position, and depends on the circumstances of the case. Here, as the House of Lords have allowed the expenses of both parties to be charged against the estate, it follows that those incurred here must be so allowed. If that had not been so, I might myself have had doubts whether this action should have gone beyond the Lord Ordinary.

On the other two actions I concur with your Lordships. These proceedings were not justified, and cannot be charged on the ward's estate.

LORD KINNEAR concurred.

The Court found Messrs Mitchell & Baxter entitled to their expenses in opposing the appointment of the *curator bonis* in the Court of Session, but refused the reclaiming-note in the action at their instance against the Bank of Scotland and the *curator bonis*, and found them liable in the expenses of it.

Counsel for Messrs Mitchell & Baxter—Guthrie Smith—C. K. Mackenzie. Agents—Parties.

Counsel for the *Curator Bonis*—H. Johnston. Agents Stuart & Stuart, W.S.

Counsel for the Bank of Scotland—Pitman. Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, December 16.

FIRST DIVISION.

[Lord Low, Ordinary.

BIRNIE AND OTHERS *v.* PENNY AND OTHERS.

Intestate Moveable Succession—Executor Making Agreement Adverse to Interest of Executry Estate—Removal of Executor—Judicial Factor.

The majority of certain executrices-dative, in consideration of a sum of money, agreed to take measures to vest the executry estate in a person who alleged herself to be the widow of the deceased intestate. The minority of the executrices and certain other relatives of the deceased denied that the alleged widow was entitled to that character, and an action of multiplepoinding had already been raised to have part of the moveable estate distributed at sight of the Court. The objectors further alleged that a large portion of the executry estate was still to be ingathered.

Held that as the majority of the executrices had agreed to use their powers adversely to the general interests of the executry estate, the administration thereof could not be left in their hands, and a judicial factor *appointed.*

Andrew Penny, a native of Scotland, died intestate on 18th May 1890 at Huanchaca in South America, leaving considerable heritable and moveable estate in Scotland and Bolivia.

Senora Maria Galindo de Penny obtained the administration of his estates in Bolivia from the Courts there. She averred that she was the widow of Andrew Penny, that he died a domiciled Bolivian, and that by the laws of that country she was entitled to the heritable estate there, and the whole moveable estate wherever situated.

The four sisters of Andrew Penny—Mrs Birnie, Mrs Christie, Mrs Mennie, and Mrs M'Intosh (who subsequently died)—were on 10th October 1890 decerned executrices-datives *qua* four of the next-of-kin. They denied the averment of Senora Maria Galindo de Penny both as to the marriage and as to the domicile of Andrew Penny, which they maintained had remained a Scottish domicile.

A large portion of the moveable estate in Great Britain consisted of a sum of £36,636, 7s. 9d., the proceeds of mineral ores consigned for sale by Andrew Penny during his lifetime, and which was in the hands of Messrs Gibbs & Sons, his London agents.

This sum the executrices claimed, and Messrs Gibbs & Sons thereupon raised an action of multiplepoinding, calling the executrices and Senora Maria Galindo de Penny as defenders, and consigned the fund *in medio* into the hands of the Court of Session.

On 20th August 1891 Senora Maria Galindo de Penny was married to William Craik, a Scotsman, and on 12th September 1891 he, as in right of his wife's whole estate under their marriage-contract, entered into an agreement with the agents of Mrs Christie and Mrs Mennie, by which they, as executrices and beneficiaries, withdrew their denial of the marriage of the late Andrew Penny, and agreed to accept £25,000 as in full of the claims of the next-of-kin.

The fourth article of the agreement was in the following terms—"Fourth. To enable the said first party (Craik) to be vested in the foresaid personal estate *quam primum*, the second parties bind and oblige their constituents (the said Mrs M'Intosh's trustees being bound only to the extent foresaid) to procure and deliver to the first party the necessary decree and authority of the Court of Session for his uplifting the sum consigned by the pursuers and real raisers in the said action of multiplepoinding, and also all assignations, conveyances, or transfers necessary for vesting in him the remainder of the personal or moveable estate belonging to the said deceased Andrew Penny; and in the event of the said Mrs Catherine Penny or Birnie not becoming a consenter to this agreement, the second parties bind their constituents as aforesaid to adopt and pursue all such competent judicial steps as the first party may direct, with the object of effectuating this agreement and arrangement."

Shortly afterwards Mrs Christie and Mrs Mennie raised an action in the Sheriff Court at Aberdeen against the agents of the executry for delivery of all papers connected therewith.

