

Tuesday, May 28.

FIRST DIVISION.

[Junior Lord Ordinary.

MARQUIS OF QUEENSBERRY AND HIS TRUSTEES v. DOUGLAS AND OTHERS.

Process—Summary Petition—Reclaiming—Interlocutor on Merits—Reclaiming Note Presented in order to Bring under Review Interlocutor not Reclaimed against—Objection not Taken in Single Bills but only in Summar Roll—Distribution of Business Act 1857 (20 and 21 Vict. cap. 56), sec. 6—Competency.

In a petition to uplift consigned money presented by an heir of entail in possession and his trustees, answers were lodged for the residuary legatees of a former heir claiming the interest which had accrued on the consigned funds during their author's tenure of the entailed estates. On February 10, 1906, the Lord Ordinary repelled this claim, and his interlocutor was not reclaimed against.

On July 14, 1906, the Lord Ordinary pronounced a further interlocutor authorising payment of the whole fund to the petitioners, and the respondents presented a reclaiming note against this interlocutor. Objection was taken to the reclaiming note when the case appeared in the Summar Roll, on the ground that what was desired by it was to review the interlocutor of February 10, an interlocutor on the merits now become final. The reclaimers maintained (1) that the objection not having been taken in the Single Bills came too late, and (2) was bad, as the interlocutor of July 14 was the first on the merits of the petition, viz., the claim of the petitioners.

Held (1) that the objection taken was not too late, and (2), following *Macqueen v. Tod*, May 18, 1899, 1 F. 859, 36 S.L.R. 649, and *Clark v. Barr's Trustees*, May 26, 1903, 5 F. 856, 40 S.L.R. 625, that the reclaiming note must be refused.

Opinion reserved whether if the objection taken had truly been to the competency of the reclaiming note, i.e., as a reclaiming note against the interlocutor of July 14, the objection must have been taken in the Single Bills.

The Distribution of Business Act 1857 (20 and 21 Vict. cap. 56), section 6, enacts—"It shall not be competent to bring under review of the Court any interlocutor pronounced by the Lord Ordinary upon any such petition, application, or report, as aforesaid" [including petitions and applications relative to money consigned under any statute or law, subject to the order, disposal, or direction of the Court of Session], "with a view to investigation and inquiry merely, and which does not finally dispose thereof upon the merits; but any judgment pronounced by the Lord

Ordinary on the merits . . . may be reclaimed against by any party having lawful interest to reclaim to the Court, provided that a reclaiming note shall be boxed within eight days, after which the judgment of the Lord Ordinary, if not so reclaimed against, shall be final."

On July 4, 1905, a petition was presented by Reginald Edward Walters, Boyton Vicarage, Launceston, and another, trustees acting under a trust deed granted by Percy, ninth and present Marquis of Queensberry, dated July 10 and 14, 1900, for authority to uplift the sum of £1026, 3s. 7d. in the hands of the King's and Lord Treasurer's Remembrancer, which sum consisted of (a) the sum of £240, 19s. 5d., consigned under the provisions of the Private Act of Parliament dealing with the Queensberry estates, 6 Geo. IV, cap. 33, and (b) the accrued interest thereon. The Marquis of Queensberry himself subsequently became a party to the petition.

On July 25, 1905, answers were lodged by Lord Alfred Bruce Douglas and others, residuary legatees under the trust-disposition and settlement of the deceased eighth Marquis of Queensberry, in which they claimed the revenue and interest on the consigned money which had accrued during the period from the accession to the entailed estate of the eighth Marquis to his death on 31st January 1900.

On February 10, 1906, the Lord Ordinary (MACKENZIE) pronounced this interlocutor—"Repels the claim made by the respondents Lord Alfred Douglas and others in their answers, . . . and continues the cause: Finds the respondents are not entitled to expenses."

After some further procedure (on July 14, 1906) the Lord Ordinary (MACKENZIE) pronounced this interlocutor—"Finds that the procedure has been regular and proper and in conformity with the provisions of the statutes; grants warrant and authority for the payment to the petitioner, the Most Honourable Percy Sholto Douglas, Marquis of Queensberry, of the sum of £1026, 3s. 7d. mentioned in the petition, with the interest accrued thereon from 31st day of December 1895; further grants warrant to and authorises the King's and Lord Treasurer's Remembrancer to pay over the said sum of £1026, 3s. 7d., with interest accrued thereon, as aforesaid, to the petitioners, the said Percy Sholto Douglas, Marquis of Queensberry, and Reginald Edward Walters, and Henry Slane Fleming, as trustees mentioned in the petition, and that upon the joint-receipt of the said Percy Sholto Douglas, Marquis of Queensberry, and the said Reginald Edward Walters and Henry Slane Fleming as trustees aforesaid, and decerns."

