Counsel for the Appellant — A. O. Mackenzie, K.C. — M. P. Fraser. Agents — Campbell & Smith, S.S.C.

Counsel for the Respondent — Duffes. Agent—James G. Bryson, Solicitor.

COURT OF SESSION.

Saturday, October 24.

FIRST DIVISION.

[Lord Cullen, Ordinary.

MACLEOD'S FACTOR *v.* BUSFEILD AND OTHERS.

Process — Reclaiming Note — Expenses — Crown—Competency—Crown Reclaiming on Expenses—Court of Exchequer (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 56), *sec.* 24.

The Crown engaged in a litigation in the Court of Session is to be treated in a matter of expenses exactly as a subject is treated, and accordingly a reclaiming note by the Crown, taken on the question of expenses only, is competent, though the Court will be slow to interfere with the Lord Ordinary's judgment.

The Court of Exchequer (Scotland) Act 1856 (19 and 20 Vict. cap. 56) enacts—Section 24—"In all causes which shall be instituted under this Act before the Court of Session acting as the Court of Exchequer in Scotland, and in all causes presently depending, or which shall come to depend, before any civil court in Scotland at the instance or on the behalf of the Crown, against any person or persons, or against the Crown at the instance of any person or persons, the Crown, or the Lord Advocate or other person or persons suing on its behalf, shall be entitled, when decree shall be given for the Crown, to move for and recover expenses of process, in the like manner as and under the like rules, regulations, and provisions as are or may be in force touching expenses of process in proceedings between subject and subject; and where in any cause, whether to be brought under this Act or presently depending, or which may come to depend before any civil court in Scotland, decree shall be given against the Crown, the subject obtaining such decree shall be entitled to move for, and if awarded to recover, expenses of process in the like manner and subject to the like rules, regulations, and provisions as aforesaid; and it shall also be competent to recover expenses of diligence to which the Crown is a party in the like manner and to the like extent as such expenses may be recovered in cases between subject and subject."

Charles John Munro, chartered accountant, Edinburgh, judicial factor on the trust estate of the late Miss Mary Macleod of Springbank, Tobermory, *pursuer and real raiser*, brought an action of multiplepoinding in the Court of Session against Miss Margaret Annie Busfeild, Craigellie, Roseberry Avenue, South Shore, Blackpool, and others; and against the Right Honourable Robert Munro, K.C., His Majesty's Advocate for Scotland, as representing His Majesty as *ultimus hæres* and His Majesty's Exchequer, *defenders*. The action dealt with matters with which this report is not concerned.

On 20th May 1914 the Lord Ordinary (CULLEN) found His Majesty's Advocate liable in certain expenses of the competition, and pronounced an interlocutor in, *inter alia*, the following terms—". . . Therefore repels (1) the claim for His Majesty's Advocate, No. 10 of process; . . . Finds the claimant, His Majesty's Advocate, liable to the claimants, Mrs Ina Anna Isabel Watson or Murchison and others, under the claim No. 9 of process, in their expenses in the competition: . . . Continues the cause for further procedure, and grants leave to reclaim."

His Majesty's Advocate reclaimed on the question of expenses, and argued—The Crown was appealing merely to get its position on the question of expenses established as a matter of principle. Its rights in this respect rested upon statutes. The Crown Suits Act 1855 (18 and 19 Vict. cap. 90) assimilated to a certain extent the position of the Crown to that of a subject, and the Court of Exchequer (Scotland) Act 1856 (19 and 20 Vict. cap. 56), sec. 24, entirely identified them. Had this been a case between subject and subject the Court would be entitled to interfere with the discretion of the Lord Ordinary on the question of expenses. Though an appeal was not taken on the merits of the case the Court were entitled to consider them in deciding the question of expenses—*Bowman Trustees* v. *Scott's Trustees*, February 13, 1901, 3 F. 450 (Lord Trayner at 451), 38 S.L.R. 557. In certain circumstances the Court would entertain appeals on expenses as readily as those on the merits—*Garrioch* v. *Glass*, 1911 S.C. 453 (Lord Salvesen at 457), 48 S.L.R. 347; *Fleming* v. *North of Scotland Banking Company*, October 20, 1881, 9 R. 11, 19 S.L.R. 4.

Counsel for the respondents were not called upon.

LORD PRESIDENT—The parties here desire an opinion to the effect that the Crown engaged in a litigation in the Outer House is to be treated in a matter of expenses exactly as a subject is treated. I am quite willing to express that opinion, although I at present do no more than say that the statute entitled the Court of Exchequer (Scotland) Act 1856 means what it says, and accordingly that we ought to approach the consideration of expenses in this case exactly as if it were a subject who raised the question before us.

