

to him the moment they became aware of it. This they did not do, but gave no intimation to the pursuer till October 11th. That is a good answer to their claim for set-off.

I should go the length of saying that on the general rules of law if any company of this kind employs an employee whose honesty is guaranteed by another, and if the employee commits a crime such as forgery, and his employers get to know of it, they are not entitled to retain him a day in their employment under the guarantee unless they inform the cautioner and he is prepared to continue the guarantee on the footing that the employee remains in their service.

LORD TRAYNER—It does not appear from the interlocutor of the Lord Ordinary whether his attention had been directed to the terms of section 6 of the Mercantile Law Amendment Act, or the cases decided in reference to that section. Having that section of the Act in view, I am not prepared to say that a guarantee to be effectual must have been executed in accordance with the requirements of the Act of 1681. But in the view I take of this case it is not necessary at present to decide that question, and I abstain meanwhile from offering any opinion upon it.

I will assume, in the defenders' favour, that the guarantee they found on is a good guarantee, and sufficient to bind the pursuer without any *rei interventus*. But assuming that, I think the defenders have forfeited any right the guarantee gave them by reason of their failure to intimate timeously to the pursuer the criminal conduct of their agent, a failure which prevented the pursuer taking those measures by which he might have protected himself against loss. I concur in the result at which the Lord Ordinary has arrived, although I cannot at present concur in the grounds on which he has proceeded.

LORD MONCREIFF—I am prepared to affirm the Lord Ordinary's judgment, but not upon the ground he gives. I assume, in the defenders' favour, that there was here a good guarantee not requiring *rei interventus*. In this view it is not necessary to consider whether *rei interventus* has been proved. But I think that the defenders did not do what they were bound to do, namely, tell the pursuer of the misconduct of Jack—that he had committed this forgery and embezzled £25. Instead of informing the cautioner of these facts they gave Jack time, and not until 11th October did they intimate to the pursuer what had happened. I could have understood the defenders' position—and I thought this was to be their case—if it could have been shown that the pursuer was well aware of what had happened although he got no notice from the defenders. But in the argument the credibility of Mr Snaddon was not attacked, and we must hold that no notice whatever was given to him. In these circumstances the defenders have forfeited any right they had under the guarantee.

The Court adhered.

Counsel for the Pursuer and Respondent — M'Lennan — Strain. Agent — Thomas Liddle, S.S.C.

Counsel for the Defenders and Reclaimers — A. S. D. Thomson — Irvine. Agents — Clark & Macdonald, S.S.C.

Thursday, December 4.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

CROSSAN v. CALEDONIAN RAILWAY COMPANY.

Expenses — Taxation — Witnesses' Fees — Skilled Witness — Medical Man — Certification.

The pursuer in an action of damages for personal injury, who had been successful and had been found entitled to expenses in both Sheriff Court and Court of Session, in his account of expenses entered a fee of £10, 10s. to a medical man, who had been his only medical witness at the proof. This witness had examined the pursuer and made a written report, and he had been certified by the Sheriff-Substitute. The Auditor taxed off £3, 3s. On a consideration of objections to the Auditor's report, the Court (*diss.* Lord Young) further reduced the fee to £5, 5s. in all, being £2, 2s. for attendance as a witness, and £3, 3s. for preparation.

Process—Note of Objections to Auditor's Report—Note of Objections must State Amount of Reduction Desired — Expenses.

Defenders who had been found liable in expenses objected to the Auditor's report on the pursuer's account of expenses in respect of the amount of a fee of £7, 7s. allowed to a certified witness.

The Court *sustained* the defenders' objections to the extent of £2, 2s., but refused to give them the expenses of the discussion, because the note of objections did not state the sum to which he claimed that the fee should be reduced.

John Crossan, Rutherglen, raised an action of damages against the Caledonian Railway Company for injuries received by him on 25th April 1901 through falling out of a workmen's train travelling between Clydebank and Rutherglen.

After proof the Sheriff-Substitute (STRACHAN) on 17th March 1902 found that the injuries were sustained by the pursuer through the fault of the servants of the defenders in not having properly secured or fastened the door of the compartment, therefore found the defenders liable in damages, and assessed them at £100, and found the defenders liable in expenses.

The defenders appealed to the Second Division of the Court of Session. On 24th October 1902 the Court dismissed the appeal, found the pursuers entitled to expenses in that Court, and remitted to the Auditor to tax the same and the expenses found due in the Inferior Court, and to report.

