Saturday, October 21.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

LATTA *v.* CRELLIN.

Process — Reclaiming-Note—Competency—Interlocutor, whether Final—Expenses—Court of Session Act 1868, *sec.* 53.

Section 53 of the Court of Session Act 1868 provides—"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. . . . 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 decerned for."

On June 22, 1893, the Lord Ordinary pronounced an interlocutor disposing of the whole merits of an action, and finding the pursuer entitled to expenses, "reserving till after taxation the question whether any, and if so what, modification should be allowed in respect of the ascertainment of the amount of the legitim fund; allows an account," &c. No reclaiming-note was taken against this interlocutor. On July 14th the Lord Ordinary pronounced an interlocutor in which he approved of the Auditor's report on the pursuer's account, and having heard counsel on the question of modification, he modified the same and decerned against the defender for the balance of the taxed amount. Within twenty-one days the defender reclaimed. The pursuer objected to the competency of the reclaiming-note, as the interlocutor of June 22nd was the final interlocutor, and that of July 14th was only executorial.

The Court, after consultation with the Judges of the First Division, *held* that the reclaiming-note was competent, as the Lord Ordinary had reserved a part of the case for subsequent discussion.

In this case James Basil Crellin, the pursuer, was found entitled to claim legitim out of the estate of the late Charles Muirhead, upon whose estate John Latta was factor. Upon 9th March 1893 the Lord Ordinary (WELLWOOD) pronounced an interlocutor in which after certain findings he remitted to an accountant to fix the amount of the legitim to be paid. Upon 22nd June 1893 his Lordship issued an interlocutor by which he "decerns and ordains the defender to make payment to the pursuer of the balance, being £1234, 14s. 6d., together with interest at the rate of five per cent. per annum on the sum of £523, 2s. 6d. from the 31st of December 1892 till date of settlement: Finds the pursuer entitled to expenses, reserving till after taxation the question whether any, and if so what, modification should be allowed in respect of the ascertainment of the amount of the legitim fund: Allows an account to be lodged, and remits the same to the Auditor to tax and report."

The defender did not reclaim against this interlocutor.

Upon 14th July 1893 the Lord Ordinary pronounced this interlocutor:—"Approves of the Auditor's report on the pursuer's account of expenses, and having heard counsel on the question of modification, modifies the same to the extent of £14, 5s.: Decerns against the defender for payment to the pursuer of the sum of £166, 6s. 2d. sterling, being the balance of the taxed amount of said account."

Section 53 of the Court of Session Act 1868 provides—"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. . . . 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 decerned for."

The defender reclaimed upon 17th August 1893.

The pursuer objected to the competency of the reclaiming-note.

The interlocutor of 22nd June 1893 was a final judgment, and should have been reclaimed against in 21 days. The subsequent interlocutor was merely executorial, disposing of the expenses, and could not be reclaimed against except perhaps as to the amount of the modification, £14, 5s. The Court of Session Act 1868, sec. 53, expressly decided that it could not be held that a cause was not finally decided because the expenses "if found due had not been taxed, modified, or decerned for"—*Stirling Maxwell's Trustees* v. *Kirkintilloch Police Commissioners*, October 16, 1883, 11 R. 1; *Tennents* v. *Romanes*, June 22, 1881, 8 R. 825; *Thompson & Company* v. *King*, January 19, 1883, 10 R. 469; *Cowper* v. *Callender*, January 19, 1872, 10 Macph. 353; *Cruickshank* v. *Smart*, February 5, 1870, 8 Macph. 512.

The defender argued—This was a competent reclaiming-note. The whole questions of the case had not been decided, and the interlocutor reclaimed against was not merely executorial, because the Lord Ordinary reserved the question of modification, and exercised his discretion regarding it after hearing counsel. This case fell under the exception stated by the Lord President in the case of Stirling Maxwell (cited *supra*). The case was ruled by *Baird* v. *Barton*, June 22, 1882, 9 R. 970.

At advising—

LORD JUSTICE-CLERK—In this case we have had an opportunity of consulting our brethren of the other Division, and are of opinion, that, without trenching upon the judgment in the case of *Stirling Maxwell*, the Judge in the Outer House having applied his mind to a question which had not been previously considered, viz., the modification of expenses, the reclaiming-note is competent and must go to the roll.

