[15*th August* 1834.]*

JAMES JOHN FRASER, W. S., Appellant. No. 32.

Lieutenant Colonel GORDON, Respondent.

Process.—Held (affirming the judgment of the Court of Session) that a reclaiming note, praying to be reponed against a decree pronounced in respect of failure to lodge a revised condescendence, not being marked by the clerk as lodged within twenty-one days, was incompetent.

Appeal.—Question, whether an appeal against a unanimous judgment refusing to repone a party against a decree in absence, without leave to appeal, be competent.

2D DIVISION. Lord Medwyn.

THE respondent, Colonel Gordon, raised certain actions in the Court of Session against the appellant, who had been formerly his law agent, concluding for large sums of money; on the dependence of which he executed arrestment and inhibition. These actions, and generally all claims existing between the parties, were made the subject of a submission to arbiters; one of the conditions of which was, that the appellant should assign to the respondent certain debts due to the appellant, and, in particular, certain debts alleged to be due to him by the Earl of Fife, for the constitution of which an action depended in the Court of Session. The appellant having accordingly granted an assignation, the respondent was sisted as a party to the action

* The correct date is 31st August 1835.

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against Lord Fife, in the place of the appellant; and on the 4th of July 1833 the Lord Ordinary decerned for certain sums of money to be paid by the Earl to the respondent. In the meantime, Lord Fife having executed a trust conveyance of his estate, a multiplepoinding was raised by his trustee, in which claims were lodged both by the appellant and the respondent. The Lord Ordinary, on the 6th of July and 14th of December, preferred the respondent, and granted warrant in his favour to uplift from a consigned fund a sufficient sum to satisfy his claim. The appellant reclaimed against this interlocutor; and the Court, on the 31st of January 1834, recalled it, and remitted to the Lord Ordinary to hear parties, and to do as to him should seem just. Thereafter the Lord Ordinary conjoined the action against Lord Fife with the multiplepoinding, and appointed the appellant "to state in a condescendence "the grounds on which he objects to Colonel Gordon, "his assignee, being sisted in these processes in his "place." Condescendence and answers were lodged and revised; and on the 4th of July 1834 the Lord Ordinary pronounced this order:—"Appoints parties "respectively to re-revise their condescendence and "answers,—the re-revised condescendence by the first "box-day in the ensuing vacation, and the re-revised "answers by the third sederunt day in November next." The appellant failed to lodge his re-revised condescendence; and on the 15th of November "the Lord "Ordinary, in respect the claimant has failed to obtem-"per the interlocutor of 4th July last, ranks and prefers "Colonel Gordon of new, in terms of the interlocutors "of 6th July and 14th December 1833; and of new "grants warrant for payment, in terms of said inter-

" locutors, and decerns: Finds Colonel Gordon en- " titled to expenses," &c. The appellant lodged a reclaiming note, praying to be reponed, but it was not marked by the clerk. The Court having refused to write upon it, the appellant lodged a note, calling the attention of the Court to the 72d section of the act of sederunt, 11th July 1828, which he alleged was applicable, and entitled him to lodge a reclaiming note any time before extract; but the Court, on the 15th of January 1835, refused the note, " in respect that the case " falls within the 57th section of the act of sederunt."*

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Fraser appealed.

Appellant.—The reclaiming note was lodged in due time, seeing that the decree passed in absence, or by default, and was not and has not been extracted. It is to a case of this nature that the 72d section of the act of sederunt applies, which provides, " that a party " wishing to be reponed against a decree in absence " may apply to the Inner House by a short note before " extract, accompanied with the defences or other " papers required, merely setting forth the interlocutor " or decree, when the Court shall remit to the Lord " Ordinary to repone the party on payment of such " expenses as to his Lordship shall seem reasonable." In the 57th section there is no specified period men-

* A few days afterwards Fraser applied to be reponed under the statute 48 G. 3. cap. 151. sec. 15., and the Court, on the 23d January, remitted to the Lord Ordinary to repone him upon payment of the previous expenses. The Lord Ordinary, on the 24th of February, decerned against him for these expenses, and allowed him, on payment of them, to give in his re-revised condescendence. He reclaimed, but the Court, on the 15th of May, adhered. He did not appeal against these interlocutors.

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tioned within which a reponing note should be lodged, the provision being merely, that it shall be lodged "within the reclaiming days," which may as well mean those referred to in the 72d section, as the ordinary period of twenty-one days; and if there be any ambiguity the leaning should be in favour of receiving the note.

But, independent of this plea, the reclaiming note is marked as having been boxed on the 6th of December, which was the last reclaiming day; and it is not a statutory nullity that the marking of the clerk was not affixed to it. By the 18th section of the judicature act, which supersedes the old forms of process, all that is required is, that "the party shall, within twenty-one "days from the date of the interlocutor, print and put "into the boxes" a reclaiming note; and the act of sederunt does not ordain that the same shall be marked by the clerk of court.

Respondent.—The appeal is incompetent, because, 1st, no notice was given to the respondent of the appellant's intention to appeal; 2d, the interlocutor of the 15th of January 1835 was pronounced unanimously, and the appellant, not having obtained leave to appeal, could not competently enter an appeal (48 Geo. III. cap. 151. sec. 14); and, 3d, the interlocutor pronounced by the Lord Ordinary on the 15th of November 1834 was not reviewed by the Inner House, and therefore could not competently be appealed against. The appellant did not allege that the Lord Ordinary did wrong in decerning against him in respect of failure to lodge his paper; but on the contrary, conceding that he had done right, he applied to the Court to be reponed, so that the Inner House

were not called on to review the interlocutor of the Lord Ordinary.

But on the merits the interlocutors are well founded. The 72d section of the statute is applicable to proper decrees in absence, where there has been no appearance at all; whereas, the 57th section applies to the case where the party has appeared, but has allowed decree to pass against him by failure to obey an order. In that latter case, the note must be lodged "within the "reclaiming days," which clearly means twenty-one days from the date of the interlocutor, being the statutory reclaiming days*; but the note was not duly lodged, and was confessedly not marked by the clerk within the twenty-one days. According to the established practice of the Court of Session, the marking of the clerk is the only authentic evidence that a paper has been duly lodged.†

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The House of Lords ordered and adjudged, That the said petition and appeal be and the same is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

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* Lumsdaine v. Australian Company, 18th Dec. 1834, 13 S. & D., 215.

† Learmonth v. Baird, 1st June 1826, 4 S. & D., 654 (new ed. 660); Stewart v. Lang, 16th Nov. 1826, 5 S. & D., 2; Workman v. Smith, 12th May 1832, 10 S. & D., 525.

THOMAS C. KERR—GEORGE W. POOLE, Solicitors.