stitute (CRAIGIE) allowed a proof before answer.

On the requisition of the pursuer the cause was remitted to the First Division of the Court of Session. He proposed an issue in ordinary form with alternative schedules.

Argued for defenders—(1) The action was irrelevant at common law. At common law an employer had discharged his duty when he had provided a competent staff, sufficient plant, and a safe system of working. In this case the competence of the staff and the sufficiency of the plant were not called in question, and the pursuer's averments did not disclose a defective system. They showed that the danger was occasioned by a casual shower of rain, and that it was of a temporary nature, calling for temporary precautions, which arose in the ordinary course of carrying on the work, and was not due to a defective system. That being so the defenders were not liable—*Harper* v. *James Dunlop & Company, Limited*, December 5, 1902, 5 F. 208, 40 S.L.R. 174; *Thomson* v. *Baird & Company, Limited*, November 26, 1903, 6 F. 142, 41 S.L.R. 152. Even if the pursuer had averred that there was a duty on the defenders to provide a permanent fence, such an averment would not by itself have been sufficient to make the case relevant at common law unless he had also averred facts and circumstances from which a dangerous system could be inferred—*Burns* v. *Henderson & Company, Limited*, June 2, 1905, 7 F. 697, 42 S.L.R. 586; *Forsyth* v. *Ramage & Ferguson*, October 25, 1890, 18 R. 21, 28 S.L.R. 26. This he had failed to do. (2) The action was also irrelevant under the Employers' Liability Act, for there was no duty on the defenders or their servants to fence the deck in question.

Argued for pursuer (the Court having called for a reply on the first branch only of the defenders' argument)—(1) The action was relevant at common law. The danger was permanent and not casual. It continued so long as the boy was working on the deck, and the provision of a rail would have been only a reasonable precaution—*Wallace* v. *Culter Paper Mills Company, Limited*, June 23, 1892, 19 R. 915, 29 S.L.R. 784; *Smith* v. *Baker & Sons*, L.R. [1891], A.C. 325.

LORD PRESIDENT—It is clear that there is here no relevant averment of liability at common law. There is no averment of a defective system; there is no averment that the defenders failed to employ a competent foreman, or that they stinted their foreman in proper materials required for the performance of his duties. All that is said is that the boy, running about the deck, which was wet and slippery and not sufficiently protected by a bulwark, slipped and fell over the edge. It is said that nothing had been erected in the nature of a temporary fencing. If it was the want of a fence that caused the accident, that was not a defective system; it was a matter which was under the control of the head workman. It is quite true that the employer is bound to provide for the safety of his workmen, and if he fails to provide some piece of machinery or structure which is necessary to protect them against what is a permanent danger, then the employer is himself liable, because he is held to have known of that danger. But he cannot be supposed to know of what may be called a casual danger emerging in the course of the work, such as that to which the boy in the present case was exposed. All he can do to protect his men against such a danger is to provide a competent foreman. There is no averment that the employer in the present case failed to provide a competent foreman, and therefore there is no fault averred at common law.

On the other hand I think a relevant case has been stated under the Employers' Liability Act, because it is said that the employers' foreman, John Graham, knew of the danger, should have erected a temporary fence to protect the workmen, and failed to do so. The pursuer may be able to prove, as he avers, that there is a general custom to fence a place of this kind. On that point it would not be proper for the Court to say anything. Unless the pursuer is able to prove that there is such a general custom, and that the failure to put up a temporary fence at this place was negligence, he will fail in his action. But he may be able to prove this, in which event he will be entitled to succeed.

I therefore think we should allow the issue under the Employers' Liability Act.

LORD DUNDAS and LORD JOHNSTON concurred.

LORD KINNEAR was absent.

The Court dismissed the action so far as laid at common law and allowed an issue under the Employers' Liability Act 1880.

Counsel for Pursuer—M'Clure, K.C.—J. A. T. Robertson. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for Defenders—Moncrieff—Gilchrist. Agent—Harry H. Macbean, W.S.

Tuesday, January 9, 1912.

FIRST DIVISION.

[Sheriff Court at Glasgow.

