and if he plead not guilty, or if the Court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted, the Court may proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to enquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last mentioned inquiry."

ASHER, A.-D., in reply, maintained that the alteration in practice, if any, introduced by the Act of 1871, section 9, applied and was intended to apply wholly to England; and farther, that the objection, even if a good one, had been raised too late.

LORD COWAN—I am of opinion that we should repel this objection, and that for several reasons.

Firstly, It is not one which can be entertained at this stage of the proceedings. If there is any ground for it at all, it should have been taken at the time of pleading to the libel. No objection was taken to the relevancy of the indictment, and none to the course then taken by the Court; the whole case is now in the hands of the jury, and cannot now be partially withdrawn from them. In this particular case, therefore, the objection comes too late. The objection itself is ingenious, and I will not say that there is not something in it; and therefore I will not confine myself to the present case, but will endeavour to deal with it generally.

Secondly, then, the Act came into operation in November 1871, and there have been many cases both in the High Court and on Circuit in which the old and invariable practice has been followed, and no change made as proposed by the panel's counsel. We have thus a precedent in maintaining the established practice, from which I should be slow to depart without clear authority.

And thirdly, the Act 24th and 25th Vict., referred to in the late Prevention of Crimes Act, 1871, contains an express provision that it shall not be held as extended to Scotland. That being so, I consider that there is nothing in the Act of 1871, and in the particular clause with which we are dealing, which can be construed as extending the provisions of 24 and 25 Vict. in any way to Scotland. Unless there had been an express provision in the recent Act that the whole previous procedure in Scotland in this respect was to be changed, I cannot allow a mere ambiguous expression or reference to upset the practice established through such a length of time. The practice in England is, and always was, quite different, and it could never have been the intention of the Legislature to make them uniform in such a manner as this.

On these grounds I think the objection should be repelled.

LORD NEAVES—The consistent course would have been to raise this question at the beginning of the trial. We might then have taken any course we liked regarding it,—now we are tied down by the whole case having been sent to a jury. But I do not, however, object to take the question on the general ground. The statute 24 and 25 Vict. c. 96, by express provision does not apply to Scotland. I cannot indeed look upon that as entirely excluding the idea that the legal procedure in Scotland might be affected by a reference to a portion of this Act in a subsequent statute. But the intention thus to alter would require to be very clearly expressed. For instance, the 116th section of 24 and 25 Vict. commences with a provision as to the libelling of previous convictions, and as to what previous convictions shall be held aggravations. But it is quite clear that the reference to the Act of 1871 does not in consequence render for the future any crime an aggravation of any other crime, contrary to existing practice in Scotland. Then follow provisions as to the laying proof of previous convictions before the jury. Not a word, however, is said in the Act 1871 which would extend the latter provisions to Scotland any more than the former. I cannot therefore think that any part of this section was intended to alter the practice in Scotland.

It is true the 9th section of the Act 1871 is based on the definition of crime in section 20 of that Act, which applies to Scotland as well as England. But I can perfectly well see a construction of the 9th section which shall consist with the idea that the 9th section itself does not apply to Scotland. The section applies to England, but it may be intended by its reference to the definition of the expression crime, to enable the Crown in an English prosecution to libel a previous conviction obtained in Scotland. It has been found in the High Court here, that a crime committed in England may be charged as an aggravation of a subsequent one in Scotland, and the intention may have been to extend such a practice to the sister country. Accordingly, as I can see no authority for extending the application of this section, I think, with your Lordship, that the objection, even if taken at a proper time, ought to be repelled.

COURT OF SESSION.

Tuesday, May 14.

FIRST DIVISION.

LAMOND'S TRUSTEES *v.* CROOM.

(*Ante*, vol. viii, p. 412.)

Process—Reclaiming-Note—Judicature Act (6 *Geo. II, c.* 120) § 17—*Court of Session Act,* 1868 (31 *and* 32 *Vict. c.* 100) §§ 53 *and* 54.

A reclaiming-note against three interlocutors, which together disposed of the whole merits of a cause, and by the last of which parties were appointed to be heard on the question of expenses, *refused* as incompetent, in respect that it was presented without leave of the Lord Ordinary.

The cause having, by interlocutor of 8th March 1871, been remitted to the Lord Ordinary (MACKENZIE), his Lordship pronounced three successive interlocutors, dated 1st August, 17th November, and 1st December 1871, in which he finally determined the fund *in medio,* and (by the interlocutor

of 1st December 1871) appointed parties to be heard on the question of expenses.

Mr Croom reclaimed.