The respondents Lord Alfred Douglas and others reclaimed.

At the hearing in the Summar Roll the petitioners (respondents) objected to the competency of the reclaiming note, and argued—This reclaiming note was incompetent. Though this was in appearance a reclaiming note against the Lord Ordinary's interlocutor of July 14, 1906, it was

in reality against that of February 10, 1906, which was an interlocutor on the merits, and had now become final. Summary petitions were regulated by the Distribution of Business Act 1857 and not the Court of Session Act 1868—*Macqueen v. Tod*, May 13, 1899, 1 F. 859, 36 S.L.R. 649. Section 6 of that Act provided that a reclaiming note might be taken against an interlocutor on the merits, but only provided it were taken within eight days. That had not been done, so the interlocutor in question was final. It was incompetent to reclaim against another interlocutor for the purpose of reviewing a former interlocutor which had become final—*Macqueen v. Tod*, *cit. sup.*; *Clark v. Barr's Trustees*, May 26, 1903, 5 F. 856, 40 S.L.R. 625.

Argued for the reclaimers and respondents—The objection to the competency of the reclaiming note could not now be taken. It should have been taken in the Single Bills. But supposing the objection to the competency to be proper at this stage, it was bad. The interlocutor of February 10, 1906, was a decision merely on the merits of the reclaimers' claim, and not on the real merits of the cause. The real merits were the right of the petitioners to the money in question, and that was not decided till July 14, 1906. Thus the authorities cited did not apply and the reclaiming note was competent.

LORD PRESIDENT—The reclaimer began by saying that he would object to the respondents' motion that this reclaiming note be dismissed, because it was an objection to the competency, and, not having been taken in the Single Bills, was now too late. I express no opinion on that subject, because the respondents' objection was not really on competency at all, but raised the question whether, by reclaiming the interlocutor under review, it was competent to quarrel an interlocutor pronounced by the Lord Ordinary at a previous stage in the proceedings and not reclaimed against at the time, and which was an interlocutor on the merits though it did not dispose of the whole merits of the petition.

I am unable to distinguish this case from that of *Macqueen v. Tod*, 1899, 1 F. 859, followed in *Clark v. Barr's Trustees*, 1903, 5 F. 856, which decided that the procedure in petitions under the Distribution of Business Act 1857 is unaffected by the Court of Session Act 1868, and that the rights of reclaimers and questions as to finality are settled by the Act of 1857 and not by the Act of 1868. I am therefore of opinion that the interlocutor of 10th February 1906 was an interlocutor on the merits, and if not reclaimed against became final. No reason has been stated why the interlocutor of 14th July 1906 is wrong if the interlocutor of 10th February is to stand.

LORD M'LAREN—I am of the same opinion. I am confirmed in the view which I expressed in *Macqueen v. Tod*, 1 F. 859, by

the further discussion of the question in the present case. It would be highly inconvenient if the rules applicable to reclaimers in ordinary actions, such as actions for the recovery of debt, were applied to administrative orders of the Court. Take, for instance, the case of a petition for the appointment of a factor *loco tutoris* or *curator bonis*. Interlocutors are pronounced in the course of such proceedings on points that do not admit of delay, such as the sale of the ward's estate or its investment. It would be intolerable if after the lapse of twenty years such interlocutors were to be brought under review by a reclaiming note against the curator's discharge. It cannot justly be said that on this point there is any omission in the Court of Session Act 1868, which I think designedly left the procedure in such cases to stand by itself under the code provided in the Distribution of Business Act 1857. It follows that any interlocutor which it is desired to bring under review must be reclaimed against within eight days.

LORD KINNEAR—I agree that what we are now deciding involves no decision as to whether an objection to the competency of a reclaiming note must or must not be taken at Single Bills. The objection here is not to the right to reclaim against the interlocutor of 14th July 1906. If that were the interlocutor to be brought under review, the reclaiming note would admittedly be in time. But when we go into the case it appears that the reclaimer has no interest in that interlocutor unless he can upset the interlocutor of 10th February 1906, and if that is an interlocutor on the merits the reclaiming note is too late. But that objection does not arise upon the face of the reclaiming note, and need not be taken in the Single Bills. I agree that the question whether the interlocutor of 10th February can now be reviewed must be decided under the Distribution of Business Act 1857. It has been argued that that interlocutor was not final, because it did not dispose of the whole merits of the petition. But it disposes upon its merits of the only question in which the reclaimer is interested, and the only question which the Court is asked to consider. It is of no consequence to the reclaimer, and it is irrelevant to the question we are asked to decide, that other controversies between other persons may be raised before the petition is taken out of Court. I am of opinion that the matter we are asked to consider was finally disposed of by the interlocutor of 10th February, and it is too late to bring that interlocutor under review. There is thus no objection to the competency of the reclaiming note against the interlocutor of the 14th July. But the present reclaimers have no interest or title to complain of that interlocutor, and the reclaiming note must therefore be dismissed.

