But if these cases could be distinguished on either or both the grounds above discussed, I think the arbitrator was entitled to find the element of accident sufficiently present in the accidental circumstances of 28th October, namely, first, the accidental accumulation of water the temperature of which produced his injury; second, Welsh's accidental employment at the work of baling, he having gone down the pit to engage in brushing; and third, the accidental attack of sub-acute rheumatism, from which none of the other persons employed in baling seem to have suffered.

The Court answered the question of law in the affirmative.

Counsel for the Appellants—Cooper, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—A. O. M. Mackenzie, K.C. — Dykes. Agents — J. Douglas Gardiner & Mill, S.S.C.

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*Tuesday, July* 20.

## SECOND DIVISION.

(SINGLE BILLS.)

## DAVIDSON *v.* SCOTT.

(Reported *supra*, p. 736.)

*Expenses — Taxation — Skilled Witness — Certification by Judge—C.A.S., K, iv,* 1, *App.* 1, *v*, 3 (2).

The Codifying Act of Sederunt provides, K, iv, 1, App. I, v, 3 (2)—". . . In cases where it is found necessary to employ professional or scientific persons such as physicians, surgeons, chemists, engineers, land-surveyors, or accountants, to make investigations previous to a trial or proof, in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such persons shall be allowed as may be considered fair and reasonable, provided that the judge who tries the cause shall—on a motion made to him either at the trial or proof, or within eight days thereafter if in session, or if in vacation within the first eight days of the ensuing session—certify that it was a fit case for such additional allowance." *Held*, after consultation with the Judges of the First Division, that the motion for a certificate for skilled witnesses should be made at the conclusion of the proof or trial, and that when this is not done the application must be made in the motion roll after notice to the other side, but without any allowance for enrolment or discussion.

*Expenses — Skilled Witness — Valuator — Fee.*

*Held* that a valuator belonged to the class of professional persons who were entitled to a fee of £2, 2s. per day for attendance as witnesses, but that a valuator who came from London was not entitled to a higher fee than a Scottish valuator.

*Expenses — Taxation — Printing — Use of Prints in Prior Action between Same Parties.*

By arrangement between the parties certain prints which had been printed in a prior action between the same parties were utilised in the second action. But for this arrangement a large part of the previous proof might have required to be again led and the documents to be reprinted. The successful defender in the second action had been the unsuccessful complainer in the prior action and had been found liable in expenses. *Held* that the successful defender in the second action had rightly been allowed by the Auditor the expenses of the printing.

*Expenses—Taxation—Fees to Counsel.*

*Held* (1) that a special consultation fee to counsel, to consider to what extent the evidence and documents in a previous action could be utilised, must be disallowed where a full consultation fee for consultation regarding proof had been allowed, and (2) that when debate fees of £15, 15s. and £12, 12s. were sent to senior and junior counsel respectively for the first day's debate, and the debate was adjourned on the first day after a discussion lasting twenty minutes, a second day's fees must be disallowed.

Donald Davidson, High Street, Grantown-on-Spey, *pursuer*, brought an action against Miss Jessie Scott, residing at Nellfield Lodge, Braidwood, Lanarkshire, *defender*, for declarator that he was entitled to certain maills and duties. The Court dismissed the action, and found the defender entitled to expenses (*ante*, p. 736). The Auditor having taxed the defender's account of expenses, the pursuer lodged a note of objections to the report, in which he challenged certain items which had been allowed. The principal objections were (1) to the fee allowed to a London valuator, as to which objection was taken to the mode certification had been obtained as well as to the actual amount of the fee; (2) to the cost of printing, in respect that the proof and documents charged for were in a previous action, and had merely been adopted into this by agreement; (3) to consultation and debate fees allowed to counsel.

The following authorities were cited:—*Shaw & Shaw* v. *J. & T. Boyd, Limited*, 1907 S.C. 646, 44 S.L.R. 460; *Kay* v. *Wilson's Trustees*, May 25, 1850, 12 D. 941; *Gunn* v. *Muirhead*, October 19, 1899, 2 F. 10, 37 S.L.R. 9; *Lord Elphinstone* v. *Monkland Iron and Coal Company, Limited*, February 2, 1887, 14 R. 449, 24 S.L.R. 323.

At advising, the judgment of the Court (LORD JUSTICE-CLERK, LORD DUNDAS, and LORD SALVESEN) was delivered by

LORD SALVESEN—In this case various objections have been stated to the Auditor's report on the defender's account of expenses. Some of these raise questions of principle.

