and (3) a fee to the pursuers' local agent, who had appeared and given evidence and had been treated as an ordinary witness.

The Court sustained the first objection, reducing the fee to twenty-five guineas, but repelled the others.

Expenses—Taxation—Proof—Statements Compiled from Documents in Process.

In a heavy and complicated case arising out of a series of contracts for the upkeep of railway waggons, the pursuers were awarded one-half of their expenses in the Outer House. Objection was taken to the Auditor's allowing

the sums charged for the preparation of certain statements, made up for the purposes of the proof, of facts and figures, in tabulated form, compiled from the books and other productions in the case.

The Court repelled the objection and approved of the Auditor's report.

On 24th March 1908 Hurst, Nelson, & Company, Limited, waggon builders and repairers, Motherwell, brought an action against Spenser Whatley, Limited, London (against whom jurisdiction had been founded by arrestments), in which they sued for (1) a sum of £1933 odd, being the amount alleged to be due and unpaid in respect of their (the pursuers') maintenance and reconstruction of 583 waggons belonging to the defenders, and (2) a sum of £354 odd as damages for alleged breach of contract. A counter-action at Spenser Whatley's instance was brought on 22nd June 1908, in which he, *inter alia*, claimed £2751 as damages for imperfect work and undue detention of waggons. On 20th January 1909 the Lord Ordinary conjoined the actions and allowed a proof. The proof, which was a complicated and difficult one, lasted twelve days, there being two adjournments, viz., on the first occasion from 28th May till 19th October 1909, and on the second occasion from 23rd October 1909 till 18th January 1910. Thereafter on 22nd February 1910 his Lordship pronounced an interlocutor in which, after deciding the questions at issue between the parties, he found Hurst, Nelson, & Company, Limited, entitled to expenses in the separate actions, and also in the conjoined actions modified to three-fourths of the taxed amount thereof. Spenser Whatley having reclaimed, the First Division (Lords Kinneir, Johnston, and Mackenzie) on 8th March 1911 varied the Lord Ordinary's interlocutor in so far as it, *inter alia*, found Hurst, Nelson, & Company entitled to "three-fourths" of their taxed expenses in the Outer House, and substituted therefor the words "one-half" and *quoad ultra* adhered. No expenses were found due to or by either party in the Inner House.

On 16th October 1912 the defenders (Spenser Whatley, Limited) lodged a note of objections to the Auditor's report in so far as he had, in taxing the expenses found due to the pursuers, allowed the following items:—I. To senior counsel for the first day of the proof (besides a consultation fee of 10 guineas) a fee of 30 guineas, and similar fees for the first day of each of the two adjourned diets (20 guineas a day being allowed for the other days of the proof). To each of these three fees of 30 guineas the defenders objected on the ground that they were excessive to the extent of 5 guineas each. II. The cost of preparing the following items, viz.—"No. of process 153—Framing statement from Spenser Whatley's truck running books (Nos. 73 and 74 of pro.) and working railway waggon book showing when waggons at Spenser Whatley's depots in 1905, 1906, and 1907, and calculation, 29 shs. figs.; three copies thereof, 29 shs. figs. No. of process

154—Framing statement of runnings of waggon No. 686 from 1st January 1904 to 15th April 1909, taken by Hurst Nelson from Spenser Whatley's working of running waggons book D and E (Nos. 77 and 78 of pro.) and from truck running books (Nos. 73 and 74 of pro.), 7 shs. figs.; three copies thereof, 7 shs. figs. No. of process 216—Framing history of repairs and re-painting of waggons belonging to Spenser Whatley, Limited, executed by Hurst Nelson & Co., Limited, during currency of the contracts for repairs, 356 large folio and figured; three copies thereof. Nos. of process 221 and 222—Framing (2) statements from invoices and Spenser Whatley's repair books showing repairs and paintings since December 1907 to April 1909—together 254 shs. figs.; three copies thereof, 254 shs. figs. No. of process 241—Framing statement of comparison of Bent's reports and Lovely's, Cox's, and others by Mr Crosbie Turner, Writer, Glasgow, 75 shs. figs.; three copies thereof, 75 shs. figs."

