

Session, and the judge who pronounces them only exercises a delegated jurisdiction; (2) it is a necessary condition of the trial of a question of fact that a trial, whether by a judge and jury or by a judge alone, is an indivisible function which must be begun and finished by the same member of the Court.

If this had been a trial by a judge with a jury no one would dispute the accuracy of what I have just said. The case is not quite so clear in the case of the trial of a cause by a Lord Ordinary without a jury. But having regard to the policy of the statute there can be little doubt on the question. The statute points out the judge who is to commence the trial, but it does not make it a condition of his going on with the trial that he is to remain a Lord Ordinary in the Outer House. The only difficulty arises on the case of *Allan v. M'Murray*, 17 D. 969. There it was held that it was incompetent for Lord Ardmillan to review an interlocutor previously pronounced by Lord Curriehill, who after taking the evidence had been transferred to the Inner House. There the irregular intervention of the second Judge may have created a difficulty, but in the present case, where all the proceedings have been regular, it seems to me that the Lord Ordinary who began the trial should carry it out to its conclusion.

LORD KINNEAR—I am of the same opinion. With the greatest respect I am unable to agree with the reasoning of the learned Judges in *Allan v. M'Murray*, 17 D. 969. It is perfectly clear that the statute contemplates that the whole proceedings shall be carried out by one judge. [*His Lordship quoted sec. 46.*] That all this is to be done by one Lord Ordinary is obvious. This cannot be put more clearly than it was by Lord Colonsay in *Allan v. M'Murray*, where he says at 971—"The language of the 46th section is applicable throughout to successive steps to be taken by the same judge who tried the case. It is in truth a continuation of the trial. The evidence has been taken, but the verdict has not been finally adjusted. The Lord Ordinary who sits at the trial performs the function of both judge and jury. The object of the statute is to combine these functions. They are not discharged until the verdict has been adjusted. But there is nothing in the statute to imply that the adjustment of the verdict is to be left to a judge who has not heard the evidence." In this case Lord Pearson has heard the evidence, and the verdict is not yet given. Lord Pearson alone can give that verdict. He must pronounce his findings. The only difficulty that has arisen is that it is said that Lord Pearson is no longer the Lord Ordinary before whom the case is pending. But the Lord Ordinary who was trying the case was certainly the judge before whom the action depends, and it did not cease to depend before him when he was removed to the Inner House. It was still a depending cause because it had not been disposed of, and if it was depending before any

judge it must have been before the judge who was still engaged in considering it. I think, if I may say so, with great respect, that it was rightly decided in *Allan v. M'Murray* that Lord Curriehill's successor could not competently take up the cause at the point at which Lord Curriehill left it. But that is only another form of saying that the new Lord Ordinary was not the Lord Ordinary in the cause, and if it does not pass to another Lord Ordinary it remains with the Judge who has taken the evidence but has not yet decided the case. I agree with the observation of Lord McLaren that the case is the same with the case of a jury trial presided over by the senior Lord Ordinary who in the course of it is removed from the Outer to the Inner House by the death or resignation of one of the Inner House Judges and the appointment of a new Judge in his room. It is not suggested that in such a case the Lord Ordinary is incompetent to complete the trial.

LORD PEARSON concurred.

The Lords remitted the case to Lord Pearson to proceed therein.

Counsel for Pursuer—Crabb Watt, K.C.—Spens. Agent—Aug. M. Graham Yooll Solicitor.

Counsel for Defender—Wilson, K.C.—D. Anderson. Agents—Fraser & Davidson, W.S.

Saturday, January 13.

## SECOND DIVISION.

[Lord Johnston, Ordinary.]

### M'CARDLE v. M'CARDLE'S JUDICIAL FACTOR.

*Process—Reclaiming Note—Competency—Judicial Factory under sec. 164 of The Bankruptcy (Scotland) Act 1856, sec. 164—Interlocutor Ordering Inquiry and not Disposing of Merits—Reclaiming Note Incompetent—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), secs. 164 and 171—Act of Sederunt, 25th November 1857, sec. 29—Distribution of Business Act 1857 (20 and 21 Vict. cap. 56), secs. 4 and 6.*

The Lord Ordinary, in dealing with certain objections to a report by the Accountant of Court on the accounts of a judicial factor appointed under section 164 of The Bankruptcy (Scotland) Act 1856, pronounced an interlocutor with a view to inquiry and investigation merely, and which did not finally dispose of any matter on the merits.

