Friday, May 21.

FIRST DIVISION.

PETITION—DAVID STAIG.

Process—20 *and* 21 *Vict., cap.* 56—*Reclaiming Note.* *Held* that an interlocutor by the Lord Ordinary on the Bills in vacation, pronounced in a summary petition, which during session would have come before the Junior Lord Ordinary, must be reclaimed against in eight days.

An interlocutor on this petition was pronounced by Lord Gifford, the Lord Ordinary officiating on the Bills, on May 7, 1875. This was reclaimed against on May 19, and on the case appearing in the single bills the respondent objected that the reclaiming note, not having been boxed within eight days, was too late.

At advising—

LORD PRESIDENT—My Lords, I think we must refuse this reclaiming note, in respect that it is too late. It is quite possible that has been caused by a mistake, but unfortunately it is a fatal mistake. There is no doubt that this is one of the petitions to be presented to the Junior Lord Ordinary in terms of sec. 4 of the Act of 1857. Then it is provided by sec. 5 that "the judgment of the Lord Ordinary granting or refusing any such petition or application, or disposing of any such report, unless the same shall be brought under review in manner hereinafter provided, shall be equally valid and effectual as a judgment of either Division of the Court to the like effect." Section 6 provides that "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, with a view to investigation and inquiry merely, and which does not finally dispose thereof on the merits; but any judgment pronounced by the Lord Ordinary on the merits, unless when the same shall have been pronounced in terms of instructions by the Court on report as herein-before mentioned, 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." Now this interlocutor was pronounced on May 7, and the reclaiming note was not boxed until May 19, and consequently after eight days. It has been said, however, that this interlocutor is one by the Lord Ordinary on the Bills, and so is a Bill-Chamber interlocutor, which may be reclaimed against within fourteen days. Now this is not a Bill-Chamber interlocutor; it is not an interlocutor is a Bill-Chamber case. The process is in the hands of one of the clerks of Session. The Lord Ordinary on the Bills in vacation comes *in loco* of the Junior Lord Ordinary, and in discharging his duties he is not exercising the jurisdiction of the Bill-Chamber.

The Court pronounced the following interlocutor:—

"Refuse the reclaiming note as incompetent; find the respondent entitled to additional expenses, which modify to two pounds two shillings sterling, and remit to the Junior Lord Ordinary to decern for said modified expenses along with the other expenses found due by said interlocutor."

Reclaimer's Counsel—J. Campbell Smith. Agent—Andrew Clark, S.S.C.

Respondent's Counsel—J. M. Gibson. Agents—Macnaughten & Finlay, W.S.

Tuesday, May 21.

FIRST DIVISION.

ROBB *v.* SCHOOL BOARD OF LOGIEALMOND.

(*Ante, p.* 278.)

School—Schoolmaster—Dismissal—Retiring Allowance—Education Act, 1872, *cap.* 60. Circumstances in which *held* that a schoolmaster dismissed for inefficiency, in terms of the 60th section of the Education Act of 1872, was not entitled to demand a retiring allowance.

The circumstances of this case are fully narrated in a former report, *ante, p.* 278. In accordance with the interlocutor of the Court of 5th February 1875, the pursuer put in the following Minute of Amendment:—

"6. The attendance at the said Side school at Ballandee has not been large at any time. The supply of schools in the district has been disproportionate to its wants, and even an equal distribution of pupils among these schools would have allowed only of a small attendance at each. The gradual decrease in the number of pupils at the said Side school has not been caused by the pursuer's inattention or neglect of duty, and he has constantly and regularly fulfilled the duties incumbent on him. Down to the year 1872 his school was regularly visited and inspected by a committee of the presbytery, and before the School Board came into existence no fault was ever imputed to him, and no complaint against him was ever made with regard to his discharge of duty as a teacher.

"7. Various causes operated to the prejudice of the said Side school. One was, that the other schools in the parish were more conveniently placed in the centres of population. These are the hamlet of Harrietfield, about a mile to the west of Ballandee, where the pursuer's school was situated; and the hamlets of Chapelhill and Millhaugh, which are near one another, about a mile to the east of Ballandee. At Harrietfield there was a school in connection with the United Presbyterian Church, and at Millhaugh an adventure school. Excepting at these hamlets, the population of the parish was widely scattered over a large area, and very few resided at or near Ballandee.

"8. Another cause was, that the population of the district has been generally on the decrease, and since 1858 has been diminished by about a third. This was owing to the removal of small dwellings formerly occupied by cottars, and also in a considerable measure to the stoppage of a woollen factory which was worked at Millhaugh until about the year 1867.