With regard to these items (Head II) the note stated—"The said items are objected to *in toto* as not being necessary or competent evidence in the case—the books from which they were compiled being there to speak for themselves, and the documents charged for not having been competently proved—and as not being properly chargeable as judicial expenses against an opponent. These documents are spoken to only by Mr Crosbie Turner, the local solicitor in the case, who does not speak to them except as collated from other documents, and they are rather of the nature of criticisms on evidence or memoranda explanatory of evidence than themselves evidence."

The remaining items to which objection was taken were set forth in the note as follows—"III. For his examination as a witness the Auditor has allowed Mr Andrew S. Nelson, Glasgow, who is one of the parties to the case, and who was examined on 19th and 20th January 1910, fees for four days at £1, 1s. a day. It is respectfully submitted that two of these days should be disallowed. IV. The Auditor has allowed to the pursuer's skilled witness, Mr Robert Macfarlane, C.A., Glasgow, who was examined on 19th January 1910, a fee for preparation of £105, besides £4, 4s. for 'time of clerks assisting, etc.', and also fees for five days at the proof at £2, 2s. a day—£10, 10s., and also as 'travelling and hotel expenses and miscellaneous outlays,' £15, 15s. The defenders object to the above item of £10, 10s. to the extent of £8, 8s., and to the above item of £15, 15s. to the extent of £14, 14s. V. The Auditor has allowed to the pursuers' other skilled witness, E. J. M'Dermid (besides a fee of £105 for preparation and £20 for 'travelling and personal expenses') fees for seven days' attendance at the proof as a witness at £2, 2s. per day. He was examined on 21st and 22nd October 1909, and the defenders object to his being allowed more than four days' attendance as a witness, and therefore object to the

above £14, 14s. to the extent of four days VI. The Auditor has allowed to Mr A. Crosbie Turner, Writer, Glasgow, pursuers' Glasgow agent, five days at £2, 2s., and expenses £2. Mr Turner was in attendance as the pursuers' law agent, and gave his evidence on 18th January 1910, and the defenders therefore object to more than one day being charged, and submit that the above £10, 10s. should be disallowed to the extent of £8, 8s., and also that the above £2 for expenses should be reduced to the first-class railway fare of 7s. 6d., and therefore disallowed to the extent of £1, 12s. 6d."

Argued for defenders—*Item I*—*Esto* that the case was a heavy and complicated one, a fee of 25 guineas for the first day of each of the three diets would have been sufficient—*Goodwins, Jardine, & Company, Limited v. Brand & Son*, 1907 S.C. 965, 44 S.L.R. 788. There was no case where a fee of thirty guineas for the first day of a proof had been sustained upon objection. Reference was also made to *Kintore v. Pirie*, 11 S.L.T. 216, and to *Boyd & Forrest v. Glasgow & South-Western Railway Company*, 1911 S.C. 1050, 48 S.L.R. 876. *Item II to VI*—... [The defenders' argument with regard to these items sufficiently appears from the note of objections (*vide supra*)].

Argued for pursuers—*Item I*—The Auditor had carefully considered the amount to be paid to counsel and had done so with special reference to what was said in the case of *Caledonian Railway Company v. Glenboig Union Fireclay Company*, 1912 S.C. 511, 49 S.L.R. 412. The amount at stake was heavy—the total sum involved being about £7000, and the period over which inquiries had to be made was some ten years. The number of the writs actually put in process was about 15,000. In these circumstances the Court would not readily interfere with what the Auditor had done. The cases of *Boyd & Forrest* and *Goodwins, Jardine, & Company* were distinguishable, for in neither was the proof so complicated as in the present case. *Item II*—The Auditor had made detailed inquiries about each of the documents objected to and had satisfied himself that their preparation was proper and necessary. He had also approved of the usual number of copies being prepared. That being so, the Court would not alter his decision unless on very good grounds. *Items III to VI*—These items were purely matters of taxation, as to which the Auditor was the best judge. No charge was made for Mr Turner's attendance as agent, and where, as here, the country agent had given evidence the Auditor had rightly dealt with the matter in treating him as an ordinary witness.

At advising—

LORD MACKENZIE—The first of these objections relates to the fees allowed to senior counsel in the Outer House. The proof lasted twelve days, during which there were two adjournments, the first from 28th May till 19th October, and the

second from 23rd October to 18th January following. In addition to a fee of ten guineas for consultation prior to the proof, the Auditor has allowed thirty guineas for the first day of the proof, and the same fee for the first day of each of the adjourned diets. The defenders object to these three latter fees as excessive to the extent of five guineas each.

