January 14, 1819, F.C. M'Laren on Wills, i, 750, was referred to.

LORD JUSTICE-CLERK—This is a painful case. It is always a sad thing to see relations quarelling about money. From all I have seen in the proof Miss Russel seems to have done her duty in an exemplary manner. She would have been justified in bringing in skilled nurses to attend upon her aunt. But she did not do so, and undertook that duty herself. It was no doubt very trying work, and she deserves great credit for it. But unfortunately we must deal with this claim as a question of legal right. The residuary legatee has not seen fit to recognise the pursuer's services. She might very well have done so but she has not. With that we have nothing to do. We can only consider whether the pursuer has any legal claim.

On the proof I hold that when the pursuer came home from America she came as a niece to live with her aunt, very much in the position of an adopted daughter. There is no case where in such circumstances a niece who has come to live with an aunt has been held to have any claim for remuneration as for services unless there was a bargain for such remuneration. When the pursuer came home she was rather depressed. The family money had been lost. She had begun to go through a period of hard probation with a view to becoming a nurse. She came to this country to find a home with her aunt instead of going out to work for herself, and to render to her aunt the duties of a daughter, not of a servant—not expecting to receive wages, but no doubt expecting to be remembered in her aunt's will. Her aunt did remember her in her will. The pursuer's case is really put on this, that after a time there was a change of circumstances. The aunt came to be in such a state of health that she required much more attention. Miss Russel had to render arduous and painful services. At the same time the aunt's mental condition became such that she could not do anything additional for the pursuer by will. I am unable to see that these circumstances affect the question which we have to decide.

Summing up the case it stands thus—The pursuer came to her aunt as an adopted daughter. She lived on with her when her health became worse. She might have employed nurses but she did not do so. She nursed her aunt herself as a daughter might have done. She cannot enforce a claim in law to wages for doing so. I think the Sheriff was wrong. I am perfectly satisfied with the Sheriff-Substitute's interlocutor and his careful note, to which I give my entire concurrence.

LORD KYLLACHY—I agree with your Lordship and with the Sheriff-Substitute. I am entirely satisfied with the Sheriff-Substitute's interlocutor and note, and am prepared to adopt all he has said.

LORD STORMONTH DARLING—I concur. The position of matters is this, that the pursuer when she came to her aunt in 1888, and again when she returned to her in 1893, was content to do so on the understanding that she was to get a home and board and clothing; as to anything beyond that she trusted to being remembered in her aunt's will. She has in fact been remembered, but not with such substantial results as she expected and thought appropriate. That may have been due to the fact that her aunt's last codicil was made in 1893, while the special services rendered to her by the pursuer were after that date, by which time the old lady's weakness, mental and bodily, had greatly increased. I concur with your Lordships in thinking that the residuary legatee on that account might well have recognised the claim which the pursuer had in equity. It is, however, impossible for us to do anything to help her, as she has failed to prove that there was any contract, express or implied, that she should receive additional remuneration for the duties she performed. I am of opinion that we should revert to the judgment of the Sheriff-Substitute, with which I agree in every respect.

LORD LOW—I am of the same opinion. Like all your Lordships, as I understand, I should have been very well pleased if it had been possible to give the pursuer some remuneration for the onerous services she has rendered to Mrs Dick during the last three years of her life. But it is only too plain that she has no claim which the law can recognise.

The Court recalled the interlocutor of the Sheriff and assoilzied the defenders.

Counsel for the Appellant—Cooper, K.C.—D. Anderson. Agents—Alexander Campbell & Son, S.S.C.

Counsel for the Respondent—C. N. Johnston, K.C.—Wilton. Agent—Alexander Bowie, S.S.C.

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*Thursday, May* 24.

## FIRST DIVISION.

[Single Bills.

## CANAVAN *v.* JOHN GREEN & COMPANY.

(*Ante* December 16, 1905, *supra* p. 200.)

*Expenses—Jury Trial—Two Trials in both of which Pursuer Successful—Verdict in First Trial Set Aside on Ground of Misdirection—Expenses of First Trial.*

In an action of damages for personal injury the pursuer obtained a verdict which was afterwards set aside on the ground of misdirection. At the second trial the pursuer again obtained a verdict. The pursuer moved for the expenses of both trials.

*Held* that as the verdict in the first trial had been set aside on the ground of misdirection the pursuer was entitled to the expenses of the first trial as well as those of the second.

*Opinions reserved* as to the right of a pursuer who has been successful in both trials to the expenses of the first where the verdict in it has been set aside as contrary to the evidence.

