

Friday, November 15.

FIRST DIVISION.

[Lord Dewar, Ordinary.

BOYLE AND OTHERS v. OLSEN AND OTHERS.

Expenses—Proof—Tender—Preparation for Proof—Acceptance of Tender synchronous with Allowance of Proof—General Regulation No. 3, appended to A.S. 15th July 1876.

In a salvage action the Lord Ordinary, before pronouncing an order for proof, allowed the defenders three days to consider as to the lodging of a tender. The three days having expired without it having been lodged, his Lordship, on the pursuers' motion, pronounced the usual order. Shortly thereafter, and before the interlocutor had been signed, the defenders lodged a tender which was accepted. *Held* (rev. judgment of Lord Dewar, Ordinary) that the pursuers were entitled to the expenses incurred by them in making preparations for the proof.

No. 3 of the General Regulations appended to the Act of Sederunt 15th July 1876 provides—"The expenses to be charged against an opposite party shall be limited to proper 'expenses of process,' without any allowance (beyond that indicated in the table) for preliminary investigations, subject to this proviso, that precognitions (so far as relevant and necessary for proof of the matters in the record between the parties), although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor shall be pronounced either approving of issues or allowing a proof."

In two conjoined actions of salvage at the instance of (1) J. S. Boyle, trawl owner, Aberdeen (owner of the steam trawler "Glenogil" of Glasgow), against Fred. Olsen, Christiania, Norway (owner of the s.s. "Balduin"), and (2) The Lindsey Steam Fishing Company, Limited, Grimsby (owners of the steam trawler "Lacerta" of Grimsby), against Actieselskabet Bonheur, Christiania (owners of the s.s. "Balduin"), the Lord Ordinary, before pronouncing an order for proof, allowed the defenders three days to consider whether they would lodge a tender which they had proposed making. The three days having expired without the tender having been lodged, his Lordship, on 16th July 1912, on the motion of the pursuers, pronounced the usual order for proof. Shortly thereafter, and before the interlocutor was signed, the defenders lodged a tender, which the pursuers accepted. The order for proof was thereafter discharged, the defenders being found liable in expenses up to the date of the tender. In taxing the pursuers' accounts of expenses the Auditor allowed, under the heading "preparations for proof," certain charges, amounting in Boyle's case to £18 odd, and

in the Lindsey Steam Fishing Company's case to £28 odd. The nature of the items in question sufficiently appears from those objected to in Boyle's case, which were as follows:—

"Preparations for Proof.

1911—Dec. 4.

Instructions for precognitions	£1 11 6
Meeting and instructing Mr David Anderson, consulting engineer, to value the "Balduin"	0 10 0
Paid him fee	4 4 0
Drawing precognition, 1 sh.	0 3 0
Meeting and instructing Mr John Rust to value the cargo of the "Balduin"	0 10 0
Paid him fee	3 3 0
Drawing precognition, 1 sh.	0 3 0
Meeting and instructing Captain W. L. Main to survey damage to "Glenogil"	0 10 0
Paid him fee	3 3 0
Drawing precognition, 1 sh.	0 3 0
Drawing precognition of Captain Rix, 5 shs.	1 10 0
Drawing precognition of F. A. Morton (mate), 5 shs.	1 10 0
Three copies precognitions, 13 shs.	1 19 0
	£18 19 6"

The Auditor having lodged his report the defenders objected to his allowance of these items, and on 31st October 1912 the Lord Ordinary (DEWAR) sustained their objections.

[His Lordship sustained similar objections in the Lindsey Steam Fishing Company's case.]

The pursuers reclaimed, and argued—The Lord Ordinary was in error in disallowing the items in question, for where, as here, an order for proof had been pronounced the pursuers were entitled to such expenses as had been necessarily and properly incurred in preparing therefor—General Regulation No. 3, appended to A.S., 15th July 1876.

Argued for defenders—Where, as here, the lodging of the tender was simultaneous with the order of proof the pursuers were not entitled to the charges made. Certain of these items were for precognitions, and where, as here, the pursuers were aware that a tender was about to be lodged they were not entitled to incur such expense, or at any rate to charge their opponents therewith—*Walker and Others v. Barclay*, 1909, 1 S.L.T. 500. The practice had been otherwise—*Mica Insulator Company, Limited v. Bruce Peebles & Company, Limited*, 1907 S.C. 1293, 44 S.L.R. 674.