The first objection is of this nature. A valuator in London was adduced as a witness for the defender, the Lord Ordinary

certifying him as a skilled witness apparently on the mere presentation of a list of witnesses for whom a certificate was desired. The pursuer complains that he had no notice of this being done, and that as the procedure prescribed by the Act of Sederunt has not been followed the certificate is void. The Act of Sederunt provides that such certificate may be granted "on a motion made to him (the Judge who tried the case) either at the trial or proof, or within eight days thereafter if in session, or if in vacation within the first eight days in the ensuing session." The pursuer maintained that if such a motion were not made at the trial or proof intimation must be sent to the opposite party, who was entitled to be heard thereon. According to the strict interpretation of the Act of Sederunt I think he is right. When the motion is made at the trial or proof there will necessarily be an opportunity of objecting, and I think it follows that if the motion is not made then, intimation of the time when it is going to be made ought to be given to the opposite party. That this was the intention of the Act of Sederunt is apparent from the fact that special provision is made for the trial or proof being in vacation or for the judgment following thereon being delivered then, for it was held in the case of *Scott* v. *Lanarkshire and Dumbartonshire Railway Company*, 5 S.L.T. 165, that the date of pronouncing judgment in cases where the evidence had been taken on proof and the date of the verdict in jury trials were the points of time from which the eight days allowed by the Act of Sederunt for a motion to certify skilled witnesses began to run, and also that in computing the eight days, days of vacation were not to be counted. It cannot, however, be doubted that according to a long course of practice a different construction has been put upon the Act of Sederunt than its terms warrant. An opinion of Lord Craighill in the case of *Elphinstone*, 14 R. 449, 24 S.L.R. 323, has been relied on to support the view that no notice is necessary, and apparently since the date of that decision (which does not itself deal with the point) the practice has been for the parties to hand to the judge's clerk a list of the names of witnesses whom they desire to have certified without any communication with each other. In view of this practice I think it is impossible to sustain the objection that the certificate of the Lord Ordinary must be treated as invalid. At the same time I think it is necessary now that we should authoritatively decide, as we are entitled to do, after having consulted the Judges of the other Division, that this practice must cease, and that parties must hereafter have an opportunity of being heard on their respective applications for certificates. Objections of various kinds may be stated to such applications. It may, for instance, be thought that one skilled witness only should be certified with regard to the part of the case on which his evidence had a bearing, and that if further skilled witnesses have been adduced they should not be certified. Or again, witnesses may be included in the application for a certificate who had made no investigation into the facts, and who therefore ought not according to the ordinary rule to receive additional allowances. The present case illustrates the danger of requiring the Lord Ordinary to deal with an application for a certificate without the assistance of counsel, for the Lord Ordinary here certified a gentleman who was never presented for examination. The earlier practice, which was much less objectionable, was thus stated by the Auditor in *Elphinstone's* case—"The practice appears to be that the agents arrange for a meeting with the judge, when they are heard on their respective applications for certificates and (if necessary) against the claim of the opposite party in whole or in part." It is much more convenient that such a discussion should take place through counsel and in the ordinary motion roll if the motion is not made at the close of the proof. As, however, we think the motion ought properly to be made at the close of the proof or trial no charge will be allowed for enrolling in the motion roll or for discussing the application if the parties for any reason have failed to do so.

The second objection stated is to the amount allowed by the Auditor for Mr Curr's fee. I am of opinion that it is excessive, and that £15, 15s. was an adequate fee for the inquiries made by him previous to his examination. These included a visit to a certain property, which took place during the same day on which he was examined, and occupied some three hours. The fact that Mr Curr came from London is no reason for allowing a higher charge than if a Scotch valuator had been employed. On the other hand, I am quite clear that a valuator belongs to the class of professional persons who are entitled to a fee of £2, 2s. per day for attendance as witnesses.

The next objection relates to charges in connection with the use of prints in a prior action between the same parties. The defender was there the complainer, and she was unsuccessful and was found liable in expenses. Much of the ground covered in that action would have had to be gone over again in the present but for an arrangement that the parties made that the evidence and prints in the action of suspension should be utilised in the present case. That was in my opinion a very proper arrangement. The necessary prints were available in the hands of the defender, and they were all used and referred to in the discussion on the reclaiming note which we heard. The cost of the original printing has been charged, and other incidental costs to adapt the prints to the present process. If the arrangement in question had not been come to, not merely might a large part of the proof have required to be again led, but the documents would have had to be reprinted. In these circumstances I am of opinion that the Auditor has rightly allowed these items, and I think in doing so he has substantially followed the decisions in the cases of *Kay* v. *Wilson's Trustees*, 12 D. 941, and *Gunn* v. *Muirhead*, 2 F. 10.

