occurred on the 6th November, with the accident, and I agree with your Lordship in the chair that we must so hold, because when the Sheriff has found that the effect of the man's over-exertion was to bring on an attack of cerebral hæmorrhage, and that he thereupon was put to bed and remained there for four days, when the second attack occurred which caused the paralysis, it lies upon the party who alleges that that second attack was disconnected with the first attack altogether, to prove it. We must hold that the Sheriff was right in holding that they were connected. His decision that the respondent received personal injury in the sense of the Act could not have been come to unless his opinion was that the hæmorrhage which caused the paralysis was itself caused by over-exertion.

LORD MACKENZIE—I agree. I think that the facts found by the Sheriff show plainly that the respondent was engaged in an operation which involved the use of considerable physical force. The Sheriff has found that as the result of those exertions the claimant had an attack of cerebral hæmorrhage upon the 6th of November. I think it is impossible, taking the term "accident" in the sense in which it should be applied in the construction of the Workmen's Compensation Act, to say that the injury which the man sustained on the 6th November was not an injury by accident arising out of and in the course of the employment. When it is seen that the Sheriff further finds that on the same day the man did not continue at his work, but that he was taken home and put to bed, where he remained until the 10th of November, and that on the 10th of November there was a recurrence of exactly the same hæmorrhage from which he had suffered on the 6th November, the result being that his right side was paralysed, it is clear that he was suffering from the results of the same injury. In these circumstances I think there is sufficient to justify the conclusion at which the Sheriff has arrived—that the respondent had received injuries by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court answered the question of law in the affirmative, and dismissed the appeal.

Counsel for the Appellants—Clyde, K.C. —C. D. Murray. Agents—Morton, Smart, Macdonald & Prosser, W.S.

Counsel for the Respondent—Johnston, K.C.—Cochran Patrick. Agents—Oliphant & Murray, W.S.

Tuesday, June 23.

FIRST DIVISION.

[Lord Dundas, Ordinary.

HENRY LAMONT & COMPANY *v.* THE DUBLIN AND GLASGOW STEAM PACKET COMPANY.

Process—Reclaiming Note—Competency—Accounting — Interlocutor Appointing Account to be Lodged—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 28—*A.S.*, 10*th March* 1870, *sec.* 2.

In an action of accounting in which the pursuers sought an account over a period of years of the gross profits of the defenders, a company, for the purpose of calculating the commission alleged to be due to them, and in which the defenders, denying that the pursuers were entitled to commission on the gross profits but only on the profits of a particular branch of the business, pleaded that on the agreement set forth by the pursuers their averments were irrelevant, that they had already accounted for any balances due, and that the pursuers were barred by having accepted payments in knowledge of the system upon which the sums paid were brought out, and by *mora*, the Lord Ordinary in the procedure roll pronounced an interlocutor before answer appointing the defenders to lodge in process the account called for.

Held that the interlocutor did not "import an appointment of proof, or a refusal or postponement of the same," within the meaning of the A.S. 10th March 1870, sec. 2, and consequently that it could not be reclaimed against without leave.

The Court of Session Act 1868 (31 and 32 Vict. c. 100), enacts—sec. 28—"*Review of Certain Interlocutors of the Lord Ordinary.* —Any interlocutor pronounced by the Lord Ordinary as provided for in the preceding section [*section* 27 *dealt with procedure after record closed and adjustment of issues*] . . . shall be final, unless within six days from its date the parties, or either of them, shall present a reclaiming note against it to one of the Divisions of the Court by whom the cause shall be heard summarily. . . ."

Section 54—"*No Appeal Allowed against Interlocutory Judgment without Leave; Effect of such Appeal.*—Except in so far as otherwise provided by the 28th section hereof, until the whole cause has been decided in the Outer House it shall not be competent to present a reclaiming note against any interlocutor of the Lord Ordinary without his leave first had and obtained. . . ."

The A.S. 10th March 1870, enacts—sec. 1 —"That the 27th section of the said Act" (*i.e.*, Court of Session Act 1868) "shall be altered to the effect of substituting for the enactments thereof the following provisions:—At closing of the record the Lord Ordinary shall require the parties to state

whether they renounce probation, and . . . (3) if the parties are at variance as to whether there shall be proof, or as to what proof shall be allowed, or if they or any one of them shall maintain that one or more of the pleas stated on the record should be disposed of before determining on the matter of proof, the Lord Ordinary shall appoint the cause to be enrolled in a roll to be called the procedure roll, . . . and after hearing parties in the said roll, the Lord Ordinary shall pronounce such interlocutor as shall be just, and may either appoint proof to be taken, or dispose of such pleas on the record as he thinks ought to be disposed of at that stage. . . ."

