

# 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.

PARTISON 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 inter-

locutor, 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 advocacy from the Sheriff-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,