Wednesday, December 4.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

CRICHTON BROTHERS *v.* CRICHTON.

Process — Extract — Interim Extract of Final Decree before Account of Expenses Taxed—Court of Session Act 1850 (13 *and* 14 *Vict. c.* 36), *sec.* 28.

Where a decree which exhausted the merits of a cause and found a party entitled to expenses had been extracted *ad interim* before taxation of the successful party's account of expenses, *held* that he was not thereby debarred from obtaining decree for the expenses, to which he had been found entitled, upon the ground that the process had been brought to an end by the extract of the decree on the merits.

Opinion per Lord Trayner that it would have made no difference if extract had been asked and obtained as a final and not as an interim extract.

Beveridge v. *Liddell*, May 21, 1852. 14 D. 772, *approved* and *followed*.

Dicta of Lord Justice-Clerk (Inglis) in *Taylor* v. *Morris*, March 20, 1860, 22 D., at p. 1034, *commented on* and *disapproved*.

Process — Reclaiming-Note — Interlocutor Approving of Auditor's Report—Competency—Expenses.

The Lord Ordinary having pronounced an interlocutor exhausting the merits of a cause and finding the pursuers entitled to expenses, the latter, before taxation of their account, extracted the decree *ad interim*. Thereafter, when their account had been taxed, the Lord Ordinary approved of the Auditor's report, and decerned for the taxed amount of the pursuers' expenses. The Lord Ordinary having refused the defenders leave to reclaim, the defenders reclaimed without leave, and maintained that the interlocutor reclaimed against was incompetent and *ultra vires* of the Lord Ordinary.

Opinions (*per* Lord Justice-Clerk, Lord Young, and Lord Trayner) that the reclaiming-note was competent.

Opinion reserved by Lord Moncreiff.

In an action at the instance of Crichton Brothers against Mrs Margaret Crichton and others, the Lord Ordinary (Stormonth Darling) on 19th July 1901 pronounced an interlocutor exhausting the merits of the cause and finding the pursuers entitled to expenses.

Before their account of expenses had been taxed the pursuers extracted the decree *ad interim*, and thereafter when their account had been taxed they moved the Lord Ordinary to approve of the Auditor's report.

On 22nd November 1901 the Lord Ordinary (Stormonth Darling) pronounced this interlocutor—"The Lord Ordinary having heard parties, Approves of the Auditor's report on the pursuers' account of expenses, and decerns against the defenders Mrs Margaret West or Crichton, John Crichton, and James Crichton, jointly and severally, for the sum of £295, 19s. 7d. sterling, being the taxed amount of said account, and allows the decree therefor to go out and be extracted in name of Messrs Carmichael & Miller, W.S., the agents disbursers thereof.

Opinion.—"To the motion for approval of the Auditor's report on the pursuers' account of expenses an objection has been taken by the defenders which raises sharply a question of process noticed by the extractor in the printed regulations applicable to his department. The question is, whether, when a decree exhausting the merits of a cause has been extracted *ad interim*, the successful party is thereby debarred from obtaining decree for the expenses to which he has been found entitled?

"The affirmative of this question can only be maintained on the ground that the extract of such a decree, though in form an interim extract, is truly a final one, and that the process, though in fact still in the office of the Clerk of Court, ought properly to be in the General Record Office, and therefore at an end as a depending process. Opinions have undoubtedly been expressed by some eminent judges in favour of this view, but the defenders quite frankly admit that, in the only case in which the point came up for actual decision, the opposite view prevailed. That was the case of *Beveridge* v *Liddell* (1852), 14 D. 772. There, as here, a decree awarding the pursuer the sum sued for, and finding him entitled to expenses, had been extracted by the pursuer by what bore to be an interim extract before his account had been taxed by the Auditor. What the Court did was to approve of the Auditor's report and to decern for the taxed amount. But Lord Medwyn (though apparently he did not formally dissent) expressed the opinion that the extract should be recalled as null, on the ground that section 28 of the Act 13 and 14 Vict. c. 36, which allowed every decree formerly extractible *ad interim* by special leave of the Court to be extracted *ad interim* without such leave, was not intended to apply to decrees exhausting the merits of a cause. Lord Justice-Clerk Inglis afterwards indicated his concurrence in Lord Medwyn's view, but that was in a case—*Taylor* v. *Jarvis* (1860), 22 D. 1031—which raised a different question, the question, namely, whether the leave of the Court was necessary for obtaining interim extract of an Outer House decree for expenses. The Court decided that leave was not necessary.

