

has not been set aside by the decision in that case, because that went expressly upon the ground that there was what the great English lawyers of that day called certain latent equities which had not been notified to the party holding the right assigned. But in this case there is no question of latent equity raised at all. On the face of this policy, which is the defenders' title, the right is declared to be defeated in certain specified events; and when the assignee takes that policy from the cedent, he takes it with that declaration upon the face of it, and knows that if breach of warranty or fraud can be substantiated the policy is void. That is on the face of the party's own title; and on that ground alone I hold that the first plea in law should be repelled. Upon the fifth plea I agree with the observations of his Lordship in the chair; I do not see the bearing of the plea.

LORD ARDMILLAN was absent.

LORD PRESIDENT—The question remains—In what manner is the case to be tried?

MR FRASER—I renew my motion that your Lordship should appoint parties to give in issues.

LORD PRESIDENT—I have looked very carefully into these cases for the purpose of determining in what way it is most expedient that they should be tried, and I have come to the conclusion that they ought to be tried before the Lord Ordinary without a jury. My reason is very much this, that I think there will necessarily arise some important legal principles which must be applied to the evidence, and some of those legal principles would be rather difficult for a jury to follow, and perhaps, as regards some of them, there might even be a natural prejudice in the minds of a jury. It is for those reasons that I think this is a case suited to be tried in the mode I have suggested. We had occasion to see an example not very long ago of the effect of trying a question of this kind without a jury, and the result was to my mind very satisfactory. I mean the case of *Foster v. The Life Association of Scotland*. That was a very delicate case, as the present may turn out to be for all we can see now, and it turned very much upon the question whether in point of fact, in the negotiations between the parties the insurer had knowingly undertaken a warranty. Whether that question may arise here I cannot tell, but for all I see it may occur, and that is a question which I think had better be determined by a Judge.

LORD DEAS concurred, on the ground stated by the Lord President. It may be an additional reason (he said) that there are three cases here, some points of which may be similar to each other, and some not. If they were to go to a jury it would be very inconvenient and expensive to have to try them separately, and if they were all tried together they would be very complicated. That is an inconvenience which is entirely obviated by the course your Lordship has suggested.

LORD MURE—Had it been a pure question of alleged fraudulent representation on the part of the assurant, that might have been a reason for

sending the case to a jury; but it is not such a case; and in the whole circumstances I concur that it is not a fitting case to be tried by a jury.

The Court pronounced this interlocutor:—

“The Lords having heard counsel on the reclaiming-note for Robert Buist and Hugh Mitchell against Lord Young's interlocutor of 23d June 1876, Recal the interlocutor except in so far as it ‘finds the defenders liable’ in expenses, ‘modifies the same at the sum of £3, 3s., and decerns;’ and having heard counsel on the first, third, fifth, eighth, and tenth pleas for the defenders, repel the said pleas, and decern: Remit to the Lord Ordinary of new to allow the parties a proof of their averments, and to proceed further in the cause as shall be just; reserving all questions of expenses.”

Counsel for the Scottish Widows Fund—Asher—Pearson. Agents—Gibson-Craig, Dalziels, & Brodies, W.S.

Counsel for the Scottish Equitable—Balfour—Pearson. Agents—Campbell & Lamond, C.S.

Counsel for the General Life and Fire Assurance Company—Dean of Faculty (Watson)—Strachan. Agent—James S. Mack, S.S.C.

Counsel for the Defenders and Reclaimers—Fraser—Scott—J. P. B. Robertson. Agent—James M'Call, S.S.C.

Saturday, July 15.

FIRST DIVISION.

[Sheriff of Midlothian.

BATCHELOR *v.* MACKERSY AND PATTISON.

(*Ante*, p. 589.)

Expenses—Act of Sederunt 19th Dec. 1835—Fees to Counsel.

Circumstances in which held that the Auditor was entitled to allow fees to counsel although they had not been paid at the time.

Observations on the practice of declining fees except in the event of success.

The Auditor added the following note to his report on the accounts of expenses in this case:—“The appellant was neither present nor represented at the audit, but the Auditor had before him a letter from the appellant, with the copies of the accounts of the expenses of the respondents served upon him, on which he had noted his objections. These were considered by the Auditor. The agents of the respondents stated that the fees entered in both accounts as paid to counsel had in reality not been paid. The Act of Sederunt of 1835 provides that ‘a party shall not upon any account be allowed to pay or state higher or additional fees to counsel after he has been found entitled to expenses than were actually paid at the time. But this rule does not apply either to cases on the Poor's Roll, or to such as have been conducted gratuitously by the agent and counsel on account of the poverty of the party.’ The object of this provision, as understood by the Auditor, is to prevent

a successful party, after judgment in his favour, increasing the amount or adding to the number of the fees actually paid by him during the course of the process, and although the exceptions from the rule are in terms limited to cases on the Poor's Roll and cases of gratuitous conduct of a cause 'on account of the poverty of the party,' the practice of the Auditor's office has been, where a case has been throughout conducted by counsel gratuitously on other grounds, to allow reasonable fees after decree has been pronounced. The fees stated in these accounts appear to the Auditor to be reasonable, and he has not disallowed them."

