

provided that aliens domiciled for ten years in England and Wales, and otherwise qualified, shall be liable to serve on juries and inquests. [In the English Jury Act, 6 Geo. IV. c. 50, it is provided (sec. 3) that "no man, not being a natural born subject of the King, is or shall be qualified to serve on juries or inquests, except only in the cases hereinafter expressly provided for." The 47th section then provides for the right of an alien to be tried by a jury *de medietate lingue* (by a moiety of voices), *i.e.*, the Sheriff is to return for one-half of the jury a competent number of aliens. On this Act it was held (*King v. Sutton*, 1828, 6 Barn. and Cress. p. 417) that while alienage was a ground of challenge *propter defectum patrie*, the challenge must be made before trial, and that the verdict will not afterwards be disturbed. Now, however, by 33 Vict. c. 14, sec. 5, the right to a jury *de medietate lingue* is abolished. In Scotland the right never existed. *Hansen*, 3 Irv. Just. Rep. p. 3. But see Macdonald's Crim. Law, p. 517, note 2, for a case where Englishmen seem to have served on the trial of an Englishman.]

At advising—

LORD JUSTICE-CLERK—We have considered this petition carefully. We are not prepared to say that an alien is not liable or competent to serve on a jury, but we have come to be of opinion that it is not desirable that a gentleman in this position should be cited. We have therefore made a recommendation in the proper quarter, which I have no doubt will be acted on, that the petitioner should not be cited unless there should be some case rendering his attendance desirable.

LORDS YOUNG and CRAIGHILL concurred.

Counsel for Petitioner—Moody Stuart. Agents—Boyd, Macdonald, & Lowson, S.S.C.

COURT OF SESSION.

Friday, December 22.

OUTER HOUSE.

WALLACE v. HENDERSON.

Process—Expenses—Condition-Precedent.

Where the pursuer in an action concluded both for damages and for count and reckoning, and the Inner House, upon a report on issues by the Lord Ordinary, dismissed the conclusion for damages as irrelevantly averred with expenses—held (per Lord Curriehill), in conformity with *Struthers v. Dykes*, 8 D. 815, that the payment of expenses to the defender was a condition-precedent to any subsequent procedure under the other conclusion of the action.

Process—Expenses—Extract-Decree—Interest.

Held (per Lord Curriehill) in conformity with *Dalmahoy & Cowan v. Mags. of Brechin*, 21 D. 210, that interest runs upon an interim decree for expenses when the decree has been extracted and charged upon.

On 27th February 1866 Robert Wallace raised an action concluding for £2000 in name of dam-

ages for breach of agreement, against James Henderson, Esquire of Bilbster, in Caithness. He also concluded for count and reckoning as to the rents of certain subjects belonging to him, with which the defender had intronitted.

On 11th January 1867 the Lord Ordinary (KINLOCK) reported the case on issues to the First Division, and of that date the Court pronounced this interlocutor:—"Find that there are not on record averments relevant or sufficient to warrant the issues proposed by the pursuer: Remit to the Lord Ordinary to dismiss the action in so far as regards the first conclusion for £2000; and to proceed with the other conclusions of the action: Find the pursuer liable to the defender in expenses since the date of the closing of the record, and remit," &c.

Mr Henderson lodged his account, had it taxed and approved of, and extracted and charged on the decree—Wallace not having paid the expenses—and the action fell asleep.

On 12th October 1874 Wallace, with the concurrence of his wife, raised another action of count and reckoning with regard to the rents of the same subject against Mr Henderson.

The Lord Ordinary (YOUNG) on 4th March 1875 sustained the defender's plea of *lis alibi pendens*, in respect of the former action being still in Court, and dismissed the action, with expenses.

The First Division, on advising a reclaiming note on 20th July 1875, recalled the Lord Ordinary's interlocutor, and sustained the action as a good action with regard to the rents from and after the date of the signeting of the summons in the first action, with £5, 5s. of expenses.

This second action was subsequently remitted to the Lord Ordinary's bar, in which the former action was pending. Wallace had died before the reclaiming note in the second action was lodged. His widow was decerned executrix-dative to him, and as such, after the first action had been wakened, was sisted in both actions.

The causes were then put to the roll by Mrs Wallace, to have them conjoined.

The defender opposed this motion, on the ground that no step could be taken in the first action until the expenses found due in the Inner House in January 1867 had been paid, with interest, and relied on the case of *Struthers v. Dykes*, June 16, 1846, 8 D. 815, where payment of such expenses were held to be a condition-precedent to going on with the action. With respect to the interest upon the extracted decree, the defender referred to the case of *Dalmahoy & Cowan v. Mags. of Brechin*, Jan. 5. 1859, 21 D. 210.

The pursuer denied that *Struthers v. Dykes* had ever been followed as a precedent, and argued that at all events, as the defender could have imprisoned Wallace upon his failure to pay when charged, he had no right to interest. It was also maintained that the pursuer was entitled to deduct the five guineas of expenses, to which she had been found entitled by the First Division in the second action, from any payment made to the defender in name of expenses.

