suer as a passenger travelling on their railway was then entitled to be, whereby his leg was injured, through the fault of the defenders—to his loss, injury, and damage?"

Damages laid at £250.

Agents for Pursuer—Murdoch, Boyd, & Co., S.S.C.

Agent for Defenders—Stodart Macdonald, S.S.C.

Thursday, Feb. 14.

FIRST DIVISION.

MARSHALL *v.* WINK AND WOTHERSPOON.

Bankruptcy — Appeal — Competency—Process. A party having appealed against a trustee's deliverance *rejecting* his claim to a fund, objection to the competency of the appeal that there was no appeal against another deliverance *sustaining* the claim of another party to the same fund repelled.

This was a question arising in a competition to be preferentially ranked on a sum of £200, belonging to the sequestrated estate of Archibald Livingston, writer in Glasgow. The parties to the competition were John Marshall, S.S.C., and William Wotherspoon, S.S.C. Mr Wink, the trustee, sustained Mr Wotherspoon's claim, and by another deliverance rejected that of Mr Marshall. Mr Marshall thereupon appealed to the Lord Ordinary the deliverance of the trustee rejecting his claim. The trustee pleaded :—

"1. The fund *in medio* being exhausted by the deliverance in favour of Mr Wotherspoon, and the appellant not having appealed that deliverance which is now final, the present appeal is incompetent and should be dismissed.

"2. At least the deliverance in Mr Wotherspoon's favour is *res judicata*, in reference to the fund in dispute.

"3. The appellant not having made Mr Wotherspoon a party to the present appeal it is incompetent; at least the appellant is bound to call Mr Wotherspoon as a party and dispute his preference with him."

The Lord Ordinary (Mure) repelled the first plea-in-law for the respondent, and, before further answer, appointed the cause to be intimated to Mr Wotherspoon.

The trustee reclaimed.

The Court, after hearing the counsel for the appellant and trustee, before answer, appointed intimation to Mr Wotherspoon, who appeared and sisted himself, and was thereafter heard by counsel, not only on the competency of the appeal but also on the merits of the dispute betwixt him and Mr Marshall, which involved very delicate and difficult questions as to the effect of an inhibition and the extent of a right of hypothec.

To-day, after having taken time to consider, the Court adhered to the interlocutor of the Lord Ordinary, repelling the first plea-in-law for the respondent, and, as a consequence thereof, they also repelled the second and third.

LORD PRESIDENT—This case is before us along with an appeal against a judgment of a trustee on a sequestrated estate, by which he has rejected a claim of preference made by the appellant Mr Marshall. He has complained of that judgment, and an objection has been taken to the appeal, on the ground that while the appellant's claim was rejected, a claim by Mr Wotherspoon had been sustained, that that claim exhausted the fund, and that the judgment in regard to it had not been appealed and was now final. Mr Marshall says he has appealed the judgment which particularly concerned him, and that that is sufficient to entitle him to have it reviewed. But the trustee, who very properly appeared in the proceedings, takes the objection expressed in his first plea in law.—[Reads.] It was impossible, when that plea was stated, to have brought the judgment sustaining Mr Wotherspoon's claim under appeal, for the statutory period for doing so had elapsed. The Lord Ordinary repelled this plea, and appointed intimation to be made to Mr Wotherspoon. By dealing with the matter in that way, there would be in the field the trustee and also Mr Wotherspoon, who is said to have a special interest in the judgment he had obtained. Mr Wink has reclaimed against that interlocutor. It appeared to us that the proper course to adopt was to have intimation made to Mr Wotherspoon that he might appear if so advised, and accordingly we pronounced an order to that effect before answer. He has appeared and sisted himself, and we have heard counsel for him both on the competency of the appeal and on the merits of the question with Mr Marshall. The discussion on the merits raised a question as to the effect of an inhibition and the nature and extent of a claim of hypothec. I think the first thing we have to do is to deal with the interlocutor of the Lord Ordinary. Now, as to the first plea, we are all of opinion that the Lord Ordinary did what was right, and we are of opinion, further, that the plea is not well founded. We think the appellant did all that was absolutely incumbent upon him under the statute when he brought his own case here. If it was necessary to do more, it might sometimes be necessary to bring appeals in regard to all the creditors on an estate. That is clearly not the meaning of the statute. I think that necessarily disposes of the respondent's 2d and 3d pleas also.

The Court accordingly repelled the first three pleas, and continued the case *quoad ultra*, in order that the parties might furnish the Court with information in regard to certain matters explained to them.

Counsel for Mr Marshall—Lord Advocate and Mr Johnstone. Agents—Marshall & Stewart, S.S.C.

Counsel for Mr Wotherspoon—Mr Gifford Agents—Wotherspoon & Mack, S.S.C.

Counsel for Trustee—Mr Scott. Agent—John Walls, S.S.C.

AIKMAN *v.* AIKMAN.

Process—Reponing Note—Competency. Objection to the competency of a reponing note against a judgment by default in not lodging issues, that the interlocutor ordering the issues was not prefixed, *repelled*; but *observed* that the omission was an irregularity.

This was a reclaiming note against an interlocutor assoilzieing the defenders "in respect of the failure of the pursuer to lodge an issue or issues in terms of the preceding interlocutor of 24th January last."

MARSHALL, for the defenders, objected to the competency that the interlocutor of 24th January was not prefixed to the note as well as the interlocutor assoilzieing the defenders, as required by Act of Sederunt, 11th July 1828, sec. 110.

