both A and C it was obvious the rents varied in three cases. Was the purchaser therefore to assume that the highest rent was the present rent? As a man of business he was not entitled to do so. And that put an end to the charge of fraud. The documents were in fact more of the nature of estimates than rentals. But the pursuer did not rely on either one or other. He had a valuation of the property made, and he inspected the property himself. The case of fraud was therefore at an end.

His Lordship did not feel disposed to give an opinion as to the question of damages. But even if there had been fraud, he did not see how the pursuer would make out his damages. He estimated them by the difference between what he gave and what he would have given. But he had no absolute right to the property. He had to give a price that would please the seller; and the defender would not have taken less than £16,000.

The defender then applied for the expenses he had incurred in having inhibition and arrestments used by the pursuer recalled. It was essential to him to have them recalled; and they had therefore been recalled on caution by a petition in the Outer House. To get the record cleared of the inhibition the process had been extracted in the Outer House; and this was therefore the proper stage to apply for the expenses of recalling an arrestment that had been wrongously used.

The pursuer objected that the petition was a separate process in which expenses must be given, refused, or reserved.

Authorities referred to—*Manson* v. *Macara*, Dec. 7, 1839; *Clark* v. *Loos*, Jan. 20, 1855: *Steven* v. *M'Dowall's Trustees*, March 19, 1867, 3 Scot. Law Rep., 320; *Laing* v. *Muirhead*, Jan. 28, 1868; 1 and 2 Vict. c. 114, § 20; 13 and 14 Vict. c. 36, § 28; 31 and 32 Vict. c. 101, § 158.

The Court held that, as the Lord Ordinary's interlocutor on the petition did not reserve the question of expenses, the judgment is now final. The defender should have reclaimed to get it amended so as to reserve expenses. The proper form for the interlocutor would have been to reserve the question of expenses and authorise interim extract. The Lord President expressed himself doubtful of the safety of taking extract under 13 and 14 Vict. c. 36, § 28, unless the interlocutor expressly authorised interim extract.

Agent for Pursuer—D. J. Macbrair, S.S.C.
Agents for Defender—Ronald & Ritchie, S.S.C.

Wednesday, June 19.

BOAK *v.* BOAK'S TRUSTEES.

Factor—Process—Competency.

Circumstances in which, during the dependence of a cause, the Court refused a note presented by the defenders, praying them to appoint a person to take such supervision of the business which was the subject of litigation, as he (the person appointed) should consider necessary. Opinions as to the competency of this proceeding.

Mr Adam Beattie and Mr John Kerr, the trustees of Mr William Boak, tanner in Edinburgh, who died in 1855, continued to carry on the business of the deceased under the management of his eldest son, Mr Allan Boak. In 1871, the son, Mr Allan Boak, brought an action of declarator and implement against the trustees, to have it declared that they had sold to him, under certain conditions, the stock-in-trade, office furniture, book debts, and current bills of the tanning, currying, and japanning business, carried on by them in the West Port, Edinburgh; and also that, on the terms libelled, the defenders agreed with the pursuer to grant him a lease of the business premises, and machinery and utensils therein.

In consequence of this alleged agreement, Mr Allan Boak began to carry on the business as if he were not manager, but owner of the business, and the trustees did not take any active steps to prevent this, pending the decision of the case before the Lord Ordinary, but only gave intimation to Mr Allan Boak that they still considered him as manager only.

In the action, the Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—

"*Edinburgh, 11th June* 1872.—The Lord Ordinary having heard counsel for the parties, and considered the argument and whole proceedings, including the proof, documentary and parole: Finds that the pursuer has failed to prove the sale and agreement averred and libelled by him; therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses, allows them to lodge an account thereof, and remits it when lodged to the auditor to tax and report."

The pursuer reclaimed.

During the dependence of the cause in the Inner House, the defenders presented a note to the Lord President, setting forth the circumstances narrated above, and stating that, as the Lord Ordinary had decided in their favour, and as some time would probably elapse before the reclaiming note would be disposed of, they could no longer permit their business to be carried on under the uncontrolled management of Mr Boak; that they had accordingly authorised Mr Frederick Hayne Carter, C.A., to take such a supervision of the trust as he might think necessary, but that Mr Boak had intimated his resolution to oppose any such arrangement. They therefore craved his Lordship "to move the Court to ordain the pursuer Allan Boak to give the said Frederick Hayne Carter, as acting for them, access to the premises in West Port, and to the stock and business books therein, for the purpose of enabling him to inspect the same, and take such measures in regard thereto, and such supervision of the business, as he may consider necessary for the protection of the interests of the trust-estate, or to do otherwise as to the Court may seem proper in the circumstances."

SOLICITOR-GENERAL and KEIR for the pursuer.
MILLER and BURNET for the defenders.

At advising—

LORD PRESIDENT—I am not prepared to say that it is incompetent to make a motion in a depending process, to regulate the possession of the subjects of litigation, but we cannot possibly grant this motion, even if it is competent, as it is vague and indefinite.