The Lord Ordinary, on the authority of the case of *Struthers v. Dykes* and *Dalmahoy & Cowan v. Mags. of Brechin*, refused to conjoin the actions until the expenses decerned for in the first action had been paid, with interest, but under deduction of the five guineas decerned for in the pursuer's favour in the second action.

The pursuer thereupon paid the expenses, with interest, but under deduction of £5, 5s. decerned for on 20th July 1875, and the causes were subsequently conjoined.

Counsel for Mrs Wallace—Strachan. Agents—Walls & Sutherland, S.S.C.

Counsel for Mr Henderson—Henderson. Agents—Horne, Horne, & Lyell, W.S.

HOUSE OF LORDS.

Friday, November 24.

WALKER AND ANOTHER v. THE PRESBYTERY OF ARBROATH.
(*Ante*, vol. xiii. p. 324.)

Church—Churchyard—Presbytery—Jurisdiction—Appeal—Ecclesiastical Buildings Act 1868 (31 and 32 Vict. c. 96) secs. 3-14, and 20.

A suspension and interdict was brought against a presbytery and the heritors of a parish by a proprietor, (a portion of whose ground had been designated for an addition to the churchyard), on the grounds—(1) that he had not got sufficient notice of the meeting of presbytery at which his ground was designated, and that therefore the decree of designation then pronounced was illegal; and (2) that he had been deprived of his right to appeal to the Sheriff (in terms of the Ecclesiastical Buildings (Scotland) Act 1868, 31 and 32 Vict. c. 96) by not receiving notice of the judgment until after the time for appeal had expired.—*Held* (*aff. judgment of Court of Session*) (1) that in view of the circumstances of the case the notice was not so insufficient as to justify the setting aside of the whole proceedings as illegal; and (2) that the designation of an addition to the churchyard was a matter within the exclusive jurisdiction of the presbytery, and not subject to the review of the Court of Session.

Churchyard—Tenant—Decree of Removing.

Held that it was regular and competent for a presbytery after designating or setting apart, a piece of ground as an addition to a churchyard, to put a value upon it and appoint the tenant to remove, although they had no executorial power to enforce the decerniture to remove; and that, assuming the tenant's interest not to be taken into view in the presbytery's valuation, it was open to the tenant to maintain any claim he had.

This was an appeal against the judgment of the First Division in a suspension and interdict at the instance of James Walker of Ravensby, in the parish of Barry, Forfarshire, and James Dargie, tenant of Barry Mills and mill lands, part of the estate of Ravensby, against the Presbytery of Arbroath and the heritors of the parish of Barry, for interdict against the respondents from proceeding to carry out a designation, as an addition to the churchyard of the parish of Barry, of a portion of the lands of Ravensby belonging to the

complainer James Walker, and in the occupation of the complainer James Dargie, and also for interdict against the respondents, the heritors of the parish of Barry, from inclosing the proposed addition to the churchyard with a wall, and from entering upon and levelling or otherwise interfering with the said ground and with the complainers in the peaceable enjoyment and occupation thereof, and from entering into any contract for the execution of any work thereon.

The circumstances of the case are fully narrated in the report of the case in the Court of Session, (*ante*, vol. xiii, p. 324), and in the opinion of the Lord Chancellor.

At giving judgment—

LORD CHANCELLOR—My Lords, the appellant in this case complains that a portion of his land, about three-quarters of an acre in extent, has been taken from him for the purpose of enlarging the churchyard of the parish of Barry, and that it has been taken from him irregularly, in a manner of which he is entitled to complain, and as against which he is entitled to have redress. My Lords, the appellant does not say that the churchyard of the parish should not be enlarged; on the contrary he admits that it ought to be enlarged; and he does not say that his land is not the proper land out of which the enlargement ought to be made, and that some other land belonging to some other person would be better land for that purpose. An appraisal of the value of his land has been made, by which the three-fourths of an acre has been valued at about £106 or £107. What the value which the appellant puts upon his piece of land may be, your Lordships are not informed, but of course he is quite in his right in saying that he estimates the value more highly than at the sum I have mentioned.

But I point out, in the first place, to your Lordships—and I do so with some regret—that the whole of this litigation is confined to the difference between the sum which I have mentioned and the larger sum, whatever it may be, which represents in the mind of the appellant the value of this small portion of land; and I cannot but strongly suspect that the costs incurred in the present litigation must amount to a very much larger sum than the difference between the sum which the respondents have been prepared to pay and that which the appellant would wish to have paid to him for this piece of land.

However, my Lords, be the sum which is at stake large or small, the appellant is entirely in his right in testing the regularity of the proceedings by which this portion of land is attempted to be taken from him. The complaint which he makes as to the regularity of these proceedings divides itself into two parts. In the first place, he says that under the circumstances of the case the presbytery never acquired any jurisdiction to take his land or to designate it as the land by which the churchyard was to be enlarged; and, in the second place, he says that even supposing that the circumstances were such as to give the Presbytery jurisdiction to designate a piece of ground for the enlargement of the churchyard, they did not give him that notice or intimation of the proceedings they were taking which he was entitled to, and which would have enabled him both to intervene in these proceedings and, if dissatisfied with the result, to appeal against them under a recent statute of the present reign. I