dealing with the amount awarded to the "Samson," as the judge of first instance, I should have apportioned the amount found due somewhat differently between the owners and the crew of the vessel. But the difference would not have been very great, and therefore I would leave that apportionment as the Lord Ordinary has made it.

No question has been raised concerning the apportionment of the salvage found due to the "Pathfinder" between the owners of the "Gantock Rock" and the owner of her cargo. It may be that both ship and cargo were insured by the same underwriters, in which case no apportionment would be called for. But however that may be, as no question of apportionment has been raised, although both owners of ship and cargo are called as defenders, I have not dealt with that matter.

LORD MONCREIFF—The Lord Ordinary has gone very carefully into this case, and I agree with his judgment, except as to the amount of damages which he has awarded to the "Pathfinder." While I do not think that the "Pathfinder" incurred very serious risk, on the other hand the salved vessel was in a position of imminent danger, and as the Nautical Assessor says, "she was not likely to have ridden out the Monday if left where she was, but in all probability would have gone ashore and become a total wreck." This is what would in all probability have happened if a powerful tug like the "Pathfinder" had not come to her assistance, and considering that the total value salved amounted to £40,000, I think that the sum of £1000 awarded to the two salving vessels is too little. I therefore think that the total sum awarded should be increased to £1550. (The cases would, I think, have warranted even a larger award). Of this sum the "Pathfinder" should receive £1200," and the "Samson" £350. Although the "Samson" perhaps ran more risk than the "Pathfinder," I think it is clear that she could not by herself have rescued the "Gantock Rock," while the "Pathfinder" could have done so without the assistance of the "Samson." I therefore think that the "Samson" is sufficiently remunerated by the sum awarded by the Lord Ordinary, viz., £350.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court varied the interlocutor of 31st January 1900 by assessing the value of the services rendered by the "Pathfinder" at £1200, and *quoad ultra* adhered.

Counsel for the Liverpool Steam Tug Co. Limited—Ure, Q.C.—Aitken. Agents—Macpherson & Mackay, W.S.

Counsel for the Owners of the "Samson" — Guthrie, Q.C. — A. S. D. Thomson. Agents—Whigham & Macleod, S.S.C.

Counsel for the Defenders — Salvesen, Q.C. — M'Clure. Agent — Campbell Faill, S.S.C.

Tuesday, June 19.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

TERRELL *v.* KER.

Process — Amendment — Multiplepoinding — Amendment of Claim after Final Decree of Ranking and Preference — Reclaiming-Note—Competency.

In an action of multiplepoinding the Lord Ordinary pronounced a decree of ranking and preference which disposed of the whole fund *in medio* and of the question of expenses. After that interlocutor had become final, a claimant, who had been ranked and preferred to a share of the fund *in medio*, while the fund was still *in manibus curiæ*, moved the Lord Ordinary to allow him to amend his claim, with the object of showing that he was entitled to a larger share of the fund *in medio* than that which had been awarded to him.

Held that the motion was incompetent, and that the interlocutor of ranking and preference was not competently submitted to the review of the Court by a reclaiming-note reclaiming against the interlocutor refusing the motion for leave to amend.

By trust-deed dated 20th July 1874 William Wemyss Ker conveyed certain funds to trustees, with directions, *inter alia*, (1) to pay the income thereof to his wife during her life, (2) after her death to pay the income to himself, and (3) upon the death of the longest liver of himself and his wife to pay the capital to the children of the marriage. After the death of the truster's widow in 1898 certain questions arose with regard to the meaning and effect of this trust-deed, and the trustees raised the present action of multiplepoinding for their determination. On 20th July 1899 the Lord Ordinary (KYLLACHY) pronounced an interlocutor disposing of the whole fund *in medio*, by which he, *inter alia*, ranked and preferred one of the claimants, Arthur A'Beckett Terrell, upon the fund "in terms of the second branch of his claim, to the effect of his receiving payment of one-fifth of one-sixth part or share of the trust estate," and also ranked and preferred him in terms of a riding claim which he made; ranked and preferred the other claimants to certain shares, and *quoad ultra* repelled the whole claims of parties; found the claimant Terrell liable in expenses to certain of the other claimants, and *quoad ultra* found no expenses due to or by any of the parties. That interlocutor was not reclaimed against. An interim condescendence of the fund *in medio*, and a scheme of division in terms of the Lord Ordinary's interlocutor of 20th July 1899, were lodged, and on 8th December 1899 the Lord Ordinary allowed them to be seen and objected to for eight days. Before any further interlocutor had been pronounced in the cause the claimant Terrell on January 16th 1900 lodged a minute, in which he craved

the Lord Ordinary to open up the record and to allow him to amend his claim. At the date of lodging this minute the fund *in medio* was still *in manibus curiæ*. The proposed amendment was to the effect that the truster was, at the date of the execution of the trust-deed of 1874, domiciled in England, and that the deed accordingly fell to be construed according to English law. The effect of such construction, the claimant maintained, would be to give him a larger share of the fund *in medio* than that to which he had been found entitled.

