Their Lordships, with expenses, reversed the interlocutor appealed against and restored the arbiter's award.

Counsel for the Appellant (Claimant)—The Lord Advocate (Munro, K.C.)—Hon. A. Shaw. Agents—Macbeth, Macbain, & Currie, Dunfermline—D. R. Tullo, S.S.C., Edinburgh—Walker, Son, & Field, London.

Counsel for the Respondents—The Solicitor-General (Morison, K.C.)—H. W. Beveridge. Agents—W. T. Craig, Glasgow—Wallace & Begg, W.S., Edinburgh—Beveridge, Greig, & Company, London.

COURT OF SESSION.

Friday, March 27.

FIRST DIVISION.

[Lord Cullen, Ordinary.

MARTIN *v.* M'GHEE AND OTHERS.

(*Ante*, p. 223.)

Process—Title to Sue—Interest—Expenses—Title of Pursuer's Representative to Sue on an Intransmissible Right.

Where in the early stages of a case a pursuer dies, and there is no transmission of the right in respect of which the action is maintained to his representative, the Court will not allow the representative to follow out a litigation in which he can obtain no judgment on the proper subject-matter of the action.

James Martin, 75 Finnieston Street, Glasgow, *complainer*, presented a note of suspension and interdict against (first) Richard M'Ghee, 69 North Street, Lurgan, and another, the trustees of the National Sailors and Firemen's Union of Great Britain and Ireland, 178 Broomielaw, Glasgow, and (second) the said Union, *respondents*, in which he craved the Court to interdict the respondents from, *inter alia*, "asking, collecting, or receiving from the members or branches of said Union contributions or levies for the purpose of promoting labour representation in Parliament, or for the purpose of paying parliamentary election expenses for the purpose of securing or maintaining parliamentary representation, or for any other parliamentary or political purposes."

The complainer having died while the case was standing in the procedure roll, his widow, who had been appointed his executrix, lodged a minute stating that she desired to sist herself as complainer. On 29th November the Lord Ordinary (CULLEN) refused the minuter's motion. On January 31st the Court recalled the Lord Ordinary's interlocutor, sisted the minuter in terms of her minute, reserving all questions as to her right to insist in the cause, and continued the cause (see *ante*, p. 223).

Thereafter the cause was again heard, when it was argued for the reclaimer—The case should be sent back to the Lord Ordinary to proceed. The Act of 1696, cap. 15, took away the necessity for an act of transference in the case of representatives of a pursuer who were willing to sist themselves, and it substituted a minute and motion, and the Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 96, provided similarly for the transference of actions against defenders—Mackay's Manual, 256-257; Shand's Practice, vol. ii, p. 538; *M'Culloch* v. *Hannay and Others*, December 24, 1829, 8 S. 122. When a pursuer died after litiscontestation, there was vested in his representatives a right to carry on the action—*Ritchie* v. *Ritchie*, March 11, 1874, 1 R. 826; Stair, iv, 40, 8; Ersk., iv, 1, 69 and 70. If a pursuer had an interest when the action was raised, the Court did not minutely scrutinise his interest at later stages—*Goodall* v. *Bilsland*, 1909 S.C. 1152, 46 S.L.R. 555. Here the present pursuer had an interest to recover expenses incurred, and that was a sufficient interest—*Ammon* v. *Tod*, 1912 S.C. 306, 49 S.L.R. 244. But further, she had an interest in that if, as she maintained, the levies were illegal, the estate of her husband might be liable for his illegal actings, and it was to the interest of the estate to know that now rather than at some future date. Reference was also made to Consolidated Act of Sederunt, B I, 1 (p. 26).

Argued for the respondents—In the early stages of an action where no great expense had yet been incurred, and there was prospect if the action continued of considerable expense being incurred, the Court should not allow the representative of a deceased pursuer to insist in an action in the subject-matter of which the representative had not then either title or interest—*Dobie* v. *M'Farlane*, June 17, 1856, 18 D. 1043. The representative had not only no interest here but no title. She was not *eadem persona* with the deceased. The membership of the union was intransmittable, and accordingly, as she had no right in respect of which the action was maintained, she had no title to insist in it—Mackay's Manual, p. 259. In *Goodall* (*cit. sup.*) the question of interest was not argued, but in any case the pursuer there remained the same. In *Ritchie* (*cit. sup.*) it was clear that the trustees who were sisted had a patrimonial interest.

