Friday, March 20.

FIRST DIVISION.

[Lord Pearson, Ordinary.

ADAM *v.* ADAM'S TRUSTEES.

Process — Reclaiming-Note — Printing — Amendment of Record—Court of Session Act 1825 (6 *Geo. IV. cap.* 120) (*Judicature Act*), *sec.* 18—*Act of Sederunt*, 11*th July* 1828, *sec.* 77.

The Court of Session Act 1825 (Judicature Act), section 18, provides that a party reclaiming against an interlocutor "shall along with his note . . . put into the boxes printed copies of the record authenticated" by the Lord Ordinary.

The Act of Sederunt, 11th July 1828, section 77, provides that reclaiming-notes "shall not be received unless there be appended thereto . . . copies of the summons with amendment, if any, and defences." . . .

A person, who had been allowed to amend his summons by restricting the conclusions in certain respects, boxed a reclaiming-note which had appended to it a print of the record as originally printed before the amendments were allowed, with the amendments written upon it in manuscript. The respondent maintained that the reclaiming-note was incompetent, upon the ground that the above provisions as to printing had not been complied with. The Court, in respect that the alterations were not extensive, *repelled* the objection to the competency and sent the case to the roll.

On 10th January 1901 Alexander Stronach Adam, who on 16th November 1900 had been decerned executor-dative *qua* one of the next-of-kin to the deceased Mrs Sarah Douglas or Adam, widow of Robert Adam, sometime Chamberlain of the city of Edinburgh, brought an action against (1) the trustees of the said Robert Adam, and (2) Helen Douglas Adam, his only surviving sister and a daughter of the deceased Mr and Mrs Adam for any interest she might have, in which he concluded for payment of £1200.

On 11th January 1901 Miss Helen Douglas Adam was also decerned executor *qua* next-of-kin of the said deceased Mrs Sarah Douglas or Adam, and as she opposed the action it was agreed to restrict the conclusion to the claim competent to the pursuer as an individual. Amendments to give effect to this were proposed and allowed by interlocutor dated 5th July 1901.

The original summons, so far as material to this case, was in the following terms:— . . . "And the defenders the said trustees ought and should be decerned and ordained to make payment to the pursuer of the sum of £1200 sterling, or of such other sum as shall appear and be ascertained by our said Lords to be due by the defenders the said trustees to the pursuer, as the balance of their said intromissions, with the legal interest thereon from the said 22nd October 1900 until payment; or in the event of the defenders failing to produce an account as aforesaid, they ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer, as executor foresaid, of the said sum of £1200 sterling, which shall in that case be held to be the balance of their said intromissions, with the legal interest thereof from the said 22nd October 1900 until payment." . . .

As amended the summons was as follows — . . . "And the defenders the said trustees ought and should be decerned and ordained to make payment to the pursuer of the sum of £600 sterling, or of such other sum as shall appear and be ascertained by our said Lords to be due by the defenders the said trustees to the pursuer, *in respect of his own interest as an individual as one of two heirs in mobilibus of the said Sarah Douglas or Adam*, with the legal interest thereon from the said 22nd October 1900 until payment; or in the event of the defenders failing to produce an account as aforesaid, they ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the said sum of £600 sterling, which shall in that case be held to be the *sum due by the defenders to the pursuer in respect of his said interest as an individual as one of said heirs*, with the legal interest thereof from the said 22nd October 1900 until payment." . . .

By interlocutor dated 12th March 1902 the Lord Ordinary (PEARSON) assoilzied the defenders.

The pursuer reclaimed—The reclaiming-note as boxed had appended to it a copy of the record as originally printed, but with the words deleted from and added to the record by the amendment allowed on 5th July 1901 respectively deleted in and added to the print in manuscript. The interlocutor of 5th July 1901 was not printed, but was merely added in manuscript to the copies of the record boxed.

The respondents objected to the competency of the reclaiming-note, and argued that the omission to print the amendments and interlocutor allowing them was contrary to the provisions of the Judicature Act and Act of Sederunt, and that it was not sufficient to insert the amendments in manuscript—*Gibson* v. *M'Kean*, 2 F. 1079, 37 S.L.R. 815; *Williamson* v. *Howard*, 1 F. 864, 36 S.L.R. 645; *Muir* v. *Muir*, 2 R. 26, 12 S.L.R. 11; *Carter* v. *Johnston*, 9 D. 598.

