Saturday, January 31.

FIRST DIVISION.

[Lord Cullen, Ordinary.

MARTIN *v.* M'GHEE AND OTHERS.

Process—Sist—Expenses—Pursuer's Representative having no Interest in Merits—Competency.

A member of a trade union brought an action in which he sought to interdict the union from collecting levies for parliamentary purposes. The pursuer having died, his widow, who had been confirmed executrix, lodged a minute craving to be sisted as complainer. The minuter as an individual had no interest in the merits of the action, but maintained that she was entitled to be sisted with a view to recovering the money expended upon it by her husband.

Held that the pursuer was entitled to be sisted, *reserving* all questions as to right to insist in the action.

James Martin, 75 Finnieston Street, Glasgow, *complainer*, presented a note of suspension and interdict against (first) Richard M'Ghee, 69 North Street, Lurgan, and another, the trustees of the National Sailors' and Firemen's Union of Great Britain and Ireland, 178 Broomielaw, Glasgow, and (second) the said Union, *respondents*, in which he craved the Court to interdict the respondents from, *inter alia*, "asking, collecting, or receiving from the members or branches of said Union contributions or levies for the purpose of promoting labour representation in Parliament, or for the purpose of paying parliamentary election expenses for the purpose of securing or maintaining parliamentary representation, or for any other parliamentary or political purposes."

The complainer having died while the case was standing in the procedure roll, his widow, who had been appointed his executrix, lodged a minute stating that she desired to sist herself as complainer.

On 29th November 1913 the Lord Ordinary (CULLEN) refused the minuter's motion.

Opinion.—"By interlocutor dated 4th June 1913, I closed the record in this action of suspension and interdict and appointed it to be put to the procedure roll. In July 1913, while the case remained unheard, the complainer died.

"The nature of the action is such that, admittedly, the complainer's interest to insist in it has not transmitted to anyone representing him.

"Although this is so, the widow of the complainer, as his executrix-dative, now seeks to be sisted in his room and place. As such executrix she has, admittedly, no interest whatever in the merits of the action. She says, however, that the action was a a well-founded one; that the deceased expended money in prosecuting it against the unjustifiable opposition of the respondents; that the amount of his executry estate was thereby diminished; and that she as his executrix is therefore entitled to be sisted as complainer in order that she may prosecute the action on its merits to the end of recovering the expenses so laid out on it by the deceased prior to his death. The respondents oppose the motion.

"No authority of any kind specifically bearing on the point at issue was cited to me, and I have not been able to find any. It is not often that the interest of a litigant dying *pendente liti* will not transmit to some one representing him.

"The general rule is well fixed to the effect that no one has right to be sisted in room of a deceased litigant, or is liable to have the action in question transferred against him if he stands aloof, unless he has the proper interest in the subject-matter of the action. No exception to this rule is, so far as has been shown to me, to be found in the books. The case of a law agent was referred to, but it is affected by special considerations, and is, moreover, strictly conditioned and limited, so that it does not aid the contention of the executrix in any way.

"Let it be supposed that the action had related solely to a disputed question of right in heritable property. On the death of the complainer, the party with interest entitled to be sisted in his room, and against whom the action might have been transferred had he stood aloof, would have been his heir in heritage. If the heir sisted himself, could the executrix have asked to be also sisted in the matter of expenses? Plainly not. Or, if the heir stood aloof, could the executrix have asked to be sisted in order to prosecute the action on its merits, in which alone the heir was interested? Equally not I think. And if this view be right I do not see why the claim of the executrix should be regarded differently because there happens to be no heir or anyone else having an interest as representative of the deceased.

"It is obvious that if the claim of the executrix to be sisted be refused, the action will be left in an unsatisfactory position. Nothing further can be done in it. But while this will be so, it would seem to me still more unsatisfactory to permit the executrix to prosecute, with any possible amount of attendant expense, an action in the merits of which she has no interest whatever, and a decree in which would be purely academic and form no real *res judicata*, merely with a view to a possible motion by her in the end of the day for expenses.

"I am of opinion that the motion by the executrix to have herself sisted as complainer falls to be refused."

The minuter reclaimed, and argued—The Lord Ordinary was in error in refusing the motion to sist, for the representatives of a pursuer could always insist in an action raised by their predecessor—Act 1693, cap. 15; Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 96; Shand's Practice, ii, 537; Mackay's Manual of Practice, 256, *et seq.* *Esto* that with respect to actions of ranking and sale special provision was made for the death of a pursuer during the dependance—A.S., 23rd November 1711, sec. 4—that was an exceptional case. It was competent for the defenders to have the action transferred against the minuter—*M'Culloch* v. *Hannay*,

