decision of the real question between the parties. But it has been decided that a reclaiming-note against an interlocutor merely decerning for expenses already found due does not bring up any previous interlocutor for review. The present interlocutor does no more than decern for the amount of expenses as taxed, for in so far as it does, or pretends to do, anything more than that, I regard it, for the reasons I have stated, *pro non scripto*.

LORD MONCREIFF—In the view which I take of this case I do not think that it raises any question of difficulty; neither does it necessarily raise any question as to procedure peculiar to multiplepoindings.

What the reclaimer desires to be allowed to do under the minute which the Lord Ordinary has refused to entertain is, not to lodge a new claim, but simply to amend his pleadings so as to lay the foundation for another argument based on the law of England. The litigation which culminated in the concerted and final interlocutor of 20th July 1899, happened to occur in a competition in a multiplepoinding, but for the purposes of this question it might have arisen in an ordinary action. Accordingly the reclaimer's right to ask leave to amend depended upon the 29th section of the Court of Session Act of 1868. Now, if this motion had been made to the Lord Ordinary before he pronounced final judgment he would probably have been bound under the statute to allow the amendment on such conditions as to expenses as he thought fit. But the reclaimer's minute was not lodged until nearly six months after the final judgment in question was pronounced. Therefore it is clear that the Lord Ordinary had no power to allow the amendment, and might have refused to write upon it.

If the reclaimer, being dissatisfied with the Lord Ordinary's interlocutor, had thought fit to reclaim against it within the statutory time, the Inner House might have recalled the interlocutor and allowed him on terms to amend his pleadings. But he allowed the interlocutor to become final, and now seeks to bring it under review in this way. He first presents what I hold to be an utterly incompetent application to the Lord Ordinary for leave to amend, and then on the Lord Ordinary refusing to grant leave he reclaims, and maintains that the interlocutor which he has thus procured by his incompetent motion brings up the previous interlocutor of 20th July 1899 which had become final. That is not the purpose or effect of section 52 of the Court of Session Act 1868—*Duncan's Factor*, 1 R. 964, Lord President Inglis, p. 968.

I therefore think this reclaiming-note is incompetent *quoad* the subject-matter of the minute, and that we cannot touch the concerted interlocutor of 20th July 1899.

The Court adhered.

Counsel for the Claimant and Reclaimer—Guthrie, Q.C.—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Claimants Objectors and Respondents—M'Lennan—Cook—Melville. Agents—W. & J. Cook, W.S.—Forbes, Dallas, & Co., W.S.—Mitchell & Baxter, W.S.

Tuesday, June 19.

SECOND DIVISION.

[Lord Low, Ordinary.

MILLS *v.* BROWN.

Trust—Trustees—Power to Appoint and Pay Trustee as Factor or Cashier—Power to Carry-on Manufacturing Business—Construction—Appointment of Trustee as Paid Manager of Manufacturing Business—Ultra vires.

A testator empowered his trustees "to appoint one of their own number or other fit person to be their factor or cashier, and to allow him a reasonable remuneration for his trouble," and also to carry on his business as a manufacturer of bricks and fire-clay goods. By a codicil he nominated "R. B., manager, my grandson," to be one of his trustees. The bulk of the testator's moveable estate consisted of his manufacturing business, of which R. B. had for some time prior to the testator's death been the manager. After the testator's death R. B. accepted office as a trustee, and continued to act as such. The trustees appointed him to be manager of the business, and paid him a salary and other remuneration for acting in that capacity. *Held* that the trustees were not entitled under the powers conferred upon them by the testator to appoint and pay one of their own number as salaried manager of the business.

Robert Brown of Shortroods, who died in 1895, left a trust-disposition and settlement, whereby he conveyed his whole estate to certain trustees, to be held by them for behoof of his family as therein directed. The estate consisted of heritable property of the value of about £33,000, and of moveable estate which consisted chiefly of a business carried on by the deceased in Paisley, for the manufacture of bricks and fireclay goods. By the fifth purpose of his settlement the testator authorised his trustees "to carry on my business of a manufacturer of bricks, tiles, and fireclay goods, and of plumbago crucibles and earthenware, as at present or as may hereafter be carried on by me in all their departments under the same firm, or in such other way or manner or under any other form as to them shall seem best." Further, he empowered them "to appoint one of their own number or other fit person to be their factor or cashier, and to allow him a reasonable remuneration for his trouble." By codicil dated 18th December 1891 he directed his trustees to divide the estate upon the expiration of ten years from his decease, unless they should find it

expedient to realise at an earlier date, and also, in addition to the power to carry on the business, empowered his trustees to convert the same into a joint stock company. By codicil dated 6th December 1893 the testator nominated as one of his trustees "Robert Brown *tertius*, manager, residing at Millarstown House, Paisley, my grandson." After the testator's death his trustees appointed Robert Brown *tertius* to be manager of the works at a salary of £700 a-year, together with a commission on the profits, and other perquisites. He accepted office as manager and continued to act in that capacity and to draw said salary and other emoluments as from April 1895 onwards. He also accepted office as a trustee and continued to act as such while acting as paid manager of the business.

