is being used for the purpose of the construction, repair, or demolition thereof."

Argued for appellant—The claim did fall under the statute, the case being governed by that of *Mellor* v. *Tomkinson & Company* [1899], L.R., 1 Q.B. 374.

Argued for the respondent—The Sheriff had only decided one of the points raised by section 7, viz., that decided in the case of *Billings* v. *Holloway*, L.R., 1899, 1 Q.B. 70, as to whether the building exceeded 30 feet in height at the time of the accident. The other questions raised by sec. 37 had never been argued before or decided by him. But the Court would only consider the specific point decided by the Sheriff—*Durham* v. *Brown Brothers*, December 13, 1898, 36 S.L.R. 190. It was not enough merely to table section 7, but the exact point raised must be stated, and no other could be decided.

Lord President—The Sheriff has decided that section 7 does not apply to the work in question, "in respect that no part of the house at the time of the accident exceeded thirty feet in height, and that the work at which the pursuer was engaged was not an engineering work within the meaning" of the Act. Now, he so decides, although, as explained in the previous statement of facts, a steam crane was used to aid in the process of demolition. Therefore he thinks that the fact of a steam crane being used does not bring the case within the section. I think that it does, and the decision of the Court of Appeal in *Mellor* v. *Tomkinson & Company* [1899], 1 Q.B. 374, is expressly to that effect. The words of Lord Justice A. L. Smith are—"Therefore if machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition of the building, it need not exceed 30 feet in height," and, of course, I add it need not be an engineering work. Accordingly I think that the Sheriff's judgment is wrong and must be recalled.

Lord Adam, Lord M'Laren, and Lord Kinnear concurred.

The Court pronounced this interlocutor:—

"Find in answer to the queries in the case that machinery driven by steam having been used for the demolition of the building, the claim is not excluded by the terms of the 7th section of the Workmen's Compensation Act 1897: Recal the dismissal of the claim, and decern: Find the appellant entitled to the expenses of the stated case on appeal, and remit the account thereof to the Auditor to tax and to report, and meanwhile continue the cause."

Counsel for the Appellant—G. Watt—Guy. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondent—Orr. Agents—Simpson & Marwick, W.S.

Thursday, May 18.

FIRST DIVISION.

[Lord Pearson, Ordinary.

MACQUEEN (WHARTON DUFF'S *CURATOR BONIS*) *v.* TOD.

Process — Summary Petition — Court of Session [Distribution of Business] Act 1857 (20 *and* 21 *Vict. cap.* 56).

Jurisdiction and procedure in summary petitions are regulated by the Distribution of Business Act 1857, and not by the Court of Session Act 1868.

Process—Summary Petition—Reclaiming-Note—Competency—Court of Session [Distribution of Business] Act 1857 (20 *and* 21 *Vict. cap.* 56), *sec.* 6.

In a petition to charge an entailed estate with improvement expenditure, the Lord Ordinary pronounced an interlocutor granting authority to the petitioner to charge, and remitting to a man of business to revise and adjust the bond and to report.

Held that a reclaiming-note against this interlocutor was competent under section 6 of the Distribution of Business Act 1857.

This was an application presented under the Entail Statutes by John Otto Macqueen, S.S.C., *curator bonis* to Miss Anne Jane Wharton Duff, heiress of entail in possession of the entailed estates of Orton and Barmuckity, for authority to charge certain improvement expenditure upon the said estates.

Answers were lodged by John Wharton Tod, the heir of entail next entitled to succeed to the said estates, and after a debate upon the relevancy and the competency of the petition, the Lord Ordinary, on 7th December 1898, pronounced an interlocutor making the usual remits.

The man of business and the man of skill having presented their reports, the Lord Ordinary (Pearson), on 25th April 1899, pronounced the following interlocutor:—"Interpones authority, grants warrant to, and authorises the petitioner . . . to charge the fee and rents of the said entailed estate . . . with the sum of £3056, 2s. 6d., together with the sum of £143, 1s. 11d., being the estimated cost of the application and the proceedings therein and of obtaining the loan and granting security therefor . . . and to that end to make and execute in favour of the said Miss Anne Jane Wharton Duff, her heirs, executors, and assignees whomsoever, or in favour of such other person or persons as may advance the said sum, a bond of annual rent or bonds of annual rent in ordinary form over the said entailed lands and estate . . . or otherwise, in the option of the petitioner, to make and execute in favour of the said Miss Anne Jane Wharton Duff, her heirs, executors, and assignees whomsoever, or in favour of such other person or persons as may advance the

amount, a bond and disposition in security, or bonds and dispositions in security . . . charging the said entailed lands and estate for three-fourths of the said sum . . . and decerns; and remits to Mr Strathern to revise and adjust the draft or drafts of such bond of annualrent or bonds of annualrent, or bond and disposition in security, or bonds and dispositions in security, and to see same extended and duly executed, and to report: Finds the respondent John Wharton Tod liable to the petitioner in the expenses caused by his appearance and opposition: Allows an account thereof to be given in, and remits," &c.