December 24, 1829, 8 S. 122—and that being so they could not object to the minuter's crave being granted. Reference was also made to *Ritchie* v. *Ritchie*, March 11, 1874, 1 R. 826, 11 S.L.R. 325, where the representatives of a deceased husband were allowed to sist themselves as respondents in a reclaiming note to the effect of supporting a decree of divorce obtained by him. The Lord Ordinary had proceeded too fast in deciding *ab ante* that the minuter had no interest in the cause. She had an interest, for the deceased had expended money in suing the action, and even though he might have been unsuccessful on the merits, he might have been awarded expenses had the other party's conduct been vexatious—*Barrie* v. *Caledonian Railway Company*, November 1, 1902, 5 F. 30, 40 S.L.R. 50. Where, as here, the deceased had an interest in the funds of the Union, *e.g.*, to protect them against malversation — *Aitken* v. *Associated Carpenters and Joiners of Scotland*, July 4, 1885, 12 R. 1206, 22 S.L.R. 796; *Osborne* v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540 — it was immaterial that the minuter as an individual had none. An action for the reduction of a licence did not become incompetent by the expiry of the year to which it effeired — *Goodall* v. *Bilsland*, 1909 S.C. 1152, at p. 1161, 46 S.L.R. 555; *M'Geehen* v. *Knox*, 1913 S.C. 688, 50 S.L.R. 463—nor would the executor of a party who had intimated a claim for damages be held disentitled to sue — *Leigh's Executrix* v. *Caledonian Railway Company*, 1913 S.C. 838, 50 S.L.R. 555.

Argued for respondents—The Lord Ordinary was right, for the minuter had no interest either in the merits or in the expenses. Admittedly she had none in the benefit money, and even if she had she could not sue for its recovery, for such an action was incompetent — Schloesser on Trade Unions, 127. Nor had she any vested right to expenses, for the question of expenses lay entirely in the discretion of the Court. *Esto* that the law agent of a deceased pursuer might sist himself so as to get a decree for expenses in his own name, that was an exceptional case, and would only be allowed (1) where expenses had actually been found due, (2) where they followed as a necessary consequence from the interlocutor previously pronounced, and (3) where the parties had entered into a compromise to defeat the agent's claim—*M'Lean* v. *Auchinvole*, June 29, 1824, 3 S. 190; *Annan* v. *Tod*, 1912 S.C. 306, 49 S.L.R. 244. The cases relied on by the reclaimer were not in point, for they involved questions of patrimonial interest, and that was wanting here. The respondents could not have had the action transferred against the minuter had she stood aloof, for they had no power under the rules of the Union to do so.

LORD PRESIDENT—In this case the Lord Ordinary appears to me to have gone too fast. He has refused a minute of sist by the executrix of the complainer in the action and dismissed the cause. Now the action was one of interdict brought by a member of a trade union in order to have the union of which he was a member prevented from collecting contributions or levies for the purpose of promoting labour representation in Parliament. The record was closed on 4th June 1913, and the complainer died on the 18th June. His widow was confirmed executrix on 29th July, and thereafter she presented this minute and asked to be sisted as a party to the process.

It seems tolerably plain that she has no interest—and will probably have no interest —in the merits of the case, and on that ground the Lord Ordinary has refused her crave to be sisted as a party in respect, he says, that "the general rule is well fixed to the effect that no one has right to be sisted in room of a deceased litigant, or is liable to have the action in question transferred against him if he stands aloof, unless he has the proper interest in the subject-matter of the action."

Now I am not prepared to subscribe to that rule as thus absolutely stated. There may be cases in which a person, who has not "the proper interest," may not be entitled to insist in the action, but on the other hand there may be cases in which he might be entitled to insist. That is a question upon which we should desire to hear further argument. In the meantime my opinion is that the rule laid down by Mr Mackay in his Manual of Practice, at p. 258, which was referred to in Mr MacRobert's argument, to the effect that "representatives of a pursuer as his heir, executor, or assignee, could always insist in an action raised by his predecessor," is unqualified, and that we cannot deny the right of the widow as executrix to be sisted as a party to this case.

On what her fate may be after she becomes a party to the case I forbear to speculate, because while I propose to your Lordships that we should recall the interlocutor of the Lord Ordinary and sist the minuter in terms of her minute of sist, I further propose that we should accompany that finding with a finding to the effect that she be entitled to be and be heard before us on the question whether or no she is entitled to insist in the action to its conclusion.

LORD JOHNSTON—I entirely agree, and I do not think it necessary to add anything to what your Lordship has said.

LORD SKERRINGTON—I agree.

LORD MACKENZIE was absent.

The Court recalled the Lord Ordinary's interlocutor, sisted the minuter in terms of her minute, reserving all questions as to her right to insist in the cause, and continued the case.

Counsel for Reclaimer—Constable, K.C.—MacRobert. Agents—Gardiner & Macfie, S.S.C.

Counsel for Respondents — Solicitor-General (Morison, K.C.)—J. B. Young. Agents—Weir & Macgregor, S.S.C.