

Tuesday, July 19.

SECOND DIVISION.

NIXON v. HOUSTON.

Expenses—Jury Trial—Expenses Caused by Adjourment of Trial—Act of Sederunt 16th February 1841, sec. 25.

Upon the morning of the day appointed for a jury trial to proceed, which was a Monday, counsel for the pursuer moved for the adjournment of the trial on the ground that on the evening of the previous Saturday the pursuer had met with an accident, and was in consequence unable to be present at the trial. No explanation was given as to the nature or circumstances of the accident. The trial having been adjourned, the Court, upon the motion of the defender, found the pursuer liable in the expenses caused by the adjournment, and thereafter, the expenses having meanwhile been taxed, and no explanation even then being forthcoming as to the nature or circumstances of the pursuer's accident, *decerned* for the taxed amount of the expenses, and without deciding any general question as to the payment of expenses in such cases being a condition of again proceeding to trial, but in view of the special circumstances of this case, upon payment of the amount of the expenses as taxed, *allowed* the trial to proceed.

John Nixon, dock labourer, Glasgow, brought an action in the Sheriff Court at Glasgow against William Houston, stevedore, Glasgow, in which he craved decree for £234 under the Employers Liability Act 1880, as damages for personal injuries.

The Sheriff Substitute (SPENS), by interlocutor dated 11th March 1898, before answer allowed a proof.

The pursuer appealed to the Court of Session for jury trial.

On 12th May the Court ordered issues, and on 20th May an issue was approved for the trial of the cause.

Monday 4th July was appointed as a diet for the trial of the cause before the Lord Justice-Clerk with a jury.

Upon that day, before the jury were empannelled, counsel for the pursuer stated that the pursuer had met with an accident on the night of Saturday 2nd July, and produced a medical certificate to the effect that the pursuer was not in a fit condition to attend at the trial. No explanation was given as to the nature of the pursuer's injuries or the circumstances under which he met with the accident. Counsel for the pursuer therefore moved that the trial should be adjourned. Counsel for the defender moved for the expenses caused by the adjournment, but the Lord Justice-Clerk intimated that he thought that question should be disposed of by the Court when the pursuer applied to have a new diet fixed for the trial. The trial was then put off.

Thereafter the pursuer gave notice for the sittings, whereupon the defender presented a note to the Lord Justice-Clerk craving that the pursuer should be found liable in the expenses caused by the adjournment of the trial, and that the trial should not be allowed to proceed until these expenses were paid, and meantime that the notice of trial given for the sittings should be discharged.

The Act of Sederunt 16th February 1841, regulating proceedings in jury causes, enacts as follows:—Section 25. "That until the jury is empannelled and sworn to try a cause, it shall be competent to apply to put off the trial on account of the unavoidable absence or sickness of a material witness, or for other sufficient cause to the satisfaction of the Court, and supported by oath or affidavit, if the Court shall so require, or, in vacation, by the Judge before whom motions are to be heard as before directed, upon payment of such expenses as shall have been incurred by the opposite party in consequence of the delay of the trial."

On 9th July counsel for the defender moved in terms of the prayer of the note, and stated that no explanation had yet been given as to the nature or origin of the pursuer's accident. Counsel for the pursuer was in attendance and stated that he had no information on that subject. He objected to the payment of the expenses of the adjournment being made a condition of the trial proceeding.

The Court intimated that they would dispose of that matter after the expenses were taxed.

The Court pronounced the following interlocutor of date 9th July 1898:—"The Lords find the pursuer liable to the defender in the expenses caused by the adjournment of the trial on the 4th inst.: Remit to the Auditor to tax the same and to report; meanwhile discharge the notice of trial for the ensuing sittings."

The account of expenses having been taxed, counsel for the defender moved for decree, and argued that the trial should not be allowed to proceed except upon payment of these expenses—Act of Sederunt, 16th February 1841, section 25.

Counsel appeared for the pursuer and stated that he had not been able to obtain any information as to the nature or circumstances of the pursuer's accident. Payment should not be made a condition of again proceeding to trial. The terms of the Act of Sederunt did not require such an order to be made.

LORD JUSTICE-CLERK—Without deciding the general question I think we can dispose of this case upon its own merits. In the absence of any information as to how this accident occurred, I think it is only fair that we should make it a condition of allowing the trial to proceed that the expenses caused by the adjournment should be paid. I prefer not to decide any general question.

