

The Court held, without difficulty, that the trustor only intended to confer a limited right on his widow—viz., so long as his son remained unmarried, and as his death rendered it impossible that that could be predicated, her right had ceased. Further, it was clearly the intention of the trustor that the widow's right to the mansion-house should terminate when the fee of the lands was full, as it had now become.

Counsel for Mrs Scott—The Lord Advocate, the Solicitor-General, and Mr John M'Laren. Agents—Messrs Morton, Neilson, & Smart, W.S.

Counsel for Mrs Gordon—Mr Watson and Mr W. A. Brown. Agents—Messrs Richardson & Johnston, W.S.

Tuesday, January 30.

FIRST DIVISION.

FRASER v. FRASER.

Process—Reclaiming-Note—Competency—30 and 31
Vct. c. 100, sec. 54.

Held that an interlocutor containing findings which, so far as they went, disposed of the first conclusion of the summons, was one disposing in part of the merits of the cause, in terms of section 11 of the Court of Session Act, 1850, and that a reclaiming-note against such interlocutor was still competent within twenty-one days of its date, provided that it was also presented within ten days of the date of the interlocutor granting leave to reclaim, in terms of the 54th section of the Court of Session Act, 1868.

The circumstances under which this reclaiming note was presented will appear from the opinion of the Lord President.

BALFOUR, for the respondent, objected to the competency of the reclaiming note, and referred to the case of *Bannatine's Trustees*, May 25, 1869, 7 Macph. 813.

STRACHAN for the claimer.

At advising—

LORD PRESIDENT—The Lord Ordinary's interlocutor in this case was pronounced upon January 9th. Upon the 19th of the same month he granted leave to reclaim against this interlocutor, and on the 25th a reclaiming note was lodged by the pursuer. This reclaiming-note is therefore lodged within ten days of the interlocutor granting leave to reclaim, but not of the interlocutor reclaimed against. It is, however, within twenty-one days of that interlocutor. The question is, whether this reclaiming note is not incompetent in consequence of its being lodged too late. Now, the interlocutor reclaimed against is, in my opinion, an interlocutor disposing in part of the merits of the cause. It contains findings which, so far as they go, dispose of the first conclusion of the libel. The term used in the Act of 1850, "interlocutors disposing in whole or in part of the merits of the cause," means only interlocutors containing a decreture which in effect disposes of a part or the whole of the merits of the cause. The question therefore is, if the interlocutor, being as I think it is of that nature, can be reclaimed against under the Act of 1850, in like manner as before the passing of that Act, whether any objection can be raised under the Court of Session Act of 1868.

The Act of 1850 introduced for the first time a limitation of the period within which a certain

class of reclaiming notes should be presented. Formerly all reclaiming notes were in respect of time in the same category. But the statute provided that it should not be competent to reclaim against any interlocutor of the Lord Ordinary at any time after the expiration of ten days from the date of signing such interlocutor, with the exception only of reclaiming notes against interlocutors disposing in whole or in part of the merit of the cause, and against decrees in absence, which reclaiming note shall continue to be competent in like manner as at the passing of this Act. Now, no doubt this statute of 1850 did regulate in a very important respect the period during which reclaiming notes were to be competent. It divides them, for the first time, into two classes. The Act 1868 introduces another division, and provides that a third class of reclaiming notes shall be taken within six days, namely, those under sections 27 and 28 of that Act. There are now therefore three different classes of reclaiming notes, each competent within a different period of time. Sections 27 and 28 of the new Act have no application to the present case, but it is said that section 54 does apply, and requires this and all reclaiming notes of the same class to be taken within ten days. It does not appear to me that section 54, or indeed any sections of that Act, except 27 and 28, alter in any way the time within which reclaiming notes are to be presented. The 54th section provides that "Except in so far as provided for by the 28th section hereof, until the whole cause has been decided in the Outer House, it shall not be competent to present a reclaiming note against any interlocutor of the Lord Ordinary without his leave first had and obtained." Now, so far, this section has nothing to do with the time within which such reclaiming note must be presented. The condition newly imported by this section is the leave of the Lord Ordinary, and it is needless to say that if the section had stopped there the time would be just exactly the same as under the former Act of 1850, except as regards reclaiming notes under section 28. But the section goes on to say, "but where such leave has been obtained, a reclaiming note presented before the whole cause has been decided in the Outer House may be lodged within ten days from the date of the interlocutor granting leave, . . . and such note shall not have the effect of removing the cause or the process from the Outer House, or of staying procedure before the Lord Ordinary," &c. Now, I do not think that this part of the section was intended to alter the time within which reclaiming notes are to be lodged, even in those cases to which it applies. The language is peculiar. It says, a reclaiming note "may be lodged," it does not say *must*; nor does it say that the reclaiming note *will* be competent if presented within ten days from the date of the leave being granted. It merely says *may* be lodged, and I think there was reason for this. It then goes on to speak very particularly with regard to the effect which such reclaiming note is to have upon the conduct of the process during the dependence of the reclaiming note. I do not mean to say that the expression used is not intended to imply that the reclaiming note, when leave has been granted, *shall* be within ten days of the date of the interlocutor granting leave. But that is all the limitation as to time that it establishes. Now, this reclaiming note has been presented within ten days of the interlocutor granting leave, and I can see nothing to justify us in saying that this interlocutor would

have been incompetent before the passing of this 54th section; and as it complies with the provisions of that section, I can therefore see no objection to it whatever.