PATTISON, for the pursuer, replied that what was desiderated by the defenders was not required by the Act of Sederunt; at all events, the want of it did not amount to incompetency.

The LORD PRESIDENT—There is no doubt that

the want of this interlocutor amounts to an irregularity, but I don't think it creates incompetency.

The Court remitted to repone on payment of expenses.

Agent for Pursuer—William Mackersy, W.S.

Agents for Defenders—Mackenzie, Innes, & Logan, W.S.

FAULDS *v.* ROXBURGH.

Partnership — Recompense — Salary — Count and Reckoning. Held by Lord Barcaple, and approved of, that a partner is not entitled to claim a salary on the ground of recompense alone. Held that, in a count and reckoning, parties were not bound to state their respective claims in detail. Terms of a record which held not exclusive of a claim for salary based on agreement.

The pursuer and defender, in the end of the year 1842, entered upon a joint adventure for the working of a colliery. The defender took the entire management of the business during the period the joint adventure was carried on. In 1863 the pursuer brought the present action, calling upon the defender to count and reckon with him with regard to his intromissions with the property and profits of the concern. After a record had been made up and closed, the Lord Ordinary (Barcaple) remitted to an accountant to make up a state of accounts. Before the accountant, the defender claimed to retain a sum in name of salary for his superintendence.

The accountant made an interim report to the Lord Ordinary with respect to a variety of matters which had been disclosed as claims and otherwise before him.

When the case came before the Lord Ordinary, both parties were agreed that proof would require to be led with regard to certain of the claims. The defender asked to be allowed a proof with regard to his claim for salary. He alleged that, although there had been no arrangement made at the commencement of the joint adventure with regard to salary, during the currency of the first year thereof, he and the pursuer had had communings on the subject, which had resulted in a verbal agreement that he was to be paid a reasonable remuneration for his superintendence and management of the business, and that the amount of it was to be fixed according to the usage in the trade. He offered to put in a minute to this effect.

The pursuer objected to the defender being allowed to prove the agreement alleged, in respect (1) the fact of there having been such was contradicted by his statements on record; and (2) that the case made on record was such as to show that he had no legal claim for salary.

The portions of the record founded on were as follow :—

"Cond. 1. About the end of the year 1842, the defender, William Roxburgh, who was then a coalmaster at Glenduffhill, proposed to the pursuer to take a joint lease of the coal upon the lands of Greenfield as a joint adventure for their mutual behoof. To this proposal the pursuer assented. It was part of the arrangement that the pursuer and defender were to have equal interests in the concern, but the defender was to take the entire management of the working of said colliery and sales of the coal or other minerals put out, and generally to act as manager for behoof of the joint concern. For such management the defender was not to receive any special remuneration beyond his interest in the profits of the concern, the firm being indebted to the pursuer for assistance and advice given by him at the outset and throughout the course of the partnership, and for his influence with the trade. No written agreement or contract was executed between the parties. The defender's counter statements are denied in so far as inconsistent with the pursuer's statement."

"Ans. 1. Admitted that in the year 1842 the pursuer and defender took a joint lease of the coal in the lands of Greenfield for the purpose of working the same in copartnership; that they were to be equally interested in the profits and losses, and that there was no written contract. It is also true that in point of fact the defender took the entire trouble and management of the concern, but there was no understanding or undertaking, and no obligation upon him to do so, and he claims a reasonable compensation for his services, and credit for disbursements for the necessary assistance. *Quoad ultra* denied."

The Lord Ordinary, while allowing the parties a proof with regard to certain other matters not specially condescended upon on record, found that the defender had not set forth any relevant or sufficient ground on which he could be entitled to charge or take credit for a salary, and that his claim for such fell to be disallowed in the accounting. His Lordship added a note, in which he explained the grounds of his judgment, the portions of which applicable to this matter are as follow :—

"*Note.*—The pursuer pressed for a judgment on the relevancy and legal merits of the defender's claim for salary. In an action of count and reckoning of this kind, in which the record, especially on the part of the defender, is naturally in very general terms, and bears little reference to the details of the accounting, the Lord Ordinary would not have been disposed to treat this as a mere question of relevancy of averment, if the defender had stated that he had other grounds for the claim besides those indicated on record; as, for instance, that the salary was regularly placed to his credit, or entered as drawn by him in the books of the concern. But the defender does not allege that he has any ground for this claim beyond what is set forth in record, viz., that he took the entire trouble and management with no understanding or undertaking and no obligation upon him to do so. It is upon this ground alone that he claims a reasonable compensation for his services. The Lord Ordinary thinks that such a claim is contrary to well-established principle in the law of partnership. A partner is not entitled to a salary for his trouble in managing the business on the mere ground of recompense; and it will not entitle him to claim a salary on that ground that he has had the sole management. The Lord Ordinary is of opinion that such a claim must be rested upon specified grounds of express or implied agreement, and that such agreement cannot be inferred from the mere circumstance of one partner having taken the sole management."

Against this interlocutor the defender reclaimed, and asked to be allowed a proof with regard to the salary, and, if necessary, that the record should be allowed to be amended or a minute to be given in in reference thereto.

After hearing counsel, their Lordships recalled the Lord Ordinary's interlocutor in so far as it dealt with the claim for salary, and before answer allowed the defender the proof asked, reserving all questions as to expenses.

Their Lordships held that there was a considerable difference between actions of count and reckoning and other actions in regard to what was