AMMON *v.* TOD.

Agent and Client—Expenses—Compromise of Action—Agents' Right to be Sisted as Parties to the Cause and to Obtain Decree for Expenses as Agents-Disbursers.

The defender in an action against whom decree with expenses had been pronounced in the Sheriff Court appealed to the Court of Session. Pending the appeal the parties settled the case without the knowledge of the pursuer's agents, the pursuer accepting a sum in full of all his claims against

the defender. The appellant having thereafter craved the Court, in respect of the compromise above referred to, to assoilzie him, and to find no expenses due to or by either party, the pursuer's agents lodged a minute craving to be sisted as parties to the case in order that they might obtain decree against the defender and appellant as agents-disbursers for their expenses.

Held by a Court of five Judges (*diss.* Lord Kinnear) that the minuters were entitled to be sisted as parties to the cause, and to obtain decree for their expenses against their client's opponent.

Arthur F. Ammon, import and export merchant, Haworth Buildings, Manchester, raised an action in the Sheriff Court at Glasgow against J. Walker Tod, agent, 102 Union Street, Glasgow, in which he, *inter alia*, sought payment of £2000 damages for breach of contract.

The following narrative is taken from the opinion (*infra*) of Lord Johnston—"The circumstances in which this question arises may, so far as is necessary for disposal of the question at issue, be very shortly stated.

The respondent Ammon held an agency for the Positive Lock Washer Company of Newark, New Jersey, U.S.A., as sole export agent for the sale of their Positive Lock Washer, excepting in the United States and Canada. The appellant Tod was in the respondent's service in Manchester, which was the headquarters of his business, and as at 1st June 1906 the respondent engaged him to represent him in Scotland. This engagement continued from year to year, and at 1st February 1909 was current until 1st June of that year. The respondent alleges, the Sheriff-Substitute has found, and the Sheriff has affirmed, that behind the back of the respondent the appellant, in the end of 1908, went to America, and there succeeded in filching from him the agency which he held from the American Company, and which on 1st February 1909 was withdrawn from the respondent and transferred to the appellant. Concurrently, on 30th January 1909 the appellant intimated to the respondent that he would from that date cease to represent him in Scotland, and terminated their current agreement, which had still four months to run.

"It is not to be wondered at that litigation between the parties immediately ensued. At once the respondent raised against the appellant an action in the Sheriff Court at Glasgow for interdict, accounting, and damages. In this action the Sheriff, on appeal on 17th March 1910, (fully agreeing with his Substitute on the facts, though varying his interlocutor on the point of damages) found it unnecessary, owing to efflux of time, to grant interdict, decerned against the appellant for £68 in the accounting, and for £100 in name of damages, with expenses.

"Though the merits of the case have not been gone into before us, it is a factor which I cannot exclude from view, that both Sheriffs found against the appellant in matter of fact by interlocutors which exhausted the cause in their Court.

"On the 30th March 1910 the defender appealed to this Division, and on 12th May of that year the case was sent to the roll. While the case was in the roll awaiting hearing, the appellant came to a settlement with the respondent without the knowledge or consent of Messrs Lindsay, Meldrum, & Oatts, writers, Glasgow, and Messrs Erskine Dods & Rhind, S.S.C., Edinburgh, who had represented the respondent in Glasgow and Edinburgh respectively. This settlement was not apparently reduced to writing, but its terms are evidenced by those of a receipt dated Manchester, 3rd February 1911, granted by the respondent to the appellant, in which the former acknowledged having received from the latter 'the sum of seventy pounds sterling in full settlement of all claims of principal and expenses which I have in the action at my instance at present pending in the Court of Session, Edinburgh, against the said James Walker Tod, and I hereby discharge him of all such claims under said action.'

"In these circumstances, and before the case came on for hearing, the appellant lodged a note craving the Court, in respect of the discharge above referred to, to recal the interlocutor appealed against, to assoilzie him from the conclusions of the action, and to find no expenses due to or by either party. This was quite consistent with the terms of the discharge, and in other circumstances the Court would have nothing to do but to interpone authority to the settlement and grant the crave of the appellant.

