land. They had only a right to erect the piers of a particular bridge. That right was paid for and secured to them in 1878, and remains with the company. And so, with regard to the first conclusion, the Lord Ordinary has, I think, come to the right conclusion. In regard to the second conclusion—that with regard to the taking the £1500 already paid into account in estimating the compensation to be now paid—I am of the same opinion as your Lordships.

LORD RUTHERFURD CLARK—I am also of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Graham Murray—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Defenders (Respondents)—Sol.-Gen. Asher, Q.C.—Trayner—Comrie Thomson. Agents—Millar, Robson, & Innes, W.S.

Wednesday, December 3.

SECOND DIVISION.

[Lord Fraser, Ordinary.

WILKIE *v.* ALLOA RAILWAY COMPANY.

Process—Expenses—Action for Larger Sum than Appeared in Pursuer's Own Books.

Where a pursuer raised an action of damages in the Court of Session for £50, and was awarded £12, that amount being arrived at from an examination of his own books, the Court *refused* to allow him expenses although the defenders had made no tender.

The Alloa Railway Company were empowered by "The Alloa Railway Act 1879," to construct the railway therein described from Alloa to the South Alloa Branch of the Scottish Central system of the Caledonian Railway crossing the river Forth by a bridge. By section 7, sub-section 1, of the Act it was provided, for the purposes of protecting the navigation of the river, that the bridge should be constructed so as to leave opening spans in the fairway of the channel of the river of certain specified widths. By sub-section 2 of this section the company were to regulate the spans as to allow vessels to pass through the spans "at all times" without delay or hindrance, "and maintain lights and signals on the bridge." The Act incorporated, *inter alia*, Part I. of the Railway Clauses Act 1863, section 15 of which provided that where a company constructs a bridge with an opening span, it shall not be lawful for the company to detain any vessel at the bridge for a longer time than is necessary for admitting an approaching engine to cross the bridge, and for opening the bridge to admit the vessels to pass, and that if the company detain a vessel longer than the time mentioned they are to be liable in the penalty mentioned in the Act, without prejudice to a claim of damage by the person sustaining loss through such detention.

The railway bridge had been partially carried across the river, and one of the opening spans had been formed in the fairway of the channel. To admit of the works being carried on on both sides of it, a temporary wooden bridge was thrown across it, which was run or swung back by a steam crane whenever the bridge required to be opened for vessels passing through it.

This action was raised against the railway company by the owner of the steam-tug "Yorkshire Lass" for £50 as the loss and damage he had sustained through their failure to give his steam-tug passage through the bridge on 27th March, 25th July, and 13th August 1883, or at least within a reasonable and proper time. He averred that on these three occasions he had sounded the tug's whistle to attract the attention of the watchman on the bridge, but the passage was not opened, and on the 27th March he lost the morning tide and the towage of two ships from Bo'ness Roads, on the 25th July he lost the towage of the "Fairy Queen," and on August 13th he lost a tide when travelling up the river to tow the lighter "Prompt." "(Cond. 10) It was the duty of the defenders, under the foresaid statutes and at common law, to have proceeded with the construction of the said bridge without causing any undue obstruction to the navigation of the river, and in particular, to have opened the said temporary bridge, and to have allowed the said tug and vessels towed by her to pass through on the occasions condescended on without any delay or hindrance, or at least without any further delay than was necessary in opening the bridge. Further, it was the duty of the defenders to have erected such a temporary swing bridge as could have been opened within a reasonably short space of time. By their failure to discharge the said duty as before mentioned, they have rendered themselves liable to the pursuer for the said loss and damage thereby occasioned."

The defenders admitted delay on the 13th August, but explained that the failure to open the bridge on that day was due to the sudden breaking of a wheel connected with the mechanism by which the bridge is opened; that "said wheel broke in consequence of a latent defect therein, for which consequently the defenders are not responsible."

A proof was led at which the pursuer produced his books. It appears from them that he had not suffered damage to an extent beyond £12.

The Lord Ordinary (FRASER), after findings in fact to the effect above stated, found that by the failure of the defenders to give the pursuer's tug-steamer passage through the bridge on the three several occasions, the pursuer had suffered loss and damage to the extent of £14, and decerned for that sum.

"*Opinion.*—It was the duty of the defenders to keep an open passage for vessels passing up the river. No person who had business to sail up the river could be obstructed by the operations of the defenders beyond what was actually necessary in swinging back the bridge. The railway company are authorised by the Act of Parliament to construct the bridge, but in the construction of their undertaking they are not allowed to interfere with the business of others. The Act makes special provision for an open space being left in the bridge to admit vessels to pass, and this is applicable to the bridge, not merely when completed, but also when in the course of con-

struction. It is clearly proved that there was delay on the 27th of March and 25th July 1883 in opening the bridge, attributable, as the Lord Ordinary thinks, to the watchman being off his post, or of his having been asleep. The delay on the 13th August is admitted, but an excuse is tendered for it, in the fact that a wheel connected with the mechanism by which the bridge is opened broke in the working. The Lord Ordinary thinks this is proved to have been the cause of delay on that day, but it affords no defence in law. It is the defenders' business to have proper machinary for their works; and if in consequence of a defect therein damage has been caused to an innocent third party, the latter cannot be made to bear the loss.

