The Court recalled the interlocutor of the Lord Ordinary, and dismissed the action.

Counsel for the Pursuer and Respondent —A. S. D. Thomson—Adamson. Agents—W. & J. L. Officer, W.S.

Counsel for the Defender and Reclaimer —D. Anderson. Agent—Walter Finlay, W.S.

Friday, February 20.

SECOND DIVISION.

[Sheriff Court at Dundee.

FRASER *v.* CALEDONIAN RAILWAY COMPANY.

(Reported *ante*, p. 43.)

Expenses — Jury Trial — Modification — Small Amount of Damages Awarded — Action Appealed from Sheriff Court against Dismissal on Relevancy — Witnesses not Resident Locally.

In an action brought in the Sheriff Court at Dundee against the Caledonian Railway Company the pursuer claimed £200 as damages for injuries sustained by her at Buchanan Street Station, Glasgow. The Sheriff-Substitute dismissed the case as irrelevant. On appeal the Court found the action relevant, and sent the case to trial by jury. The jury found for the pursuer, and assessed the damages at £25. On a motion for the defenders that the pursuer should only be allowed expenses on the Sheriff Court scale on account of the small amount recovered, *held* that as the case had been brought to the Court of Session in a successful appeal on relevancy, and as the witnesses of the accident were not resident at Dundee, this was not a case for modification, and that the pursuer was entitled to full expenses.

Shearer v. *Malcolm*, February 16, 1899, 1 F. 574, 36 S.L.R. 419, *distinguished.*

This case was the sequel to the case reported *ante*, p. 43, in which Mrs Margaret Isabella Fraser sued the Caledonian Railway Company for £200 as damages for injury sustained by being pushed off the platform at Buchanan Street Station, Glasgow, through the pressure of the crowd, when returning to Dundee on the Dundee Autumn Holiday, 1901.

The action having been found relevant, and the interlocutor of the Sheriff-Substitute dismissing it as irrelevant recalled, as reported *ante ut supra*, on 13th November 1902 an issue in common form was approved for the trial of the cause. On 8th December the case was tried before the Lord Justice-Clerk and a jury, and the jury returned a verdict for the pursuer and assessed the damages at £25.

On 20th December the Court, on the motion of the defenders, granted a rule on the pursuer to show cause why a new trial should not be granted.

On 6th February 1903, after hearing counsel, the Court discharged the rule, and of consent applied the verdict, reserving meantime the question of expenses.

On 20th February counsel for the defenders and respondents moved the Court to modify expenses to the amount which would have been payable on the Sheriff Court scale, and cited *Shearer* v. *Malcolm*, February 16, 1899, 1 F. 574, 36 S.L.R. 419.

Argued for the pursuer and appellant—The pursuer was entitled to full expenses, taxed in the ordinary way — *Casey* v. *Magistrates of Govan*, May 24, 1902, 39 S.L.R. 635. The present case was distinguishable from that of *Shearer*. The pursuer in the present case required to appeal to the Court of Session because the Sheriff-Substitute had decided against her on relevancy. In *Shearer* the action was brought in the Court of Session. Further, in the present case the witnesses would have had to travel from Glasgow to Dundee even if the case had been tried by proof in the Sheriff Court, so that no more expense had been incurred by trying the case in Edinburgh.

At advising—

LORD JUSTICE-CLERK—We have already decided that the pursuer is entitled to expenses, and the only question remaining for us is whether there should be any modification. Now, I think that is a matter to be dealt with in each case on its own special merits. In this particular case there is this peculiarity which does not often occur in cases coming up from the Sheriff Court. The pursuer was refused a proof in the Sheriff Court, her action being held irrelevant; and accordingly, if that was an erroneous judgment it required an appeal to set it right, and accordingly here we had a discussion on the relevancy, with the result that the Court thought that there was a relevant case for consideration. Now, the case being here, no one seems to have suggested that it should be sent back again to the Sheriff at that time. There might have been reasons for that which are not known to me, but at all events no such motion was made, and when the case was here an issue was allowed and it went to trial.

Now in such cases, if the matter is a small one, and if the result of holding the case here is to enormously increase the expenses by bringing a great crowd of witnesses from distant parts of the country to Edinburgh when the case might quite well be disposed of in the Sheriff Court, I should hold that in such circumstances there were certainly grounds for modification. But this case is peculiar in this respect, that while the accident which led to the injury took place in Glasgow, the case was raised in the Sheriff Court at Dundee against the Caledonian Railway Company, and therefore required to be disposed of in the Sheriff Court at Dundee, or in the Court of Session by jury trial. It was a case of an accident occurring at an overcrowded railway station, and it is quite obvious that many of the witnesses would have to come from Glasgow to Dundee, and

therefore considerable expenses would be incurred from that cause, and that probably there would be less expense by the trial being held here than in Dundee. Now, in that view I think this is not a case in which there is sufficient ground for modifying the expenses, notwithstanding the fact that the verdict is not of large amount. I am therefore for allowing full expenses without modification.

