

Saturday, June 9.

SECOND DIVISION.

[Lord Young, Ordinary

DUNCAN AND OTHERS v. LINDSAY,

— *et c.* con.

*Process—Reclaiming Note—Exclusion of Review.*

Terms of joint minute—agreeing that in cross actions between sellers and purchasers the question of interest and expenses should be disposed of by the Lord Ordinary (the whole other questions in the case having been settled)—*held* not to exclude review of Lord Ordinary's judgment.

These were conjoined cross actions, the first, at the instance of the sellers, for payment of the agreed on price of certain heritable subjects with interest; and the second, at the instance of the purchasers, for implement of the contract of sale contained in a minute of sale dated 8th and 11th September 1875, with a further conclusion for damages for non-implement. The dispute of parties arose from the fact that the seller had failed at the agreed on date of settlement to discharge certain bonds affecting the subjects sold. After the record had been closed, but before any order for proof, it was stated in a joint minute for the parties "that they had arranged as to the settlement of the price of the subjects in question, and the delivery of the deeds, and that the only questions remaining were as to the rate of interest payable by the said James Cochrane Lindsay, and the expenses of process; and the parties agreed to these questions being disposed of by the Lord Ordinary on the correspondence in process and the following facts," &c.

Upon this joint minute the Lord Ordinary pronounced an interlocutor disposing of the questions of interest and expenses.

Against this interlocutor Lindsay, the purchaser, reclaimed.

The sellers objected to the competency of the reclaiming-note, and argued—There was here a reference to the Lord Ordinary of the only matters remaining in issue between the parties. This was confirmed by the correspondence of parties. On 14th March 1877 the seller's agent wrote to the purchaser's agent—"I accordingly enclose the draft of the minute, which you can be good enough to revise and return to me to-night or to-morrow, so that we may finally get the case taken out of Court on Saturday." The purchaser's agent replied on the following day,—“If we cannot agree as to the question of interest, the principal sum may be settled, leaving this question, as well as the expenses, to be settled by Lord Young.”

The claimer in answer referred to *Robertson, Petitioner*, July 18, 1876, 3 *Rettie*, 104.

At advising—

LORD JUSTICE CLERK—It is matter of regret that the parties did not express themselves more clearly in giving effect to what was a most natural and reasonable arrangement. But I think that the language of the joint minute is not sufficiently distinct to exclude the right of review in ordinary course. The language is ambiguous,

and I am not satisfied that in a matter of this kind we ought to proceed on the correspondence, which certainly favours the idea of review being excluded.

LORD ORMDALE—When nothing remained to be settled except interest and expenses, it was most natural that parties should agree that these questions should be finally disposed of by the Lord Ordinary. I think they did so agree, for, although there might be some doubt of this on the joint-minute, the expressions used in the letters, which have been read without objection, leave no doubt on my mind that the parties intended that the matter should go no further.

LORD GIFFORD—I concur with your Lordship in the chair. This process is in dependence before a Lord Ordinary, and the parties most reasonably arrange some questions and also the materials for deciding the questions which remain. It was natural that they should accept the decision of the Lord Ordinary as final, but an agreement to that effect must be expressed. It is an important agreement to exclude the ordinary right of review, and to make the judge an arbiter who has a "sacred right to commit injustice." I do not think the joint-minute clearly expresses an agreement to that effect, and I do not think its terms can be controlled or amplified by the correspondence of parties. There are cases in which even the use of the word "finally" has been held not to exclude the right of appeal from the Sheriff-Courts.

Objection to competency of reclaiming-note repelled.

Counsel for Reclaimer—Asher—Strachan.  
Agent—Alex. Gordon, S.S.C.

Counsel for Respondent—Balfour—Mackintosh.  
Agent—Alex. Morison, S.S.C.

Tuesday, June 12.

SECOND DIVISION.

[Sheriff of Banffshire.

STEUART v. STEPHEN.

*Interdict—Trespass—Landlord and Tenant.*

Where a person, who did not aver any legal right, was in the habit of taking a short cut to a railway station across lands in the occupation of an agricultural tenant, and without objection on the tenant's part, interdict at the proprietor's instance *refused*.

This was an appeal from the Sheriff Court of Banffshire, in a petition at the instance of Steuart of Auchlunkart against Stephen, a shoemaker, residing at Deanshaugh, craving interdict against the respondent from trespassing on a piece of land lying between the Boat-of-Bridge Road and the Mulben Station of the Highland Railway Company. The land was occupied by Hay, the agricultural tenant of the petitioner. The respondent occupied certain land and houses on the further side of the said road from the railway