By interlocutor dated 17th January 1900 the Lord Ordinary allowed the minute to be received and seen for eight days. Certain of the other claimants lodged objections, in which they objected to the proposed amendment being allowed.

On 3rd March 1900 the Lord Ordinary refused the crave of the minute, and found the minuter liable in expenses to the objectors, and by interlocutor dated 10th March he granted leave to reclaim.

Opinion.—"The minuter here, Mr Arthur A'Beckett Terrell, was a claimant in a multiplepoinding at the instance of Ker's trustees, which I disposed of at the end of the Summer Session. He claimed in that process a share of a certain fund, which was a trust fund constituted by a certain trust-deed, and the ground of his claim, as expressed in his plea-in-law, was this—'On a sound construction of the trust-deed and of the other deeds libelled, the claimant is entitled to be ranked and preferred in terms of his claim.' That was, as I have said, the ground of his claim. It was a claim rested on what he alleged to be the just construction of the trust-deed and certain relative deeds. In July last I repelled Mr Terrell's claim, and sustained certain competing claims, which claims were rested on a different construction of the trust-deed, and although the fund is said to be still *in manibus curiæ*, there can be no doubt that so far as the Outer House is concerned my judgment is final. It is said that a reclaiming-note is still possible, but that is disputed, and I am not called upon to express any opinion on that question. I have to consider the case as one in which I am, apart from some special ground, *functus*, having pronounced a final decree of ranking and preference.

"What the minuter now desires is to open up the decree of ranking and preference, and he proposes to do so by amending his claim and putting forward what he describes as a new ground of claim—a ground of claim which he says has not hitherto been considered. That new ground of claim is in substance this. He says that he has ascertained that the truster was domiciled in England, and not, as assumed, in Scotland; that the trust-deed falls therefore to be construed according to English law, and that according to English law, or, at all events, to certain canons of construction recognised in the English courts, the judgment which I pronounced in July repelling his claim is not according to the just construction of the trust-deed.

"Now, of course, this suggestion is met on the other side by the plea of *res judicata*, and *prima facie* that plea seems upon ordinary rules conclusive. But the minuter contends that he is really in the position of the pursuer of an action, and having failed on one *medium concludendi*, is entitled to bring a new action founded on a different medium. He contends that he is in that position, and not in the position of a defender, who being bound to state all his defences, is open, if he does not do so, to the plea of 'competent and omitted.'

Now, I do not propose to decide whether, with respect to this kind of question, the position of a claimant in a multiplepoinding is to be assimilated to that of a pursuer or to that of a defender, say in an action of declarator relative to the question which is at issue. I can say that when that question really arises there may be some room for argument, and that it may be necessary to review amongst others the cases of *Dymond*, 5 R. 196; *Elder's Trustees*, 22 R. 505; and the *Phosphate Sewage Company*, 5 R. 1125. But having given every attention to the minuter's argument, I have not been able to see that any such difficult question is here involved.

"It is not in my opinion possible to represent the minuter's new contention as in any proper sense a new ground of claim or of action. It is, I think, no more than a new argument, good or bad, proposed to be used in support of the minuter's original ground of claim—that is to say, his original view of the true construction of the trust-deed. The *medium concludendi* is and must still be the same, viz., the true construction of the trust-deed and relative writings, and no new light which can now be thrown upon that, the sole and true issue, can, in my opinion, be held to set up a new issue, or to obviate the plea of *res judicata* founded on the *ex hypothesi* final decree which I pronounced in July. Therefore I refuse the crave in the minute."

The minuter reclaimed, and argued—The Lord Ordinary was wrong in refusing to receive the claim. The interlocutor of 20th July 1899 merely ranked and preferred the claimants to the fund *in medio* "to the effect of their receiving payment or conveyance" of certain shares of the trust-estate. No doubt a scheme of division could be worked out therefrom if the parties agreed, but the interlocutor did not in terms dispose of the whole subject-matter of the cause or competition between the parties within the meaning of section 53 of the Court of Session Act 1868, and was therefore not reclaimable — *Kennedy* v. *Taylor*, May 14, 1873, 11 Macph. 603; *Governors of Strichen Endowments* v. *Diverall*, Nov. 13, 1891, 19 R. 79. But the present reclaiming-note brought under review all prior interlocutors, and the Court could thus recal the interlocutor of 20th July 1899—1868 Act, section 52. The practice of the Court was to admit a new claim at any time so long as the fund was *in manibus curiæ*, which was the case here—*Stodart* v. *Bell*, May 23, 1860, 22 D.