Section 2 — "That the provisions of the 28th section of the said statute" (*i.e.*, Court of Session Act 1868) "shall apply to all the interlocutors of the Lord Ordinary hereinbefore referred to . . . so far as these import an appointment of proof or a refusal or postponement of the same."

On 21st January 1908 Henry Lamont & Company, steamship owners and agents, Glasgow, brought an action against the Dublin and Glasgow Steam Packet Company, Dublin, in which they sought decree ordaining the defenders (for whom they had acted as agents) to produce "a full and particular statement and account of the gross earnings of the defenders' company from 4th December 1878 until 30th November 1907, whereby the true amount due by them to the pursuers for commission thereon, and for rent of office and profit on Clyde dues," might be ascertained, or otherwise to pay to the pursuers the sum of £15,000, or such other sum as should be found to be the proper balance due.

The pursuers averred—"(Cond. 2) The agreement between the pursuers and the defenders regarding the pursuers' appointment and remuneration as agents was embodied in four letters. . . . By the said agreement the pursuers' remuneration for their services as sole agents in Glasgow, including the provision of office and staff and the guaranteeing of the freight, was to consist of the following:—(1) A commission of 3 per cent. on the gross earnings of the company; (2) an allowance of £100 per annum (afterwards reduced to £80 per annum) in consideration of the company receiving the use of the pursuers' office; and (3) the benefit or profit upon all Clyde dues on goods carried to Glasgow by the defenders' steamers was to belong to and be accounted for to the pursuers. . . ."

In answer the defenders stated—"(Ans. 2) Denied that the pursuers' remuneration under said letters was to be 3 per cent. on the gross earnings of the company. Explained that the commission was to be on the gross earnings of the steamers in the Glasgow and Dublin trade alone, for which ships the pursuers were acting as agents. Explained further that it has been upon this footing that a commission on gross earnings has all along been paid to the pursuers and their predecessors. Explained further, that the profit on Clyde dues, which the pursuers were to get, applied only to the profit on inward dues. . . ."

The pursuers pleaded, *inter alia*—"(1) The pursuers having acted as agents for the defenders in terms of the agreement founded on, and the defenders having failed though called upon to account to the pursuers for, and wrongfully and illegally withheld in their hands, the true balance due to the pursuers, decree should be pronounced against the defenders in terms of the first conclusion of the summons."

The defenders pleaded, *inter alia*—"(1) On a sound construction of the agreement libelled in Cond. 2 the pursuers' claims (1) and (3) as therein set out are irrelevant, and ought not to be permitted to probation. (2) The defenders having all along accounted to the pursuers for any balances due, fall to be assoilzied. (3) The payments made by the defenders to the pursuers having been accepted by them in full knowledge of the system in which the amounts were arrived at as a settlement of all claims competent to them, the pursuers are barred from pursuing this action, and the defenders fall to be assoilzied. (4) The pursuers being barred by *mora* from insisting in the present action, the defenders fall to be assoilzied therefrom."

On 13th March 1908 the Lord Ordinary (DUNDAS) allowed a proof before answer. On 23rd May the First Division recalled this interlocutor on the ground that the allowance of proof was premature, and remitted the case to the Lord Ordinary to proceed as accords. Thereafter on 4th June 1908 his Lordship pronounced the following interlocutor:—"The Lord Ordinary having heard counsel in the procedure roll, before answer appoints the defenders to lodge in process within three weeks the statement and account called for in the summons, and the pursuers to answer the said statement and account, if so advised, within three weeks thereafter."

The defenders reclaimed.

The respondents objected to the competency of the reclaiming note, and argued—The leave of the Lord Ordinary had not been obtained, and therefore the reclaiming note was incompetent. This was not an interlocutor allowing a proof, or postponing or refusing the same. It did not dispose of any pleas on the record. It therefore did not come within the Act of Sederunt of 10th March 1870, secs. 1 and 2, and the Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 28. It was a mere step in procedure in an action of accounting—*Carron Company* v. *Stainton's Trustees*, June 27, 1857, 19 D. 932—and required leave—Mackay's Manual, p. 294.