The question of the principle to be applied by the Auditor in dealing with counsel's fees was under consideration by this Division of the Court in the recent case of the *Caledonian Railway Company v. Glenboig Fireclay Company, Limited* (1912 S.C. 511). It was there laid down that the question of counsel's fees must within certain limits always be a question of degree, and that they must be considered not necessarily with a view merely to the day for which the fee is allowed, but with a view to remuneration for the case as a whole. It was there recognised that there are certain limits, and no case could be referred to in the argument in this case in which a fee larger than twenty-five guineas had been allowed to senior counsel by the Auditor as against an unsuccessful litigant for the first day of a proof. While reserving my opinion on the question whether in any case a larger fee than twenty-five guineas should be allowed, I am of opinion that there is not sufficient cause for a larger fee being allowed here for the first day. This is what was allowed in the cases of *Goodwins, Jardine, & Company* (1907 S.C. 965); *Earl of Kintore v. Pirie* (11 S.L.T. 216); and *Boyd & Forrest v. Glasgow and South-Western Railway* (1911 S.C. 1050), all exceptionally heavy cases. It necessarily follows that no larger fee should be allowed for the other days in question. In coming to this conclusion full weight has been given to the fact that the fees of only two counsel have been allowed. Therefore, without saying anything that will in the least weaken the principle laid down in the *Glenboig* case, I am of opinion that the first objection should be sustained.

The second objection relates to a group of charges for certain statements made up for the purposes of the proof. The argument against these documents may be summarised thus—That they were a mere digest of documents already in process; that although they might have been of use to counsel, yet they are not such as form a legitimate charge against an opponent; that certain of them contained matter which was of the nature of criticism or comment on evidence already led; and that the documents were unnecessary and not proved. Obviously the extent to which the preparation of such documents is legitimate must entirely depend on the circumstances of the particular case in hand. We are able to judge of the circumstances of this case, because there was a hearing in the Inner House extending over many days. Certain of the matters in dispute in the Outer House were not reopened, as the facts had been sufficiently ascertained to enable the parties to realise which side was right, but it was evident from the

documents laid before us that it was essential to collect and tabulate the materials in order to present the case to the Court in an intelligible state, and to avoid an amount of detail which would have been intolerable. I have examined the productions here objected to, and keeping in view especially the claim of damages made by Spenser Whately & Co., of £2751, I am unable to take the view that the Auditor should have disallowed any of them. Those which were objected to with most effect are Nos. 221, 222, and 241 of process, especially No. 241. If I had been able to take the view that these were papers prepared for the purpose of presenting in print what were really points in arguments, or of the nature of comment or criticism, they would not have been allowed. I do not so regard them. On a consideration of the proof I think that the statements referred to are sufficiently proved. It was argued that in any view the charge should be limited to copying fees only, and that drawing fees should not be allowed. I do not think we should interfere with the discretion of the Auditor in such a matter. If the documents are allowed, I think it necessarily follows that it was legitimate to make the number of copies allowed in practice. This objection should therefore in my opinion be repelled.

Objections three, four, and five appear to me to deal purely with matters of taxation, and there is no reason for disturbing what has been done. These objections should be repelled.

Objection six is to allowances made to Mr Turner, the Glasgow agent of the pursuers. It was, however, explained that there were not in the account any charges for Mr Turner's attendance as agent, and that he had been dealt with on the same principles as a party who appears as a witness in the cause, and is entitled to be treated as an ordinary witness. The Auditor was, I think, right in taking this view of the sixth objection, which should therefore be repelled.

LORD KINNEAR — I agree with Lord Mackenzie.

LORD JOHNSTON—I also concur. But I should like to add that while I accept the consideration which guided the Court in the case of *Caledonian Railway Company v. Glenboig Union Fireclay Company* (1912 S.C. 511), as a most important consideration in determining the proper fees to be paid to counsel, and one which is quite properly applicable to the present case, I do not think it by any means the only consideration, and I do not suppose your Lordship intends to represent it as such. I think there are other considerations, which have been taken into account in the cases which have been before the Court, especially in the course of the last few years, and it is on consideration of all of these cases that I have come to the same conclusion as your Lordship.

The LORD PRESIDENT did not hear the case.

