Friday, October 21.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

EARL OF KINTORE *v.* ALEX. PIRIE & SONS, LIMITED.

(*Ante*, December 18, 1902, 40 S.L.R. 210, 5 F. 818.)

Process — Reclaiming-Note — Competency— Interlocutor Granting Expenses subject to some Modification Held to be Final—Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 53.

An interlocutor was pronounced by a Lord Ordinary which taken along with previous interlocutors disposed of the whole merits of the cause, and which found one party "entitled to expenses subject to some modification," the amount of the modification not being fixed.

Held that this was a final judgment in the Outer House within the meaning of section 53 of the Court of Session Act 1868.

The Court of Session Act 1868, section 53, enacts:—"Definition of Final Judgment in the Outer House—It shall be held that the whole cause has been decided in the Outer House, when an interlocutor has been pronounced by the Lord Ordinary, which either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or decerned for." . . .

In an action at the instance of the Earl of Kintore and Others, proprietors of the salmon fishings in the river Don, against Alex. Pirie & Sons, Limited, proprietors of mills on that river, to prevent the defenders abstracting water therefrom, the Lord Ordinary on 19th August 1904 pronounced an interlocutor which taken along with previous interlocutors disposed of the whole merits of the case. The interlocutor then proceeded:—"Finds the pursuers entitled to expenses, subject to some modification, and remits the account thereof when lodged to the Auditor to tax and report."

The defenders reclaimed, their note being dated September 29th. Upon its appearing in the Single Bills, counsel for the pursuers objected to its competency, and argued—The Lord Ordinary's interlocutor gave expenses "subject to some modification," and the amount or the basis of modification was not decided. It was therefore not a final judgment, and the leave to reclaim which was necessary had not been obtained—*Baird* v. *Barton*, June 22, 1882, 9 R. 970, 19 S.L.R. 731; *Crellin's Trustee* v. *Muirhead's Judical Factor*, October 21, 1893, 21 R. 21, 31 S.L.R. 8; *Taylor's Trustees* v. *M'Gairgan*, May 21, 1896, 23 R. 738, 33 S.L.R. 569; *Burns* v. *Waddell & Son*, January 14, 1897, 24 R. 325, 34 S.L.R. 264.

Argued for the defenders—The reclaiming-note was competent, as the interlocutor fell within the terms of the Court of Session Act 1868, section 53.

At advising—

Lord President—By the interlocutor of 19th August 1904, taken along with the prior interlocutors, the whole subject-matter of the cause in so far as requiring to be dealt with has been disposed of, and the Lord Ordinary "*quoad ultra* finds it unnecessary to dispose of the conclusions of the summons otherwise than as already disposed of: Therefore dismisses the same; and decerns: Finds the pursuers entitled to expenses subject to some modification, and remits the account thereof when lodged to the Auditor to tax and report." It appears to me that this interlocutor satisfies the definition of a final judgment in the Outer House given in section 53 of the Court of Session Act 1868.

It was, however, maintained that the reclaiming-note is incompetent, because, as I understood, the finding of expenses in favour of the pursuers was "subject to some modification" which is not specified, the contention being that a reclaiming-note is incompetent until the amount of the modification has been determined. It appears to me, however, that when the whole subject-matter of the cause has been disposed of, and a finding of expenses such as occurs in the interlocutor of 19th August 1904 has been made, it is not necessary in order to warrant a reclaiming-note that the amount of the expenses shall have been ascertained or that the amount of the modification shall have been determined.

I therefore think that the objection to the competency of the reclaiming-note should be repelled.

Lord Adam—I concur. I think the interlocutor in question falls under section 53 of the Act. That section declares that "It shall be held that the whole cause has been decided in the Outer House when an interlocutor has been pronounced by the Lord Ordinary which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause." Then it goes on to say, "It shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or decerned for." Now the whole subject-matter of the cause has been decided, and expenses have been found due. They are found due subject to modification, but the saving clause makes it quite clear that if expenses have been decerned for that is none the less a final interlocutor, an interlocutor disposing of the whole subject, and subject to review, although the amount of the modification or the amount of expenses as taxed has not been fixed. I agree with

your Lordship that it is quite clear that the interlocutor in question is reclaimable as a final interlocutor.

