

Company had a good claim for £1350 against the defenders, that that claim has never been discharged, and that the right to it is now vested in the pursuer.

LORD YOUNG—I concur. After I had read the judgment of the Sheriff-Substitute I thought that judgment was so clearly right that the contrary was not arguable. I remain of that opinion now after having attended carefully to the only argument that could have been stated against it by Mr M'Clure, and I agree with the Sheriff-Substitute and with the opinion of Lord Trayner.

The LORD JUSTICE-CLERK concurred.

LORD MONCREIFF was absent.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—Hunter. Agents—J. & J. Ross, W.S.

Counsel for the Defenders and Appellants—Johnston, K.C.—M'Clure. Agents—Murray, Beith, & Murray, W.S.

Wednesday, May 28.

SECOND DIVISION.

REES v. HENDERSON.

Expenses—Taxation—Jury Trial—Fees to Counsel.

In taxing the account of the successful party in an action which had been tried before a jury, the trial lasting one day, the Auditor taxed off fifteen guineas and seven guineas respectively from fees of thirty guineas to senior counsel and twenty guineas to junior counsel for attendance at the trial. The pursuer consented to the fees being reduced to twenty-five guineas and fifteen guineas respectively but objected to the Auditor's report in so far as it reduced the fees below these sums. *Held (diss. Lord Young)* that the fees as so reduced of consent were appropriate, and objections *sustained*.

Opinion (per Lord Trayner) that it is not part of the Auditor's duty to fix counsel's fees.

In an action at the instance of George Henry Rees, 4 Parkside Terrace, Edinburgh, against John Young Henderson, Winncote, Aldrington Road, London, S.W., which was tried before a jury, the pursuer was successful, and the defender was found liable in expenses.

In the pursuer's account of expenses, fees of thirty guineas to senior counsel and twenty guineas to junior counsel were charged for attendance at the trial, which lasted one day. The Auditor taxed off fifteen guineas from the former and seven guineas from the latter. The pursuer consented to the fees being reduced to twenty-

five guineas for senior counsel and fifteen guineas for junior counsel respectively, but objected to the Auditor's taxation in so far as it reduced the fees below these sums.

Argued for the pursuer—It was not within the province of the Auditor to make any deduction from the fees sent to counsel, but assuming that it was within his province he had disregarded the decisions of the Court in the mode in which he had exercised his discretion in the present case. According to the decisions the fees which the pursuer sought to charge against his opponent were such as the Court had approved in similar circumstances—*Mackie & Company v. Gibb*, October 26, 1899, 2 F. 42, 37 S.L.R. 36; *Wilson v. North British Railway Company*, December 13, 1873, 1 R. 304, 11 S.L.R. 155; *Hubback v. North British Railway Company*, June 25, 1864, 2 Macph. 1291; *Cooper & Wood v. North British Railway Company*, December 19, 1863, 2 Macph. 346.

Argued for the defender—The Auditor was the proper judge of the fees that could be charged as between party and party, and the Court would not interfere with his discretion.

LORD JUSTICE-CLERK—We have here an objection to the Auditor's report on an account of expenses. The objection is that the Auditor has in taxing reduced the fees sent to counsel for the successful party. Now, the propriety of the fees sent to counsel cannot depend on what actually takes place at the trial, because according to our practice fees are sent to counsel before the trial begins, but apparently it has been fixed that the fees sent here were ordinary fees in a case of this kind. The objector is willing to consent to a reduction of £5, 5s., making the Solicitor-General's fee £26, 5s. I am of opinion therefore that we should sustain the objection to the extent now maintained by the pursuer.

LORD YOUNG—I think the Auditor, as the experienced taxing officer of the Court, is the judge of what are the proper fees in the particular case before him. I assume that he knows the particular case before him when he taxes the whole account. Now, unless we are prepared to make a scale of fees with a maximum and a minimum, or to fix an ordinary fee which the Auditor is to allow in all cases unless he sees reasons for making an exception in a particular case, I think we should not interfere with the discretion of the Auditor in any particular case either by increasing or reducing the fee which he has allowed. He may have allowed what appears to us a large fee, but I do not think it would be convenient or for the public interest that we should hear an argument with a view to reducing it. And the same consideration applies when we are asked to increase the fees allowed by the Auditor.