Argued for the appellant—The provisions of the statutes as to printing were not imperative but merely directory—*Fisken* v. *Fisken*, 3 F. 7, 38 S.L.R. 4. In the cases cited the omissions had been material, while here that was not so.

At advising—

LORD PRESIDENT—The question in this case is whether the reclaiming-note is incompetent because certain amendments made on the summons under an interlocutor dated 5th July 1901 have not been

printed, but are merely written in manuscript upon the summons.

It is provided by the Judicature Act 1825, section 18, that a party reclaiming against an interlocutor "shall along with his note put into the boxes printed copies of the record authenticated" by the Lord Ordinary.

The Act of Sederunt of 11th July 1828 provides that reclaiming-notes "shall not be received unless there be appended thereto . . . copies of the summons with amendments, if any, and defences."

In the present case certain amendments were made upon the summons under the interlocutor above mentioned, by which the pursuer's claim, which was originally both in his own right and as executor of his mother, was restricted to his claim as an individual, and the sum claimed was reduced from £1200 to £600, there being also added in manuscript, by way of amendment, on the margin of the summons "in respect of his own interest as an individual as one of the two heirs *in mobilibus* of the said Sarah Douglas or Adam," and the restricted claim was in manuscript on the margin of the summons, described as "sum due by the defender to the pursuer in respect of his said interest as an individual and as one of said heirs." The amendments thus made are not printed but were written upon the summons appended to the reclaiming-note, and the defenders maintain that the reclaiming-note is incompetent because it does not comply with the requirements of the Act of Parliament and Act of Sederunt already referred to.

It was decided in the case of *Carter* v. *Johnston*, February 6, 1847, 9 D. 598, that where a record was closed on the summons and defences with pleas-in-law for the pursuer, and these pleas-in-law were not appended to the reclaiming-note, it could not be received because it was incompetent under the 77th section of the Act of Sederunt above referred to. The pleas-in-law which were omitted were undoubtedly very vital and indeed essential parts of the record.

In the case of *Muir* v. *Muir*, 2 R. 26, a defender had been allowed to make extensive additions to the closed record, which introduced an entirely new defence and formed the main subject of debate in the Outer House, and the defender having reclaimed to the Inner House appended to the reclaiming-note a print of the original record with the amendments in manuscript. It was held that "considering the extent of the additions" this was not sufficient compliance with the terms of the Judicature Act and Act of Sederunt of 11th July 1828, section 77, and the reclaiming-note was refused as incompetent. It is important to observe that in this case the question was treated as one of degree, and it appears that the alterations and additions there were materially greater than those in the present case.

In the case of *Williamson* v. *Howard*, 1 F. 864, a summons contained conclusions (1) for specific implement of a contract by which the pursuer alleged that he had sold a heritable subject to the defender, and (2) for damages. In the Outer House the first conclusion was amended, and thereafter the Lord Ordinary assoilzied the defender from both conclusions. The pursuer reclaimed, but having sold the subject to another purchaser he insisted only in the second conclusion. The defender objected to the competency of the reclaiming-note on the ground that the copy of the summons appended to it did not contain the amendments on the first conclusion, and the reclaiming-note was held incompetent, *diss.* Lord Young. Here again the amendments appear to have been of a more extensive character than those in the present case.

In the case of *Gibson* v. *M'Kean*, 2 F. 1079, a reclaiming-note was refused as incompetent where an essential part of an interlocutor reclaimed against was omitted in the print appended to the reclaiming-note. Here also the omission seems to have been of a much more important character than in this case.

In view of these decisions I have felt considerable difficulty as to whether the plea of incompetency should be sustained in the present case, but upon the whole I am of opinion that it should not, seeing that although there was no print of the amendments, they were (as I understand) placed in manuscript upon the print of the summons appended to the reclaiming-note when the latter was boxed. Under these circumstances I think it would be too stringent an application of the Act of 1825 and the relative Act of Sederunt to refuse the reclaiming-note as incompetent, and I therefore think that the plea directed against its competency should be repelled.