As to the merits of the case, the parties presenting this application have no case at all. The dispute arose as to an alleged sale of the business by the trustees to Mr Allan Boak in 1870. Mr Boak alleged that an agreement to this effect had been completed, and that the business was henceforth his, and accordingly he carried on the

business as if it belonged solely to him. Now at this time the trustees would have been perfectly entitled to apply to the Court for an *interim* remedy, for example to apply for the appointment of a factor. But, instead of such a proceeding, they allowed Mr Boak to continue in possession of the business as owner, pending the decision of the question whether he was really owner or not. Then, after a year's delay, while the cause is still depending, they present this note, craving the Court to ordain Mr Boak to allow Mr Carter, as acting for them (the trustees), access to the premises, &c., in order that he may take such supervision of the business as he may consider necessary for the protection of the interests of the trust-estate. We cannot entertain an application of this sort, seeing that there is no insolvency, or supervening inability on Mr Boak's part, and that the only thing which the trustees can show to support their application is a judgment of the Outer House in their favour.

Lord Deas—I have no doubt at all that during the dependence of a process of this kind it is competent to apply for a factor in the usual way if good cause can be shown, and the factor is an officer of, and responsible to, the Court. Whether the same thing can be done in a depending cause by a mere motion I am not prepared to say. I have never seen it done, and at all events it would require very strong reasons to justify any such proceeding. It is not pretended that there is any statutory authority for such application, and I think that there are statutory enactments against it. The note craves that the Court should ordain the pursuer, Allan Boak, to give the said Frederick Hayne Carter, as acting for the trustees, access to the premises in the West Port, and to the stock and business books therein, for the purpose of enabling him to inspect the same, and take such measures in regard thereto, and such supervision of the business, as he may consider necessary for the interests of the trust-estate. Now, I am not prepared to give the least countenance to the competency of this application. A similar application might have been competent in a regular form, but not in this incidental form, and there is no reason why the application should have been made in such an unusual manner.

As to the merits of the cause, I entirely agree with your Lordship.

Lord Ardmillan—I do not say that it would be incompetent in a case of great emergency to apply to the Court in a going process for an order to effect an interim arrangement, and regulate the possession and temporary administration of the subjects of litigation. But such a proceeding is very unusual, and requires a very strong case, which that under consideration certainly is not; and I am of opinion that it would be out of the question to grant the prayer of this note.

Lord Kinloch—I agree with your Lordship, both as to the competency of this application, and the merits of the case. I think it is quite competent for the Court to arrange for the interim possession of the subject of a litigation, and I do not think that this is confined to the appointment of a judicial factor. But here Mr Boak is in possession of the subjects of litigation, and it is not proposed to dispossess him; but what is proposed is, to appoint what is nothing else than a judicial spy, and the result of such an appointment would be that no appreciable good would be done, and the person appointed would inevitably quarrel with Mr Boak. I think that, to say the least of it, it would be inexpedient to make this appointment.

Agents for Pursuer—Henry & Shiress, S.S.C.
Agents for Defenders—G. & H. Cairns, W.S.

Wednesday, June 19.

ROY *v.* THOMSON PAUL.

Compensation—Interest.

A obtained decree for expenses in the English Court of Chancery against B, and B obtained decree for expenses in a Court of Session action in Scotland against A. A then brought an action against B in the Court of Session for the English expenses, with interest, and B pleaded compensation. *Held* that B's plea of compensation was sufficient to warrant the Court in superseding consideration of the cause until A had an opportunity of stating in a competent form his objections to the claims of B.

In 1835 a loan of £10,000 was agreed to be made by Mr Wood of Leith to Major Anstruther of Thirdpart. The loan was negotiated by Mr Thomson Paul, W.S., as agent for Mr Wood, and Mr Robert Roy, W.S., as agent for Major Anstruther. The loan was made on the security of Major Anstruther's liferent interest, as heir of entail in the entailed estate of Thirdpart, and of certain policies of insurance on Major Anstruther's life. The transaction was guarded by certain agreements to secure the application of the loan to the payment of existing encumbrances on the estate—which was already burdened with various securities,—and to prevent any part of it going into the hands of the borrower or his personal creditors till the estate had been made perfectly clear from all burdens, and an undoubted security for the loan. In order so far to carry into effect the conditions of the loan, Mr Wood agreed to apply the sum of £7900 in redeeming certain heritable annuities over the estate, and in paying off other heritable and preferable debts. As this left a sum of £2100 applicable to other purposes specified in the agreement, it was arranged that the money should in the meantime be placed in the Bank of Scotland in the joint names of Messrs Paul and Roy, and this was accordingly done. At the date of this deposit, Messrs Dickson & Steuart, W.S., were personal creditors of Major Anstruther in the sum of £433, 13s. 5½d. due on open account, and they proceeded thereafter to raise an ordinary action in the Court of Session against the debtor to compel payment. Upon the dependence of the action they raised letters of inhibition and arrestment against Major Anstruther, and on 13th June 1835 they executed an arrestment against Messrs Paul and Roy as debtors to Major Anstruther. This arrestment was followed by an action of furthcoming against Mr Roy and Mr Paul, and in it the Lord Ordinary pronounced an interlocutor, allowing the defenders to raise an action of multiplepoinding, calling all parties interested. Accordingly, Mr Roy and Mr Paul, in 1840, brought a summons of multiplepoinding against Major Anstruther, Messrs Dickson & Steuart, Mr Wood, and