

with in these cases having been reserved, that question fell to be decided by the court which disposed of the general question of expenses, and that that court must be held, if they make a general finding of expenses without reservation, to have determined the question of the reserved expenses in favour of the party in whose favour the award of general expenses has been made.

I am therefore of opinion that the note of objections for the pursuers must be repelled.

The defenders, however, have objected to the Auditor having disallowed the expenses of the reclaiming note to the Inner House on the preliminary defences. The Auditor's taxation on this matter is supported by the pursuers on the ground that under section 5 of the General Regulations as to the preparation and taxation of accounts for judicial proceedings contained in the Act of Sederunt of 15th July 1876 the Auditor was entitled to disallow these expenses. That section is in the following terms—“ . . . [Quotes, v. sup.] . . . ”

Acting in pursuance of this provision, the Auditor has disallowed, and I think rightly, the expenses of the reclaiming note in connection with the preliminary defences. I do not think the alteration made by the Inner House on Lord Johnston's interlocutor was such as, in view of the whole case as now decided, to entitle the defenders to recover these expenses. Unfortunately for the pursuers, the defenders cannot now be made liable for them, because the pursuers omitted to ask for them when the case was finally disposed of. It appears, I may observe, that new defences altogether had to be lodged, so the success, if success it can be called, which the defenders obtained by reclaiming against Lord Johnston's interlocutor was really valueless.

But the question still remains whether it was competent for the Auditor, seeing that these expenses had been directed to be expenses in the cause, to disallow them in terms of the said fifth section of the Regulations. It was maintained by the defenders that it was not, and that these expenses not having been specifically dealt with or asked to be dealt with at the final disposal of the case, the matter cannot now be opened up, and that the Auditor was precluded from doing so by the general finding for expenses. In short, it was maintained that they were in precisely the same position as, or at least a similar position to, reserved expenses. I cannot agree with this. These expenses were simply declared to be expenses in the cause, and to my mind this can only mean that they are in no different position from any other expenses in the cause, and accordingly a general finding of expenses, though it includes them, does not prevent them being disallowed “on the taxation of the account,” if in the words of article V. of the Regulations it appears that they apply to a branch of the litigation in which the party found entitled to expenses generally has proved unsuccessful. In my opinion

the defenders have proved unsuccessful in that branch of the litigation, and although unfortunately the pursuers failed to ask at the first disposal of the case by this Division on 22nd December 1909 for the expenses of the reclaiming note to the Inner House on the preliminary defences, and therefore cannot now recover them, yet I am clearly of opinion that the defenders are not entitled to recover their expenses of that branch of the litigation from the pursuers, and that it was alike competent and just for the Auditor to act as he has done.

I am accordingly of opinion that the objections for the defenders should be repelled.

LORD DUNDAS and the LORD JUSTICE-CLERK concurred.

LORD LOW was absent.

The Court repelled the objections for the pursuers and the defenders and approved of the Auditor's report.

Counsel for Pursuers—M'Lennan, K.C.—Mercer. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for Defenders—Wilson, K.C.—Lyon Mackenzie. Agents—Macrae, Flett, & Rennie, W.S.

Friday, October 22, 1909.

OUTER HOUSE.

[Lord Salvesen.

WILSON v. RAPP.

M'LAUHLAN v. RAPP.

Process—Ship—Conjunction—Salvage—Two Claims in respect of Services on Same Occasion—Separate Actions against Shipowner.

Two persons raised separate actions against a shipowner for salvage of a certain vessel which had gone ashore, each making similar averments as to the dangerous position of the ship, the value of the property salvaged, and the meritoriousness of the services rendered, but claiming the award for himself. On a motion for conjunction of the actions on the part of the defender, which was opposed by one of the pursuers, the Court (*per* Lord Salvesen, Ordinary) ordered the actions to be conjoined, and appointed one of the pursuers to conduct the case so far as it was common to both pursuers.

Process—Procedure—Ship—Conjoined Actions—Tender and Acceptance—Tender by Common Defender—Acceptance by Each of the Pursuers—Cumulo Amount of Both Acceptances in Excess of Tender—Motion by Defender to be Dropped from Cause.

In conjoined actions by two pursuers claiming an award of salvage for services rendered on the same occasion, the common defender tendered a sum of £550. One pursuer lodged a minute

accepting the tender to the extent of £500, and the other to the full amount of the tender, viz. £550. The defender moved to be dropped from the cause in respect of his tender and the acceptance thereof. The Court (*per* Lord Salvesen) refused the motion on the ground that the acceptances being for a *cumulo* sum of £1050 did not meet the tender of £550.