The following item appeared in the pursuer's account of expenses:—"1902, February 24. Paid the following witness, Dr Clarke, £10, 10s."

Dr Clarke was the only medical witness for the pursuer at the proof. At the request of the pursuer's agent he had on 30th December 1901 examined the pursuer with reference to the injuries received on 25th April, and made a written report thereon, which was put in at the proof. The Sheriff-Substitute had certified that he was a witness entitled to an allowance for previous investigation in addition to the fee of £2, 2s. provided by the table of fees. When the pursuer's account of expenses came before the Auditor, the Auditor taxed off £3, 3s., leaving the fee to Dr Clarke standing in the account at £7, 7s.

The defenders lodged the following note of objections to the Auditor's report:—"14th November 1902—The defenders object to the Auditor's report on the pursuer's account of expenses in respect of the amount of the fee which the Auditor has allowed to Dr Clarke, a certified witness for the pursuer. The fee allowed is shown in the schedule annexed, and amounts to the sum of £7, 7s."

Argued for the defenders—The fee of £7, 7s. was too large. £4, 4s. was ample, £2, 2s. for attendance and £2, 2s. for preparation — *Watson v. Caledonian Railway Company*, June 22, 1901, 3 F. 999, 38 S.L.R. 717; *Ebbw Vale Steel Co., Ltd. v. Wood's Trustees*, June 2, 1898, 25 R. 925, 35 S.L.R. 759.

Argued for the pursuer—The Court would not willingly interfere with the discretion of the Auditor in these matters. There was no reason for such interference in the present case. The following facts had probably weighed with the Auditor in allowing the fee, viz.—(1) Dr Clarke was the only medical witness for the pursuer, (2) his report was a long one, (3) the injury was serious and required careful consideration, (4) Dr Clarke had been certified by the Sheriff. The case of *Watson, supra*, was in his favour, as there fees amounting to £8, 8s. had been allowed to the pursuer's medical witnesses, and the case had never gone to trial.

At advising—

LORD JUSTICE-CLERK—I have come to the conclusion that the fee objected to is too high. I do not see any justification for a fee of seven guineas in the case. There must be some modification. It is a difficult question to say how much that modification should be, and looking to the whole circumstances I have come to the conclusion that five guineas would be a reasonable and proper fee. The doctor here examined was the sole doctor on that side of the case, and

therefore the party on the other side who lost the case is not subject to the fees of two medical men. Such fees would have been allowed in such a case. Parties generally have more than one medical witness, and as this doctor, being alone, would necessarily have to prepare himself very carefully for cross-examination on the medical part of the case, I think three guineas and two guineas suitable, although in an ordinary case it might be too much.

LORD YOUNG—For reasons which I have more than once explained before I am against interfering with the judgment of the Auditor in a case of this kind. One of these reasons—and in my judgment a conclusive one—is pretty well illustrated by this case. The question is whether a fee of seven guineas ought in the circumstances of the case to be allowed to a medical witness. The Auditor in his discretion has allowed a fee of seven guineas; and the question which has been argued very fully—argued before this Court of four Judges, and of which we have made *avizandum*—is whether or not the discretion which must be shown in such a matter has been well exercised or has been excessive to the extent of two guineas. Now, upon my word I cannot think it very becoming that there should be litigation—for that is really the meaning of it—in this Court very expensive to the parties) about two guineas. What is thought by the Legislature on such a matter is well illustrated by a number of Acts of Parliament, and Lord Stair, even so far back as his day, says that in determining matters of common law and common procedure the Court may and ought to attend to what the Legislature has shown to be its feelings in such a matter. If there is any error committed in the Small Debt Court there is no appeal allowed on the merits at all, and that is just to prevent litigation about small matters. No case is allowed to be appealed from the Sheriff to this Court if the question relates to anything under £25. That again is only to prevent unseemly litigation at great expense in this Court about small sums—comparatively small sums—of money. No case can be brought in this Court for the same reason, in which the subject is under a certain value. And the notion that there may be such litigation upon objection to audits—discussion about a matter of two or three guineas—in my opinion ought to be rejected by this Court in the legitimate interests of parties and in pursuance of the sense and feeling of the country as illustrated in the legislation I have referred to. I am entirely against allowing appeals such as this against the judgment of the Auditor.

