ordinary course, the Sheriff would have had first of all to hear parties on this plea and then dispose of it. From the interlocutor it appears that the parties agreed that the facts should first be ascertained by way of proof before this plea was determined. The present appeal is intended to upset this arrangement, for the pursuer now asks us to settle an issue and send the case to a jury. I do not see how the defender could be allowed to appeal (as is sometimes done under the 40th section) in order to have the action thrown out on relevancy without a breach of the arrangement that the evidence should be led before this question was determined, and both parties must be free, or neither.

I hope I have made it plain that my judgment rests on the words in the interlocutor, "of consent, before answer." I am for dismissing the appeal.

LORD ADAM—I concur.

LORD M'LAREN—My first impression was that no apparent distinction could be taken between an interlocutor proceeding upon a consent and an interlocutor proceeding merely upon the motion of one of the parties. But your Lordship's opinion is clear to the effect which has been stated, and as this is merely a question of practice, I have not such confidence in my opinion as to lead me to dissent.

LORD KINNEAR — I concur with your Lordship in the chair.

The Court dismissed the appeal with expenses.

Counsel for the Pursuer—T. B. Morison. Agent—Marcus J. Brown, S.S.C.

Counsel for the Defenders—A. S. D. Thomson. Agents—Finlay & Wilson, S.S.C.

Thursday, May 21.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

TAYLOR AND OTHERS *v.* M'GAVIGAN AND ANOTHER.

Process—Reclaiming-Note—Competency—Court of Session Act 1850 (13 *and* 14 *Vict. cap.* 36), *sec.* 11—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 53.

Held (following *Baird* v. *Barton*, June 22, 1882, 9 R. 970, and *Crellin's Trustee* v. *Muirhead's Judicial Factor*, October 21, 1893, 21 R. 21) that an interlocutor decerning for and modifying expenses, pronounced after an interlocutor disposing of the cause otherwise, and reserving the question of expenses, may be reclaimed against at any time within twenty-one days from its date.

In this action the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor on 20th January 1896, in the following terms:—"Having resumed consideration of the cause . . . assoilzies the defenders from the whole conclusions of the summons, and decerns: Finds the defenders entitled to expenses, of which allows an account to be given in, and remits it when lodged to the Auditor of Court to tax and to report: Reserving as to modification."

On 7th March 1896 the Lord Ordinary pronounced the following interlocutor:—"Approves of the Auditor's report: . . . Finds that the taxed amount thereof is £77, 15s. 9d., and having heard counsel on the question of modification, modifies the taxed amount to the sum of £67, 5s. 9d., and decerns against the pursuers for payment to the defenders of that amount accordingly."

On 20th March, being the thirteenth day after the date of this interlocutor, the pursuers presented a reclaiming-note, which was objected to by the defenders as incompetent.

Argued for the defenders—Under the Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 11, this was an interlocutor which could only be reclaimed against within ten days, and it had been so expressly decided in *Cowper* v. *Callender*, Jan. 19, 1872, 10 Macph. 353. No doubt a reclaiming-note against an interlocutor dealing with expenses brought the previous interlocutors under review (*Crellin's Trustee* v. *Muirhead's Judicial Factor*, Oct. 21, 1893, 21 R. 21), but that reclaiming-note must be presented within the statutory time, and *Crellin* had decided nothing to the contrary.

Argued for the pursuers—The reclaiming-note was competent. *Crellin's Trustee* (*ut sup.*) had decided that an interlocutor such as this was not merely executorial, but was a final interlocutor disposing of the merits of the case, and could therefore be reclaimed against to the effect of submitting the whole case to review.—*Baird* v. *Barton*, June 22, 1882, 9 R. 970, had settled that such an interlocutor might be reclaimed against within twenty-one days. *Cowper* could not stand against *Baird*, especially as it had been decided purely on a construction of the Court of Session Act 1850, sec. 11. The ruling statutory provision here was the 53rd section of the Court of Session Act 1868.

At advising—

LORD PRESIDENT—In my opinion this case is ruled by *Baird* v. *Barton* and *Crellin's Trustee* v. *Muirhead's Judicial Factor*. The reclaiming-note is therefore competent.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court sent the reclaiming-note to the roll.

Counsel for the Pursuers and Reclaimers—M'Lennan. Agents—Cumming & Duff, S.S.C.

Counsel for the Defenders and Respondents—Younger. Agents—Carmichael & Miller, W.S.

Thursday, May 21.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

BROWN *v.* ROBERTSON.