Expenses—Ship—Conjoined Actions—Salvage of Vessel Claimed by Two Different Pursuers—Tender by Common Defender Accepted but in Different Proportions by Pursuers—Proof between Pursuers.

A and B, pursuers in conjoined actions for salvage, agreed that a sum of £550, tendered by the common defender, was sufficient remuneration for their services, but accepted the tender in different proportions, viz., A for £500 and B for £550. In a proof A was found entitled to £500, and B to £50. Held (*per* Lord Salvesen) that B was liable in the expenses of the proof to A.

On 26th March 1909 John Simpson Wilson, steam tug owner, Bo'ness, raised an action against Fritz Rapp, master of the steamship "Konigsau" of Flensburg, and as representing the ownership thereof in this country, concluding for payment of £1500 in name of salvage services. On 24th May 1909 John M'Lauchlan, hotelkeeper, Star Hotel, Aberdour, also raised an action against the same defender claiming £1500 as sole salvor of the "Konigsau" on the occasion in question. The circumstances sufficiently appear from the Lord Ordinary's opinion *infra*.

At the adjustment of record in both actions on 23rd June 1909, counsel for the defender moved to have the actions conjoined. This was assented to on behalf of M'Lauchlan, but opposed on behalf of Wilson.

At advising on 1st July 1909—

LORD SALVESEN—"These are separate actions for salvage, raised against the owners of the German steamship 'Konigsau.' This vessel ran ashore on the island of Inchcolm on 21st March, but was got off by three tugs belonging to the pursuer David Wilson. He accordingly claims a salvage award in respect of the services rendered by his tugs.

"The pursuer M'Lauchlan also claims salvage on the ground that having been the first to locate the vessel he was asked by the master to take her off the rocks, and that he engaged for that purpose the tugs belonging to the other pursuer. He claims also to have directed the whole salvage operations.

"It is apparent from the above summary of the averments of the pursuer in each action that they are at variance as to whether the salvage is wholly payable to one or other or partly to both. They could not therefore have joined in raising one action. On the other hand they make similar statements as to the perilous position of the stranded ship, the value of the property salvaged, and the meritorious

nature of the services rendered; and of course both are equally interested in obtaining as large an award as possible. The defenders now ask me to conjoin the two actions, so that they may not be subjected to unnecessary expense, and so that they may have an opportunity of making a single tender. The motion for conjunction is supported by the pursuer John M'Lauchlan, who is willing that the other pursuer should have the conduct of the case so far as it does not conflict with his separate position; while the pursuer Wilson objects strenuously to any conjunction.

"It was laid down by Bruce, J., in the case of the 'Strathgarry,' 1895, P.D. 264, at p. 266, that 'the matters which ordinarily lead the Court to order consolidation in salvage actions are considerations of convenience and economy.' I apprehend that the same considerations regulate our practice.

"If the actions are to proceed as separate actions, it would be necessary, apart from the consent of parties, to have the same facts inquired into twice, even if they were put down for trial on the same day. This would obviously cause a great deal of unnecessary expense. Further, if one of the pursuers was dissatisfied with the amount of the award in his case and reclaimed to the Inner House, it might be necessary for the defenders to submit the other case to review also, although both parties were satisfied with the amount awarded, in case the Inner House should take a different view as to the relative services of the two salvors. All this is obviously most inexpedient. On the other hand, if the actions are conjoined and the conduct of the case given to one of the pursuers, the other will only require to lead evidence as to the matters relating to his share in the services rendered, and the evidence for the defender will be led after that for both pursuers has been taken. I cannot see how any possible injustice can be done to either of the pursuers by this procedure. The pursuers will of course be entitled to the services of separate agents and counsel at the proof to compete against each other as to the division of the salvage award. As to this the defenders have really no interest, and it would appear to be unjust to throw upon them the *onus* of deciding for themselves which of the competing claims is entitled to most consideration. On grounds of convenience and economy, therefore, it would appear to be plainly desirable that the actions should be conjoined.

"The pursuer Wilson maintained conjunction in such circumstances to be incompetent, and while I agree that there is no precedent for it in Scotland, it seems now to be settled in England, after some conflict of opinion, that where there are several suits at the instance of salvors who are all claiming to be rewarded by the owners of one vessel, such suits should be consolidated unless there is a risk of injustice being done to the rival claimants. This practice was fixed by the decision in the case of the 'Strathgarry' overruling a previous practice, under which the Court

refused to consolidate except of consent of parties. I see no reason to doubt that the Admiralty jurisdiction of the Court of Session is as wide in such matters as that of the Admiralty Court in England, and that this Court has power to direct apart from the consent of parties how suits which relate to the same subject-matter shall be tried. Section 547 of the Merchant Shipping Act provides a mode of trying all salvage claims in one action raised at the instance of the owners of the salvaged property, but this provision has remained practically a dead letter, and cannot well be made applicable to a foreign ship which can only be subjected to the jurisdiction of the Court by arrestments. The section, however, indicates that the Legislature regarded it as desirable that the claims of competing salvors should be settled in one action.