On 2nd November 1899 William Mills, one of the trustees under the trust settlement, and certain of the beneficiaries thereunder raised the present action against the trustees and Robert Brown *tertius* as an individual, in which they concluded (1) for declarator that it was *ultra vires* of the trustees to pay salary or remuneration to the defender Robert Brown *tertius* for acting as manager of the business; (2) for interdict against their continuing to pay such salary or remuneration; and (3) for repayment by Robert Brown *tertius* of the sums received by him as such salary or remuneration.

Defences were lodged for the defender Robert Brown *tertius* as an individual and for the defenders the trustees.

The pursuers pleaded—(1) It being illegal and *ultra vires* of the trustees of the said deceased Robert Brown to appoint one of their own number to be manager of the works and business carried on by them as aforesaid under the firm of Robert Brown & Son, and to allow him remuneration for his services as manager so long as he acts as and holds the office of a trustee, the pursuers are entitled to decree of declarator and interdict, in terms of the conclusions of the summons to that effect, with expenses.

The defenders averred that for some time prior to the testator's death the works were managed by the defender Robert Brown *tertius*.

The defenders the trustees, and the defender Robert Brown *tertius* as an individual, both pleaded, *inter alia*, that the trustees being entitled under the trust-disposition and settlement and relative codicils to appoint the defender Robert Brown *tertius* as factor or manager on that part of the trust estate consisting of the business and works, and to pay him a suitable remuneration therefor, they should be assoilzied, with expenses.

On 16th March 1900 the Lord Ordinary (Low) pronounced an interlocutor in which he granted decree of declarator and interdict in terms of the first two conclusions of the summons; and before answer in reference to the petitory conclusions, appointed the defenders to lodge a statement of the sums paid to the defender Robert Brown by way of salary and commission on profits as manager of the said business.

Opinion.—" . . . . . The defenders' case upon the merits is that the appointment and remuneration of Robert Brown as manager of the business was authorised by the trust-deed. They do not dispute that if the trust-deed did not contain authority to that effect the payments which were made to Robert Brown cannot be justified.

"In the trust-disposition and settlement the truster authorised his trustees 'to carry on my business of a manufacturer of bricks, tiles, and fireclay goods, and of plumbago crucibles and earthenware as at present or as may hereafter be carried on by me in all their departments under the same firm, or in such other way or manner or under any other form as to them shall seem best.'

"Robert Brown was not nominated a trustee in the trust-disposition and settlement which is dated in 1887, but in a codicil dated 6th December 1893. He is there designated 'Robert Brown *tertius* manager, residing at Millarston House, Paisley, my grandson.' It is stated in the defences (and I shall assume that it was the case) that at the date of the codicil Robert Brown had practically the whole control of the business as manager.

"The defenders' argument was to the effect that the testator having in the first place authorised his trustees to carry on the business 'as at present or as may hereafter be carried on by me,' and having afterwards named as a trustee his grandson, whom he described as manager, and who was in fact manager of the business, the inference was that he intended the trustees to have power to continue his grandson as manager and to remunerate him.

"I do not think that the argument is well founded. It seems to me that the object of the clause which I have quoted from the settlement was to give the trustees, in the event of their exercising the power of carrying on the business, full discretion as to the extent and form in which they should do so. I think that the idea is the same as that which appears in a codicil in which the truster empowered the trustees to convert the business into a limited liability company.

"In regard to the designation of Robert Brown as 'manager,' that appears to me to be a mere description from which it is impossible to draw any such inference as is suggested by the defenders. Further, the truster in his settlement authorised his trustees to appoint one of their own number to be factor or cashier, and to give him reasonable remuneration, and there is a similar power in regard to the appointment of a law-agent. The truster therefore must be taken to have been aware that to entitle a trustee to remuneration for services rendered to the trust it was necessary that authority to that effect should be granted, and therefore the fact that he granted no authority in regard to a manager of the business rather indicates that his intention was that the trustees should not have such authority.