At advising—

LORD PRESIDENT—In this case we some time ago allowed the widow to be sisted as a party to the action in room and place of her husband. We expressly reserved the question of her right to insist in the action. She is the executrix-dative, and we considered that she was entitled, if she chose, to become a party to this action in order that she might state her case to us, and that we might have an opportunity of considering and deciding whether she should be allowed to prosecute the action to its end on the merits, or if not, whether she should be entitled to recover expenses. We have now heard a full argument upon that question, with the result that I am satisfied that the executrix-dative has no interest whatsoever in the merits of this action, and that a decree on the merits would be of no use or advantage to anybody. It would be idle

and futile. But notwithstanding we may, if we think that the conduct of the defenders has been unreasonable, undue, or excessive, and has caused unnecessary expense, find the executrix-dative entitled to an award of expenses. But after considering all that has been said on both sides I come to the conclusion that no unreasonable conduct can be laid at the door of the defenders.

The original pursuer of the action died in the month of July 1913. Immediately before the date of his death the record was closed and the case sent to the procedure roll by the Lord Ordinary. It stood there unheard at the date of the death. The defenders were willing to leave it alone. They made no move. They asked nothing of the pursuer as executrix of her husband. In my opinion it ought to have been left alone.

I am very far from saying that there may not be cases in which we should in our discretion allow actions to proceed which involve nothing except a question of expenses; but where in the early stages of a case a pursuer dies and there is no transmission of the right in respect of which the action is maintained to his representative, as is the case here, then I am very clearly of opinion that we ought not—to use the words of Lord Neaves in the case of *Dobie* v. *M'Farlane*, 18 D. 1043—to allow the representative "to follow out a litigation in which he can obtain no judgment on his proper demand." And therefore because a decree on the merits would in my judgment be futile, and the conduct of the defenders here has not been unreasonable, I am of opinion that this action ought to be dismissed, and that no expenses should be found due to or by either party.

I have to intimate that LORD JOHNSTON and LORD MACKENZIE concur in that opinion.

LORD SKERRINGTON—I concur with your Lordship.

LORD ORMIDALE was present at the advising, but had not heard the case.

The Court dismissed the action and found no expenses due to or by either party.

Counsel for the Reclaimer — Constable, K.C. — MacRobert. Agents — Gardiner & Macfie, S.S.C.

Counsel for the Respondents—Mackenzie, K.C.—J. B. Young. Agents—Weir & Macgregor, S.S.C.

Friday, March 27.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

M'ROBERT *v.* REID AND OTHERS.

Road—Right-of-Way—Right of Frontager to Use it as an Access to his Property—Interdict—Defence—Relevancy.

When a public right-of-way is once established, the user cannot be confined to travellers from end to end. Accordingly a frontager whose lands abut on the public right-of-way is entitled in his capacity as a member of the public to use it as an access to his property from either terminus.

In an action by a proprietor against the owner of an adjoining estate to prevent him using as an access to his property a path which passed through his (the pursuer's lands), the defender, whose property abutted on the path in question, pleaded that he was entitled to use it in respect that it had been used by the public as a public right-of-way for more than forty years.

Held (*diss.* Lord Johnston) that the defender was entitled to plead the public right-of-way, and, the right having been vindicated, to *absolvitor*.

Opinion (*per* Lord Johnston) that the defender was not entitled in his capacity as a member of the public to use the route as an access for his property, and that accordingly as he did not plead a servitude of way, interdict should be granted as craved.

Expenses—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1 (*b*) *—Applicability.*

The Public Authorities Protection Act 1893, section 1, enacts with regard to actions raised against any persons on account of acts done in pursuance of any Act of Parliament or of any public duty or authority, (*b*) "Whenever in any such action a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client."

An action between two adjacent proprietors in which the existence of a public right-of-way was involved, having been intimated to the District Committee of the County Council, the latter were, on their own motion, sisted as defenders to the action. The defenders, the District Committee, having been successful in vindicating the existence of the public right-of-way, and having been awarded expenses, moved that these should be taxed as between agent and client in respect of the Public Authorities Protection Act 1893.

Held that the Act was inapplicable to the circumstances of the case, and motion *refused*.

On 17th June 1911 Sir Alexander M'Robert, Douneside, Tarland, *pursuer*, brought an action against Edward A. Reid, the proprietor of the estate of Westtown, which lay immediately to the north of Douneside, *defender*, in which he craved interdict against the defender entering or trespassing upon his (the pursuer's) lands. Mr Reid lodged defences in which he admitted that he had been in the habit of passing through certain fields on the estate of Douneside when going to or coming from the village of Tarland in the south, but averred that he had done so in virtue of a public right-of-way running from Cushnie in the north across the hill of Cushnie and thence through the lands of Douneside to Tarland. On 26th July 1911 the Sheriff-Substitute (LAING) on the defender's motion appointed intimation of the action to be made to the Deeside District