before a decree can be obtained that finally disposes of the whole cause, and a good deal of expense may yet have to be incurred before the finding can be made operative. Take, for example, the ordinary course of procedure in Dean of Guild Courts. The question that generally arises there is, whether warrant shall be granted to erect buildings in conformity with certain plans. After that warrant is granted, there must be a remit to a man of skill; his report must be approved of, and a long course of procedure gone through; and there are expenses in Court and incidental expenses yet to be incurred. It would be an extravagant conclusion to hold that the buildings might be put up—it might be at great cost—and the question yet remain open whether any building is to be put up or not, or rather that there should be no opportunity of reviewing the warrant for their erection. That cannot be the result of these enactments.

Now, that is very much the position of affairs here. That question as to the erection of the march-fence is not only disposed of by the Sheriff, but he has got a report from a man of skill, and has approved of that report; accordingly I am of opinion that this is an appealable interlocutor. It is imperative, however, that the question of expenses should be disposed of; luckily there is an easy remedy, as your Lordship has pointed out, for that defect.

LORDS MURE and SHAND concurred.

The Court refused the appeal, in respect that the Sheriff's interlocutor contained no finding as to expenses.

Counsel for Petitioner (Respondent)—J. P. B. Robertson. Agents—J. C. & A. Stewart, W.S.

Counsel for Respondent (Appellant)—Balfour. Agents—M'Neill & Sime, W.S.

Friday, October 19.

SECOND DIVISION.

[Lord Young, Ordinary.

TRAILL *v.* CONNON.

Sale—Title—Implement where Title not free from doubt.

The seller of an heritable property for an adequate price obliged himself to grant a valid title to the purchaser, but subsequently found himself unable to do so owing to the circumstance that it was alleged to be burdened with a bond for £1000. The purchaser, who was formerly tenant of the property, consented to remain in possession pending the issue of an action of reduction of the bond. Eventually the Court reduced the bond. The seller thereafter raised an action against the purchaser for payment of the purchase price. The Court, in the exercise of their discretion, *held* that looking to the special circumstances of the case, and to the difficulty and nicety with which the decision of the action of reduction had been attended, payment could not be required until the expiry of the period during which an appeal might be taken to the House of Lords, unless with security against the consequences of a reversal.

Dr Traill, the pursuer in this action, sold to the defender Mrs Connon various subjects in the burgh of Kirkwall for £1300. The agreement of sale was dated 27th and 30th January 1875, and the entry was to be at Whitsunday 1875, when the price was to be paid. The pursuer bound himself to give a good title to the defender, and in the agreement of sale he specially bound himself to disencumber the subjects of a bond and disposition in security for £1000, for which sum he had formerly granted a bond and disposition in security over the property in favour of Smith's trustees. That bond had been negotiated by Messrs Scarth & Scott, W.S., who had acted as agents for both borrower and lenders. After the sale to the defender, and after the disposition in her favour had been adjusted, but before the term of payment had arrived, it was discovered, through the bankruptcy of Messrs Scarth & Scott, that Ballantyne's trustees also claimed to be lenders of the same £1000, and demanded payment thereof from Dr Traill. No bond had been granted in favour of Ballantyne's trustees, but it appeared that they had paid the £1000 to Messrs Scarth & Scott for the purpose of being lent to Dr Traill, and that the money had actually been applied for Dr Traill's use, while Smith's trustees' £1000 had apparently never reached Dr Traill, but had remained in the hands of Messrs Scarth & Scott. In these circumstances (as was alleged by the defender in this action) the pursuer was not in a position to implement the agreement of sale, and applied to the defender for delay until the competing claims for the £1000 should be settled. The defender was tenant and in personal occupation of the property, and she agreed to delay the settlement on condition of receiving the search of incumbrances, and also of the pursuer being responsible for all damages arising through the delay. The pursuer thereupon brought an action of reduction of Smith's bond; and after a troublesome and very difficult litigation obtained the judgment of the Inner House reducing the said bond, and thereafter applied to the defender for implement of the purchase, but she objected to settle unless secured against the consequences of a reversal of the decree in the House of Lords, should an appeal be taken against it. The pursuer thereupon raised the present action, concluding for payment of the price of the property with interest at 5 per cent. from 15th May 1875, and £100 damages in respect of the defender's refusal to implement. The Inner House judgment was pronounced on 3d June 1876, and consequently the defender's right of appeal would not expire, and the decree would not become final, till 3d June 1878.

The Lord Ordinary (YOUNG), on 16th May last, pronounced an interlocutor decerning against the defender substantially in terms of the conclusions of the summons.

The defender reclaimed.

