

wrong on the merits of an application for the benefit of the poor's roll. There are no such allegations here.

LORD ADAM, LORD M<sup>c</sup>LAREN, and LORD KINNEAR concurred.

The Court refused the prayer of the note.

Counsel for the Respondent—T. B. Morison. Agent—Peter Morison, S.S.C.

Wednesday, May 25.

FIRST DIVISION.

MACPHERSON v. HOY.

*Appeal to House of Lords—Leave to Appeal—Interlocutory Judgment—Appeal from Dean of Guild Disposed of in Court of Session and Remitted to him to Pronounce Operative Decree—Judicature Act 1808 (48 Geo. III. cap. 151), sec. 15.*

Held that a judgment of the First Division in an appeal from the Dean of Guild Court, which exhausted the conclusions of the appeal, but remitted the case to the Dean of Guild with instructions as to how to dispose of it, was not an "interlocutory judgment" in the sense of section 15 of the Judicature Act; and a petition for leave to appeal to the House of Lords, which was presented after the Dean of Guild had pronounced judgment in the cause in terms of the remit, no appeal having been taken against that judgment, refused.

*Opinion (per Lord President)* that even if the judgment of the Court were regarded as interlocutory in the sense that it was pronounced in a process brought to the Court on appeal from the Dean of Guild, and subsequently remitted to him, any appeal would be futile against an interlocutory judgment which was followed by a final one, so long as the last named stood unappealed.

Mr John Macpherson on 3rd April 1897 presented a petition in the Edinburgh Dean of Guild Court for warrant to take down certain buildings Nos. 9 to 13 Market Street and erect new ones on the sites. Answers were lodged by Mr James Hoy, who pleaded, *inter alia*, "The respondent having a servitude *non altius tollendi* over the petitioner's property, the petition ought to be dismissed," and the Dean of Guild, after hearing parties, found that the respondent Hoy had no right of servitude *altius non tollendi* over the property of the petitioner, repelled the above plea-in-law, and granted warrant in terms of the prayer of the petition.

The respondent appealed to the First Division, who on 22nd October 1897 pronounced an interlocutor whereby they "Sustain the appeal: Recal the interlocutor of the Lord Dean of Guild dated 13th May 1897 in so far as it finds that the

respondent Hoy has no right of servitude *altius non tollendi*, and repels the third plea-in-law for the respondent, and grants warrant to the petitioner in terms of the prayer of his petition and plans, and finds the petitioner entitled to expenses, and remits the account to the Auditor: Find that the respondent Hoy has a right of servitude *altius non tollendi* over the properties Nos. 9 and 10 Market Street, and is entitled to have the prayer of the petition refused in so far as it relates to those properties: *Quoad ultra* adhere to the said interlocutor: Find the respondent Hoy entitled to expenses in both Courts, and remit the accounts thereof to the Auditor to tax and to report, and continue the cause and decern."

On 16th November the Court pronounced a further interlocutor whereby they "Approve of the Auditor's report upon the account of expenses of James Hoy, the appellant, No. 99 of process, and decern against the petitioner John Macpherson for the taxed amount thereof, being £86, 5s. 3d.: Further, remit to the Dean of Guild to refuse the prayer of the petition in so far as it relates to Nos. 9 and 10 Market Street, and *quoad ultra* to proceed."

These interlocutors were extracted by the respondent, and the process was transmitted to the Dean of Guild Court.

On 16th December the Dean of Guild pronounced the following interlocutor:—"Having resumed consideration of this petition, with certified copy interlocutors of the First Division of the Court of Session of 22nd October and 16th November 1897, in terms of these interlocutors refuses the prayer of the petition in so far as it relates to the properties Nos. 9 and 10 Market Street, and ordains the petitioner to amend his plans in this respect in conformity with the findings of the interlocutor of 22nd October 1897: Grants interim warrant to the petitioner to take down and remove the existing buildings Nos. 11, 12, and 13 Market Street, and *quoad ultra* continues the cause."

A petition was presented to the First Division by John Macpherson craving for leave to appeal against that part of the interlocutor of 22nd October recalling the judgment of the Dean of Guild so far as dealing with the respondent Hoy, and against the interlocutor of 16th November.

The respondent objected to the competency of the petition.

Argued for respondent—The process was no longer in the Court, having been remitted to the Dean of Guild Court. The decree had been implemented there, and it was no longer competent to come back here and obtain leave to appeal against it. In point of fact, the judgment of this Court was not an interlocutory one at all, but a final judgment exhausting the conclusions of the Court of Session process, for there was nothing more which the Court could do to dispose of the case. Accordingly, it was not competent to ask for leave to appeal against it in terms of section 15 of the Judicature Act. In any case, the proper course for the petitioner would be

to bring up the last interlocutor of the Dean of Guild on appeal *pro forma*, and have it taken to the House of Lords, for no operative judgment could be obtained while that interlocutor stood.