SOLICITOR-GENERAL, for him, was proceeding to object to certain findings by the Lord Ordinary, and also to move the Court to dispose of the question of expenses, when the Court suggested the question, whether the reclaiming-note was competent under sections 53 and 54 of the Court of Session Act, 1868, seeing that it was presented without leave of the Lord Ordinary.

The case of *Bannatine's Trs.* v. *Cunninghame*, Jan. 12, 1872, *ante*, p. 209, was referred to.

At advising—

LORD PRESIDENT—There are three interlocutors prefixed to this reclaiming-note, and intended to be brought under review. It is not said that either of the first two interlocutors can be brought under review without leave of the Lord Ordinary, but it is contended that the third interlocutor can be reclaimed against without leave, and has the effect of bringing up the other two. Whether the interlocutor of 1st December 1871 can be brought under review without leave is an important question in practice, which depends mainly on the construction of section 53 of the Court of Session Act, 1868. What the Lord Ordinary has practically done is to decide the merits of the competition apart from the question of expenses. As regards the merits of the cause, apart from the expenses, this is a complete interlocutor. If the interlocutor is adhered to, there can be no further procedure on the merits. But the question of expenses has not been decided. The 17th section of the Judicature Act directs the Lord Ordinary to dispose of the merits and expenses by the same interlocutor. This enactment has been interpreted in practice as entitling the Lord Ordinary to reserve the question of expenses. The effect is to separate the final judgment into two. Until both have been disposed of, there is not a final judgment within the meaning of section 17 of the Judicature Act. When the merits have been disposed of, and parties appointed to be heard on the question of expenses, is it competent to reclaim without leave? The objection is, that the interlocutor reclaimed against is not an interlocutor disposing of the whole cause. Then comes section 53 of the Act of 1868. The phraseology is so distinct as to make it impossible to get over it. "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;" (*i.e.*, when the Lord Ordinary finds it unnecessary to decide certain questions); "but it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or decerned for." It is further important to observe that this very 53d section contemplates that a final judgment may consist of more than one interlocutor. If the party had waited till the question of expenses had been disposed of, he would have been entitled to present a reclaiming-note against the interlocutor disposing of expenses, which would have brought up the previous interlocutors. But he has stepped in and reclaimed against the first half of the final judgment, before the second part is pronounced. The natural reading of the 53d section of the Act of 1868, and reason and expediency, are all in favour of construing this reclaiming-note as incompetent.

LORD DEAS—I am of the same opinion, and I consider that the judgment is very important and wholesome. This reclaiming-note would have been quite competent after the Lord Ordinary had disposed of the question of expenses. I think that at this stage it is incompetently presented under section 53 of the Court of Session Act, 1868. This is much strengthened by the enactment of the Judicature Act, that the Lord Ordinary shall decide the question of expenses at the time he disposes of the merits. The object of the enactment is obviously that he shall decide the question of expenses while the case is fresh in his recollection. The only relaxation is that he may reserve the question of expenses. It is clear enough that if we held this reclaiming-note competent, one great object of the Act would be defeated, which is to diminish litigation, and to prevent lawsuit within lawsuit without end. In many cases it may be expedient to reclaim before the question of expenses is decided, but the statute makes the Lord Ordinary sole judge of the expediency.

LORD ARDMILLAN—I do not think this point is decided by the case of *Bannatine's Trustees* v. *Cunninghame*, but I consider that the view which your Lordships take is the legitimate result of that decision, and the correct interpretation of section 53. There are three possible cases. There may be a judgment finding no expenses due. That, of course, is a final judgment. Next, there may be a judgment finding expenses due, but without a decerniture. This case is specially met by section 53 of the Act of 1868. Thirdly, the judgment may reserve the question of expenses, or, which is equivalent, appoint parties to be heard thereon. In this case the proper time to reclaim is after the question of expenses has been decided.

LORD KINLOCH—I concur. It is clear that the Act of 1868 intended that the matter of expenses should be decided as well as the merits before the party is entitled to reclaim as a matter of right. It is inexpedient that one of the parties should be entitled to take the case out of the Lord Ordinary's hands. No doubt he may obtain leave to reclaim if the Lord Ordinary thinks fit. But no leave has been asked or obtained in this case.

The Court pronounced the following interlocutor;—Refuse the reclaiming-note as incompetent, in respect it is presented without leave of the Lord Ordinary, and, in respect the interlocutor of 1st December 1871, though disposing of the merits of the competition, does not dispose of the expenses of process; reserve the expenses of this reclaiming-note to be disposed of by the Lord Ordinary along with the other expenses of process.

Agents for Lamond's Trustees—J. & R. Macandrew, W.S.

Agent for Mr Croom — Laurence M. Macara, W.S.