

Wednesday, March 2.

FIRST DIVISION.

[Lord Kincairney,
Ordinary.

MATHIESON *v.* SCOTTISH TRADE
PROTECTION SOCIETY.

*Process—Adjustment of Issues—Report by
Lord Ordinary to Inner House—Court of
Session Act 1850 (13 and 14 Vict. cap. 36),
sec. 38.*

The Lord Ordinary having dealt with the adjustment of issues and presented a report to the Inner House under section 38 of the Court of Session Act 1850—a section which is superseded by the procedure prescribed by the Court of Session Act 1868, and repealed by the Statute Law Revision Act 1875—*held* that it was incompetent for the Court, under the report, to adjust an issue or to review the previous interlocutors of the Lord Ordinary disallowing or refusing issues, and cause *remitted* to the Lord Ordinary to proceed.

Observations on the statutory procedure to be followed in the adjustment of issues.

On 11th October 1897 Donald Mackay Mathieson raised an action of damages for slander against the Scottish Trade Protection Society, Edinburgh.

On 7th December 1897 the Lord Ordinary (KINCAIRNEY) closed the record and assigned Tuesday the 14th December for the adjustment of issues.

An issue proposed by the pursuer having been disallowed without any interlocutor being pronounced, the Lord Ordinary on the 14th December continued the adjustment of issues till Tuesday the 4th of January.

On 21st January 1898 the Lord Ordinary disallowed an amended issue proposed by the pursuer.

The pursuer having proposed another amended issue, the Lord Ordinary on 1st February pronounced the following interlocutor:—"Refuses the motion of the pursuer to lodge the amended issue proposed by him: Reports the cause to the First Division of the Court, in terms of the Statute 13 and 14 Vict. cap. 36, and relative Act of Sederunt of 15th July 1865."

The Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 38, enacts that "Where, in the course of any cause before the Court of Session, matter of fact is to be determined and an issue is to be adjusted with reference thereto, it shall be the duty of the pursuer to prepare and lodge in process the issue he proposes . . . and the Lord Ordinary before whom such cause depends, after causing issues to be prepared and lodged as aforesaid, shall forthwith appoint parties to attend him at chambers, or shall order the case to the roll for the adjustment of an issue or issues for the trial of the cause . . . and if such issue or issues be not adjusted and settled with consent of parties at the

meeting or enrolment so fixed, or at a second such meeting or enrolment for the same purpose, if such second meeting or enrolment shall be appointed by the Lord Ordinary, the Lord Ordinary shall immediately report the matter to the Inner House, by whom such issue or issues shall upon such report be adjusted and settled."

The Act of Sederunt, 15th July 1865, sec. 12, enacts that "It shall not be competent, by any consent of parties, to delay the adjustment of the issues beyond the second statutory meeting; but if issues shall not then be adjusted, it shall be in all cases imperative on the Lord Ordinary to report the case to the Inner House in terms of the statute."

The Act of Sederunt, 10th March 1870 (following upon secs. 27 and 28 of the Court of Session Act 1868) enacts by sec. 1 (5) that "In every case in which proof is to be taken before a jury, issues shall be adjusted either at the time of proof being appointed in the cause, or on a day to be fixed not later than eight days thereafter; and the parties shall lodge the issues respectively proposed by them two days before the day so fixed."

By the Statute Law Revision Act 1875 (38 and 39 Vict. cap. 66), sec. 38 of the Court of Session Act 1850 is repealed.

Argued for the defenders—The course taken by the Lord Ordinary in reporting the case was incompetent. He had proceeded upon a repealed section of the Act of 1850. The Act of Sederunt 10th March 1870 made it imperative for the Lord Ordinary to adjust issues. The interlocutor of 21st January not having been reclaimed against was now final, and it could not be reviewed upon the Lord Ordinary's report. All that could be done was to dismiss the action.

Argued for the pursuer—There was no doubt that the Lord Ordinary had followed a course of procedure now obsolete. The proper course for the Court now to adopt was to send the case back to the Lord Ordinary with instructions to adjust an issue.

