the defenders in the present action claimed absolvitor. The Court, Lord Curriehill dissenting, sustained the plea. On appeal, the House of Lords reversed and remitted to the Court below to proceed with the cause, making no mention of expenses. The pursuer now craved the Court to apply the judgment, and to find him entitled to the expenses of discussing the preliminary plea.

Scott for pursuer.

Rutherfurd for defenders.

At advising—

Lord President—This question of competency is perhaps new, and it arises very purely. The defenders having been assoilzied on a plea of *res judicata*, an appeal is taken, and there is a simple reversal of the judgment of this Court, the effect of which is to place the parties in the same position as they were in before the plea was sustained, with this difference, that the plea is cleared out of the way. The House of Lords have said nothing as to expenses, or whether either party is to have them in regard to the discussion of that plea in this Court. I see no ground on which it is incompetent for this Court in proceeding with the cause, as we are bound to do, to determine, in the first place, whether the pursuer should be entitled to the expenses of clearing away that plea at this stage, and therefore I am disposed to consider the matter as clear on principle.

But as to the merits, I do not take so favourable a view of the pursuer's case. In some respects he is in a very unfavourable position, for though no doubt he is in fact a different person from the former pursuer, he is substantially in the same position, and he is going to try the same question which was previously tried. It is settled that, if he has a good case on the merits, he is not to be prevented from establishing his case by the previous judgment. It is for us to exercise our discretion whether he should have expenses now at this stage of the proceedings. Now, on looking at that case, I think the pursuers, the magistrates, who got up their case with very great labour and care, presented to the jury a case which was defective in an essential particular. There was a plain interruption of the right of way in 1838. Their proof of possession only went back to 1798, and therefore there was no proof of possesion for forty years. Having gone back for thirty-seven years, they would have been entitled to presume back for the remainder of the prescriptive period, if the period prior to 1798 had been beyond the memory of man. But that was not the case, for there were witnesses for the defender who knew the ground in question before 1798, and who proved that for some ten years previously there had been no footpath there at all. That evidence was uncontradicted by any evidence led by the pursuers. When the case came before the Court on a motion for a new trial, it was clear that the verdict was bad in law, for there was not a case on the evidence on which the pursuers were entitled to a verdict, and the verdict was set aside, not for the purpose of re-trying the case, for that was of no use unless the pursuers had had at their command a body of evidence as to the period prior to 1798, sufficient to overcome the evidence of the defender. It is competent, no doubt, for this gentleman to come and make out what the magistrates were of opinion they could not make out, but it will not be easy for any one who remembers the previous trial to believe in the existence of such evidence. It is possible there may be; but if, for want of such evidence, the pursuer ultimately fails, it would be very hard on the defenders, who must defend themselves for a second time, that they should be subjected in the long run to any expense. I think the way to do justice is to reserve these expenses to the end of the case.

Lord Curriehill concurred.

Lord Deas—I am of the same opinion. I think it is quite competent for us to give expenses to the pursuer. It is plain from the authorities that the House of Lords do not always express their judgment in these matters of expenses in the same way. In this case it is clear that they did not deal with the matter of expenses, and did not mean to do anything to prevent us from dealing with them. The judgment simply reversed the interlocutor of this Court, and remitted to us to proceed accordingly. This opinion proceeds on the terms of this judgment. But I am clearly of opinion that we ought to reserve the question of expenses.

Lord Ardmillan concurred.

Agents for Petitioner—D. Crawford & J. Y. Guthrie, S.S.C.

Agents for Respondents—Gibson-Craig, Dalziel, & Brodies, W.S.

Thursday, June 25.

RAYNER *v.* SCOTT AND OTHERS.

Jury Trial—Delay to proceed to Trial—A. S., 13th Feb. 1841, *sect.* 7. A motion to dismiss an action, in respect of failure timeously to proceed to trial, is properly made in the Inner-House. On the merits, motion *refused*, in respect that the delay was mainly attributable to the defenders.

In this case, issues were adjusted on 13th July 1861.

Shand, for the defenders, moved for absolvitor, in respect of the failure of the pursuer to proceed to trial within year and day.

Clark, for pursuer, suggested that the motion ought to have been made before the Lord Ordinary.

Shand cited *Ferguson*, 13th July 1861, 23 D. 1290.

The Lord President called attention to A. S., 13th Feb. 1841, sect. 7—"after the issue or issues are so engrossed, all motions shall be made in the Division to which such cause belongs."

Lord Deas—The only doubt ever entertained was, whether the motion could be made before the Lord Ordinary.

On the motion—

Clark, for pursuer, contended that the delay was owing to the fault of the defenders. In July 1861 they had obtained a commission for taking evidence in the East Indies. Correspondence then went on between the parties, with a view to a settlement, until 1864. In 1865 some procedure took place by way of adjusting interrogatories, and, under interlocutor of the Lord Ordinary, documents in the process were sent abroad. In 1866 and 1867 the defenders' agents assured the pursuer's agent that the commission was still going on. In March 1868 the pursuer had moved for circumduction, which motion was opposed by the defenders, and refused by the Lord Ordinary. The commission was not yet reported.

