such indications as it could of its disapproval, on the ground that counsel would have to attend, and that it was generally cheaper to bring the witnesses here than to send the counsel to the circuit town. These trials at circuit have accordingly ceased.

In these circumstances I can see no ground for any modification at all. It cannot be on the ground that the agent here acted discreditably in taking up a case which he should not have taken up, and which he took up with a view to his own interest, for there is no suggestion that the agent here was censurable in any respect or that he acted otherwise than in a proper, creditable, and praiseworthy discharge of duty. He took up a case which on trial by a jury has been determined to be a proper and sound case, and which has so resulted as I have pointed out. I must therefore tender my protest against announcing in such a case as the present that something is to be taken off the expenses properly incurred in this Court, because if the party had been rightly advised he would not have brought it here—would not have brought it to jury trial at all—but would have had it tried in the inferior court. I cannot assent to that, and I repeat my most express and distinct dissent from it, and therefore say that there is no ground suggested to us here for putting into our interlocutor any words which would import that when we come to examine the Auditor's report we will strike off part of the pursuer's account as a punishment to him for acting on the advice of his man of business and bringing the case here for jury trial, the case having been sent to jury trial with the consent of both parties.

LORD TRAYNER—I am of opinion with your Lordship in the chair that expenses should be given to the pursuer, subject to modification, and that for the reasons which I stated in the case of *Brennan*, and which it would only be wearisome to repeat.

LORD MONCREIFF — I agree with the majority of your Lordships.

The Court pronounced this interlocutor:—

"Apply the verdict: Decern against the defenders for payment of the sum of thirty pounds sterling: Find the pursuer entitled to expenses, but subject to modification," &c.

Counsel for the Pursuer and Appellant—M'Clure — Grainger Stewart. Agents — Oliphant & Murray, W.S.

Counsel for the Defenders and Respondents—Watt, K.C.—C. D. Murray. Agents —Morton, Smart, Macdonald, & Prosser, W.S.

*Tuesday, May 26.*

## FIRST DIVISION.

## CLARK (BARR'S *CURATOR BONIS*) *v.* BARR'S TRUSTEES.

*Process—Summary Petition—Reclaiming—Interlocutor on Merits—Reclaiming-Note Presented in order to Bring under Review Interlocutor not Reclaimed against—Distribution of Business Act* 1857 (20 *and* 21 *Vict. cap.* 56), *sec.* 6.

In a petition by a *curator bonis* for discharge, the Lord Ordinary, on 21st August, pronounced an interlocutor determining certain questions of accounting between the curator and the curatory estate raised by a report of the Accountant of Court, and also a question, in dispute between the curator and the representatives of the deceased ward, as to the curator's right of retention in certain shares. This interlocutor was not reclaimed against. On 26th November the Lord Ordinary pronounced a further interlocutor finding that on payment by the curator of a balance due to the ward's representatives he was entitled to discharge. The petitioner presented a reclaiming-note against the latter interlocutor, and stated that he did so for the purpose of submitting the former interlocutor to review.

*Held* (1) (following *Macqueen* v. *Tod*, May 18, 1899, 1 F. 859, 36 S.L.R. 649) that the right to reclaim against interlocutors pronounced under the petition was wholly regulated by section 6 of the Distribution of Business Act 1857, and (2) that the interlocutor of 21st August was a judgment pronounced by the Lord Ordinary upon the merits in the sense of section 6, and accordingly (3) that the reclaiming-note against the interlocutor of 26th December was an incompetent method by which to bring under review the interlocutor of 21st August.

The Distribution of Business Act 1857 (20 and 21 Vict. cap. 56), sec. 6, enacts:—"It shall not be competent to bring under review of the Court any interlocutor pronounced by the Lord Ordinary upon any such petition, application, or report as aforesaid" [including a petition for the discharge of a judicial factor] "with a view to investigation and inquiry merely, and which does not finally dispose thereof on the merits; but any judgment pronounced by the Lord Ordinary on the merits, unless where the same shall have been pronounced in terms of instructions by the Court on report as hereinbefore mentioned, may be reclaimed against by any party having lawful interest to reclaim to the Court, provided that a reclaiming-note shall be boxed within eight days, after which the judgment of the Lord Ordinary, if not so reclaimed against, shall be final."

On 14th May 1901 a petition was presented

by Malcolm Turner Clark, steamship owner and commission agent, 5 Oswald Street, Glasgow, *curator bonis* to John Barr, for exoneration and discharge in respect of his actings and intromissions as *curator bonis*. The ward John Barr had died on 9th February 1901 and left a will appointing trustees of his estate.

