accident was due to that negligence, yet it could not be shown that it was so. In other words, the man there, who met his death by being knocked down by a train, might and probably did go through the gates negligently left open, but he might also have got over a fence half-a-mile away and walked along the line. In this case the rupture might have come down because he ran after the straying sow, but it might have come down through disease or through a mere fit of sneezing; we know nothing about it, and on the whole I do not find facts here which drive me to the inference that the death was caused by an accident arising out of and in course of his employment. I am therefore of opinion that the note should be refused.

LORD KINNEAR—I am of the same opinion. I think the question must be considered in exactly the same way as if we had before us a statement of facts by the Sheriff in a special case to the same effect as the statement made by the applicant, and raising the same questions as the applicant desires to raise.

Now I think the result of the statement contained in the note really comes to this, that this man was ruptured; that the rupture became strangulated after he had, in the course of his employment, walked for five and a half miles over rough ground to fetch a sow belonging to his employer; that there were materials before the Sheriff from which he might have thought that there were strong reasons for conjecturing that the strangulation had been caused by the exertion and strain involved in this walk over the rough ground; but that the Sheriff also thought that although there might be ground for such conjecture there was no evidence before him from which he ought to draw the inference the strangulation was in fact so occasioned. Now if that was the state of the Sheriff's mind, the question for him was one of fact and of fact alone, and I do not think it is possible for this Court to say that the Sheriff was wrong. I think it would be quite out of the question to say that no reasonable judge could have come to the conclusion that the accident was not proved.

LORD JOHNSTON—Assuming, though by no means admitting, that, on the facts set forth, the Sheriff might have been entitled to draw the inference that an accident had occurred to the deceased, I do not think it is possible to say that on the facts set forth such was a necessary inference or one which in law the minuter should have drawn, and, that being so, I agree with your Lordships that this note should be refused, as it would be futile to require the Sheriff to state a case which it is clear must be refused.

LORD MACKENZIE—I am of the same opinion, upon the ground that the facts set out in this note are not sufficient to entitle us to interfere with the conclusion reached by the Sheriff.

The Court refused the prayer of the note.

Counsel for Appellant—Gillon. Agent—James D. L. Melrose, W.S.

Counsel for Respondents — Moncrieff. Agents — Fraser, Stodart, & Ballingall, W.S.

Wednesday, May 17.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

STEELE (RAMSAY'S JUDICIAL FACTOR) *v.* KER AND OTHERS (SMITH'S TRUSTEES).

Process — Multiplepoinding — Lodging of Claims—Claim Lodged after Decree of Ranking and Preferring had Become Final—Claim by Judicial Factor to Administer—Competency.

In an action of multiplepoinding raised by the judicial factor on a trust estate an interlocutor was pronounced on 22nd January 1910 which, *inter alia*, ranked and preferred a bank as assignees of A to one-half of the fund *in medio*. No reclaiming note was presented against this interlocutor. On 19th March 1910 the judicial factor lodged a claim in which he founded on an assignation by A, in favour of the testamentary trustees whom he represented, prior in date to that in favour of the bank, and claimed to be ranked and preferred to a certain extent on any sum to which the bank should be found entitled.

Held that the interlocutor of 22nd January 1910 having become final, the claim for the judicial factor could not be received either by the Lord Ordinary, or in the Inner House on a reclaiming note against the interlocutor of the Lord Ordinary rejecting the claim.

Dymond v. *Scott, &c.*, November 23, 1877, 5 R. 196, 15 S.L.R. 96; *Hall's Trustees* v. *Macdonald*, March 8, 1892, 19 R. 567, 29 S.L.R. 465, *distinguished.*

In 1909 Henry Moncrieff Steele, C.A., judicial factor on the trust estate of the late Andrew Ramsay, raised an action of multiplepoinding with reference to the fee of part of the testator's estate.

A claim to be ranked and preferred to one-half of the fund *in medio* was lodged by the British Linen Bank, who maintained that in terms of the residuary clause in the trust-disposition and settlement of the deceased Andrew Ramsay one-half of the fund *in medio* vested in John Crawford Hunter, who died in 1899, and was transferred to the bank by a bond and disposition in security for a cash credit of £17,000 dated 25th December 1878, by which the said John Crawford Hunter conveyed to the bank his whole right and interest in the residue of the deceased Andrew Ramsay's estate, and in which the balance due in 1909 exceeded £9000.

On 22nd January 1910 the Lord Ordinary (MACKENZIE) pronounced an interlocutor in which, *inter alia*, he ranked and preferred the British Linen Bank in terms of their claim. No reclaiming note against this interlocutor was presented.

