

pupilarity, moved the Court to appoint a curator *ad litem* to them.

Counsel for the eighth parties referred to *Ward v. Walker*, 1920 S.C. 80, 57 S.L.R. 121, and *Macdonald's Trustee v. Medhurst*, 1915 S.C. 879, 52 S.L.R. 698.

The Court appointed a curator *ad litem* in both cases.

Counsel for the Eighth Parties—Hunter. Agents—Campbell & Smith, S.S.C.

Counsel for the Fifth Parties—King. Agents—Arch. Menzies & White, W.S.

HOUSE OF LORDS.

APPEAL COMMITTEE.

Thursday, February 24.

(Before Viscount Cave, Lords Dunedin, Atkinson, Shaw, and Moulton).

NORTH BRITISH RAILWAY COMPANY v. MAGISTRATES OF EDINBURGH.

(In the Court of Session, March 12, 1920, 57 S.L.R. 344, 1920 S.C. 409).

Process—Appeal to House of Lords—Competency—Interlocutory Judgment of Inner House—Leave to Appeal Granted—Subsequent Final Judgment by Lord Ordinary.

In an action against the magistrates of a burgh for relief from certain burdens and for recovery of sums paid, the First Division on 12th March 1920 granted the decree of declarator craved and remitted the cause to the Lord Ordinary to dispose of the petitory conclusions of the summons. Leave to appeal was granted. No appeal having been presented, the pursuers (after notice to the defenders, who did not appear) obtained decree from the Lord Ordinary for the sum sued for with expenses. Both the principal sum and the pursuers' expenses as taxed were thereafter paid by the defenders. On 24th February 1921 the defenders presented a petition and appeal against the interlocutor of 12th March 1920.

The Committee *dismissed* the appeal as incompetent.

On 12th March 1920, in an action at the instance of the North British Railway Company against the Magistrates of Edinburgh, the First Division, on a reclaiming note, found and declared that the defenders were bound in all time coming to relieve the pursuers and their successors in the subjects mentioned in the summons from all burgh assessments and other burdens therein specified, and *quoad ultra* remitted the cause to the Lord Ordinary to dispose of the petitory conclusions. On 19th March 1920 the defenders applied for and obtained leave to appeal to the House of Lords. No appeal having been presented, the pursuers

enrolled the cause before the Lord Ordinary and on 1st June 1920 (after notice to the defenders, who did not appear) moved for and obtained decree with expenses. Thereafter the pursuers' account was taxed in presence of the agents for both parties, and the sum decerned for, and the pursuers' expenses as taxed, were duly paid by the defenders.

On 24th February 1921 the defenders presented a petition and appeal against the interlocutor of 12th March 1920. The pursuers presented a petition craving that the appeal should be dismissed as incompetent "because the interlocutor of the First Division of 12th March 1920 being an interlocutory judgment is not now appealable, inasmuch as a subsequent interlocutor of 1st June 1920 pronounced in the cause by one of the Lords Ordinary . . . disposing of the remaining merits of the case and of expenses was not reclaimed against in terms of the Act 6 Geo. IV, cap. 120, section 18, and has in consequence now become the final interlocutor disposing of the whole merits of the cause, and is no longer subject to review by the Court of Session in Scotland or by your Lordships' House."

At the hearing before the Appeal Committee the agents for the appellants argued that the appeal was competent, and cited *Downe, Bell, & Mitchell v. Pitcairn and Others*, 1829, 3 W. & S. 472.

The agent for the respondents maintained that where, as here, the interlocutory judgment of the First Division had been followed by a subsequent interlocutor in the Outer House exhausting the cause the appeal was incompetent. The case of *Downe*, relied on by the appellants, was distinguishable, as the Journals of the House (vol. lvi, 1824, p. 119, see also p. 461) showed that at the time the appeal was presented, viz., 29th March 1824, the last interlocutor in the case was that of the Second Division, dated 11th March 1824, and that the subsequent interlocutor of Lord Mackenzie, dated 22nd May 1824, and that of the Inner House adhering thereto, dated 22nd June 1824, were both pronounced after the appeal had been presented. In *Downe's* case therefore the appeal had not been taken *after* but *before* the final decision of the cause. The head-note was misleading.

The Committee dismissed the appeal as incompetent.

Agents for the Pursuers and Respondents—James Watson, S.S.C., Edinburgh—Lewin, Gregory & Anderson, London.

Agents for the Defenders and Appellants—A. Grierson, S.S.C.—Beveridge & Company, Westminster.

