

321, 1911 S.C. (J.) 20, 48 S.L.R. 56. The provision of section 34, sub-section 8, of the Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65) showed that that was the order of procedure contemplated by that Act in such circumstances as the present. Counsel also referred to *H. M. Advocate v. Hunter*, June 26, 1890, 2 White 501.

Argued for the respondent—In judging whether ground was enclosed or unenclosed the test was whether there was means to restrict access by the public—*Walker v. Reid*, 6 Ad. 358, per Lord Ardwall, 1911 S.C. (J.) 41, 48 S.L.R. 99. Here the public had free access, there being neither a door to the shed or any impediment to their getting on to the quay. Counsel also referred to *Woods v. Lindsay*, 6 Ad. 294, per Lord Justice-General, 1910 S.C. (J.) 88, 47 S.L.R. 774. (2) The previous conviction was not libelled as part of the substantive charge, but merely as an aggravation. It fell to be libelled in the complaint in terms of section 34 of the Summary Jurisdiction (Scotland) Act 1908, and in terms of sub-sections (2) and (4) of that section the procedure followed by the magistrate was correct.

LORD JUSTICE-CLERK—This case turns on the question whether or not a certain shed was “unenclosed ground,” or rather, whether it was competent for the magistrate who tried the case, after hearing the evidence and finding proved the facts which we have here stated, to hold that it was “unenclosed ground.” I think that the magistrate was right in so holding, in spite of Mr Crabb Watt’s ingenious argument to the contrary.

The fact that the shed was on a quay can make no difference. The quay itself was public ground, and on it there was this erection, with a roof and certain fixed wooden partitions which partially closed it in but left large openings in front and in rear. It was left open, it was out of use for harbour purposes, and the public were in the habit of using it freely. It was in every respect a place open to the public, and I think it comes within the description of “unenclosed ground.” I do not see that the fact of its having a cover over it makes any difference. There are many places in public grounds so roofed in in order to form a shelter from the rain, but there can be no doubt that such a shelter is unenclosed ground so long as the public are able to pass into it, and under the roof, and to range freely over the park in which it is placed.

The only other question was whether it was competent for the magistrate to proceed as he did to repel the objection to the competency of proving the previous conviction libelled after he had found the appellant guilty of the charge. The appellant here contends that as the previous conviction was stated against him in the complaint, it had to be proved before the case for the prosecution was closed. I think differently. I think the magistrate was bound to make up his mind first whether

the offence was proved, and only after he had found the accused guilty of the offence was it his duty to proceed to consider the previous conviction, which was libelled, not as a substantive charge, but as an aggravation—rendering the accused liable to a heavier punishment. As it was merely a question of greater or less punishment, the judge here was just in the same position as when, under the Criminal Procedure Act of 1887, a previous conviction is libelled as an aggravation. There, if it is to be proved, it must be proved separately by a separate inquiry before the same jury, and a separate verdict returned; and section 67, which prescribes this procedure, is made to apply to summary prosecutions by section 71. In my opinion the judge in this case could not have proceeded in any other way than he did. If he had done so there would have been good ground for overturning the conviction.

LORD DUNDAS—I agree upon both points and have nothing to add.

LORD GUTHRIE—I concur.

The Court dismissed the appeal.

Counsel for the Appellant—Crabb Watt, K.C.—Duffus. Agent—J. G. Bryson, Solicitor.

Counsel for the Respondent—C. D. Murray, K.C.—Hon. W. Watson. Agents—Campbell & Smith, S.S.C.

COURT OF SESSION.

Thursday, November 30.

SECOND DIVISION.

[Lord Skerrington, Ordinary.]

RAMSAY’S JUDICIAL FACTOR v. BRITISH LINEN BANK.

Process—Multiplepointing—Final Decree of Ranking and Preference—Condescendence of Fund Subsequently Lodged—Competency of Claims of Compensation and Retention by Holder of Fund.

In an action of multiplepointing raised by a judicial factor on a trust estate, a claimant was ranked and preferred to a share of the fund *in medio* by decree which was allowed to become final. The pursuer and real raiser thereafter lodged a condescendence of the fund *in medio*, in which he put forward claims of compensation and retention against the share of the fund to which the claimant had been ranked.

Held that the claims were *competent*.

On 30th June 1909 Henry Moncrieff Steele, C.A., Glasgow, who had in 1895 been appointed judicial factor on the trust estate of the deceased Andrew Ramsay, merchant in Greenock, brought an action of multiplepointing to determine the rights

of parties in a sum of £9000, which formed part of the trust estate.