1092; *Elder's Trustees* v. *Elder*, March 16, 1895, 22 R. 505; *Dymond* v. *Scott*, Nov. 23, 1877, 5 R. 196, where a claim was received after final judgment in the Inner House. The interlocutor had proceeded upon an error in fact, viz., the assumption that the truster was domiciled in Scotland. It could not therefore be pleaded as *res judicata* against the reclaimer—*Cheape* v. *Lord Advocate*, Jan. 11, 1871, 9 Macph. 377; *Creditors of Eyemouth*, Elchies' Decisions, ii. *sub voce* Bankrupt, No. 12; *Graham* v. *Maxwell*, May 20, 1814, 2 Dow's App. 314. The reclaimer did not know and had no means of knowing until recently the facts now averred. That distinguished this case from *Colquhoun* and *Duncan*, quoted by the objectors. In any view, under section 29 of the 1868 Act the Court was empowered to allow "at any time" all amendments necessary to determine the real question between the parties, and these words were wide enough to cover the claim now tendered.

Argued for the objectors—The interlocutor of 20th July 1899 was a final decree of ranking and preference, and therefore reclaimable without leave. The reclaimer had failed to avail himself of his right and must abide the consequences. It was settled that a decree of ranking and preference was a decree excluding all others who did not reclaim—*Haig* v. *Colquhoun's Creditors*, May 26, 1812, F.C.; *Duncan's Factor* v. *Duncan*, June 3, 1874, 1 R. 964. The Lord Ordinary was *functus* as soon as he had pronounced a final interlocutor, and had no power to grant the reclaimer's motion, which was made after the process had ceased to depend before him, and was therefore incompetent. In *Dymond* the claim admitted was not a new claim affecting the decree of preference which had been pronounced, but a riding claim. The interlocutor of July 20, 1899, was *res judicata—Elder's Trustees*, *supra*, a case which was directly in point. The reclaimer's position was that of a defender in an ordinary action, against whom the plea of "competent and omitted" was valid—*Phosphate Sewage Company* v. *Lawson's Trustee*, July 20, 1878, 5 R. 1125. The provisions of section 29 of the 1868 Act applied only to a pending action, and the present process was no longer pending. It had been held that an amendment was not competent after judgment had been delivered, although the interlocutor had not been signed—*Mackenzie* v. *Munro*, March 17, 1869, 7 Macph. 676.

At advising—

Lord Justice-Clerk—The Court heard a very long and elaborate argument for the reclaimer in this case, but in my opinion it may be disposed of on a very simple and clear ground. The case is one of multiplepoinding. On 20th July 1899 the Lord Ordinary pronounced an interlocutor, by which he ranks and prefers Arthur A'Beckett Terrell (that is, the reclaimer) upon the fund *in medio* in terms of the second branch of his claim, to the effect of his receiving payment or conveyance of one-fifth of one-sixth part or share of the trust estate. He ranked and preferred the other claimants to certain shares, and he closes his findings by these words—"*Quoad ultra* repels the whole claims of parties, and decerns."

That interlocutor was not reclaimed against, and became final by lapse of the reclaiming-days. In my opinion, if any party was dissatisfied with that interlocutor he was bound to reclaim against it timeously, and could not bring it up upon any subsequent interlocutor of the Lord Ordinary. By pronouncing that interlocutor the Lord Ordinary became *functus* except in regard to disposing by decree for a taxed amount of the expenses he had awarded. It would, I think, have been quite incompetent for him on the motion of a party to open up the case in any way. The time was past for stating new grounds of claim or new pleas, for those before the Lord Ordinary had been finally disposed of, and the case was at an end when the judgment was allowed to become final. I therefore hold that he was right in refusing to entertain the minute lodged for the reclaimer. I would move your Lordships to adhere to his interlocutor.

Lord Young—I concur.

Lord Trayner—In this case, as your Lordship has noticed, the Lord Ordinary by an interlocutor dated 20th July 1899, ranked and preferred certain claimants on the fund *in medio*, and *quoad ultra* repelled "the whole claims of the parties." The present reclaimer was one of the claimants whose claim was repelled, and the Lord Ordinary found him liable in expenses to certain other claimants. The Lord Ordinary thus by the interlocutor I have referred to disposed of the whole cause, and as no reclaiming-note was presented against it that interlocutor became final. In January 1900 (long after the Lord Ordinary's judgment had become final) the present reclaimer moved the Lord Ordinary to open up the record and allow him to amend his claim. This motion the Lord Ordinary refused, and it is against the interlocutor refusing this motion that the present reclaiming-note is presented. I think the Lord Ordinary should, in strict form, have declined to hear the motion which the reclaimer made, or at all events have refused to write upon it. The process was at an end so far as any competition was concerned, and in my opinion the Lord Ordinary could not at that stage have allowed either the lodging of any new claim, or any amendment of a claim which had been finally adjudicated on, or even have considered such a matter. It is immaterial what was the nature of the proposed amendment, the Lord Ordinary was *functus*, for he had disposed of the whole cause.

