

point. It may be said that Cunninghame has nothing to do with this conveyance, and that that will afford him no defence, for Bannatine was infeft in the entire feudal estate, and his was the active title to uplift the rents, though he might have to account for them to the Logans. But it is sufficiently evident that Cunninghame, being liferenter and also factor for the deceased Mr Bannatine, and having in him thus two characters, one or other of which would entitle him to uplift these rents did, in fact uplift and pay them to the Misses Logan; for I look on that assignation now produced as perfectly conclusive on the question of fact, that the income from the minerals was fully accounted for by Cunninghame to the Misses Logan. The assignation has a statement which is a complete discharge to him, and it also conveys to him any right still in them to ask for payment of rents due to them and not yet received. The codicil and the assignation, read together, constitute for him a complete defence, so far as concerns the rents of these minerals. In connection with that, I must observe that there is nothing in the interlocutor of 29th May that requires to be recalled, or that is inconsistent with what I have said. The Lord Ordinary refuses the motion to open up the record to add a statement to the defences, that the defender had obtained the assignation No. 29 of process from Miss Anne Logan of her and her sister's right and interest to the income of the minerals referred to in the record. It is not necessary that the record should be opened up for that. The introduction of the assignation is enough, and the record stands well enough as it is. Cunninghame in his 12th article states that the bequests of the income of the minerals was not binding on him, but he resolved to give effect to what might be his wife's wishes, and accordingly handed over to the Misses Logan the whole of the mineral rents received by him after his wife's death, so far as might not be necessary for payment of his wife's debts and legacies; and he pleads in the 4th plea—(*reads*). This assignation I read as evidence that this payment was made as averred, and therefore it is not necessary to interfere with the interlocutor of 29th May.

It is only necessary, in conclusion, to say that there is here some matter as to which I am not in a position to offer any opinion. There is a sum of £179 paid by the Glasgow and South-Western Company for part of the minerals in question that they wished to have left unwrought. To whom that belonged, and to whom it ought to have been paid, we are not in a position to judge. That depends on a variety of circumstances. It may be that it is a part of the mineral field which, in all probability, would never have been wrought during the lives of these ladies; and if that is so it would be a strong ground for saying that that belonged to the fiar and not to the liferenter; but if it was mineral that was just about to be broken into by the mineral tenant, the case would be altered; but on that I give no opinion.

The practical effect is to recal that finding in the interlocutor of 26th March which follows the disposal of the first and second pleas.

The other Judges concurred.

Agent for Pursuers—W. K. Thwaites, S.S.C.

Agents for Defenders—A. & A. Campbell, W.S.

Thursday, July 8.

BRODIE AND OTHERS v. MUIRHEAD.

Reclaiming Note—Competency—Court of Session Act 1868. An interlocutor pronounced by a Lord Ordinary allowing before answer a proof of the parties' averments, and appointing the proof to proceed before him on a day to be named, held not to fall within the 28th section and the fourth sub-division of the 27th section, and therefore a reclaiming note presented more than six days from the date of the interlocutor held competent.

In this case the Lord Ordinary, on 30th June 1869, pronounced this interlocutor:—"The Lord Ordinary having heard parties' procurators and made avizandum, Allows, before answer, a proof of the facts set forth on the Record, so far as parties are at issue regarding the same, and appoints said proof to proceed before him on a day to be named, and appoints the cause to be enrolled for that purpose."

On 6th July he pronounced this interlocutor:—"The Lord Ordinary having heard counsel on the motion of the defender to obtain leave to reclaim against the interlocutor of 30th June last, Grants leave to reclaim against said interlocutor."

On 7th July a reclaiming note was presented.

In the Single Bills.

CATTANACH, for respondents, objected that under the 27th and 28th sections of the Court of Session Act 1868 the reclaiming note was incompetent, not being presented within six days from the date of the interlocutor reclaimed against.

NEAVES for claimer.

At advising—

LORD PRESIDENT—One important circumstance here is that the Lord Ordinary has granted leave to reclaim, showing that his Lordship did not think this interlocutor fell under the 28th section, under which no leave is required. It is the right of the party to reclaim within six days; but if he does not reclaim in six days the interlocutor is final, and cannot be opened up at any stage of the case. It becomes absolutely final. It is not like an interlocutor that may or may not be reclaimed against. The class of interlocutors which fall under the operation of the 27th and 28th sections would require to be pretty strictly defined, and I think they are so by the 27th section. The finality is provided for in the 28th section in these words—"Any interlocutor pronounced by the Lord Ordinary, as provided for in the preceding section, except under sub-division (1), shall be final in law within six days from its date; the parties or either of them shall present a reclaiming note against it," &c. We must be satisfied that the interlocutor before us is within the description of those declared to be final before we can refuse it as incompetent. Is this then an interlocutor, pronounced by the Lord Ordinary, provided for under the preceding section? The only part of that section said to apply is the fourth sub-division, and that is—"The Lord Ordinary shall think farther probation should be allowed, but that such probation should not be taken before a jury." These words express merely the motion of the Lord Ordinary—"He may pronounce an interlocutor dispensing with the adjusting of issues, and determining the manner in which proof is to be taken or inquiry is to be made, and make such order as may be necessary for giving effect to such interlocutor." The first obser-

vation to be made here is, that the interlocutor before us is not one dispensing with the adjustment of issues. Nay, I think there is nothing in it that necessarily implies that there are to be issues; for though a proof is to be led, a proof before consent, it might be convenient to have an issue adjusted with a view to that proof. In the second place, this is not merely determining the manner of proof; it allows a proof before answer, which is not contemplated in the 27th section. Sometimes it is of very considerable importance whether the proof is to be before answer or not. If the proof is allowed without these words it usually amounts to sustaining the relevancy of the averments; but if the words are added, the relevancy is still open. I cannot hold this to be within the meaning of the fourth sub-division of the section, and therefore I am for repealing the objection.