The petition was remitted in the usual course to the Accountant of Court to examine and audit the accounts of the *curator bonis*.

The Accountant reported that the curator's accounts were correctly stated and vouched. But he further specially reported (1) that the curator had been guilty of failure in duty, through which the estate had suffered loss, and that he was liable to the penalties imposed by section 6 of the Pupils Protection Act 1849, in respect of which his commission should be reduced by £300; (2) that certain law accounts incurred by the curator in relation to a previous report by the Accountant were not proper charges against the curatory, that these accounts should be disallowed, and that a relative bank overdraft, which was debited, was unnecessary and the interest thereon should be disallowed.

Objections to this report were lodged by the petitioner.

Appearance was also made for the testamentary trustees of the deceased ward, who supported the contentions of the Accountant, and also maintained that the petitioner was bound to transfer to them as part of the curatory estate 500 shares which stood in his name, and that he had no right of retention in these shares.

On 21st August 1902 the Lord Ordinary on the Bills (PEARSON) pronounced an interlocutor, in which he found (1) that the law accounts in question incurred by the *curator bonis* were not proper charges against the curatory, and that the relative bank overdraft was unnecessary, and that the amount of bank interest thereon charged against the curatory should be replaced; (2) that in the circumstances the *curator bonis* was not liable in any of the penalties imposed by section 6 of the Pupils Protection Act 1849; (3) that the *curator bonis* was bound to transfer to the representatives of the deceased ward the 500 shares presently standing in his name as part of the curatory estate, and that he had no right of retention or indemnity therein, and was bound to endorse and deliver to the said representatives the deposit-receipts for the dividends accrued thereon, so far as in his custody or under his control; (4) found no expenses due as between any of the parties from 8th March 1902 to this date, reserving as to expenses *quoad ultra;* and of new remitted to the Accountant of Court to give effect to the foregoing findings, and to adjust the balance due to or by the *curator bonis*, and to report.

This interlocutor was not reclaimed against.

The Accountant of Court having lodged an additional report, the Lord Ordinary on November 26, 1902, pronounced an interlocutor in which he found that the balance due by the *curator bonis* to the ward's estate was £80, 11s. 1d.; that on payment by the curator of this sum to the ward's representatives, less the taxed amount of the expenses of the petition, he would be entitled to his discharge in terms of the prayer of the petition.

The petitioner reclaimed.

It was stated by the petitioner and reclaimer that the reclaiming-note was presented for the purpose of submitting to review the Lord Ordinary's interlocutor of August 21, 1902, and that he had no objection to, or interest to oppose, the interlocutor of November 26, 1902, in itself.

Argued for the respondents—The reclaiming-note against the Lord Ordinary's interlocutor of November 26, 1902, was not a competent mode of bringing under review the Lord Ordinary's interlocutor of August 21, 1902, which was the only purpose the reclaimer had in view. The interlocutor of August 21, 1902, could only be competently reviewed by being reclaimed against within eight days. The right to reclaim in summary petitions of this kind was regulated wholly by the Distribution of Business Act 1857, and the provisions of the Court of Session Act 1868 were inapplicable —*M'Nab* v. *M'Nab*, December 21, 1871, 10 Macph. 248, 9 S.L.R. 171; *Macqueen* v. *Tod*, May 18, 1899, 1 F. 859, *per* Lord M'Laren, 36 S.L.R. 649; *Wallace* v. *Whitelaw*, February 23, 1900, 2 F. 675, 37 S.L.R. 483. The interlocutor of 21st August 1902 was a decision on the merits. It was none the less so although it might be that it did not exhaust the merits. It determined the merits on certain questions of right which were in dispute between the parties, and therefore fell under the category of interlocutors which, under section 6 of the Act 1857, must be reclaimed against within eight days and if not so reclaimed against were final.

Argued for the respondents—In view of the decision in *Macqueen* v. *Tod* (*supra*) it was admitted that the question whether the interlocutor of 21st August 1902 could be reviewed under this reclaiming-note was regulated by the Distribution of Business Act 1857, section 6. The interlocutor of 21st August 1902 was not an interlocutor which, in the language of section 6, "finally" disposed of the merits. It certainly decided certain questions of accounting raised by the report of the Accountant of Court as well as the minor question as to the petitioner's right of retention in certain shares. But there remained many questions still undecided, and these questions could only be properly raised and decided in a reclaiming-note against the interlocutor of 26th November, which did finally dispose of the petition on the merits. The proper view was that the interlocutor of August 21 was a mere step in the supervision and regulation by the Court of the administration of the petitioner, which came competently under review in a reclaiming-note against the interlocutor of 26th November finally disposing of the petition on the merits.

