

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

again on November 28 1907—"... I have received from the printer proof prints of the closed record. I send you one. Please return it with any corrections you may have to make, and say how many prints you want. We must, of course, observe the rules of Court"—And again on 3rd December—"Am I just to print off? If you have no adjustments to make I suppose I may do so. But if you have, please return the print sent you with them thereon. Please attend to this else we may be blamed by the Court"—And again on 7th December—"Why are you delaying returning the print? I will print off on Tuesday, assuming that, unless I have the print back on Monday showing any amendments you may have to make, you have none"—And again on 11th December—"I find I must lodge prints of the closed record on Friday. Be pleased to say if you have any amendments by return"—And again on 18th December—"... You are to blame for the delay. I must print off and lodge prints to-morrow." On December 9, 1907, the defenders' agents had written to the pursuers' agent mentioning the return to town of one of their partners and promising that the proof print should be returned with adjustments the following day.

Prints of the closed record being tendered on December 19, 1907, were refused by the Clerk.

Argued for the pursuer (who was called on to show cause, there being no opposition to the motion)—The delay in lodging the prints had been brought about by the fact that the case was a complicated one and was being negotiated to a settlement. The fault of the pursuer's agent was in allowing time to the defenders' agents for returning the proof print with adjustments. This was, however, not contumacy, and, there being a discretion in the Court to repon the pursuer, the Lord Ordinary's interlocutor should be recalled—*Glen v. Thomson*, November 21, 1901, 4 F. 154, Lord Kinnear, 156, 39 S.L.R. 129. The same rule obtained in the case of appeals—*Donald v. Irvine*, March 17, 1904, 6 F. 612, 41 S.L.R. 420; *Boyd, Gilmour, & Company v. Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, Lord Justice-Clerk (Macdonald) at p. 108, 26 S.L.R. 84; *Liquidator of the Gael Iron Company, Limited, v. Orr*, December 13, 1884, 12 R. 345, 22 S.L.R. 198, *sub nom. Dickson v. Orr*.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to him for further procedure.

Counsel for the Pursuer (Reclaimer)—Forbes. Agent—Robert Broatch, Solicitor.

Counsel for the Defender (Respondent)—Munro. Agents—Galbraith-Stewart & Reid, S.S.C.

Friday, January 10.

FIRST DIVISION.

[Lord Salvesen, Ordinary.]

FORREST'S TRUSTEES v. MERRY & CUNINGHAME, LIMITED.

Mines and Minerals—Lease—Construction—Clause against Working Adjoining Minerals, with a Penalty for Contravention—Whether Clause an Absolute Prohibition.

A minute of agreement, between the proprietor (first party) of one portion of a coalfield, worked by means of pits on his ground, and the lessees (second parties) of the coalfield, provided—"The second parties hereby undertake and bind themselves and their foresaids that from and after the term of Whitsunday 1893 they will work the coal in the adjoining properties only to such an extent as to enable them to pay to the several proprietors thereof such sums of lordship as will amount to but not exceed the fixed rents agreed to by their existing leases to be paid to such proprietors respectively: Declaring that if in any year during the currency of this lease the sums payable to such adjoining proprietors shall exceed the said fixed rents (which amount *in cumulo* to £550 sterling per annum), then and in that event the second parties shall be bound, as they hereby agree and bind themselves and their foresaids, to pay to the first party and his foresaids the sum of 1d. per ton on every ton of coal worked from the lands of such adjoining proprietors in excess of the quantities necessary to make up or equal the said fixed rents payable to them as above mentioned: In consideration whereof the first party gives up and renounces from and after the term of Martinmas 1888 the right to exact the wayleave of 1d. per ton presently payable to him."

The minute of agreement had been signed contemporaneously with the lease of the minerals, and the leases with the different proprietors were parts of one general scheme. In a subsequent clause the years for making up "shorts" were restricted, but not "so long as" the adjoining output was restricted.

Held that the prohibition was not absolute, but might be contravened on payment of the 1d.

On February 18, 1907, Miss Jane Wilson Forrest, Woodhouse, Blantyre, and others, the testamentary trustees of the late John Clark Forrest of Auchinraith, Blantyre, who died on 28th August 1893, raised an action against Merry & Cuninghame, Limited, iron and coal masters, Glasgow, in which they sought declarator (with corresponding interdict) "that the defenders are not entitled while they continue tenants of the pursuers under the lease entered into between the said John Clark Forrest, on