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

pronounced by a Lord Ordinary may apply for a review of it within twenty-one days by printing and putting into the boxes a reclaiming-note, enacts—"If the interlocutor has been pronounced without cases, the party so applying shall, along with his note as above directed, put into the boxes printed copies of the record authenticated as before."

The Act of Sederunt, 11th July 1828, sec. 77, provides that reclaiming-notes against an Outer House interlocutor "shall not be received unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record, in terms of the statute, if the record has been closed."

The pursuer objected to the competency of the reclaiming-note on the ground that the requirements of the Judicature Act and the Act of Sederunt 1828, had not been complied with in respect that a printed copy of the record had not been appended to the reclaiming-note.—*M'Evoy* v. *Brae's Trustees*, January 16, 1891, 18 R. 417; and *Wallace* v. *Braid*, February 16, 1899, 36 S.L.R. 419, referred to.

The defenders argued that the provisions of the Judicature Act and the Act of Sederunt were directory, not imperative—*Allan's Trustee* v. *Allan & Sons*, October 23, 1891, 19 R. 15; and that the case of *Wallace*, *ut sup.*, was distinguished from the present by the fact that there copies of the record had not been boxed to the judges. The defenders also cited *Campbell's Trustees* v. *Campbell*, March 7, 1868, 6 Macph. 563; and *Harris* v. *Haywood Gas Coal Company*, May 12, 1877, 4 R. 714.

At advising, the opinion of the Court was delivered to the following effect by

LORD PRESIDENT—The Court find this case to be ruled by that of *M'Evoy*, and accordingly hold the reclaiming-note incompetent.

The Court refused the reclaiming-note as incompetent.

Counsel for the Pursuer—Guy. Agent—William Fraser, S.S.C.

Counsel for the Defenders—M. P. Fraser. Agent—John Martin, L.A.

Saturday, May 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CONLON *v.* CORPORATION OF GLASGOW.

Master and Servant—Employment—Constitution of Relationship — Reparation — Collaborateur.

A tramway driver raised against the proprietors of a tramway an action of damages for injuries received by him from a car driven by one of the defenders' servants. The defenders pleaded "*collaborateur.*" The proof showed that the pursuer was on the defenders' list of "spare men" who were in the habit of reporting themselves at the depôt at 7 a.m. and waiting on till 9 a.m. on the chance of taking the place of the regular drivers if the latter failed to turn up. If the spare man, after reporting himself at 7, waited on till 9 without getting a job, he received one shilling from the defenders, but if before 9 he went away or got a job elsewhere he received nothing from them. On the morning in question the pursuer had reported himself at the tramway depôt, and was standing waiting when the accident happened.

Held that the pursuer was not in the employment of the defenders at the time when the accident happened, and case remitted to the Sheriff to proceed.

Matthew Conlon, tramway driver, 50 Cavendish Street, Glasgow, raised an action for £200 damages against the Corporation of the City of Glasgow.

The pursuer averred—"(Cond. 2) On 5th October 1898 the pursuer, who at the time of the accident after mentioned was out of employment, was standing at or near the gateway of defenders' tramway stables at Pollokshaws waiting for employment, when without warning, and in a careless and reckless manner, a servant in defenders' employment drove a car past the spot where pursuer was standing, causing him to be jammed between the car and the pillar of the gateway, whereby pursuer was severely crushed about the chest and ribs, and has been rendered unfit for work. . . . Pursuer was not in defenders' employment at the time of the accident, and was standing where he had a right to be. Pursuer had left defenders' employment, and was paid off and discharged before said accident."

The defenders averred, *inter alia*, "that it was a fellow driver of the pursuer who was driving the car between which and the gate the pursuer was at the time of the occurrence; and pleaded "(2) *Collaborateur.*"

On 22nd November 1898 the Sheriff-Substitute (GUTHRIE) allowed the pursuer a proof of his averment that he had been discharged from the defenders' service before the accident occurred, and to the defenders a conjunct probation."

The proof brought out the following facts:—The pursuer was a "spare man." A "spare man" was one who at 7 a.m. came to the Tramway depôt of the Glasgow Corporation and reported his arrival. He then waited on till 9 a.m. on the chance of one of the regular drivers of the tramway cars not turning up, and his taking his place. If he waited on from 7 till 9 and got no job he received one shilling from the tramway department; if he got a job as driver he got a full day's pay, viz., 3s. 10d. If the spare man, after reporting himself at 7 o'clock, got a job elsewhere under some other person, he was entitled to take it, but if he left for any reason before 9 o'clock, he did not get one shilling from the Corporation Tramways Department. The Tram-