Executor—Liability to Creditors of Deceased—Business Carried on by Executrix—Profits Made Subsequently to Death of Debtor—Enhanced Value of Goodwill.

There is no fiduciary relation between an executor, whether dative or nominate, and the creditors of a deceased person, and the former is not bound to administer the executry estate for behoof of the latter, but must merely account for it as at the date of the deceased's death. *Globe Insurance Co.* v. *Mackenzie* (7 Bell's App. 296), *followed.*

The widow of a publican having been appointed his executrix-dative, continued his business, and obtained a transfer of the licence in her own name and a renewal of the lease. No steps were taken at that time by the creditors of the deceased to vindicate their rights, and no arrangement was made by them with the executrix as to the terms upon which she was to carry on the business. Eighteen months after the creditors sequestrated the estate of the deceased, and the trustee subsequently raised an action against the executrix, concluding, *inter alia*, for the profits which she had made in the business, and for the enhanced value of the goodwill. *Held* that the executrix was bound to account only for the value of the estate, including the goodwill, as at the death of her husband.

Mr John Stewart, wine and spirit merchant, Greenock, died in 1893, leaving debts which considerably exceeded the assets. His widow Mrs Catherine Stewart, now Robertson, was appointed his executrix, and she gave up an inventory and obtained confirmation. The estate as given up by her amounted to only £70, including £50 for "goodwill, furniture, and fittings." No steps were taken at that time by the deceased's creditors to vindicate their claims, and the widow continued his business. She obtained a transfer of the licence, and at the next and succeeding licensing courts obtained renewals. She also made arrangements with the landlord by which she continued in possession of the shop, and ultimately obtained from him a five years' lease in her own favour. No agreement was entered into between Mrs Robertson and the creditors, but she made certain payments to them from time to time in extinction of her husband's debt.

In March 1895 the creditors of Mr Stewart obtained sequestration of his estate, and in October 1895 the trustee on the sequestrated estate raised the present action against Mrs Robertson. The summons concluded for declarator that the defender had entered on the premises and carried on the business as the executrix of the deceased, and solely for behoof of persons "legally interested in his estate;" and further, for delivery of the licence, removal from the shop, and accounting for all the profits made in the business. There was an alternative conclusion for payment of a certain sum as the alleged value of the deceased's estate at the time of his death.

The pursuer pleaded—"1. The pursuer is entitled to decree in terms of the declaratory conclusions and also in terms of the conclusions for removing and delivery, in respect that (1) The defender Mrs Robertson, in breach of her duty as executrix of John Stewart, failed to realise the assets of his estate and appropriated said assets and applied them in a hazardous trade; (2) The business carried on by said defender by means of said assets constitutes a trust in her person for behoof of those legally interested in John Stewart's estate; (3) The existing assets of the said business now belong to the pursuer as trustee on John Stewart's sequestrated estates. 2. Alternatively, the said assets of John Stewart's estate, or the assets now coming in place thereof, being still realisable, the defender Mrs Robertson is bound forthwith to realise the same, and to account to the pursuer as trustee foresaid for the proceeds to be realised therefrom. 3. The said defender Mrs Robertson having, in breach of her duty as executrix of John Stewart, employed the assets of his executry estate in trade, is liable to account to the pursuer for the profits realised from the employment of said assets in such trade; and, failing an accounting, decree should be pronounced in terms of the alternative conclusions thereanent."

The defender pleaded—"(6) The defender being only bound to account for the value of the estate of her late husband as at the date of his death, and she having been all along, and still being, willing so to account, and having so accounted, the action was unnecessary and ought to be dismissed."

The Lord Ordinary (KYLLACHY) on 20th March repelled the first and third of the pursuer's pleas, and allowed the parties a proof before answer as to the value and disposal of the deceased's estate.

Opinion.—"The defender in this case is the widow of a public-house keeper in Greenock who died in 1893. At his death the defender was appointed his executrix-dative, and gave up an inventory and obtained confirmation. The estate as given up by her amounted to only £70, including £50 for 'goodwill, furniture, and fittings.' The debts seem to have considerably exceeded the assets, but the creditors took no steps and the widow continued the deceased's business. She obtained a transfer of the licence into her own name, and at the next and succeeding licensing courts she obtained renewals. She also made arrangements with the landlord by which she continued in possession of the shop, and she ultimately obtained from him a five years' lease in her own favour. She is still in possession, and still carrying on the business. It is not alleged that any agree-