Mrs Birnie, who had refused to accede to

the agreement, and the children of a predeceasing brother of Andrew Penny, thereupon presented this petition to the Court for sequestration of the estate and appointment of a judicial factor.

They averred—"That it is essential that the administration should be taken out of the hands of the majority of the executrices and entrusted to a judicial factor. By entering into the agreement above referred to, the said executrices have acquired an interest adverse to the rights of the petitioners, and they have undertaken obligations which incapacitate them for properly discharging the duties which they owe to the petitioners with reference to the administration and recovery of the estate both in this country and in Bolivia." There was a large amount of property besides the sum consigned in the multiplepoinding, which had not yet been recovered.

Answers were lodged for the other executrices, a brother of Andrew Penny, and the trustees of the deceased executrix, in which they denied that the agreement in any way prejudiced the petitioners or any of the next-of-kin in any steps they might take to assert their rights, as it only affected those who consented to it. They further averred that the application for a judicial factor was unnecessary, as most of the moveable estate was already in the hands of the Court, and they were about to raise another action of multiplepoinding and consign the remainder. Answers were also lodged in similar terms for Mr and Mrs Craik.

On 7th November 1891 the Lord Ordinary (Low) refused the petition.

"*Opinion.*—I am of opinion that the petitioners have not made out a case for the appointment of a judicial factor.

"In the first place, as regards the moveable estate of the late Mr Penny in this country, a judicial factor is unnecessary, because the whole estate has been thrown into Court in a multiplepoinding, in which the petitioners will have an opportunity of establishing their claim.

"In regard to any moveable estate which may be in Bolivia, I think that the petitioners can themselves take such steps as may be necessary to protect their rights.

"The only other ground upon which the appointment of a judicial factor is asked is, that an action has been instituted in the Sheriff Court of Aberdeenshire against the Messrs Collie, advocates in Aberdeen, who were the executors' agents, for delivery of all papers in their hands connected with the executry. The action is said to be truly in the interests of Mr and Mrs Craik, and the petitioners say that it would be greatly to their prejudice if Mr and Mrs Craik were to be put in possession of documents and information which were obtained with the view of opposing Mrs Craik's claim to any part of Mr Penny's estate.

"Counsel for the majority of the executors, however, undertook that they would not attempt to proceed further in the action pending the process of multiplepoinding, and I think that this is sufficient to safeguard the petitioners' interests in regard to the documents in Messrs Collie's possession."

The petitioners reclaimed—The arguments of the several parties were substantially a repetition of the averments already stated.

At advising—

Lord President—I think that the executrices cannot be allowed to remain in office, and that a factor must be appointed. I can quite well understand beneficiaries being unwilling to face a legal difficulty and preferring to take a sum of money instead; but here the agreement pledges all the powers of the executrices, *qua* executrices, against the estate they represent. This is plain from the agreement, which says that upon payment of £25,000 to the next-of-kin "to enable the first party to be vested in the foresaid personal estate *quam primum*, the second parties bind and oblige their constituents (the said Mrs M'Intosh's trustees being bound only to the extent foresaid) to procure and deliver to the first party the necessary decree and authority of the Court of Session for his uplifting the sum consigned by the pursuers and real raisers in the said action of multiplepoinding, and also all assignations, conveyances, or transfers necessary for vesting in him the remainder of the personal or moveable estate belonging to the said deceased Andrew Penny; and in the event of the said Mrs Catherine Penny or Birnie not becoming a consenter to this agreement, the second parties bind their constituents as aforesaid to adopt and pursue all such competent judicial steps as the first party may direct, with the object of effectuating this agreement and arrangement." It is on account of that condition that this opposition is made.

When we look at the position of this estate there is a special reason why the beneficiaries interested in the residue of the estate have cause for alarm. It is true that a large amount of the estate is in the hands of the Court in the multiplepoinding, but it is not denied that there is some more, as Mr Campbell has told us, still to come in. It is further significant that this condition binds the majority of the executrices to allot all their rights to the widow, and the result therefore is that under this agreement so far as concerns the estates in Bolivia, both heritable and moveable, and the remittances which ought to come to London, the widow is entitled to demand the whole of them. That is not a position for executrices to be in, and the Court cannot allow it, for they are bound to diminish the rights of the executry estate.

I am therefore of opinion that we should recal the Lord Ordinary's judgment and appoint a judicial factor.

Lord Adam concurred.