LORD PRESIDENT—I think this is a very clear case, and that the Auditor here was quite right. I do not think the Lord Ordinary would have interfered with the Auditor unless he had thought he ought to be influenced by the opinion of Lord Salvesen in the Outer House in the case of *Walker v. Barclay*, 1909, 1 S.L.T. 500. Of course a decision of one Lord Ordinary in the Outer House does not bind another Lord Ordinary. But I need not say any—

thing about Lord Salvesen's decision, because I think each of these cases must be decided on its own merits. But that this case comes within the words of the Act of Sederunt, 15th July 1876, I have not any doubt. Here there was an order for proof pronounced, and I am quite willing to give the defenders the benefit of the doubt and to treat the tender as synchronous with the order for proof being pronounced. By an order for proof it is shown that the case demanded proof if the facts were not admitted, and I think the meaning of the Act of Sederunt is quite clear that by an order for proof being pronounced it is shown that there was a case requiring investigation. That being so, when expenses are found due to the pursuer the intention is that that should carry the expenses of investigations so far as necessary, even although those investigations were made prior to the order for proof being pronounced, and although, owing to the further conduct of the parties, the defender having made a tender, the proof itself never in fact came to be led. I think the defender here had himself to blame, because he could have put in his tender at such a time as to have put the pursuer in bad faith when he applied for an order for proof. If the tender had been put in and had been brought to the knowledge of the pursuer I do not think he could then, without considering the tender, have rushed in to get an order for proof.

I rather agree with what has fallen from my brother Lord Mackenzie, that the Act of Sederunt, if it errs at all, errs on the side of undue severity to the pursuer.

I therefore think that what the Auditor did was right, and that Lord Dewar's interlocutor upon that matter must be recalled and the finding of the Auditor restored.

LORD KINNEAR—I am entirely of the same opinion.

LORD JOHNSTON—I also agree, and think that the matter is very largely disposed of by the case referred to (*The Mica Insulator Company v. Bruce Peebles & Company*, 1907 S.C. 1293).

LORD MACKENZIE—I am of the same opinion.

The Court recalled the Lord Ordinary's interlocutor, repelled the defenders' objections to the Auditor's reports on the pursuer's accounts of expenses, approved of the Auditor's reports thereon, and decerned against the defenders for payment to the pursuers of the taxed amount of their respective accounts.

Counsel for Pursuers (Reclaimers)—A. R. Brown—Burn Murdoch. Agents—Alex. Morison & Company, W.S.—Mackenzie & Kermack, W.S.

Counsel for Defenders (Respondents)—Horne, K.C.—Lippe. Agents—Boyd, Jameson, & Young, W.S.

Thursday, October 31.

EXTRA DIVISION.

[Lord Dewar, Ordinary.]

A B v. C B AND G H.

Husband and Wife—Process—Divorce—Adultery—Act of Sederunt, 17th July 1908—Minuting Defender Found Entitled to Final Judgment.

A B brought an action of divorce against his wife, in which he asked the Court to find facts "proven relevant to infer guilt of adultery of the defender C B with G H." The case having been intimated in terms of the A.S. of 17th July 1908 to G H, he lodged a minute craving to be sisted as a party to the cause. After proof the Lord Ordinary decerned against the wife in terms of the conclusion of the summons, but, in respect that there was no conclusion against G H, found it unnecessary to consider how far the evidence was good against him. G H reclaimed, and in the Inner House counsel for the pursuer admitted that he could not maintain that adultery was proved against G H. Parties differed as to whether in the circumstances the action should be dismissed as against G H., or decree of absolvitor pronounced in his favour.

Held that there was a declaratory conclusion against G H; that he was therefore entitled to have a judgment on the question of whether adultery was proved against him or not; that the Court could not decide that question without hearing the evidence, and were entitled to the opinion of the Judge of first instance upon it; that therefore the case must go back to the Lord Ordinary in order that he might decide whether adultery was proved against G H, and if not, whether decree of dismissal or absolvitor should be pronounced.

The Act of Sederunt of 17th July 1908 enacts—"In every action of divorce on the ground of adultery in which appearance has not been entered, and in which the person with whom the defender is said to have committed adultery, has not been cited as a co-defender, the Lord Ordinary before whom the action depends shall, before fixing a diet of proof, unless cause be shown to the contrary, appoint intimation to be made to such person, . . . and such person, if he or she desires to dispute the truth of the averments made against him or her, shall be entitled to lodge a minute craving to be sisted as a party to the cause, . . . and on such person being sisted, he or she shall become a party to the cause and be subject to the same procedure as if he or she had originally been cited as a co-defender, and with the same rights and liabilities as to the expenses occasioned by such intervention."

On 29th June 1911 A B, *pursuer*, brought an action of divorce against his wife C B, *defender*, in which the conclusion of the