the trustees, and law-agent and factor of the trust, taxed, Finds that the said accounts have been already taxed by the auditor of the Faculty of Procurators, Glasgow, but that it is admitted that said taxation took place *ex parte*, and was obtained by the defender the said James Robertson at his own hands, and that without special authority from or intimation to the other trustees or beneficiaries: Finds that in these circumstances the pursuer is entitled to have the said business accounts taxed of new: Therefore remits the same to Mr James M'Intosh, S.S.C., Auditor of the Court of Session, to tax, and to report *quam primum;* reserving all questions of expenses."

The Lord Ordinary refused the defenders motion for leave to reclaim.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 27, contains certain enactments relating to procedure after the closing of the record, and in particular to the allowing or refusing of probation.

Section 28 enacts that any interlocutor pronounced by the Lord Ordinary, as provided for in the preceding section, shall be final, unless within six days from its date the parties, or either of them, shall present a reclaiming-note against it to one of the Divisions of the Court.

Section 54—"Except in so far as otherwise provided by the 28th section hereof, until the whole cause has been decided in the Outer House, it shall not be competent to present a reclaiming-note against any interlocutor of the Lord Ordinary without his leave first had and obtained."

The Act of Sederunt 10th March 1870, section 2, enacts—"That the provisions of the 28th section of the said statute [the Act of 1868] shall apply to all the interlocutors of the Lord Ordinary hereinbefore referred to, so far as these import an appointment of proof, or a refusal or postponement of the same."

The defenders reclaimed.

On the case appearing in the Single Bills the pursuers objected that the reclaiming-note was incompetent.

Argued for the pursuers—The reclaiming-note was clearly excluded by section 54 of the Act of 1868. The interlocutor of the Lord Ordinary here was not one appointing, refusing, or postponing a proof. Hence the case was easily distinguishable from that of *Quin* v. *Gardner & Sons*, June 22, 1888, 15 R. 776, relied on by the defenders, where the remit to a man of skill was intended to take the place of a proof.

Argued for the defenders and reclaimers—The reclaiming-note was competent. *Quin's* case afforded an exact analogy to the present one.

At advising—

LORD PRESIDENT — The Court are of opinion that this reclaiming-note is incompetent, the interlocutor reclaimed against not falling within the provisions of the 27th and 28th sections of the Court of Session Act 1868 as modified by the Act of Sederunt of 10th March 1870. We consider that the case of *Quin* does not apply. The reclaiming-note is therefore excluded by the 54th section of the Act.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused the reclaiming-note,

Counsel for the Pursuers—Clyde. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Defenders — M'Lennan. Agents—Cumming & Duff, S.S.C.

Friday, December 18.

FIRST DIVISION.

[Sheriff Court of Aberdeen.

FARQUHAR *v.* AITKEN.

Process—Abandonment of Action—Appeal for Jury Trial—Judicature Act 1825 (6 *Geo. IV. c.* 120), *sec.* 40.

Held that an appellant for jury trial in terms of sec. 40 of the Judicature Act 1825, may competently abandon his action by a minute in the form provided in sec. 10 of the Judicature Act and sec. 115 of the relative Act of Sederunt, 11th July 1828, for actions originating in the Court of Session.

Robert Farquhar, house painter, Aberdeen, raised an action in the Sheriff Court of Aberdeen concluding for £50 damages in respect of alleged slander. The Sheriff-Substitute (BROWN) allowed a proof, and the defender appealed under sec. 40 of the Judicature Act (6 Geo. IV. c. 120) to the First Division of the Court of Session for jury trial.

On 19th December 1896 the pursuer put in a minute of abandonment, in which, after narrating the various steps in the procedure of the case, he concluded—"And that in view of the denial by defender of the slander complained of, and in respect of the heavy expenses which would necessarily be incurred in having the case tried by a jury, the pursuer and respondent has resolved to abandon, and hereby abandons, the action in terms of the statute."

The provision referred to is contained in section 10 of the Judicature Act, as regulated by the 115th section of A.S., 11th July 1828.

A question having arisen as to whether the minute should not be presented in the form provided by section 61 of A.S., 10th July 1839, which prescribes the appropriate form for abandonment in actions raised in the Sheriff Court,

Argued for pursuer—When an appeal for jury trial was presented under the Judicature Act, it could be dealt with by the Court as though originating in the Court of Session—*Cochrane* v. *Ewing*, July 20, 1883, 10 R. 1279; and accordingly abandonment in Court of Session form was competent. In *Kermack* v. *Kermack*, November 27, 1874, 2 R. 156, a minute of abandonment was held to be competently presented in Sheriff Court form, but that was an ordinary

appeal from the Sheriff Court, not one under the Judicature Act.

