*Friday, January* 16.

## FIRST DIVISION.

### M'EVOY *v.* BRAES.

*Process—Reclaiming-Note—Printing and Appending Record—Judicature Act* 1825 (6 *Geo. IV. c.* 120), *sec.* 18—*A.S., 11th July* 1828, *sec.* 77.

A Lord Ordinary having dismissed an action after hearing parties, the pursuer, who was suing *in forma pauperis*, reclaimed, but failed to append to the reclaiming-note a print of the record, the printing of which had been dispensed with in the Outer House. When the reclaiming-note appeared in Single Bills, the reclaimer moved the Court to dispense with printing and send the case to the roll.

*Held* that the reclaiming-note was incompetent, a print of the record not having been appended thereto in terms of section 18 of the Judicature Act, and section 77 of the relative Act of Sederunt, 11th July 1828.

Michael M'Evoy, labourer, Bo'ness, suing *in forma pauperis*, raised an action against John Braes, grocer, Linlithgow. In the Outer House printing was dispensed with.

On 11th December 1890 the Lord Ordinary (WELLWOOD) "having considered the debate, together with the process," sustained certain of the defender's pleas and dismissed the action.

The pursuer printed and boxed a reclaiming-note against this interlocutor, but did not append thereto a print of the record.

When the reclaiming-note appeared in Single Bills, the pursuer moved the Court to dispense with printing and send the case to the roll for discussion.

The defender objected to the competency of the reclaiming-note, on the ground that a print of the record was not appended thereto, and argued—The provisions of the Judicature Act and of the relative Act of Sederunt were imperative on this point. If the reclaimer desired a dispensation from printing, he ought, before lodging his reclaiming-note, to have presented a note craving the Court to grant such dispensation—Judicature Act 1825 (6 Geo. IV. c. 120), sec. 18; A.S., 11th July 1828, sec. 77; *Miller* v. *Simpson*, December 9, 1863, 2 Macph. 225; *Muir* v. *Muir*, October 17, 1874, 2 R. 26.

The pursuer argued—The provision of the Judicature Act was directory, not imperative. The pursuer could not have moved the Court to dispense with printing sooner than he did, as until the reclaiming-note was boxed the process was not before the Court. The procedure suggested by the defender related only to appeals from inferior courts, which are regulated by the 1868 Court of Session Act and relative Act of Sederunt. If it was held that his reclaiming-note was incompetent because a print of the record was not appended thereto, the practical result would be that a person suing *in forma pauperis* would never be able to bring an adverse judgment of the Lord Ordinary under the review of the Inner House—*Campbell's Trustees* v. *Campbell*, March 7, 1868, 6 Macph. 563; *Wilson* v. *Stark*, February 17, 1844, 6 D. 692.

At advising—

LORD PRESIDENT—This is a reclaiming-note against an interlocutor of Lord Wellwood's pronounced *in foro*, in which his Lordship, having considered the debate, together with the process, sustained certain of the defender's pleas, dismissed the action and decerned, and therefore it appears on the face of the interlocutor that this is a reclaiming-note against a judgment of the Lord Ordinary pronounced after hearing parties, and which disposes of the whole merits of the cause. The objection taken to the competency of the reclaiming-note is that the closed record is not appended thereto. When the point was stated to us several cases were cited which left the impression on the mind of the Court that there was some doubt as to the existing practice. That impression has turned out to be a false impression, and I cannot help thinking that there was some confusion in the minds of the parties due to their mixing up the present question with the question of printing, or the expenses of printing, in appeals, which is regulated by the Court of Session Act 1868. Acting under the impression I have referred to, we thought it would be desirable to confer with the other Division of the Court before deciding the point raised, but on looking into the cases we found that there was no occasion for such a conference, as the question is settled by a series of decisions, and the practice seems to be uniform. The object, therefore, of the suggested conference was found not to exist, as the question on which we desired to consult the other Division was already settled by authority.

That question depends on the construction of the 18th section of the Act 6 Geo. IV. cap. 120, and section 77 of the Act of Sederunt of 11th July 1828. Section 18 of the statute provides—"That when any interlocutor shall have been pronounced by the Lord Ordinary, either of the parties dissatisfied therewith shall be entitled to apply for a review to the Inner House of the Division to which the Lord Ordinary belongs; provided that such party shall, within twenty-one days from the date of the interlocutor, print and put into the boxes appointed for receiving the papers to be perused by the Judges, a note reciting the Lord Ordinary's interlocutor, and praying the Court to alter the same in whole or in part; and if the interlocutor of the Lord Ordinary shall have been pronounced on cases, the party applying for a review shall, along with the note as above directed, print and put into the boxes the cases which have been before the Lord Ordinary; and if the interlocutor has been pronounced without cases, the party so applying shall, along with his note as above directed, put into the boxes printed copies of the record authenticated as before, and shall at the same time give notice of his application for

review by delivery of six copies of the note to the known agent of the opposite party." Now, it cannot be doubted that that provision is expressed in imperative terms. It provides that certain things are to be done in order to enable parties to bring an interlocutor of a Lord Ordinary under review. One condition is, that "the party applying for a review shall, along with his note, . . . put into the boxes printed copies of the record."