"But this application was met by the agents lodging a minute craving that they might be sisted as parties to the action as agents-disbursers, 'in order that a decree may be pronounced against the appellant and defender in their favour as agents-disbursers for the expenses of the action as between agent and client." This minute was answered by the appellant, and on the face of the minute and answers the question was sharply raised whether the settlement which had taken place on the 3rd February 1911 was not made by the appellant in knowledge of the respondent's insolvency and in fraud of his agents' rights? I do not think that it is necessary to go into the averments on this matter, which could not be accepted without proof, in disposing of the question before us. Nor, in my opinion, is that question affected by the allegation sought to be introduced after the last discussion, to the effect that the respondent was at any rate now in fairly affluent circumstances and able to meet his agents' claims."

Parties were heard on the minute and answers on 1st March 1911 before a Court consisting of the LORD PRESIDENT, LORD JOHNSTON, and LORD SKERRINGTON.

On 17th March 1911 the Court appointed the case to be heard before Five Judges, and it was so heard on 19th May following.

Argued for the minuters—Where, as here, decree had been pronounced in the pursuer's favour, with expenses, and where, as here, the action had been settled extrajudicially behind the back of the pursuer's agents, the latter were entitled to be sisted in order that they might get decree for their expenses, to which, on the settlement, they had acquired an independent right—*Hamilton* v. *Bryson*, June 17, 1813, F.C.; *Rox* v. *Stewart*, July 3, 1818, F.C. (*vide* also Session Papers therein); *Sloss & Gemmil* v. *Kennedy*, May 28, 1823, 2 S. 344; *M'Lean* v. *Auchinvole*, June 29, 1824, 3 S. 190; *Ferguson* v. *Richardson*, July 8, 1826, 4 S. 814; *Cheyne* v. *Cheyne*, January 18, 1832, 10 S. 202; *Macgregor & Barclay* v. *Martin*, March 12, 1867, 5 Macph. 583, 3 S.L.R. 295; *Cornwall* v. *Walker*, March 18, 1871, 8 S.L.R. 442; *Crawford* v. *Smith and Another*, November 20, 1900, 8 S.L.T. 249. But for this appeal they could have got decree *de plano*, *i.e.*, without being sisted. The decree for expenses need not be a final decree—*Rox*, *cit. supra*. Further, where, as here, the settlement was in disregard of and without any consideration for the agents' rights, the latter were not bound to go into the merits. The cases of *Murray* v. *Kyd*, February 14, 1852, 14 D. 501, and *Macqueen* v. *Hay*, November 29, 1854, 17 D. 107, relied on by the respondent, were really in the minuters' favour, for in the former the stage had not been reached which entitled an agent to any expenses, for the expenses there were reserved, and so did not necessarily follow (*vide* Lord Cockburn's opinion), and the latter was a case of collusion. The respondent was not entitled to be heard on the merits as against the agents' right to expenses, for the merits had been disposed of by the settlement. *Esto* that *quoad* themselves the principals might open up the settlement, they could not do so *quoad* the agents so as to defeat their vested right to expenses.

Argued for respondent—The cases cited by the minuters were cases of final judgment, and were therefore inapplicable. In order to entitle an agent to decree for expenses in his own name he was bound to prove collusion—*Murray* v. *Kyd*, *cit. supra*; *Macqueen* v. *Hay*, *cit. supra*; Bell's Com., vol. ii, pp. 35 and 38. Standing the present appeal, the minuters had no vested right to expenses, for the judgment might be reversed. The case of *Rox* (*cit. supra*) was distinguishable, for that was a case of collusion. In any event, the respondent was entitled to be heard on the merits where, as here, the agents had disregarded the settlement and gone on with the action. An agent was not entitled to prevent his client settling a case by continuing the litigation on his own account, for he was bound to look to his own client for his expenses. Moreover, the compromise of an action did not necessarily involve any admission of liability on the merits, and therefore in the absence of collusion it lay on the agents to show that expenses necessarily followed. They could not do so here, and that being so they were not entitled to be sisted.

