Saturday, December 15.

FIRST DIVISION.

[Lord Johnston, Ordinary.

LEE *v.* POLLOCK'S TRUSTEES.

(*Ante*, June 2, 1906, 43 S.L.R. 657 and 8 F. 857.)

Process — Abandonment— Withdrawal of Minute of Abandonment—Conditions as to Expenses on which Party Withdrawing Minute may Proceed—Expenses Payable.

Where a pursuer, acting *bona fide*, lodges a minute of abandonment which he subsequently withdraws, and proposes to go on with the cause, the expenses, the payment of which a Lord Ordinary should make a condition of his being allowed to proceed, are not the whole expenses in the cause incurred by the defenders, but the full amount of expenses, as taxed, occasioned to them by or in connection with the pursuer's minute of abandonment and his subsequent withdrawal thereof, so far as the said expenses will not be available at future stages of the case.

This case is reported *ante ut supra*.

John Bethune Walker Lee, the pursuer in an action for payment of a casualty, against Martha Jamieson or Pollock and others, Andrew Pollock's testamentary trustees, had on the day prior to the diet for proof lodged a minute of abandonment. This minute the Lord Ordinary (JOHNSTON) allowed subject to payment of the defenders' expenses. These expenses when taxed amounted to £130, 13s. 9d. Lee, prior to the taxation, had proposed to withdraw his minute, and, subsequent thereto, moved accordingly. His Lordship refused this motion unless the defenders' expenses were paid, and on these not being paid he assoilzied the defenders. The First Division, however, on a reclaiming note, recalled his Lordship's interlocutor by one, dated 2nd June 1906, in these terms — "Recal the said interlocutor: Sustain pursuer's motion to withdraw his minute of abandonment: Allow him to withdraw said minute accordingly: Remit the cause to the Lord Ordinary to proceed therein as to him may seem just: Find the pursuer entitled to expenses since the date of the interlocutor reclaimed against, and remit the account thereof to the Auditor to tax and to report to the said Lord Ordinary, to whom grant power to decern for the amount of said expenses." [*Vide* also 43 S.L.R. 657.]

The Lord Ordinary thereafter, on 23rd June 1906, pronounced this interlocutor: — "The Lord Ordinary in respect of the interlocutor of the 2nd instant by the First Division, and having heard parties on the motion of the pursuer to have another diet of proof fixed, and on the motion of the defenders for absolvitor, Finds the pursuer entitled to have such diet of proof fixed, but only on condition of his paying to the defenders the sum of £130, 13s. 9d., being the taxed amount of their account of expenses, under deduction of the sum of £18, 8s. 8d., being the taxed amount of the pursuer's account of expenses, under certification that in the event of the pursuer failing to make payment of the same within fourteen days of this date, decree of absolvitor will be pronounced as moved for by the defenders."

And his Lordship, on 11th July 1906, pronounced this further interlocutor — "The Lord Ordinary, in respect the pursuer has failed to pay to the defenders the expenses mentioned in the interlocutor of 22nd June last, and on the motion of the defenders, assoilzies them from the conclusions of the summons and decerns: Finds the defenders entitled to expenses incurred by them in the Outer House: Allows an account to be given in, and remits the same to the Auditor to tax and report."

The pursuer reclaimed, and argued that he was entitled to withdraw his minute of abandonment on payment of such expenses as had been occasioned by lodging and withdrawing the minute, or had thereby been rendered unavailable in future stages of the cause.

Argued for respondents—The Lord Ordinary had a discretion in this matter and had rightly exercised it. The pursuer, as stated by the Lord Ordinary, had received great and unusual indulgence, and in these circumstances the Court would not interfere with what his Lordship had done.

At advising—

The judgment of the Court (LORD KYLLACHY, LORD PEARSON, and LORD ARDWALL) was delivered by

LORD PEARSON—This is a reclaiming note against a decree of absolvitor by default. It is well settled in practice that we have power to repone the pursuer against such a decree upon such conditions as the justice of the case seems to require. It will, however, only be done in very special circumstances; and regard will be had to the nature of the action, to the conduct of the pursuer in the litigation, and specially to the nature of the default made by him. Now in this case there are some unfavourable circumstances. There has been a good deal of unexplained vacillation and delay on the part of the pursuer, involving a waste both of time and money; and he has already had a good deal of indulgence both from his opponents and from the Lord Ordinary. The Lord Ordinary, however, has stated that there is a fair question to be litigated, requiring to be cleared up by proof; and a diet of proof was fixed for 1st February last. On the previous day the pursuer lodged (as he was entitled to do) a minute of abandonment in terms of the statute; and the defender's account of expenses was lodged and taxed by the Auditor. It was taxed at the considerable sum of £130, 13s. 9d, the amount having, in the Lord Ordinary's opinion, "been a good deal increased by Mr Lee's conduct of the