On 22nd January 1910 the British Linen Bank as assignees of John Crawford Hunter, one of the residuary legatees under Mr Ramsay's settlement, under bond and disposition and assignation in security in their favour, dated 25th December 1878, were ranked and preferred by Lord Mackenzie to one half of the fund *in medio*. No reclaiming note was presented against this interlocutor. On 19th March 1910 the pursuer and real raiser presented a claim "to be ranked and preferred on any amount to which the bank may be entitled to the extent of £4051, 2s. 10d." in respect of alleged debts due to the trust estate by John Crawford Hunter, the bank's cedent under two bonds and dispositions in security granted by him in favour of the trustees dated respectively 15th May 1874 and 17th May 1875. This claim was held by the Lord Ordinary (MACKENZIE), and on 17th May 1911 by the Second Division, to be incompetent—see *Ramsay's Judicial Factor v. British Linen Bank*, 1911 S.C. 832, 48 S.L.R. 743.

Thereafter the pursuer and real raiser lodged a condescendence of the fund *in medio* in which he made certain claims of compensation and retention against the one-half of the fund to which the bank had been ranked, in respect of the alleged debts due to the trust estate by Hunter under the said bonds.

The bank lodged objections to the condescendence of the fund and maintained that the pursuer's claims of compensation and retention against the share of the fund to which they had been ranked could not be competently maintained in a condescendence of the fund *in medio*.

On 28th October 1911 the Lord Ordinary (SKERRINGTON) pronounced this interlocutor:—"Finds that any pleas of compensation or retention otherwise competent to the pursuer and real raiser in a question with the British Linen Bank are still open to him notwithstanding the interlocutor of 22nd January 1910: Continues the cause for further procedure, and on the motion of said bank grants leave to reclaim."

Note.—"At an earlier stage of the present case the Second Division (affirming Lord Mackenzie) decided that after an interlocutor had become final disposing of the whole fund *in medio*, and ranking and preferring the claimants the British Linen Bank to one-half thereof, it was incompetent for the pursuer and real raiser to lodge a claim alleging that the trust estate was a creditor of the bank's cedent Mr Hunter, and claiming to be ranked and preferred to the amount of the debt on any sum to which the bank might be entitled (*Ramsay's Judicial Factor v. British Linen Bank* 1911 S.C. 832). The pursuer now seeks to accomplish the same result by lodging a condescendence of the fund *in medio*, in which he claims that he has a right of compensation, or otherwise of retention, in respect of the debt which he alleges to be due to the trust estate by the bank's author. The interlocutor appointing a

condescendence of the fund to be lodged was subsequent in date to the interlocutor of the Inner House already referred to. No argument was addressed to me, and all questions are reserved as to the relevancy and validity of the alleged claims at the instance of the trust estate against Hunter, and as to the validity of the rights of compensation or retention claimed by the pursuer. The only question argued was whether these rights, if otherwise well founded, were still open to the pursuer, or whether it was incompetent for the pursuer to insist upon them in the face of the final decree of ranking and preference. If the question is still open I see no objection to its being decided upon a discussion of the condescendence of the fund *in medio*, in the same way as if the pursuer had been only the nominal raiser of the action. See A. S., 11th July 1828, sec. 47; Bell's Comm., vol. ii, p. 278, 7th ed.

"The interlocutor of ranking and preference did not contain any decree for payment, but the Court held that it was none the less a final decree completely disposing of the competition and excluding all other parties except those who were ranked and preferred. But the Court did not decide that a decree of ranking and preference is to all effects and purposes the same as a decree for payment. If a litigant allows a decree for payment to go out against him I should suppose that he cannot subsequently suspend the decree upon the ground that at its date he had a counter claim upon which he might have founded a plea of compensation or retention. On principle, however, I see no reason why a merely declaratory decree finally establishing a claimant's right to a part of the fund *in medio*, and so constituting him a creditor of the fund-holder, should be held to preclude the latter from pleading compensation or retention. No question of compensation or retention could arise in the present case until it had been established that a particular claimant, viz., the bank, was a creditor of the pursuer, or rather of the trust estate. Accordingly I am of opinion that it is still open to the pursuer to plead compensation or retention as against the successful claimant. Obviously, however, as a matter of fair play, notice of any such claims ought to be given at the earliest possible moment by the pursuer and real raiser of an action of multiplepounding, and no doubt such notice would have been given in the condescendence annexed to the summons if the point had not been overlooked. The pursuer's present position is quite different from that stated by him when he came into Court, and if expense has been caused by this change of front, it will probably fall upon the pursuer to make it good. I shall pronounce a finding that any pleas of compensation or retention otherwise competent to the pursuer and real raiser in a question with the bank are still open to him notwithstanding the interlocutor of 22nd January 1910, and I shall continue the case for further procedure."