The Court sustained the note of objections to the extent of the amount objected to under Head I of the note, and decreed against the defenders for payment to the pursuers of the taxed amount of their account less the amount successfully objected to by the defenders.

Counsel for Pursuers—D. P. Fleming.
Agents—P. Gardiner Gillespie & Gillespie, S.S.C.

Counsel for Defenders—J. R. Christie.
Agents—Davidson & Syme, W.S.

Saturday, October 26.

FIRST DIVISION.

[Lord Dewar, Ordinary.]

FREE CHURCH OF SCOTLAND AND OTHERS *v.* MACKNIGHT'S TRUSTEES.

Trust—Statute—Churches (Scotland) Act 1905 (5 Edw. VII, cap. 12), secs. 1 (1) and (3), 4 (1), and First Schedule—Churches (Scotland) Act Commission—Allocation by the Commissioners to the Free Church of Rights of the Free Church in a Trust Estate—Bequest for Promotion of Home Missions with Power to Trustees to Employ the Bequest Independently of the Church—Effect of Allocation on Trustees' Power of Independent Action.

The Churches (Scotland) Act 1905, sec. 1 (1), enacts that the Commission established by the Act shall allocate between the Free Church and the United Free Church "the property in question as defined by this Act. . . ."

Section 4 (1) enacts that all property which on 30th October 1900 "was held for the purposes of any . . . mission" shall be "deemed to be property in question within the meaning of this Act."

Section 1 (3) enacts that the Commission in making their allocation shall make adequate provision for the support of ministers, for itinerant preachers, and for the general purposes of administration and management of the Free Church, and that the funds out of which provision may be made for each of these objects shall be those set out in the second column of the First Schedule to the Act, opposite the description of the object in the first column. In the second column of the First Schedule the words "Sustentation Fund, Home Mission Fund, Highlands and Islands Fund, any moneys which the Commission regard as applicable for these or similar purposes," appear opposite the following words set forth in the first column, viz.—"(a) Support of ministers of Free Church congregations . . . and of itinerant preachers. (b) General purposes of administration and management of the Free Church."

A testator by a codicil to his will directed his trustees to expend the free

annual income of the residue of his estate for the promotion of the Home Mission in connection with the Free Church. The will contained a declaration "that it shall be in the power of my trustees to engage Free Church missionaries, or in their discretion other workers, including laymen and lady missionaries or workers, being members of the Free Church, in the promotion of" the said mission, "in such a way as they may think proper, either through the Church or independently of it, . . . or my trustees may, should it be deemed by them more expedient, pay over the free annual income of my estate to" the treasurer of the said mission. The Church Commissioners allocated to the Free Church for support of ministers and itinerant preachers, and for administration and management of the Free Church, "the whole rights and interests" which the Free Church had in the said estate.

In an action brought by the Free Church to have it declared that the trustees were bound to pay the income to the treasurer of the Church, held that, the allocation having substituted for the original object of the testator's bounty objects that could only be carried out by the Church itself, the trustees' discretionary power of independent action was inapplicable to the present circumstances, and that the declarator must therefore be granted.

The Free Church of Scotland, *pursuers*, raised an action against the trustees of the late Alexander Edward MacKnight, advocate, Edinburgh, *defenders*, in which, *inter alia*, they concluded for declarator that "the defenders, as trustees foresaid, are bound to pay over to the pursuers or their treasurer for the time being, or to such other person as may be authorised by them to receive the same, the whole free annual income of that portion of the means and estate of the said Alexander Edward MacKnight which, under the directions contained in the codicil dated 13th May 1898 to his said trust-disposition and settlement, was appointed to be administered and applied for the promotion of ' . . . the Home Mission in connection with the Free Presbyterian Church of Scotland,' for which missions it is declared in the said codicil that the residue is to form 'the capital fund for the same,' being the fund or moneys dealt with by the order of the Commissioners appointed for the purposes of and acting under the Churches (Scotland) Act 1905 (5 Edw. VII, ch. 12), No. 1252, entitled 'Alexander Edward MacKnight's Trust,' and dated 10th day of November 1909, and also referred to in a further order of the said Commissioners of the same date, numbered 1253, entitled 'Provision for support of ministers and itinerant preachers, and for administration and management of the Free Church,' in order that the said income may be by the pursuers or their said treasurer or other duly authorised representatives applied for such one or other or more of