“The real reason why the pursuer Wilson objects to conjunction is that he is apprehensive that the defenders will thereupon make a tender of one sum, as was done in the case of the “*Jacob Landstrom*,” (1878) 4 P.D. 191, and leave the two pursuers the responsibility of deciding—if they are otherwise satisfied with the gross amount tendered—as to how it should be divided between them. I do not propose to decide at present a point that may not arise for decision, namely, whether such a tender in the conjoined actions would be sufficient, or whether according to our practice the defenders must tender a specific sum to each pursuer. I am quite satisfied, however, that apart from conjunction it would not be competent to pronounce such an order as Sir Robert Phillimore made in the case just cited, ordering a single tender for the whole services rendered to the ship, leaving to the defenders to elect in which action it was to be paid in. Whether the responsibility of dividing the fund is to be thrown upon the pursuers or defenders does not in my opinion affect the question of conjunction, which depends upon other grounds. I shall accordingly pronounce an order conjoining the actions, and appointing the pursuer Wilson in the conjoined actions to conduct the case so far as it is common to both claimants.”

His Lordship pronounced this interlocutor (*Wilson's Case*)—“The Lord Ordinary closes the record on the summons and defences, . . . and having considered the motion of the defender to conjoin herewith the action at the instance of John M'Lauchlan against the present defender, conjoins herewith the said actions; and in the conjoined actions allows to the parties a proof of their respective averments, and to the respective pursuers a conjunct probation; grants diligence against witnesses and havens; and appoints the proof to proceed before the Lord Ordinary on the 20th October 1909 at 10 o'clock forenoon; further, appoints the pursuer John Simpson Wilson, in the conjoined actions, to conduct the case so far as it is common to both claimants; reserves meantime all questions of expenses.”

On 1st July 1909 the following minute of tender was lodged on behalf of the defender—“Armit, for the defender, stated to the Court that he tendered, and hereby tenders, to the pursuers in the conjoined actions, in full of the conclusions in the actions (1) at the instance of John Simpson Wilson, steam-tug owner, Bo'ness, registered owner of the steam-tugs ‘*Pero Gomez*,’ ‘*Flying Fish*,’ and ‘*Royal Norman*’ of Bo'ness, and (2) at the instance of John M'Lauchlan, hotelkeeper, Star Hotel, Aberdeen, the sum of £550 sterling, with expenses to date as same may be taxed.”

On 5th July the following minute was lodged on behalf of the pursuer (Wilson)—“W. T. Watson, for the minuter, stated to the Lord Ordinary that so far as the minuter's interest as pursuer of the action at his instance is concerned, he is willing to accept, and hereby accepts, the defender's minute of tender to the extent of the sum of £500, with expenses of process to the date of the lodging of the said minute of tender, in full of the conclusions of the summons at his instance.”

On 8th July the following minute was lodged on behalf of the pursuer (M'Lauchlan)—“Deas, for the minuter, stated to the Lord Ordinary that so far as the minuter's interest as pursuer of the action at his instance is concerned, he is willing to accept, and hereby accepts, the defender's minute of tender, with expenses of process to the date of the lodging of the said minute of tender, in full of the conclusions of the summons at his instance.”

Thereupon counsel for the defender moved the Court to find that so far as the defender was concerned the action was at an end. The Lord Ordinary, however, refused the motion, on the ground that the minutes of acceptance being together for a *cumulo* sum of £1050 did not meet the tender of £550.

On 27th July a joint-minute was lodged for the pursuers in the following terms—“Watson, for the pursuer Wilson, and Deas for the pursuer M'Lauchlan, concurred in stating to the Court that, without prejudice to and under reservation of their rights and pleas and their objection to the competency of the minute of tender, they were agreed, and hereby agree, that the sum of £550 contained in the said minute of tender is reasonable remuneration for the whole services rendered by the said pursuers and by the tugs ‘*Pero Gomez*,’ ‘*Flying Fish*,’ and ‘*Royal Norman*,’ and the masters and crews of these vessels, to the s.s. ‘*Konigsau*’ and her cargo and freight.”