The British Linen Bank reclaimed, and

argued—In stating the condescence of the fund the holder was not entitled to deduct any part of it on the plea of compensation or retention against a particular claimant. The condescence was simply a statement of the amount of the funds in the holder's hands—A. S., July 11, 1825, sec. 47. This section and the passage in Bell's Comm. (7th ed.), ii, 278, mentioned by the Lord Ordinary, clearly made reference to claims of retention by the holder against the fund as a whole, and not to claims like the present, against the share of a particular claimant. If the procedure followed by the real raiser were competent, the amount of the fund *in medio* would vary according as it was decided that one or other of competing claimants was entitled thereto. The settling of the condescence was a cause in itself and a distinct process from the competition—*Walker's Trustee v. Walker*, Feb. 20, 1878, 5 R. 678, 15 S.L.R. 383. The fund might competently have been approved of before the claimants were ranked; had that been done, the real raiser's plea of compensation could not possibly have been stated. This was just an attempt to get the Court again to consider a claim that had already been held incompetent—*Ramsay's Judicial Factor v. British Linen Bank*, 1911 S.C. 832, 48 S.L.R. 743.

Argued for the pursuer and real raiser—The fund *in medio* had not been approved of, and the amount thereof was still unsettled. In settling the amount the holder was entitled to discuss—as he did here—any claims of compensation or retention competent to him—Bell's Comm. (*cit. sup.*), A. S., 11th July 1828 (*cit. sup.*); Mackay's Practice, vol. ii, 112.

At advising—

LORD SALVESEN—This reclaiming note raises an apparently novel point of procedure. The pursuer and real raiser of this action of multiplepounding has a claim against the late John Crawford Hunter, arising out of certain bonds granted by him in favour of the trust estate which the pursuer represents, the security subjects conveyed under the bonds having proved insufficient to meet the principal and interest. Mr Hunter became bankrupt in 1887, and his estates were realised under a voluntary trust-disposition. He died in 1890.

The object of the action was to ascertain the persons in right of a sum of about £9000 which had been disposed in liferent to certain ladies who are now dead; and by interlocutor which was allowed to become final the Lord Ordinary ranked and preferred the British Linen Company Bank to one-half of the fund *in medio* as assignees of the late John Crawford Hunter under an assignation dated in 1878. The pursuer thereafter lodged a claim in respect of the unpaid portion of the bonds already referred to. In this claim he asked to be ranked and preferred on any amount to which the bank had already been found entitled to the extent of £4051, 2s. 10d. This claim was dismissed as incompetent

by the Lord Ordinary, and we affirmed his interlocutor. Had it been truly a riding claim it was advised that it would not have been lodged too late, but as it was really a claim in competition with the bank, who had already been ranked and preferred to one-half of the fund *in medio*, it was held that it could not be entertained. As at present advised I do not think the pursuer suffered any prejudice by this, for his claim was bad, being framed exactly as it would have been if John Hunter had himself been the successful claimant (in which case it would have been a proper rider), whereas the pursuer could not claim to ride upon the bank's claim as the assignee of Hunter.

The pursuer thereafter put in a condescence of the fund *in medio*, in which he proposed to deduct from the one-half share to which the bank had been found entitled as assignees of John Crawford Hunter the amount of Hunter's indebtedness to the trust estate. The British Linen Bank lodged objections, in which they maintained that the claim of compensation or retention against the fund *in medio* put forward by the judicial factor was incompetent. The Lord Ordinary has sustained the competency, and I am of opinion that we ought to affirm his interlocutor.

The main argument by which the reclaiming note was supported was that, while the fund *in medio* might be subject to deduction in respect of sums due to the holder of the fund, the amount of the fund could not be greater or less according as it was decided that one or other of the competing claimants was entitled to it. There is at first sight much force in this argument, but in the end I have come to the conclusion that it is not sound. The simplest case would have been if John Crawford Hunter had still been alive and the whole fund *in medio* had been found to belong to him. In that case I cannot doubt that in stating the fund *in medio* the holder of the fund would have been entitled to deduct any sums which were due to him by John Crawford Hunter. In other words, the latter could not have demanded payment of his share of the estate in the pursuer's hands without meeting his indebtedness. On the other hand, had some other claimant been found entitled to the fund *in medio*, no claim of retention could have been made by the pursuer as against such claimant. The fact that the claim is made, not by Hunter, but by his assignees, does not seem to me to alter the right of the pursuer to deduct any sum due by Hunter to him. Nor does it make any difference that the claim of retention only affects one-half of the fund *in medio*. Professor Bell (Bell's Com., ii, p. 278) says that "in stating the amount of the fund the pursuer is entitled to discuss any claim of retention or of compensation which may be competent to him," and no authority was quoted to the contrary. Counsel for the bank practically conceded that whatever other answers they might have to the pursuer's claim, it might not be incompetent for him to state it later before they obtained any decree