The respondent reclaimed.

The Court of Session [Distribution of Business] Act 1857 (20 and 21 Vict. c. 56), section 6, enacts—"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 [this includes petitions under the Entail Acts] with a view to investigation and inquiry merely, and which does not finally dispose thereof upon the merits; but any judgment pronounced by the Lord Ordinary upon the merits, unless where the same shall have been pronounced in terms of instructions by the Court on report as 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."

Upon the reclaiming-note appearing in Single Bills, the petitioner objected to it as incompetent, and argued—No interlocutor was reclaimable under the Distribution of Business Act 1857, unless it "finally disposed of the merits." The interlocutor in question did not do so. The interlocutor finally disposing of the merits would be pronounced after the man of business had reported, as he was by this interlocutor directed to do, upon the draft bond. If sections 53 and 54 of the Court of Session Act were applicable they would not assist the reclaimer here—*Governors of Strichen Endowments* v. *Diverall*, November 13, 1891, 19 R. 79, referred to.

Argued for the respondent and reclaimer—The reclaiming-note was competent. The question between the parties was, Is the curator entitled to charge? That question had been finally disposed of by the Lord Ordinary. All that remained to be disposed of was purely executorial. Even assuming that sections 53 and 54 of the Court of Session Act applied, this interlocutor therefore was a final interlocutor—*M'Ewan* v. *Sharp*, January 13, 1899, 36 S.L.R. 292. Under section 6 of the Distribution of Business Act, which had always been interpreted in a liberal spirit—*Sharp* v. *M'Call*, November 20, 1860, 23 D. 38—this interlocutor was clearly reclaimable—"Any judgment on the merits" was reclaimable, and the sentence in which the words "finally dispose" occurred, was simply explicatory of the immediately preceding expression "with a view to investigation and inquiry merely." It would be highly inconvenient if a reclaiming-note must be postponed until the money had changed hands, and the bond been signed and put on record.

At advising—

Lord M'Laren—This is a reclaiming-note against an interlocutor of the Junior Lord Ordinary disposing in substance of the prayer of a petition under the Entail Amendment Acts for authority to charge improvement debt on the entailed estate. It is objected to the competency of the reclaiming-note that it does not dispose of the whole merits of the cause within the meaning of the Court of Session Act 1868, and this because the interlocutor contains a clause remitting to a man of business to revise and adjust the terms of the bond which is to be made to affect the entailed estate.

Now, if the competency of this reclaiming-note depended on the 54th section of the Act of 1868, it would probably be a good objection that it was presented without the leave of the Lord Ordinary, because under the somewhat strict definition of what amounts to the decision of the "whole cause" which is contained in the 53rd section, it may reasonably be maintained that the whole cause is not decided until the form of the proposed bond shall have been approved by the Lord Ordinary.

But it is one of the peculiarities of the Court of Session Act 1868 that it contains no schedule of repeal, and in its concluding section the effect of all the previous statutes is reserved except in so far as they may be inconsistent or at variance with the provisions of the Court of Session Act itself. Now, the jurisdiction of the Junior Lord Ordinary in the matter of summary petitions is created by the Distribution of Business Act 1857, and it is perfectly clear that this jurisdiction is untouched by the Court of Session Act 1868. It is of course a possible view that the Act of 1857 might be effective as regards the jurisdiction thereby conferred, but ineffective in so far as it regulates procedure, being superseded to this extent by the Act of 1868. But this hypothesis, when tested by comparison of clauses, breaks down, because it is immediately seen that the Court of Session Act 1868 provides no machinery for the disposal of summary petitions in the Outer House in substitution for the provisions of the Distribution of Business Act 1857. The effect of the last-named provisions is accordingly reserved entire. Indeed, it may be said that in the Distribution Act jurisdiction and procedure are so interwoven that it would be next to impossible to separate them by partial repeal. The series of clauses of the Distribution Act form a short but complete and well-considered code for the disposal of summary petitions, and I am of opinion that the right to reclaim is entirely regulated by that Act. Before passing from this point I may notice that under the Distribution Act an interlocutor of the Lord Ordinary on the merits of a

summary petition is final unless reclaimed against within eight days, while under the Court of Session Act an interim reclaiming-note with leave may be presented at any time within ten days. If, then, we suppose the 53rd section of the Court of Session Act applied to summary petitions, we have this anomalous result, that the time allowed for reclaiming against an interim order is more extensive than the time allowed for reclaiming on the merits.