At advising—

LORD JOHNSTON—[*After narrating the facts, ut supra*]—The question seems to me to be simply this, Are the agents-disbursers entitled to be sisted to move for decree for expenses in their name as agents-disbursers, and if they are, in what situation are they to stand? Are they entitled to decree *de plano* in respect that the litigation between the principal parties has been brought to an end by a settlement made without their consent, and which ignores their claims? Or can the appellant insist that they shall take the place of the respondent as if there had been no settlement with him, and undertake the *onus* of supporting on the merits the Sheriff's interlocutor against his appeal, on which, as against the agents, he proposes to stand, though he departs from it as against the client. The *onus* would probably not be a very heavy one, and not inconceivably the appellant's contention might end in a considerably increased claim by the agents against him. But the agents are entitled to resist on matter of principle the idea that they are bound to undertake any such *onus*.

I have come without hesitation to the conclusion that they are not so bound.

It would be an almost grotesque situation that the Court should be obliged—for *ex hypothesi* there would be no obstacle—to give effect to the minute for the appellant and assoilzie him from the conclusions of the action, and yet have to allow the action to proceed on the merits, with the agents as contradictors, in order to dispose of a question of expenses merely. Such a course would be against the whole tradition and practice of the Court.

It appears to me, therefore, that either the agents are not entitled to be sisted at all as agents-disbursers, after a settlement has been made between the principal parties to include expenses, or that they are entitled to be sisted and to obtain decree *de plano* for their expenses against their client's opponent, without having to carry on the litigation on the merits in order to vindicate their claim to expenses.

The leading case on the subject is *Hamilton* v. *Bryson* (June 17, 1813, F.C.). In this action damages had been found due but remained to be assessed, and consequently there was no finding for expenses. The parties settled behind the agent's back for a sum to cover damages and expenses, and the agent took similar steps to those taken here. Notwithstanding the settlement, the Court decerned for expenses "to the effect that decreet may go out for the amount of the expenses sustained in name of the agent." As the present appellant's contention is, so far as I understand it, based entirely on this, that by the appeal taken by him the case is still in dependence, I take the opportunity in passing to point out that *Hamilton's* case was also not only in dependence in the Outer House, but was still subject to being reclaimed to the Inner House. In giving judgment Lord Meadowbank points out that up to that date the agent's equitable remedy had only been

allowed in cases in which the clients were abiding by the ordinary course of judicial procedure and an operative decree was going out in favour of one or the other in common course, and that the case before the Court was undoubtedly an extension of such equitable remedy to a case where the parties were departing from the ordinary course of judicial procedure, and settling the case between themselves so as to avoid the necessity of any operative decree issuing. Lord Meadowbank, in extending the equitable right to the agent in the case before him, sought to place that right on the principle of implied lien. Lord Bannatyne, on the other hand, attributed it to the principle of *jus quæsitum* to the agent, which his employer could not discharge or disappoint. But I humbly doubt whether the rule can be referred to any particular principle of law. I think that it is enough to say that it is a rule of practice introduced on grounds both of equity and expediency. The important thing is that the equitable right was sustained by the Court at the stage which the case had reached, though individual judges reserved their opinion as to whether at any stage of the case the agent could prevent a settlement which would result in disappointing his claim.

In *Rox* v. *Stewart* (3rd July 1818, F.C.) *Hamilton's* case was simply followed.

But in *M'Lean* v. *Auchinvole* (3 S. 190) the rule was made more precise. It was "held that there were three cases in which an agent was entitled to insist in the process to the effect of getting decree for the expenses in his own name. (1) Where expenses had actually been found due; (2) where they followed as a necessary consequence from the interlocutor previously pronounced; and (3) where the parties had entered into a compromise for the purpose of defeating his claim." The second case figured shows, I think, that the rule is an equitable and expedient one merely, and that it can hardly be reduced to a definite governing principle of law. It is expedient that a litigant, possibly of slender means, should be able to get his case taken up by an agent, and it is equitable that the agent should be able to look to a return for his risk and labour with some security. But there is a counter consideration. It is not expedient to encourage litigation, or to prevent the timeous adjustment of differences, or equitable to give the agent such security for his remuneration unless his efforts have reached a point at which they may fairly be said to have materially influenced the result of the adversary's surrender. Hence the rider on the more general proposition that when expenses have not actually been found due at least they must have followed as a necessary consequence of what has actually been done.