Argued for reclaimers—This was an interlocutor importing an allowance of proof as the lodging of the account therein mentioned virtually amounted to proof. The statements in the account would be conclusive evidence against the defenders, for they would be bound by their own statements, and was indeed the sole evidence

upon the basis upon which the pursuers desired an accounting, but upon which the defenders denied they were entitled to one. The reclaiming note therefore was competent—Court of Session Act 1868, sec. 28, A.S. 10th March 1870, sec. 2; *Little* v. *North British Railway Company*, July 4, 1877, 4 R. 980, 14 S.L.R. 608; *Quin* v. *Gardiner & Sons, Limited*, June 22, 1888, 15 R. 776. The liability to account was really the merits, and in ordering this account to be lodged the Lord Ordinary had prejudged the question at issue. The words "before answer" were unavailing, for the interlocutor virtually disposed of the first four pleas stated by the defenders. The Lord Ordinary should have allowed proof limited to the issue of liability to account and subject to the defenders' pleas (1) that they had already accounted, and (2) that the action was barred by *mora* being first disposed of.

LORD M'LAREN—This is a reclaiming note against an interlocutor of the Lord Ordinary ordering the defender to give in an account, and that account must necessarily be on the basis of the summons, because it is an action of accounting in which an account is claimed for gross profits. It is plain enough that an interlocutor in general terms which orders the account sued for to be put in does touch upon the merits of the case, and I can also sympathise with the objection that was made to the order that a man engaged in commercial business does not wish to have his books made the subject of investigation, or even to give in an account showing his whole profits for a series of years. Such an account is usually made up for the information of shareholders or partners, and there are obvious inconveniences resulting from its publication. But then, while there may be a little hardship in a particular case, we are dealing with rules of procedure, and we must remember that fixed rules are necessary, and that however carefully these rules are framed they must inevitably in some cases be attended with present hardship although without eventual prejudice to the case. I do not think there is any eventual prejudice, because at a certain stage every interlocutor is subject to review, and the whole merits of a case can be brought before the Inner House.

The objection to the competency is that this reclaiming note is taken without the leave of the Lord Ordinary. Unless an interlocutor disposes of the whole merits of the case, it cannot, as a rule, be reclaimed against without leave, and it cannot be said that this interlocutor disposes of the whole merits of the case, because the Lord Ordinary has neither dismissed the action nor given decree. It is said that the case falls within the provision of the 28th section of the Court of Session Act of 1868, and the relative Act of Sederunt, dated 10th March 1870. I think that whether we look at the Act of Parliament, or whether we look at the Act of Sederunt, it is equally clear that the right to reclaim without the leave of the Lord Ordinary was only intended to be given where the interlocutor reclaimed against made irrevocable findings touching inquiry into the facts of the case. If proof were allowed, or the case were sent to a jury, and the interlocutor was not reclaimable without leave, then it is perfectly clear that in the event of the Lord Ordinary refusing his leave, a certain amount of prejudice is incurred by the defender who is resisting a proof, because he is subjected to a very costly, and it may turn out useless, inquiry into the facts. But the same thing cannot be said regarding a preliminary disposal of legal questions, because although there may be an inconvenience in the meantime, there is not much expense, and the whole question can eventually be brought before the Court for review. In this case I think the provision of the Act of Sederunt is even clearer than the Act of Parliament, and of course it was intended to be an improvement on the Act of Parliament, the result of experience in the working of the Act. The provision in section 2 of the Act of Sederunt is that the provisions of the 28th section of the statute giving the right of review without leave shall apply "so far as these import an appointment of proof or a refusal or postponement of the same." There has not been a refusal or postponement of proof in this case—certainly not a refusal—and it cannot be said to be a postponement because the Inner House had already found that an order for proof in this case was premature. But, again, I do not think we can hold this to be an interlocutor necessarily importing an appointment of proof. I rather think the view of the Lord Ordinary is that if an account is given in he will be in a better position to judge as to how far proof is necessary, or how it is to be limited, than he would be at the present time. In fact, if proof were to be allowed at this stage, I do not see how the interlocutor could be framed except by an order in general terms, and that is the very thing which this Division of the Court has already decided against. I may say that but for the fact that there had been a former unsuccessful reclaiming-note causing a certain interruption in procedure, I think it is very likely the Lord Ordinary would have given leave to reclaim against the interlocutor now sought to be reviewed. At all events, he might in the exercise of his discretion have given leave to reclaim, but I presume that his acquaintance with the case had led him to think that it would not be to the benefit of either party to be allowed to reclaim, and we cannot interfere with his Lordship's discretion. Accordingly I move your Lordships that we should dismiss the reclaiming note.

