

The
Scottish Law Reporter.

WINTER SESSION, 1883-84.

In order to secure regularity of publication, it is occasionally necessary to insert the Reports of Cases slightly out of the order of dates on which they have been decided.

COURT OF SESSION.

Tuesday, October 16.

FIRST DIVISION.

[Lord Fraser, Ordinary.]

STIRLING MAXWELL'S TRUSTEES AND
OTHERS *v.* POLICE COMMISSIONERS OF
KIRKINTILLOCH.

Process—Reclaiming-Note—Competency.

A reclaiming-note against an interlocutor which merely approves of the Auditor's report, and decerns for the taxed amount of expenses which have been previously found due, is incompetent.

In an action of declarator and interdict at the instance of Thomas Cartwright and others (Sir William Stirling Maxwell's trustees and executors) against the Commissioners of Police of the Burgh of Kirkintilloch, the defenders, by minute dated 20th July 1882, admitted that "the waters of the river Kelvin and its tributaries the Luggie Water and the Bathlin Burn, condescended on, had been, and were now, seriously polluted by discharges of sewage into them from the drains of the burgh of Kirkintilloch;" they further declared that they were willing to execute a system of drainage works to prevent the pollution of the said streams, and they craved the Lord Ordinary to remit to men of skill to report as to the best method of preventing further pollution, the end which they had in view. The minute further stated that the defenders agreed to pay the expenses of process incurred up to the date of the minute, and to be incurred by the pursuers, and

consented to an account thereof being remitted to the Auditor for taxation.

On the 23d May 1883 the Lord Ordinary (FRASER), in respect the defenders had proposed no definite scheme for abating the nuisance complained of, pronounced this interlocutor—"Finds and declares conform to the first alternative conclusion of the summons, and interdicts, prohibits, and discharges in terms of the conclusion for interdict, and decerns: Further, supercedes extract of this decree till the 17th day of July next: Finds the pursuer entitled to expenses: Allows an account thereof to be given in, and remits the same to the Auditor for taxation and report."

No objections were lodged to the Auditor's report, and on 19th July 1883 the Lord Ordinary approved of the report, and decerned against the defenders for the sum of £74, 5s. 6d., the taxed amount thereof.

On the 16th August following the defender boxed a reclaiming-note, and on the first sederunt-day moved that the case be sent to the roll.

The pursuers objected to the competency of bringing the various interlocutors in the cause under review in a reclaiming-note against the approval of the Auditor's report, especially when no objection had been taken to the report when its approval was moved.

Authorities referred to—*Tennents v. Romanes*, June 22, 1881, 8 R. 824; *Fleming v. North of Scotland Banking Co.*, Oct. 20, 1881, 9 R. 11; *Thompson v. King*, Jan. 19, 1883, 10 R. 449; 13 and 14 Vict. c. 36 (Court of Session Act 1850), sec. 11; *Baird v. Barton*, June 22, 1882, 9 R. 970.

At advising—

LORD PRESIDENT—The interlocutor pronounced by the Lord Ordinary upon the 23d of May last may fairly be said to have disposed of the con-

clusions of the summons as well as of the whole merits of the cause, and it finds the pursuer entitled to expenses, allows an account thereof to be given in, and remits the same to the Auditor to tax and report, all in common form. In the interlocutor now reclaimed against the Lord Ordinary has done nothing but approve of the Auditor's report on the pursuer's account of expenses, and decern against the defender for the taxed amount; and the question comes to be, whether that is an interlocutor which is subject to review? If the defender had lodged objections to the Auditor's report, and taken a judgment on these objections, the case would have been a very different one; but no such course has been followed nor is it suggested that any such objections could be made good.

In these circumstances I find it impossible to distinguish the present case from those of *Tennent and Thompson*, to which we were referred. Although, no doubt, the interlocutors in these cases were pronounced in appeals in Sheriff Court causes, yet the principle there involved applies equally to the present case.

LORDS DEAS, MURE, and SHAND concurred.

The Court refused the reclaiming-note as incompetent.

Counsel for Pursuer—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Defender—M'Kechnie. Agents—Cairns, M'Intosh, & Morton, W.S.

Tuesday, October 16.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

GRANT SUTTIE'S TUTORS, PETITIONERS.

Process—Entail Petition—Interlocutor Signed in Vacation—Reclaiming-Note—Competency—Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 94—Distribution of Business Act 1857 (20 and 21 Vict. c. 56), sec. 6.

Held that section 94 of the Court of Session Act 1868 applies to entail petitions, and therefore that an interlocutor on an entail petition pronounced by a Lord Ordinary in vacation, and prior to the first box-day, was competently reclaimed against on the second box-day.

Section 94 of the Court of Session Act 1868 is in these terms—"It shall be lawful for the Lords Ordinary at any time in vacation or recess to sign interlocutors pronounced in causes heard in time of session . . . provided that when any such interlocutor is dated at or prior to the first box-day in vacation, the same may be reclaimed against on the second box-day, and when the interlocutor is dated after the first box-day, then on the first sederunt-day ensuing, or within such number of days from the date of such interlocutor as may be competent in the case of a reclaiming-note against such interlocutor dated and signed during session." . . .

The Distribution of Business Act 1857 provides (sec. 4) that petitions and applications under the Entail Acts shall be brought before the Junior Lord Ordinary, and (sec. 6) that "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 on the merits; but any judgment pronounced by the Lord Ordinary on the merits, unless where the same shall have been pronounced in terms of instructions by the Court in manner hereinbefore mentioned, may be reclaimed against by any party having lawful interest to reclaim to the Court, provided that a reclaiming-note shall be boxed within eight days, after which the judgment of the Lord Ordinary, if not so reclaimed against, shall be final."

In a petition by Lady Susan Grant Suttie and others, the tutors of Sir George Grant Suttie, heir of entail in possession of the lands of Preston-grange and others, to restrict provisions to younger children granted by Sir James Grant Suttie, the preceding heir of entail, in excess, as the petitioners alleged, of the amount which could be competently granted by him, the Lord Ordinary (KINNEAR), after remitting to Mr J. P. Wright, W.S., to inquire into the circumstances set forth in the petition, pronounced an interlocutor on 31st July 1883, fixing a sum as the utmost amount which could be competently granted by Sir James, and finding that the provisions made by him were, so far as in excess of that sum, null and void. The petitioners reclaimed against this interlocutor on the 13th September, the second box-day in vacation, and upon the first sederunt-day they moved that the case be sent to the roll.

The motion was objected to by the respondents, who argued that in terms of section 6 of the Distribution of Business Act 1857 the reclaiming-note should have been boxed within eight days of the date of the Lord Ordinary's interlocutor, or at all events on the first box-day. This not having been done, the interlocutor complained of had become final, and the present reclaiming-note was incompetent. Section 94 of the Court of Session Act 1868 did not apply to entail petitions.

The reclaimers argued that by section 94 of the Court of Session Act 1868 the Lord Ordinary could competently pronounce an interlocutor in vacation in a cause heard before him in session, which term "cause" included an entail petition, and that the proper time for reclaiming against the present interlocutor was the second box-day, when the reclaiming-note was duly presented, and that the case ought therefore to be sent to the roll.

At advising—

LORD PRESIDENT—This case falls under the 94th section of the Court of Session Act of 1868, previous to the passing of which a Lord Ordinary was not entitled to sign interlocutors during vacation. By the terms of this statute, however, it is now provided that Lords Ordinary may sign, in vacation or recess, interlocutors pronounced in causes heard in time of session. If therefore the present reclaiming-note is within the provisions of this section, it was properly lodged upon the 13th September, which was the second box-day