Now if one of His Majesty's subjects bring a claim in a multiplepoinding raising the question of the construction of a settlement, and a reclaiming note were presented before us against the Lord Ordinary's judgment on a question of expenses, it undoubtedly would be competent, and it would be open to us to reconsider the Lord Ordinary's

judgment. No doubt we should do so with a strong bias in favour of the view that the Lord Ordinary's decision was well exercised, and it would have to be shown to us that the Lord Ordinary had clearly erred in denying the claimant expenses out of the fund.

Now, one of the obvious disadvantages of raising that question in the present case is that the reclaimer, to wit, the Crown, has not thought fit to open the case upon the merits, so that we are denied an opportunity of considering the question of the construction of this settlement. But I think we see enough of the case from the opinion of the Lord Ordinary, which was read to us by Mr Smith Clark, clearly to discern that his Lordship may—not necessarily that he must—he may have considered that the case of *Jack's Executor* v. *Downie*, 1908 S.C. 718, raised and decided the point which was before him, and in that view he may have—again I do not say he must—he may have thought that the question raised by the Crown was so hopeless that it ought never to have been raised. The Lord Ordinary may have come to that conclusion, but I do not think we ought, having the question of expenses merely before us, to interfere with his discretion, and in saying so I for my part have treated the Crown exactly as I would treat one of His Majesty's subjects.

I am therefore for affirming the interlocutor of the Lord Ordinary.

LORD MACKENZIE—I am of the same opinion. It was admitted by the counsel for the Crown, in answer to a question, that the Lord Advocate was in exactly the same position as any ordinary litigant, and that admission could not be withheld in view of the terms of section 24 of the Court of Exchequer (Scotland) Act 1856, which provides that in a question with the Crown, the rules, regulations, and provisions touching expenses of process are to apply just as if the litigation were between subject and subject.

Accordingly we have here a reclaiming note by one who, in the matter in hand, is in exactly the same position as a subject, and for my part I am prepared to accept the rule—the salutary rule—which Lord Shand laid down in the case of *Fleming* v. *North of Scotland Banking Company* (1881) 9 R. 11, at p. 14. His Lordship there says—"It has been frequently said in this Court that a party seeking review of a question of expenses only is in very unfavourable circumstances, and the Court will discourage appeals on reclaiming notes on expenses merely. But I know of no authority for saying that where a case of obvious or gross injustice can be made out a party is precluded from bringing such a question before us."

Now what the Lord Ordinary has done in this case is to negative an argument maintained on behalf of the Crown as *ultimus hæres*—that the words in the will under consideration differ from the words used in *Jack's Executor* v. *Downie*, 1908 S.C. 718.

The Lord Ordinary held that the description of the estate in Mrs Watson's settlement, "my whole means and estate," was not narrower than the words used in *Jack's* case, "all my estate." He therefore held that the claim by the Crown was negatived by an express judgment of this Court, and in those circumstances it appears to me out of the question to say that he was not entitled in the exercise of his discretion to say that the Crown must pay the expenses of the party with whom they had been contesting that question of right, and that is sufficient for the determination of the present question. It is a question solely upon the special circumstances of this case. It raises no question of general principle whatever.

I accordingly agree with your Lordship.

LORD SKERRINGTON—I agree with your Lordship on both points. In the first place I think that the Crown falls to be dealt with in the same way as a private litigant. In the second place, I agree that a person who appeals or reclaims purely on a question of expenses is in an unfavourable position in this respect, that the Court cannot possibly have such an intimate knowledge of the circumstances and merits of the action as if the case had been discussed in the ordinary way. It necessarily follows that the Court will be more slow to interfere with the discretion of the Lord Ordinary on the question of expenses than it would have been if it had heard a full debate and had been disposing of the merits also. On the other hand I demur to any such view as that the Court is entitled for reasons of expediency to discourage appeals purely on the question of expenses. The duty of the Court is to consider any question which comes competently before it.

The Court affirmed the interlocutor of the Lord Ordinary.

Counsel for the Reclaimer—The Lord Advocate (Munro, K.C.)—Smith Clark. Agent—James Ross Smith, S.S.C.

Counsel for the Respondents—M'Lennan, K.C.—Hendry. Agents—J. Miller Thomson & Co., W.S.

Tuesday, October 27.

FIRST DIVISION.

[Lord Anderson, Ordinary.

WALLACE-JAMES *v.* BAIRD AND ANOTHER.

Reparation—Slander—Innuendo—Privilege—Letter by President of Nursing Association to Chairman of Parish Council as to Medical Officer not calling in Nurse.

"It is not for the Court, it is for the pursuer, to allege the slanderous meaning which he attaches, and says ought to be attached, to a writing or statement, not in itself slanderous, of which he complains." *Dictum* of Lord President Inglis in *Sexton* v. *Ritchie & Company*, March 18, 1890, 17 R. 680, 27 S.L.R. 536, *approved*.