"I was further referred to the case of *Baillie* v. *Cameron* in 1891, 28 S.L.R. 895, where their Lordships of the Second Division were asked by a successful pursuer to grant leave for interim extract of a decree in so far as it dealt with the merits of the cause under reservation of his right to extract the decree for expenses when the Auditor's report should have been approved of. It was objected that, as by the Act of

1850 any decree which was formerly extractible with leave could now be extracted without leave, the application was either incompetent or unnecessary. The Court granted leave; but there was nothing to show that their Lordships thought leave absolutely necessary; it may have been granted only *ob majorem cautelam*. At all events, the case shows that their Lordships saw no objection to such a mode of proceeding in itself.

"In this state of matters I think I ought to disregard *obiter dicta* however weighty, and follow the latest case which decides the actual question. I do so, I confess, with all the more readiness that the decision is in accordance with the justice of this case. To do otherwise would enable the losing party by a mere technicality to evade payment of a debt in which he has been found liable. A court, when it gives judgment on the merits of a case, is understood to intend that its decree shall be put in force *quam primum*, and, when it awards expenses, that the taxed amount shall be paid. No rule of process ought to be interpreted so as to defeat these cardinal purposes unless there is much more imperative reason for doing so than any which I can discover in the supposed necessity of treating an interim extract as a final one."

On 27th November 1901, the Lord Ordinary refused a motion by the defenders for leave to reclaim.

Note — "I do not refuse this motion because I am against the defenders having an opportunity of submitting my interlocutor of 22nd November to review. The sum involved is considerable, and the question which I decided has given rise to considerable difference of judicial opinion. I refuse the motion simply because, looking to the terms of sec. 54 of the Court of Session Act 1868, I think I have no power to grant it. That section seems to me to refer solely to interlocutors pronounced *before* 'the whole cause has been decided in the Outer House,' as these words are interpreted by sec. 53. Whether a reclaiming-note would be competent without leave under sec. 11 of the Act of 1850, is a question which it is not for me to decide — see *Cowper* v. *Callander*, 10 Macph. 353."

The Court of Session Act 1850, (13 and 14 Vic. cap. 36) sec. 28, enacts — "That every Act and warrant and decree granted or to be granted during the dependence of a process before the Court of Session, and which according to the present practice might be extracted *ad interim*, if special allowance to that effect were granted by the Lord Ordinary or the Court, shall be extractible *ad interim* without the necessity of such special allowance, unless the Lord Ordinary or the Court shall otherwise direct."

The defenders reclaimed, and argued—The decree extracted by the pursuers was a decree exhausting the merits of the cause, and the extract, though nominally *ad interim*, was in fact a final extract, which put an end to the process, and the pursuer had accordingly lost his right to have his account audited. That was undoubtedly the older rule — Shand's Practice, 1048; *Town Council of Rothesay* v. *M'Neil* (1789), M. 12,188. The law was not altered by the Act of 1850, which applied only to decrees granted "during the dependence of a process," not to final decrees exhausting the cause — *Beveridge* v. *Liddell*, May 21, 1852, 14 D. 772, *per* Lord Medwyn; *Taylor* v. *Jarvis*, March 20, 1860, 22 D. 1031, *per* Lord Justice-Clerk (Inglis); *Baillie* v. *Cameron*, July 17, 1891, 28 S.L.R. 895.

Argued for the pursuers and respondents —Whatever might have been the law prior to the Act of 1850, the question here raised was ruled by the decision in *Beveridge*, *supra*, which was directly in point, and determined that a party was not barred by extracting a final decree *ad interim* from subsequently obtaining decree for his taxed expenses. The dictum of the Lord Justice-Clerk in *Taylor*, that the party lost the right to get his account audited, proceeded on a misapprehension of Lord Medwyn's opinion in *Beveridge*, and in any view was *obiter*. The pursuers also objected to the reclaiming-note as incompetent.

At advising—

LORD JUSTICE-CLERK — The objection taken to decree for expenses is of a purely technical nature, and if successful would have the serious result that expenses, the amount of which upon audit comes nearly to £300, would be lost to the successful party. The objection is based upon the alleged fact that before decree for expenses was obtained extract was taken of the final judgment in the cause, and that therefore there was no process before the Lord Ordinary in which he could competently pronounce any further interlocutor. To the answer that the extract was *ad interim* only, it is replied that this was incompetent, and that the extract must be considered as if these words had not been in it.

The case of *Beveridge* v. *Liddell*, if well decided, is quite in point, for there the judgment had been extracted by what bore to be an *interim* extract before audit of the account, and the Court approved of the auditor's report and decerned for the taxed expenses. The question was mooted in that case by Lord Medwyn whether the extract should not be recalled as null, and it is said that in the case of *Taylor* v. *Jarvis* the late Lord Justice-Clerk (Inglis) expressed concurrence with Lord Medwyn's view. It is plain from the report that what was said in the case was of the nature of *obiter dictum*, and it should not, even if sound, which is in my opinion doubtful, be held to detract from what was actually done by the Court in the case of *Beveridge*.