LORD PRESIDENT—The question which we have now to decide is whether this reclaiming-note is a competent method of bringing under review the decision contained in the interlocutor of the Lord Ordinary of 21st August 1902, and this depends upon whether the questions decided by that interlocutor constituted in whole or in part the merits of the cause. Section 6 of the Distribution of Business Act 1857 provides—[*his Lordship read the section*]. This section recently received authoritative interpretation in the opinion of Lord M'Laren in the case of *Macqueen* v. *Tod* (1 F. 859), and I entirely concur in that opinion. It is impossible to read the interlocutor of 21st August 1902 without seeing that it does deal with the merits of the cause, and it is therefore incompetent now to bring those findings under review. Whether there is anything in the case not affected by these findings I do not know, but I am clear that this reclaiming-note is incompetent in so far as it proposes to submit to review the interlocutor of 21st August 1902.

LORD ADAM—There is no objection to this reclaiming-note so far as it deals with the interlocutor of 26th November 1902, but then we are told that the object of the reclaiming-note is to bring under review the interlocutor of 21st August 1902, which was not reclaimed against at the time. If we decide that it is incompetent to review the interlocutor of 21st August 1902, the reclaimer admits that he has no interest in this reclaiming-note, and the matter will be disposed of without the intervention of this Court. The question is whether a reclaiming-note against an interlocutor in a petition for discharge brings up all previous interlocutors as in a case under the Court of Session Act 1868. It is settled by the cases of *Macqueen* v. *Tod* (1 F. 859) and *Wallace* v. *Whitelaw* (2 F. 675) that the special procedure in the case of petitions provided by the Distribution of Business Act 1857 is not touched by the Act of 1868. Accordingly we have to go to the Act of 1857, and section 6 of that Act provides that any interlocutor upon the merits shall be final unless reclaimed against within eight days. The only question therefore is, whether the interlocutor of 21st August 1902 is an interlocutor on the merits. The petition is for the discharge of a judicial factor, and the merits are whether he has properly accounted for the estate—what is the balance he has to account for or which may be due to him? The interlocutor of 21st August 1902 deals with all these questions and settles what the factor has to account for. It therefore deals with nothing else but the merits, and I agree that it is not subject to review.

LORD KINNEAR—I am of the same opinion. But for the case of *Macqueen* v. *Tod* it might perhaps have been argued that the 52nd section of the Court of Session Act 1868 is so far inconsistent with the 6th section of the Distribution of Business Act 1857 that the earlier provision must be held to have been repealed. But that question was fully considered in the case of *Macqueen* v. *Tod* (1 F. 859), and it is now conceded — and I think the concession could not have been withheld—that the right to reclaim against the interlocutor in question must be regulated by the Act of 1857, and that Act alone. The question therefore is, whether the interlocutor of 21st August 1902 is a decision on the merits. Section 6 of the Act of 1857 deals with two different classes of interlocutors—(1) interlocutors with a view to investigation, and (2) interlocutors on the merits. That is an exhaustive description of the kinds of interlocutors which may be pronounced in the course of procedure under such petitions. It is quite clear that the interlocutor in question is not one of the first class, and *prima facie* it would seem to follow that it must be one of the second class. But apart from that consideration it appears to me that an interlocutor which decides a point in dispute between two contending parties according to their legal rights is an interlocutor on the merits. Mr Graham Stewart says there may be many questions which may still be raised and are still undecided, but that is just the difference between petitions of this kind and ordinary actions which made it necessary to make special regulations for procedure in the former case by the provisions of the Distribution of Business Act. The petition is merely a process for instituting a judicial administration, and in the course of such administration there may or may not be disputed questions of right, each of which must be determined on its own merits. It cannot be supposed that no interlocutor disposing of such questions is to be brought into the Inner House until the whole process in the petition, which means the whole administration in the hands of the Court, has come to an end; and therefore the question of competency cannot depend upon whether the process is exhausted, but simply on whether the interlocutor disposes on the merits of the question with which it purports to deal. I think therefore that the question whether the interlocutors reclaimed against dispose of the whole cause does not arise, and I do not doubt that an interlocutor deciding that a curator must account for a certain sum is an interlocutor on the merits. I therefore agree that a reclaiming-note against the interlocutor of 26th November 1902 is an incompetent method by which to bring under review the interlocutor of 21st August 1902, and it would be futile to review the former interlocutor if we cannot recal the interlocutor on which it is founded.