"9. Other circumstances from which the said Side school at Ballandee suffered arose out of sectarian rivalry and animosity, and also out of the political feeling that ran high in the district in

and subsequent to the year 1868. For example, the teacher of the United Presbyterian school received only a nominal salary, which was supplemented by his fees, and to keep up the supplement the Dissenters in the parish worked and canvassed on all hands in his favour, and in opposition to the pursuer. Again, during the year 1868-69, the minister of the *quoad sacra* charge of Logiealmond, with the view to counteract the influence of dissent, and compete with the United Presbyterian school at Harrietfield, opened a school at Chapelhill, which he taught himself without charge. The effect of this was that, while it drew a number of pupils away from the United Presbyterian school, it unfortunately inflicted serious injury on the said Side school at Ballandee, and rendered the working of it more and more difficult and precarious."

The following Answers were lodged for the defenders:—

"Art. 6. Denied. Explained, that Mr Robb's predecessor as teacher of the school had on an average from 70 to 80 scholars. Mr Robb, for the first year after his appointment, had about 70 or 80 scholars. For some time before his removal there were no scholars attending the school. The school accommodation in the district has not been disproportionate to its wants, the present teacher at Ballandee (Robb's immediate successor) having had in June last 69 scholars. The present scholars consist of the children of Established Church, Free Church, and United Presbyterian Church parents. The decrease in the number of pupils was caused by Mr Robb's inattention and neglect as a teacher. The pupils were withdrawn at great inconvenience to themselves and their parents. Admitted that a committee of Presbytery for some years attended the annual examination of Robb's school, but they discontinued their attendance.

"Art. 7. Denied that the causes here stated operated to the prejudice of Robb's school. On the contrary, the school at Harrietfield being about a mile west from Ballandee, the children of parents living at or about Chapelhill and Millhaugh had to travel two miles twice a day to attend school at Harrietfield. Besides, the United Presbyterian congregation at Harrietfield being unable to pay an adequate salary, the teacher at that school was seldom a person of sufficient attainments. It had nine teachers within the eight years prior to 1873. The inspector's report is referred to as to the Harrietfield school. Ballandee school is conveniently and centrally situated for the people in the district, and the present teacher at Ballandee has experienced no difficulty in acquiring and maintaining an adequate number of scholars. The school at Millhaugh was a female school (taught by a female, and principally a sewing school for girls), and was only in existence for a short time.

"Art. 8. Admitted that some small holdings were converted into larger ones, and may have caused a small decrease in the population. Denied that the decrease was considerable, or had any appreciable effect on the attendance at Robb's school. Previous to the stoppage of the wool mill in 1867, the attendance at Robb's school had greatly diminished.

"Art. 9. Denied that Robb's school suffered from sectarian rivalry and animosity, or political feeling, in the district at any period. His predecessor's scholars were composed of children of the three religious bodies in the district, and the present teacher finds that his pupils are in the same way drawn from these three bodies. The teacher at Harrietfield school was frequently or generally a member of the Established Church, and the school was attended by many children whose parents belonged to that body. The Chapelhill school was opened and taught by the minister, because Robb's scholars having been withdrawn, the means of education in the parish were greatly reduced. It was discontinued after a few months, from want of suitable accommodation. *Quoad ultra* denied."

The pursuer asked for a proof of his averments, and the Court on 20th March pronounced the following interlocutor:—"The Lords having heard counsel on the reclaiming note for Alexander Robb against Lord Young's interlocutor of 18th November 1874, before further answer, remit to the School Board of Logiealmond to reconsider their resolution of 29th October 1873 refusing the pursuer a retiring allowance, and, if they adhere thereto, to specify in their resolution the ground of such refusal."

In compliance with this interlocutor, the School Board held a meeting, at which the following resolution was passed:—"The meeting then, after full consideration of these papers and of the whole matter, unanimously resolved to adhere to the resolution contained in their former minute of 29th October 1873, to refuse Robb a retiring allowance; and in obedience to the deliverance by the Court, the meeting specified, and hereby specify, the pursuer Robb's inefficiency as the ground of their refusal, that inefficiency being occasioned by his extreme indolence, culpable neglect of his duties as a teacher, and general misconduct, as proved by the complete absence of scholars, and substantiated by the evidence of the inhabitants of the district."

At advising—

The Lord President—In this case we gave judgment in February, differing from the Lord Ordinary on the construction of the statute, and holding that a schoolmaster dismissed for inefficiency might have right to demand a retiring allowance although his case did not fall within the category of old age or infirmity, and we continued the cause to allow the pursuer to give a more definite statement as to the cause of his inefficiency.

The pursuer did amend his record, and his averments have been answered by the School Board. But we thought it right, on the 13th of March, seeing that there was no record in the minutes of the School Board of the grounds on which they declined to give a retiring allowance, to make them reconsider their resolution, and if they adhered to it to specify the grounds of their refusal. We have now before us a minute of the School Board of 27th April to the following effect—(Reads).

