Saturday, November 16.

FIRST DIVISION.

CLARK & MACDONALD, PETITIONERS.

Process—Interlocutor—Error—Diligence.

In a case in which the Court decerned in favour of the pursuer for a sum of money, the Depute-Clerk of Court, in writing out the interlocutor, inadvertently committed the clerical error of substituting £14 for £41. This error he subsequently discovered and corrected before extract, without having the correction authenticated by the judge who signed the interlocutor. The interlocutor, as corrected, and the extract, were both in conformity with the judgment of the Court.

A charge having been given upon the extract-decree, and having expired without payment being made, the goods of the defender were poinded. The defender thereupon presented, in the Bill Chamber, a Note of Suspension and Interdict of the decree and proceedings thereon. The agents-disbursers of the pursuer, in whose name decree had been extracted and the charge given, then presented a petition craving the Court to confirm and authenticate the amendment made in the interlocutor by the Clerk of Court.

The Court pronounced no order on the petition, but reported to the Lord Ordinary in the Bill Chamber that the interlocutor as amended correctly expressed the judgment of the Court.

Messrs Clark & Macdonald, S.S.C., Edinburgh, presented this petition to the Court, in which they narrated the following facts:—On 20th July 1895 the First Division approved of the Auditor's report on the pursuer's account for expenses in an action for payment raised by Donald Mackenzie, London, against William Bain, accountant, Great King Street, Edinburgh, decerned against the defender for the taxed amount thereof, £41, 2s. 8d., and allowed the decree to go out and be extracted in name of the petitioners as agents-disbursers. By inadvertency, the Depute-Clerk of Court, who wrote out the interlocutor, instead of the true figures, £41, 2s. 8d., inserted the figures £14, 2s. 8d. in the interlocutor. The error was noticed by the defender shortly after the interlocutor was signed, but the petitioners were not aware of any error having been made, and subsequently ascertained that, before they saw the interlocutor, the Depute-Clerk of Court had corrected his mistake by changing £14 to £41, thus bringing the interlocutor into conformity with the judgment of the Court. This alteration was not pointed out to the petitioners, who ordered extract in usual course, under the belief that same was in order, which it *ex facie* appeared to be.

The petitioners, on obtaining their extract, charged the defender William Bain thereon to pay the sums therein mentioned. The charge expired without any intimation having been made by the defender to the petitioners of the alleged default in the interlocutor, but, on the petitioners instructing a poinding of the effects of the defender, he only then presented a note of suspension and interdict of the decree and whole proceedings following thereon, and Lord M'Laren, Lord Ordinary officiating on the Bills, on 9th October 1895, pronounced the following interlocutor in the note of suspension and interdict:—'Edinburgh, 9th October 1895.—On caution to see and answer in eight days; meantime sists execution, and to be intimated.—JOHN M'LAREN.'

"The said defender William Bain has found caution, and is insisting in said note of suspension and interdict to the great hurt and prejudice of the petitioners, who are rightly and justly entitled to the said sum of £41, 2s. 8d., which was the taxed amount of expenses, and which was the sum the Court intended to grant decree for, and believed they were granting decree for.

"In these circumstances the petitioners are under the necessity of applying to your Lordships to exercise your *nobile officium*, and to confirm and authenticate the amendment by the Clerk of Court in said interlocutor, as if the said amendment had been made and duly authenticated on 20th July 1895, being the date of the said interlocutor sought to be rectified, so that the proceedings which have followed thereon may be held to be regular and in conformity with law."

The petitioners accordingly craved the Court to "confirm and authenticate the amendment by the Clerk of Court in the said interlocutor, as if the said amendment had been made and duly authenticated on said 20th July 1895, being the date of the said interlocutor sought to be rectified."

Mr Bain lodged answers, in which he stated that on 6th August his agent's clerk made a copy of the interlocutor at the Register House, that on 7th August the respondent had himself done the same, and that on both these occasions the interlocutor bore to decern for the sum of £14, 2s. 8d. The respondent further stated that, considering his then indebtedness to be £14, 2s. 8d., he had gone to the country, and only returned two days before the expiry of the charge. He had then pointed out to the messenger-at-arms that the interlocutor was for £14 odds, not for £41 odds, but, notwithstanding, his goods were poinded on 2nd October. He was then compelled to take the proceedings in the Bill Chamber referred to by the petitioner. As these proceedings would come under notice of the Court in due course, he submitted that the petition was incompetent, or at all events premature.

The respondent accordingly asked the Court to refuse the petition.

At an early stage in the discussion the Junior Lord Ordinary (Low), at the suggestion of the Lord President, reported the action pending in the Bill Chamber to the Court.

