

Friday, October 23.

SECOND DIVISION.

[Lord Wellwood, Ordinary.]

SMITH v. ALLAN & SONS.

Process—Reclaiming-Note—Competency—Failure to Deliver Copies to Opposite Agents—6 Geo. IV., cap. 120, sec. 18—Expenses.

A reclaimer boxed his reclaiming-note on the second box-day in the summer vacation, but omitted to send copies to the opposite agent before the case appeared in the Single Bills on the 1st sederunt day. On a motion to have the reclaiming-note dismissed, the Court (1) held, following *Campbell's Trustees v. Campbell*, March 7, 1868, 6 Macph. 563 (*dub.* Lord Justice-Clerk), that such a failure if no prejudice was suffered by the opposite party would not render the reclaiming-note incompetent, and (2) (*diss.* Lord Justice-Clerk), deferred consideration of expenses till the decision on the merits.

In this action by John Baird Smith, sole surviving trustee of the late Thomas Allan senior, ironfounder, Springbank, Glasgow, against Thomas Allan & Sons, ironfounders, Glasgow and Bonlea, the Lord Ordinary, by interlocutor dated 8th September 1891, assoilzied the defenders from the conclusions of the summons as laid, and decerned.

The pursuer reclaimed, and boxed the reclaiming-note on 24th September. It appeared in the Single Bills of the Second Division upon the first sederunt day, 15th October 1891, and the case was sent to the roll. The reclaimer did not at the time he boxed his reclaiming-note give notice of his application for review by delivery of six copies of the note to the known agent of the opposite party according to the provisions of the Act 6 Geo. IV., cap. 120, sec. 18.

The respondents enrolled the case in the Single Bills of the Second Division for 23rd October, and asked the Court in respect of such omission to dismiss the reclaiming-note with expenses.

They argued that this was the course that had always been followed—*Fraser v. Carnegie and Others*, (*Steven's Trustees*) June 6, 1839, 1 D. 886; *Muir v. Muir*, October 17, 1874, 2 R. 26; *Taylor v. Macdonald and Another*, February, 10, 1844, 6 D. 637; *Bell v. Warden*, July 2, 1830, 8 D. 1007; *Pollock v. Harkness*, July 7, 1835, 13 S. 1072. It might have been enough if copies had been furnished even the same morning as the case appeared in the Single Bills, but that had not been done, and the copies had not yet been delivered.

The respondent argued—It was admitted that copies had not been furnished to the opposite agents, but that was from inadvertence, and they would be furnished at once. It had been decided that failure in this respect did not render the reclaiming-note

incompetent—*Campbell's Trustees v. Campbell*, March 7, 1868, 6 Macph. 563.

At advising—

LORD YOUNG—I think that this case is ruled by that of *Campbell*, decided in 1868, which is the latest authority upon this point. That case decided that the direction in the statute as to the delivery of six copies to the opposite party is directory only and not imperative, and that if there should be an accidental omission which causes no prejudice to the opposing party, it is in the power of the Court to relieve him of the consequences. That was done in the case of *Campbell*, and I think we should do so here. I therefore think we should refuse this motion and with expenses.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD JUSTICE-CLERK—I confess I am not so clear on the matter as your Lordships appear to be, but I am not prepared to dissent if that is your Lordships' opinion.

In the case of *Bell*, reported in 8 Shaw, it was decided that in circumstances similar to these it was not competent to present the reclaiming-note. I think it was all the more important because it was a decision of both Divisions of the Court, and it was held that where copies of the reclaiming-note had not been lodged before the case appeared in the Single Bills, the note fell to be dismissed, although it might be different where the copies had been lodged on the same morning as the case appeared in the Single Bills—but I do not dissent.

Counsel for the respondent moved that expenses should not be granted against him.

LORD YOUNG—I think that the most expedient mode—and I have heard the question most carefully considered and decided in the House of Lords—is for the Court to consider and decide the question of expenses when deciding the merits of the case. I did so here. The motion was one in the face of what we have thought is the real effect of the last decision on this point, and it was a motion to take advantage of an accidental mistake by which no prejudice has been suffered by anyone.

LORD JUSTICE-CLERK—Although I did not dissent upon the other question I must dissent on the question of expenses. I think it a very hard case. The respondent had the authority of a case decided by both Divisions of the Court in his favour. If your Lordships are of opinion that expenses should be granted, I must dissent.

The Court refused the motion and found the defenders (the mover) liable in expenses of the motion, modified to two guineas.

Counsel for Reclaimer—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondent—W. C. Smith. Agents—Beveridge, Sutherland, & Smith, S.S.C.