There remains the question whether the present reclaiming-note is competent in view of the provisions of the 6th section of the Distribution of Business Act. To a right understanding of the meaning and effect of that section it is necessary to bear in mind that in the year 1857, and until the passing of the Court of Session Act 1868, every interlocutor of a Lord Ordinary was reclaimable, and the effect of a reclaiming-note (even against a purely formal order) was to stop all procedure in the Outer House. Secondly, every interlocutor which was not reclaimed against within twenty-one days or less (as the case might be) became final, and could not be brought under the review of the Inner House by a reclaiming-note representing against a later interlocutor.

The Distribution Act, in the clauses relating to summary petitions, limits the right to reclaim, but does not touch the principle or rule that an order not immediately reclaimed against was final. Section 6 provides first that it shall not be competent to bring under the review of the Court any interlocutor pronounced by the Lord Ordinary upon any petition, &c., "with a view to investigation and inquiry merely, and which does not finally dispose thereof upon the merits." It is then provided that "any judgment pronounced by the Lord Ordinary on the merits" (unless under instructions) may be reclaimed against by any party having interest within eight days.

On a fair construction of the section these two categories are mutually exclusive. There is no *tertium quid*, no possible interlocutor that is neither final nor subject to review. The question, then, would seem to be, which of the categories fits the case of the present reclaiming-note. I think it is the second, because this is a reclaiming-note against an interlocutor on the merits, though it may be that it does not exhaust the merits of the petition. Again, this reclaiming-note does not fall within the first category, because it is not an interlocutor pronounced "with a view to investigation and inquiry merely." I do not overlook the words which follow—"and which does not finally dispose thereof upon the merits." The word "finally" perhaps creates a difficulty, but I think the words last quoted must be taken as illustrative of the case of an interlocutor pronounced with a view to investigation. If, for example, the Lord Ordinary should refuse the proposed investigation or inquiry, that would be an interlocutor on the merits, because it necessarily leads to the dismissal of the petition, and the qualifying words may have been intended to safeguard the right to reclaim in such circumstances. In any view, the present reclaiming-note prays for review of an interlocutor which affects the merits, and it does not seem to be necessary under the Distribution Act that the interlocutor should dispose of the whole merits of the cause. Such a restriction indeed might have amounted to a denial of the right of review. If the present reclaiming-note be not competent, there would, according to the Act of 1857, be nothing open to the consideration of the Inner House under a subsequent note except the revision of the draft bond, because, as I have already pointed out, a reclaiming-note at that time only brought under review the particular interlocutor reclaimed against. It is difficult to suppose that the Legislature meant to exclude review on the substance of the petition and to give it only upon the form of the bond or other deed necessary to give effect to the Lord Ordinary's finding. For this reason also I am of opinion that this is a reclaimable interlocutor, and that the objection to the competency is not well founded.

Lord Adam, Lord Kinnear, and the Lord President concurred.

The Court sent the case to the Summar Roll.

Counsel for the Petitioner—A. O. M. Mackenzie. Agents—Mackay & Young, W.S.

Counsel for the Respondent—J. H. Millar. Agents—W. & J. Cook, W.S.

Friday, May 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

BLACKWOOD *v.* SUMMERS, OXENFORD, & COMPANY.

Process—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 18—*A. S.*, 11*th July* 1828, *sec.* 77—*Reclaiming-Note without Record Appended—Competency.*

A reclaiming-note against an interlocutor of a Lord Ordinary *refused* as incompetent, in respect that a printed copy of the record was not appended thereto, although copies of the record were appended to the prints of the reclaiming-note boxed to the Judges.

M'Evoy v. *Brae's Trustees*, 18 R. 417, *followed.*

This was a reclaiming-note by the defenders against an interlocutor of the Lord Ordinary (Kincairney) pronounced in an action raised by Robert Angus Blackwood against Summers, Oxenford, & Company.

The defenders did not append a printed copy of the record to the reclaiming-note, but the copies of the reclaiming-note boxed to the Court had printed copies of the record appended to them.

The Judicature Act 1825 (6 Geo. IV. cap. 120), sec. 18, after declaring that either of the parties dissatisfied with an interlocutor