Shand replied that certified copies of the documents sent abroad were in process; that the defenders did not find it necessary to go on with their

proof; and that the pursuer ought to have gone to trial.

Lord President—This is a motion made under the most unfavourable circumstances I ever saw. There have been questions under this clause of the Act which have caused a good deal of trouble,—where there has been delay of a year and day on the one side, and no blame on the other, but some unintentional dilatoriness. In these cases, where the Court has seen that the pursuer had been led on to delay by the inactivity of his adversary, they have refused to apply the rule. But in this case it appears that the fault is as much that of the defenders as of the pursuer, if not more so, and it is out of the question for the defenders now to turn round and make this penal demand.

Lord Curriehill concurred.

Lord Deas—This delay is entirely attributable to the defenders. And this is just an example of what is constantly occurring. Issues were adjusted in this case seven years ago. It is said, Look at the delay of the Court of Session. But that is entirely due to the parties themselves. We have no power in the matter, and to-day half an hour or more of the time of the Court has been wasted in this discussion. It is very desirable that there should be some remedy for such cases.

Motion refused, with expenses.

Agents for Pursuer—Murdoch, Boyd, & Co., S.S.C.

Agents for Defenders—Hill, Reid, & Drummond, W.S.

Thursday, June 25.

SECOND DIVISION.

MELROSE *v.* SPALDING.

Sheriff—Act of Sederunt 15th Feb. 1851—*Findings in fact. Held,* in accordance with a previous judgment of the Court, that a Sheriff-substitute is bound to pronounce findings in fact in his interlocutor.

This was an advocation from Roxburghshire of an action for a plasterer's account. The Sheriff-substitute decided against the advocator, and the Sheriff adhered. The advocator's counsel, in opening, observed that he had difficulty in impugning the interlocutor, as the Sheriff-substitute had not set forth findings in fact, as required by the Act of Sederunt 1851; but stated that he was ready to waive all objections to the form of the interlocutor.

Pattison and Campbell Smith for advocator.

Thomson and Keir for respondent.

At advising—

Lord Justice-Clerk—In this advocation, although a proof was led, the Sheriff has pronounced an interlocutor, without any findings in fact. This matter has been brought under consideration by counsel, and we are referred to a judgment of this Division, in 1866, in the case of the *Glasgow Gas Light Company*, where a remit was made to the Sheriff, before entering upon the merits of the advocation, to recal his interlocutor, and to pronounce one in the form prescribed by the Act of Sederunt, 15th February 1851. It does not appear from the report of that case whether the Court, in deciding it, had the 16th section of the Sheriff-court Act of 1853 specially brought under their notice; but we have ascertained that the Act of 1853 was carefully considered, and was held not to over-ride the Act of Sederunt. It having been held that the generality of the Act of Parliament was not inconsistent with the provision of the Act of Sederunt as to cases where proof was led, we must therefore hold that decision as an authority directly in point, and remit this advocation to the Sheriff.

The other judges concurred.

Agent for Advocator—James Somerville, S.S.C.

Agent for Respondent—David Milne, S.S.C.

Friday, June 26.

FIRST DIVISION.

MARQUIS OF HUNTLY, PETITIONER.

(*Ante,* p. 360.)

Expenses—Entail Petition—Railway Company—Taxation—Montgomery Act—Lands Clauses Act. An heir of entail in possession obtained a judgment of the Inner-House (reversing judgment of Lord Ordinary) finding that consigned money might competently be applied in procuring a renunciation of a lease as a permanent improvement within the meaning of the Montgomery Act. *Held* that the expenses of the reclaiming note were not a reasonable charge against the Railway Company.

The Auditor, in taxing the petitioner's account of expenses, taxed off a sum of £24, 17s. 2d. of expenses incurred in connection with the reclaiming note presented by the petitioner on 28th January 1868, and on which judgment was given in the petitioner's favour on 1st March. The petitioner lodged a note of objection to the Auditor's report. The Lord Ordinary (Mure) reported the matter to the Inner-House.

H. Smith for petitioner.

Lancaster for Railway Company.

At advising

Lord President—The question raised by this note of objections is, whether the Railway Company are liable in the present case for certain expenses, said to have been incurred by the pursuer in re-investing the money consigned by the Railway Company. That depends, in the first place, on the construction of the 79th section of the Lands Clauses Act, and, in the second place, on the view which we may in our discretion take of this particular claim for expenses, for under that section it is not imperative to award all the expenses that fall under the general description of being incidental to the procedure, and the Court are left to deal with the matter as they think just. The words of the section are, that "it shall be lawful for the Court of Session to order the expenses of the following matters, including therein all reasonable charges and expenses incident thereto to be paid by the promoters of the undertaking," &c. It is left to them to consider what are reasonable. The matter here is the re-investment of money, and the question is, whether the expenses are reasonable charges and expenses, incidental to proceedings for the investment of money? The Auditor, as I understand, has allowed all the expenses incurred under this petition except that of reclaiming against the Lord Ordinary's interlocutor of 21st January 1868, and the bearing on that reclaiming note.

Now the question raised by that reclaiming note was singular and new, and attended with a good deal of difficulty, and it appears to me that it would not be reasonable to make that a charge against