shall certify that he shall be entitled to recover any larger proportion of his expenses, not exceeding two third parts thereof."

A pursuer in an action for damages for personal injury, raised in the Sheriff Court, appealed to the Court of Session for jury trial, and by the verdict recovered a sum of £40 in name of damages. *Held* that the provision of the Act of Sederunt as to expenses applied not only to the expenses in the Court of Session but also to those incurred in the Sheriff Court.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), section 106, enacts—"The Court of Session may from time to time make such regulations by Act of Sederunt as shall be necessary for carrying into effect the purposes of this Act . . . Provided that every such Act of Sederunt shall, within one month after the date thereof, be transmitted by the Lord President of the Court of Session to one of Her Majesty's Principal Secretaries of State in order that it may be laid before both Houses of Parliament, and if either of the Houses of Parliament shall, by any resolution passed within thirty-six days after such Act of Sederunt has been laid before such House of Parliament, resolve that the whole or any part of such Act of Sederunt ought not to continue in force, in such case the whole or such part thereof as shall be so included in such resolution shall from and after such resolution cease to be binding."

This was an action for damages for personal injury raised by William Lafferty, Greenock, against the Caledonian Railway Company, in the Sheriff Court at Glasgow. The action was appealed to the Court of Session for jury trial under the provisions of the Judicature Act 1825 (6 Geo. IV, cap. 120), section 40, and the pursuer obtained a verdict for £40. He asked full expenses.

LORD MACKENZIE—"This action was brought in the Sheriff Court at Glasgow, and was appealed under the 40th section of the Judicature Act to the Court of Session for jury trial. It is an action of damages for personal injuries, in which the pursuer recovered by the verdict of the jury a sum of £40. A motion was made on the pursuer's behalf to apply the verdict and find him entitled to full expenses. This was opposed by the defenders on the ground that section 8 of the Act of Sederunt of 20th March 1907 applies, and that the pursuer is only entitled to one-half of the taxed amount, unless a larger proportion, not exceeding two-thirds, is certified for.

"Counsel for the pursuer argued that the Act of Sederunt did not apply, as it did not come into operation until after the action was raised. This is plainly a bad objection. The action was brought on 20th April, and the date of the Act of Sederunt is 20th March 1907. No doubt the Act had thereafter to be laid before both Houses of Parliament, but it was only if either House resolved 'that the whole or any part of such Act of Sederunt ought not to continue in force,' that the whole or such part was to cease to be binding from the date of the resolution. If there was no such resolution (which was the case here), then the Act continued in force from its date.

"I should have been of opinion, even if the action had been brought before 20th March 1907, that the Act of Sederunt, dealing as it does with procedure, is retrospective in its effect.

"It was further maintained that the Act of Sederunt did not apply to the expenses in the Sheriff Court. Section 8 provides— . . . [*quotes, supra in second rubric*] . . .

"I am of opinion that this applies to the whole expenses in the cause, and is not limited to the expenses in the Court of Session. It has been decided that when a cause has been appealed under the 40th section of the Judicature Act for trial by jury, the Court may deal with it in the same manner as if it had originated in the Court of Session—*Cochrane* v. *Ewing*, July 20, 1883, 10 R. 1279, 20 S.L.R. 842. It then is an action of damages in the Court of Session, and in the absence of any qualification of the general expression 'the taxed amount of his expenses' in section 8 I am of opinion that it means the whole expenses in the cause.

"It was contended that this was a case in which a certificate should be granted for the larger amount, viz., two-thirds. I have considered this and referred to the notes taken at the trial. I am clearly of opinion that this is not a case in which a certificate should be granted.

"Accordingly the verdict will be applied, decree given in favour of the pursuer for £40, and a finding pronounced entitling pursuer to one-half of his expenses, and remitting to the Auditor."

Counsel for the Pursuer—A. M. Anderson —W. T. Watson. Agents — Oliphant & Murray W.S.

Counsel for the Defenders—King. Agents —Hope, Todd, & Kirk, W.S.

Saturday, October 26.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

ANDERSON'S TRUSTEES *v.* JAMES DONALDSON & COMPANY, LIMITED (IN LIQUIDATION).

Company—Winding up by Order of the Court—Superior's Action of Sequestration for Feu-Duty — Preference — Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *secs.* 163 *and* 87.

The Companies Act 1862, sec. 163, enacts — "Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company

after the commencement of the winding-up shall be void to all intents."

Held that an action of sequestration of moveables for arrears of feu-duty at the instance of a superior against his vassal, a company in liquidation, was not an "attachment, sequestration, distress, or execution" within the meaning of the section, and might consequently proceed though raised after the commencement of the winding-up.

