sets of rails, the tubs being connected by a rope or chain passing over a fixed pulley at the top of the incline, is mechanical haulage in the sense of section 46 (4) of the Coal Mines Act 1911.

I think that the learned Sheriff-Substitute has rightly concluded that it is not so.

Haulage is the action or process of hauling. It requires power to effect it. That power must be developed, as distinguished from applied. It may be developed (1) by manual or animal labour, (2) by the attraction of gravity, and (3) by means of mechanical contrivance. These are contrasted in various sections of the Act, though the expressions used occasionally vary. For instance, section 43 (2) speaks of the haulage being "worked by gravity or mechanical power." By the latter phrase is meant power developed by means of mechanism, for strictly there is no such thing as mechanical power.

Now in section 46 there is, as regards haulage, one provision (section 46 (2) (*c*)) for the case where "the haulage is worked by animal power," another (section 46 (3)) for the case where "the haulage is worked by gravity," and a third (section 46 (4)) for the case "where mechanical haulage is used." I quote in each case the expression adopted by the statute. It is this latter provision with which we are concerned. The turn of phrase of the first and second case is altered in the third case. But the expression "where mechanical haulage is used" is only another way of saying where the haulage is "worked by" mechanical contrivance. In either case it is the animal, gravity, or the mechanical contrivance which develops the power necessary to operate the haulage.

In the method described by the Sheriff-Substitute, or, to use the mining term "on the wheel brae," it is not the rope and pulley which develops the power or works the haulage, but the force of gravity, applied through the rope and pulley as its channel, and accordingly I think that the Sheriff-Substitute came to a right conclusion in holding that the haulage in question was not mechanical haulage in the sense of the Act, section 46 (4).

I think that confusion has arisen in the mind of the prosecution owing to a misapprehension of the parenthetical words "not being endless rope or endless chain haulage," which are found in section 46 (4). That is not a description of mechanical haulage but of haulage, and is equally applicable to gravitation as to mechanical haulage, as is shown by a reference to section 46 (3). The true import of the provision, read with its parenthesis, is on every haulage road where haulage, not being endless rope or endless chain haulage, is worked by mechanical contrivance certain precautions are to be taken. So read, the parenthesis creates no difficulty in the way of deciding the question, as the Sheriff-Substitute has, I think, rightly decided it.

LORD MACKENZIE—I agree with your Lordships that the Sheriff-Substitute has come to a right conclusion in this case. I may say that I should have been very slow to differ from the conclusion reached by the Judge who had the advantage of hearing the evidence of skilled witnesses on such a question as this. It appears from the papers before us that a number of documents were laid before him, and we were informed by counsel at the Bar that he had had the advantage of hearing expert testimony. The provision which he had to construe is one which occurs in a fasciculus of clauses dealing with travelling roads and haulage, and inasmuch as they are dealing with a provision which imposes a penalty, it would require to be provided in plain language what the provision was that had to be provided by the mine management.

Now, as your Lordships have pointed out, whatever might *prima facie* be the meaning attached to the expression "mechanical haulage" if it occurred as an isolated term, I think there is quite sufficient material in the clauses, particularly 43, 44, 48, and 57 of the Act, for justifying the conclusion taken by the learned Sheriff-Substitute after he had had the advantage of having explained to him the practical application of these different provisions. Accordingly I think that the conclusion he has reached is correct.

The Court answered the questions of law in the negative and dismissed the appeal.

Counsel for the Appellant — Solicitor-General (Anderson, K.C.)—Wark. Agent —Sir William S. Haldane, W.S., Crown Agent.

Counsel for the Respondent—Horn, K.C. —W. T. Watson. Agents—Wallace & Begg, W.S.

COURT OF SESSION.

Thursday, May 29.

FIRST DIVISION.

(SINGLE BILLS.)

BRADLEY *v.* MENLEY & JAMES, LIMITED.

Expenses—Tender—Reparation—Slander—Jury Trial—Nominal Damages.

An action of slander was raised to which defences were lodged. The defender thereafter offered to the pursuer £5 in settlement of his claim. The pursuer refused this offer. Three issues were allowed, and on each the jury found for the pursuer, and assessed the damage at sixpence on each issue. The defenders, in moving the Court to apply the verdict asked for expenses, including those before the tender.

Held that the defenders were not entitled to expenses before the date of tender.

Orlando Charnock Bradley, Principal of the Royal (Dick) Veterinary College, Edinburgh, *pursuer*, raised an action of damages for slander against Menley & James, Ltd., *defenders*, London, concluding for £500 damages. After having lodged defences the defenders tendered to the pursuer the sum of £5 in full of his claim. The pursuer refused this tender. Three issues were allowed, and, on 26th March 1913, the case was tried before the Lord President and a jury. The jury found for the pursuer on each of the issues and assessed the damages at 6d. on each.

On 29th May 1913 the defenders, in Single Bills, moved the Court to apply the verdict and to find them entitled to expenses, including those incurred before the date of the tender.

The motion was heard by Five Judges, who had assembled to hear Justiciary appeals.

LORD PRESIDENT—The point that is raised here is one, I think, more of novelty than of difficulty. This was an action of damages at the instance of Professor Bradley, and the issue that was sent to the jury was whether the defenders caused certain things to be published, and whether these things were of and concerning the pursuer. It was then innuendoed that they represented him as being guilty of disgraceful professional conduct, to the loss, injury, and damage of the pursuer.

Now the jury really affirmed all those propositions except the last. They held that the defenders had published, that the publications were of and concerning the pursuer, that they did contain a slur upon his professional conduct, but that the pursuer had no real damage done to him by them, and accordingly they assessed the damage at sixpence on each of the three issues. That they did following the view of the facts I had suggested to them in my charge.

Now it is the fact that a tender was put in at some period immediately after the lodging of the defences, and the tender being for a larger sum than the one shilling and sixpence recovered, the defenders would be entitled to expenses after the date of the tender, in accordance with the well-known rule. But then, in asking us to apply the verdict the defenders move also for the expenses prior to the tender, and they do so upon the ground that the action, as they say, never ought to have been raised.

Now the pursuer does not move for these expenses, and he does not move for them for this very good reason, that he comes within the words of the 40th section of the Court of Session (Scotland) Act 1868 (31 and 32 Vict. cap. 100), which provides that "where the pursuer in any action of damages in the Court of Session recovers by the verdict of a jury less than £5, he shall not be entitled to recover or obtain from the defender any expenses in respect of such verdict, unless the judge before whom such verdict is obtained shall certify on the interlocutor sheet that the action was brought to try a right besides the mere right to recover damages; or that the injury in respect of which the action was brought was malicious; or, in the case of actions for defamation or for libel, that the action was brought for the vindication of character and was in his opinion fit to be tried in the Court of Session." Well, no such certificate was asked from me, and accordingly the pursuer is not in a position to ask for expenses. I may say at once, in order that counsel may not think I am putting any slur upon them, that I should never have granted a certificate in this case if I had been asked to do so, because I am clearly of opinion that this action should never have been raised, and that it was persisted in after it should have been given up. I think that the offers of *amende* in the letters of the defenders were very proper offers and ought to have been accepted. But then the defenders ask that they should have expenses up to the tender. I think if we granted that we should be, so to speak, going against the verdict of the jury. After all, the jury has affirmed, as I say, certain propositions which put the defenders, not only technically, but in one sense really in the wrong. No doubt the publications did not cause any damage to the pursuer, and the pursuer ought not to have gone on with the action; but still the verdict of the jury shows that in one sense the pursuer was right in raising the action.

Accordingly I think that the motion of the defenders, so far as it asks expenses prior to the date of the tender, should be refused, that we should apply the verdict, and in accordance with ordinary practice where there has been a tender, find the defenders entitled to all expenses since the date of the tender.

LORD JUSTICE-CLERK—I am of the same opinion. When a case such as this is brought, and the Court see fit to send it to a jury, it is a proper case of an action of damages, and the law implies, if the facts are made out, that there was damage. The jury cannot find a verdict for the pursuer—where the claim is for damages—without finding some damages due, but there are cases in which the facts present themselves so unsatisfactorily for the pursuer that the jury, although the pursuer is entitled to a verdict, may give a very small sum of damages as was done in this case. There are also cases in which the purpose of the action, although it may take the form of an action of damages, is to establish some particular fact of importance to the pursuer, and he may often not ask any substantial damages, and in such a case, the jury being required to find damages due, will award just a nominal amount.

In the case where the verdict is given for a very small sum, it is, in the first place, for the judge who tried the case to consider, as your Lordship did in this case, the question whether he would give a certificate that the action was properly raised for the vindication of character. I have heard from your Lordship that you would not have given such a certificate.

Further, there is the case where nominal

damages are given because substantial damages are not sought. The purpose of action is by giving a sum of damages, however small, to mark the fact that there was a wrong done.

Now I must concur with your Lordship in thinking that the fact that the verdict of the jury was for the pursuer, and that fulfilling their duty they had to assess damages even although they assessed them at so small a sum, implies that the action was an action which might be raised and for which the pursuer could bring facts entitling him to a verdict in his favour.

In these circumstances I cannot see that there is any ground for holding that the defenders are entitled to get expenses up to date when by their practical act of putting in a tender of a certain sum of money they placed the pursuer in a position of considering whether he would go on with the action and try to get more or would accept what was offered. If he had accepted the tender he would certainly have been entitled to expenses up to its date. I entirely agree with what your Lordship has said.

LORD DUNDAS, LORD JOHNSTON, and LORD GUTHRIE concurred.

LORD KINNEAR, and LORD MACKENZIE were absent.

The Court applied the verdict, and in respect thereof decerned against the defenders for the sum of one shilling and sixpence, being the *cumulo* amount of the damages assessed by the jury, found neither party entitled to expenses up to the date of the tender, and found the defenders entitled to expenses subsequent thereto.

Counsel for the Pursuer—Watt, K.C.—J. R. Christie. Agent—Robert Anderson, S.S.C.

Counsel for the Defenders—Constable, K.C.—Hon. W. Watson. Agents—Finlay & Wilson, W.S.

Thursday, June 5.

FIRST DIVISION.

[Sheriff Court at Glasgow.

HOLMAN & COMPANY *v.* UNION ELECTRIC COMPANY, LIMITED.

Jurisdiction — Arrestment ad fundandam jurisdictionem — Action for Implement of a Contract, and, Failing Implement, Damages.

A Scottish firm raised an action in a Sheriff Court against an English limited company and used arrestments to found jurisdiction. The action was for delivery to the pursuers of 30,000 pairs of carbons in terms of a contract, or failing delivery for £1000 damages.

The Court, *holding* that there being no question of a *pretium affectionis* the action was not truly one *ad factum præstandum*, *sustained* the jurisdiction.

Holman & Company, electrical engineers, 20 West Campbell Street, Glasgow, *pursuers*, raised an action in the Sheriff Court of Lanarkshire at Glasgow against the Union Electric Co., Ltd., Park Street, Southwark, London, *defenders*. The claim of the pursuers' initial writ was—"For delivery of 30,000 pairs Excello yellow flame carbons 600 m/m by 10 m/m and 9 m/m, ordered by pursuers from the defenders on 18th December 1912 at the price of £153, 10s. nett per 10,000 pairs, in virtue of a contract between the parties for the supply of such carbons for one year from 20th December 1911, or failing delivery payment of £1000, being damages sustained by the pursuers through defenders' failure to implement the said contract [or alternatively for payment of £1000 damages in respect of defenders' breach of said contract]." The alternative claim in brackets was added by amendment as after mentioned. Their crave to the Court was similar and was similarly amended.

The defenders pleaded, *inter alia*—"(1) No jurisdiction; and *separatim*, the action is incompetent in respect that a decree *ad factum præstandum* cannot be granted by the Sheriff of Lanarkshire against an English company."

On 4th March the Sheriff-Substitute (LYELL) pronounced this interlocutor—"Having considered the closed record and heard parties' procurators under reference to the subjoined note, appoints the cause to be put to the procedure roll."

Note.—"This is an action for implement of a contract, or failing implement for damages, in which jurisdiction has been founded by arrestment. The defenders object that in respect the leading conclusion is for delivery in implement of the contract—which is just a conclusion for decree *ad factum præstandum*—no effective jurisdiction has been founded against them by arrestment. The question is not free from difficulty, and one can certainly see that such a decree would be difficult to enforce against an English defender. It could not be enforced by registration under the Judgments Extension Act of 1882, which applies only to judgments for debt, damages, or costs. It has been held that arrestment does not confer jurisdiction to try questions of status, and it appears unsettled whether jurisdiction has been thereby conferred to try declarators and reductions—*Lindsay* v. *London and North Western Railway Company*, 18 D. 62, App. 3 Macq. 99; *Longworth* v. *Hope*, 3 Macph. 1049; *Shaw* v. *Dow & Dobbie*, 7 Macph. 449. But after full consideration of the cases Lord Kincairney sustained his jurisdiction, when so created, in an action *ad factum præstandum* in *Powell* v. *MacKenzie & Company*, (1900) 8 S.L.T. No. 152, p. 182. It appears to me, however, seeing that the conclusion for damages for breach of contract is obviously competent, that the pursuers might well confine themselves to that conclusion, more especially as on their own showing the contract cannot now be implemented in terms as the time of the delivery stipulated is long past. I