LORD ADAM — This reclaiming-note is objected to as being incompetent because the record has not been printed and appended to the reclaiming-note and boxed to the Court as required by the 18th section of the Judicature Act (6 Geo. IV. c. 120), and relative Act of Sederunt. The reason why it is said that the record in this case has not been printed is that during the course of the case it was found necessary to make amendments on the record as originally printed, and the amendment was put on the record in manuscript. Now it is not disputed that the whole record has been appended to the reclaiming-note and boxed to the Court. The objection is that though appended to the reclaiming-note and submitted to the Court the amendment is in manuscript and not in print. In regard to the provisions of the Act of 1825 and relative Act of Sederunt, it appears to me that while some of them are of an imperative nature others are of a more directory character. For example, the provisions with regard to reclaiming days must be rigidly enforced. This may also be the case with regard to the provision that the whole record must be appended to the reclaiming-note, but the regulation that printed copies of the record must be lodged is directory only. We must keep in view the procedure and practice which used to prevail in 1825, when long cases for debate were

lodged along with reclaiming-notes. These were regulated by the same statute, and to say that the omission of a few words was to be followed with the result that the reclaiming-note was to be held to be incompetent is not well founded. Accordingly, I think that this provision is directory only —not in the sense that a party may or may not follow it at his convenience, but that the Court may recognise a certain latitude in the way it is to be observed, and be satisfied if there has been substantial compliance with it.

In this case I think that there has been substantial compliance with the enactments.

The cases to which reference was made are in an entirely different category. In all of them except *Muir* (2 R. 26) the objection taken was that the whole record was not before the Court for consideration. In the case of *Carter* (9 D. 598) the pleas-in-law of the pursuers were omitted altogether. In *Williamson* (1 F. 864) part of the summons was omitted, and again in *Gibson* (2 F. 1079) an essential part of the interlocutor submitted to review was not printed at all. All these cases were probably well decided. The case of *Muir* (2 R. 26) resembled this case except in one important particular, viz., the extent of the amendments. The report of that case says that "considering the extent of the additions" the requirements of the statute and Act of Sederunt had not been complied with.

I should have no hesitation in following that decision, because in it there was no substantial compliance with the provision of the Act. But then I agree with your Lordship that the additions in manuscript in this case are not extensive but insignificant in extent, and I think it would be entirely wrong to throw out the case when the whole record is actually before the Court and a few words only are in manuscript.

LORD M'LAREN—I agree with your Lordships. The question is as stated by Lord Adam, whether there has been substantial compliance with the Act of Parliament and Act of Sederunt. Whenever the omission is of the category of a clerical or printer's error I should have no difficulty in holding that the enactments had been complied with. The present case is not a case of omission. The objection is that certain words added by way of amendment to the record have been inserted in manuscript. Now, when cases come before us and amendments are allowed, we are generally content to have them written on the record, so as not to put the parties to the expense of reprinting. The result of sustaining the present objection would be that in the event of any amendment, however slight, being allowed by the Lord Ordinary the party would be put to the expense of reprinting the record as amended as a condition of bringing the case into the Inner House for review. It is not to be overlooked in construing this provision of the Judicature Act, that the general power of amendment was given by a later statute, and consequently such amendments as we have now under consideration were not within the view of the framers of that Act.

LORD KINNEAR concurred.

The Court repelled the objections to the competency and sent the case to the roll.

Counsel for the Reclaimer—Guy. Agents —Gordon, Petrie, & Shand, S.S.C.

Counsel for the Respondents — Chree. Agents—Hamilton, Kinnear, & Beatson, W.S.

HOUSE OF LORDS.

Friday, March 20.

APPEAL COMMITTEE.

(Before Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson, and Lord Lindley.)

BARRIE *v.* CALEDONIAN RAILWAY COMPANY.

(*Ante*, November 1, 1902, 40 S.L.R. 50.)

Appeal to House of Lords—Competency—Appeal on Question of Expenses only.

An appeal to the House of Lords on the question of expenses only is not competent.

This case is reported *ante ut supra.*

The Caledonian Railway Company (defenders and appellants) appealed to the House of Lords, but upon the question of expenses only.

The pursuer and respondent objected to the competency of the appeal, in respect that it was taken upon the question of expenses only, and cited Macqueen's Practice of the House of Lords, p. 94; Denison & Scott's House of Lords Appeal Practice, p. 67; *Tod* v. *Tod* (1827), 2 W. & S. 542; *Horne* v. *Pringle* (1840), 8 Cl. & F. 264; and Court of Session (Scotland) Act 1825 (6 Geo. IV. c. 120) (Judicature Act), sec. 40.

The Appeal Committee held that the appeal, being on the question of expenses only, was incompetent, and dismissed the appeal with five guineas costs.

Agents for the Pursuer and Respondent—A. & W. Beveridge, Westminster—Smith & Watt, W.S., Edinburgh.

Agents for the Defenders and Appellants —Grahames, Currey, & Spens, Westminster—Hope, Todd, & Kirk, W.S., Edinburgh—H. B. Neave, Glasgow.