In the later case of *Baillie* v. *Cameron* the Court gave its sanction to the issue of an *interim* extract on the application of the successful party, under reservation of the right to extract the decree for expenses when the audit was complete. This makes it plain that the Court held such a procedure to be competent in itself, and the fact that leave was granted does not imply that it was incompetent without leave. I see no ground for holding it incompetent.

Under the Act of 1850 any interlocutor or decree which was formerly extractible with leave became extractible without leave, and I cannot doubt that in *Beveridge's* case the Court acted rightly in holding that, an *interim* extract of judgment only having been granted, they could decern for the amount of expenses when taxed. I can see no reasonable ground for excluding such a decerniture, while such a rule would be fraught with inconvenience for which no stateable advantage can be suggested as compensation. I am in favour of repelling the objection and affirming the interlocutor.

As regards the competency, the Court did not have a full argument, the parties being willing that the Court should deal with the merits of the reclaiming-note. I shall therefore not say anything upon that matter, except to say that, subject to anything that might have been said in debate to influence my view to a contrary effect, I would have been prepared to hold the reclaiming-note competent.

LORD YOUNG—I think that the question which was decided by the Lord Ordinary may competently be brought here by a reclaiming-note, and I am also of opinion that that question ought to be decided as his Lordship has decided it, viz., that it was regular and proper to consider the auditor's report and dispose of any objections, and to approve of it as he has done. I am therefore for affirming the interlocutor.

LORD TRAYNER—The first question raised before us was whether this reclaiming-note is competent. I think the objection taken to the competency should be repelled. There can be no reclaiming-note in the ordinary case against an interlocutor approving of an auditor's report and decerning for the amount of the taxed expenses previously found due. But the reclaimers here maintain that the interlocutor reclaimed against was *ultra vires* of the Lord Ordinary. Now, perhaps the most usual method of reviewing an interlocutor upon that ground is by reduction, but there seems to me to be no reason for compelling the reclaimers to resort to that mode if review can be had by the more expeditious and cheaper mode of a reclaiming-note. And I think it may, The process is before us, and I think we may give the reclaimers any remedy to which they are entitled in this process and now.

But on the question which this reclaiming-note is brought to try I think the Lord Ordinary is right. Any decree of which the Court can competently direct an interim extract to be issued may now be extracted without leave of the Court. That was what was done here. But an interim extract has never precluded the litigant taking it from proceeding to get the Auditor's report on his account of expenses (formerly awarded) approved of, and decree for the amount granted. There is therefore, in my opinion, no ground for objecting to what the Lord Ordinary has done.

I cannot say I would have been of a different opinion even had the decree first extracted by the pursuers not been asked and obtained as an interim extract. Take the case that a pursuer has obtained a judgment in his favour for payment of a sum of money and expenses, and that that judgment was pronounced on the last day of a session. It is then impossible to have the expenses audited and decerned for until the following session. But according to the view urged by the reclaimers the pursuer in such a case is not to be allowed to extract his decree for the principal sum except on condition that he thereby forfeits his right to the expenses which have been awarded. I cannot adopt that view. To postpone extract of the decree for the principal sum for a whole vacation might render such a decree useless by preventing the execution of diligence which alone might make the decree effectual, and that a pursuer by proceeding to make his decree effectual for the principal sum is thereby to exclude himself from afterwards making the rest of his claim—that is, for expenses—effectual by extract and diligence seems to me to be based on no good or stateable reason whatever. To extract the judgment separately for its two component parts seems to me quite within the power of a pursuer and does no prejudice to the debtor.

LORD MONCREIFF—I am of the same opinion. I agree with the Lord Ordinary, and I think it would be unfortunate if we found ourselves compelled by practice or decision to come to a different conclusion, because if the reclaimers were successful the result would be that the respondents would be defrauded of their taxed expenses amounting to £295, 19s. 7d., to which they have been found justly entitled.

It may be conceded that if this question had arisen before the passing of the Act 13 and 14 Vict. cap. 36, the decision would have been otherwise, because according to the practice as exemplified by the case of *The Town Council of Rothesay* v. *M'Neil*, M. 12,188, if a party in whose favour a decree on the merits with a finding for expenses was pronounced, thought fit without special authority of the Court to extract the decree on the merits before his account of expenses was taxed and decerned for, the cause was held to be at an end, and it was not thereafter competent to demand decerniture for expenses.