The Act of Sederunt does not superadd any additional condition or penalty. It merely makes a regulation which gives force and effect to the statutory provision. That regulation is contained in the 77th section of the Act of Sederunt, and is in these terms—"Provided always, that such notes, if reclaiming against an Outer House interlocutor, shall not be received unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record, in terms of the statute if the record has been closed." . . . Now, that is a mere direction to the Clerk of Court to give effect to the statutory provision by refusing to receive a reclaiming-note when the record is not appended thereto. Taking the statute and the Act of Sederunt together, it appears to me that there is no room for doubt or hesitation as to the meaning or practice or as to the force of the Act of Sederunt. Accordingly, we find that it has been decided over and over again that any failure to comply with these provisions is quite fatal. The first case on the point is the case of *Brown* v. *Moodie*, 17 Jur. 568, in which the failure consisted in the summons and defences not being appended, while the closed record was. That was in the time—before 1850—when the revised condescendence and answers formed a separate paper. The original summons and defences were part of the record, but it also consisted of the revised condescendence and answers. The case accordingly shows that the whole record must be appended in order to comply with the statute. In two cases the reclaimers failed to box the record at all, viz.—*National Exchange Company* v. *Drew & Dick*, Nov. 16, 1860, 22 D. 27, and *Bell* v. *Ogilvie*, January 28, 1862, 24 D. 375—and there the statutory provision was held imperative, and the want of the record was held to be fatal. The cases even go further, for in *Carter* v. *Johnston*, February 6, 1847, 9 D. 598, the record was closed upon the original summons and defences and pleas-in law for the pursuer, and the omission to print the pursuer's pleas as part of the record was held to be fatal. Then there is another case illustrative of the same principle, and giving effect to it in somewhat hard circumstances—*Muir* v. *Muir*, Oct. 17, 1874, 2 R. 26. In that case an extensive amendment on the record had been made in the Outer House in writing, and the record appended to the reclaiming-note was the original printed record with the addition of the amendment in MS., and the omission to print the amendment was held fatal to the reclaiming-note, though it looked like a mere piece of inadvertence. Besides the cases I have mentioned, there have been various others to the same effect, and it seems to me impossible to dispute that the practice has been uniform, and I think it would be spending judicial time idly if we were to have further argument upon the matter. This is a reclaiming-note against the judgment of a Lord Ordinary pronounced *in foro*, and the closed record is an indispensable appendage to the reclaiming-note, without which the reclaiming-note cannot be received.

LORD ADAM—I have had an opportunity of considering the cases to which your Lordship has referred, and to my mind they are perfectly conclusive of the matter.

LORD KINNEAR—I am of the same opinion. I think the question is absolutely concluded by authority.

LORD M'LAREN was absent.

The Court refused the reclaiming-note as incompetent.

Counsel for the Pursuer—Cosens. Agent—A. Gordon Petrie, S.S.C.

Counsel for the Defender—M'Lennan. Agent—Thomas Liddell, S.S.C.

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*Friday, January* 16.

## FIRST DIVISION.

[Lord Kyllachy, Ordinary.

(TEIND CAUSE.)

## SPEIR *v.* LORD WILLOUGHBY DE ERESBY.

*Teinds—Sub-Valuation and Approbation—Construction—Prescription.*

In a note to a sub-valuation certain lands were declared to be "nocht valued becaus yai ar sett decimis inclusis," and among these the lands of D. An action of approbation was subsequently brought by the proprietor of the lands of P, which had been valued in the sub-valuation, and by the proprietor of the lands of D, in which the lands of D were described as "formerly a part of the lands of P." The summons referred to the report of the Sub-Commissioners, and concluded for approval of that report in so far as concerned the valuation of the pursuer's lands before specified, and the Court ratified, allowed, and approved the report of the Sub-Commissioners in so far as concerned the valuation of the pursuer's lands libelled, interponed their decreet and authority thereto, found and declared in terms thereof that the yearly avail of the stock and teind of the lands of P were and should be in all time coming 40 bolls victual, and decerned conform to the conclusions of the libel. More than forty years after the date of the