

appear to the factor that there is strong expediency for granting abatement of rent, either temporarily or permanently, or for renewing or granting a lease for a period of years, or for draining or for erecting buildings and fences, or for otherwise improving the estate in a manner not coming within the ordinary course of factorial management, he shall report the same to the accountant, who may order any necessary inquiry, and shall state his opinion thereon in writing; and such report and opinion may be submitted by the factor to the Lord Ordinary with a note praying for the sanction of the Court to the measure proposed; and the Lord Ordinary shall, with or without further inquiry, report the matter to the Court, who, if they consider it expedient and consistent with due regard to the amount of the estate at the time, may sanction the measure, and the decision of the Court shall be final and not subject to appeal; and if the estate be held under entail it shall be lawful to the Court to authorise the factor to take proceedings for constituting a charge against the future heirs of entail and if any factor having charge of the estate of any lunatic or other person incapable of managing his own affairs shall deem it proper for the comfort or welfare of such person that the whole or a part of such estate should be sunk on annuity, he shall report the matter to the Accountant, who shall state his opinion thereon in writing, and such report and opinion shall be submitted by the factor with a note as aforesaid to the Lord Ordinary, who shall report the matter to the Court, and it shall be in the power of the Court to sanction the measure, and the decision of the Court shall be final and not subject to appeal; and in all other matters in which special powers are according to the existing practice in use to be granted by the Court, the Court shall have power to grant the same in like manner and form as is above provided."

This was a petition presented to the Court by John Fleming, writer, Glasgow, and others, for the appointment of a *curator bonis* to James Halliday. It appeared from the petition that the annual value of James Halliday's estate did not exceed £100.

By interlocutor of 5th July 1910 the Junior Lord Ordinary (DEWAR) appointed Henry Hamilton Fleming, chartered accountant, Glasgow, to be *curator bonis* with the usual powers, and meantime reserved the question of expenses.

On 22nd July 1910 the petitioners moved, before the Lord Ordinary officiating on the Bills in vacation, that they should be found entitled to the expenses of the petition as for an application in the Court of Session, and not merely as if made in the Sheriff Court in terms of the Judicial Factors Act 1880.

Argued for the petitioners—This application was necessarily made to the Supreme Court in order that the *curator bonis* might be in a position later to apply by note in the pending process for special powers to make up title to and sell the

ward's heritable estate. Power to sell was an extraordinary power and could only be granted by the Supreme Court—*Maconachie*, February 4, 1857, 19 D. 366, per Lord Curriehill at p. 371. Under the Judicial Factors Act 1880 the Sheriff, although he might appoint a *curator bonis* on a small estate, could not grant special powers other than those enumerated in section 7 of the Pupils Protection Act 1849, which did not include power to sell. It was therefore necessary, in order that the curator might be able to give an unexceptionable title to a purchaser, that the proceedings should be in the Court of Session.

The Lord Ordinary (CULLEN), without expressing any opinion, pronounced the following interlocutor:—"The Lord Ordinary on the Bills having heard the agent for the petitioners, finds the petitioners entitled to the expenses of the petition and procedure following thereon out of the curatorial estate, and remits the account thereof, when lodged, to the Auditor for taxation."

Agents for the Petitioners—H. B. & F. J. Dewar, W.S.

Friday, October 21.

FIRST DIVISION.

(SINGLE BILLS.)

INGLIS v. NATIONAL BANK OF SCOTLAND, LIMITED.

Process — Reclaiming Note — Competency — Interlocutor Approving of Auditor's Report and Decerning for Expenses — Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 53.

An interlocutor was pronounced by a Lord Ordinary assailing the defenders and finding them entitled to expenses, reserving as to modification if any. More than twenty-one days thereafter a subsequent interlocutor was pronounced approving of the Auditor's report and discerning for the taxed amount of expenses.

Held that it was competent to reclaim against this interlocutor within twenty-one days.

The Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 53, enacts — "It shall be held that the whole cause has been decided in the Outer House when an interlocutor has been pronounced by the Lord Ordinary which, either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or discerned for. . . ."

In this case, which was an action at the

instance of William Inglis, merchant, Bathgate, against the National Bank of Scotland, Limited, for repayment of the amount contained in a bill which the pursuer alleged had been paid, the Lord Ordinary (SALVESEN) on 22nd April 1910 pronounced this interlocutor—"Assoilzie the defenders from the conclusions of the actions: Finds the defenders entitled to expenses, reserving as to modification if any: Allows an account to be given in, and remits the same when lodged to the Auditor of Court to tax and report, and decerns."

