This was a case arising out of the Apportionment Act, 33 and 34 Vict., cap. 35, sec. 2, and the question between the parties, who were the executor of the late Honourable M. C. Maxwell of Terregles, and the *curator bonis* of the present heir of entail in possession, was—

"Whether the first party, as executor of the late Honourable Marmaduke Constable Maxwell, is entitled to a proportion of the rents of the entailed estate of Terregles, payable at Martinmas 1872, corresponding to the period between Whitsunday 1872 and the day of the death of the said Honourable Marmaduke Constable Maxwell on 16th July 1872?"

Authorities—*Murray Kinnynmond* v. *Cathcart and Rocheid*, Nov. 6, 1739, Kilk. 563; *Marquis of Queensberry* v. *Duke of Queensberry's Trs.* Feb. 18, 1814, F.C. 575; *Campbell* v. *Campbell*, July 18, 1849, 11 D. 1426; *Blaikie* v. *Farquharson*, July 1849, 11 D. 1456; *Swinton* v. *Gawler*, June 20, 1809; *Ker* v. *Turnbull*, M. 5430, 5 B. S. 876; *Elliot* v. *Elliot*, M. 15,917; *Petty* v. *Mackenzie*, Nov. 21, 1805, Hume, 186; Ersk. ii. ix. 64.

At advising—

LORD PRESIDENT—The late Mr Marmaduke Constable Maxwell was heir of entail in possession of the estate of Terregles till his death on July 16, 1872, and the present question is between his executor and the next heir of entail. The rents payable on the estate were forehand rents, and the crops to which, if the rents had been payable at the ordinary legal terms, they would have belonged, were not yet reaped. The terms of the lease, however, are distinct. The rent was to be "payable half-yearly, by equal portions, at the terms of Martinmas and Whitsunday, beginning the first term's payment at the first term of Martinmas after the entry for the half-year preceding, and for the next half-year at the Whitsunday thereafter, and so on half-yearly and termly during the lease, with interest and penalty during the not-payment." As the entry was to be at Whitsunday, it is plain that the payment to be made at the Martinmas following was not for the crop then reaped, and so the lease bears that it was for the half-year previous—it was rent payable for a period of time, and not for a crop. In like manner, under another form of lease introduced by Mr Maxwell himself, the rent is said to be for the half-year preceding, and so on half-yearly and termly—a form of words which means the same thing. Now, on the part of the heir of entail, we have had argument on the authorities applicable to postponed rents, which seems to me to have no bearing on this case. In such a case as that, the question is determined by reference to the legal terms, and the rule in forehand rents being different, the application of that principle to this kind of rent has never been recognised. As Lord Kilkerran says in the case of *Murray Kinnynmond*—"If, by the convention of parties, annualrents, for example, be made payable before the legal term, the executors will have the benefit of that convention; and the case would be the same in a forehand payment of rents of lands, for there is no instance of what is both due and exigible not going to executors." Now, no doubt this does not solve the question as to the Apportionment Act, but it shows how the parties agreed that the rents falling due at Whitsunday 1872 should belong to the executor. Now, this rule of law would not have been applicable to an entailed estate if forehand rents had been a novelty—if the previous heir of entail had himself introduced them,—for he would, in that case, have been taking an undue advantage to himself. But that is not the case here, for forehand rents are the law and custom of the estate adopted by the entailer. On the authority of the decisions in the case of the *Queensberry* estates, this is like a fee-simple succession, and the question here is, Are forehand rents for periods of time, not crops, subject to the second section of the Apportionment Act? Mr Marshall says they do not accrue during the period at the term of which they are payable; that a rent cannot be growing due during half-a-year. This argument is fallacious, whether we look at the terms of the Act or of the leases. The rent is payable at Martinmas for a half-year, and the same at Whitsunday; that must be a current rent accruing, growing as much in the one case as in the other. The object of the Act was to simplify the law of apportionment—to make everything in the nature of income apportionable,—and so it is made matter of enactment that everything payable in the nature of income is to be held as accruing, whether it does so of its own nature or not. In short, whatever is of the nature of income, payable at the next term, is held to be growing due day by day. I am clearly of opinion that the rent payable at Martinmas must be divided between the heir and executor, and consequently that the question must be answered in the affirmative.

Counsel for Lord Herries—Kinnear and Watson. Agents—Mackenzie & Kermack, W.S.

Counsel for Adamson—Marshall. Agents—Campbell & Espie, W.S.

Saturday, February 8.

SECOND DIVISION.

[Lord Mure, Ordinary.

M. P. CAMERON *v.* GORDON AND OTHERS.

Process—Reclaiming Note—Court of Session Act, 1861 (31 *and* 32 *Vict. cap.* 100).

Question—whether an interlocutor, which has become "final," under § 28 of the Court of Session Act, may be reviewed by reclaiming note against a subsequent interlocutor, under § 52.

An objection was taken to the competency of a reclaiming note, on the following ground:—On July 8, 1868, the Lord Ordinary pronounced an interlocutor in the cause, against which none of the parties reclaimed. On July 23, 1872, certain of the claimants in the multiplepoinding moved the Lord Ordinary for immediate payment of a share of the fund *in medio*. This motion was refused, on the ground that it could not be competently granted, having regard to the terms of the prior interlocutor of July 8, 1868, which had rendered the whole cause *res judicata*, whereas the Lord Ordinary was practically now asked to reconsider his judgment.