LORD YOUNG—It did not occur to me when the motion was made to modify expenses that there was any ground whatever for that motion. The case, looking to the record, was one eminently fitted for jury trial. I could hardly conceive of a case better fitted for jury trial than this was. As your Lordship says, the Sheriff having thrown out the case as irrelevant, an appeal to this Court was necessary to do justice to the pursuer, who in our opinion had stated a relevant case. We decided accordingly, and it did not occur to any of the parties, and certainly did not occur to any of us, for none of us suggested such a thing, that it should not be tried by a jury, and it was tried by a jury, and without anything to suggest the idea that it involved improperly any expense whatever. Though the verdict was for £25 it was a substantial verdict, and according to ordinary practice it is followed by a judgment for expenses. If the defenders, a railway company here, thought that there was liability, and that some damages, if only £25 or any sum they thought was sufficient compensation then our law and practice enables the defenders to tender that; and if £25 had been tendered here by the defenders as compensation the defenders would not have been liable in expenses, modified or not, but would have been entitled to expenses. But there was no tender at all, and it being a case proper for jury trial, and a verdict having been given for £25 in a case in which no tender at all was made, it does not occur to me that there is any suitable ground for modifying expenses. With reference to what your Lordship has said about cases being brought here from the Sheriff Court with the view to jury trial, that is permitted by statute to either party. In any case like the present either party has a statutory right to bring the case here with the view to jury trial. I think we have decided—we have proceeded more than once on the view—that it is notwithstanding in the discretion of the Court to determine that a case is not a suitable one for jury trial, having regard to all the circumstances appearing in it, and in the exercise of discretion we may send it back to the Sheriff to proceed with the proof which we have allowed. We have done that, and in some cases have left the Sheriff to determine the expenses of appeal when he decided the case upon proof. But where we think that a party in the exercise of his statutory right has brought a case that ought to be sent to a jury, and we send it to jury trial, then, although the verdict may be for a small amount of damages, the defender having made no tender at all, I am for proceeding on the ordinary rule of giving expenses to the gaining party, who has rejected no offer and has won the case against the other. I do not see there is any harm, but if there is any it is for the Legislature to correct it, in allowing a case to be brought in the Sheriff Court, and appealed here with a view to jury trial, because during the preliminary proceedings there is less expense in the Sheriff Court than if the action was brought here in the first instance. The preliminary expense of the record and the closing of it is certainly not greater—I imagine it is less —than it would be in this Court, and therefore we start with this—that the expense is not increased but if anything diminished by that course being followed. And on the case being sent to jury trial, the suggestion that if the case is properly proceeded with without anything occurring at the trial to increase the expense, the fact that the verdict is only for £25 should disentitle the successful party to his expenses, is not to me sustainable. I therefore repeat that not only in this particular case, but in any case which is properly appealed here with a view to jury trial, and which in our opinion is fit for jury trial—for if we do not think so we will not send it, and are not bound to send it—there is no ground for proceeding otherwise than on the general rule that if the pursuer gets even £25 for a wrong for which he has been offered nothing, he is entitled to his expenses.

LORD TRAYNER—I think a good deal may be said against giving expenses to the pursuer in a case like the present, where the jury have valued the claim at so small a sum—for I think it is not a substantial verdict—as £25. The terms of the Judicature Act we are all familiar with, and they have been acted on for a good many years, but I am clearly of opinion that whatever was the purpose and benefit of that Act when passed it has been very much abused within the last few years. The question of expenses is entirely one within the discretion of the Court, and while the practice is to give the successful party the expenses of the case, there is nothing to prevent the Court considering, if they see fit, whether the expenses should be to the full extent. In this case, without saying more on the matter of the general question, I would have been very well pleased to follow, and I think we might with propriety have followed, the precedent this Court has set in the case of *Shearer*, but having regard to the special circumstances of this case, which distinguish it somewhat from *Shearer*, and which your Lordship in the chair has detailed, I am not unwilling to assent to the judgment proposed.

