COURT OF SESSION.

Saturday, November 7.

SECOND DIVISION.

[Lord Fraser, Ordinary.

IRVINE *v.* KINLOCH.

Process—Expenses—Decree for Expenses in Accessory Action—Effect on Procedure in Original Action.

A woman who had brought an action of count, reckoning, and payment against the executrix-nominate under her father's settlement, raised, while that action was still pending in the Outer House, another action against the same defender for reduction of the settlement. She failed in the reduction, and was found liable in expenses, which were taxed at £105. The utmost which she could recover in the original action was £100. *Held* that the expenses in the reduction were to be regarded as expenses incurred in the original action, and that the Lord Ordinary had rightly *refused in hoc statu* a motion for a proof in that action, in respect the taxed expenses in the reduction had not been paid

On 8th November 1883 Mrs Isabella Kinloch or Irvine brought an action of count, reckoning, and payment against her sister Miss Jessie Kinloch, as executrix-nominate of the deceased James Kinloch, the father of the pursuer and the defender. This action was sisted in order to enable the pursuer to bring another action against her sister for reduction of their father's settlement. That action was unsuccessful, and the pursuer was found liable in expenses, which were taxed at £105. She then moved for a proof in the original action. The defender objected to the motion being granted until the pursuer had paid the expenses, which she had not done. It was admitted that the utmost which the pursuer, if successful, could recover in the original action was £100, though she stated that she had a further claim on other grounds against her father's estate.

On 24th October 1885 the Lord Ordinary (Fraser) pronounced this interlocutor—"In respect the pursuer has not paid the taxed expenses in the action of reduction at her instance against the defender, refuses in *hoc statu* the pursuer's motion for a proof."

The pursuer reclaimed.

Authorities cited—*Struthers* v. *Dykes*, February 10, 1848, 10 D. 675; *Magistrates of Dundee* v. *Morris*, December 14, 1856, 19 D. 168; *Wallace* v. *Henderson*, December 22, 1876, 4 R. 264.

At advising—

Lord Justice-Clerk—I think this case must be decided on its own particular circumstances. I cannot say that I differ from the Lord Ordinary, though I must own that my first impression was against allowing this obstacle to be placed in the way of the pursuer proving her case, because the expenses for which she has been found liable but has not paid were incurred in another action. But the facts are very special. This is an action substantially for the distribution of the effects of the deceased James Kinloch, the father of the pursuer and also of the defender, who is his executrix-nominate. After bringing this action the pursuer raised another action, also against her sister, in which she concluded for the reduction of their father's settlement, and of course if she had been successful in that action that would have put an end to the present one. But she failed and was found liable in payment of the defender's expenses, amounting to about £105, and these expenses have not yet been paid. In these circumstances I cannot say that I think the Lord Ordinary has taken an unreasonable view in holding that the expenses in the action of reduction are to be treated as really expenses in the present action, which must be paid as a condition of allowing the pursuer to proceed farther with her case.

Lord Young—I am of the same opinion. Mr Rhind candidly conceded that the question was to be regarded as in no way different from what it would have been had the expenses actually been incurred in the present action. The action of reduction being incidental to this one, the expenses arising out of it are expenses relating to a step of procedure in this action just as much as if it had been within the present summons. Once the action of reduction was decided, the present action proceeded on the footing that the deed sought to be reduced was to stand. Now, I think it is within the discretion of the Court to decline to allow a pursuer to proceed with his action except on condition of paying his adversary's expenses up to date. I say that is within the discretion of the Court. There may be cases in which it is equitable that a pursuer should not be permitted to proceed further with his action until he has paid the expenses for which he has been found liable up to the particular stage which the action has reached. That is what the Lord Ordinary has done here, and in the circumstances I can see no ground for altering his judgment.

Lord Craighill—I have come to be of the same opinion. It is now conceded that the question is to be treated as one regarding expenses incurred in the present case, and the question is, whether looking to the whole circumstances it is reasonable that the defender should be bound to go on litigating with the pursuer without having received payment of such expenses as have been found due to her. Fortunately we are not going to lay down any general principle beyond this, that the matter is one which is within the discretion of the Court. We are not going to say that in every case in which expenses have been found due, payment of these expenses must be a condition of further litigation. The question is, whether such payment is reasonable in the present case, and I think it is, and for this reason—The expenses which are here in question amount to about £105, while it is admitted that all the defender could recover in the present action is about £100. So that even if successful she would recover nothing, and the defender might have to incur a great deal more expense, which would be absolutely irrecoverable even if the pursuer got decree for the full amount. These are the circumstances in which the Court has to exercise its discretion in the present case; and in these circumstances I think the Lord Ordinary has exer-

cised that discretion rightly, and that his judgment consequently ought to be affirmed.

LORD RUTHERFURD CLARK—I do not differ. The Lord Ordinary has refused the motion *in hoc statu*, and of course it will be open to the pursuer to renew her motion whenever the *status* has altered. Perhaps she may be able to induce the defender to give her a charge on the decree for expenses.