LORD TRAYNER—The appeal made to us by the appellants in this case against the Auditor's report is an appeal which in law they are entitled to make, and it is an appeal which we are bound to hear and decide. I think, therefore, the appellants need no apology for exercising their legal rights. It is my opinion (more than once

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expressed before) that it is not only the right but the duty of the Court to correct the Auditor, who is an officer of Court, when in our opinion he goes wrong. In this case I am clearly of opinion that he has gone wrong, and that it is our duty to put him right. The witness whose fee is here in question is a surgeon or physician. His fee according to the table of fees for attending and giving evidence is two guineas and no more. With regard to that fee the Auditor had no discretion to exercise. Nor have we. It is a fee fixed by the Court, with which this Division of the Court cannot interfere. It is not a case for the exercise of any discretion. It is a case for the application of a fixed rule, according to which for attendance as a witness alone this gentleman was entitled to two guineas and nothing more. But then he was a certified witness, and according to the table of fees a certified witness is allowed something more than the fee for attendance and giving evidence, because under that certificate it is assumed—it is granted upon that ground—that he had to make some investigation prior to giving evidence in order to prepare for doing so. With reference to witnesses who have been certified, the table of fees again lays it down that such person shall be entitled to such additional fee for the trouble and expense incurred in order to qualify him to give evidence as may be considered fair and reasonable. Now, here I think there is a certain amount of discretion both in the Auditor and in the Court, but how that discretion ought to be exercised is evidenced to us by the two cases of *Watson v. Caledonian Railway Company*, 3 F. 999, and *Ebbw Vale Steel, &c. Company v. Wood's Trustee*, 25 R. 925. The views upon which the Court proceeded in these two cases would I think entitle this witness to one guinea in addition to his fee for attendance—that would be three guineas in all. But I am quite willing to consider that there is an element in this case which might entitle him to something more, and that element is this. The witness was not the medical attendant of the pursuer in the case, and properly to prepare himself to give evidence, he had, in addition to his examination of the pursuer, to read and consider the record of the pursuer's illness and treatment in the infirmary during the time when he was confined there. I think that the three guineas which I have up to this point justified as the fee to be given him might be increased to the extent of another guinea. But I cannot, having regard to the table of fees and the decisions I have referred to, justify an allowance in this case beyond four guineas. Your Lordship has suggested that he should be paid five guineas. I do not formally dissent from that, though in my judgment all this witness is entitled to and all that the defenders are bound to pay is the sum of four guineas.

LORD MONCREIFF—I am also of opinion that it is the duty and right of this Court to entertain objections to the Auditor's report. In considering them, and con-

sidering whether the objections should be sustained or not, this Court is in use, and I think rightly, to pay attention, and great attention, to the views which the Auditor has expressed. But I cannot agree that the Auditor is final in these matters, and I think it would be unfortunate if it were held that he was. Now, in the present case the Auditor has allowed a fee of £7, 7s. to this medical witness, who was certified by the Judge—the meaning of that being that an additional allowance was to be given in respect of preparations which he had to make in order to give evidence at the trial, which in point of fact he did. As a witness at the trial he was only entitled to two guineas a-day as a skilled witness; and therefore the only question was what he was to get as proper remuneration for qualifying himself to give that evidence. Now, what the Auditor gave him was two guineas as a skilled witness, and five guineas for his trouble in qualifying himself to give evidence. Now, it seems to me—and I agree with the majority of your Lordships—that five guineas was excessive. I think we shall give effect to a sufficient extent to the views of the Auditor in this matter in allowing three guineas on that head. There was a certain amount of preparation which the witness had to make, but he only once examined the injured man, and therefore I think if he is allowed three guineas, which contrasts very favourably with what was given lately in the cases to which we were referred, he will be amply rewarded for the trouble he had in preparing for the trial. Therefore, if he is allowed five guineas in all—two for attendance as a witness, and three for his preparation—I think that is a fair fee. I think the seven guineas allowed by the Auditor too much, and that two guineas should be struck off.

Counsel for the defenders asked for the expenses of the discussion. Counsel for the pursuer submitted that there should be no expenses, as there had been divided success.

LORD TRAYNER—I think it is a case for no expenses, for this reason, to which I would like to call attention—that the note of objections does not state the extent to which the objection is made; it simply says a fee of £7, 7s. is allowed, and that is too much. In order to make it a proper note of objections I think the defenders ought to have stated to what extent they wish the fee reduced.

The other Judges assented.

The Court pronounced an interlocutor sustaining "the defenders' objections to the Auditor's report to the extent of £2, 2s.," &c.

Counsel for the Pursuer and Respondent—T. B. Morison. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders and Appellants—King. Agents—Hope, Todd, & Kirk, W.S.