LORD MONCREIFF—In this case I agree with your Lordship that there are grounds for allowing full expenses and not modifying. The only difficulty arises from the fact that only £25 of damages has been awarded, but I think your Lordship has pointed out a sufficient reason why we should not on that account modify the

expenses. The pursuer was, in the first place, obliged to come here to get the relevancy of the action sustained; and, in the second place, as the accident occurred in Glasgow, probably as much expense would have been caused by taking witnesses to Dundee to have the case tried before the Sheriff as by bringing them here to have it tried before a jury.

As to the power of the Court in such cases if they think fit to modify the expenses even after a verdict, I do not entertain any doubt, and we have had within the last two years a case in which by the decision of this Court, where a jury returned a verdict for £25, we did modify the expenses at least by one-third—from £150 to £100. I think that is a very necessary power, although I think it ought to be exercised only in extreme cases. Seeing that the right of appeal for jury trial still exists it must receive fair play; but, on the other hand, that right I think must be exercised in a reasonable manner, and I think there is no doubt a great number of cases have been brought here with great hardship to the defender, which should have been taken in the Sheriff Court. The Court has inherent power with regard to expenses to modify to some extent to prevent injustice, but, as I have said, I do not think that that power should be exercised except in extreme cases, and this is not a case in which I think that power should be exercised for the reasons stated.

The Court found the pursuer entitled to expenses, and remitted to the Auditor to tax and to report.

Counsel for the Pursuer and Appellant—Young—Gunn. Agents—Mackay & Young, W.S.

Counsel for the Defenders and Respondents—Clyde, K.C.—M'Clure. Agents—Hope, Todd, & Kirk, W.S.

Friday, February 20.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

ROSSI *v.* MAGISTRATES OF EDINBURGH.

Police—Burgh—Ice-Cream Shops—Conditions Inserted in Licence for Premises where Ice-Cream is Sold—Ultra vires—Edinburgh Corporation Act 1900 (63 *and* 64 *Vict. cap. xxxiii.*), *section* 80.

By section 80 of the Edinburgh Corporation Act 1900, as amended by section 57 of the Edinburgh Corporation Order 1901, it is provided, *inter alia*, that any person selling ice-cream (except in a duly licensed hotel) without a licence from the Magistrates, "who are hereby empowered to grant the same," for the house, building, or premises where such ice-cream is kept for sale or sold, shall be liable to a penalty, provided that such licences shall run from the date of issue until the 15th May ensuing, and upon renewal, from the date of expiry of the licence so renewed to the 15th May succeeding, "unless the same shall be sooner forfeited, revoked, or suspended," and that "every person licensed . . . to sell ice-cream under the provisions of the Act who shall . . . sell ice-cream except during the hours between" 8 a.m. and 11 p.m. "on any lawful day, or at such extended hour at night as the Magistrates may by special regulation, in particular cases and for reasons assigned, permit," shall be liable to the penalty prescribed. No statutory form of licence was provided.

Held that under this provision the Magistrates were entitled to issue licences for the sale of ice-cream containing the following conditions:—(1) That the licencee should not keep open his premises or sell ice-cream therein on Sundays, or on any other days set apart for public worship by lawful authority; (2) that he should not keep open his premises or sell ice-cream therein before 8 a.m. or after 11 p.m.; and (3) that the Magistrates, or any of them, might at any time revoke or suspend the licence.

By section 80 of the Edinburgh Corporation Act 1900, as amended by section 57 of the Edinburgh Corporation Order 1901, it is enacted—"From and after the commencement of this Act every person who shall keep or suffer to be kept or used or use any house, building, room, or place, for public billiard playing, or shall keep a public billiard table or bagatelle board, or other table or instrument used in any game of the like kind at which persons are admitted to play, or shall sell ice-cream (except in any premises duly licensed as a hotel), without having obtained a licence from the Magistrates, who are hereby empowered to grant the same, for the house, building, or premises where such billiard table, bagatelle board, or other table or instrument as aforesaid is kept or used, or such ice-cream is kept for sale or sold, and also every person licensed under this Act who shall not, during the continuance of such licence, put and keep up the words 'licensed for billiards,' or 'licensed for the sale of ice-cream,' as the case may be, legibly printed in some conspicuous place on or near the door and on the outside of the house or building specified in the licence, shall be liable to a penalty not exceeding ten pounds, and in the event of such house, building, room, or place being continued to be kept or used for such purpose after such conviction, to a continuing penalty of ten pounds for every day during which the offence is committed or continued, together with the reasonable costs and charges of the conviction: Provided always that such licences shall run from the date of issue until the 15th day of May next ensuing, and upon renewal, from the date of expiry of the licence so renewed to the 15th day of May succeeding after expiry, unless the same shall be sooner forfeited, revoked, or suspended; and the