Monday, May 2,

(Before the Lord Chancellor, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

GLEBE SUGAR REFINING COMPANY, LIMITED, AND ANOTHER v. TRUSTEES OF PORT AND HARBOUR OF GREENOCK AND OTHERS.

(In the Court of Session, March 31, 1920, 57 S.L.R. 374, 1920 S.C. 470.)

Harbour—Powers of Harbour Trustees—Lease—Ultra Vires—Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. cap. 27), sec. 23—Greenock Port and Harbour Consolidation Act 1913 (3 and 4 Geo. V, cap. xlii), sec. 109.

The Greenock Port and Harbour Consolidation Act 1913 (3 and 4 Geo. V, cap. xlii), sec. 109, empowers the Harbour Trustees to grant to any person the exclusive right to use any of their quays.

The Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. cap. 27), which (with the exception of certain sections) is by section 6 of the above-mentioned Act of 1913 incorporated therein, enacts—Section 23—“The undertakers may lease or grant the use or occupation of any warehouses, buildings, wharfs, yards, cranes, machines, or other conveniences provided by them for the purposes of this or the Special Act, at such rents and upon such terms and conditions as shall be agreed upon between the undertakers and the persons taking the same, provided that no such lease be granted for a longer term than three years.”

The Trustees of the Harbour of Greenock having leased a graving dock which formed part of their statutory undertaking to a firm of ship repairers for ten years, an action was brought by certain ratepayers entitled to use the harbour, concluding for declarator that the Trustees had no power to grant the exclusive use of the dock to any person, and for reduction of the lease. No mention was made in the pleadings of either of the parties of section 23 of the Harbours, Docks, and Piers Clauses Act 1847, nor was the section brought to the notice of the Lord Ordinary or of the First Division during the debate, the discussion being confined to the powers of the Trustees under the Act of 1913. *Held (rev. the judgment of the First Division)* that section 23 of the Act of 1847 applied to the case, that its effect was decisive, and that accordingly the lease was *ultra vires* and fell to be reduced.

Administration of Justice—Duty of Counsel and Agents—Duty to Bring to the Notice of the Court Authorities which Bear Either Way upon Matters under Debate.

Observations per the Lord Chancellor as to the duty of counsel and those who instruct counsel to bring to the notice of the Court authorities which bear one way or the other upon matters under

debate, whether these authorities assist or not the party who is aware of them.

The case is reported *ante ut supra*.

The pursuers appealed to the House of Lords.

After hearing counsel on 6th and 8th December 1920 their Lordships on 23rd February 1921 appointed the cause to be further heard on the effect of section 23 of the Harbours, Docks, and Piers Clauses Act 1847. At the hearing the Lord Chancellor stated that the attention of their Lordships had been directed by Lord Atkinson to section 23 of the Harbours, Docks, and Piers Clauses Act 1847, and that it appeared to their Lordships that the section had a material bearing upon matters which had been debated in the case.

Counsel for the parties were then further heard.

At the conclusion of the argument his Lordship made the following observations:—

LORD CHANCELLOR—Their Lordships will give reasons in writing for the opinion which they have formed. But as a point of very considerable general importance has arisen I think it right to make this observation at once. It is not, of course, in cases of complication possible for their Lordships to be aware of all the authorities, statutory or otherwise, which may be relevant to the issues which in the particular case require decision. Their Lordships are therefore very much in the hands of counsel and those who instruct counsel in these matters, and this House expects—and indeed insists—that authorities which bear one way or the other upon matters under debate shall be brought to the attention of their Lordships by those who are aware of those authorities. This observation is quite irrespective of whether or not the particular authority assists the party which is so aware of it. It is an obligation of confidence between their Lordships and all those who assist in the debates in this House in the capacity of counsel. It has been made clear that Mr Sandeman, Sir John Simon, and Mr Macmillan were unaware of the existence of the section, which appears to their Lordships to be highly relevant to, and in the event decisive upon, the matter under discussion here. Indeed, the circumstances in which leading counsel are very often briefed at the last moment render such an absence of knowledge extremely intelligible. But I myself find it very difficult to believe that some of those instructing learned counsel were not well aware of the existence, and the possible importance and relevance, of the section in question. It was the duty of such persons, if they were so aware, to have directed the attention of leading counsel to the section, and to its possible relevance, in order that they in turn might have brought it to the attention of their Lordships. A similar matter arose in this House some years ago, and it was pointed out by the then presiding Judge that the withholding from their Lordships of any authority which might throw light upon the matters under debate was really to obtain a decision from their Lordships in the absence of the material