the conjoined action of declarator was instituted, concluding to have it declared that the defenders have erected a building exceeding the height allowed by the feu-contract, and that they should be ordained to pull down and remove the said erection in so far as it is in excess of the height permitted by the feu-contract.

That the defence stated to these actions may be fully appreciated, it is necessary to keep in view the following considerations:—

In the first place, that the restriction inserted in the feu-contracts is expressly declared to be the securing of the "utility and ornament" of the streets, according to the views which the superior entertained of the way in which these objects could be best attained.

In the second place, that with this view all the feuars in the compartment on both sides were taken bound to comply with this restriction, and the obligation to that effect imposed on any one of them is bound up with, and in express terms made part of, the common obligation imposed upon all.

And, in the third place, that this restriction had not in view any personal object or interest of the superior, but was stipulated for in order to the benefit of his feuars, to the utility of their possession of the subjects, and to the ornament of the street in which their buildings were situated.

Now, the whole feuars are at one in holding it to be for their interest to depart from this restriction,—in repudiating it as neither conducing to their utility nor to the ornament of their several possessions. And it is of importance to observe, as to this last matter, that while the superior averred in the record (art. 7) that "the operations complained of interfere with and injuriously affect the utility and ornament of George Street and Renfield Street," he has led no proof whatever of that averment, which is, on the contrary, disproved by the defenders in the course of the proof, one of the witnesses being the pursuer's master of works.

The title of the suspender to bring this action is under the feu-contract, and the question is, Has he an interest, and can he persevere in inforcing the regulations of the contract? Before entering upon this, I must take the opportunity of saying that the distinction taken at the Bar,—that this is a case raising purely equitable principles, and though decided in favour of the defender, would not limit an action of damages at the instance of the complainer,—is one to which I cannot assent. As a Court combining equity and law, the pursuer raised the only issue that was competent to him by trying the question in a suspension and interdict, and afterwards bringing a declarator. No doubt cases come up which require the peculiar application of equitable principles, and others which require a stringent application of legal ones, but the great mass of cases are those in which we take equitable considerations into view in judging of legal rights, and legal considerations in judging of equitable claims. If, having brought the action of declarator, he followed up that by a petitory demand, which would be the proper course, he could raise no question of damages if he failed in the declarator; it might be different if he succeeded. But in disposing of the case as we must do, let us consider what are the principles applicable to its decision. I think there is a distinction between conditions inserted into the contract for the benefit of the superior, and conditions for the benefit of the co-feuars. I think that this is a condition which we must keep in view here. His Lordship proceeded to apply the distinction to the present case, pointing out that the condition must be held to be of the latter class; and, after saying that Mr Campbell had no interest to inforce the condition, proceeded —But I think that, apart from the question of interest, Mr Campbell is bound by the tolerance or consent of Mr Ranken. Then there is the consideration that four of seven of the feuars have *de facto* been allowed to erect buildings in the manner which is here challenged. No attempt seems to have been made to get them to reduce these erections to the standard height. And, therefore, this is an attempt by the complainer to inforce against one feuar a condition in which he has no interest, and the violation of which he has tolerated in others. I think the complainer ought to satisfy the Court that he has the power to call upon all the feuars who have disregarded the condition of their feu-contract to act upon it, and to inforce it. We cannot take it off his hands that he will be able to do that if he gets a judgment now. He must bring his action for that purpose; and we are not to assume that he would succeed. I see no room, therefore, for pronouncing judgment against the defender.

Lord Benholme concurred.

Lord Neaves rested his judgment mainly on the consideration that the complainer, having tolerated the violation of the condition by the other feuars, was barred from pleading it against the defender.

The Lord Justice-Clerk delivered no opinion, having been absent from the discussion.

Agents for Complainer—H. & H. G. Gibson, W.S.

Agents for Respondents—Ronald & Ritchie, S.S.C.

Tuesday, June 23.

FIRST DIVISION.

JENKINS *v.* ROBERTSON AND OTHERS.

(*Ante*, iii, 374.)

Expenses—House of Lords—Res judicata—*Preliminary plea—Prescription—Competency.* In a declarator of right of way the defenders pleaded *res judicata* in respect of proceedings in a previous action. The House of Lords, reversing the judgment of the Court of Session, repelled the plea, but made no mention of expenses. The pursuer moving for expenses of discussing the preliminary plea, the Court *held* that they could competently dispose of the question, but, on the merits, *refused* the motion.

In 1863 Jenkins and other parties brought an action of declarator of public right of way for foot passengers along the right bank of the river Lossie, over the properties of North College and Blackfriars' Haugh. The defenders, Robertson and others, proprietors of the ground, pleaded *res judicata* in respect of a decree of absolvitor obtained by them in a previous action of the same kind brought by the Magistrates of Elgin. It appeared that in 1860 the same question of right of way was tried between the magistrates and the present defenders, and a verdict was returned for the pursuers; but that verdict was subsequently set aside as against evidence. After sundry negotiations the action was settled, the defenders being assoilzied, and the pursuers paying a certain sum of expenses. In respect of these proceedings in the former action,

the defenders in the present action claimed absolvitor. The Court, Lord Curriehill dissenting, sustained the plea. On appeal, the House of Lords reversed and remitted to the Court below to proceed with the cause, making no mention of expenses. The pursuer now craved the Court to apply the judgment, and to find him entitled to the expenses of discussing the preliminary plea.