The next case was *Ferguson* v. *Richardson* (4 S. 814). The circumstances are intricate, but the decision certainly carries the application of the rule quite as far as is sought here.

Subsequent cases have, I think, involved questions merely of the application of the rule of *M'Lean's* case (*supra*). Thus in *Murray* v. *Kidd* (14 D. 501) the agent was not allowed to sist himself because, though an interlocutor had been pronounced repelling the defences, expenses had been specially reserved. Without further litigation it could not be determined what the result in the matter of expenses would be.

The case is however, important, for whereas in the previous cases there was no hint of the agent being sisted that he might go on with the litigation in order to gain a judgment on the merits and so obtain a finding for expenses, but only of his being sisted to move for expenses in his own name, it was assumed that the former would have been necessary, and this was the reason why the agent's motion was refused. For the reason why expenses were reserved was that though the defences were repelled this only led to an accounting, and the real, merits of the case lay in the accounting. But the Lord Justice-Clerk (Hope), whose opinion evinces marked hostility to the rule, states what I think is the key to the decision of the present question, viz.—The rule being fixed, it becomes a matter for stipulation in the compromise when the parties know of the rule."

But there is one other case of importance, *Cornwall* v. *Walker* (1871, 8 S.L.R. 442), where Lord President Inglis takes the opportunity of correcting the expression used in *M'Lean's* case (*supra*), viz., "followed as a necessary consequence." His Lordship says that a finding of expenses "never is a necessary result or consequence—it is always in the discretion of the Court, and depends more or less upon how the litigation has been carried on. The true rule is that the agent is entitled to sist himself and prosecute the case to obtain a finding of expenses in his favour when such a finding of expenses is the legitimate consequence of what has been already done."

Such being the state of the authorities, I admit without hesitation that were this case in the position that further litigation was necessary in order to reach a point at which it could be said that an award of expenses would legitimately follow, the agents could not be heard to ask to sist themselves in order to carry the litigation to that point. But that is not the position here. The litigation has been carried to a point at which not only would an award of expenses legitimately follow, but has actually been pronounced. That an appeal or a reclaiming note has been lodged does not alter that fact. The parties to the action enter on a compromise in the knowledge that an interlocutor finding on the merits and awarding expenses is standing. They compromise in order to get rid of both in favour of their own private arrangement, and in doing so they make it impossible that the action should go on to decide the merits of the appeal or reclaiming note. It would be against the whole catena of decisions which has created and defined the agent's equitable right that they should be so allowed thus to cut the ground from

below his feet where by his exertions he has brought the litigation to a point at which the rights of parties have been judicially, though it may not be finally, ascertained.

The true doctrine, in my opinion, is that when litigants approach a compromise the party who finds himself obliged to buy a discharge from claims must be held to know his opponent's agent's right, and must be held to contract with his opponent subject to that right. The limitation of that right admits of no continued litigation on the merits. Nor can a re-opening of the case on the merits with the agent be allowed in order to avoid his claim for expenses when it has been closed with the client.

LORD KINNEAR—I regret that I am unable to agree with the opinion just delivered, and the more so because I understand that your Lordships concur in it. But as I am unable to assent to the judgment proposed, I think it necessary to state my grounds, although I shall do so as shortly as possible.