*M'Quilkin* v. *Glasgow District Subway Company*, January 24, 1902, 4 F. 462, 39 S.L.R. 328; and *Grant* v. *William Baird & Company, Limited*, February 20, 1903, 5 F. 459, 40 S.L.R. 365, commented on.

This case is reported *ante ut supra*.

John Patrick Canavan, labourer, 14 South Shamrock Street, Glasgow, raised an action of damages at common law, or alternatively under the Employers' Liability Act 1880, against John Green & Company, masons, 600 Eglinton Street, Glasgow. The case went to a jury and he obtained a verdict. The Court having set aside the verdict of the jury on the ground of misdirection on the part of the Judge, the case was tried a second time, when a jury under the Lord President again returned a verdict for the pursuer, assessing the damages at £220. A rule was refused.

The pursuer on 24th May moved in the Single Bills for the expenses of both trials.

The defenders opposed the motion *quoad* the expenses of the first trial and argued—The pursuer was not, as of right, entitled to the expenses of the first trial and should not in this case be allowed them. The two most recent decisions on the point were conflicting, *i.e.*, *M'Quilkin* v. *Glasgow District Subway Company*, January 24, 1902, 4 F. 462, 39 S.L.R. 328; and *Grant* v. *William Baird & Company, Limited*, February 20, 1903, 5 F. 459, 40 S.L.R. 365.

Counsel for the pursuer were not called on.

LORD PRESIDENT—The facts in this case are familiar to your Lordships. There was a jury trial in which the pursuer claimed damages alternatively at common law and under the Employers' Liability Act. The jury after a direction by the learned Judge returned a verdict for the pursuer under the statute, ignoring the common law liability and without saying yea or nay to the common law issue, but assessing the damages at a figure which was within the statutory limits.

The verdict was afterwards set aside on the ground of a misdirection by the learned Judge as to the statutory provision on which the question turned. A new trial then took place at which I presided. I purposely directed the jury to give special findings as to the common law and statutory liability. The jury found for the pursuer on both issues and assessed the damages at a sum which was not within the statutory limits. On a motion for a new trial your Lordships refused to disturb the verdict on the ground that the jury had given a verdict on the common law issue, and that there was a certain amount of evidence to support their finding. The pursuer now asks for the expenses of both trials.

It seems to me that when the miscarriage of the first trial is due to the misdirection of the Judge, there is no question of the pursuer's right to the expenses of the first trial as well as those of the second. I therefore think the motion now made should be granted. Our attention was called to two cases which I agree are not very easy to reconcile, and when an appropriate case arises it may well be that they ought to be reconsidered. Such a case, however, is not now before us, and I desire to reserve my opinion till the appropriate case occurs.

LORD M'LAREN—I agree entirely in what your Lordship has said as to cases in which a new trial has been granted on the ground of misdirection on the part of the Judge; but I desire to reserve my opinion as to the expenses of a first trial where the verdict has been set aside on the ground that the evidence was insufficient to justify the verdict, because even if the pursuer recovers damages as the result of the second trial, it is his fault or error that he did not bring forward such evidence at the first trial as should satisfy the Court as well as the jury.

LORD KINNEAR—I am rather inclined to think that the two cases cited, although at first sight they may appear to be conflicting, are yet distinguishable. My own view is that the question of expenses ought always to be decided with special reference to the circumstances of the particular case. But I agree with your Lordship that it is not necessary to distinguish between the two cases quoted to us for the purpose of disposing of the present application. The pursuer here got a verdict in the first trial, which was set aside because the Court thought that the law had not been satisfactorily explained by the learned Judge who presided at the trial. If the error could have been corrected without a new trial, and the consequent judgment had been an absolvitor, the pursuer must have borne the expense caused by his obtaining a wrong verdict. But because the verdict was set aside it did not follow that the pursuer was wrong and the defender right on the question of fact. The consequence of setting the verdict aside was a new trial; and the result of the second trial, when the law was fully explained, was the same as that of the first. On the question for a jury, therefore, the pursuer was found to be in the right all along, and if the expense of the first trial has been thrown away it is because the defenders insisted, as they were entitled to do, on a second trial, which has not altered the result. The pursuer therefore cannot be said to have caused the expense of a double trial. I think, therefore, that as the successful party he is entitled to the expenses of the litigation in the usual way.

LORD PEARSON—I agree in the judgment proposed. In this case a second trial was granted on the ground that there had been a misdirection by the Judge who presided at the first trial. I think the result might be different if the verdict had been set aside not only on the ground of misdirection but on the further ground that the verdict was contrary to evidence. That would

have been a different case, and I do not express any opinion on it.

The Court found the pursuer entitled to the expenses of both trials.

Counsel for Pursuer—J. C. Watt, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders—G. Watt, K.C.—Constable. Agents—Simpson & Marwick, W.S.

