Wednesday, January 8, 1908.

SECOND DIVISION.

(SINGLE BILLS.)

ANDERSON'S TRUSTEES *v.* JAMES DONALDSON & COMPANY, LIMITED (IN LIQUIDATION).

(*Ante* October 26, 1907, vol. 45, p. 26.)

Expenses — Company — Decree for "Expenses" — Winding-up by Order of the Court—Petition for Leave to Proceed with Action against Company in Liquidation — Petition Unsuccessfully Opposed by Liquidator, against whom "Expenses" Given—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 87.

A petition brought under section 87 of the Companies Act 1862 for leave to proceed with an action against a company in liquidation, craved expenses in the event of the liquidator appearing and opposing the petition. It was opposed by the company and its liquidator. Authority to proceed was granted with expenses to the petitioners. The Auditor disallowed expenses incurred prior to the date of lodging answers. The petitioners objected to this.

The Court, *holding* that "expenses" meant "expenses in the cause," and that the contention that no extra expense was occasioned to the petitioners prior to the lodging of answers was not timeously raised, *sustained* the objection.

Opinion by the Lord-Justice Clerk that even assuming the question had been raised timeously, the liquidator by choosing to appear incurred a possible liability for expenses in the petition prior to his appearance.

The Companies Act 1862 (25 and 26 Vict. cap. 89), section 87, enacts—"When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose."

The trustees of James Anderson presented a note craving the Court to grant them leave to proceed with an action of sequestration for arrears of feu-duty at their instance against James Donaldson & Company, Limited, for the winding up of which company an order had on 1st June 1907 been pronounced by the Court. The prayer of the note concluded with a crave "to find the company and liquidator, if they or either of them appear to oppose the prayer hereof, liable in expenses." Answers were lodged for the company and the liquidator, and the petition was opposed by them. On 25th July 1907 the Lord Ordinary officiating on the Bills (MACKENZIE) refused the prayer of the note. The petitioners reclaimed, and on 26th October 1907 the Court pronounced this interlocutor—"The Lords having heard counsel for the parties on the reclaiming note against the interlocutor of Lord Mackenzie, dated 25th July 1907, Recal the same: Find the sequestration at the instance of the reclaimers competent; authorise them to proceed therewith, and decern: Find the reclaimers entitled to expenses, and remit the account thereof to the Auditor to tax and report."

At taxation the Auditor disallowed, *inter alia*, all expenses incurred prior to the date of lodging answers.

The petitioners presented a note of objections to the Auditor's report, *inter alia*, to the disallowance of these expenses.

Argued for the objectors—There being no limitation in the interlocutor the granting of expenses meant expenses in the cause, and not merely those subsequent to or occasioned by opposition. The attempt to restrict expenses had not been made timeously. Assuming the question was timeously raised, there was no reason why the liquidator, if he chose to appear, should not pay expenses. In *County of London Electric Lighting Company, Limited* v. *Pattisons, Limited, and Liquidators* (on which the liquidator had proceeded), the expenses for which pursuers held a decree, were not those in the petition, but were the expenses incurred in the action allowed by the petition. That case consequently merely decided that the expenses of one action could not include the expenses in another.

Argued for the liquidator and company—The application to the Court for leave to proceed was necessary under section 87 of the Companies Act, and was not dependent on their opposition, which could not have resulted in additional expense prior to its commencement, the lodging of answers. The petitioners, moreover, in their prayer only asked expenses in the event of opposition, thereby practically admitting they were only entitled to expense caused by opposition. The expenses prior to *litis contestatio* were clearly separable from those subsequent thereto, and the Auditor was entitled to distinguish them. Prior to the lodging of answers they had caused no additional expense and ought not to be held liable for what they had not occasioned—*M'Leod* v. *Leslie*, May 27, 1865, 3 Macph. 840.

LORD JUSTICE-CLERK—I think that the first objection should be sustained. Whatever may be the merits of the question as to whether expenses should be given, as between the successful and the unsuccessful parties to the case, only from the time when the opposition began, that question should have been settled at the time when the motion for expenses was made. Any other rule would be productive of the greatest inconvenience. It is out of the question that the matter should be decided by the Auditor on statements made by a party, and should then come up here on a note of objections to his report. The Court having found the petitioners entitled to expenses, it seems to me that "expenses" means "expenses in the cause" unless

there is something in the interlocutor to show that some expenses, which would otherwise be legitimate, are excluded. The liquidator does not need to appear unless he chooses. But if he chooses to appear and take up the case, he takes up the whole case, including a possible liability for expenses already incurred. Here the liquidator saw fit to appear, and I can see no ground for writing off expenses merely because they happen to have been incurred before he appeared. If he loses his case his liability is just that of an ordinary litigant.