LORD M'LAREN was absent.

On the question of expenses it was stated that the Accountant of Court had intimated to the respondents, the wards' representatives, that they were responsible for the conduct of the case against the reclaiming-note in the Inner House.

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming-note against the interlocutor of Lord Pearson dated 26th November 1902, and heard counsel for the parties—In respect it was stated by the reclaimer that the reclaiming-note was presented for the purpose of submitting to review the interlocutor of 21st August 1902, Find that the latter interlocutor could only be reclaimed against in accordance with the provisions of section 6 of the Distribution of Business (Scotland) Act 1857, and not having been so reclaimed against is final; and it having been stated by the reclaimer that they have no objection to the said interlocutor of 26th November 1902, Adhere to the said interlocutor, and decern: Find the respondents John Barr's trustees entitled to the expenses of the reclaiming-note, and remit the account thereof to the Auditor to tax and to report, and find no expenses due to or by the Accountant of Court."

Counsel for the Petitioner and Reclaimer—Craigie — Graham Stewart. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents Barr's Trustees—Mackenzie, K.C.—Galbraith Miller. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Accountant of Court—Blackburn. Agent—Thomas Carmichael, S.S.C.

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*Tuesday, May* 26.

## SECOND DIVISION.

[Lord Pearson, Ordinary.

## HALLIDAY *v.* DUKE OF HAMILTON'S TRUSTEES.

*Arbitration — Arbiter — Disqualification — Arbiter Engineer to One of the Parties — Opinion Expressed by Arbiter as Engineer in Reply to his Employers.*

A contract for the erection of a pier contained an arbitration clause whereby the contractor and his employers agreed to refer any question arising out of the contract to the employers' engineer as arbiter. A question arose under the contract, with regard to which the employers' engineer expressed a definite opinion in reply to his employers, who had consulted him in the course of negotiations with the contractor for the settlement of his claim. Thereafter the contractor raised an action against his employers for the determination of the question at issue. The defenders pleaded that the question fell to be determined by the arbiter appointed under the contract. The pursuer maintained that the arbiter appointed under the contract had so acted and expressed himself with regard to the question that he was disqualified from acting in the capacity of arbiter. *Held* (*aff.* judgment of Lord Pearson) that the arbiter was not disqualified.

This was an action at the instance of George Halliday, contractor, Rothesay, against the trustees of the Duke of Hamilton for payment of, *inter alia*, £960 alleged to be due to him for certain extra work done by him in connection with the construction of a pier.

The defenders founded upon an arbitration clause in the contract for the construction of the pier.

The pursuer in reply maintained that the arbiters named were disqualified.

By contract dated 24th and 25th January 1898, entered into between the pursuer and the defenders' factor and commissioner, the pursuer contracted to build a pier at Whiting Bay, in the island of Arran, for the defenders, conform to plans prepared by Messrs Stevenson, civil engineers, Edinburgh.

The contract contained an arbitration clause in the following terms:—"In the event of any question, dispute, or difference arising, either during the progress of said works or after the completion thereof, between the parties hereto, regarding the work, or as to the true intent and meaning of these presents, or the construction of the said plans, specifications, and schedule, or as to the price to be paid for any work not contained in the said schedule, or as to any other matter in connection with this contract, the same shall be and are hereby referred to the decision of David Alan Stevenson, civil engineer, Edinburgh, whom failing to Charles Alexander Stevenson, also civil engineer there, as sole arbiter, whose awards, interim or final, shall be final and binding upon the parties hereto." The arbiters named were the partners of the firm of D. & C. Stevenson, the defenders' engineers. It was declared by the contract that Messrs Stevenson should have power to increase or diminish the quantities, and to make any alterations in the works they might from time to time deem necessary, such alteration or deviation from the quantities to be valued at the schedule rates, or in the event of these not being applicable, rates fixed by the engineers, and to be added to or deducted from the contract price, which was £5430.

During the progress of the work of building the pier difficulties were unexpectedly encountered owing to the presence of rock on the site of the pier at a point where, according to the plans and specifications appended to the contract, the sea bottom was represented as consisting of material suitable for having certain piles driven into it. It being impossible to drive the piles where the rock occurred, the pursuer obtained instructions as to the mode in which they were to be fixed from Messrs Stevenson, the defenders' engineers, who granted a certificate therefor as for extra work.

On the completion of the pier, the pursuer, in terms of the contract, rendered to Messrs Stevenson an account, in which,