Lord M'Laren—I am of the same opinion. It is not a ground for displacing

executors that they have interests which conflict with their duty to the executry estate, but it is different where they bind themselves to use their powers for one party and against the estate. That is a wrong position for them to be in, and the Court has no option except to give effect to an application for their recal and for the appointment of a judicial factor.

LORD KINNEAR—I concur. The appearance for the widow at the bar is conclusive against continuing the executrices in office.

The Court recalled the interlocutor of the Lord Ordinary, and appointed a judicial factor.

Counsel for Petitioners and Reclaimers—Comrie Thomson—W. Campbell. Agent—R. C. Gray, S.S.C.

Counsel for Mrs Christie and Others—Jameson—F. T. Cooper. Agents — Henry & Scott, S.S.C.

Counsel for Mr and Mrs Craik—D.-F. Balfour, Q.C.—C. J. Guthrie—J. C. Watt.

Thursday, December 17.

FIRST DIVISION.

THE LORD ADVOCATE *v.* THE DUKE OF HAMILTON.

(*Ante*, p. 213.)

Process—Appeal to House of Lords—Leave to Appeal—Interlocutory Judgment—48 Geo. III. c. 151, *sec.* 15.

In an action by the Crown for legacy-duty and inventory duty the defender objected that the property in question had never vested in his ancestor, and therefore was not subject to taxation, but the Court decerned in terms of the summons, and ordered accounts to be lodged in order that the amount of the duty exigible should be ascertained.

The defender applied for leave to appeal to the House of Lords, on the ground that the sequel of the case would consist of an accounting, and was entirely separable from the questions which had been decided, and that the judgment of the House of Lords, even if affirmative, might affect the treatment of the said accounting. The Court *granted* leave to appeal.

In the case of the Lord Advocate *v.* The Duke of Hamilton (reported *ante* p. 213), their Lordships of the First Division, on 1st December 1891, pronounced the following interlocutor—"The Lords having considered the reclaiming-note for the defender the Duke of Hamilton, against the interlocutor of Lord Wellwood, dated 11th June 1891, and heard counsel for the parties, Adhere to the said interlocutor: Refuse the reclaiming-note: Find the respondent entitled to additional expenses since the date of the interlocutor reclaimed against: Remit the account thereof to the Auditor to tax and to report to the Lord Ordinary, and remit to his Lordship to proceed, with power to decern for the taxed amount of said expenses."

The defender presented a petition to the First Division under the Act 48 Geo. III. cap. 151, sec. 15, praying for authority to appeal the interlocutor above quoted, and that of the Lord Ordinary of date 11th June 1891, to the House of Lords, the conclusions of the action not having been exhausted by these interlocutors.

Argued for him—This was a case in which an appeal at the present stage ought to be allowed. If the decision of the Court was affirmed a long and expensive inquiry, involving an accounting extending over a considerable period of time would have to be entered upon, while if the decision was varied or reversed a different period would be embraced in the accounting, or an accounting might be avoided altogether. The questions decided by the Court were large and important, and might be fairly viewed as the main principles of the case, while those which remained, though of importance to the parties, were really questions of detail, and were entirely separable from those decided by the Court. The question whether an appeal ought to be allowed at the present stage being a matter for the discretion of the Court, the circumstances of the present case were particularly favourable.

Argued for the respondent—Inquiry before the Lord Ordinary would in any event be necessary in order to ascertain the value of the articles liable in duty, and to determine the amount for which decree would be given in respect of legacy-duty on the present Duke's succession. Liability for this was not disputed, but the amount fell to be ascertained. Even if the present appeal was successful there were questions in regard to that legacy-duty which might form the snbject of a second appeal, the possibility of which always weighed with the Court in considering an application like the present. It was argued also that certain of the articles were heritable in their nature, and that legacy-duty could not be claimed in respect of them, and it was also a matter of dispute whether the value of the articles was to be taken at the time of their sale, and according to the price which they realised, or as at the death of the defender's father Duke Archibald, when they were valued for inventory purposes by the trustees. These were questions which would affect the money value of the decree to be pronounced, and they should be determined before any appeal was allowed in order to obviate the possibility of a second appeal—*Stewart* v. *Kennedy*, February 26, 1889, 16 R. 521.

At advising—

LORD PRESIDENT—I think that this is a case in which we should grant leave to appeal. The questions which we have decided are large and important questions, and are entirely separable from what might be called the sequel of the case. No doubt,