The other Judges concurred.

Agent for Pursuers—R. Denholm, S.S.C.

Agent for Defender—D. Curror, S.S.C.

Thursday, July 8.

SECOND DIVISION.

KENNEDY v. MURRAY.

Salmon Fisheries Act, 25 and 26 Vict. c. 97—Bye-laws—Power of Commissioners—Costs. (1) Held that the Commissioners under the statute 25 and 26 Vict. c. 97, have power to make bye-laws as to lades, dams, &c., not in the process of being constructed or repaired. (2) Terms of bye-laws which held to be regulations in the sense of the statute. (3) Held (by a majority) that the Commissioners under the statute have power to impose an obligation on owners or occupiers of mills to execute the works embraced in the bye-laws at their own costs.

This was a summary application, brought in the Sheriff-Court of Ayrshire by William Murray, solicitor in Girvan, clerk to the District Board of the River Girvan, against the Right Hon. T. F. Kennedy of Dunure, for the purpose of compelling the latter to put "hecks" at a certain mill-lade belonging to him on the river Girvan, in terms of bye-laws passed by the Commissioners under the Salmon Fisheries Act, 25 and 26 Vict. c. 97, sec. 6.

There were a variety of preliminary pleas stated, going to exclude the petitioner's title to sue, but these were repelled; and, on the merits, the Sheriffs both decided in favour of the petitioner. Mr Kennedy advocated, and after hearing counsel some time since, the Second Division sent the case for argument before seven Judges upon the following special questions:—

1. Whether the Commissioners, under the statute 25 and 26 Vict. cap. 97, sec. 6, had power to make bye-laws as to lades, dams, &c., not in the process of being constructed or repaired?

2. Whether the following bye-laws, Nos. 3, 4, and 5 (being the bye-laws founded on by the petitioner), are 'regulations' in the sense of the said Act?—

"(3) At the intake of every lade there shall be placed, and constantly kept, a heck or grating for each opening, or one embracing the whole openings—the bars to be not more than 3 inches apart if horizontal, and not more than 3 inches if vertical.

"(4) A similar heck or grating shall be placed,

and constantly kept, across the lade or troughs immediately above the entrance to each mill-wheel.

"(5) A similar heck or grating shall be placed, and constantly kept, across the lower end of each tail-lade at its entrance into the main river."

3. Whether the Commissioners have power to impose an obligation on owners or occupiers of mills to execute the works embraced in the bye-laws at their own cost?

4. Whether the bye-laws, supposing them to be competently issued, are framed with such precision and clearness as to be valid and operative in reference to the parties by whom the regulations are to be observed, and the manner in which they are to be executed?

5. Assuming that the construction of hecks has been competently directed by the bye-laws of the Commissioners, and that the cost of construction is chargeable against the advocator as owner of the mill, and assuming that additional trouble and some cost will be imposed by the additional hecks, whether the case of the advocator, who has had immemorial possession of the mills, is within the provision that such regulations shall not interfere "with any rights held at the time of the passing of the Act under royal grant or charter, or possessed for time immemorial?"

GIFFORD and H. J. MONCREIFF for advocator.

CLARK and ASHER for respondent.

At advising—

LORD-JUSTICE CLERK—The application in the case we are now to consider was made to the Sheriff of Ayr, and proceeded upon a statement made by William Murray, solicitor in Girvan, who is described as clerk to the Fishery Board for the district of the river Girvan. He makes as against Mr Kennedy the allegation that, certain bye-laws having been made by the Commissioners appointed under the statute of 1862 applicable to the salmon fishings of Scotland, Mr Kennedy had refused or neglected to obey that bye-law, and in consequence he craved that the Sheriff should take such proceedings as should cause its enforcement at his expense. The statement was, that he was bound to erect and construct at his own expense three several hecks upon the mill and mill-lade belonging to Mr Kennedy, and that, the Commissioners having in virtue of the bye-law given Mr Kennedy notice to do the work, he had refused or delayed to do so. The notices embraced a number of questions with which we have nothing to do at present, but they embrace the matters embodied in the questions now submitted for our consideration. The first question put to us, whether the Commissioners, acting under the statute of 1862, had power to make bye-laws as to lades, dams, &c., not in the process of being constructed or repaired. The power which is given to the Commissioners is conferred by the 6th section of the Act, and the power is to make general regulations as to the construction of mill dams or lades, or water-wheels, so as to afford a reasonable means for the passage of salmon. The argument of Mr Kennedy proceeded upon this, in the first place, that it was not to be assumed that he was to be disturbed in a possession which had existed for time immemorial on valid title, except he was about to construct or make alterations on the dam connected with his mill. No doubt the words used admit of the construction which Mr Kennedy puts upon them, for regulations as to the construction and alteration of mill-dams may very