

clusions of the summons as well as of the whole merits of the cause, and it finds the pursuer entitled to expenses, allows an account thereof to be given in, and remits the same to the Auditor to tax and report, all in common form. In the interlocutor now reclaimed against the Lord Ordinary has done nothing but approve of the Auditor's report on the pursuer's account of expenses, and decern against the defender for the taxed amount; and the question comes to be, whether that is an interlocutor which is subject to review? If the defender had lodged objections to the Auditor's report, and taken a judgment on these objections, the case would have been a very different one; but no such course has been followed nor is it suggested that any such objections could be made good.

In these circumstances I find it impossible to distinguish the present case from those of *Tennent and Thompson*, to which we were referred. Although, no doubt, the interlocutors in these cases were pronounced in appeals in Sheriff Court causes, yet the principle there involved applies equally to the present case.

LORDS DEAS, MURE, and SHAND concurred.

The Court refused the reclaiming-note as incompetent.

Counsel for Pursuer—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Defender—M'Kechnie. Agents—Cairns, M'Intosh, & Morton, W.S.

Tuesday, October 16.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

GRANT SUTTIE'S TUTORS, PETITIONERS.

Process—Entail Petition—Interlocutor Signed in Vacation—Reclaiming-Note—Competency—Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 94—Distribution of Business Act 1857 (20 and 21 Vict. c. 56), sec. 6.

Held that section 94 of the Court of Session Act 1868 applies to entail petitions, and therefore that an interlocutor on an entail petition pronounced by a Lord Ordinary in vacation, and prior to the first box-day, was competently reclaimed against on the second box-day.

Section 94 of the Court of Session Act 1868 is in these terms—"It shall be lawful for the Lords Ordinary at any time in vacation or recess to sign interlocutors pronounced in causes heard in time of session . . . provided that when any such interlocutor is dated at or prior to the first box-day in vacation, the same may be reclaimed against on the second box-day, and when the interlocutor is dated after the first box-day, then on the first sederunt-day ensuing, or within such number of days from the date of such interlocutor as may be competent in the case of a reclaiming-note against such interlocutor dated and signed during session." . . .

The Distribution of Business Act 1857 provides (sec. 4) that petitions and applications under the Entail Acts shall be brought before the Junior Lord Ordinary, and (sec. 6) that "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, 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 in manner 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."

In a petition by Lady Susan Grant Suttie and others, the tutors of Sir George Grant Suttie, heir of entail in possession of the lands of Preston-grange and others, to restrict provisions to younger children granted by Sir James Grant Suttie, the preceding heir of entail, in excess, as the petitioners alleged, of the amount which could be competently granted by him, the Lord Ordinary (KINNEAR), after remitting to Mr J. P. Wright, W.S., to inquire into the circumstances set forth in the petition, pronounced an interlocutor on 31st July 1883, fixing a sum as the utmost amount which could be competently granted by Sir James, and finding that the provisions made by him were, so far as in excess of that sum, null and void. The petitioners reclaimed against this interlocutor on the 13th September, the second box-day in vacation, and upon the first sederunt-day they moved that the case be sent to the roll.

The motion was objected to by the respondents, who argued that in terms of section 6 of the Distribution of Business Act 1857 the reclaiming-note should have been boxed within eight days of the date of the Lord Ordinary's interlocutor, or at all events on the first box-day. This not having been done, the interlocutor complained of had become final, and the present reclaiming-note was incompetent. Section 94 of the Court of Session Act 1868 did not apply to entail petitions.

The reclaimers argued that by section 94 of the Court of Session Act 1868 the Lord Ordinary could competently pronounce an interlocutor in vacation in a cause heard before him in session, which term "cause" included an entail petition, and that the proper time for reclaiming against the present interlocutor was the second box-day, when the reclaiming-note was duly presented, and that the case ought therefore to be sent to the roll.

At advising—

LORD PRESIDENT—This case falls under the 94th section of the Court of Session Act of 1868, previous to the passing of which a Lord Ordinary was not entitled to sign interlocutors during vacation. By the terms of this statute, however, it is now provided that Lords Ordinary may sign, in vacation or recess, interlocutors pronounced in causes heard in time of session. If therefore the present reclaiming-note is within the provisions of this section, it was properly lodged upon the 13th September, which was the second box-day