I am inclined to agree with Lord Johnston that the authorities, so far as they go, are in favour of the view which he proposes that your Lordships should take; but then I agree with him also in thinking that there is no principle of law to be extracted from those authorities which ought to determine the right now in dispute. I think these cases might be followed if it were necessary to go any further than the decisions have already gone. But since there is, as I hold, and I think Lord Johnston holds also, no principle to support the decisions, I cannot see any reason why we should follow out those decisions to a logical consequence beyond what is definitely fixed. Looking at the question as it is now raised, I of course concede, what is perfectly familiar doctrine, that when one of two parties to a cause has obtained a decree for expenses his agent is entitled to be sisted in order that he may obtain the decree in his own name. In the ordinary case there is no necessity for sisting as matter of practice, because counsel for the successful party moving for decree of expenses moves at the same time that the decree should go out in name of the agent-disburser and not in that of the client himself, and that is allowed as a matter of course. But that can only happen when it is already fixed and determined not only that the party has a right to expenses but that he has a right to the operative decree for enforcing payment of these expenses; and therefore that practice does not appear to give the agent a right to come in to the exclusion of his client so long as it is still uncertain whether there is an absolute right to expenses vested in his client or not. I venture to say that there is no principle to support the claim now made, but I by no means say that there is no principle in law to support the agent's claim to recover the expenses in his own name in the ordinary case; and I think it is admitted on all hands that he is entitled to his decree, because that is a right which arises, not as against his client's opponent, but as against his client himself upon the contract of agency. I agree with a remark which Lord Johnston made, that it is not exactly what has been called the agent's hypothec—it is not a right of retention (which I think a somewhat more apt expression in the language of our law). It is not a right of retention, because there is nothing actually in the agent's hands which he would be otherwise required to make over to his client; but it is a right arising out of the contract of agency, which has been pushed further than retention, to give him an effective security upon moneys which it is assumed belong to his client. It must arise out of the contract of agency if it be a right at all, and it must therefore be a right against the client, because the agent has no contractual relation whatever with his client's opponents. Therefore it seems to me to be clear that the condition of the agent's right to obtain decree against his client's opponent for a payment of money must be that the client has a fixed and absolute right to compel such payment. The agent may be entitled to enforce the claim for his own benefit, because he has an effective security over a fund which he has recovered for his client in performance of his contract of agency. But the security cannot attach until it is fixed that the fund belongs to the client. But the client's right depends upon a judgment of the Sheriff Court, which is brought before this Court by appeal, and we cannot assume that the judgment is right without hearing the appeal on its merits. We are told that the merits are no longer before us, because the parties who are *domini litis* have agreed upon a compromise, and that would be a perfectly satisfactory result if the compromise were to receive effect. But the agent says he is entitled to disregard the compromise without allowing the question which it settled to be reopened. I could have understood his position, although I think there is no sound principle to support it, if he had maintained that the compromise should be set aside altogether, and claimed to take his client's place as *dominus litis* and to carry on the litigation for his own benefit. But what he proposes is that your Lordships should affirm the judgment appealed against without hearing the appeal, so that decree should go out against the defender for the whole amount found due, notwithstanding that he has already paid a sum which his opponent has agreed to accept as sufficient. This appears to me an extravagant stretch of any right of security which can possibly arise out of the contract of agency. But it is said to be out of the question to allow the whole action upon the merits to be tried at the instance of the agent in order that the question of expenses might be settled so as to give him a security which he has not yet got. Lord Johnston has said that your Lordships reject that idea, and I agree that that is out of the question. But it is equally out of the question that your

Lordships should assume that the judgment under appeal is good without having heard the appellant upon the merits of his appeal. I concede that it is extremely likely that two consecutive judgments by the learned Sheriffs below may be right, but the Court of Appeal is not entitled to affirm them any more than to reverse them without hearing parties. I am not therefore prepared to hold against the appellant that the judgment is good unless he consents to his appeal being dismissed, in which case there would be no difficulty. But his consent to the dismissal of the appeal is dependent upon the compromise receiving effect, and that is the reverse of a consent to the decree now proposed. I confess that I am not sorry that my opinion on this subject can have no practical weight in the case, because I concede that there are authorities against it. I think the principle is against the authorities, and therefore I must express my dissent.

LORD MACKENZIE—I agree with Lord Johnston, and I do so for the reason that I think the matter is settled by the authorities.

LORD SKERRINGTON—I agree with Lord Johnston.