No reclaiming note was presented against this interlocutor.

The Auditor having reported, the Lord Ordinary (DEWAR), on 19th July 1910, pronounced this interlocutor—"The Lord Ordinary approves of the report by the Auditor *ad interim* in the defenders' account of expenses, and decerns against the pursuer for payment to the defenders of the sum of £363, 6s., the taxed amount thereof."

The pursuer reclaimed against this interlocutor, his note being dated August 18, 1910, the first boxday in vacation.

The defenders objected to the competency of the reclaiming note, and argued—The interlocutor of 22nd April 1910 was a final interlocutor in the sense of the 53rd section of the Court of Session Act 1868 (31 and 32 Vict. c. 100), and if the pursuer intended to reclaim on the merits he should have done so within twenty-one days of its date—*Earl of Kintore v. Alex. Pirie & Sons, Limited*, October 21, 1904, 42 S.L.R. 5. The interlocutor reclaimed against contained no reclaimable matter and could not therefore be reclaimed against—*Stirling Maxwell's Trustees v. Kirkintilloch Police Commissioners*, October 16, 1883, 11 R. 1, 21 S.L.R. 1. If it could be, the reclaiming note should have been lodged within ten days.

Argued for pursuer—*Esto* that the expenses were not part of the merits, they were part of the subject-matter of the cause. That being so, the reclaiming note was competent, and it brought up all prior interlocutors—*Baird v. Barton*, June 22, 1882, 9 R. 970, 19 S.L.R. 731; *Crellin's Trustee v. Muirhead's Judicial Factor*, October 21, 1893, 21 R. 21, 31 S.L.R. 8; *Taylor's Trustees v. M'Gairgan*, May 21, 1896, 23 R. 738, 33 S.L.R. 569.

At advising—

LORD PRESIDENT—In this case Lord Salvesen on 22nd April 1910 pronounced an interlocutor assoilzieing the defenders and finding them entitled to expenses, reserving as to modification if any, and, the expenses having been taxed, Lord Dewar on 19th July approved of the Auditor's report and decerned against the pursuer for the amount of the taxed expenses. The pursuer has presented a reclaiming note against Lord Dewar's interlocutor, and the question which has been raised is whether that reclaiming note is competent.

In the argument at the bar it was urged that the cases of *Crellin's Trustee v. Muirhead's Judicial Factor*, October, 21, 1893, 21 R. 21, 31 S.L.R. 8; and *Earl of Kintore*

v. Pirie & Sons, Limited, October 21, 1904, 42 S.L.R. 5, were not reconcilable; but when these cases are closely examined I do not think that they will be found to be at all inconsistent. The rules as to reclaiming may not be strictly logical, but for practical purposes there is no doubt as to how the matter stands.

These rules can be stated very shortly. The first is that although in one sense there cannot be more than one final interlocutor in a case, yet in another sense there may be, because there may be an interlocutor which is not final according to the strict meaning of that term but yet is final in the sense of the statutory definition for the purpose of allowing it to be reclaimed against within twenty-one days without leave. This was the position in the *Kintore* case, and this was all that was decided there. The interlocutor in that case disposed of the merits of the cause but left over the matter of expenses for the purpose of modification. Now if anyone were asked whether, without reference to any statute, that was a final interlocutor, the answer would be "No," for something was still to be done—the expenses had to be dealt with. But then, according to section 53 of the 1868 Act, it was final, because that section provides that it shall not prevent a cause from being held as wholly decided that expenses have not been taxed, modified, or decerned for. Now the interlocutor in the *Kintore* case satisfied this definition, and accordingly the reclaiming note was held to be competent. That is the explanation of the case.

The next rule is that according to section 52 of the 1868 Act every reclaiming note has the effect of submitting to review the whole of the prior interlocutors in the case.

The third and last rule is one which does not depend on the precise provisions of any statute; and it is this, that where at the end of a case there is an interlocutor which is merely executorial, and does not represent the determination of any contention between the parties, that interlocutor cannot be reclaimed against. This rule is based on a series of decisions, of which *Stirling Maxwell's Trustees v. Kirkintilloch Police Commissioners* (October 16, 1883, 11 R. 1) is one. The typical example of a case falling under this rule is that in which one party has succeeded in the cause and has been found entitled to expenses and a remit is made to the Auditor, and then when the case comes back from the Auditor the Lord Ordinary pronounces an interlocutor approving of the Auditor's report and decerning for the taxed amount of the expenses. This last interlocutor cannot be reclaimed against, and the reason for this is just to prevent the statutory rule that a reclaiming note from an interlocutor brings up for review all the previous interlocutors in the case coming into operation, because if an executorial interlocutor could be reclaimed against, the result, under the rule, would be that the whole matter would be brought

up again when the whole contention between the parties had really ceased.