The other Judges concurred.

Objection repelled.

Agents for the Reclaimer—Macbean & Malloch, W.S.

Agents for the Respondent—Gibson-Craig, Dalziel, & Brodies, W.S.

Tuesday, January 30.

SECOND DIVISION.

BRITISH FISHERIES SOCIETY v. MAGISTRATES OF WICK.

Road Trustees—Assessment—23 and 24 Vict. c. 201.

The magistrates of a burgh were under a local Act empowered to levy an annual assessment for "maintaining, keeping in repair, and improving" the roads and bridges—*held* that a ratepayer was not entitled to interdict the levying of the assessment on the ground that the magistrates had imposed a greater assessment than was necessary for the year's expenses, in order to accumulate a fund to rebuild a bridge.

The questions raised in this suspension and interdict sufficiently appear from the Note which the Lord Ordinary (GIFFORD) appended to his interlocutor granting the interdict:—

"*Note.*—The question in this case turns almost exclusively upon the terms of the Statute 23 and 24 Vict., c. 201 (Aug. 20, 1860), which is a local statute applicable to highways, roads, and bridges in the county of Caithness.

"By the 33d section of the statute, the management of the roads and bridges within the boundaries of Wick (meaning thereby the parliamentary boundaries, as defined by the Reform Act) are transferred from the road trustees to the Magistrates and Town Council of Wick, who are to have the same powers as the trustees for the county roads, except the right of levying tolls.

"By section 26, the Magistrates and Town Council of Wick are empowered to levy an annual assessment, not exceeding 6d. per pound, for the purposes expressed in the Act, and these purposes are defined in section 48 of the statute. The clause is quoted in reason 2 of the record.

"The question raised in the present case is whether the respondents, the Magistrates and Town Council of Wick, are entitled to levy the assessment complained of, and sought to be suspended, not for the purpose of defraying the current expenses of "maintaining, keeping in repair, and improving" the roads and bridges within Wick, and the current expenses of the trust, but for the purpose of accumulating a large fund, which at some future and undefined period they intend to apply in effecting either a renewal of the bridge of Wick, or some costly and extraordinary improvement thereof, the exact nature of which the respondents have not defined, either on record or at the Bar.

"It is admitted that the respondents have in hand an accumulated fund of upwards of £800; that the expenses of the current year will not ex-

ceed £800; and therefore the assessment in question can only be justified if the respondents have a right to accumulate.

"The Lord Ordinary is of opinion that, under the statute, the respondents are not entitled to assess for the purpose of accumulating a large and indefinite fund, to be expended at some future and undefined period on operations or improvements on the roads and bridges under their charge. He has therefore granted suspension and interdict, as craved. The grounds of his opinion are, shortly—

"1st. The power to make an annual assessment must be fairly limited by the probable annual expenditure. The Magistrates are statutory trustees, and their powers to assess must be strictly construed so as not to exceed the limits of the statute. The statute limits the assessment to be 'for the purpose defined;' and as the assessment is annual, it is fair to read the statute as meaning that it shall be for 'the annual expense' of maintaining, keeping in repair, and improving the subjects of the trust.

"Hence it is thought the respondents could not make the assessment biennial or quinquennial, and levy two years' expenses or five years' expenses in one year. Each year must bear its own burdens. Of course there must be a wide margin allowed for contingencies or estimates, and, if it were merely this, the discretion of the trustees will not be lightly interfered with.

"Still the estimate must be made, and there must be no deliberate attempt to lay the expenses of one year upon the ratepayers of another.

"2d. This is still more manifest when it is considered that one-half of the assessment is borne by the tenants, or merely temporary occupants of lands and heritages in the burgh. It would be unfair to tax a tenant of one year for an improvement which is not to begin for ten or fifteen years after he has left the town or the district. Exact adjustment is impossible, but there must be a reasonable attempt to give the benefits of the repairs and improvements to the ratepayers who actually pay for them.

"3d. The respondents have power to borrow on the credit of the assessment two years' gross amount thereof. This seems intended to limit the extraordinary expenditure which the respondents may disburse. Practically they must not exceed three years' assessment at once. Two years' they may borrow, and a third year's they have in hand. This is quite fair, and the interest of the borrowed money will fall justly and equitably upon the ratepayers of subsequent years who have got the benefit of the expenditure.

"4th. The magnitude of the proposed operation, and the time required for accumulation, is unreasonable. According to the statement of the respondents themselves, they will require between £3000 and £4000, besides the expense of a temporary bridge. Admittedly it will take twelve or fifteen years to accumulate the amount, current expenses requiring to be provided for. Virtually the respondents propose to tax proprietors and tenants for fifteen years for the benefit of those who may be proprietors and tenants fifteen years hence. The Lord Ordinary thinks this is *ultra vires*. Had the matter related to one or two years only, he might have hesitated to interfere, as there must be some discretion and latitude in such cases, but the present case is beyond all reasonable latitude. If the respondents can accumulate for fifteen years, it would be difficult to prevent them accumulating