On 19th March 1910 the judicial factor lodged a claim in which he averred that John Crawford Hunter was indebted to the estate of the deceased Andrew Ramsay to the amount of £4051, 2s. 10d., under two bonds by him in favour of Andrew Ramsay's testamentary trustees granted prior to that in favour of the British Linen Bank, and claimed to be ranked and preferred to the above amount on any sum to which the bank might be found entitled.

An interlocutor allowing this claim to be received was pronounced on 19th March 1910.

On 12th May 1910 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard counsel on the condescendence and claim for the judicial factor on the trust estate of Andrew Ramsay, dismisses the said claim as incompetent, in respect the interlocutor of 22nd January 1910 is a final interlocutor on the merits of the competition, and decerns. . . ."

Opinion.—"The position of this case is that, by an interlocutor of the 22nd of January 1910, I, *inter alia*, ranked and preferred the claimants the British Linen Bank to one-half of the fund *in medio* in terms of their first alternative claim. That interlocutor proceeded upon the view that John Crawford Hunter, who had the vested right described in my previous opinion, had granted the securities which are set out by the judicial factor in article 8 of the condescendence annexed to the summons (*i.e.*, the bond and disposition above referred to, and a subsequent disposition to a trustee for behoof of creditors). The claim which I am now asked to consider is a claim put forward by the judicial factor himself, founded on the fact that, prior in date to the securities on which the bank's right is founded, John Crawford Hunter had granted certain securities to the testamentary trustees whom the judicial factor now represents.

"Now I am clear upon the authorities which have been cited, more particularly the case of *Duncan's Factor* v. *Duncan*, 1 R. at p. 964; the cases of *Landale* v. *Wilson*, 2 F. 1047, and *Terrell* v. *Ker*, 2 F. 1055, that I am *functus* as regards the matter of competition. The interlocutor of the 22nd January is a final interlocutor on the merits of the competition.

"I refer more particularly to the opinion of the Lord President in the case of *Duncan* upon that point. I am unable to see that I can possibly at this stage entertain the claim. An argument was submitted to the effect that the interlocutor of 22nd January was not to be considered final because there was no decree for payment. That argument, I think, cannot be maintained in view of the opinion of the Lord President in *Duncan's* case, nor is it consistent with the views expressed by Lord Trayner in the case of *Landale*. Accordingly, regarding this as an independent claim which might have been stated in the competition, but which was not stated in the competition, I am unable to do anything else than hold that it is incompetent at this stage and to dismiss the claim.

"My opinion might have been different had I been able to regard this as a riding claim, but in order that it might be in the position of a riding claim it would have been necessary that the successful claimant should have been not the British Linen Bank but John Crawford Hunter. If John Crawford Hunter had been ranked it might then have been competent for the judicial factor to take advantage of the principles which were recognised in the case of the *Scottish Life Assurance Company*, 9 S.L.T. 348; the *Anglo-Foreign Bank*, 16 S.L.R. 731; and also, as I read the case, of what was done in *Dymond* v. *Scott*, 5 R. 196. There having been no decree for payment, if the claim by the judicial factor had been of the nature of a proper riding claim it might have been possible to allow him even at this late stage to come into the competition.

"That is not the view I take of this claim, and therefore I am unable to see how I can admit the claim to be discussed on its merits in the present proceedings.

"It was also maintained that because I had already written upon the interlocutor sheet on the 19th March allowing the claim to be received, therefore the argument for the bank came too late, but in the case of *Terrell* the Lord Ordinary had pronounced an interlocutor allowing the minute to be received and seen. It was pointed out in the Inner House that the Lord Ordinary should have declined to hear the motion, or at all events refused to write upon it. It may be that that ought, strictly speaking, to have been the course taken in the present case; but however that may be, I think that the only result of the opinion I hold is to dismiss the present claim as incompetent."

The pursuer and real raiser (the judicial factor) reclaimed, and argued—Even if the interlocutor of the Lord Ordinary were right, the Court could still receive the claim, which was of the nature of an administrative claim — *Dymond* v. *Scott*, &c., November 23, 1877, 5 R. 196, 15 S.L.R. 96; *Binnie's Trustee* v. *Henry's Trustees*, &c., July 3, 1883, 10 R. 1075, 20 S.L.R. 723; *Cowan's Trustees v. Cowan*, October 17, 1888, 16 R. 7, 26 S.L.R. 9; *Hall's Trustees* v. *Macdonald*, March 8, 1892, 19 R. 567, 29 S.L.R. 465. The cases of *Duncan's Factor* v. *Duncan*, June 3, 1874, 1 R. 964 (where the claim had been presented and withdrawn); *Landale* v. *Wilson*, June 19, 1900, 2 F. 1047, 37 S.L.R. 791 (where there was a final interlocutor of the Inner House); and *Terrell* v *Ker*, June 19, 1900, 2 F. 1055, 37 S.L.R. 807 (when leave was asked to amend a claim which had been ranked) were distinguishable.

