

with the Auditor, and I have examined both the authorities and the practice. The only question seems to me to be, what is the true effect and meaning of a decree for expenses? and I have no doubt at all that the decree in this case carries the expenses reserved in the Inner House. The sole purpose of the reservation was that the expenses of the reclaiming-note should follow the decree disposing of expenses generally, unless the Court saw reason afterwards to make a different provision regarding these. If there had been no reservation, neither party might have got expenses, and the reservation is simply to the effect I have mentioned. I think that only leaves open the question that was argued, as to whether this was a point upon which a party generally unsuccessful had been specially successful, and therefore the expenses which the Auditor had allowed should be disallowed under the Act of Sederunt; and on that also I hold that the Auditor has taken the course not only justified by practice but in accordance with the reason of the thing, because the meaning of the judgment of the First Division was that this was not an expense which ought to be separated from the general expenses of the case, being expenses incurred upon a point on which the party respondent was plainly successful, and I think the meaning of the judgment was that it must follow the general expenses, unless there was some other reason for dissociating it from the general expenses. If a party volunteers to come forward to contest a right, and incurs expenses and exposes his opponent to expenses in order that he may establish right to contest the case, the question whether he is ultimately to get the expenses of that discussion depends very much upon whether he really had any right or substantial interest to maintain, and if it turns out that he has none, or that in his own judgment he thinks he has so little that he does not continue to contest, I do not say there positively is, but there may be very good reasons for refusing him expenses of the discussion, because he has only been successful in throwing expenses on the other party and in obtaining no other useful result at all. Although I think it is possible to take that view, I do not say that is the view I shall take in this case, although I think it is the view on which the First Division proceeded. What I mean is, that I think there may be perfectly reasonable grounds for refusing these expenses, and that being so, I think it was plainly necessary, if the defenders wished to have these expenses excepted from the general decree, that the defenders should have moved me to that effect before I pronounced decree. Then the matter might have been discussed. It is too late now to dispose of that matter, because I have given a decree which certainly carries these expenses, and which I think the Auditor is not entitled to touch, because he could not have disallowed these expenses without differing from the First Division, and therefore I think it is too late to disturb the matter."

Counsel for Pursuer—Trayner—Thorburn—Graham Murray. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Counsel for Defenders—R. Johnstone—W. C. Smith. Agent—Andrew Newlands, S.S.C.

Saturday, December 13.

## SECOND DIVISION.

[Lord Fraser, Ordinary.]

BROWN v. RODGER AND ANOTHER.

Process—*Misnomer in Summons*—*Citation—Diligence.*

A small-debt action was brought against a Miss Isabella Brown, 40 Lorne Street, Leith Walk, Leith. It was served personally on a Miss Barbara Jane Brown residing there. She did not defend. Decree was obtained in absence, and a charge and poiding followed. She then sought to interdict the poiding, on the ground that she owed the creditor nothing, and was not Isabella Brown. The Court *suspended* the poiding, and distinguished the case from *Spalding v. Valentine & Company*, July 4, 1883, 10 R. 1092.

Barbara Jane Brown, residing at 40 Lorne Street, Leith Walk, Leith, presented in the Bill Chamber, against William Ritchie Rodger, law agent, Edinburgh, judicial factor on the estate of the deceased Mrs Marion Macfarlane or Morton, grocer, 219 Leith Walk, Leith, and also against John Watson, sheriff-officer, this note of suspension and interdict of a threatened sale on a poiding of her effects executed by Watson on the instructions of Rodger as judicial factor fore-said. The threatened sale, she averred, was for non-payment of £5, 9s. 11d., with 7s. 1d. of expenses, alleged to be due by a Miss Isabella Brown, 40 Lorne Street, Leith Walk, to the deceased Mrs Morton, and she not being Miss Isabella Brown, and never having passed by that name, or by any other name than Barbara Jane Brown, and not being due the debt in question, the poiding was wrongous and unwarrantable. She stated that she had had dealings with Mrs Morton under her own name, and had paid all accounts she was due to her.

Rodger lodged answers, in which he stated that the complainer was a customer of Mrs Morton; that on examining Mrs Morton's books on his appointment as judicial factor he found an outstanding account due by the complainer; that he called on her and asked her to settle it, and that she admitted the debt, and said she was unable to settle it then, but promised to make an arrangement, and that she failing to do so, he raised the small-debt action, on decree in absence in which the poiding proceeded. He further stated:—"It appeared on examining the business books that the first page of the defender's account is headed thus—'Miss Isabella B. Brown, 40 Lorne Street,' the word 'Isabella' being delete as shown in this article. The complainer did not know the deceased Mrs Morton's customers, and therefore thinking that the 'B' in the above heading stood for 'Bella,' made out the account sued on in name of Isabella Brown. The account is contained on, *inter alia*, three pages of the deceased Mrs Morton's ledger, the first of which pages is headed as above, the second being headed 'Miss B. J. Brown, 40 Lorne Street' (the initials of the name now stated by the complainer as her proper name), while the third page is headed 'Miss Isabella Brown, 40 Lorne Street,' and bears a reference back to the prior