Argued for her—Where the purchaser could show that there was even a doubt about the seller's title, the Court did not require him to pay the price until this doubt was cleared up. Here the doubt was considerable, and the Court had great

difficulty in coming to a conclusion. The defender could not be asked to pay until the decree was final, or until caution against the consequences of an appeal was given. As regarded the question of interest, in the circumstances, the purchaser being liable to be called upon to pay the price at any moment, 5 per cent. was not exigible. She had not full enjoyment of the property, and only bank interest could be asked—*Dunlop* v. *Crawford*, May 26, 1849, 11 D. 1062, and 12 D. 518; *Brown* v. *Cheyne*, December 6, 1833, 12 S. 176.

Argued for respondent—The pursuer was ready to implement his part of the agreement of sale, and the defender ought therefore to implement hers. The title which the pursuer had offered was good. It was absurd to say that in cases of this sort you must always wait till the time for appealing to House of Lords had expired. If this were upheld there would be constant cases merely for the purpose of gaining delay. The defender having been in full possession of the property, must pay 5 per cent. interest on the purchase-money till paid.

At advising—

Lord Justice-Clerk—This is a question depending on the discretion of the Court, in the special circumstances of the case. They are very special. I am far from saying that in the general case a judgment of this Court is not to receive effect until the two years, within which an appeal to the House of Lords may be presented, have expired. The reverse certainly may be safely assumed, but in this case Dr Traill, after selling his property to the defender, and obliging himself to grant a valid title at the time of entry, found himself unable, from embarrassments created by himself, to fulfil his obligation, and was obliged to bring an action to reduce an alleged incumbrance affecting the property sold. The purchaser, at the seller's desire, took and retained possession, and the defender obtained a decree of this Court in June 1876. It was a very difficult and complicated case, and the Court had considerable doubt in regard to it. The judgment will be final in June 1878, and the question is, whether during the interval the pursuer can require payment of the price. This I think he is not justified in doing without protecting the defender from the risk of a reversal. It seems clear enough that any title he can give, being in truth not only doubtful but litigious, would not be readily available in the market. He must find caution, and this will of course terminate when the two years have expired.

As to the question of interest, I think 4 per cent only should be charged, for the seller had not a complete or undoubted title to give.

Lord Ormidale—I am of the same opinion. The position of the parties is this:—Mrs Connon was all along in possession, for before she entered into possession as proprietrix she was the tenant. In consequence of the litigation here Dr Traill could not give a clear title, which he had bound himself to do, but the question of title remained over until the judgment of the Court should be obtained. Mrs Connon all this time continued in possession, and enjoyed to a certain extent the benefit arising from the property. But still she could not have the full enjoyment while she was without a title; but as to this question I need say nothing, as I understand it has been agreed between the parties that interest at the rate of 4 per cent. should be charged for the time the defender has been in possession as proprietrix, and this, I think, is a favourable result for her.

The other question is attended with some difficulty. It seems to me to be a question for the discretion of the Court arising out of the particular circumstances. In this case, if an appeal had actually taken place, could it then be maintained that Mrs Connon, the purchaser, was bound to take the title offered to her? This could hardly be maintained, and yet the risk is the same in present circumstances as long as an appeal is open.

I can quite understand a case where it would be inconceivable that the judgment of this Court wiping off an incumbrance could be reversed, and where it would be absurd to ask the parties to guard against the chance of an appeal. In such a case this could only be pleaded for the purpose of gaining delay; but the Court would not listen to this.

The action which came before us in connection with the £1000 bond was a very difficult and nice case, and that being so I think there are reasonable grounds for apprehension, and therefore Mrs Connon may say—You must give me security. Supposing Mrs Connon had paid the price for the property, and got such a title as Dr Traill could have given her and had then wanted to sell, would any purchaser knowing the full state of the facts between the parties give her the same price as he otherwise would, or even become the purchaser at all? In the same way if she wished to borrow.

Taking all these tests into consideration, I am of opinion that Mrs Connon is quite reasonable in saying—I must have a guarantee against the risk of appeal. I think that Dr Traill must find caution.

Lord Gifford—I am of the same opinion. Whenever we reach the conclusion that this is a matter of discretion, I can have no doubt that there is here a doubtful title.

The pursuer's counsel asked that the case should be sisted till the period for appealing should expire, instead of the pursuer finding caution, which was agreed to.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for Mrs Mary Frost or Connon against Lord Young's interlocutor of 16th May 1877, Recal the same, and of consent sist this process till the 3d day of June 1878, that it may be seen whether an appeal will be presented against the judgment of this Court, of date 3d June 1876, in the action of reduction at the instance of the pursuer against Smith's Trustees and others: Find the reclaimer entitled to expenses since the date of the Lord Ordinary's interlocutor; *quoad ultra* no expenses; and remit to the Auditor to tax the same, and to report, and decern."