Scott for pursuer.

Rutherfurd for defenders.

At advising—

Lord President—This question of competency is perhaps new, and it arises very purely. The defenders having been assoilzied on a plea of *res judicata*, an appeal is taken, and there is a simple reversal of the judgment of this Court, the effect of which is to place the parties in the same position as they were in before the plea was sustained, with this difference, that the plea is cleared out of the way. The House of Lords have said nothing as to expenses, or whether either party is to have them in regard to the discussion of that plea in this Court. I see no ground on which it is incompetent for this Court in proceeding with the cause, as we are bound to do, to determine, in the first place, whether the pursuer should be entitled to the expenses of clearing away that plea at this stage, and therefore I am disposed to consider the matter as clear on principle.

But as to the merits, I do not take so favourable a view of the pursuer's case. In some respects he is in a very unfavourable position, for though no doubt he is in fact a different person from the former pursuer, he is substantially in the same position, and he is going to try the same question which was previously tried. It is settled that, if he has a good case on the merits, he is not to be prevented from establishing his case by the previous judgment. It is for us to exercise our discretion whether he should have expenses now at this stage of the proceedings. Now, on looking at that case, I think the pursuers, the magistrates, who got up their case with very great labour and care, presented to the jury a case which was defective in an essential particular. There was a plain interruption of the right of way in 1838. Their proof of possession only went back to 1798, and therefore there was no proof of possesion for forty years. Having gone back for thirty-seven years, they would have been entitled to presume back for the remainder of the prescriptive period, if the period prior to 1798 had been beyond the memory of man. But that was not the case, for there were witnesses for the defender who knew the ground in question before 1798, and who proved that for some ten years previously there had been no footpath there at all. That evidence was uncontradicted by any evidence led by the pursuers. When the case came before the Court on a motion for a new trial, it was clear that the verdict was bad in law, for there was not a case on the evidence on which the pursuers were entitled to a verdict, and the verdict was set aside, not for the purpose of re-trying the case, for that was of no use unless the pursuers had had at their command a body of evidence as to the period prior to 1798, sufficient to overcome the evidence of the defender. It is competent, no doubt, for this gentleman to come and make out what the magistrates were of opinion they could not make out, but it will not be easy for any one who remembers the previous trial to believe in the existence of such evidence. It is possible there may be; but if, for want of such evidence, the pursuer ultimately fails, it would be very hard on the defenders, who must defend themselves for a second time, that they should be subjected in the long run to any expense. I think the way to do justice is to reserve these expenses to the end of the case.

Lord Curriehill concurred.

Lord Deas—I am of the same opinion. I think it is quite competent for us to give expenses to the pursuer. It is plain from the authorities that the House of Lords do not always express their judgment in these matters of expenses in the same way. In this case it is clear that they did not deal with the matter of expenses, and did not mean to do anything to prevent us from dealing with them. The judgment simply reversed the interlocutor of this Court, and remitted to us to proceed accordingly. This opinion proceeds on the terms of this judgment. But I am clearly of opinion that we ought to reserve the question of expenses.

Lord Ardmillan concurred.

Agents for Petitioner—D. Crawford & J. Y. Guthrie, S.S.C.

Agents for Respondents—Gibson-Craig, Dalziel, & Brodies, W.S.

Thursday, June 25.

RAYNER *v.* SCOTT AND OTHERS.

Jury Trial—Delay to proceed to Trial—A. S., 13th Feb. 1841, *sect.* 7. A motion to dismiss an action, in respect of failure timeously to proceed to trial, is properly made in the Inner-House. On the merits, motion *refused*, in respect that the delay was mainly attributable to the defenders.

In this case, issues were adjusted on 13th July 1861.

Shand, for the defenders, moved for absolvitor, in respect of the failure of the pursuer to proceed to trial within year and day.

Clark, for pursuer, suggested that the motion ought to have been made before the Lord Ordinary.

Shand cited *Ferguson*, 13th July 1861, 23 D. 1290.

The Lord President called attention to A. S., 13th Feb. 1841, sect. 7—"after the issue or issues are so engrossed, all motions shall be made in the Division to which such cause belongs."

Lord Deas—The only doubt ever entertained was, whether the motion could be made before the Lord Ordinary.

On the motion—

Clark, for pursuer, contended that the delay was owing to the fault of the defenders. In July 1861 they had obtained a commission for taking evidence in the East Indies. Correspondence then went on between the parties, with a view to a settlement, until 1864. In 1865 some procedure took place by way of adjusting interrogatories, and, under interlocutor of the Lord Ordinary, documents in the process were sent abroad. In 1866 and 1867 the defenders' agents assured the pursuer's agent that the commission was still going on. In March 1868 the pursuer had moved for circumduction, which motion was opposed by the defenders, and refused by the Lord Ordinary. The commission was not yet reported.

Shand replied that certified copies of the documents sent abroad were in process; that the defenders did not find it necessary to go on with their