Argued for the petitioners—This was admittedly a clerical error, which the Clerk was not only entitled but bound to correct when he discovered it. The answers were irrelevant, for it was not disputed that the extract was correct and in conformity with the judgment of the Court—*Miller* v. *Lindsay*, June 8, 1850, 12 D. 964; *Allan* v. *Wormser Harris & Company*, June 8, 1894, 21 R. 866, *per* Lord Rutherfurd Clark, 875; Mackay's Practice, p. 320.

Argued for the respondent—Granted that a clerical error may be corrected *de recenti*, and before extract, this error had not been corrected *de recenti*. The real question in the case was whether the diligence against the respondent was good. The petitioners, indeed, virtually admitted that it was bad by coming to the Court and asking to have the warrant for the extract and charge authenticated so as to set up all that followed thereon. The proper action for determining that question was the suspension in the Bill Chamber, and the present petition was unnecessary—*Sykes* v. *Nicol*, July 18, 1848, 10 D. 1499; *Ritchie* v. *Ferguson*. November 16, 1849, 12 D. 119.

LORD PRESIDENT—This question relates to a judgment of this Court, and the parties are agreed that in fact the judgment was given for the sum of £41, 2s. 8d., and not for £14, 2s. 8d.

Lord Low has reported to us the case at present depending before him, and it appears that the judgment was for £41, 2s. 8d., the interlocutor bears to be for £41, 2s. 8d., and the extract is for that sum.

Our attention has been drawn to an irregularity which occurred in the history of the interlocutor, which is the written record of the judgment, and it appears to me that, while certainly it would have been in accordance with regular practice that any alteration upon it should be authenticated by the judge who signed the interlocutor, yet in this case the omission is not shown to introduce any vice into the interlocutor, because in point of fact it accords with the judgment of the Court.

It therefore seems to me that the interlocutor has not been successfully impugned, and we, who pronounced it, inform his Lordship, who has reported the case to us, that the interlocutor does correctly record the judgment pronounced by us. Accordingly, I think that we should find that it is unnecessary to dispose of the petition, and that we should state to Lord Low that the interlocutor is in accordance with the actual judgment of the Court.

LORD M'LAREN—I concur. It must always be remembered that an interlocutor is merely a brief minute of the judgment pronounced, intended for the use of the officer of the Court in the preparation of the form of extract, and that there are no statutory provisions regulating the authentication of such minutes. The signature of the judge is all that is necessary.

I think with your Lordships that after the interlocutor is signed, the Clerk of Court ought not to make the smallest clerical alteration upon it without submitting it to the approval of the judge.

In ordinary course, where the correction consists in the deletion of one word or figure and the substitution of another, the judge would initial it, but that is merely for the purpose of preserving evidence of the fact that the correction has been submitted to his approval.

In the present case the clerical correction was not submitted to the judge, because probably the Clerk of Court thought the parties were agreed that it should be done. The omission of that precaution has led to the present proceedings, but as the Court has now been satisfied that the interlocutor as it stands truly expresses the judgment of the Court, I agree that it is unnecessary that any formal correction should be made.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced no order on the petition, but reported to the Lord Ordinary that the interlocutor as amended correctly expressed the judgment of the Court.

Counsel for the Petitioner—Watt—J. G. Stewart. Agents—Parties.

Counsel for the Respondent—A. M. Anderson. Agent—Alex. Gunn, S.S.C.

Thursday, November 21.

SECOND DIVISION.

WALLACE'S EXECUTORS *v.* WALLACE.

Succession—Universal Settlement—Residuary Legatee—Lapsed Bequests of Heritage.

A testator by his last will and testament, dated 1884, which dealt with his whole estate, heritable and moveable, left certain heritable subjects to one of his nieces as a token of his special favour. He also named her residuary legatee by a clause in the following terms:—"I leave as my residuary legatee my niece, who will pay my funeral expenses and any debts I may justly owe."

Held that she was entitled, as residuary legatee, to take bequests of heritable as well as moveable property which had lapsed during the testator's lifetime, by the predecease of another beneficiary, and that such bequests did not fall into intestacy.

By holograph will and testament, dated 18th March 1884, George Johnstone Wallace of Newton Hall, Fifeshire, bequeathed to his nephew, Adolphus Wallace, "the estate of Newton Hall, in the parish of Kennoway, Fifeshire, Scotland, with farm live stock and farm implements, &c., and, with the said estate, the mansion-house, also the furniture and household furnishings, pictures, &c., subject, however, to the following conditions, viz.—That the mansion-