"The argument, however, upon which the defenders mainly relied was that the authority to appoint one of their number to be their 'factor or cashier,' and to allow him a reasonable remuneration, was sufficient authority to appoint and remunerate Robert Brown as manager of the business.

"Now, it is to be observed that the power given to the trustees to appoint one of their number to be 'factor or cashier' does not bear to be given with reference to the business. It is just one of a number of powers which the truster conferred upon his trustees. He first gave them the power to carry on the business; then he authorised them (with certain limitations) 'to sell and dispose of or feu out' his heritable estate, and to realise his moveable estate; then he gave them certain powers of investment; and then followed the power to appoint as 'factor or cashier' and as law-agent one of their number 'or other fit person.'

"The defenders argued that the authority given was to appoint either a factor or cashier, and that the word 'factor' was wide enough to include manager of the business.

"I am unable to take that view. I do not think that two appointments were contemplated, but only one—the appointment, namely, of a person who would perform the duties, such as collecting rents, falling to what in well-known phraseology is described as a factor or cashier, and as matter of fact the trustees appointed an accountant in Glasgow to perform duties of that description. It may not be possible to frame a definition which would exhaust all the duties which may fall within the province of a factor or a factor and cashier, because these must vary according to the character of the estate, but it seems to me to be clear that, according to the ordinary and understood meaning of the phrase (and the truster in this case seems to me to use it in the ordinary sense) a factor or cashier does not embrace the skilled manager of a manufactory.

"I am therefore of opinion (there being, as I have said, no defence except that the appointment and remuneration of Robert Brown were sanctioned by the truster) that the pursuers are entitled to decree in terms of the declaratory conclusion and the conclusion for interdict.

"In regard to the petitory conclusion, I propose to appoint the trustees to lodge a statement of the sums which have been paid to Robert Brown by way of salary and commission."

The defender Robert Brown reclaimed, and argued — The general rule that a trustee is not entitled to make a profit out of his office was displaced in the present case by the expressed intention of the testator. The trustees were authorised to carry on the testator's business "as at present, or as may hereafter be carried on by me." These words must be interpreted in the light of the circumstances which were present to the testator's mind, and the fact was that Robert Brown acted as manager of the business for some years before the testator's death. Further, in the codicil of 6th December 1893, in nominating Robert Brown as one of his trustees, he described him as "manager." In any event, the power to appoint a "factor," empowered the trustees to appoint Robert Brown as manager. The word "factor" was capable of construction, and its meaning must depend on what his duties were—*Cameron's Trustees* v. *Cameron*, December 8, 1864, 3 Macph. 200; *Goodsir* v. *Carruthers*, June 19, 1858, 20 D. 1141. Here the estate consisted of the fireclay works, and of lands suitable for feuing. The feuing of the estate would fall properly within the duties of a factor—why not the management of the other department, viz., the works?

Counsel for the pursuers was not called upon.

LORD JUSTICE-CLERK—It may be that it would be the best arrangement for the interests of the trust estate that this gentleman should continue to be the manager of these works; but that is not the question. The question is, whether under this trust-deed the power to appoint a factor given by the testator to his trustees—which is just the usual power commonly given by a testator to his trustees—covers the case of a trustee being the manager of a manufactory. The defender must find his right in the word "factor," and it is an entire novelty to me that that word should be held to include the management of an industrial concern such as is here in question. It is quite settled that the word has in such a trust-deed a technical meaning, and I find nothing in the deed in this case to alter or extend that meaning.

LORD YOUNG—I am of the same opinion. I think that this gentleman cannot remain a trustee and also manager of this business at a salary; but I suppose there is a remedy; he may resign his trusteeship; and if the other trustees are willing to appoint him, then he would be at liberty to act as manager and to receive proper remuneration.

LORD TRAYNER—I recognise that this case presents some features of hardship. Mr Robert Brown has been acting as manager of this concern since the testator's death, and the Lord Ordinary has given effect to the pursuer's contention that the defenders were acting *ultra vires* when they paid Mr Brown the salary which, no doubt, he earned. The rule of law, however, is quite settled which excludes a trustee from making profit out of the trust estate unless the truster has himself otherwise directed. It is said that the testator authorised the employment and payment of Mr Brown as manager, because he authorised his trustees to appoint a factor or cashier from among their own number. But I agree with the Lord Ordinary in thinking that the power to appoint a factor did not authorise them to appoint one of their number as manager of this business and pay him a salary as such.