LORD KINNEAR—I quite agree. The objection is that we are prevented from holding that this interlocutor, which would otherwise have been final, is a final interlocutor in the sense of the statute, because although expenses have been found due they have not been modified. They have been found due subject to modification, and the modification has not been made. But then the statute says in so many words that it shall not prevent a cause being held as finally decided that expenses if found due have not been taxed, modified, or decerned for. It appears to me that that directly and in terms meets the objection. I have no difficulty in holding with your Lordships that the reclaiming-note is competent. I cannot agree with the statement made at the bar that there is something ambiguous in the use of the term "modified." That appears to me always to mean one and the same thing. It means the exact ascertainment of the precise sum that is to be paid. If the Lord Ordinary thinks that it is necessary that before expenses are paid some further deduction should be made from what may have been made in taxation, then he makes that deduction before the expenses are finally decerned for. The words have only one meaning.

LORD M'LAREN was absent.

The Court repelled the objection and sent the case to the roll.

Counsel for the Pursuers and Respondents—Campbell, K.C.—P. Balfour. Agents—Alexander Morison & Company, W.S.

Counsel for the Defenders and Reclaimers—Clyde, K.C.—Nicolson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, October 22.

SECOND DIVISION.

GENERAL ASSEMBLY OF THE FREE CHURCH OF SCOTLAND *v.* LORD OVERTOUN.

(*Ante*, August 1, 1904, vol. 41, p. 742.)

Process—Petition to Apply Judgment of House of Lords—Motion to Discuss whether Application of Judgment should be Delayed—Duty of Court of Session in Applying Judgment of House of Lords not Judicial but Purely Ministerial.

A petition was presented to the Court to apply the judgment of the House of Lords and to declare in terms of the direction to the Court in that judgment to make certain specific declarations.

When the case was put out in the Single Bills, the unsuccessful parties appeared and moved the Court to send the petition to the Summar Roll for discussion as to whether the Court had any discretion to delay applying the judgment of the House of Lords, and, if so, whether such discretion should be exercised in the exceptional circumstances of the case.

The Court *refused* to send the petition to the Summar Roll, and *granted* the prayer of the petition *de plano*, on the ground that the duty imposed on them by the remit from the House of Lords was not judicial but purely ministerial—*diss.* Lord Young, who was of opinion that the case should be sent to the Summar Roll for full discussion.

On 1st August 1904 the House of Lords pronounced judgment in the case of the General Assembly of the Free Church of Scotland and others (pursuers and appellants) *v.* Lord Overtoun and others (defenders and respondents), reversing the decision of the Court of Session and remitting the cause to the Court of Session in Scotland with a direction "to declare (1) that the association or body of Christians calling themselves the United Free Church of Scotland has no right, title, or interest in any part of the whole lands, properties, sums of money, and others which stood vested as at the 30th day of October 1900 in the Right Hon. John Campbell Baron Overtoun and others, as general trustees of the Free Church of Scotland; and (2) that the said appellants (pursuers) and those adhering to and lawfully associated with them conform to the constitution of the Free Church of Scotland, are and lawfully represent the said Free Church of Scotland, and are entitled to have the whole of said lands, property, and funds applied according to the terms of the trusts upon which they are respectively held for behoof of themselves and those so adhering to and associated with them and their successors as constituting the true and lawful Free Church of Scotland, and that the defenders, the said Right Hon. John Campbell Baron Overtoun and others, as general trustees foresaid, or the defenders second enumerated, or those of the defenders in whose hands or under whose control the said lands, property, and funds may be for the time being, are bound to hold and apply the same (subject always to the trust after mentioned) for behoof of the pursuers and those adhering to and associated with them as aforesaid, and subject to the lawful orders of the General Assembly of the said Free Church of Scotland, or its duly appointed Commission for the time being, and in particular that they are bound to denude themselves of the whole of said lands, property, and funds in favour of such parties as may be nominated as general trustees by a General Assembly of the Free Church of Scotland or its duly appointed Commission for the time being, but subject always to the trusts upon which the said lands, property, and funds were respectively held by the said defenders for behoof of the Free Church of Scotland as at 30th October 1900, and to do therein as shall be just and consistent