The Court adhered.

Counsel for Pursuer—Rhind—Gunn. Agent—D. Howard Smith, Solicitor.

Counsel for Defender—Moncreiff. Agent—David Hunter, S.S.C.

Tuesday, November 10.

SECOND DIVISION.

[Sheriff of Fife and Kinross.

ROBERTSON *v.* WRIGHT.

Property—Trespass—Interdict—Cattle Trespassing from One Side of a River to Lands on the Other Side—Reasonable Precautions—Act 1686, *cap.* 11.

A proprietor of lands on one side of a river sought to interdict the tenant on the opposite bank "from allowing his cattle to illegally trespass across the river and graze on his lands." *Held* that it was the defender's duty to take reasonable precautions to prevent his cattle crossing the stream and doing damage to the pursuer's lands, but that it was not proved that he had failed to take reasonable precautions so as to warrant an interdict against him within the prayer of the petition.

In this action Donald Robertson, of Mayfield, Cupar, sought to interdict Andrew Muir Wright, a sheep and cattle salesman, "from allowing cattle or other bestial belonging to him, or grazing with his authority in the grass field on the lands of Wards, of which he is tenant under John Anderson, to illegally trespass on the pursuer's property, or any part thereof."

The pursuer's lands extended along the south bank of the river Eden for about a mile. There was a footpath used by the public along the pursuer's bank. The pursuer had fenced his land inside the footpath, leaving a strip of ground (along which there was a public right-of-way) from 12 to 15 feet wide between it and the edge of the river. The land on the opposite side of the Eden for about a mile, including the lands of "Wards," was leased for grazing purposes by Wright, and he was in use before fair-days in the district to place a large number of cattle there. The pursuer complained that the defender allowed cattle to illegally trespass on his lands by fording the Eden, breaking down the banks, and grazing on his side of the river. He averred that in this way they injured the bank.

The defender denied the trespass, and averred that he had men watching the cattle when they were on his lands, and that he took all reasonable precautions to prevent them straying or trespassing.

The pursuer pleaded—"The defender Wright's cattle, or those of others for whom he is responsible, having trespassed on the pursuer's property, and there being reason to apprehend they may again do so, the pursuer is entitled to have such trespass interdicted by the Court."

The defender pleaded—"(1) An interdict in the terms prayed in the petition cannot competently be granted. . . . (2) The application is incompetent, the pursuer's remedy—on the supposition that the wrong complained of has been committed—being an action of damages or the statutory remedy provided by the Act 1686, cap. 11. (6) The defender having taken all reasonable and necessary precautions to prevent his cattle trespassing on the lands of Mayfield, the application is oppressive, and interdict ought not to be granted."

On 27th October 1884 the Sheriff-Substitute (HENDERSON) refused interdict on the grounds that there was no common law obligation on the defender to fence his lands or to herd his cattle so as to keep them off the pursuer's ground (Stair, i. 3, 67), and that the pursuer's remedy was to proceed under the Act 1686, cap. 11.

On appeal the Sheriff (CRICHTON) "allowed the pursuer, if so advised, to lodge a minute containing the averments he offered to prove as to the defender having failed to take reasonable precautions to prevent his cattle straying on pursuer's lands."

In the minute, which the pursuer accordingly lodged, he stated—"The pursuer believes and avers that during the whole of defender Wright's tenancy of the said field he has wrongfully and illegally failed to take reasonable precautions, or any precautions, to prevent the cattle belonging to him, and the cattle under his charge, from straying from the said field on to the pursuer's lands, and has wrongfully and illegally failed to comply with, and has contravened, the provisions of the Act 1686, cap. 11, not only by not herding, or causing to be herded, his cattle sufficiently to prevent them trespassing on the pursuer's said lands, but by not in any respect causing them to be herded so that they might not destroy his grounds; and that the foresaid trespasses and injuries were caused by the defender Wright's said failure to take reasonable or any precautions as aforesaid, and by his said failure to observe, and contravention of, the provisions of the said statute."

On 7th February 1885 the Sheriff allowed a proof and recalled the Sheriff-Substitute's interlocutor of 27th October 1884 *in hoc statu*, and allowed the parties a proof of their respective averments.

"*Note.*— . . . The Sheriff thinks it right to state, that should it turn out that the defender has failed to comply with the provisions of the Act 1686, as stated in the minute now lodged, the Sheriff is of opinion that the pursuer, besides the remedies of poinding the strayed cattle under the statute, or suing for damages, would be entitled to interdict."

The import of the proof appears fully in the opinion of Lord Young and in the note to the Sheriff's final interlocutor.

On 11th July 1885, after proof had been led, the Sheriff recalled the Sheriff-Substitute's interlocutor of 27th October 1884, repelled the first and second pleas stated for the defender: Further, after findings in fact to the effect stated in