page. The complainer is the party referred to in the pages above mentioned and in the account sued on. The goods, payment for which is sought, were ordered by and delivered to her; the small-debt decree for the price is against her. The summons on which the decree follows proceeds against the complainer under the name of 'Miss Isabella Brown'; it was served at her dwelling-place, was received personally by her under said name without objection, and although she was thereby certiorated that unless she appeared in the Small Debt Court on 26th March 1884 she would be held as confessed, she failed to appear, and thus was held as confessed. Thereafter the complainer was charged under said decree on 28th March 1884 under pain of pouncing. The execution bears, and it is the fact, that the charge was given to her personally. She did not apply for a re-hearing as she might have done, or take any of the steps competent under the Small Debt Act to set aside the decree. The complainer represented to the officer who delivered to her the said charge that she was the defender named and designed therein, and she knows quite well that the summons and charge were intended for her, and that the debt sought to be recovered is due by her. There is no other spinster or woman of the name of Brown at 40 Lorne Street but the complainer, and her allegations mean nothing more than that a misnomer has taken place, inasmuch as she has been summoned as Miss Isabella Brown instead of Miss Barbara Jane Brown. The summons is against Miss Brown, and the account is in the name of Miss Brown, and it does not matter that there is a mistake as to the Christian name, there being no doubt as to the identity of the complainer."

The complainer pleaded—“(1) The respondent having wrongfully pounced the effects and furniture of the complainer in manner libelled, she is entitled to obtain interdict against them as prayed. (2) The complainer not being 'Miss Isabella Brown,' is entitled to have the threatened sale interdicted, with expenses, but only against the sheriff-officer in the event of him entering appearance.”

The respondent pleaded—“(3) The complainer having been duly cited to the Small Debt Court, and having failed to attend, and having been personally charged on the decree following said citation, and having failed to avail herself of the competent remedy, cannot now by way of interdict challenge the validity of the decree which was pronounced against her, or the proceedings following thereon. (4) The complainer having failed to apply for a hearing and sist, or to take an appeal as provided by the Small Debt Act, is barred from objecting to the validity of the decree. (5) The proceedings following on said decree being *ex facie* regular, the interdict sought is incompetent. (6) The articles pounced being the property of the complainer, and being pounced for her lawful debt, after due and regular citation to the Small Debt Court, an interdict is incompetent to stay proceedings on said decree.”

The note was passed, and interim interdict granted. Thereafter the process was marked to Lord Fraser.

The Lord Ordinary (FRASER) pronounced this interlocutor:—“Allows to the suspender and the comparing respondent William Ritchie Rodger a proof of their averments, the said respondent to

lead in the proof, and to the said respondent a conjunct probation: Appoints the proof to proceed,” &c.

The complainer reclaimed, and argued—Proof should not be allowed, but interdict should be granted; the misnomer was fatal to the pouncing.

The respondent replied—He should not be denied the right of proving the debt and doing diligence against his debtor by an objection so purely technical. The Court had overruled a precisely similar objection in the case of *Spalding*, July 4, 1883, 10 R. 1092.

At advising—

LORD JUSTICE-CLERK—I am quite clear that this case is not ruled by the case of *Spalding*, because there is on record here no sufficient allegation to indicate that anything was done on the part of the complainer to induce the creditor to think the debtor's name was “Isabella” and not “Barbara;” nor does it appear that Mrs Morton really ever did think so. But in a moment of carelessness the factor named her “Isabella” instead of “Barbara,” and the proceedings went on to the end without correction of this error. I think the pouncing was therefore not executed against the proper party. It may be that she was the true debtor, but a proceeding of this kind must be in all respects accurate. I see no excuse on the part of the factor for not having ascertained the true name of the party whom he intended to sue as a debtor. I do not think—all the more because Mr Smith has very properly stated that his client does not intend to found any action of damages—we should allow a proof in this Court about a small-debt action, when the proper course for the creditor would have been to have dropped the first proceedings and raised them of new.

LORD YOUNG—I am entirely of the same opinion.

LORD CRAIGHILL—I have some doubts about this case, but on the whole I think the safer course is as your Lordship proposes. What is now urged by the respondent is a plea of personal bar against the complainer's objection to the regularity of this pouncing, and undoubtedly that would be a good plea, but the grounds on which the plea of personal bar is sought to be maintained are so unsatisfactorily presented on record that I do not venture to differ from the conclusion at which your Lordship has arrived.

LORD RUTHERFURD CLARK—I entirely agree with your Lordship, and indeed very clearly. Mr Smith properly intimated that his client did not seek to found any claim of damages, but I think it right to say that my opinion does not depend on that undertaking on his part, since I should have decided the case in precisely the same way had there been no such intimation.

The Court pronounced this interlocutor:—

“The Lords . . . recal the said interlocutor, sustain the reasons of suspension, suspend the proceedings complained of, and declare the interdict granted to be perpetual: Find the complainer entitled to expenses,” &c.

Counsel for Complainer—Campbell Smith. Agent—Daniel Turner, S.L.

Counsel for Respondent—M'Kechnie. Agent—William Black, S.S.C.