For the respondents it was stated that the practice was well known, and in such a case as the present was perfectly reasonable. Reference was made to the case of *Tough's Trustees v. Dumbarlon Water Commissioners*, 1 Rettie 879.

At advising—

LORD PRESIDENT—What the Auditor proposes to do in this case, viz., to allow a reasonable fee, although it was not actually paid at the time, is consistent with a practice of long standing—a practice with which I was quite familiar while at the bar, and of which your Lordships are, I have no doubt, well aware. The practice is reasonable in itself, and it is not inconsistent with the provisions of the Act of Sederunt. The principle is that counsel and agent may feel that the circumstances of a case are such that the agent cannot consent to make charges or the counsel to receive fees from their client; but they cannot have the same feeling to the client's opponent, and when he is found liable this feeling will therefore disappear. Accordingly it is quite reasonable that, when the client's opponent has to pay, such a charge should be allowed by the Auditor.

LORD DEAS—It is perfectly natural that a counsel should not wish to accept fees from a brother counsel, or an agent from a brother agent; but that is no reason why they should not be entitled to receive them from the opposite party if he is found liable. I concur with your Lordship.

LORD MURE—I also concur with your Lordship. The practice was well known to me when at the bar.

The Court pronounced this interlocutor :—

"The Lords having considered the Auditor's reports on the accounts of expenses incurred by the respondents, Nos. 490 and 491 of process, and heard counsel for the respondents thereon and on the questions reserved for the determination of the Court, no appearance being made for the appellant, Allow the fees mentioned in said reports to be charged, approve of the Auditor's report on the account of expenses incurred by the respondent George Handasyde Pattison, No. 491 of process, and decern against the appellant for payment to the said respondent George Handasyde Pattison of the sum of Thirty-three pounds three shillings and one penny sterling of taxed expenses: Farther, approve of the Auditor's report on the account of expenses incurred by the respon-

dent Robert Johnston, No. 490 of process, and decern against the appellant for payment of the sum of Twenty-three pounds sterling of taxed expenses to David Reid Grubb, solicitor, the agent-disburser thereof."

Counsel and Agent for Pursuer (Appellant)—Party.

Counsel for Mackersy (Defender and Respondent)—Burnet. Agent—George Begg, S.S.C.

Counsel for Pattison (Defender and Respondent)—Dean of Faculty (Watson)—Black. Agent—William Saunders, S.S.C.

Tuesday, July 18.

FIRST DIVISION.

[Lord Young, Ordinary.

PETITION—ROBERTSON.

Process—Petition—Competency—Reclaiming Note—Statute 36 and 37 Vict. cap. 63—Review by Inner House.

Held that the following provision in the 7th section of the Law Agents Act 1873, viz.—"A single judge shall be entitled to act as the Court with reference to all petitions for admission as a law agent under this Act," does not render a reclaiming note against his judgment incompetent.

Observed by the Lord President that the power of review by the Inner House of all interlocutors pronounced by the Lord Ordinary cannot be taken away by implication.

This was a petition presented in terms of the 10th section of the Law Agents Act (36 and 37 Vict. cap. 63). The Lord Ordinary pronounced the usual interlocutor, quoted in the Lord President's opinion. The petitioner, believing that he was entitled to be admitted without examination, on the ground that at the date of the passing of the Act he was entitled to be admitted a procurator under the Procurators Act of 1865, asked leave to reclaim against this interlocutor, which the Lord Ordinary granted, reserving all questions of competency.

On the question of competency it was argued for him—The expression "Lord Ordinary" used in the 7th clause of the Act indicates the intention of the Act to allow the review of any interlocutors pronounced under the powers conferred by it. Under section 8th of the Judicature Act of 1825 review is declared competent unless expressly excluded—*Otis v. Kidston*, 24 Dunlop 419, Lord Justice Clerk's remarks, p. 426.

At advising—

LORD PRESIDENT—The first point to be disposed of in this petition regards the competency presented to the Court by John Robertson, writer, Edinburgh, to be admitted a law agent; and Lord Young, to whom the petition was presented, has pronounced an interlocutor by which he "remits to the examiners appointed by the Act of Sederunt of 6th November 1873, to inquire into the facts set forth in the petition,