The avowed purpose of the present reclaiming-note is to bring under review the interlocutor of 20th July 1899, and under that review to ask leave to make the proposed amendment as necessary to the

decision of the real question between the parties. But it has been decided that a reclaiming-note against an interlocutor merely decerning for expenses already found due does not bring up any previous interlocutor for review. The present interlocutor does no more than decern for the amount of expenses as taxed, for in so far as it does, or pretends to do, anything more than that, I regard it, for the reasons I have stated, *pro non scripto*.

LORD MONCREIFF—In the view which I take of this case I do not think that it raises any question of difficulty; neither does it necessarily raise any question as to procedure peculiar to multiplepoindings.

What the reclaimer desires to be allowed to do under the minute which the Lord Ordinary has refused to entertain is, not to lodge a new claim, but simply to amend his pleadings so as to lay the foundation for another argument based on the law of England. The litigation which culminated in the concerted and final interlocutor of 20th July 1899, happened to occur in a competition in a multiplepoinding, but for the purposes of this question it might have arisen in an ordinary action. Accordingly the reclaimer's right to ask leave to amend depended upon the 29th section of the Court of Session Act of 1868. Now, if this motion had been made to the Lord Ordinary before he pronounced final judgment he would probably have been bound under the statute to allow the amendment on such conditions as to expenses as he thought fit. But the reclaimer's minute was not lodged until nearly six months after the final judgment in question was pronounced. Therefore it is clear that the Lord Ordinary had no power to allow the amendment, and might have refused to write upon it.

If the reclaimer, being dissatisfied with the Lord Ordinary's interlocutor, had thought fit to reclaim against it within the statutory time, the Inner House might have recalled the interlocutor and allowed him on terms to amend his pleadings. But he allowed the interlocutor to become final, and now seeks to bring it under review in this way. He first presents what I hold to be an utterly incompetent application to the Lord Ordinary for leave to amend, and then on the Lord Ordinary refusing to grant leave he reclaims, and maintains that the interlocutor which he has thus procured by his incompetent motion brings up the previous interlocutor of 20th July 1899 which had become final. That is not the purpose or effect of section 52 of the Court of Session Act 1868—*Duncan's Factor*, 1 R. 964, Lord President Inglis, p. 968.

I therefore think this reclaiming-note is incompetent *quoad* the subject-matter of the minute, and that we cannot touch the concerted interlocutor of 20th July 1899.

The Court adhered.

Counsel for the Claimant and Reclaimer—Guthrie, Q.C.—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Claimants Objectors and Respondents—M'Lennan—Cook—Melville. Agents—W. & J. Cook, W.S.—Forbes, Dallas, & Co., W.S.—Mitchell & Baxter, W.S.

Tuesday, June 19.

SECOND DIVISION.

[Lord Low, Ordinary.

MILLS *v.* BROWN.

Trust—Trustees—Power to Appoint and Pay Trustee as Factor or Cashier—Power to Carry-on Manufacturing Business—Construction—Appointment of Trustee as Paid Manager of Manufacturing Business—Ultra vires.

A testator empowered his trustees "to appoint one of their own number or other fit person to be their factor or cashier, and to allow him a reasonable remuneration for his trouble," and also to carry on his business as a manufacturer of bricks and fire-clay goods. By a codicil he nominated "R. B., manager, my grandson," to be one of his trustees. The bulk of the testator's moveable estate consisted of his manufacturing business, of which R. B. had for some time prior to the testator's death been the manager. After the testator's death R. B. accepted office as a trustee, and continued to act as such. The trustees appointed him to be manager of the business, and paid him a salary and other remuneration for acting in that capacity. *Held* that the trustees were not entitled under the powers conferred upon them by the testator to appoint and pay one of their own number as salaried manager of the business.

Robert Brown of Shortroods, who died in 1895, left a trust-disposition and settlement, whereby he conveyed his whole estate to certain trustees, to be held by them for behoof of his family as therein directed. The estate consisted of heritable property of the value of about £33,000, and of moveable estate which consisted chiefly of a business carried on by the deceased in Paisley, for the manufacture of bricks and fireclay goods. By the fifth purpose of his settlement the testator authorised his trustees "to carry on my business of a manufacturer of bricks, tiles, and fireclay goods, and of plumbago crucibles and earthenware, as at present or as may hereafter be carried on by me in all their departments under the same firm, or in such other way or manner or under any other form as to them shall seem best." Further, he empowered them "to appoint one of their own number or other fit person to be their factor or cashier, and to allow him a reasonable remuneration for his trouble." By codicil dated 18th December 1891 he directed his trustees to divide the estate upon the expiration of ten years from his decease, unless they should find it