Saturday, February 21.

SECOND DIVISION.

[Sheriff Court of Forfarshire at Dundee.

BRENNAN *v.* DUNDEE AND ARBROATH JOINT RAILWAY.

Expenses—Jury Trial—Appeal for Jury Trial — Modification — Small Amount Awarded by Jury.

An action of damages against a railway company for personal injuries sustained at a station within three miles of Dundee was raised in the Sheriff Court there. The Sheriff-Substitute having allowed a proof, the pursuer appealed for jury trial; the jury returned a verdict for the pursuer and assessed the damages at £25. The pursuer having moved for expenses, the Court, on the motion of the defenders, *found* the pursuer entitled only to modified expenses, in respect that the damage suffered was slight; that the pursuer and all the witnesses examined at the trial were resident at or within a very few miles of Dundee; and that by reason of those considerations the case ought not to have been brought to the Court of Session for jury trial, but should have been tried before the Sheriff.

Fraser v. *Caledonian Railway Company, ante*, p. 373, *distinguished.*

An action was raised in the Sheriff Court at Dundee at the instance of Helen Brennan, winder, residing at Polepark, Lochee Road, Dundee, against the Caledonian Railway Company and the North British Railway Company as owners of the Dundee and Arbroath Joint Railway. The pursuer sued for £100 as damages for personal injuries sustained by her at Broughty Ferry station.

On 22nd October 1902 the Sheriff-Substitute allowed a proof.

The pursuer appealed for jury trial. No suggestion was made that the case should be sent back to be tried before the Sheriff.

The Court sent the case to trial, and it was tried before Lord Trayner and a jury. The jury returned a verdict for the pursuer, and assessed the damages at £25.

On 7th February 1903 the Court refused a motion by the defenders for a rule to show cause why the verdict should not be set aside and a new trial granted.

The pursuer moved the Court to apply the verdict and find her entitled to expenses. The defenders moved the Court to find the pursuer entitled only to modified expenses.

No argument was presented for the parties on the question of modification, but the Court was referred to the case of *Fraser* v. *Caledonian Railway Company, ante*, p. 373, which was then at avizandum, and the cases there cited.

At advising—

LORD TRAYNER—In this case the pursuer, resident in Dundee, brought an action in the Sheriff Court of Dundee for £100 of damages against the defenders in respect of an injury which she had sustained at the Broughty Ferry Station. She maintained that these injuries were the consequence of the defenders' fault in admitting too many people to the station and not having a sufficient staff of officials there to regulate the unusual traffic, which on that occasion they had reason to expect. The Sheriff at Dundee allowed a proof, and thereupon the pursuer appealed the case to this Court for jury trial under the provisions of the Judicature Act. Now the question, being one of personal injury, was of course fitted for jury trial, and it is said that the pursuer had an absolute right at law to choose that form of trying her case; and for the purpose of what I am going to say I admit the right on the part of the pursuer to ask for a jury trial. But it is obvious, not only from the record but from what has happened since, that this is a case which might very well have been tried and disposed of by the Judge Ordinary at Dundee. The case was not a case of any difficulty; it was a mere question of fact; and every witness examined in the case was resident at Dundee, or Broughty Ferry, which is within three miles of Dundee. The result of bringing the case to Edinburgh was that all the witnesses had to be brought here, and a great deal of expense was in that way occasioned which would have been saved had the case been tried in Dundee. In addition to that there was of course expense incurred in the jury trial far in excess of anything that would have been incurred by the trial of the case before the Sheriff. I suppose I am not wrong in saying that the whole expense of a trial before the Sheriff, from the serving of the summons to final judgment, would have been less than the amount paid to counsel for attendance at the one day of trial in Edinburgh. Now, if there are two modes in which a case may be tried, and of which the pursuer has a choice—as I said before, I do not deny his or her right to exercise that choice—but if the one is an expensive way and the other is a cheap way, I can see no reason why the pursuer in the exercise of his or her choice should take the expensive mode at the cost of the defender. If the pursuer in a case of this kind likes to appeal to a jury—that is, if she chooses the expensive way of trying her case, I think that the additional expenses must be visited on herself, and that there is neither reason nor good sense for subjecting the defender to that expense, which might have been avoided by the adoption of the other and cheaper mode of trial. In this case the pursuer claimed £100, and the jury gave her a verdict for £25. I am bound to say that in my estimation that was a very ample allowance to the pursuer for the damage she suffered, an allowance which had I been judge might have been much less, if anything at all.

