

this claim is not one which comes under the clause of reference. If either of these claims for damages had been fairly under the clause of reference, I am not prepared to say that the arbiter could not have assessed damages. This is a difficult question, and I rather think it would depend upon the terms of the clause of reference, for it may well be, that if there was a clause of reference giving power to the arbiter to fix damages, it would be competent for him to do so. But we are not called upon to decide this question, for there is no such power given in the clause of reference now before us.

LORDS ARDMILLAN and JERVISWOODE concurred.

The Court recalled the interlocutor of the Lord Ordinary, and remitted the case to him to be proceeded with.

Counsel for Pursuer—Watson and Smith. Agent—Thomas Spalding W.S.

Counsel for the Defender—Solicitor General and Asher. Agents—J. & R. Macandrew, W.S.

Saturday, December 21.

SECOND DIVISION.

[Lord Manor, Ordinary.]

SAWERS, PETITIONER.

Expenses.

Where the House of Lords had ordered an interlocutor of the Second Division (reversing a judgment of the Lord Ordinary in favour of the defender in the cause) to be reversed, and the said cause to be remitted back to the Court of Session to do therein as shall be just and consistent with this judgment—*held* that the original defender was entitled to expenses since the date of the Lord Ordinary's interlocutor.

On 23d June 1868 a petition was presented by James Monteith, trustee on the estate of the late Peter Sawers, praying the Court to sequestrate the estate and appoint a judicial factor. The petition was opposed by the Rev. Peter Sawers, the only other trustee on the estate. On 5th November 1868 the Lord Ordinary refused the petition, and found the Rev. Peter Sawers entitled to modified expenses. The petitioner appealed to the Second Division, who, after a remit to the Sheriff of Renfrew, and report from him on 18th March 1869, recalled the interlocutor of the Lord Ordinary, appointed a judicial factor, and found the petitioner entitled to expenses out of the trust-estate.

The respondent appealed to the House of Lords.

On 23d February 1872 the House of Lords ordered the interlocutor of the Second Division to be reversed, "and further, ordered that the costs decerned for payment out of the trust-estate shall, if the same have been paid or retained, be repaid to the said trust-estate, with interest, and further, ordered that the said cause be remitted back to the Court of Session, to do therein as shall be just and consistent with this judgment."

The respondent in the original petition now presented a petition craving the Court to apply the judgment of the House of Lords—"to alter the interlocutors appealed from, in terms of said judgment, to dismiss the reclaiming petition for the late James Monteith, to affirm the interlocutor of the

Lord Ordinary of 5th November 1868, and to refuse the prayer of the petition for the appointment of a judicial factor; and also to ordain the respondents to repeal and pay back the costs, amounting to £93, 18s. 2d., decerned for under the said interlocutor of 14th July 1869, if the same have been paid or retained, with interest thereof at five per cent. from the date thereof, to the said trust-estate, and to find the petitioner entitled to the expenses of process since the date of the Lord Ordinary's interlocutor of 5th November 1868, including the expenses of the present application; to remit the account thereof, when lodged, to the Auditor to tax and report, and to decern in the petitioner's favour for the taxed amount against the said Hugh McConnell and John Petrie, as trustees of the late James Monteith, or to do farther or otherwise as to your Lordships shall seem proper."

The representatives of the petitioner in the original petition, who had been sisted in the petition in June 1869, appeared as respondents, and argued that as the House of Lords had not mentioned the matter of expenses in their judgment, it was not competent for the Court to find the petitioner entitled to his expenses since the date of the Lord Ordinary's interlocutor, and also, that it was not a case for an award of expenses.

Authorities cited—*Campbell v. Colquhoun*, Dec. 20, 1854, 17 D. 245; *Hay*, 17 D. 246; *Purves*, 7 D. 810; *Stewart v. Scott*, 14 S. 692.

At advising—

LORD JUSTICE-CLERK—I have little difficulty in dealing with this application. In the cases cited to us, the House of Lords affirmed or adhered to the judgment allowed by the Court, and reversed the judgment complained of. Here the Court alters the interlocutor of the Lord Ordinary, and the House of Lords reverses, and does nothing more but simply remits to us. The question is—Whether this limits our power to do justice in the matter of expenses? I think not.

LORD COWAN—I concur. The question is—Whether the original application was well founded or not? The House of Lords say it was not.

LORD BENHOLME.—I have no decided opinion, but I cannot think the distinction drawn between the case where the House of Lords affirms the judgment allowed by this Court and where it simply reverses and remits to us, is substantial or satisfactory. When the House of Lords does not say anything about expenses, but simply reverses, I doubt whether it means anything more than that the judgment should be wiped away—otherwise it would have remitted to us to deal with the matter of expenses.

LORD NEAVES—We must affirm the Lord Ordinary's judgment, as there is here a reclaiming-note which we must decide upon, and the necessity of our affirming it makes it necessary to give expenses. Both in point of form and in justice I think the proposed procedure is correct.

Counsel for Petitioner—Scott and Lord Advocate (Young). Agent—A. Beveridge, S.S.C.

Counsel for Respondent—Trayner. Agents—M'Ewen & Carment, W.S.