Athole Hydropathic Company, Limited in Liquidation v. *Scottish Provincial Assurance Company*, March 19, 1886, 13 R. 818, 23 S.L.R. 570, *followed; Allan* v. *Cowan*, November 15, 1892, 20 R. 36, 30 S.L.R. 114, *distinguished.*

The Companies Act 1862, section 87, enacts—"When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose."

Section 163 is given in the rubric.

The trustees of the late James Anderson, in the liquidation of James Donaldson & Company, Limited, presented a note, under section 87 of the Companies Act 1862, craving the Court to grant them leave to proceed with and prosecute to judgment an action of sequestration of the moveables upon a certain piece of ground of which they were the superiors and James Donaldson & Company the vassals, the ground of the action being the refusal of the liquidator to pay the feu-duty.

The presenters of the note stated, *inter alia*—"Upon 1st June 1907 an order was pronounced by the Court for winding up James Donaldson & Company, Limited, registered and incorporated under the Companies Acts, and having its registered office at No. 157 Great Junction Street, Leith, and appointing J. Maxtone Graham, Chartered Accountant, Edinburgh, as liquidator. Upon 4th June 1907 the compearers raised an action of sequestration in the Sheriff Court at Edinburgh against, *inter alios*, the said James Donaldson & Company, Limited, in liquidation, praying for sequestration of the whole moveables on . . . [*the ground described*], . . . and the Sheriff having on 4th June 1907 granted warrant to cite and sequestrated, the petition and deliverance thereon were duly served on 5th June 1907, and the moveables were of that date inventoried by the sheriff officer. The present liquidator had not extracted his appointment at that date, and the petition was not served upon him, but it was served upon William Home Cook, Chartered Accountant, Edinburgh, the former liquidator. The compearers are the superiors of the area of ground referred to, and as the liquidator declines to pay the half-year's feu-duty of £107, 10s., due at Whitsunday last, and to give security for the current year's feu-duty of £215, it is necessary, in order to give effect to the superiors' hypothec upon the moveables on the ground, to proceed with the said sequestration. At the time when said action was raised the compearers did not know whether the limited company claimed any interest in the goods attached, but in a letter by the liquidator's agents to the compearers' agents on 12th June 1907 the present liquidator expressly claimed that the whole goods attached are the property of the company."

Answers were lodged for the company and liquidator.

On 25th July 1907 the Lord Ordinary on the Bills (MACKENZIE) pronounced an interlocutor refusing the prayer of the note.

The trustees of the late James Anderson reclaimed, and argued—The Lord Ordinary's interlocutor should be recalled, and leave to proceed with the action granted. Admittedly if it fell under section 163, leave could not be granted under section 87 (although upon this point the Courts in England had taken a different view)—*Allan* v. *Cowan*, November 15, 1892, 20 R. 36, 30 S.L.R. 114; *Radford & Bright, Limited* v. *D. M. Stevenson & Company*, February 20, 1904, 6 F. 429, 41 S.L.R. 330. The question therefore was, did it fall under section 163? It did not. The superior, *quâ* superior, had, prior to and independently of the liquidation, a preferential right of security by virtue of his infeftment—Bell's Com. vol. ii, p. 26, 27; *Yuille and Others* v. *Lawrie & Douglas*, January 24, 1823, 2 S. 155 (N.S. 140). The case of *Athole Hydropathic Co., Limited, in Liquidation* v. *Scottish Provincial Assurance Company*, March 19, 1886, 13 R. 818, 23 S.L.R. 570, decided that section 163 only applied to cases where the creditor attempted to acquire a preference not already his, and did not strike at the case of a creditor only seeking, as here, to make effectual a preference he already had. In *Athole*, moreover, the creditor was a heritable creditor pursuing an action of poinding who was in a less favourable position than a superior pursuing an action of sequestration for feu-duty. *Athole* had been followed in *Holmes Oil Company in Liquidation*, 8 S.L.T. 360, and the *ratio* of *Athole* had been approved and explained in *Allan* v. *Cowan*, *cit. sup.* There was no inconsistency between the cases of *Athole* and *Allan* v. *Cowan*. In the latter, the rate collector who was asking leave to proceed had no absolute antecedent preference such as a superior has for his feu-duty; he had merely a statutory preference which might come into competition with similar statutory preferences, and these preferences were therefore appropriate to be worked out as a matter of ranking in the liquidation. Further, however, and in any event, the word "sequestration" in section 163 was not applicable to a superior's action of sequestration for feu-duty—Bell's Dictionary, p. 976; Bankruptcy (Scotland) Act 1856, sections 3, 7, 107. The fact that in the Bankruptcy Acts certain rights and remedies of superiors and heritable creditors were expressly reserved, whereas there was no such reservation in the Companies Acts, was explained by the fact that, there being automatic vesting in the trustee in bankruptcy, such express reservation was necessary in order to save

those rights. There being no automatic vesting in the liquidation, no such reservation was necessary. The fact that the action had been commenced without the leave of the Court was no bar to leave being now granted—*D. M. Stevenson & Company* v. *Radford & Bright, Limited, and Liquidator*, June 4, 1902, 10 S.L.T. 82.

