Friday, May 27.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

SAWERS *v.* CLARK.

Proof—Reference to Oath.

Where a cause had been disposed of upon the relevancy of the averments made upon record, *held* that it was incompetent for the unsuccessful party thereafter to refer to the oath of his opponent the subject-matter of the dispute between them.

Held that it was incompetent to refer to the oath of an agent, by whom an alleged agreement was made for the party, the terms of the agreement.

Terms of a reference to oath which was held to be *incompetent.*

Process—Reference to Oath—Reclaiming-Note—Effect of Reclaiming-Note against Interlocutor Refusing a Reference to Oath after Final Judgment—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 52.

After the Lord Ordinary had pronounced final judgment in a cause, and the time for reclaiming against his judgment had expired, the unsuccessful party made reference to the oath of the opposing party, and the Lord Ordinary having refused the reference, a reclaiming-note was presented against his interlocutor.

Held that this reclaiming-note did not have the effect of submitting to review the previous judgment of the Lord Ordinary on the merits of the cause.

On 18th June 1890 John Sawers paid Andrew Clark, who held two decrees against him, the sum of £220, for which Clark granted the following receipt:—"Leith, 18th June 1890.—Received from John Sawers, Esq. of Parkfoot, the sum of £220, being the principal sums contained in the two decrees at my instance against him."

Clark thereafter raised an action against Sawers for payment of £54, which was made up of the interest due on the sums decerned for in the foresaid decrees, and the expenses of diligence thereon, and an account for services alleged to have been rendered by Clark as Sawers' agent. On 20th March 1891 the Lord Ordinary found that Clark was "not entitled to credit in this action for the sums of interest contained in or attaching to existing decrees," and *quoad ultra* remitted Clark's accounts to the Auditor *qua* Accountant and Auditor; and by a subsequent interlocutor the Lord Ordinary approved of the Auditor's report, and decerned against the pursuer for a sum of £19, 0s. 6d., and found the pursuer entitled to a modified sum of expenses. Sawers having reclaimed against this interlocutor, the First Division on 21st October 1891, "having heard counsel, . . . and considered the whole cause," recalled the interlocutor reclaimed against, assoilzied the defender, and decerned, finding the defender entitled to expenses.

In the meantime, pending the hearing on the reclaiming-note, Clark charged Sawers under one of the decrees before mentioned to pay him a sum of £15, 9s. 11d., as the interest accrued thereon, and Sawers brought a suspension of this charge, founding, *inter alia*, upon the judgment pronounced by the First Division on 21st October 1891, and pleading "*res judicata.*"

Clark, in answer, denied that the matter was foreclosed by the interlocutor referred to, and also averred that the following letter, dated 18th June 1890, had been delivered to the complainer and his agent, along with the receipt of the same date—"In order to avoid, if possible, further litigation, an interim settlement to-day has been arrived at, whereby you have paid me the sum of £220, being the principal sums contained in the two decrees at my instance against you, but under reservation of my right to recover from you the interest and expenses detailed in the states of debt dated 18th curt., but sent to your agent Mr Gentle preparatory to a settlement on 16th curt., it being distinctly understood by both you and me that my right to recover said interest and expenses is expressly reserved, as also your objections thereto, and that the settlement arrived at does not imply any abatement or abandonment by me of said interest and expenses."

On 6th January 1892 the Lord Ordinary (KYLLACHY), being of opinion that the judgment pronounced by the First Division on 21st October 1891 was conclusive against the respondent's claim for interest under the decrees obtained by him against the complainer, sustained the reasons for suspension, suspended the charge, and decerned, finding the suspender entitled to expenses.

After this interlocutor had become final the respondent lodged the following minute of reference—"The respondent refers it to the oath of the complainer, whom failing to his agent Andrew Gentle, solicitor, Edinburgh, who acted for and along with the complainer at the time, and who alone knows the terms and conditions of the settlement then arrived at, whether the payment made by the complainer to the respondent on 18th June 1890 was an interim payment, and the settlement then arrived at was an interim settlement, and whether the letter" (above quoted) "was delivered by the respondent to the complainer and to the said Andrew Gentle prior to the money being paid, and whether said letter correctly embodied the terms and conditions of the settlement then arrived at between the complainer and the respondent."

On 19th February 1892 the Lord Ordinary refused the reference to oath contained in the above minute.

The respondent reclaimed, and argued—1. A reference to oath was competent after final judgment—Dickson on Evidence, sec. 1433—and it was competent to refer to the oath of an agent or factor with regard to a transaction wholly carried through by him

for his principal. The reference should therefore be sustained. 2. Alternatively, it was maintained that the present reclaiming-note brought up the previous judgment of the Lord Ordinary on the merits—Court of Session Act 1868, sec. 52; Mackay's Practice, i. 552.