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*Friday, May 25.*

## FIRST DIVISION.

[Sheriff Court at Falkirk.

## CALDWELL *v.* DYKES.

*Process—Appeal—Appeal merely on Question of Expenses—When only to be Given Effect to.*

*Per* Lord President—"I have no hesitation in saying that I think an appeal upon mere expenses, without touching the merits, ought to be severely discouraged both in the Sheriff Court and in this Court, and that it is not too much to say that it should never be given effect to unless either there has been an obvious miscarriage of justice in the interlocutor reclaimed against, or in some of those cases where the expenses have become a great deal more valuable than the merits."

On 18th December 1904 James Thomson Caldwell, flesher, Vicar Street, Falkirk, brought an action in the Sheriff Court at Falkirk against James Dykes, flesher, High Street, Falkirk, to recover £97, 15s. 4d. alleged to be due him on an accounting; and on the 24th April 1905 the Sheriff-Substitute (MOFFAT) after a proof gave him decree for £73, 4s. 4½d. but found neither party entitled to expenses. Parties acquiesced in the Sheriff-Substitute's judgment on the merits, but the pursuer took an appeal to the Sheriff on the question merely of expenses. The Sheriff (LEES) on 21st July 1905 recalled the finding as to expenses of his Substitute and allowed the pursuer one-half of his expenses. The defender appealed to the Court of Session.

The nature of the cause appears from the following findings of the Sheriff-Substitute in his interlocutor of 24th April:—"Finds in fact—(1) That in the beginning of July 1904 the defender was engaged to act as salesman and manager to the pursuer of a flesher's business at Vicar Street, Falkirk, at a salary of £1, 10s. per week, payable weekly, with a commission of ten per cent. on profits; (2) That there was no arrangement between the pursuer and defender that the defender should take over the business as soon as he was able to pay £300, or on any other terms; (3) That it was the duty of the defender to account regularly to the pursuer for the drawings of the business; (4) That in accordance with his duty the defender up to 8th October 1904 placed the drawings of the business to the credit of the pursuer's account in bank; (5) That the pursuer was in the habit of remitting money regularly for the payment of wages; (6) That on or about 8th October 1904 the defender entered into negotiations with the pursuer to purchase the said business; (7) That these negotiations did not come to a successful termination; (8) That from the 8th October 1904 the defender failed to account to the pursuer for his intromissions; (9) That the defender was dismissed from his employment as manager for the pursuer on 19th October 1904; (10) That the defender did not leave the employment but continued to carry on business until the evening of the 24th October 1904; (11) That on the evening of the 24th October the defender handed over the key of the shop to the pursuer and left the premises: Finds in law that the defender is bound to account to the pursuer for his intromissions in the management of the business up to 24th October 1904: Finds in fact (12) That on an accounting the defender is due the pursuer the sum of £73, 4s. 4½d. sterling; (13) That the defender has already paid to the pursuer, in obedience to the interlocutor of 19th December 1904, the sum of £51, 2s. sterling." The defender had on record admitted his indebtedness to the extent of £51, 2s., and had made a tender of £85, not appearing on the record, to avoid the litigation.

Argued for the defender (appellant)—An appeal merely on the question of expenses was competent—*Fleming* v. *North of Scotland Banking Company*, October 20, 1881, 9 R. 11, 19 S.L.R. 4; *Bowman's Trustees* v. *Scott's Trustees*, February 13, 1901, 3 F. 450, 38 S.L.R. 557—and the finding of the Sheriff-Substitute was the right one in the circumstances of the case—*Critchley* v. *Campbell*, February 1, 1884, 11 R. 475, 21 S.L.R. 326; *Mavor and Coulson* v. *Grierson*, June 16, 1892, 19 R. 868, 29 S.L.R. 766. This was not a case where the pursuer was entitled as of right to expenses. The action was one of accounting, and in such a case a pursuer though successful was not entitled as of right to full expenses. The pursuer had taken the first step in appealing to the Sheriff, and therefore could not complain of this appeal.

Argued for the pursuer (respondent)—The Court would not look favourably on an appeal from the Sheriff Court merely on the question of expenses, and in this case ought not to reverse the Sheriff's judgment. The conduct of the defender had been unreasonable all through. He was under a duty to account to the pursuer, failed at first to do so, and when he did his statement of his intromissions was so unsatisfactory that the pursuer had to employ professional accountants to go into the matter. The Sheriff on these facts was justified in his interlocutor, which was indeed the only equitable one possible.

LORD PRESIDENT—I confess that this is a case to which I address myself with great regret, because I think it is deplorable that, in a case where the original claim was for