Argued for the respondent—The Lord Ordinary was right, and leave should be refused. The action for sequestration fell under section 163. The word "sequestration" was expressly employed in the section, and even if it could be shown that sequestration for feu-duty was not "sequestration" in the precise sense of the word as employed in the section, its language was otherwise so comprehensive as to include every kind of diligence—*In re Wanzer*, 1891, 1 Ch. 305. The only difficulty in the way was the case of *Athole, cit. supra.* But that case, even if rightly decided, was not really an adverse authority. It dealt with something different, viz., a poinding of the ground, and was not applicable to the superior's hypothec, which was not really a pre-existing and independent right of security depending wholly upon his infeftment, but a right which had to be made real by the diligence of sequestration—see Erskine, ii, 6, 56, and 62. The present action of sequestration was therefore really an attempt to obtain a new security, and was not struck at by *Athole*, but fell under *Allan* v. *Cowan, cit. sup.* If, however, the cases of *Athole* and *Allan* were inconsistent, the latter was to be preferred. For no good reason could be suggested for putting a heritable creditor or a superior in a more favourable position than a creditor to whose debt a preference had been given by Act of Parliament. It was further significant that whereas the Bankruptcy Act of 1856 saved the remedies of superiors and heritable creditors, the Companies Acts contained no such provisions. In any event leave to proceed should be refused, the action having been commenced in breach of section 87. The case of *Stevenson, cit. sup.*, relied upon by the appellant in this connection, was quite different, as it did not deal with the question of diligence, which was *strictissimi juris.*

LORD LOW—I am of opinion that the interlocutor of the Lord Ordinary on the Bills must be recalled. I think the only question is, whether the present case is ruled by the judgment in the *Athole Hydropathic* case or that in the case of *Allan.* I think it is conceded that there is no substantial difference between the position of the creditor here and the creditor in the *Athole Hydropathic* case. There the creditor was an heritable creditor infeft in the lands, who was seeking, by the diligence of poinding, to make good the security which he had over the moveables upon the land. In this case the creditor is the superior, who is seeking to make good, by the diligence of sequestration, the security which he has of the moveables upon the land for arrears of feu-duty. It seems to me that for the purposes of this question the position of these two creditors was identical, because both of them had a right of security in regard to certain moveables, and in both cases what they were attempting to do was to make that right of security effectual by attaching the moveables. In the *Athole Hydropathic* case it was found that such a proceeding did not fall within the meaning of the 163rd section of the Companies Act of 1862. I recognise that the question raised in that case was one of very considerable difficulty, upon which different views might very well be held. But the case was fully argued in the First Division, and the judgment that was given was a considered judgment of Lord President Inglis, of Lord Shand, and of Lord Adam—a tribunal of unquestionably high authority—and the view which they took has been held to rule the law ever since its date, some twenty years ago.

It is said, however, that the more recent decision of the same division in the case of *Allan* really is not consistent with the view which was taken in the *Athole Hydropathic* case. As it happened, I was the Lord Ordinary in the case of *Allan*, and it seemed to me that it was ruled by the case of the *Athole Hydropathic.* But a different view was taken, and I am now satisfied was rightly taken, by the First Division, because the creditor in the case of *Allan* was the collector of the county assessments, and he founded upon a statutory provision to the effect that the debt for the assessments should be a preferable debt. I think that I was perhaps misled to some extent by the way the case had been put in the *Athole Hydropathic* case, when it was said that the creditor was only seeking to make effectual a preference which he already had. But, as I have indicated, when that case is examined, the ground of judgment was that he was seeking to make effectual, not a preference in the sense of having a preferable debt, but a preference in the sense of having a security for his debt. Now, in the case of *Allan* the creditor had no security for his debt whatever. He had merely a statutory declaration that in the event of bankruptcy his debt should be dealt with as a preferable debt. I am therefore satisfied that the First Division were quite right in holding that the case of *Allan* was not ruled by the previous case of the *Athole Hydropathic.*

I therefore think that the interlocutor reclaimed against should be recalled, and leave granted to the superior to proceed with the sequestration notwithstanding the liquidation of the debtors.