LORD PRESIDENT—Were the question open I confess I should agree with Lord Kinnear, but I look on the matter as absolutely settled by authority, and I cannot bring myself to the view that in doing what we propose to do to-day we are going any further than the case of *Cheyne* v. *Cheyne* (1832, 10 S. 202). I do not wish to go over the ground again, but I think the progress of the authorities may be very shortly stated. I take first the case of *M'Lean & Macdonald* v. *Auchenvole* (1824, 3 S. 109). That resulted in the expression of three propositions—that is to say, that an agent was entitled to insist on getting decree in his own name for expenses, first, where expenses had actually been found due; second, where expenses would have followed as a necessary consequence from the interlocutor pronounced; and third, where the parties had entered into a compromise for the purpose of defeating his claim, the third case being where the process had not gone the length of expenses being found due. These three propositions the Court laid down in what was a carefully considered judgment.

The next stage was reached in the case of *Murray* v. *Kidd* (1852, 14 D. 501), and the immediately succeeding case of *M'Queen* v. *Hay* (1854, 17 D. 107), and there is no doubt that the Lord Justice-Clerk Hope to a great extent went back on *M'Lean's* case. Now if the authorities had remained in that state I should have thought the question to be open, but I think the end came when the effect of both of these sets of cases was considered by this Division of the Court in the case of *Cornwall* v. *Walker* (1871, 8 S.L.R. 422), and I think that case was a considered judgment to the effect that the Court would abide by the view of *M'Lean's* case. Lord President Inglis begins his judgment by saying that in cases where expenses have been found due before the compromise there is no difficulty whatever; so, putting aside the question whether a certain interlocutor takes along with it as a necessary consequence a finding of expenses—a question which does not arise here—that seems to me to settle the matter, but for the point that has been raised by Lord Kinnear. Lord Kinnear thinks that we are going further than we have gone before, because the interlocutor in this case is not final in the sense of not having yet become immune by the lapse of time against some process of review. I am unable to take this view because I consider the point to have been already decided in the series of cases of which *M'Lean's* was the first. There are two senses of the word "final." This case is here on an interlocutor which is final in the sense that it is final on the merits but is not final in the sense of review. In the cases to which I have just referred, there is no question that the interlocutors were final in the first sense, that is to say, on the merits. If that is so I think it settles the question, for I cannot conceive of the main question that is before us arising after an interlocutor has been pronounced that is final in the second sense—there is then nothing to compromise. If a person has an interlocutor deciding a case on the merits, and then allows the appealing days or reclaiming days to run out, he has no *quid pro quo*, and in all of these cases there must of necessity be a *quid pro quo*. As long as appeal is open one party may say, "True it is that you have got your judgment in Court below, but I am going to take you to the Court above, and you may lose what you have got," and the other party may then say that he will compromise. In the other case there is nothing to compromise with.

If the matter had been open I think one might on principle come to a perfectly different result, because I think it is very difficult to say why an agent should get anything more than what is his client's money, and expenses that have been decerned for do not become the client's money until the other party has surrendered them. But as the matter is not open I agree with your Lordships.

The interlocutor will be, in respect of the motion of the defender to dismiss the appeal, to sist the agent for the defender, and to remit the case to the Sheriff that he may grant expenses.

The Court pronounced this interlocutor—

"Sist the minuters Lindsay, Meldrum, & Oatts as parties to the cause to the effect and extent of finding them entitled to the expenses found due by the defender and appellant in the Sheriff Court, and find them entitled to these expenses accordingly (under the reservation that upon the appellant making payment to the said Lindsay, Meldrum, & Oatts of the said expenses he shall be entitled to receive

from the said Lindsay, Meldrum, & Oatts an assignation of their right to recover the sum from the pursuer and respondent); and also sist the said minuters Lindsay, Meldrum, & Oatts, and Erskine Dods & Rhind, to the effect and extent of finding the said minuters entitled to the expenses of the minute of sist No. 56 of process and procedure thereon in this Court: Find the said minuters entitled to these expenses accordingly," &c.

Counsel for the Minuters—Lippe—King Murray. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for Defender (Appellant)--Horne, K.C.—Hon W. Watson. Agents—Dove, Lockhart, & Smart, S.S.C.

Friday, December 22.

SECOND DIVISION.

BROWN AND OTHERS *v.* HASTIE.