in last vacation. Now, Mr Dundas maintains that the provisions of section 94 cannot be held as applicable to entail petitions, but I think that this is a mistake, as I fail to find in this section any restrictive words, and in the absence of such restrictive words its provisions must be held as applicable to all cases tried before a Lord Ordinary. If the Lord Ordinary does not proceed in terms of section 94, then any interlocutor so pronounced in the cause must necessarily be bad. Under sub-section 1 of section 12 of the Entail Amendment Act 1875, provision is made that application under the Entail Acts, though addressed to the Court, shall be presented to the Junior Lord Ordinary, and during any vacation or recess of the Court to the Lord Ordinary officiating on the Bills, who shall have all jurisdictions, powers, and authorities necessary for dealing with the same, and we are told that, as a matter of practice, such petitions are carried on in vacation. If, then, the contention of the respondent be correct, petitions which have been commenced in session before the Junior Lord Ordinary, must be carried on in vacation before the Lord Ordinary on the Bills. This would create a serious difficulty, as the jurisdiction of the Junior Lord Ordinary in such petition would necessarily terminate at the end of the Session. It seems to me that section 94 enables the Junior Lord Ordinary in this cause, as in all causes which have been under his consideration during the session, to pronounce an interlocutor after the Court has risen.

LORDS DEAS, MURE, and SHAND concurred.

The Court repelled the objection and sent the case to the Summar Roll.

Counsel for Petitioners (Reclaimers)—Pearson. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondents—Dundas. Agents—Dundas & Wilson, C.S.

Thursday, June 14.

OUTER HOUSE.

[Lord Fraser.

M'SKIMMING v. STENHOUSE.

Donatio mortis causa—Delivery—Equivalents of Delivery—Animus donandi de presenti.

A sum of money was deposited in a bank by the owner on deposit-receipt in the joint names of herself and another person, "payable to either or survivor," and the deposit-receipt was part of the contents of a box which was subsequently delivered by her orders when on her death-bed to that other person. Held that though a donation of the money could not be effectually constituted by the terms of the receipt, a donation had been constituted by her directing the donee to take possession of the box containing it.

On 9th February 1882 Mrs Elizabeth Craig or Stenhouse deposited with the Union Bank of

Scotland at Barrhead the sum of £400, and obtained a deposit-receipt in these terms:— "Received from Mrs E. C. Stenhouse, Kirkton, Neilston, and Mrs Mary Jane Stenhouse, London, payable to either or survivor, the sum of £400 sterling, which is placed to their credit on deposit-receipt." Mrs Mary Jane Stenhouse was the widow of a step-son of Mrs Elizabeth Stenhouse. Mrs Elizabeth Stenhouse, who was a widow and had no children, died on 12th October 1882. On 13th October Mrs Mary Jane Stenhouse endorsed the deposit-receipt and cashed it at the bank office at Barrhead. On 30th November 1882 Mrs Isabella Locke or M'Skimming, cousin-german of the deceased, was decerned executrix-dative qua next-of-kin to her, and was thereafter duly confirmed as such executrix. In making inquiries as to the amount of the executory estate, the fact that the said deposit-receipt had been so cashed was discovered, and Mrs Mary Jane Stenhouse was called upon to refund to the estate £400; this she refused to do. Mrs M'Skimming as executrix then raised the present action against her, in which the first conclusion was that the defender should be decerned to pay the sum of £400 with interest.

The pursuer averred that the deposit-receipt had been in the possession of the late Mrs Stenhouse at the time of her death, and was not delivered to the defender, or any *mortis causa* donation made of its contents, and that the receipt and the contents of it were part of the executory estate. The pursuer also averred that the late Mrs Stenhouse for some time before her death was in such a state of health that she was unable to make any such donation as was alleged. The defender averred that the deposit-receipt had been taken in the terms above quoted for the purpose of effecting a donation to her of the proceeds if she survived, and that a box containing it along with other articles had been given to her by instructions of the deceased some days before her death in further pursuance of this intention. The defender also averred that the deceased at the time of her death was of sound mind and able to make a disposition of her effects. She further explained that she was the widow of the deceased's stepson and had long been her most intimate friend. She pleaded that she was entitled to absolvitor in respect that the deceased made an effectual donation of the proceeds of the deposit-receipt to her *inter vivos*, or at all events *mortis causa*.

After a proof, the import of which is fully stated in his following opinion, the Lord Ordinary (FRASER) pronounced this interlocutor—"Finds it proved that the now deceased Mrs Elizabeth Stenhouse deposited with the Union Bank of Scotland at Barrhead the sum of £400, and obtained from the bank a deposit-receipt for the said sum dated 9th February 1882, which set forth that it was received from the said Mrs Stenhouse and from the defender, and was payable to either or the survivor: Finds that the said Mrs Stenhouse made a donation *mortis causa* of the sum contained in the said deposit-receipt to the defender," &c.

"Opinion.—The late Mrs Elizabeth Stenhouse, who resided at Kirkton, Neilston, died on the 12th October 1882, at the age of 82. Her income consisted of two annuities of £250 and £100, out of which she had saved £400, which she had de-