sented within ten days, as the interlocutor reclaimed against was not one disposing of the merits of the cause, which had been disposed of by the previous interlocutor. Objection *sustained.*

The Lord Ordinary (ORMIDALE) on the 2d August 1871 pronounced an interlocutor disposing of the whole merits of the cause, and finding the pursuer entitled to expenses, but subject to modification, the amount of which is left to be determined till after the pursuer's account of expenses has been taxed and reported on by the Auditor.

On the 18th November following his Lordship pronounced the following interlocutor:—

"*Edinburgh, 18th November* 1871.—The Lord Ordinary approves of the Auditor's report upon the pursuer's account of expenses, No. 318 of process, amounting as taxed to the sum of £135, 3s. sterling; and having heard the counsel for the parties on the modification of expenses, modifies the same to the sum of £110, 10s. sterling; for which decerns against the defender."

On the 7th December following the defender presented a reclaiming-note.

SOLICITOR-GENERAL and BLACK, for the pursuer, objected to the reclaiming-note as incompetent, not having been presented within ten days, as required by 13 and 14 Vict. c. 36, sec. 11.

HALL, for the defender, argued that the enactment does not apply to the last interlocutor in a case; *Fisher* v. *Pearson*, March 7, 1851, 13 D. 906; *Henderson* v. *Joffray*, Nov. 13, 1852, 15 D. 11. He also referred to the Court of Session Act, 1868, sec. 52 and following sections.

At advising—

LORD PRESIDENT—The pursuer objects to the competency of this reclaiming-note as being too late, and founds on 13 and 14 Vict. c. 36, sec. 11. It is not suggested that this enactment has been repealed. The leading words of the enactment are negative, which are always imperative.—"It shall not be competent to reclaim against any interlocutor of the Lord Ordinary at any time after the expiration of ten days from the date of signing such interlocutor." The only exceptions are "reclaiming-notes against interlocutors disposing in whole or in part of the merits of the cause, and against decrees in absence;" these may be competent when presented within twenty-one days. This reclaiming note certainly does not fall within the exception; it therefore falls within the leading enactment, and is necessarily incompetent. No relevant answer has been attempted. It has been suggested that some provisions in the Court of Session Act, 1868, giving a particular effect to reclaiming notes, take off the effect of sec. 11 of 13 and 14 Vict. c. 36. Section 52 of the Court of Session Act enacts that every reclaiming note shall have the effect of submitting to review the whole of the prior interlocutors. But that does not mean every reclaiming note, whether competent or incompetent. What would have been the effect of this note had it been presented in time is a question not before us.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—I am clearly of opinion that this reclaiming-note, not being presented within ten days of the judgment reclaimed against, is incompetent. It is so under the express terms of the Act 1850; and the Act 1868 does not in this respect alter the previous statute. Though the objection to competency was reserved till the discussion of the case on the merits, it must be sustained in the same way, and to the same effect, as if the note was at once thrown out when the case appeared in the Single Bills.

This being so, I think the question argued to us does not arise, Whether, if the reclaiming-note had been competent, it would have brought up for review all the prior interlocutors in the cause. For I entertain no doubt that such an effect can only be operated where the reclaiming-note is in itself competent. I have a strong impression on that question. But I think it is better not to state it where the question is not properly before us.

HALL then moved the Court to transmit the process to the Lord Ordinary, with a view to the defender presenting a petition to be reponed.

SOLICITOR GENERAL—The process is not before the Court. There has been an attempt to bring it here, which has been unsuccessful.

The Court found the reclaiming-note incompetent, and refused the motion for the defender.

Agent for Pursuer—David Curror, S.S.C.

Agents for Defender—Hill, Reid, & Drummond, W.S.

Friday, January 19.

TAYSEN & CO. *v.* JOHNSEN, *et e contra.*

Sale—Rejection—Disconform to Contract.

Circumstances in which the consignees of a cargo of dried fish were *held* warranted in rejecting the same as disconform to contract.

In June 1870 Christian Johnsen of Christiansünd, in Norway, undertook to supply Taysen & Co., merchants, Leith, with a quantity of "new white hard dried ling" and "new white and well dried tusk." On the arrival of the cargo it was rejected by Taysen & Co. as disconform to contract, and was subsequently sold under a warrant. Each party brought an action against the other—Taysen & Co., who had resold the cargo before its arrival, for the loss of profit which they would have made, and Johnsen for the difference between the invoice price and that actually realized.

The actions were conjoined, and a proof allowed. The question involved was whether Taysen & Co. were warranted in rejecting the cargo. For Johnsen it was contended that the fish were as white as Norwegian fish usually are, and that Taysen & Co., themselves Norwegians, having ordered fish from Norway, must be satisfied if they got what is known in Norway as "new white hard dried ling" and "new white and well dried tusk."

The Lord Ordinary (MURE) found that the cargo consigned did not consist of "new white hard dried ling" or "new white and well dried tusk," and that Taysen & Co. were warranted in rejecting the cargo as being disconform to contract, and decerned against Johnsen for £132, 10s. 5d., as the profit which Taysen & Co. would have made upon the sale.

In his note his Lordship observed that "the defence, even if relevant in law, which he is disposed to think it is not, was not borne out by the evidence."

Johnsen reclaimed.

ASHER and DARLING for him.

SOLICITOR-GENERAL and TRAYNER in reply.

The Court adhered.

Agents for Johnsen—Scarth & Scott, W.S.

Agent for Taysen & Co.—P. S. Beveridge, S.S.C.