

SUMMER SESSION, 1898.

COURT OF SESSION.

Thursday, May 12.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

M'CAFFERTY v. M'CABE.

Process—Jury Trial—Preliminary Proof.

An action of damages was raised by a workman against his employer in respect of injuries sustained while in his employment. The defender denied that the pursuer had been in his employment at the date of the accident, and the Sheriff-Substitute allowed a proof on this point. The pursuer having appealed to the Court of Session for a jury trial, the defender moved the Court to allow the proof ordered by the Sheriff before sending the case to a jury. The Court *refused* the motion, in respect that the question of employment was not distinct and separable from the general merits of the case.

An action was raised in the Sheriff Court of Lanarkshire by James M'Cafferty, labourer, Glasgow, against James M'Cabe, stevedore, Glasgow, concluding for payment of £500 as damages in respect of an accident sustained by the pursuer at a time when he alleged he was in the employment of the defender.

The pursuer averred—“(Cond. 1) The pursuer is thirty years of age, and is a stevedore's labourer, and on 15th December last he was in the employment of the defender, who is a stevedore in Glasgow. Denied that the pursuer was in the employment of P. & J. M'Cabe, as Patrick M'Cabe died about a year ago, and James alone carries on business now under his own name.”

The defender averred—“(Ans. 1) Admitted that the pursuer is thirty years of

age, and is a stevedore's labourer. *Quoad ultra* denied, and explained that on said date pursuer was in the employment of P. & J. M'Cabe, stevedores in Glasgow.”

The defender denied the truth of the pursuer's account of the accident, and contended that he was not responsible for it, and further pleaded—“(2) The pursuer not having been in the employment of the defender at the time when he received his injuries, the defender should be assoilzied, with expenses.”

The Sheriff-Substitute (BALFOUR) on 24th February 1898 allowed the pursuer a proof of the averments contained in the first article of his condescendence.

The pursuer appealed to the Court of Session for a jury trial.

On the case appearing in the Single Bills, the appellant having moved the Court to order issues, the respondent submitted that the proof allowed by the Sheriff-Substitute should first be proceeded with, on the ground that it dealt with a separate question of fact which might itself be sufficient to decide the case. He quoted in support of his contention the cases of *M'Leod v. Pirie*, November 15, 1893, 20 R. 381, and *Conolly v. Young's Paraffin Light and Mineral Oil Co.*, November 17, 1894, 22 R. 80.

LORD PRESIDENT—I must say one has some intellectual sympathy with the procedure adopted by the Sheriff, and I would gladly, if possible, not disturb it. On the other hand, it must be remembered that the pursuer is here by right on appeal for the purpose of going to a jury, and Mr Moncreiff has not been able to point out any question extraneous to the merits of the case, such as the question of notice, as a proper subject for preliminary investigation, but only the defenders' denial that the pursuer was in their employment. But that is just one point which is singled out by the defenders from the merits of the case as constituting the strength of their case, and I do not think that there is any

sufficient ground for our selecting as a separate question what is really part of the train of facts for the consideration of the jury.

LORD M'LAREN—I agree. I think the question of employment is so involved in the merits of the case that it cannot easily be separated. In that respect this case is very different from the case referred to by Mr Moncreiff as to the sufficiency of the notice given to the defender in terms of the Employers Liability Act. Of course the question of the sufficiency of the notice of action is a distinct and separable thing from the merits of the case.

LORD ADAM concurred.

LORD KINNEAR was absent.

The Court ordered issues.

Counsel for Pursuer — R. S. Brown.
Agent—Henry Robertson, S.S.C.

Counsel for Defender—Moncreiff. Agents
—Drummond & Reid, W.S.

Friday, May 13.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THE COUNTESS OF SEAFIELD v. KEMP.

Process—Reclaiming-Note—Whether Timeously Presented—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 94—Act of Sederunt, 14th March 1894.

On 25th March the Lord Ordinary pronounced an interlocutor in a case which had been heard during session, disposing of part of the case, and granting leave to reclaim. The first box-day in vacation was on April 7th. Held that a reclaiming-note was timeously lodged on the second box-day.

Section 94 of the Court of Session Act 1868 (31 and 32 Vict. cap. 100) enacts—"It shall be lawful for the Lords Ordinary at any time in vacation or recess to sign interlocutors pronounced in causes heard in time of session or at any extended sittings or at the trial of causes by jury or by proof before the Lord Ordinary; provided that where any such interlocutor is dated at or prior to the first box-day in vacation, the same may be reclaimed against on the second box-day; and where the interlocutor is dated after the first box-day, then on the first sederunt day ensuing, or within such number of days from the date of such interlocutor as may be competent in the case of a reclaiming-note against such interlocutor dated and signed during session. . . . Provided that in the case of an interlocutor which cannot be reclaimed against without the leave of the Lord Ordinary, such leave may be given by such Lord Ordinary, or in his absence by the Lord Ordinary sitting on the Bills, during vacation."

The Act of Sederunt of 14th March 1894 enacts—"That in all cases where the days allowed for presenting a reclaiming-note against an interlocutor pronounced by a Lord Ordinary in the Outer House expire during any vacation, recess, or adjournment of the Court, such reclaiming-note may be presented on the first box-day occurring in said vacation, recess, or adjournment after the reclaiming days have expired; and if there be no such box-day, then on the first ensuing sederunt day."

An action of declarator and interdict was raised by the Countess of Seafield and others, proprietors of lands on the banks of the river Spey, against Mr Robert Kemp, distiller, Elgin, concluding for declarator that the pursuers were entitled to have the water in a fit state for primary purposes, and craving the Court to interdict the defender from polluting the river by discharges from his distillery.

The case having been heard during session, the Lord Ordinary (KYLACHY) on 25th March 1898—which date was within the spring vacation—pronounced an interlocutor by which he disposed of the declaratory conclusions of the summons, superseded in the meantime consideration of the conclusion for interdict, and granted leave to reclaim.

The defender lodged a reclaiming-note on the 28th April, being the second box-day in vacation, the first having been on 7th April. The pursuers, on the case being called in Single Bills, objected to the competency of the reclaiming-note, on the ground that it ought to have been lodged upon the first box-day, the reclaiming days having expired upon the 5th of April. They argued that the 94th section of the Court of Session Act had in contemplation final interlocutors which could be reclaimed without leave, not interlocutory judgments which could be reclaimed against only within ten days. The last class, of which the present case was one, fell under the provisions of the Act of Sederunt of 1894. If it did not apply, the result of section 94 of the Court of Session Act would be to extend greatly the time for reclaiming, and the defender would have thirty-three days instead of ten in which to reclaim.

[In answer to a question from the Lord President, counsel for the defender stated that the Act of Sederunt had been passed in consequence of the decision in the case of *Mackenzie v. Lucas & Aird*, February 15, 1894, 1894, 21 R. 544. Counsel for the defender was not called upon.]

LORD PRESIDENT—It is quite clear that this reclaiming-note was presented under the section of the Act of Parliament, and I think it is impossible to get over its provisions.

LORD ADAM—I am of the same opinion. I have never been able to see why this reclaiming-note was said to be incompetent.

LORD M'LAREN—I am also of the same opinion. There may be cases where the Act of Sederunt might have a beneficial