LORD STORMONTH DARLING and LORD LOW concurred.

LORD ARDWALL was absent.

Counsel for the Petitioners (Objectors)—C. H. Brown. Agents—W. & T. P. Manuel, W.S.

Counsel for the Respondents—Constable. Agents—Davidson & Syme, W.S.

Wednesday, January 8.

FIRST DIVISION.

[Lord Dundas, Ordinary.

ROBERTSON *v.* JOHNSTON.

Process — Reponing — Failure to Lodge Prints in Action in Outer House—Reclaiming Note against Interlocutor Dismissing Action—"Cause Shown"—A.S. 2nd November 1872, *sec.* 5.

A petitory action in the Outer House was, after the record was closed, dismissed on account of prints not having been lodged as required by A.S. 2nd November 1872, sec. 5. The pursuer presented a reclaiming note and in the Single Bills moved that the interlocutor be recalled and the cause sent back to the Lord Ordinary. His counsel explained, and produced correspondence to show, that the cause, being a complicated one, had been in course of being settled, that for this reason time had been given the defender to produce his adjustments, and, although throughout he had been repeatedly pressed and the urgency shown him, unfortunately the prints had only been ready and tendered when too late.

The Court *recalled* the interlocutor and *remitted*, finding neither party entitled to expenses.

The Act of Sederunt of 2nd November 1872, to regulate proceedings in the Outer House—made under the Court of Session (Scotland) Act 1850 (13 and 14 Vict. cap. 36), sec. 54, and the Court of Session (Scotland) Act 1868 (31 and 32 Vict. cap. 100) sec. 106—sec. 5, enacts—"Within four days from the date of the interlocutor closing the record, the agent for the pursuer, or for the party appointed to print the record, shall lodge with the clerk to the process two printed copies of the record as finally adjusted and closed. . . . . And failing the said agent lodging such copies within the prescribed period, the clerk shall record such failure by a note on the interlocutor sheet. . . . . And failing the two copies of the printed record being lodged as aforesaid, the cause shall be deleted from the debate or procedure roll, as the case may be, and shall be restored to the roll only on motion made to the Lord Ordinary by any party to the cause lodging the said two printed copies as aforesaid. Provided that, if none of the parties to the cause move the Lord Ordinary to restore the same to the roll, and lodge the two printed copies as aforesaid within twenty-one days of the date of the interlocutor closing the record, the Lord Ordinary shall pronounce an interlocutor dismissing the action, and finding neither party entitled to expenses, which shall not be recalled by the Lord Ordinary of consent but may be recalled only in the manner and on the conditions aforesaid" *i.e.*, as provided in section 1, "on reclaiming note to the Inner House, upon such conditions as to expenses or otherwise as may be imposed by the Court or by the Lord Ordinary under remit."

On October 3, 1907, Andrew Robertson, accountant, Edinburgh, assignee of William Charles Steven, chartered accountant, Edinburgh, judicial factor on the trust-estate constituted by antenuptial contract of marriage dated July 31, 1871, between Adam Scott, sometime grocer and wine merchant in Edinburgh, and Mrs Mary Kennedy Lamond or Scott, his wife, raised an action against John Johnston, chartered accountant, Edinburgh, judicial factor on the trust estate constituted by the antenuptial contract of marriage between William Lamond, 46 Pierce Avenue, Chicago, U.S.A., and Mrs Elizabeth Drummond or Lamond, his wife, dated April 22, 1873, to recover £92, 9s. 11d. On November 20, 1907, the Lord Ordinary (SALVESEN) closed the record and appointed the cause to be put to the procedure roll. On December 9, 1907, the Clerk of Court noted on the interlocutor sheet that prints had not been lodged in terms of A.S. 2nd November 1872, and deleted the cause from the procedure roll, and on December 18, 1907, the Lord Ordinary (DUNDAS), in respect that parties had failed to comply with the provisions of sec. 5 of the A.S. 2nd November 1872, dismissed the action, finding neither of the parties entitled to expenses.

The pursuer reclaimed, and in the Single Bills moved the Court to recal the Lord Ordinary's interlocutor and to remit to him to proceed with the action.

The pursuer founded his motion on a correspondence between the parties' agents, which showed that negotiations for a settlement had been proceeding when the record was closed. On November 26, 1907, pursuer's agent had written to defender's agents—"On seeing my counsel in the end of the week for his adjustments, he told me that your counsel had told him he need not trouble about adjustments as the case was to be settled. I would be pleased were this so. If so, how is that to be done?"—And