The Scottish Law Reporter.

SUMMER SESSION, 1868.

COURT OF SESSION.

Wednesday, May 13.

FIRST DIVISION.

KIRK-SESSION OF WESTER ANSTRUTHER *v.* WILKIE.

Reclaiming Days—Competency—13 *and* 14 *Vict., c* 36, *sec.* 11. An interlocutor finding it "incompetent to pronounce farther on the merits of the case," and finding one of the parties liable in expenses, held to be an interlocutor on the merits, and a reclaiming note presented more than 10 days after the date of the interlocutor held competent.

In an action for delivery of certain writs, the Lord Ordinary (KINLOCH), in respect of a minute by the defender, and a statement by the pursuer that they accepted the offer contained in the minute, found it unnecessary to pronounce any interlocutor in the merits; appointed parties to be heard on the question of expenses; remitted to Mr Kermack to adjust a deed and thereafter pronounced this interlocutor:—

"*Edinburgh, 4th March* 1868.—The Lord Ordinary having heard parties' procurators, and made avizandum and considered the process: Finds it incompetent for the Lord Ordinary to take judicial cognisance of the matter embraced in Mr Kermack's report, or to pronounce further on the merits of the present case; and, with respect to the question of expenses, Finds the defender, Mr Wilkie, liable to the pursuers in the expenses of process, subject to modification: Allows an account thereof to be lodged, and remits to the auditor to tax the same, and to report."

The defender lodged a reclaiming note on 16th April. When the case appeared in the single bills on the meeting of the court in May,—COOK, for the respondent, objected to the competency of the reclaiming note, on the ground that, not being a reclaiming note on the merits, it ought to have been presented within 10 days from the date of the interlocutor reclaimed against. He cited *Cairns* 14 December 1858, 21 D., 116.

PATTISON for reclaimer, cited *Fisher*, 7th March 1851, 13 D., 906.

LORD CURRIEHILL—I think this reclaiming note is competent. The Lord Ordinary has found that it is incompetent to decide this case. It is not that he refuses to decide the case, but that he holds it is incompetent to do so. I hold that this interlocutor, if final, is an end of the case, and is an interlocutor on the merits.

LORD DEAS—I have no doubt. The case is perfectly clear. If there are merits in this case, the party maintaining them is put out of court by this interlocutor.

LORD ARDMILLAN—I am of the same opinion. I am not sure that to dispose of the merits does not mean something different from deciding upon them. If the Lord Ordinary says he will not decide on them, can it be said that he does not thereby dispose of the merits?

LORD PRESIDENT—I am of the same opinion.

Agents for Reclaimer — Macdonald & Roger, S.S.C.

Agents for Respondent—T. & R. Landale, S.S.C.

Wednesday, May 13.

SECOND DIVISION.

REID *v.* KEITH.

Lease—Shop—Auction—Inversion of Possession. Held, that when a lease of a shop is granted for the carrying on of a specified trade, it is an inversion of the possession, and therefore illegal, without consent of the proprietor, to carry on another trade that is materially different.

This was an advocation from the Sherff-court of Aberdeenshire, of a process of interdict brought in that court by the advocator against the respondent. The advocator was proprietrix of a shop in Union Street, Aberdeen, which was let up to the 1st June 1863 to William Fraser, merchant in Aberdeen, as a wine and grocery shop, under a lease which excluded assignees and sub-tenants, but contained no special conditions with reference to the business to be carried on in the premises. In October 1862, the respondent applied to the advocator for a lease of this shop as Fraser's successor, and obtained a lease for five years from the date of the expiry of Fraser's possession and the lease so granted contained an express prohibition against the use of the shop as an auction room. Subsequent to the granting of this lease, the respondent made an arrangement with Fraser by which he obtained immediate entry to the subjects, taking over the remainder of Fraser's lease, and obtaining the verbal consent of the advocator to this arrangement. The question now was, whether, during the period which intervened before the expiry of Fraser's lease, the respondent was entitled to sell goods by auction in the shop in question? It was, on the one hand,

maintained by him (the respondent) that there was no restriction upon his use of the subjects during the period in question, either at common law or in virtue of any arrangement to that effect. It was, on the other hand, maintained by the advocator that the use of the subjects as an auction room was (1) illegal, as an inversion of the use for which the subjects were let to Fraser; and (2) contrary to an express condition alleged to have been made verbally by the advocator in consenting to the subsetting of the shop by Fraser.

The Sheriff-substitute granted interim interdict; but, on a record having been made up and proof led, he recalled that interdict and refused the advocator's petition. The Sheriff adhered, and the advocator now brought the present advocation, in which it was agreed to cancel the proof taken in the Inferior Court, and have a new proof before the Lord Ordinary. On advising that proof, the Lord Ordinary adhered to the judgment of the Sheriff.

