*Thursday, July 3.*

## FIRST DIVISION.

[Lord M'Laren, Ordinary.

## PENNEY (SAWERS' FACTOR) *v.* SAWERS AND OTHERS.

*Process — Reclaiming-Note — Failure to Print.*

Circumstances in which a reclaiming-note was *refused* in respect that the reclaimer had not printed and put before the Court the materials requisite for the determination of the case.

In an action of multiplepoinding raised in the Court of Session by Joseph Campbell Penney, C.A. (judicial factor on the estate of the late Peter Sawers), against James Sawers and others, the Lord Ordinary (M'LAREN) pronounced an interlocutor on 17th July 1889, ranking and preferring James Sawers, New South Wales, and Thomas Dodds, solicitor, Bathgate, his mandatory, to the balance of the fund *in medio*.

John Sawers, another claimant, reclaimed, and the case appeared in the Single Bills on 22nd October and was sent to the roll.

The case came on for hearing upon 24th June, when the reclaimer craved the indulgence of the Court in respect of a change of agency, and asked for ten days' delay to enable him to print the documentary evidence.

On the 3rd of July the case was again put out for hearing and the reclaimer craved the further indulgence of the Court, and asked for additional delay to enable him to complete the printing of the evidence, a very small portion of which only was ready.

Counsel for the respondents objected to further delay, alleging that the motion was in pursuance of a policy of obstruction which the reclaimer had been carrying on for some time to delay the decision of the case—*Muir* v. *Mackenzie*, October 15, 1881, 9 R. 10.

At advising—

LORD PRESIDENT—I am of opinion that we must refuse this reclaiming-note in respect that the reclaimer has failed to avail himself of the indulgence which we gave him in delaying the case from the 24th June to the 3rd July in order to enable him to complete the printing of the proof and documents.

I am quite aware that there is no statute or Act of Sederunt requiring that the reclaiming-note should be accompanied by a print of the proof or of the documents to be founded on; but I quite adhere to an observation which I am reported to have made in the case cited, in which, concurring with Lord Deas, I observed that if a reclaimer or appellant, as the case may be, fails to put before the Court the proof or document necessary for the understanding of the case, in print, when the case comes on for hearing in the course of the roll, the reclaiming-note or appeal, as the case may be, should be dismissed.

With the circumstances of this case we are not of course acquainted except in the most cursory way, but I think that we have seen enough of it to enable us to form a pretty clear conjecture that the reclaimer's object has been delay. I am therefore for refusing the reclaiming-note in respect that the reclaimer has not printed and put before the Court the materials requisite to enable them to decide the case.

LORD SHAND—The proof in this case was taken and avizandum made on 13th June 1889, and the interlocutor reclaimed against was pronounced upon 17th July following, so that there has been nearly a year during which the prints might have been put in.

For my own part, I think it is an extremely loose practice which has crept in of late years of parties simply printing a reclaiming-note prefixing the Lord Ordinary's interlocutor without in many cases adding the opinion of the Lord Ordinary, and giving neither the proof nor any of the documents required, and only putting them in two or three days before the case comes on for hearing. I think the practice of former times, of boxing the necessary prints along with the reclaiming-note, was much more satisfactory. In the present case, in justice to the respondent, I think that the reclaiming-note should be refused.

LORD ADAM concurred.

LORD M'LAREN—I also concur. I think that we should not put out cases in our weekly roll unless the necessary prints have been previously lodged. When that has not been done it would then be open to the respondent to move for decree.

One is always unwilling to grant decree by default, but I am satisfied in this case that the reclaimer has had ample indulgence, and that we are doing no injustice by refusing this reclaiming-note.

The Court refused the reclaiming-note.

Counsel for Reclaimer—Rhind. Agent—Andrew Gentle, L.A.

Counsel for Respondents James Sawers and Mandatory—Shaw—Gunn. Agents—R. R. Simpson & Lawson, S.S.C.

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*Thursday, July 3.*

## FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

## ROWAT AND OTHERS (SMITH'S TRUSTEES) *v.* D. & J. CHALMERS AND OTHERS.

*Process — Maills and Duties — Right in Security — Debtor in Occupation of Security-Subjects.*

A heritable creditor obtained decree in an action of maills and duties to recover the unpaid interest due on his bond. It appeared from a proof that