Counsel for the claimants and respondents (The British Linen Bank) were not called on.

LORD JUSTICE-CLERK — This is a very unfortunate case for the pursuer and real raiser; but this party is in no different position from any other party who, having allowed an interlocutor to become final, is not entitled afterwards to have that interlocutor overturned. I can see no distinction between the Inner House and the Outer House at all, because the question is not what branch of the judicature has given the decision, but the question is whether the interlocutor is final or not. I am clearly of opinion that it is final. If the party had desired to prevent himself falling into that position, he might have lodged a reclaiming-note in time, before the interlocutor became final, and then not have proceeded with it if it were found not to be advisable to proceed with it further. But, seeing that this is a case of an interlocutor which is not now reviewable by us, I do not see how we can interfere.

LORD DUNDAS—I am of the same opinion. One is reluctant to refuse to admit a claim which, *prima facie*, seems to have something to say for itself upon the merits, if the claimant could get there. On the other hand, it is essential that our procedure should be kept normal and regular, and I am bound to say that I think, as your Lordship does, that we should be going against the whole trend of the decisions if we were to admit this claim. The Lord Ordinary has treated the matter with his usual care and gone into the cases, and I do not see that any good would be done by commenting upon them in detail. I shall only make one or two remarks with reference to what Mr Brown has said. The case of *Hall*, which he pressed upon our attention, seems to me to have very little to do with the present case, because there the claim, which was admitted at a late stage, was truly a claim for purposes of administration, whereas here, although the claim which it is sought to put in may be said in a sense to be an administrative one from one point of view, it is quite plainly much more than administrative, and is indeed actively competitive, from the point of view of the bank. The case of *Dymond* was very special in its circumstances, and has always been so regarded. One may notice also that there was no delay, so far as appears, on the part of Mr Dymond in making his claim *qua* arrester (which was somewhat of the nature of a riding claim) after his arrestment had been made, and the arrestment of course formed a new fact in the case. These facts distinguish it, to my mind, from the present, where there has been, from some unexplained cause, an unfortunate delay, during which the Lord Ordinary's former interlocutor became final. The reclaimer has been from the outset a party to the action; he knew it was there, and ought to have observed what course it was taking. In the recent case of *Landale* this Division went pretty fully into the earlier decisions. It is true that there the case had been to the Inner House at a previous stage, whereas here the final interlocutor is an Outer House one. But I do not think the reclaimer can make much of that distinction, looking to some of the other decisions, *e.g.*, *Duncan's Factor*. I do not see that we are in any better position as regards the admission of this claim than the Lord Ordinary was. The interlocutor of 22nd January 1910 has become final, and final I am afraid it must remain.

LORD SALVESEN—I entirely agree with both your Lordships. I think this proceeding on the part of the judicial factor was simply an attempt to get the Lord Ordinary to review his previous interlocutor after it had become final. That being so, it was of course incompetent for the Lord Ordinary to do so, and it is equally incompetent for us.

LORD ARDWALL was absent.

The Court adhered.

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

Counsel for the Claimants (Respondents)—Macphail, K.C.—F. C. Thomson. Agents—Mackenzie & Kermack, W.S.

Wednesday, May 17.

FIRST DIVISION.

[Lord Dewar, Ordinary.

ALEXANDER STEPHEN & SONS, LIMITED *v.* THE ALLAN LINE STEAMSHIP COMPANY, LIMITED.

Ship — Collision — Pilot—Fault of Pilot—Proof—Merchant Shipping Act 1894 (57 *and* 58 *Vict. c.* 60), *sec.* 633.

The presumption of fault on the part of a ship which runs into a vessel while moored is not a presumption of law but a presumption of fact, depending, *inter alia*, on the time of the collision, the place where it happened, and the existing weather conditions.

A steamship on her way up the Clyde in charge of a compulsory pilot collided with and injured another steamship moored to a wharf in the river. The collision took place when it was very dark and when there was a very thick fog. In an action of damages at the instance of the injured vessel, *held* that the pursuers had failed to prove that the collision was caused by the fault of the defenders or of any one for whom they were responsible, and defenders *assoilzied*.

Held further, that the defenders were not bound in order to come within the statutory exemption to prove any specific fault on the part of the pilot, but that it was enough for them to show that the vessel was under the pilot's orders, and that his orders were obeyed.