LORD TRAYNER—I agree with your Lordship in the chair. I do not think that it is part of the Auditor's duty to fix counsel's fees. I think that the proper point of view

from which counsel's fees are to be regarded is this—The agent who sends the fee, and is from his intimate knowledge of the facts and character of the case he is conducting able to estimate the work which his counsel will have to perform, is best able to form an opinion as to the fee which ought to be sent. If on a consideration of the whole circumstances (better known to him than to anyone else) he sends a fee which is not distinctly extravagant, I would not allow the Auditor to interfere with it. Nor do I think it necessary that we should have a scale or tariff of counsel's fees. The practice of the Court has very well established what is reasonable or unreasonable in that matter. Taking that practice into view here I think that the Auditor has done wrong in reducing counsel's fees in this case. I think that the objection to the Auditor's report should be sustained, and that we should allow twenty-five guineas to senior counsel and fifteen guineas to his junior.

The Court allowed fees of twenty-five guineas to senior counsel and fifteen guineas to junior counsel, and sustained the objections to that extent.

Counsel for the Pursuer—C. D. Murray.
Agent—Marcus J. Brown, S.S.C.

Counsel for the Defender—J. R. Christie.
Agent—James F. Mackay, W.S.

HIGH COURT OF JUSTICIARY.

Monday, June 2.

(Before the Lord Justice-Clerk, Lord M'Laren, and Lord Stormonth Darling.)
MILNE & COMPANY v. MACLENNAN.

Justiciary Cases—Statutory Offence—Locomotives—Metal Spikes on Driving Wheel of Locomotive on Public Road—Road—Locomotives Amendment (Scotland) Act 1878 (41 and 42 Vict. cap. 58), sec. 3 (4).

The Locomotives Amendment (Scotland) Act 1878 (41 and 42 Vict. c. 58), sec. 3, enacts that "it shall not be lawful to use on any highway a locomotive constructed otherwise than in accordance with the following provisions, that is to say . . . (4) The driving wheels of a locomotive shall be cylindrical and smooth-soled, or shod with diagonal cross-bars of not less than three inches in width, nor more than three-quarters of an inch in thickness, extending the full breadth of the tire, and the space intervening between each such cross-bar shall not exceed three inches."

Held that the use of metal spikes fixed into and projecting two inches from the diagonal cross-bars of the driving wheels of a locomotive, when it was being driven along a public road, constitutes a contravention of sec. 3 (4)

of the Locomotives Amendment (Scotland) Act 1878.

John Milne & Company, Limited, manufacturers of manures and feeding-stuffs, Dyce, Aberdeenshire, were charged in the Justice of Peace Court, Aberdeen, on a summary complaint at the instance of Thomas M'Lennan, Procurator-Fiscal. The complaint set forth that the accused, "being the owners of a locomotive propelled by steam (No. 1581), (first), did, on 14th November 1901, on the public road leading between Auchterless Railway Station, parish of Auchterless, and Parkhill Stores, parish of Monquhitter, both in Aberdeenshire, use said locomotive by driving it with two wagons attached along said road, said locomotive being constructed otherwise than in accordance with the provisions of section 3 of the Locomotives Amendment (Scotland) Act 1878, in so far as twenty or one or more large metal spikes were fixed into and projected 2 inches or thereby from the diagonal cross-bars of the driving-wheels thereof; (second) did on 23rd November 1901, on the highway leading between Parkhill Stores, parish of Monquhitter, by way of Keithen to Auchterless Station, parish of Auchterless, all in Aberdeenshire, . . . use said locomotive by driving it with two wagons attached along said roads, said locomotive being constructed otherwise than in accordance with the provisions of section 3 of the Locomotives Amendment (Scotland) Act 1878, in so far as twenty or one or more metal spikes were fixed into and projected 2 inches or thereby from the diagonal cross-bars of the driving-wheels thereof—and all this they did contrary to sub-section (4) of said section 3 of said Act."

At the diet on 31st January 1902 the agent of the accused objected to the competency and relevancy of the complaint, in respect that the Act of Parliament libelled did not prohibit the acts charged in the complaint.

The Justices repelled this objection. A plea of not guilty was tendered by the accused. The diet was adjourned to 7th February 1902, when after evidence had been led the accused were convicted of the contravention charged, and adjudged to pay £2, 10s. of modified penalty with £3 of expenses.

The accused took a case for appeal.

In the case stated by the Justices of the Peace the following facts were stated to have been proved:—"The locomotive in question is the property of the appellants, and it was used by them by driving it, with two wagons attached, on the dates and at the places specified in the complaint. The driving-wheels of the locomotive in question are shod with diagonal cross-bars in conformity with section 3 (4) of the Act of Parliament libelled, but holes are drilled in these bars into which spikes can be fixed [specimen spikes were produced]. The object of fixing these spikes into the diagonal cross-bars of the driving-wheels is to enable the locomotive to be driven over roads when covered with snow