LORD MONCREIFF—I can understand that there might in other circumstances have been hardship to the defender in this

case; but apparently the challenge of his appointment was made shortly after the testator's death. Probably the testator did not contemplate the difficulty which has arisen; but the question must be decided on the terms of the settlement, and in it I find no words which authorise the appointment of one of the trustees as manager of the business.

The Court adhered.

Counsel for the Pursuers and Respondents—Findlay. Agents—Gill & Pringle, S.S.C.

Counsel for the Defender and Reclaimer Robert Brown *tertius*—Jameson, Q.C.—Cook. Agents—Davidson & Syme, W.S.

Agent for the Defenders Robert Brown's Trustees—F. J. Martin, W.S.

Wednesday, June 20.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

SHAW, MACFARLANE, & COMPANY *v.* WADDELL & SON.

Contract—Breach of Contract—Right to Rescind—Failure to Delivery Timeously—Time of Essence of Contract.

S. & Company, a firm of coal merchants, entered into a contract with W. & Son, coalmasters, under which they agreed to purchase from W. & Son a quantity of coal for shipment in a particular steamer. The contract was made partly by verbal communications and partly by writing. In the course of the correspondence S. & Company wrote upon 4th April, "We have booked steamer to load 12th, 16th." In reply to this W. & Son sought to guard themselves as to liability for demurrage in the event of detention of the steamer waiting for her cargo. In another letter on the same day S. & Company wrote—"We have now to advise you that the vessel will be ready to load on Wednesday 13th, and we will expect you to have the coal forward in good time." To this letter W. & Son replied on the 5th April confirming the terms of their previous letter as to liability for demurrage. On the same day S. & Company wrote—"The vessel must be loaded on the date indicated, and we shall hold you responsible for any loss we may sustain should you fail to supply the cargo as purchased."

On the 19th April W. & Son, hearing that the steamer would not be ready for three or four days, wrote rescinding the contract. The steamer did not arrive at Grangemouth till April 22nd, and was not ready for loading till the 23rd.

In an action of damages against them at the instance of S. & Company for breach of contract, it appeared that 740 tons of coal to fulfil the pursuers' contract were loaded on trucks at the defenders' colliery before 19th April, and that in consequence of the pursuers' failure to take delivery the sidings at and near the colliery were blocked.

Held, after a proof, that time was of the essence of the contract, and that in the circumstances the defenders were entitled to cancel it.

An action was raised in the Sheriff Court of Lanarkshire by Messrs Shaw, Macfarlane, & Company, coal merchants, Glasgow, against Messrs Waddell & Son, coalmasters, Glasgow, concluding for payment of the sum of £138, 15s. as damages for breach of a contract to supply the pursuers with a cargo of coal for shipment in a particular steamer.

The pursuers averred, that in consequence of the failure of the defenders to implement the contract they had been obliged to supply a cargo of coal for the steamer at a loss of 3s. 9d. per ton, their total loss amounting to the sum sued for.

The defenders averred that the pursuers had failed to take timeous delivery of the coal, that in consequence all work had to be suspended at their colliery owing to the sidings having been blocked with waggons for the pursuers' contract, and that their business had been seriously dislocated thereby. They maintained that in these circumstances they were entitled to cancel the contract.

The following narrative of the facts is (with the exception of the two final paragraphs) taken from the opinion of the Lord President:—"It appears to be common ground, and both the Sheriffs have found, that in the beginning of April 1898 the pursuers entered into a contract with the defenders under which they agreed to purchase from the defenders 740 tons of their splint coal to be shipped at Grangemouth by the steamer 'L'Avenir,' the pursuers alleging, and the Sheriff-Substitute finding, that the probable days of loading were to be 12th to 16th April, and the defenders maintaining, and the Sheriff finding, that the agreement was more specific, viz., to load 12th to 16th April. The contract was made partly by verbal communications and partly by writing, the material letters being dated 4th and 5th April. Different quantities were mentioned in the earlier letters as the subjects of the purchase or purchases; but in a letter from the pursuers to the defenders, dated 4th April, they said—'We have booked steamer, 740 tons, to load 12th to 16th as mentioned to Mr Hamilton on Friday, and will advise you when she is ready to load.' In their reply of the same date, 4th April, the defenders sought to guard themselves both as to quantities and as to liability for demurrage and the consequences of a strike; and in answer to this communication the pursuers, still on 4th April, wrote, *inter alia*—'We mentioned the size of the steamer, 740 tons, to your Mr Hamilton in our office on Friday, and gave him the probable date of loading, 12th to 16th, and he agreed to load her if we gave him plenty of time. We have now to advise you that