LORD PEARSON concurred.

The Court refused the reclaiming note.

Counsel for the Petitioners (Respondents)
—Horne. Agents—P. Gardiner Gillespie
& Gillespie, S.S.C.

Counsel for the Respondents (Reclaimers)
—Thomas Trotter. Agent—A. W. Gordon,
Solicitor.

Friday, May 31.

SECOND DIVISION.

[Sheriff Court at Airdrie.

WALLACE v. GLENBOIG UNION
FIRECLAY COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (2) (c)—“Serious and Wilful Misconduct”—“Attributable”—Naked Lights in a Mine—Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), sec. 49, Rule 8.

A fireman finding gas in a fireclay pit put up a notice “Gas found in mine” on certain bratticing as he returned. He also nailed up two boards to prevent further passage into the mine, and warned an overman (his superior) of his discovery. The bratticing, which was for regulating the outlet and inlet of air, required to be repaired, and to do this it was necessary to take down and pass the boards. The overman, with three assistants, proceeded with naked lights to take down the boards preparatory to repairing the bratticing, and went as far as a pump about 19 feet beyond the notice. One of the assistants then, without the orders or knowledge of the overman, advanced with his naked light about 100 feet farther into the mine, when his lamp lighted the gas and caused an explosion which killed the overman. It was proved that while the bratticing remained unrepaired, as it was, there was no danger of the gas penetrating to the pump.

Held that the death of the overman was not attributable to his serious and wilful misconduct.

Praties v. The Broxburn Oil Company, Limited, February 26, 1907, 44 S.L.R. 408, commented on, approved, and followed.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1, (2) (c), enacts—“If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed.”

The Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), section 49, enacts, *inter alia*—“Rule 8. No lamp or light other than a locked safety lamp shall be allowed or used—(a) In any place in a mine in which there is likely to be any such quantity of inflammable gas as to render the use of naked lights dangerous; or (b) in any working approaching near a place in which

there is likely to be an accumulation of inflammable gas. And when it is necessary to work the coal in any part of a ventilating district with safety lamps, it shall not be allowable to work the coal with naked lights in another part of the same ventilating district situated between the place where such lamps are being used and the return air-way.”

The additional special rules of the Glenboig Union Fireclay Company, Limited, framed in pursuance of the Coal Mines Regulation Act 1887, *inter alia*, provided—“‘Overman’ means a person having charge of the mine below the surface, or any part thereof, and the workers employed therein. . . .”

“Overman.—6. Subject to the control and direction of the manager or under-manager, the whole operative details shall be under the care and charge of the overman. He shall see that the workers of every class in their several departments discharge their duties; and shall receive and attend to all reports made to him as to the state of repair of the air courses, machinery, mid-walls, trap-doors, roads, ventilating appliances, and working-places. He shall cause remedies to be provided where needed, and shall have power to hire and discharge workers.

“7. He shall see the general and special rules faithfully and vigorously enforced.

“67. Miners and other workers shall not proceed into travelling roads or working-places until it shall have been reported to them by the fireman, roadsman, or other person appointed for the purpose, that such travelling roads or working-places are safe to be entered.

“68. Until such report or intimation of safety is so made, no miners or other workers shall pass beyond the station appointed; and if no other place or station has been appointed, they shall always understand that the pit-head is the station at which they are required to wait the necessary examination and report.

“71. Miners are expressly forbidden to go into or improperly near any place throughout the whole mine where danger is known or suspected to exist. They are forbidden to continue at any part of a face where a sudden outburst of fire-damp shall happen, or where danger from any cause whatever shall apparently threaten, until the same shall have been examined and reported safe, or the impurity or other cause of danger removed.

“100. All workers are prohibited from entering or remaining in any place throughout the whole mine where not absolutely required by duty to be at the time; and on no account shall they proceed through any fence or pass any notice erected to indicate that danger exists.”

This was a stated case on appeal from the Sheriff Court of Lanarkshire at Airdrie in an arbitration under the Workmen's Compensation Act 1897, brought by Mrs Mary Allan or Wallace, Station Cottages, Livingstone, widow of Joseph Wallace, colliery overman, as an individual and as tutor for her pupil children, against the