The Court sustained the minute of abandonment.

Counsel for the Pursuer—A. J. Morison. Agent—Alex. Morison, S.S.C.

Friday, December 18.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

THOMSON *v.* THOMSON AND OTHERS.

Lease — Constitution of Lease — Whether Agreement to Assign Business, etc., an Implied Lease of Premises.

By written agreement A assigned to B the business of engineer carried on by him in certain premises, "and the whole stock, funds, assets, rents, and goodwill thereof, together with the whole machinery and appliances in said premises, whether fixed or unfixed, belonging to him." In respect of this assignation B on his part undertook, *inter alia*, to pay to A an annuity of £250 for life.

B entered into occupation of the premises, where he continued to carry on the business, and duly fulfilled his obligations under the agreement.

At a subsequent date A raised an action against B to have him ordained to remove from the premises in question on the ground that he had no lease or other title to possess them.

It appeared from a proof that it would be difficult to find a suitable site for the business in the same locality, and that the erection of new buildings and the removal thither of the heavy plant and machinery in the old premises would involve a large expenditure of time and money.

Held (*aff.* judgment of Lord Stormonth Darling, though for a different reason) that B was entitled to absolvitor, on the ground that in a question with A, and in the circumstances, the agreement must be taken to imply a lease of the premises to B for the term of A's life, and at a rent which, though not definitely stated, was included in the annuity.

This was an action raised by William Thomson, engineer, Glasgow, against his sons by his first marriage, William Thomson junr., and John Thomson, and his son-in-law Charles Davidson, to have them ordained to flit and remove from certain premises in Smith Street, Kinning Park, Glasgow.

The premises in question had been originally purchased by the pursuer and fitted up by him with machinery. His second wife, whom he married in 1871, alleged that they had been conveyed to her by her marriage-contract, and in 1883 the pursuer, who had continued to pay the ground-annual in respect of the premises, and had paid his wife no rent for his occupation of the same, took a formal lease of them from her for a period of twenty years at a rent of £40.

A dispute having arisen between the pursuer and his wife as to the ownership of the subjects, matters were finally settled by Mrs Thomson granting a formal conveyance of the property to her husband.

Prior to this the pursuer had entered into the agreement with the defenders which formed the subject of the present action. Mrs Thomson was originally the pursuer, but on 10th January 1896 her husband, who was by that time owner in title as well as in fact of the premises in Smith Street, was sisted as pursuer in her place.

The agreement referred to was dated 22nd January 1894, and contained the following stipulations:—

First—The pursuer assigned and transferred to the defenders "the business of engineer presently carried on by" him at 57 Smith Street, "and the whole stock, funds, assets, rents, and goodwill thereof, together with the whole machinery and appliances in said premises, whether fixed or unfixed, belonging to" him.

By article 2 it was provided—"The first party [the pursuer] shall, however, remain as consulting engineer in connection with the business at such salary as may be agreed upon from time to time, and the second party shall be bound to take the advice of the first party on all points connected with the practical management and development of said business as well as the ordering of all material and plant necessary for the carrying on of said business and the engaging and dismissing of employees; but the first party shall not be responsible in any way for the advice so given, and he shall only give such time and attention to such points as he may think proper.

"*Third*—The second party bind and oblige themselves to pay the whole debts and obligations of the first party in connection with said business at the date hereof, as the same mature, and to free and relieve, and harmless and scatheless keep, therefrom the said first party in all time coming."

Fourth—In respect of the assignation of the business, and the stock, funds, assets, rents, and goodwill thereof, and machinery and appliances, the second parties bound themselves to pay to the first party an alimentary annuity of £250 during all the years of his life, to begin at the following Whitsunday.

Fifth—In the event of failure to pay the annuity, the first party was empowered to enter into the possession and management of the said business and stock, funds, assets, rents, and goodwill, and machinery, and appliances, and to call upon the second party to retransfer the same to him.

"*Sixth*—The second party shall not be at liberty to dispose, sell, or transfer said business, or any portion of the plant or stock and others, during the lifetime of the first party; nor shall it be in the power of