LORD YOUNG—Our decision is put entirely upon the ground of the modification of expenses, but it must be understood this reclaiming-note brings up all previous interlocutors.

LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court sent the case to the roll.

Counsel for the Reclaimer — Wallace. Agent—Geo. M. Wood, S.S.C.

Counsel for the Respondent—C. K. Mackenzie — Peddie. Agents — Macandrew, Wright, & Murray, W.S.

Saturday, October 21.

SECOND DIVISION.

[Sheriff of Ayrshire.

CUNNINGHAM *v.* THE AYRSHIRE FOUNDRY COMPANY, LIMITED.

Process—Appeal for Jury Trial—Reparation—Wrongous Dismissal—Discretion of Court—Judicature Act (6 *Geo. IV. cap.* 120.)

A servant dismissed by his employers sued them in the Sheriff Court for the balance of a year's wages, alleging that he had been engaged for that term. The defenders alleged that the engagement was weekly, and that the pursuer had failed to do his work properly. The action was removed to the Court of Session for jury trial under the 40th section of the Judicature Act.

The Court in the exercise of their discretion (*dub.* the Lord Justice-Clerk) refused to send the case to a jury, and remitted it to the Sheriff Court for proof, on the ground that the question was not assessment of damages, but only of resting-owing.

In April 1893 James Cunningham, a steel smelter in Glasgow, brought an action in the Sheriff Court of Kilmarnock, against the Ayrshire Foundry Company, Limited, for two sums of £220 and £30, being respectively the balance of an alleged yearly engagement and the rent of a house. He averred that he had been in the defenders' service at a wage of £4, 10s. a-week and left it, and that upon 22nd November 1892 a director and over-manager for defenders requested him to "return to their employment, and offered in that event to give him a year's fixed engagement with a salary of £5 per week of six shifts upstanding, *i.e.*, whether there was work for him or not;" that this director agreed to pay the rent of a house at Stevenston, where the defenders' works were situated; and that this engagement was agreed to by the defenders. He accordingly went back to Stevenston and worked there till 10th January 1893, when he was dismissed. The defence was a denial of the yearly engagement, and averments that the engagement was weekly, and that the pursuer had been discharged for gross carelessness in allowing the steel furnace to get into a disgraceful state.

The Sheriff-Substitute (HALL) allowed parties a proof of their respective averments. The pursuer appealed to the Court of Session for jury trial under the 40th section of the Judicature Act. Issues for the trial of the case were ordered.

The respondent now objected to the case being sent to jury trial, and argued—This was not a proper case for jury trial. There was no question of assessment of damages. It was simply a question whether the pursuer had done his work properly.

The appellant argued—This was a case where the appellant had suffered damage through breach of contract, and such cases were always sent to jury trial. The sum at stake was much larger than was usual in cases of damages, but the principle was that where damage had resulted the pursuer was entitled to jury trial—*Groom* v. *Clark*, May 18, 1859, 21 D. 831.

At advising—

LORD YOUNG—It was formerly an important question whether in appeals from the Sheriff Court under this section with a view to jury trial, the Court had a discretion to refuse to send any individual case for trial by jury, and might, if it thought that was the proper course, send it back to the Sheriff Court for proof; that was an important question, but it has been settled in both Divisions that the Court has such a discretion and that we are bound to exercise our discretion in each case.

We have usually exercised our discretion by sending the case for jury trial, but several times we have used it exceptionally, when we thought that it was not a proper case for jury trial, by sending it back for proof in the Sheriff Court. In my opinion we should properly exercise our judgment by sending this case to the Sheriff Court for trial. In England this discretion is expressly given by statute. It is a right given by statute that a case begun in the County Court may be appealed to the High Court of Justice, but there is a discretion given to the High Court if, they think any individual case to be more fit for trial in the County Court, to send it there for trial. Therefore the discretion we have got by construction of the statute is expedient, and is in accordance with the statutory discretion given to English Judges.

If we should adopt the other view, I think it is plain enough that every domestic servant who thinks he or she has been wrongously dismissed might bring an action in the Sheriff Court for the amount of his