Before the proof began, on 20th October, it was stated on behalf of the defender, that in view of the above-mentioned joint-minute of 27th July, he had no interest to appear at the proof, but reserved his right to be heard on the question of expenses.

Evidence was then led by the two pursuers to determine by which of them the vessel had been salvaged. M'Lauchlan claimed the whole salvage, or alternatively, in any case, a larger proportion of the salvage than

£50, which was the sum left to him by Wilson's minute of acceptance.

On 22nd October the Court awarded Wilson £500 and M'Lauchlan £50. The Lord Ordinary held it established that Wilson had really salvaged the vessel, and that £50 was ample remuneration to M'Lauchlan for such personal services as he had rendered in the matter.

On the question of expenses it was contended for M'Lauchlan that each pursuer should pay his own expenses, and the following authority was referred to—'The Lee,' May 15, 1889, 6 Asp. Mar. Cas. 395.

LORD SALVESEN— . . . [After referring to the case of "Lee" quoted by Mr Armit] . . . The case is different when one of the claimants has said that he for his part accepts a particular portion of the sum tendered, and is ultimately found entitled to an award of equal or greater amount, because the whole subsequent expense is then caused by the action of the dissatisfied salvor who refused to take the balance as his share of the total salvage remuneration. If there had been no minute by Wilson of 5th July, then the case would have been otherwise. Looking at the matter from the broad point of view as to who caused this expense—the expense of and incident to the proof—I cannot doubt that Mr M'Lauchlan caused it by making a demand which I have found to be untenable. He must therefore pay the expenses incurred by Wilson. As to the small matter of expenses to the defender between 3rd and 27th July, I am afraid that M'Lauchlan must pay these, as if he had agreed to accept the £50 ultimately awarded to him at the same time as Wilson offered to accept the £500 which he receives the case would at once have taken end.

The Lord Ordinary pronounced an interlocutor by which he found the defender liable in expenses to both pursuers down to the date of the tender; found M'Lauchlan liable in expenses to Wilson from 5th July, and further found M'Lauchlan liable to defender in expenses from the date of the tender to 27th July, and *quoad ultra* found no expenses due to or by any of the parties.

Counsel for the Pursuer Wilson—Murray, K.C.—W. T. Watson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Pursuer M'Lauchlan—T. B. Morison, K.C.—Armit. Agents—Bruce & Black, W.S.

Counsel for the Defender—Horne. Agents—Boyd, Jameson, & Young, W.S.

Thursday, January 20, 1910

SECOND DIVISION.

[Lord Guthrie, Ordinary.]

CORDINER v. DUFFUS (CORDINER'S JUDICIAL FACTOR) AND OTHERS.

Succession—Trust-Disposition and Settlement with Codicils—Construction—Vesting—Codicil Executed for a Specific Purpose—Reference to Codicil for Purpose of Modifying Construction of Trust-Disposition.

By his trust-disposition and settlement a testator gave the liferent of his estate to his wife, and by the tenth purpose provided—"After giving effect to the several provisions hereinbefore expressed in the events before specified, I appoint and direct my said trustees, after the death of my said wife, to realise the whole of my estate, heritable and personal, if it shall be necessary to do so, and to pay or convey the same . . . to Robert Cordiner, son of my late brother Robert, or to his heir-at-law. . . ."

By codicil dated 9th October 1890 the trustor, after narrating the terms of the tenth purpose of his trust-disposition, directed—"And whereas I am desirous of making provision for the event which may happen of the said Robert Cordiner (otherwise Robert Charles Cordiner) predeceasing me: Therefore I do hereby direct my trustees, in the event of the said Robert Charles Cordiner having predeceased me, to dispoise and make over to my wife Mrs Margaret Farquharson Busfield or Cordiner, should she survive me, my lands and estate of Cortes, in the county of Aberdeen, and that after satisfying the other purposes of the trust in manner provided by the said settlement, and I declare that I make this provision because my heir-at-law next after the said Robert Charles Cordiner . . . is already possessed of independent means and estate, and with this addition I hereby confirm the foregoing trust-disposition and settlement. . . ."

The trustor was survived by his widow and by R. C. Cordiner, and the latter predeceased the former.

Held (affirming judgment of Lord Ordinary Guthrie) that the codicil having been executed for a specific and declared purpose unconnected with the general destination of the residue set forth in the trust-disposition, it could not be held as modifying the construction of the clause therein disposing of the fee of the residue in the event of the survivance of Robert Cordiner, and consequently that no right of fee had vested in him at his death.

On 18th January 1909 Mrs Josephine Grote Stockwell or Cordiner, widow of the late Rev. Robert Charles Cordiner, and his