LORD STORMONTH DARLING—I entirely agree. I think that this case is precisely ruled by the judgment twenty years ago of the First Division in the *Athole Hydropathic* case.

LORD JUSTICE-CLERK—I am of the same opinion. I must say that no two cases could be nearer to one another than the *Athole* case and this case. I think the one is practically the same as the other.

And as regards the case of *Allan*, it distinguishes very clearly between such a case as we have at present and the case with which the Court were then dealing. It does so absolutely, and the decision in *Allan's* case in no way affects the decision of the First Division in the case of the *Athole Hydropathic.*

Mr Constable stated a very ingenious argument to the effect that if the decision to be given in this case was to be in accordance with the case of the *Athole Hydropathic*, certain logical consequences would follow in other cases. I do not know whether that is so or not, nor do I think it necessarily follows. But if it be true that certain logical consequences would follow, that is a matter for the Legislature to deal with and not for this Court. Therefore although the argument of Mr Constable was very ingenious we cannot go behind the case of the *Athole Hydropathic.*

LORD ARDWALL was not present.

The Court pronounced this interlocutor—

. . . "Find the sequestration at the instance of the reclaimers competent: Authorise them to proceed therewith, and decern," &c.

Counsel for the Compearers—G. Watt, K.C.—C. H. Brown. Agents—W. & T. P. Manuel, W.S.

Counsel for the Respondents—Constable. Agents—Davidson & Syme, W.S.

Saturday, October 26.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

THE ALLGEMEINE DEUTSCHE CREDIT ANSTALT AND ANOTHER *v.* THE SCOTTISH AMICABLE LIFE ASSURANCE SOCIETY AND OTHERS.

Process—Insurance—Declarator ab ante—Declarator of Title without Proper Contradictor—Competency—Right in Policy of Assurance not yet become a Claim.

Assignees of a policy of insurance on the life of A raised an action of declarator against the assurance company and also against former holders of the policy (who, however, were not subject to the jurisdiction of the Court), in which they sought declarator that they had right to the policy, that the defenders other than the company had no right in the policy, and that the company were bound on the sums becoming due and payable to make payment to them or those then in their right. At the date when the action was raised A was still alive. The company alone lodged defences.

Held that the action must be dismissed inasmuch as (1), so far as directed particularly against the assurance company it was a declarator *ab ante* which could not be entertained, and (2), so far as it was a declarator of title only, there was no proper contradictor present.

On 28th June 1906 the Allgemeine Deutsche Credit Anstalt and Erttel Freyberg & Company, bankers, Leipzig, raised an action against the Scottish Amicable Life Assurance Society, Oscar Philipp, merchant, London, the official receiver in bankruptcy as trustee on Philipp's bankrupt estate, Gustav von Portheim, merchant, Prague, and W. Schultz-Engelhard, Berlin, in which they sought to have it found and declared that they had right to the extent of one-half each to the policy of assurance No. 34,186, dated 22nd August 1884, granted by the defenders the Assurance Society on the life of Philipp, that the defenders other than the Assurance Society had no right or title in the policy, and that the defenders the Assurance Society "are bound, on the sums contained in the said policy becoming due and payable, to make payment thereof to the pursuers or to any person or persons who may have derived right from them in and to the said certificate, policy, contents, and proceeds thereof."

The policy in question narrated that Oscar Philipp had become a contributor of the Assurance Society, that he undertook to pay the premiums mentioned, and on that being done "then Gustav von Portheim, merchant, Prague, Austria, his executors, administrators, or assignees, shall be entitled to receive out of the stock and funds of the said society after the death of the said contributor, on proof of said death being made to the satisfaction of the ordinary committee of management of the said society, the sum of two thousand pounds sterling."

The pursuers averred that after a series of assignments, which were set forth, the interest in the policy was now vested in them.

The only defenders who compeared were the Assurance Society. They admitted the receipt of many notices with regard to the policy, stated that they had declined, and did decline, to go into the question of the validity of the pursuers' title, and pleaded, *inter alia*—"(4) The action as laid is incompetent in respect that the pursuers have no right to demand a declarator in the circumstances condescended on. (5) The action as laid is premature. (6) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons in respect that they do not disclose any right in the pursuers to maintain this action against these defenders in respect of a policy which has not yet become a claim."

On 2nd February 1907 the Lord Ordinary (ARDWALL) pronounced this interlocutor:—"Sustains the 4th, 5th, and 6th pleas-in-law stated for the defenders: Dismisses the action so far as the same is directed against the defenders the Scottish Amicable Life Assurance Society, and decerns."

Opinion.— . . . [*After narrating the nature of the action, supra*] . . .