Against this latter interlocutor refusing the motion, leave was given to reclaim on July 30, 1872.

For the reclaimer it was argued—The Act 31 and 32 Vict. cap. 100, sec. 52, runs as follows:—"Every reclaiming note, whether presented before or after the whole cause has been decided in the Outer House, shall have the effect of submitting to the

review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date, not only at the instance of the party reclaiming, but also at the instance of all or any of the other parties who have appeared in the cause, to the effect of enabling the Court to do complete justice, without hindrance from the terms of any interlocutor which may have been pronounced by the Lord Ordinary, and without the necessity of any counter reclaiming note; and after a reclaiming note has been presented, the reclaimer shall not be at liberty to withdraw it without the consent of the other parties as aforesaid; and if he shall not insist therein, any other party in the cause may do so, in the same way as if it had been presented at his own instance."

This enables the reclaimer to bring under review the interlocutor of July 8, 1868, as well as the subsequent one.

The respondents argued, that under § 28 of the same Act, the interlocutor of July 8, 1868 could not be brought under review, because it had become "final." The section is as follows:—"Any interlocutor pronounced by the Lord Ordinary as provided for in the preceding section, except under sub-division (1), shall be final, unless within six days from its date the parties, or either of them, shall present a reclaiming note against it to one of the Divisions of the Court, by whom the cause shall be heard summarily; and when the reclaiming note is advised, the Division shall dispose of the expenses of the reclaiming note, and of the discussion, and shall remit the cause to the Lord Ordinary to proceed as accords: Provided always that it shall be lawful to either party within the said period, without presenting a reclaiming note, to move the said Division to vary the terms of any issue that may have been approved of by an interlocutor of the Lord Ordinary, specifying in the notice of motion the variation that is desired: Provided also that nothing herein contained shall be held to prevent the Lord Ordinary or the Court from dismissing the action at any stage upon any ground upon which such action might at present be dismissed according to the existing law and practice."

Authorities quoted—*Bannatyne's Trs.* 7 Macph. 813; *Scheniman*, June 25, 1828, 10 S. 1019; *Forbes*, 10 S. 374; *Matthew*, 6 D. 718.

The Court, before disposing of the question raised, appointed Counsel to be heard on the merits.

Counsel for Reclaimer—Balfour. Agent—A. Morison, S.S.C.

Counsel for Respondent—Rutherford. Agents—Murray, Beith, & Murray, W.S.

Friday, February 21.

FIRST DIVISION.

[Lord Gifford, Ordinary.

BLACK AND OTHERS *v.* EDINBURGH TRAMWAYS COMPANY.

General Tramways Act, 1870—*Special Act*, 1871—*Inconsistency—Relative Plans.*

Where the provisions of a Special Act of Parliament conflicted with those of a General Act incorporated with it, *held* (*diss.* Lord President) that the former must prevail, notwithstanding that the relative Parliamentary plans referred to in the Special Act appeared to sanction the variation.

This was an action of suspension and interdict, raised by Messrs Black and others, owners and occupiers in North Bridge Street, against the Edinburgh Tramways Company, and its object was to compel the Company to remove their rails at certain points *ex adverso* of the suspenders' property, on the ground that the statutory distance of 9 feet 6 inches had not been left between the outer rails of the tramway and the curb-stone.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 24th July* 1872.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, statutes, and plans founded on, and whole process, Finds that, according to the sound construction of the statute incorporating the respondents, being 'The Edinburgh Tramways Act, 1871,' and the statutes and agreements incorporated in the said Act, the respondents had, and have, no right to lay down or construct their Tramway upon that portion of North Bridge Street extending from the High Street of Edinburgh to the open part of said North Bridge, so that for a distance of 30 feet or upwards a less space than 9 feet and 6 inches shall intervene between the outside of the footpath on either side of the road and the nearest rail of the tramway; and this in respect that one-third of the owners or one-third of the occupiers of the houses, shops, or warehouses, abutting upon the part of the road where such less space shall intervene as aforesaid, have timeously objected thereto.: Finds that, if within the portion of North Bridge Street above mentioned, the respondents' tramways are so constructed that, for a distance of 30 feet or upwards, a less space than 9 feet and 6 inches intervenes between the outside of the footpath and nearest rail of the tramway, the suspenders are entitled to have the same lifted and removed; and with these findings, Appoints the cause to be enrolled, reserving in the meantime all questions of expenses.

"*Note.*—When this case was argued before the present Lord Ordinary in the Bill Chamber in April last, on the question of interim interdict, the only documents produced to the Lord Ordinary, besides the Statutes founded on. were a copy or tracing from the Parliamentary plan, No. 17 of process, and a copy of the Parliamentary notice that the Act was applied for, the copy notice being No. 19 of process.

"The copy of the Parliamentary notice of the intention to apply for the Bill was founded on by the respondents, but the Lord Ordinary was of opinion that it formed no part of the Statute, and could not be referred to as explaining or controlling the words of the Act.

"Immediately before the closing of the record, there was produced a copy of the complete Parliamentary plans, prefixed to which, and numbered as a sheet of which, is a sheet of letterpress, containing a description of the position of the centre line of each tramway. This was seen by the Lord Ordinary for the first time at the debate on the closed record, and it certainly is a very important part of the respondents' case, and meets to some extent the considerations which, in the Bill Chamber, induced the Lord Ordinary to grant interim interdict.