LORD KINNEAR—I am of opinion that this is a reclaiming-note which cannot be entertained without the leave of the Lord Ordinary, and as the Lord Ordinary has refused to grant leave, it must necessarily be dismissed. If we had to determine the question arising on Mr Clyde's argument, I should think that it would have required serious consideration, and I have no doubt it did receive serious consideration from

the Lord Ordinary. But then, having considered it and disposed of it, he says it is not a fit case to bring before the Inner House, and we cannot interfere with his discretion on this point.

LORD MACKENZIE—I concur.

LORD PEARSON was absent.

The Court sustained the objection and refused the reclaiming note.

Counsel for the Pursuers (Respondents)—Scott Dickson, K.C.—Orr Deas. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders (Reclaimers)—Clyde, K.C.—Spens. Agents—J. & J. Ross, W.S.

Thursday, June 25.

FIRST DIVISION.

[Sheriff Court at Linlithgow.

RINTOUL *v.* DALMENY OIL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 13—*Dependants*—"*Wholly*" *Dependent*—*Dependent in Fact and Dependent in Law.*

In a claim by a widow for compensation for the death of her son it was proved that she had five sons including the deceased; that of these the deceased alone was unmarried; that for several years before his death she had lived with him and been entirely supported by him; that she did not, and could not, earn anything herself; that her other sons though able and liable to contribute to her support had not in fact done so.

Held that the claimant was wholly dependent on the deceased at the time of his death within the meaning of the Workmen's Compensation Act 1906.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 13, enacts:—"*Definitions.*—In this Act . . . 'dependants' mean such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death . . . 'Member of a family' means . . . mother . . ."

Mrs Jessie Hardie or Rintoul, widow, Church Place, South Queensferry, claimed compensation under the Workmen's Compensation Act 1906 from the Dalmeny Oil Company, Limited, Dalmeny, in respect of the death of her son George, a miner, who was fatally injured while in the defenders' employment, and upon whom she alleged she was at the time of his death wholly dependent.

The matter was referred to the arbitration of the Sheriff-Substitute at Linlithgow (MACLEOD), who awarded compensation.

A case for appeal was stated.

The *facts* as stated in the case were—"Including the deceased, the respondent had five sons — Peter, Thomas, George (deceased), William, and James, all of whom were working miners. Of these, deceased alone was unmarried. Of the other four (who all survive) Peter and Thomas have each a wife and nine children, most of whom are dependent on them. William has a wife and four children dependent upon him, and James has a wife and two children dependent on him. For several years before her deceased son's death the respondent had lived with him and been entirely supported by his earnings. She did and could earn nothing herself, and no one else contributed to her support. But though as matter of fact the respondent derived her whole support from her said son, during these same years her four other sons were all (*a*) able and (*b*) liable to contribute to her support, but her said deceased son had taken the whole burden of the respondent's support upon himself and was *de facto* her sole support, the others not in fact contributing."

The Sheriff-Substitute further stated—"I decided in law that the respondent was at the time of her said deceased son's death wholly dependent on his earnings, and accordingly I awarded her the sum of £300, there being agreement between the parties that that was the amount appropriate to my decision. Had I decided that the respondent was at the time of her said deceased son's death only in part dependent upon his earnings I would have awarded her £160."

The *questions of law* were—"(1) Was respondent wholly dependent upon the earnings of her said deceased son at the time of his death within the meaning of the Workmen's Compensation Act 1906? (2) Was respondent only partially dependent upon the earnings of her said deceased son at the time of his death within the meaning of the said Act?"

Argued for appellants — *Esto* that the question of dependency was one of fact—*Main Colliery Company* v. *Davies*, [1900] A.C. 358—the question remained, what was the test of dependency. The criterion was the obligation to support, not the fact of supporting. The respondent had other means of support, for her other sons were equally liable to contribute. That being so she was only "in part dependent" on the deceased — *Cunningham* v. *M'Gregor & Company*, May 14, 1901, 3 F. 775, at p. 778, 38 S.L.R. 574; *Turners Limited* v. *Whitefield*, June 17, 1904, 6 F. 822 (Lord Kinnear's opinion), 41 S.L.R. 631; *Sneddon* v. *Addie & Son's Collieries, Limited*, July 15, 1904, 6 F. 992, *per* Lord Moncreiff at p. 996, 41 S.L.R. 826; *Coulthard* v. *Consett Iron Company, Limited*, [1905] 2 K.B. 869, *per* Collins, M.R., at p. 872 foot. In *Coulthard's* case no support was given and yet the Court held there was total dependency. That showed that the obligation to support must be kept in view as well as the fact of actual support. The respondent, accordingly, could not be said to be wholly dependent on her deceased son.

Argued for respondent—The question of