Trust — Trustee — Conveyance to Trustee, whom Failing to his Heir-Male—Title of Heir-Male to Administer Trust Estate.

A truster conveyed his estate to H., whom failing to "the nearest heir-male who may be resident in Great Britain and *sui juris*" of the said H.

Held that such heir-male was entitled to act as trustee in succession to H. for the purpose of administering the trust estate.

Miss Sophia Brown and others, *first parties*, William Brown and others, *second parties*, Mrs Stewart and another, *third parties*, Mrs Wood and others, *fourth parties*, and John Gill Hastie, solicitor, Edinburgh, *fifth party*, brought a Special Case for the determination of certain questions arising under the trust-disposition and settlement, dated 18th January 1893, of Charles Wood of Infield, Shetland, who died in 1903. The first, second, and third parties were the next-of-kin of the testator and their representatives. The fourth parties were the testator's widow and annuitants under the settlement. The fifth party was the nearest heir-male resident in Great Britain of John Hastie, the sole trustee nominated under the settlement.

The following *narrative* is taken from the opinion of Lord Salvesen—"The questions in this Special Case arise out of a trust conveyance by the late Mr Charles Wood. By this deed he conveyed to John Hastie, "or such other person or persons as shall be named by me or assumed into the trust hereinafter constituted, whom failing the nearest heir-male who may be resident in Great Britain and *sui juris* at the time of the said John Hastie, or such other person or persons, as trustee," for the purposes therein mentioned, and his or their assignees, all and sundry his whole estate. The purposes of the trust so far as material were, after providing for certain annuities and legacies, (1) a direction to the trustee to manage the residue of his estate and to pay over to his wife the free yearly proceeds and interest therefrom; and (2) on the death of his said wife a direction to his trustee to realise the residue of his estate and to pay and divide the same amongst his nearest-of-kin in moveables. Mr Hastie accepted the office of trustee and executor on the testator's death, and administered the estate as sole trustee until his own death on 28th September 1910. His nearest heir-male is Mr John Gill Hastie, who is resident in Great Britain and who is of full age. He is the party of the fifth part."

The following *questions of law* were, *inter alia*, submitted to the Court—"3. Whether the said John Gill Hastie, the fifth party, is entitled to act as trustee on the testator's trust estate for the purpose of administering the same? or, 4. Whether the trust administration created by the testator has lapsed by the death of the said deceased John Hastie?"

Argued for the first, fourth, and fifth parties—The trust had not lapsed by Mr Hastie's death. His heir-male was plainly included in the conveyance to trustees in the settlement. It was very important to note that the heir-male was called as a trustee in the conveying clause. There was no suggestion whatever that he was there merely to preserve a link in the title. The clause here was in practically the same form as that in the Styles—Juridical Styles (5th ed.), vol. i, 288. It was very well recognised that where the destination in a trust-disposition included the heir of a last-surviving trustee, such heir could administer the trust—Menzies' Lectures on Conveyancing (new ed.), 682; Wood's Lectures on Conveyancing, 419, 421. In *White* v. *Anderson*, November 30, 1904, 12 S.L.T. 493, it was decided by Lord Pearson, on the special terms of the deed then under consideration, that the heir of a trustee had merely a formal title, but his Lordship expressly declined to give an opinion on the point raised here. Lord M'Laren no doubt stated (Wills and Succession, vol. ii (3rd ed.), 913 and 914, sec. 1686) that a trustee by succession could not in general exercise the discretionary powers of the trust. This view, however, was unsupported by authority.

Argued for the third parties—The trust administration had lapsed, and Mr Hastie's heir-male was not entitled to administer the trust. The meaning of the clause was simply that the testator had made provision for the legal title being carried on. The heir's title was merely formal. The law was correctly stated by Lord M'Laren in the passage above quoted—Wills and Successions, vol. ii (*cit. sup.*).

At advising—

LORD SALVESEN delivered the judgment of the Court (LORD JUSTICE-CLERK, LORD SALVESEN, and LORD GUTHRIE)—[*After the narrative above quoted*]—The first question in the case is whether Mr John Gill Hastie is entitled to administer the trust, or whether his sole duty is to make up titles