The last objection which it is necessary to notice relates to fees sent to counsel for (1)

a special consultation before the proof, and (2) for the debate in the Inner House. The consultation fees objected to were sent that counsel might consider to what extent the evidence and documents in the previous action of suspension should be imported into the present case. Now I cannot understand how that matter could be considered apart from the general question regarding the proof to be led in respect of which another consultation fee to each counsel had been allowed. All the matters relating to the proof should have been considered together, and indeed it is difficult to see how they could have been considered apart. I therefore think that the fees connected with this consultation should be disallowed.

As regards the debate fees, £15, 15s. and £12, 12s. were sent to senior and junior counsel respectively for the first day's debate, and £12, 12s. and £8, 8s. for the second. Having in view the character and dimensions of the case the first day's fees were sufficiently generous, but they are not challenged as regards amount. It is said, however, that the discussion on that day only lasted some twenty minutes, when it became necessary to adjourn the debate, as a question of competency had been raised on a technical point, and that the second day's fee should be disallowed. I think this objection is well founded. The first day's fee had not been exhausted, and the attendance of counsel on the two days together did not really occupy even a whole day.

The remaining objections involve matters of pure taxation and were not ultimately pressed.

LORD GUTHRIE was present at the advising, but delivered no opinion, not having heard the case.

The Court sustained the objections to the extent of £46, 16s. 5d.: *Quoad ultra* approved of the report, and decerned against the pursuer for payment of the sum of £557, 16s. 1d., and found no expenses due to or by either party in connection with the discussion of the objections to the Auditor's report.

Counsel for the Pursuer — M'Lennan, K.C.—Maclaren. Agent—John Robertson, S.S.C.

Counsel for the Defender—Macphail, K.C.—Dykes. Agent—James Scott, S.S.C.

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*Tuesday, July 20.*

## SECOND DIVISION.

[Lord Hunter, Ordinary.

## SCOTT PLUMMER *v.* BOARD OF AGRICULTURE FOR SCOTLAND.

*Landlord and Tenant — Property — Small Holding — Arbiter — Award — "Depreciation in the Value of the Estate" — "In Consequence of and Directly Attributable to" — Small Landholders (Scotland) Act* 1911 (1 *and* 2 *Geo. V, c.* 49), *sec.* 7 (11).

The Small Landholders (Scotland) Act 1911, section 7 (11), enacts—". . . Provided that where the Land Court are of opinion that damage or injury will be done . . . to any landlord . . . in respect of any depreciation in the value of the estate of which the land forms part, in consequence of and directly attributable to the constitution of the new holding or holdings as proposed, they shall require the Board, in the event of the scheme being proceeded with, to pay compensation to such amount" as the Land Court, or in certain circumstances an arbiter appointed by the Lord Ordinary on the Bills, determine. It further enacts—" In determining the amount of compensation under any provision of this Act no additional allowance shall be made on account of the constitution or enlargement of any holding being compulsory."

An arbiter, appointed by the Lord Ordinary on the Bills at the request of the landlord, made an award of compensation, *inter alia*, for depreciation on the ground that the estate had been depreciated in capital and saleable value. In an action at the instance of the landlord to enforce the decree-arbitral, *held* (*rev.* judgment of Lord Hunter, Ordinary) that the arbiter had not acted *ultra vires* in making the award, and that the award was covered by the terms of the statute.

*Opinions per* the Lord Justice-Clerk and Lord Johnston that the provision as to where the constitution or enlargement of a holding was compulsorily was merely to prevent a compulsory allowance being invariably granted as under the Lands Clauses Acts.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, c. 49), enacts—Section 7—"*Powers to Facilitate the Constitution of New Holdings.* . . . (11) . . . Provided that where the Land Court are of opinion that damage or injury will be done to the letting value of the land to be occupied by a new holder or new holders, or of any farm of which such land forms part, or to any tenant in respect that the land forms part or the whole of his tenancy, or to any landlord either in respect of an obligation to take over sheep stock at a valuation, or in respect of any depreciation in the value of the estate of which the land forms part in