LORD YOUNG—I agree. If there had been any creditable explanation of how this accident occurred, although naturally

enough the pursuer's representatives could not give it on the day appointed for the trial, yet if there had been one they must have been able to give it now. Without expressing any opinion on the general question, I think this is a case for making payment of the expenses incurred through the adjournment a condition of allowing the trial to proceed.

LORD TRAYNER and LORD MONCREIFF concurred.

The Court pronounced the following interlocutor:—

"The Lords approve of the Auditor's report on the defender's account of expenses, and decern against the pursuer for the sum of £67, 12s., the taxed amount thereof; and upon payment thereof allows the trial to proceed."

Counsel for the Pursuer—R. L. ORR—Findlay. Agents—Patrick & James, W.S.

Counsel for the Defender—Jameson, Q.C.—Salvesen. Agent—Alex. Wylie, S.S.C.

Wednesday, July 20.

FIRST DIVISION.

[Sheriff of Forfarshire.

RAMSAY & SON v. BRAND.

Contract—Building Contract—Disconformity to Specification—Materiality of Deviations.

Illustration of the rule that though one who undertakes to perform certain specified work has no claim for the contract price or any part thereof unless he has executed the work *modo et formâ*, nevertheless, if the disconformity to contract be only in matters of detail, he will be entitled to demand payment of the contract price less such a sum as may be required to complete the work in compliance with the contract.

Contract—Building Contract—Approval of Work by Architect.

Observed, per Lord President—"The architect to whose satisfaction the work is to be done according to specification cannot approve of work done disconform to specification, for without special permission he has no authority to dispense with performance of the express terms of the contract."

This was an action raised in the Sheriff Court at Arbroath by D. Ramsay & Son, builders, against Robert Brand, concluding for declarator that the pursuers were entitled, in terms of a certain contract between them and the defender, to complete the mason work of a cottage in Arbroath in the course of erection for the defender, and craving warrant to the pursuers to complete the mason work of the cottage accordingly. There was also a conclusion

for payment of £79, 10s., being the contract price of the said mason-work.

The pursuers founded upon their contract with the defender and relative specifications, which provided that the whole work should be done "to the entire satisfaction of the architect in every respect."

When the pursuers' offer to execute the work was accepted in April 1896 a Mr Mason was the defender's architect. He resigned his appointment in the following month, when a Mr Lamond was employed by the defender, and Mr Symon, Arbroath, was appointed architect in succession to him in February 1897.

The defender pleaded, *inter alia*—" (4) The defender not being bound to accept work and materials disconform to contract, notwithstanding the architect's satisfaction therewith, the pursuers are not entitled to the finding and declarator asked by them. (7) The mason work, so far as executed, and the materials already supplied, being materially disconform to contract, the pursuers are not entitled to the finding and declarator asked by them."

After sundry procedure the Sheriff-Substitute (DUDLEY STUART) on 26th August 1887 pronounced an interlocutor by which he found the pursuers entitled to complete the mason work of the cottage in terms of the contract, and granted warrant to Mr Symon to superintend its execution and completion, and ordained him to report.

On 29th September 1897 Mr Symon reported that having examined the building, he found certain specified parts of the work unfinished, and that the pursuers had since proceeded with the work, "which is now satisfactorily completed in terms of the contract." In a letter to the defender's agents dated 15th October 1897 Mr Symon wrote as follows:—"Of course what I state in regard to the completion of the contract referred only to the items specified in the report, as I considered that the interlocutor prevented me taking any notice of any other part of the disputed work."

On 27th October 1897 the Sheriff-Substitute (DICKSON) found that the pursuers had completed the mason work of the cottage to Mr Symon's satisfaction, and gave decree in their favour for the sum sued for.

The defender appealed, and on 16th March 1898 the Court recalled the Sheriff-Substitute's interlocutor of 26th August 1897 and the interlocutors subsequent thereto, and remitted to Mr Symon "to report whether the work executed prior to the 26th August 1897 has been done to his entire satisfaction in every respect, or in what respect, if any, the said work is disconform to contract, and what sum, if any, it would cost to complete the work in accordance with the contract."

On 6th May 1898 Mr Symon presented a long and detailed report, in which he dealt minutely with numerous particulars, in which the defender alleged that there had been deviations from contract or bad workmanship. The following are typical passages from the report:—"The foundations are not deep enough, inasmuch as there is an average of 6 inches of black earth or