for payment against him. If so, the point which they raise is one of procedure only and not of substance, and it is more convenient that it should be ascertained now than at some later stage in the process. A record has been made up on the condescendence of the fund and objections, and the merits of the pursuer's claim can be properly determined on this record. I am therefore for adhering to the interlocutor reclaimed against and remitting the cause to the Lord Ordinary to proceed.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for Pursuer and Real Raiser—Murray, K.C.—C. H. Brown. Agents—L. & L. L. Bilton, W.S.

Counsel for British Linen Bank—Macphail, K.C.—F. C. Thomson. Agents—Mackenzie & Kermack, W.S.

Friday, December 15.

FIRST DIVISION.

(SINGLE BILLS.)

M'LAUGHLIN v. WEMYSS COAL COMPANY, LIMITED.

Expenses — Stated Case — Interlocutor — Construction — Expenses of Stated Case — Preparation of Condescendence — Adjustment of Case — Workmen's Compensation Act 1906 (6 Edw. VII, c. 58).

A workman whose claim under the Workmen's Compensation Act 1906 had been dismissed by the arbiter as irrelevant was, on appeal, on a stated case, allowed to lodge a condescendence of the facts on which his claim was based. The appeal was thereafter sustained, and a remit made to the arbiter to proceed, the appellant being found entitled to "the expenses of the appeal." The appellant objected to the Auditor's report in so far as it disallowed the expenses connected with the adjustment of the stated case, amounting to £3, 14s. 2d. The respondents also objected to it in so far as it allowed the expenses in connection with the condescendence, amounting in all to £9, 10s. 8d. *Held* (1) that where an interlocutor bears to be for the "expenses of the appeal," or the "expenses of the stated case," or the "expenses of the stated case on appeal," expenses will be allowed to a modified extent, and a fee of three guineas allowed; and (2) that as the expenses connected with the condescendence had been due to the irrelevancy of the claimant's initial writ, the respondents had been wrongly charged therewith, and objection sustained.

Observed (per Lord President) that

in future when a party has been awarded the expenses of a stated case the fee to be allowed, inclusive of that payable to the sheriff-clerk, will be three guineas and a half.

Thomas M'Laughlin, stonebreaker, Dundee, having appealed against a decision of the Sheriff-Substitute at Cupar (ARMOUR HANNAY) dismissing as irrelevant an application at his instance under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) against the Wemyss Coal Company, Limited, *respondents*, the Court on 25th November 1911 sustained the appeal and found the appellant entitled to the "expenses of the appeal."

The Auditor having lodged his report, the appellant objected thereto in so far as he (the Auditor) had disallowed certain charges connected with the preparation and adjustment of the stated case.

A note of objections was also lodged by the company (*respondents*) in which they objected to certain other items in the same account.

The circumstances in which the notes were presented sufficiently appear from the opinion (*infra*) of the Lord President.

The items objected to by the appellant (*viz.*, those disallowed) were as follows:—

1911.		
June 20.	Taking instructions to appeal and agency requesting Sheriff to state case for appeal	£0 10 0
	Borrowing and returning draft stated case	- 0 4 6
	Revising case, 3 shs.	- 0 10 0
	Agency submitting revisions	- 0 6 8
	Borrowing process to send to Edinburgh	- 0 3 0
	Paid sheriff-clerk dues of stated case	- 1 10 0
	Agency instructing Edinburgh correspondents	- 0 10 0
		£3 14 2"

The items objected to by the respondents (*viz.*, those allowed) were as follows:—

1911.		
Nov. 4.	Framing memorial for counsel, 3 shs.	£0 18 0
	Fair copy	- 0 4 6
	Instructing Junior Counsel to frame condescendence for appellant	- 0 10 0
	Paid fee and clerk	- 3 8 0
	Note of papers and copy	- 0 4 6
	Making 2 copies of following papers for counsel:—	
	Initial writ, 2 shs.	- 0 4 6
	Note of defences, 1 sh.	0 2 3
	Sheriff's interlocutor and note, 2 shs.	- 0 4 6
	Precognitions, 3 shs.	- 0 6 9
	Medical report, 2 shs.	0 4 6
	Instructing Senior Counsel to revise	- 0 6 8
	Paid fee and clerk	- 2 7 0
	Note of papers	- 0 1 6
9	Revising draft condescendence, 4 sh.	- 0 5 0
	Paid Counsel's clerk writing, 4 shs.	- 0 3 0
		£9 10 8"