In the whole circumstances of the case I think we would only be doing justice to the defenders, and no injustice to the pursuer, by following the course we took in the case

of *Shearer*, 1 F. 574, and finding the pursuer entitled to expenses, but subject to modification.

LORD MONCREIFF — I am of the same opinion. Yesterday we disposed of the same question in regard to an accident which occurred at Glasgow, and in which a claim was made against the Caledonian Railway Company. In that case we did not modify the expenses of the successful pursuer, who had recovered a sum of £25, because in our opinion no additional expense had been caused by the case being tried in Edinburgh before a jury, and also on this ground, that in that case the pursuer had to come to this Court because the Sheriff had dismissed the action as irrelevant. If the case had not been tried by a jury here it would have had to be tried in Dundee, and the witnesses, many of whom were in Glasgow, would have had to be taken to Dundee. On these considerations we decided that there were no grounds in that case for modifying the expenses.

The present case is of another description, and Lord Trayner has fully stated the considerations which point to an opposite conclusion. In the course of the advising yesterday we all expressed our views in regard to the general question before the Court in such cases, and at the risk of repetition I may say what my views are on that point. The right of appeal for jury trial undoubtedly still exists, and must receive effect. On the other hand I think it must be fairly exercised; but unfortunately, as we know, it too often happens that cases are brought here that ought to have taken end in the Sheriff Court, the result being to saddle the defenders with large and unnecessary expenses, even though they are successful, because the defenders are often left to bear their own expenses, the pursuer not being able to pay. Again, if the pursuer is successful, the defenders have to pay the expenses of both sides at Court of Session rates. Now, often in these cases the Court, in the recollection of all of us, have appealed to the pursuer, or rather to the advisers of the pursuer, to consent to the case being sent back to the Sheriff and tried by him without a jury; but the reply almost always made—and I do not blame counsel for it—is that they have no authority to consent. And I do not wonder at that, for the case is brought here for the express purpose of being tried by jury. Now, the Court are not altogether helpless in this matter. They have much discretionary power in regard to awarding expenses and modifying expenses; and I see no reason to think that that power of modification does not apply in its full vigour to cases of this class as well as to other kinds of cases. At the same time I think that that power of modification, when cases are appealed for jury trial, should be only used in extreme cases where it can be demonstrated that the defender would not be fairly treated if full expenses were awarded. Now, I do not think that the amount of the sum in the verdict awarded to the pursuer is conclusive. For instance, in one class of cases—for vindication of character — an award of £25 would be ample, and there would be no ground for modifying expenses if that sum were given. But it is quite a different matter where it is a question of personal injuries—personal injuries such as are sufficiently compensated by an award of £25, as in this case; that is surely a case that ought to have been tried in the Sheriff Court and not in the Supreme Court.

We must take into consideration the whole circumstances of the case. I need not recapitulate the circumstances which Lord Trayner, who tried the case, has given in detail. In this action I think it would not be fair to the defenders to award full expenses, and therefore I agree that there should be a modification.

LORD JUSTICE-CLERK—The opinion of the Judge who tried the case that it is not a case which was suitable and proper to be brought here for jury trial has always very great weight with me, and without anything else I might be inclined to concur with the Judge who tried the case in that opinion. But I think I may add my own opinion in addition to that—that I think this was evidently not a case that ought to have been brought here for jury trial. Lord Moncreiff has mentioned the fact, which we have observed in a great many cases, that when the question is put to counsel for the pursuer in such cases, whether they will not agree to take the case before the Sheriff, they plead that they have no authority to consent. I say for myself that I am perfectly certain that in a great many of these cases, if the risk of coming to a jury trial were to be put before the parties to the case themselves they would very soon give authority for it being dealt with by the Sheriff, for there cannot be the slightest doubt that often in these cases an award of damages is, in consequence of extra expenses, not a gain but a loss to the party litigating, which it would not have been if the case had been tried in a less expensive Court. I have known cases in my own experience, many of them, in which bitter complaints were made by clients, and for which no redress could be given by the Court or anybody else, that though they got a verdict from the jury the award was all swallowed up, and there still was a considerable sum of expenses that could not be got out of the other side. I think it would be well if counsel would consider the advisability of discouraging the bringing of cases of this class to the Court of Session for trial. I concur with what your Lordships have said.

LORD YOUNG was absent.

The Court found the pursuer entitled to expenses, subject to modification.

Counsel for the Pursuer—Watt, K.C.—Mitchell. Agent—D. Graham Pole, S.S.C.

Counsel for the Defenders—Clyde, K.C.—Grierson. Agent—James Watson, S.S.C.