Now, if we had had this deliverance before us originally, I should have held that there was a very strong presumption against the schoolmaster. No doubt the School Board was entitled under the Act to consider whether the claim for retiring allowance was justified in respect of the grounds of dismissal. The School Board have considered that question, and have refused the allowance

Now, has Robb made any such allegations against the grounds assigned by the School Board as to form the subject of inquiry? I do not think he has, and I look upon the proposal for further inquiry as out of the question.

One prominent fact is not disputed, and that is, that for some time the school has been without a single scholar, and any attempt on the pursuer's part to explain away that fact has failed. That of itself is sufficient; but when there is added the ground of dismissal assigned by the School Board, I am bound to come to the conclusion that the schoolmaster has no case, and that we must adhere to the interlocutor of the Lord Ordinary.

Lord Deas—I am of the same opinion. I adhere to what I said on a former occasion, that a schoolmaster should not be called upon to prove that he was not in fault in the first instance. But your Lordship's proposal does not interfere with that principle, for the fact alone that there are no scholars throws an *onus* on the schoolmaster to explain that that is not his fault.

I agree with your Lordship that the pursuer has given no intelligible explanation or relevant answer to the distinct statement of the School Board.

Lords Ardmillan and Mure concurred.

The Court adhered.

Counsel for the Pursuer—Scott and Young. Agent—George Begg, S.S.C.

Counsel for the Defenders—Dean of Faculty (Clark) and Keir. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, May 25.

FIRST DIVISION.

[Sheriff of Lanarkshire.

M'DONALD *v.* M'DONALD.

Husband and Wife—Separation and Aliment—Sheriff.

When a wife is living in family with her husband it is not competent for the Sheriff to award the wife an allowance of interim aliment on the ground of the husband's cruelty. If she has a case for separation and aliment, she must raise an action in the Court of Session.

This was an action raised on 16th December 1873 in the Sheriff Court of Lanarkshire by Mary Hume or M'Donald, residing at 373 Bath Street, Glasgow, wife of David M'Donald, tailor and clothier there, pursuer, against the said David M'Donald, defender, concluding "for alimont aye and until a permanent arrangement of the rights and interests of the parties shall be made by a competent Court, with expenses. The pursuer being compelled to live separately from the defender by reason of the defender conducting himself towards her in such a harsh, cruel, and tyrannical manner as to endanger her health and life, and more particularly upon the 11th day of December current, within the house occupied by them at 373 Bath Street, aforesaid, struck her with his fists upon the face and other parts of her person to her serious injury and effusion of blood, and also having on various previous occasions ill-used her."

A diet of proof was fixed on 28th January 1874, and evidence was led on 2d April, 30th May, 25th and 26th October; and on 5th December 1874 the Sheriff pronounced this interlocutor:—

"*Glasgow, 5th December* 1874.—Having heard parties' procurators, and made avizandum, finds that the pursuer and defender are husband and wife, and that on the 11th day of December 1873, within the house occupied by them, the defender struck the pursuer with his hand on the head to the effusion of blood, and that she has since and is now living separate from him: therefore decerns against him for the sum of 12s. a-week in name of interim aliment for the maintenance and support of the pursuer, commencing payment of the said aliment as on the 11th day of December 1873, and so on weekly thereafter in advance, aye and until a permanent arrangement of the rights and interests of the parties shall be made by a competent Court; finds the defender liable to the pursuer in expenses.

"*Note.*—The record of evidence in the present case discloses a story of domestic unhappiness between husband and wife such as does not often come before a court of law. The conduct of the pursuer, almost ever since her marriage with the defender, has been characterised by almost every feature unbecoming in a wife. Vexatious and irritable temper, petty annoyance, grave dereliction of duty, studied insult, personal violence even, have formed prominent incidents in her behaviour. With one exception only, the defender seems to have shewn great command of temper and forbearance, carried, perhaps, to an extent that was hardly consistent with his duty of ruling well his own household. Most men of more firmness of character would have at an early period of the marriage taken legal but efficient means to teach and compel the pursuer to obedience and duty. That she has, at least, relieved him of her society, is a result which he ought to be the last to regret. Still, whatever the provocation received, it has wisely been laid down by the law that a man shall not in any circumstances, except the imperative necessity of self-defence, lift hand to his wife. This, by his own letter, No. 6/1 of process, the defender is proved to have done, though after a long course of misconduct on the part of the pursuer, which, while it cannot justify, may go far to palliate, his rash act. The Sheriff-Substitute is anxious it should be understood that were it not for the admission in this letter he would have been inclined to place very little reliance in the pursuer's own statement, but would have been inclined to hold that when the defender struck her he was acting in self-defence."

The defender appealed, and the Sheriff adhered.

The defender appealed to the Court of Session.

At advising—

The Lord President—I have had occasion more than once to express opinions on the powers of Sheriffs exercised in cases of separation and aliment in granting interim aliment. It is a useful jurisdiction, and one which I should be unwilling to interfere with if exercised in circumstances suitable for its operation. But there