But by the 28th section of the Court of Session Act of 1850 it was enacted "that every act and warrant and decree granted or to be granted during the dependence of a process before the Court of Session, and which according to the present practice might be extracted *ad interim* if special allowance were granted to that effect by the Lord Ordinary or the Court, shall be extractible *ad interim* without the necessity of such special allowance, unless the Lord Ordinary or the Court shall otherwise direct."

It is now suggested that this enactment has no application to a final decree on the merits. I confess that I see no good reason

either in the terms of the clause or in the good sense of the matter for such an opinion. It is clearly of as great if not greater importance to a litigant that he should be able to extract the final decree on the merits without awaiting the taxation of his account of expenses as that he should be able to extract an interim decree at an earlier stage without awaiting the conclusion of the cause. This case is a very good example. The time when decree was pronounced was 19th July, and I understand that it would have been impossible for the pursuers to have got their account of expenses taxed and decerned for before the meeting of the Court in October. It was not maintained before us, although it may have been suggested, that before 1850 it was incompetent to obtain special authority from the Court to extract decree on the merits, reserving right to come back for approval of the Auditor's report and decree for expenses. The case of the *Magistrates of Rothesay* indicates the contrary. And it does not seem to me that the words of the 28th section are confined to interlocutors prior to the final decree on the merits, the words used being "Every decree granted or to be granted during the dependence of a process," which are certainly wide enough to include a final decree.

I therefore, with great respect, am of opinion that we are not bound by the expression of opinion made *obiter* in the case of *Taylor* v. *Jarvis*.

I express no opinion as to the competency of the reclaiming-note, which was assumed.

The Court adhered.

Counsel for the Pursuers and Respondents —Campbell, K.C.—Dewar. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders and Reclaimers —Chree. Agents—Gill & Pringle, S.S.C.

Wednesday, December 4.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ELLISON *v.* ELLISON.

Husband and Wife—Divorce—Action for Divorce and for Recovery of Terce, Jus Relictæ, and Conventional Provisions —Arrestment—Recal—Process—Diligence —Debtors (Scotland) Act 1838 (1 *and* 2 *Vict. cap.* 114) (*Personal Diligence Act*), *sec.* 16.

A wife brought an action against her husband, which contained (1) a conclusion for divorce on the ground of adultery, and (2) conclusions for the recovery of the terce and *jus relictæ* and the conventional provisions to which she would be entitled on obtaining decree of divorce. The pursuer used arrestments on the dependence of this action. The Court *recalled* the arrestments, upon the ground (1) that the case must be treated as if two separate actions had been raised by the pursuer, one for divorce and the other containing the pecuniary conclusions, and (2) that arrestment on the dependence would not have been competent in either of these actions, in respect that arrestment is not competent upon the dependence of an action of divorce, and that meanwhile the wife would have had no title to sue an action for terce, *jus relictæ*, and conventional provisions.

Question—Whether the arrestments would have been competent if it had been relevantly averred that the husband was *vergens ad inopiam* or *in meditatione fugæ*.

Question—Whether an action combining such conclusions was competent.

Opinions reserved.

Expenses—Husband and Wife—Recal of Arrestments in Action Containing, inter alia, Conclusions for Divorce.

In an application for recal of arrestments used on the dependence of an action at the instance of a wife containing a conclusion for divorce and also conclusions for recovery of terce, *jus relictæ* and conventional provisions, the Court, having recalled the arrestments as incompetent, *found* the wife liable in expenses, upon the ground that the question was not properly consistorial.

Section 16 of the Debtors (Scotland) Act 1838 (1 and 2 Vict. cap. 114) (Personal Diligence Act) provides that "It shall be lawful to insert in summonses . . . concluding for payment of money a warrant (or will) to arrest the moveables, debts, and money belonging or owing to the defender until caution be found." . . .

This was an action at the instance of Mrs Jenny Galbraith Hamilton or Ellison against her husband Robert Arthur Ellison. The summons concluded (1) for divorce on the ground of adultery, and (2) "upon decree being pronounced in terms of the foregoing conclusions for divorce," for declarator that the pursuer was entitled to implement of the provisions in her favour contained in her marriage-contract, and to the terce and *jus relictæ* to which she would have been entitled at the defender's death. There was a further conclusion for count, reckoning, and payment, with a view to recovery of her *jus relictæ*.

On 28th September 1901 the pursuer used arrestments on the dependence of the action.

The pursuer averred that the defender earned a salary of £400, "and that in addition he has a substantial annual income from other sources." She averred further, however, that she had reason to believe that in the event of her raising the present action he would alienate his property so as to prejudice her rights consequent on divorce, and that he had in fact transferred certain shares. The pursuer further averred —"Upon the defender's own statement of the value of his estate he is *vergens ad inopiam*."