Argued for the complainer—1. The reference was incompetent, and was rightly refused. 2. The reclaiming-note did not bring up the previous interlocutor on the merits, as that interlocutor had become final, and nothing remained to be done in the cause except that the Court should exercise the "executorial" function of decerning for the expenses already found due—*Stirling Maxwell's Trustees* v. *Kirkintilloch Police Commissioners*, October 11, 1883, 11 R. 1; *Tennents* v. *Romanes*, June 22, 1881, 8 R. 824.

At advising—

LORD PRESIDENT—The first question is, whether the Lord Ordinary decided rightly when by his interlocutor of 19th February 1892 he refused the reference to oath contained in the minute, and my opinion is that the Lord Ordinary did decide rightly in refusing that reference. It is to be observed that the judgment previously given by the Lord Ordinary, which had become final by that time, was a judgment not upon fact, but upon the averments made on record, and accordingly was a judgment on relevancy and law. Now, the right which a party has after judgment to refer to the oath of his opponent is described by Mr Bell (Prin. sec. 2263) as "the last resource of a party who fails in or despairs of any other evidence." The question whether the averments of a party are relevant is not a proper matter for reference. Therefore the subject-matter of the reference which was here made is totally incompetent looking to the quality and nature of the judgment previously pronounced. But the reference is shown to be still more clearly incompetent when we turn to the terms of the minute of reference itself. The questions referred are "whether the payment made by the complainer to the respondent on 18th June 1890 was an interim payment, and the settlement then arrived at was an interim settlement, and whether the letter quoted was delivered by the respondent to the complainer and to the said Andrew Gentle prior to the money being paid, and whether said letter correctly embodied the terms and conditions of the settlement then arrived at between the complainer and the respondent." It is not therefore a reference of the whole cause, even if that were competent, but a reference of certain queries from which an inference might be drawn adverse to the party referred to. That is not a competent reference. It is to be further observed that the reference is not to the opposing party alone, but to the "complainer, whom failing to his agent," and the qualification of the latter is thus described, "who acted for and along with the complainer at the time, and who alone knows the terms and conditions of the settlement then arrived at." But Professor Bell, in the same section as I have already referred to, says—"And it is not competent to refer to the oath of an agent, by whom an alleged contract was made for the party, the terms of the contract." That is directly in point, and accordingly there are a number of grounds, any one of which is sufficient to render this reference incompetent, and to place the Lord Ordinary's interlocutor refusing the reference beyond question.

But then it is said that the reclaiming-note against this interlocutor brings up for review the Lord Ordinary's previous judgment on the merits. By the 18th of February that judgment had become final, and the question is, whether the respondent, having allowed it to become final, can now seek by the same act to do two things, first, to go back upon and examine an interlocutor which has become final, and second, ask the Court to grant him a reference to the oath of the opposing party. A reference to oath is the resort of a party who gives up the judgment of the Court and refers to his opponent on some question of fact. How then is it possible to bring together the two interlocutors pronounced in this case. It is clear that the object of the provision contained in section 52 of the Act of 1868 was to sweep out of the way of the Court the difficulty of doing justice in the ordinary *cursus curiæ*. The two remedies here sought, the reference to oath and the examination of the Lord Ordinary's judgment on the merits, are clearly incompatible. In the one view, the cause is to be decided by the Court on grounds of law; in the other all that is swept away, and the decision of the cause is referred to the oath of the opposing party.

I am therefore clearly of opinion that the previous interlocutor of the Lord Ordinary is not brought up by the reclaiming-note against his interlocutor of 19th February 1892, and that we cannot enter upon an examination of the merits of the judgment of 6th January 1892.

LORD ADAM—The Lord Ordinary's interlocutor of 6th January 1892 disposed of the whole merits of the case, and left nothing to be done in the Court of Session except that the Court should perform what was called in the case of *Stirling Maxwell's Trustees* its "excutorial" functions as to expenses. The effect of allowing that interlocutor to become final was to end the proper process in the Court of Session. But the law no doubt is, that at any time before extract a party has the privilege of stopping extract by a reference to the oath of his opponent. That is a proceeding apart and separate from, though arising out of and incidental to the process. It is an interlocutor refusing a reference of that nature with which we are here dealing, and the question is, whether an interlocutor of this kind is referred to in the 52nd section of the Court of Session Act. I do not think it is, and I am therefore of opinion with your Lordship that this reclaiming-note does not submit to review the previous interlocutor of 6th January 1892.