Now all this may not be strictly logical, and in certain cases there may be two courses open to a party in regard to reclaiming. I have no doubt that, as was quite properly decided in the *Kintore* case, the defenders in that case were entitled to reclaim although the matter of the modification of expenses had not been determined, but I have also no doubt that if they had not reclaimed then, but had allowed the case to go on, they could, under *Crellin's* case, have reclaimed against the interlocutor dealing with the modification of expenses, and this would have brought up for review the whole previous interlocutors.

The application of these rules is easy, and the result here is that there is a reclaimable interlocutor, and accordingly I think the case should be sent to the roll.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD ARDWALL, who was present at the advising, gave no opinion, not having heard the case.

LORD SALVESEN was sitting in the Second Division.

The Court repelled the objection.

Counsel for Pursuer (Reclaimer)—Mac-Robert. Agent—Allan M'Neil, Solicitor.

Counsel for Defenders (Respondents)—Hon. W. Watson. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, October 21.

FIRST DIVISION.

[Sheriff Court at Dundee.

THE DUNDEE STEAM TRAWLING COMPANY, LIMITED v. ROBB.

Master and Servant—Workmen's Compensation Act 1906 (8 Edw. VII, cap. 58)—Process—Appeal—Accident Arising out of and in Course of Employment—Failure by Arbitrator to State Facts on which his Finding was Based.

Circumstances in which the Court, on the failure of an arbitrator to state the salient points of the evidence on which his finding was based, used, of consent of parties, a transcript of the notes of evidence taken ex parte in the Court below, and reversed his decision.

Per the Lord President—"I must add that the entry 'contusion of chest' in the register of deaths proves, in the absence of the doctor, nothing as to its own correctness."

Mrs Elizabeth Dempster or Robb, Ferry Road, Dundee, widow of John Robb, engineer there, claimed compensation under the Workmen's Compensation Act 1906 from the Dundee Steam Trawling

Company, Limited, in respect of the death of her husband.

The Sheriff-Substitute (CAMPBELL SMITH) having awarded compensation, a case for appeal was stated.

The Case stated—"The following are the facts which the Sheriff-Substitute held as proved, viz., that the respondent's late husband John Robb, while working as an engineer in the employment of the defenders, and engaged in such employment on 2nd May 1909 cleaning with water and otherwise the boiler of the trawler 'Marion' belonging to the appellants, then lying in the Fish Dock, Dundee, sustained injuries to his chest through falling, and that in consequence of the injuries then sustained, and arising out of and in the course of his employment with the appellants, he died on 25th June 1909; that the average weekly earnings of the deceased during the three years next preceding the injury were £2, 4s.; that weekly payments amounting to £9, 18s. were made to or on behalf of the said John Robb; and that the respondent and her children, William and Christina, the children of her marriage with the said John Robb, were wholly dependent upon his earnings.

"The Sheriff-Substitute found that the injury from which the death of the said John Robb resulted arose out of and in the course of his employment with the appellants, and found the appellants liable in £290, 2s. of compensation, and awarded that sum accordingly, and found the appellants liable to the respondent in expenses."

The *question of law* was—"Whether, on the facts admitted and proved, I was entitled to hold that the deceased met his death through an accident arising out of and in the course of his employment?"

On 22nd February 1910 the appellants presented a note to the First Division in which they stated that the Sheriff-Substitute had refused to state a material question of law which was argued before him and which they had requested him to put before the Court. They set forth certain facts which they alleged had been admitted and which raised the question of law which he had refused to state and which they desired to submit on appeal, viz., "Whether there was evidence upon which it could competently be found that the said John Robb on 2nd May 1909 sustained injuries in consequence of which he died on 25th June 1909 by an accident arising out of and in the course of his employment?"

The appellants in their note prayed for an order on the respondent to show cause why a case submitting the above question to the Court of Session should not be stated by the Sheriff for the following reason, namely—That the question whether there was any legal evidence upon which it could competently be found that the said John Robb sustained injuries by an accident arising out of and in the course of his employment was clearly and definitely raised before the Sheriff, and was a question of law which the appellants were entitled to bring before the Court.

Counsel were heard on 13th May 1910