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

required to be stated on record — that it was neither necessary nor expedient that the claims of parties should be set forth in detail, and that it was not necessary to read the portions of the record, founded on by the pursuer as excluding the claim, in so strict a way as to give them such effect, and that they were to be read in the light of those to which they were an answer. Their Lordships expressed their concurrence with the views of the Lord Ordinary upon the claims of partners to remuneration for services, and the grounds on which such must be based.

Judgment accordingly.

Counsel for the Pursuer—Mr Gifford and Mr Orr Paterson. Agents—J. & A. Peddie, W.S.

Counsel for the Defender—Mr Shand and Mr MacLean. Agent—W. Mitchell, S.S.C.

Friday, Feb. 15.

FIRST DIVISION.

PET.—MACKENZIE OR BRODIE.

Judicial Factor—Parish Minister. The Court will not appoint a parish minister a judicial factor.

Process—Petition. When an estate is small, the appointment of a factor and authority to make up titles may be asked in one petition.

This petition for the appointment of a judicial factor was reported by Lord Mure (1) because the person proposed to be appointed was a parish minister; and (2) because the petition for the appointment contained also a prayer for authority to make up titles to certain heritable subjects. His Lordship stated that the Court were not in use to appoint parish ministers to such an office; and, in regard to the second point, that although an application for authority to make up titles was generally the subject of a separate application, there were cases in which it had been held competent, as the estate was small, to combine it with the application for the factor's appointment.

BIRNIE, for the petitioner, cited Kirk, 14 S. 814, and Campbell, 12 D. 913, as cases in which parish ministers had been appointed. The estate was trifling, and the minister would act without remuneration.

The Court expressed their unwillingness to multiply precedents for appointing parish ministers, and another person was accordingly suggested and appointed. In regard to the other point, they thought that in this case the appointment and the authority to make up titles might be granted under the same application.

Agents for Petitioner—G. & J. Binny, W.S.

Saturday, Feb. 16.

FIRST DIVISION.

MACKAY *v.* M'CULLOCH.

Process—Reclaiming Note—Lodging—A. S. 24th Dec. 1838. A reclaiming note against an interlocutor refusing a note of suspension must be marked as lodged by the clerk to the process within fourteen days.

This was a reclaiming note against an interlocutor pronounced in the Bill Chamber refusing a note of suspension. It had been boxed and marked as boxed within the reclaiming days, but it was not presented to the clerk of the process to be marked as lodged until after they had expired. The clerk having refused to receive it,

W. N. M'LAREN, for the reclaimer, moved the Court to allow it to be received.

MACLEAN, for the respondent, objected.

The Act of Sederunt 24th Dec. 1838, sec. 5, provides, in regard to reclaiming notes of the kind in question, that they "shall be intimated to the agent of the opposite party and clerk of the bills, and in time of session be duly marked and boxed within fourteen days from the date of the interlocutor reclaimed against."

The Court had no doubt that the marking referred to in the Act of Sederunt was the marking by the clerk to the process, and that the marking by the boxing clerk did not satisfy the provision. They therefore refused to write on the reclaiming note.

Agent for Reclaimer—J. M. Macqueen, S.S.C.

Agent for Respondent—John Ross, S.S.C.

HOUSE OF LORDS.

Monday, Feb. 11.

LORD ADVOCATE *v.* HUNT.

(In Court of Session, 3 Macp. 426.)

Property—Bounding Charter—Barony—Parts and Pertinents—Prescriptive Possession. In an action to have it declared that the ruins of the Royal Palace of Dunfermline and the ground on which they stand belong to the Crown, the defender pleaded prescriptive possession following upon a bounding charter, or otherwise upon a barony title with parts and pertinents. Held 1. (aff. Court of Session) that the ground claimed was not embraced within the boundary title; and 2. (rev. Court of Session) that although the defender had been in possession for the requisite period, it was not proved that he had possessed the subject as a part and pertinent of the barony.

This is an appeal from an interlocutor of the First Division of the Court of Session, assoilzieing the respondent from the conclusions of a summons in an action raised against him by the Lord Advocate on behalf of the Commissioners of her Majesty's Woods and Forests. Those conclusions were to the effect that it should be found and declared that Mr Hunt had no legal right or title to certain pieces of land enumerated and described in the summons, and situate in the vicinity of the Abbey of Dunfermline. The only conclusion, however, ultimately persisted in was that which related to the piece of ground on which stand the ruins of the royal palace. The abbey or monastery of Dunfermline had very extensive properties, which were partly appropriated to the Crown and partly made over to private families. The lordship of Dunfermline, which appears to have included the royal palace, was annexed to the Crown by the Act 1593, c. 189. In the year 1589, James VI., on his marriage, made a grant of the lordship to Queen Anne of Denmark, which was confirmed by Parliament by the Act 1593, c. 190. A second charter of the lordship was granted by the King in 1593, in favour of Queen Anne and the heirs lawfully procreated, or to be procreated, of the marriage between her and the King, whom failing, to the King's heirs and successors whatsomever to the Crown of Scotland; and this charter was ratified by Parliament