His Lordship pronounced the following interlocutor:—

"Finds that the advocator (petitioner in the Sheriff-court) has failed to prove, as matter of fact, that it was a condition of the consent given by her, or on her behalf, to the occupation by the respondent of the shop No. 88 Union Street, Aberdeen,—of which she was proprietrix, and of which the witness William Fraser was the tenant for the period between the 6th October 1862 and 1st June 1863, when the lease held by the said William Fraser was to terminate, and a lease in favour of the respondent for five years was to commence to run,—that no public sale or sales of books by auction was to be permitted therein during the period foresaid: Finds in point of law that, having relation to the character of the subjects so held in lease by Mr Fraser, and let to the respondent, there existed no implied prohibition against carrying on sales by auction therein: and further, Finds that such sales by auction did not operate an inversion of the use and possession of the premises; and, with reference to the foregoing findings, Repels the reasons of advocation; remits *simpliciter* to the Sheriff; and decerns: Finds the advocator liable to the respondent in the expenses incurred by him in this Court: Allows an account thereof to be lodged, and remits the same to the auditor to tax and to report.

(Signed) "CHARLES BAILLIE.

"*Note.*—This case is not free from difficulty. But the Lord Ordinary is of opinion that no general principle of law or decision can be referred to by the advocator which fixes that it is illegal to carry on sales by auction in a shop such as that here in question, within burgh. If special damage through such use be done and proved, the interference of the proprietor therewith would be warranted on grounds which would be distinct and sufficiently intelligible. But that is not the case with which the Lord Ordinary has had here to deal, and, in the whole circumstances, he is of opinion that the advocator has failed to show reason sufficient to set aside the judgments in the Sheriff-court, which form the subject of this advocation. (Initd.) C. B."

The advocator reclaimed.

MACKENZIE and BALFOUR for her.

MUIR and REID in answer.

The Court held that the use as an auction room of subjects let as an ordinary shop was an inversion of the possession, and was illegal without the consent of the proprietor; that there was no reliable evidence of such consent; and that being so, it was unnecessary to inquire whether there had been any express prohibition introduced into the consent given by the landlord to the subset by Fraser.

Agents for Advocator—Hill, Reid and Drummond, W.S.

Agent for Respondent—W. Officer, S.S.C.

Friday, May 15.

TODD *v.* SANDISON AND OTHERS.

Poor—Assessment—Lands and Heritages—Parish. Circumstances in which *held*, on advising a proof, that certain lands were situate within a parish, and therefore liable to contribute assessment for the relief of the poor laid on lands and heritages, and that certain other lands were not so situate and therefore were not liable.

This was an action brought by Archibald Todd, Inspector of Poor of the parish of Eyemouth, against Magnus Sandison of Highlaws, George Webster of Hallydown, Robert Cosens of Bogangreen, and Mr John Johnston, Inspector of Poor of the parish of Coldingham; and the object of the action was to have it declared that certain lands belonging to the defenders were situated in the parish of Eyemouth, and liable to assessment in that parish for relief of the poor.

After various procedure, and a proof taken by commission of the averments of parties, the Lord Ordinary (JERVISWOODE) found (1) with reference to the estate of Highlaws, that three fields forming part of that estate lay within the parish of Eyemouth, but that, *quoad ultra*, the defender Sandison was entitled to absolvitor; (2) with reference to the estate of Hallydown, that three fields known as Bennesty, Longbron, and Short Crimmels lay within the parish of Eyemouth, but that, *quoad ultra*, the defender Webster was entitled to absolvitor; (3) with reference to the estate of Bogangreen, that no part of that estate lay within the said parish, and therefore that the defender Cosens was entitled to be entirely assoilzied.

His Lordship added the following note:—

"The questions, which have been fully discussed before the Lord Ordinary, and on which he has been called on to pronounce judgment, are, in some respects, of a peculiar character, whether they be regarded in relation to the matters of fact, or to the legal principles which bear upon their determination.

"One point of leading importance, on which the Lord Ordinary feels it due to the parties to endeavour to explain his views here, is that which arises under the second plea in law for the pursuer, which is rested on the effect due to the Act of Parliament there and in the record mentioned.

"If, as has been maintained on the part of the pursuer, the extent of the parish be so distinctly fixed and ascertained under the provisions of that Act that any competent authority having the Statute to administer can, from its own terms, arrive at a safe conclusion as to the subjects which it embraces and to which it applies, the contention of the pursuer on this point might at once prevail.

"But if it be true, as the Lord Ordinary holds it to be, that the Act of Parliament is open to, and requires construction by extraneous inquiry in relation to the terms in which the subjects which are to form the new parish are therein described, it becomes all-important to ascertain how the provi-