"The sum found due is only £14. The sum concluded for is £50; but there was no tender, and the defence set up was an absolute denial of all liability. The action concluding for £50 was competent in the Supreme Court; and as there was no tender, the pursuer must get his expenses."

The defenders reclaimed, and argued—(1) The Lord Ordinary was wrong on the merits. (2) The amount of damage sustained by the pursuer was capable of being ascertained from his own books, which he had produced at the proof, and amounted to under £12. It was incompetent to bring an action for that amount in the Court of Session. He ought to have gone to the Small Debt Court. He was simply endeavouring to evade the Small Debt Act. Knowing in his own mind that his action was in substance one for £12, he concluded for £50, and by so doing endeavoured to sue in the higher Court.

The pursuer replied—The question of expenses was one largely in the discretion of the Lord Ordinary, and the Court were slow to interfere with that discretion unless very special cause were shown. The reason the case was brought to the Court of Session was that it raised a question of great importance as to the railway company's liability for latent defects in their engine on the bridge. Besides, the action was competently raised there, the conclusion being for a sum of £50.

At advising—

Lord Justice-Clerk—I think your Lordships are all agreed that this is a case which should never have come here. It is said an important question is raised in it as to the general liability of persons in the position of the defenders for a latent defect in the mechanism of their machinery. In so far as that ground of judgment is concerned, although the evidence is contradictory, I see no reason to alter the decision of the Lord Ordinary. But the amount at stake in the case is hardly above the Small Debt Court limit, and that a case for so small an amount should run the gauntlet of all the stages in this Court is, I think, contrary to the spirit of the Act; and I am so far from thinking this view a denial of justice that my hope is that it will be seen to be so consistent with justice that we shall not have to give expression again to it in a similar case.

Lord Young—That is my opinion also. There is no case made to interfere with the judgment of the Lord Ordinary. The tug was detained, and the owner must be compensated; and I agree further that no case is made to interfere with the amount found due to him by the Lord Ordinary, except to the extent of £2, which Mr MacWatt admitted was erroneously awarded by the Lord Ordinary, and that reduces the amount to £12. Then the question is one of expense. I quite sympathise with Mr M'Kechnie's argument. We may well give expenses here, notwithstanding the sum at stake is small, if the question involves principles worthy of the consideration of the Court, but I see no such reason here. I agree with your Lordship that the case ought never to have been brought here, but in the Small Debt Court, for I proceed on the assumption that the pursuer, knowing that his damage only amounted to £12, came here stating that it amounted to £50. We might have altered the interlocutor to the effect of giving the pursuer his expenses at the Small Debt rate, and then as the defender, on the assumption I am now making, ought not to have been brought into the Court of Session, he, although partially unsuccessful, would be entitled to set off the excess of his costs in the more expensive Court. That is, perhaps, the logical result, but I think justice will be done by simply affirming the interlocutor of the Lord Ordinary, with the qualification of reducing the damages by £2 and awarding no expenses on either side.

Lords Craighill and Rutherfurd Clark concurred.

The Court pronounced this interlocutor—

"Alter the Lord Ordinary's interlocutor in so far as it finds that the pursuer has suffered loss and damage to the extent of £14, and decerns therefor, and finds him entitled to expenses: Find that he has sustained loss and damage to the amount of £12, and ordain the defenders to make payment to him of that sum: *Quoad ultra* adhere to said interlocutor; find no expenses due by either party to the other; and decern."

Counsel for Pursuer — M'Kechnie — MacWatt. Agent—James Wilson, Solicitor.

Counsel for Defender — D.-F. Macdonald, Q.C.—Ure. Agents—Maconochie & Hare, W.S.

Saturday, December 6.

FIRST DIVISION.

[Sheriff of Inverness-shire.

LORD MACDONALD *v* MACLEOD.

Lease—Removing Notice—A.S., 14th Dec. 1756 *—Sheriff Courts (Scotland) Act* 1853 (16 *and* 17 *Vict. cap.* 80)*—Agricultural Holdings (Scotland) Act* 1883 (46 *and* 47 *Vict. cap.* 62), *sec.* 28.

Held that the 28th section of the Agricultural Holdings (Scotland) Act 1883 applied to a yearly lease expiring at Whitsunday 1884.

By section 28 of the Agricultural Holdings (Scotland) Act 1883 it is enacted—"Notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention