

Saturday, July 9.

FIRST DIVISION.

(SINGLE BILLS.)

SPEIRS v. CALEDONIAN RAILWAY COMPANY.

Expenses—Taxation—Commission to Examine Witness—Expense of Commission.

On 1st March the evidence of a marine engineer, whose ship was due to sail "about the middle" of the month, but the date of whose actual departure was indefinite, was taken on commission for pursuer. At the trial on 22nd March the pursuer produced and examined the witness in question. *Held* that the expenses of the commission were not chargeable against the unsuccessful defenders.

In an action of damages for personal injuries at the instance of Mrs Margaret Speirs, Abbotsford Place, Glasgow, *pursuer*, against the Caledonian Railway Company, *defenders*, in which the jury had returned a verdict for the pursuer, a question arose upon the Auditor's report on the pursuer's account of expenses.

The trial took place on the 21st and 22nd of March 1921. An important witness for the pursuer whose evidence had been taken on commission on 1st March was able to attend at the trial and give evidence. The witness, a marine engineer, stated at the trial that his ship had been due to sail "about the middle" of March.

The Auditor having lodged his report the defenders objected to it in so far as he had allowed the expense of the commission and also the charge for the attendance of the same witness at the trial, and argued—The commission had been executed *ob majorem cautelam*. That was not sufficient to make the other party liable for the expense—*Couper v. Cullen*, 1874, 1 R. 1101, 11 S.L.R. 641, *per* Lord President Inglis. It had been executed when there was no real necessity. The witness was important but not essential. The rule had been to refuse such expenses—*Napier v. Campbell*, 1843, 5 D. 858; *Maclaine v. Cooper*, 1846, 8 D. 429; *Napier v. Leith*, 1860, 22 D. 1262. A relaxation of the rule had been permitted during the war but should not be continued.

Argued for the pursuer—There was no general rule. It was always a question of circumstances, and the Court would not interfere with the Auditor's discretion unless he were clearly wrong—*Maclaine v. Cooper*, *supra*; *Couper v. Cullen*, *supra*. The practice for at least the past six years had been to allow these expenses. The witness was necessary, being the only one independent of the parties who could speak to the facts. The ship was "billed" to sail a week after the commission was executed, and in these circumstances the pursuer was acting reasonably in having the evidence taken.

LORD PRESIDENT—There is no general rule applicable to a question like the present except this—that no party is entitled to

throw costs incurred by him in connection with litigation upon his opponent unless he can show that they were incurred under reasonable necessity for the conduct of the case.

In the present instance the commission was applied for one month before the date of the trial, and was executed very shortly after it was applied for, at a time when, according to the information obtainable from the witness himself, there was not only no immediate prospect of his leaving the country for an absence which would outlast the date of the trial, but on the contrary the date of his actual departure was indefinite and might possibly not arrive (as indeed turned out to be the case) until after the date of the trial. In these circumstances it seems to me that while it may have been a proper precaution for the pursuer to apply for the commission when he did, so as to be able to put it in force without delay if circumstances should render that course necessary, he was not justified in executing it at a time when the necessity for that step was (to say the least of it) very doubtful, and then, notwithstanding that he produced and examined the witness at the trial, in seeking to charge the other side with the expense.

It may be that some laxity in this matter has recently prevailed owing to war conditions, but in sustaining the present objection, as I propose we should do, I am not departing in any way from the practice which prevailed in this matter before the war.

LORDS MACKENZIE, SKERRINGTON, and CULLEN concurred.

The Court sustained the objection.

Counsel for Pursuer—Mackay, K.C.—Gibson. Agents—Manson & Turner Macfarlane, W.S.

Counsel for Defenders—Graham Robertson. Agents—Hope, Todd, & Kirk, W.S.

Saturday, July 9.

FIRST DIVISION.

[Sheriff Court at Glasgow.]

SCOTTISH SUPPLY ASSOCIATION, LIMITED v. MACKIE.

Process—Summary Ejection—Competency—Title to Sue—Sale of Business—Agreement by Purchaser to Employ Vendor and Allow him to Remain in Occupation of House during Employment—No Assignment to Purchasers of Current Year's Tenancy by Vendor—Renewal of Lease by Vendor in his Own Name after Sale of Business without Informing Purchasers—Refusal by Vendor to Vacate House on Termination of Employment.

An employer brought an action of summary ejection against a dismissed employee, part of whose remuneration consisted in the right during the employment to occupy a house as long as the employer remained tenant of it. Prior to the employment the defender had

carried on a business as carting contractor, and since 1910 had occupied (on a missive renewable from year to year) premises which included the house in question. In December 1919 he sold the business to the pursuers with immediate possession, and accepted employment under them with the right to occupy the house during the employment, the pursuers undertaking to relieve him of the rent due at Whitsunday 1920. No express assignment of the then current year's tenancy was made in favour of the purchasers. In January 1920 the defender, unknown to the pursuers, re-took the house for a year from Whitsunday 1920. Thereafter the pursuers having notified him that his employment would end on 31st December 1920, and that on said date he was to remove from the house, defender refused to remove, and claimed that he was still tenant of the premises. *Held* that as defender's possession was supported by a *prima facie* valid title, the remedy by summary ejection was not competent against him, and action *dismissed*.

The Scottish Supply Association, Limited, Glasgow, *pursuers*, brought an action of summary ejection against John Mackie, 16 Gloucester Street, Glasgow, *defender*, in which they craved the Court to grant warrant for the summary ejection of the defender from the house occupied by him at 16 Gloucester Street, Glasgow.

The pursuers made the following averments—“(Cond. 1) By agreement between the pursuers and the defender, dated 1st December 1919, the pursuers engaged the defender in the capacity of foreman carter for their business, and the defender accepted said position. (Cond. 2) By said agreement the pursuers purchased the business of cartage contractor then carried on by the defender at 14 Gloucester Street, Glasgow, including the firm name of John Mackie, but they allowed defender so long as he should remain in their employment, and so long as the pursuers should remain the tenants of the premises, the use of the house No. 16 Gloucester Street, Glasgow, with coal supply, free of rent and taxes. (Cond. 3) By said agreement it is further provided that it shall be in the option of either party to terminate the agreement of service on giving to the other party two months' notice in writing of his or their intention so to do. (Cond. 4) On or about 28th October 1920 the pursuers through their law agents intimated by letter to the defender that they would dispense with his services on 31st December 1920, and also that he was to remove from said house on the same date. (Cond. 5) Notwithstanding the expiry of said notice of removal the defender continues to occupy said house, although he is no longer in pursuers' employment, and he maintains that he is tenant thereof. (Ans. 5) . . . Admitted that the defender continues to occupy the house at 16 Gloucester Street, Glasgow, and that he is not now in pursuers' employment. Explained that defender is tenant of said house. The missive of let between the defender and Messrs John

Laing & Son, house factors, Glasgow, dated 2nd February 1910, which has been renewed on similar terms except as regards the amount of rent to be paid by defender from year to year since said date, is produced. (Cond. 6) The pursuers have ascertained that the defender (who was the tenant of the whole premises at 14 and 16 Gloucester Street, consisting of stables, &c., and said house prior to the date of said agreement) had on 21st January 1920 re-taken same for the year from Whitsunday 1920 in breach of his duty as a servant of the pursuers and without informing them. The defender's said action was unknown to the pursuers until after the said intimation of 28th October 1920. Denied that defender is the tenant of said house, and averred that pursuers are the tenants, and have paid the rents thereof falling due since the date of said agreement except the rents for the quarters ending Martinmas 1920 and Candlemas 1921, which were duly tendered. (Ans. 6) Admitted that defender on or about 21st January 1920 re-took the said house and also the stables at 14 Gloucester Street aforesaid for the year from Whitsunday 1920 to Whitsunday 1921 on the terms contained in the said missive of let, except as regards the amount of rent to be paid by defender, and that at the present date he is tenant of said house. . . . Denied that the pursuers paid the rent of said house at Martinmas term 1920 and at Candlemas term 1921, and averred that said rent was paid by defender.”

The agreement referred to contained, *inter alia*, the following provisions:—“It is contracted and agreed to between the parties hereto as follows:—(First) The vendor agrees to sell and the purchaser to purchase, free of all or any liabilities pertaining thereto, at the price of £2000, the business of cartage contractor presently carried on by the vendor under the name of ‘John Mackie’ at 14 Gloucester Street aforesaid, in which purchase price is included the firm name and goodwill of said business, together with the ten horses and ten lorries employed in connection therewith, as also all plant, fittings, harness, and moveable effects of whatever nature or description appertaining thereto. (Second) The price will be paid and possession given on 1st December 1919. . . . (Fourth) The purchaser undertakes to relieve the vendor of the half-year's rent due at Whitsunday 1920. (Fifth) The purchaser agrees to engage the vendor in the capacity of foreman carter for said business at a wage of £4 per week. . . . (Sixth) The purchaser further agrees to allow the vendor, so long as he remains in the purchaser's employment, and so long as the purchaser remains tenant of the premises, the use of the house No. 16 Gloucester Street, with coal supply, free of rent and taxes. (Seventh) It shall be in the option of either party to terminate the agreement of service on giving to the other party two months' notice in writing of his or their intention so to do.”

The pursuers pleaded, *inter alia*—“1. The defence is irrelevant. 2. The pursuers having allowed the defender to occupy said house as a consequence of his employment