Argued for petitioner—The judgment of the Court was interlocutory, in respect that it was given in a Dean of Guild process, and something remained to be done to exhaust the cause after it had been pronounced. It was true that the more correct course might have been to bring up the Dean's last interlocutor on appeal, but it was the constant practice of the Court to grant leave to appeal when the process was not here, *e.g.*, when a Lord Ordinary granted leave to reclaim, the process remained with him, but the Court might grant leave to go to the House of Lords. Even if the appeal were competent without leave, the Court might grant leave *ob majorem cautelam*.

LORD M'LAREN—This is an application for leave to appeal against a judgment of this Division of the Court which, it is admitted, exhausted the conclusions of the Court of Session process, *viz.*, the appeal from the Dean of Guild Court. The application to the Dean of Guild Court was not disposed of by one interlocutor, because it is not in accordance with our practice to pronounce operative decrees granting authority to build. It is always necessary after the questions of law in dispute have been disposed of that a remit should be made to the Dean of Guild in order that he may see that the practical requirements of which his Court has cognisance are complied with—stability of structure, drainage, and other matters which may be said to constitute the merits of the ordinary run of such cases.

Now, by our judgment we determined the legal question which was raised by the appeal, and remitted the case to the Dean of Guild with instructions to grant the application in part, and *quoad ultra* to refuse it. Under the 15th section of the Act of 1810, it is provided that hereafter no appeal shall be allowed against interlocutory judgments of the Court of Session unless where leave has been granted or where there was a difference of judicial opinion. In my opinion our judgment was not an interlocutory judgment in the sense of that section. It appears to me that if an appeal from our judgment is competent, leave to appeal is unnecessary—if an appeal is no longer competent in consequence of the case having gone back to the Dean of Guild, then our leave will not make it competent. I think, therefore, that the petition should be refused, and it will be for the parties to consider whether they should appeal from our final judgment without leave, or whether they should bring up the decree of the Dean of Guild *pro forma*, in order to have the material for an appeal to the House of Lords.

LORD ADAM and LORD KINNEAR concurred.

LORD PRESIDENT—Two views may be

taken of this case, both leading to the same result. The one is that stated by Lord M'Laren and adopted by your Lordships, *viz.*, that our former judgment was a final disposal of the case, against which an appeal is competent without leave. The other is that it was an interlocutory judgment in a process brought here on appeal from the Dean of Guild Court, which has gone back there. If this latter view be tenable, the present application is open to the fatal objection that we are invited to allow a futile appeal against an interlocutory judgment which has been followed by a final judgment, which last stands unappealed.

The Court refused the prayer of the petition.

Counsel for the Petitioner—Ure, Q.C.—Cooper. Agent—Robert Stewart, S.S.C.

Counsel for the Respondent—Sol.-Gen. Dickson, Q.C.—Guy. Agent—A. D. Vert, S.S.C.

Friday, May 27.

#### FIRST DIVISION.

BOYES AND OTHERS (HAMILTON'S TRUSTEES) *v.* BOYES AND OTHERS.

*Succession—Terce and Jus Relictæ—Approbate and Reprobate—Intestacy.*

A testator provided to his wife a life-rent of the residue of his estate subject to the declaration that that provision should be in full of all that his wife could claim in the name of *terce*, *jus relictæ*, or otherwise. Through the death of the fiars before vesting took place the residue fell into intestacy of the testator.

*Held* that the widow was entitled to her legal rights of *terce* and *jus relictæ* out of the estate which had fallen into intestacy, without forfeiting her life-rent provision under the testator's settlement.

By trust-disposition and settlement Mr James Hamilton, Glasgow, who died on 29th January 1892, conveyed his whole estate, heritable and moveable, to trustees for certain purposes. Among these was the provision of an alimentary life-rent to his widow of the residue of his estate, restricted to one-half of the free yearly income and annual proceeds of the residue in the event of her second marriage. The fifth purpose was as follows—“After answering the purposes foresaid, I direct my trustees to hold and apply the said rest, residue, and remainder of my estate for behoof of the whole children of the marriage between me and the said Annie Hall M'Casland Yuill or Hamilton, and the issue of such as may have predeceased, *per stirpes*, and to pay or apply the free yearly proceeds thereof to or for behoof of such children, and the lawful issue of such of them as