LORD PRESIDENT—This case has strayed out of the procedure prescribed by the Act of 1868. It may be well at the outset to notice that not only has section 38 of the Act of 1850 been superseded by the procedure prescribed by the Act of 1868, but it has been repealed by one of the Statute Law Revision Acts, and therefore we have to consider this question from the point of view of the Act of 1868. Now, I take it to be clear that the Act of 1868, as modified by the Act of Sederunt of 10th March 1870, contemplates that the parties shall lodge issues, and that the Lord Ordinary, dealing with the averments of the parties, shall adjust issues, if he considers that there is issuable matter on record, either at the time of proof being appointed in the cause, or on a day to be fixed not later than eight days thereafter. I am not saying that it is not perfectly competent for the Lord Ordinary to continue the discussion on the adjustment of issues, or to suggest that the issue lodged may not undergo such essen-

tial changes as to make it in substance a new issue, and that it may not be therefore convenient in the course of adjustment to have the remodelled issue in a clean draft before adjustment. But the statutory system is that the Lord Ordinary having begun, must go through the work of adjusting issues and then quit it. It seems entirely inconsistent with the procedure prescribed by the Act that he should proceed piecemeal first to take up one issue and refuse it, and then take up another issue and refuse it, and that by interlocutors extending as here over a period of two months. Now, this report brings before us this process under somewhat singular conditions. I suppose that it may be said that a Lord Ordinary may report any cause at any stage; but it is, at least, equally certain that the Court, dealing with the cause upon the report, can deal with it only as regards its future progress, and cannot touch any interlocutor which has been pronounced in the Outer House up to the point of the report. Therefore we have it not in our power to reconsider, review, or recal, any of the interlocutors by which the case has, if I may say so, been embarrassed in the past. We can only consider what is to be done with the case as regards its future progress, the previous interlocutors being final, although they may lead by process of logic to certain inevitable conclusions. I think, therefore, that we are not in a position to do better for the case than to remit to the Lord Ordinary to proceed. I am against giving any instructions at all as to what the future procedure ought to be, because it may well turn out that, in consequence of the pass into which the cause has been brought by the somewhat irregular procedure, there will be a serious question whether more or better can be done than to dismiss the action. I say no more than that that is a question; but as matters at present stand, it is a question for the Lord Ordinary, and not for us, to decide. Our hands remain entirely free to dispose of the question if and when it is brought before us by a competent form of procedure. At present we are, as regards the past, powerless, and as regards the future the Outer House is the proper tribunal in which to extricate the matter.

LORD ADAM—I concur.

LORD M'LAREN—I also agree. I think that we should not be able to adjust an issue under this report. When we proceed in the ordinary course to adjust an issue, the whole case is open to us, while as the case now stands the Judge has refused one issue, and as regards another has not allowed it to be put in. Supposing it to turn out that we should think one of the rejected issues suitable for the trial of the case—I am not suggesting that it is suitable but it is a possible view—then, as there is no reclaiming-note against the interlocutors disallowing the issues, we should be disabled from giving effect to our view. I mention this to show that if we were to consider the case on the merits we might

find ourselves in an *impasse*; therefore we must replace the case in the position in which it was before the Lord Ordinary made his report.

LORD KINNEAR—I am entirely of the same opinion. The Lord Ordinary has presented a report upon the mistaken assumption that the 38th section of the statute of 1850 is still in force and regulates the procedure now to be followed. I agree with all of your Lordships that that is entirely erroneous, and indeed the contrary is not maintained. That that section of the statute has been repealed, and that the matter is regulated by subsequent legislation, there can be no doubt. That does not prevent the Lord Ordinary from reporting any question upon which he desires to be advised by the Court. But his Lordship's interlocutor states no such question. We cannot deal with the procedure which has already taken place, because there are a number of interlocutors which cannot be brought before us otherwise than by reclaiming-note. Therefore I quite agree that the only practicable course is to remit to the Lord Ordinary to proceed, leaving his Lordship and the Court free to consider what the proper course of procedure in the present stage of the process ought to be.

The Court remitted to the Lord Ordinary to proceed with the cause.

Counsel for the Pursuer—Jameson, Q.C.—M'Lennan. Agent—T. M. Pole, Solicitor.

Counsel for the Defenders—Ure, Q.C.—T. B. Morison. Agent—Peter Morison, S.S.C.

Friday, June 18, 1897.

OUTER HOUSE.

[Lord Stormonth-Darling.

CAIRNS v. DICKSON AND OTHERS.

Company—Directors—Liability—Directors Liability Act 1890 (53 and 54 Vict. c. 64), sec. 3.

Circumstances in which held that a shareholder in a company which had fallen into liquidation had failed to prove such misrepresentations of fact on the part of the directors as to infer liability on their part either at common law or under the Directors Liability Act 1890.

This was an action at the instance of Andrew Cairns, ironfounder, 321 Rutherglen Road, Glasgow, against James H. Dickson and others, directors of the Employers Insurance Company of Great Britain, which fell into liquidation in July 1895, concluding for payment of £441, 17s. 11d., being the amount paid by him for shares in the said company, plus the calls made thereon, and minus the dividends paid thereon.

The nature of the pursuer's averments and the facts elicited by a proof are set