*Held*, on a consideration of The Bankruptcy (Scotland) Act 1856, secs. 164 and 171, Act of Sederunt 25th November 1857, sec. 29, Distribution of Business Act 1857, secs. 4 and 6, that a reclaiming note was incompetent.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) provides, sec. 164—

"It shall be competent to one or more creditors of parties deceased to the amount of one hundred pounds, or to persons having an interest in the succession of such parties, in the event of the deceased having left no settlement appointing trustees or other parties having power to manage his estate or part thereof, or in the event of such parties not accepting or acting, to apply by summary petition to either Division of the Court for the appointment of a judicial factor, and . . . the Court may appoint such factor . . ." Sec. 171.—"Where any judgment of the Lord Ordinary is to be brought under review of the Inner House, the same shall be done by a reclaiming note in common form presented within fourteen days from the date of the judgment . . ."

The Act of Sederunt of 25th November 1857, for regulating the procedure of judicial factors under the Bankruptcy Act 1856, provides, sec. 29—"All proceedings, which in this Act are appointed to take place by or before the Court, shall, although the same be addressed to the Lords of Council and Session, be brought before, dealt with, and disposed of by the Junior Lord Ordinary officiating in the Outer House or by the Lord Ordinary officiating on the Bills in time of vacation, subject to the review of the Inner House, in conformity with the 4th section of the statute 20th and 21st Vict. cap. 56 (The Distribution of Business Act 1857).

The Distribution of Business Act 1857 (20 and 21 Vict. c. 56) provides, sec. 4—"All summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just; and in particular all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz. . . ." (*Here follows a list of petitions and applications.*) Sec. 6—"It shall not be competent to bring under review of the Court any interlocutor pronounced by the Lord Ordinary upon any such petition, application, or report as aforesaid with a view to investigation and inquiry merely, and which does not finally dispose thereof upon the merits; but any judgment pronounced by the Lord Ordinary on the merits . . . may be reclaimed against. . ."

J. M. M'Leod, C.A., Glasgow, was in 1899 appointed judicial factor on the estate of the deceased James M'Cardle, late of Carnlough, in the county of Antrim, farmer, and of 124 Trongate, in the city of Glasgow, on a petition at the instance of his widow, Mrs Ellen Mullin or M'Cardle, brought under section 164 of the Bankruptcy (Scotland) Act 1856.

The factor entered into management of the estate, and ultimately, with a view to

winding up the factory and obtaining his discharge, lodged his accounts, which were in ordinary course remitted to the Accountant of Court, who lodged a report upon them.

Mrs M'Cardle lodged objections to the Accountant's report, maintaining, *inter alia*, that as her husband was a domiciled Irishman at his death, his executry was an Irish executry, for which she was responsible, and that the rights *hinc inde* must be determined on that footing. She also averred that the factor had allowed no value for the goodwill of a lodging-house business in Trongate, Glasgow, which had belonged to the deceased.

The Lord Ordinary (JOHNSTON) on 23rd December 1905 pronounced an interlocutor allowing the parties proof on the question of the deceased's domicile and the goodwill of the Trongate business.

Mrs M'Cardle reclaimed against the interlocutor.

The judicial factor, on the reclaiming note appearing in the Single Bills, objected to its competency, arguing—The factor having been appointed under sec. 164 of the Bankruptcy Act 1856, the proceedings were regulated by sec. 29 of the Act of Sederunt of 25th November 1857. The effect of that section was to add petitions and applications brought under the Bankruptcy Act 1856 to the list of those petitions and applications contained in the fourth section of the Distribution of Business Act 1857, in which review of any interlocutor pronounced with a view to investigation and inquiry merely, and which did not finally dispose of the merits, was expressly excluded by sec. 6 of that Act.

Argued for the reclamer—It was sec. 171 of the Bankruptcy Act 1856 that dealt with review, and it contained no limitation as to the nature of the interlocutor that could be reclaimed against. Further, sec. 29 of the Act of Sederunt of 25th November 1857 referred only to sec. 4 of the Distribution of Business Act 1857, and made no mention whatever of sec. 6, which was the only section that limited the right of review.

LORD JUSTICE-CLERK—It seems to me perfectly clear that if sec. 6 of the Distribution of Business Act 1856 applies to this case, Mr Horne's argument is conclusive. On a consideration of the statutes and of the Act of Sederunt, I am satisfied that it does apply, and that this reclaiming note is therefore incompetent, since it is against an interlocutor pronounced with a view to investigation and inquiry merely, and does not finally dispose of any matter upon the merits.

LORDS KYLLACHY, STORMONTH DARLING, and LOW concurred.

The Court refused the reclaiming note as incompetent.

Counsel for Reclamer—Findlay. Agents—Gill & Pringle, W.S.

Counsel for Respondent (M'Cardle's Judicial Factor)—Wilson, K.C.—Horne. Agents—Bell, Bannerman, & Finlay, W.S.