Counsel for Pursuer (Respondent) — Guthrie Smith—R. V. Campbell. Agents—Maitland & Lyon, W.S.

Counsel for Defender (Reclaimer)—Fraser—Keir. Agents—Skene, Webster & Peacock, W.S.

Wednesday, October 24.

FIRST DIVISION.

EARL OF GALLOWAY *v.* NIXON.

Interdict—Breach of Interdict, where penalty inflicted.

Nature of penalty inflicted by the Court, and terms of an interlocutor pronounced, in a case of breach of an interdict against salmon fishing with bag or stake nets.

The Earl of Galloway obtained in 1868, in an action directed against the burgh of Wigtown, George Nixon, and other parties therein named and designed, a declarator and interdict from the Court of Session giving him the exclusive right of salmon fishing with bag or stake nets in the Bay of Wigtown. In 1877 he presented a petition and complaint to the Court, setting forth that in breach of the interdict the fishing was being carried on by a fisherman named Nixon. It was further stated that Nixon had returned unopened a registered letter sent to him through the post, which, along with other letters, was written by the petitioner's agents to warn him of the illegality of his proceedings, and to ask him to desist. When summoned to appear personally before the Court, Nixon failed to do so. A warrant for his apprehension was then issued, and he was brought before their Lordships of the First Division, when, after counsel had been heard, the following interlocutor was pronounced:—

> "The Lords having resumed consideration of the cause, and the respondent George Nixon being placed at the bar in custody, and having admitted by his counsel that he is guilty of the breach of interdict complained of, Find the respondent guilty accordingly, and, in respect thereof, sentence and adjudge him to be imprisoned in the prison of Wigtown for the space of one calendar month, and thereafter to be set at liberty; and ordain him to be incarcerated and detained in the prison of Edinburgh till he can be removed to the prison of Wigtown: Find the respondent liable in the expenses of process, and remit to the Auditor to tax the account thereof and report: And, in respect it is admitted by the respondent that the net complained of has not yet been removed, authorise the petitioner forthwith to remove the same; and decern: Further, authorise execution hereof to pass on a copy hereof certified by the Clerk of Court, and decern *ad interim*."

Counsel for Petitioner—Mackintosh. Agents—Russell & Nicolson, C.S.

Counsel for Respondent—J. G. Maitland. Agent—J. Macpherson, W.S.

Friday, October 26.

FIRST DIVISION.

[Lord Adam, Ordinary.

LITTLE *v.* NORTH BRITISH RAILWAY CO.

Issues — Form of Issues when Damages claimed against a Railway Company by one travelling without a Ticket.

Form of issue in an action of damages by a child of eight years old against a railway company for injuries sustained by him when travelling on their line with his aunt without a ticket, his statement on record being that he did so with the licence or implied authority of the servants of the company, while the defenders averred that the intention of the aunt in failing to take out the ticket was to defraud them.

This was an action at the instance of William Little, a boy of eight years old, residing at East Borland, Denny, against the North British Railway, to recover damages for injuries received by him when travelling on their line, through their fault, or that of those for whom they were responsible.

On 4th August 1876 the pursuer was travelling with his aunt Janet Moir, who took a ticket for herself but none for the pursuer, from Balloch Pier to Glasgow station on the defenders' railway. In the course of the journey the door of the carriage in which they were travelling flew open, the pursuer fell out, had his skull fractured, and suffered other severe injuries. The fault alleged against the defenders was that they had failed to secure the door when the train was at Balloch, or that there was a defect in the door or in its lock.

It was averred for the pursuer—"The said Janet Moir took a third-class ticket for herself, entitling her to travel from Balloch Pier to Glasgow, but did not take one for pursuer, believing that no charge was made for the conveyance of children so young as he was. Denied that either she or the pursuer had any intention of defrauding the defenders. The pursuer was seen by the clerk from whom his aunt obtained the ticket, and other servants of the Company, and they one and all allowed or gave licence to the pursuer to take his place as a passenger in the railway carriage, and to remain in it. He had thus the licence or implied authority of the defenders to be in the railway carriage, out of which he fell, through their fault, as after stated."

The defenders, *inter alia*, answered—"The defenders believe and aver that the pursuer's aunt failed to take out a ticket for him with intent to avoid payment of the fare which she well knew was due. It was well known, and the pursuer's said aunt was well aware, that railway companies do not carry children above three years of age free. Moreover, the particular train in question was one run under the provisions of the Act 7 and 8 Vict. cap. 85, section 6, by which it is *inter alia* enacted that 'children under three years of age accompanying passengers by such train shall be taken without any charge, and children of three years and upwards, but under twelve years of age, at half the charge for an adult passenger.'"