case." The pursuer thereupon moved for leave to withdraw his minute of abandonment. The Lord Ordinary, however, refused this motion in respect the pursuer had failed to pay the defender's taxed expenses; and he assoilzied the defenders and decerned against the pursuer for payment to them of the same taxed expenses On a reclaiming note that interlocutor was recalled (8 F. 857), and the Court allowed the minute of abandonment to be withdrawn, holding, as the report bears, that the pursuer had an absolute right to withdraw his minute if he liked; and they remitted to the Lord Ordinary to proceed in the cause as to him might seem just. Now if on his return to the Outer House the pursuer had again impeded the due course of the process, and had by so doing demonstrated that he was not acting in *bona fide*, the defenders might very soon have been in a position to demand absolvitor by default. But the case did not take that shape. On the contrary, within three weeks of the case being remitted back the pursuer enrolled it to have another diet of proof fixed. Clearly he was not entitled to have that motion granted *simpliciter* or without conditions. The previous diet of 1st February had proved abortive owing to his minute of abandonment being lodged on the previous day; and thereby the defenders had or might have incurred outlay and expenses which were not available in the future stages of the case, and which clearly ought to be reimbursed before the pursuer was allowed to proceed. But what the Lord Ordinary did was to allow the pursuer's motion to have a diet of proof fixed only on condition of his paying to the defenders (less a contra account which had to be set off) the whole sum of £130, 13s. 9d. already mentioned, being the defender's whole taxed expenses in the litigation down to 1st February; and upon the pursuer failing, as he did, to make this payment within fourteen days, the Lord Ordinary pronounced decree of absolvitor. It appears to me that the terms thus imposed on the pursuer were suggestive rather of penalty than of indemnity, and went beyond anything which our practice admits or the justice of the case required. I think the pursuer's motion to have a diet of proof fixed should have been allowed on condition of his paying to the defenders a sum representing fully the expenses (as taxed) caused to them by the pursuer's conduct, so far as these will not be available at future stages of the case, but under deduction of the sum of £18, 8s. 8d. mentioned in the Lord Ordinary's interlocutor. As we are not in a position to fix the amount, it will be for the Lord Ordinary to ascertain it.

That is the judgment of the Court; and I am authorised to say that this result has been arrived at after conference with the two other members of this Division who were present when the former remit was made in this case.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR were absent

The Court pronounced this interlocutor—

"Recal the interlocutors of 22nd June and 11th July 1906, and remit to the Lord Ordinary to grant the pursuer's motion to have a diet of proof fixed on condition of his paying to the defenders the taxed amount of the Outer House expenses occasioned to them by or in connection with the pursuer's minute of abandonment and his subsequent withdrawal thereof, so far as the said expenses will not be available at future stages of the cause; but under deduction of the sum of £18, 8s. 8d. mentioned in the Lord Ordinary's interlocutor of 22nd June 1906, and decern: Find the pursuer entitled to expenses since 11th July 1906, the date of the Lord Ordinary's interlocutor, and remit," &c.

Counsel for Pursuer and Reclaimer—Craigie, K.C.—Spens. Agent—J. B. W. Lee, S.S.C.

Counsel for Defenders and Respondents—Lippe. Agents — Boyd, Jameson, & Young, W.S.

Saturday, December 15.

FIRST DIVISION.

[Sheriff Court at Airdrie.

HALEY *v.* THE UNITED COLLIERIES, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1), *and sec.* 7—"*Arising Out of and in the Course of the Employment*"—*Accident to Workman Taking Short-Cut Home across Sidings and down Railway Line after Going to Uplift Wages and to Inquire when Work would Resume.*

A miner went to a pit where he was employed to inquire when it would resume work after a temporary stoppage, and to uplift wages. In returning he made use of a short-cut home sometimes used though neither authorised nor actually prohibited, which took him by neither of the provided roads but across the sidings belonging to the mine and down the railway line of a railway company. While in the act of crossing the sidings, and consequently still on the mine premises, he sustained fatal injuries through an accident. *Held* that while the miner's visit to the mine might be "in the course of the employment," the accident was not one "arising out of and in the course of the employment" in the sense of the Workmen's Compensation Act 1897.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (1), enacts—"If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his