The only remaining question is, whether the Lord Ordinary was right in refusing the reference to oath craved by the respondent. That reference is to the oath "of the complainer, whom failing to his agent." The reference to the oath of the agent is not competent, and I hold the reference was properly refused.

LORD M'LAREN—I agree that the reference is not expressed in such terms that the complainer was bound to accept it, and therefore that the Lord Ordinary rightly refused to sustain it.

On the other question, I concur in the view suggested by Lord Kinnear in the course of the discussion, and further developed by your Lordship in the chair, that it is not according to our practice that a reclaiming-note against an interlocutor refusing a reference to oath should be counted as a reclaiming-note on the merits of the case. A reference to oath puts an end to the case as a case in litigation. The object of the present reclaiming-note is that the Court should sustain the reference to oath, and we are therefore disentitled from examining the Lord Ordinary's previous judgment on the merits. The opposite view seems to me to be entirely at variance with the language of the Court of Session Act.

LORD KINNEAR concurred.

The Court adhered.

Counsel for Complainer—W. Campbell. Agents—Gill & Pringle, W.S.

Counsel and Agent for Respondent—Party.

Tuesday, May 31.

FIRST DIVISION.

FRASER *v.* MAGISTRATES OF ROTHESAY.

Reparation—Dangerous Part of a Road—Fencing.

Held that part of a road supported upon a retaining-wall, and with a drop of 8 or 9 feet to the seashore, was not necessarily dangerous so as to require fencing, and that the question of whether it was dangerous or not was peculiarly one for a jury to determine upon evidence.

Mrs Alice Graham or Fraser, Whitehill Street, Glasgow, and her children, brought an action against the Provost, Magistrates, and Town Council of the burgh of Rothesay, being the local authority for said burgh, for damages and *solatium* for the death of the late Robert Fraser, her husband. Mrs Fraser also sued for damages for injuries sustained by herself.

The case was tried before Lord Adam and a jury upon 21st, 22nd, and 23rd March 1892, when the following facts were ascertained—The deceased Mr Fraser and his wife were, on the evening of 29th August 1890, standing on the public road within the burgh of Rothesay which leads from Rothesay to Port Bannatyne. The road in question runs along the seashore. At the point at which Mr and Mrs Fraser were standing there is a footpath on the side furthest from the sea, but there is none on the side nearest to the sea. Along the roadway there is a single line of tramway rails, with occasional double lines or lyes used as crossing-places for the tram-cars. The road is bounded and supported on the side nearest to the sea-wall by a perpendicular breast or retaining-wall. The top of this wall is on the same level as the road, and the depth of the wall from the road to the shore beneath varies from 8 to 9 feet or thereby, the shore below consisting of rock and shingle. There is no cope or parapet or fence or protection of any kind on the sea side of the road for the protection either of foot-passengers or of vehicles. Mr and Mrs Fraser were standing near the edge of the retaining-wall looking out towards the sea. An open hackney carriage, occupied by three ladies, was being driven along the road at the time. When a little distance away from the place where Mr and Mrs Fraser were standing one of the wheels of the carriage collapsed, the horse ran off, and the horse and the carriage and its occupants were precipitated over the retaining-wall on to the shore beneath. The horse and carriage swept Mr and Mrs Fraser also over the breast-wall on to the shore beneath. Mr Fraser sustained injuries from which he died in the course of a few hours, and Mrs Fraser suffered serious personal injury.

The pursuers contended, *inter alia*, that the defenders had failed in their duty of fencing the said road—a duty imposed on them at common law and by statute, in particular by section 94 of the Act 1 and 2 Will. IV. c. 43, which provides as follows, "And be it enacted, that the trustees of every turnpike road shall erect sufficient parapet walls, mounds, or fences, or other adequate means of security along the sides of all bridges, embankments, or other dangerous parts of the said roads"—in respect that the part of the road in question was a dangerous part.

The jury returned a verdict for the defenders.

The pursuers moved for a rule, on the ground that the verdict was contrary to evidence, as the place of the accident was plainly dangerous—*res ipsa loquitur*—and ought to have been fenced.

At advising—

LORD ADAM—One of the questions raised was, whether or not the particular part of the road where the accident happened was dangerous—in which case it was admitted that the defenders were bound both at common law and under the statute of Will. IV. to fence it.

On this question we had a large body of conflicting evidence. Witnesses were adduced who spoke to the condition of hundreds of miles of roads in the Highlands,