

because the meeting was not duly called, being only intimated from the pulpit. I should be of opinion that if the meeting was held for the purpose of the ordinary administration of church business, such intimation would be sufficient, but as your Lordship has pointed out, that was not the purpose of the meeting, but it was for the determination of a very critical matter—whether or not this money could be claimed by the committee of management, and whether, if the trustees or Mr Darling, in whose hands the money was, were not disposed to give it up, there should be an action raised against him to determine the point.

That was a very important meeting, and care should have been taken to bring knowledge of it to all the parties interested. Now, the parties most concerned, to whom intimation should have been made, were the Darlings. Who can say that, if there had been a moderate statement of Mr Darling's position, there might not have been an amicable arrangement? Accordingly if it were maintained that intimation was never made to him, or that knowledge that the meeting was to take place was never brought home to him, there would be a great deal to say against the competency of the proceedings or the due authorisation of the action. But we are entitled to assume that he did know that it was intended to hold a meeting, for he does not deny it and was not examined on this point, and that being so it was his duty to attend it. I am of opinion, therefore, in the circumstances, that the intimation given was sufficient, and that this plea should be repelled.

LORD M'LAREN—When trustees, a committee, directors, or members of a public body, are to be called together, the question whether a meeting is properly convened must be determined primarily by the terms of the constitution of the trust. But if there is nothing written on the subject, then custom must prevail, and for all ordinary purposes I should say that if it is the custom to call together a body concerned with the administration of ecclesiastical affairs by intimation from the pulpit, then, on proof being given of the existence of such a custom, such intimation would be sufficient.

In the case of public bodies which meet on stated days, no intimation is required. But of course where there are no stated days intimation of some kind must be made, and in the present case the meeting was properly called.

Now, looking to the case of *Wyse*, 8 R. 983, this must be regarded as an authority not only on the formal question as to what is necessary to constitute a meeting of trustees, but also on the more important question as to what is the fair relation of trustees towards one of their number who may be expected to be a dissident from the course which the general body propose to adopt. I cannot help thinking in the present case that when it appeared that Mr Darling was not attending the meeting, and especially if the committee had reason

to believe that he was in ignorance of it, the proper course would have been to adjourn, and to give him notice of the intention to take action against him in respect of the sum of money held by him. If he had attended the meeting, it is not unreasonable to expect that there would have been an attempt to settle the dispute in a less controversial manner than by a legal action to try the question whether the money was to be administered by the managers or by the trustees. But Mr Darling is not said to have been in ignorance of the meeting, or to have been excluded from the deliberations of his colleagues. That would have made his case very different, but all that he says is that the committee are not entitled to succeed because the action was not duly authorised.

I agree with your Lordships that the Sheriff has rightly disposed of this plea by repelling it.

LORD KINNEAR was absent.

The Court affirmed the judgment of the Sheriff-Substitute.

Counsel for Pursuers—Sol.-Gen. Dickson, Q.C.—Purves Smith. Agent—T. C. Smith, S.S.C.

Counsel for Defender—C. N. Johnston—A. S. D. Thomson. Agent—J. B. M'Intosh, S.S.C.

Friday, March 11.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

MACKIN v. LORD ADVOCATE.

Crown—War Department—Jurisdiction of Civil Courts—Military Pension—Chelsea and Kilmainham Hospitals Act 1826 (7 Geo. IV. c. 16), secs. 10 and 13.

In an action against the Lord Advocate, as representing the War Department, brought by a former soldier and non-commissioned officer who had served in the army for such a period as entitled him, under the Chelsea and Kilmainham Hospitals Act 1826, sec. 10, and relative regulations, to a pension for life, and who had been awarded, and had for a number of years received, payment of such a pension, the pursuer concluded for declarator that he was entitled to the pension, and that he had not committed any act subjecting him to forfeiture of the said pension. The summons also contained a conclusion for payment of the pension. By the statute above referred to (sec. 13) the Chelsea Commissioners are empowered, upon complaint and proof to their satisfaction of gross misconduct on the part of a pensioner, to take away his pension. The defender averred that the pursuer had been deprived of his pension by the Chelsea Commissioners in respect of gross misconduct. The pursuer stated that no proof of misconduct

had been adduced before the Commissioners, and that no intimation of any inquiry into his conduct had been made to him. No decision or finding by the Commissioners was produced, but the Solicitor-General, who appeared for the defender, stated in answer to the Bench that the Commissioners had considered the case and had determined to forfeit the pursuer's pension, and that he was in possession of excerpts from their minutes showing that this was so. The Court *dismissed* the action.

This was an action at the instance of Thomas Mackie or Mackin, who was formerly a soldier and non-commissioned officer in the army, against the Lord Advocate as representing the War Department under the Act 20 and 21 Vict. cap. 44.

The pursuer concluded (1) for declarator that he, in respect of service for twenty-one years and upwards as a soldier and non-commissioned officer in Her Majesty's military forces, was entitled to a pension for life at the rate of 1s. 10d. sterling per diem, payable in advance quarterly or otherwise, and that he had not committed any act subjecting him to forfeiture of said pension; and (2) for decree ordaining the defender to pay the arrears due to the pursuer, and to make payment to the pursuer of the sum £8, 7s. 5d. quarterly in advance or otherwise during the pursuer's lifetime from 1st July 1897 onwards.

The pursuer averred, *inter alia*—“(Cond. 1) The pursuer, who now resides in Glasgow, was for upwards of twenty-one years a soldier in Her Majesty's army. . . . On 11th November 1879 he was admitted to a pension of 1s. 10d. per day for life, being £33, 9s. 8d. per annum. Under the statutes and royal warrants following thereon, then in force and regulating the service of soldiers in the army, the pursuer had an absolute right to the said pension. On leaving the service he received from the commanding and other officers, under whom he had served, the highest testimonials attainable by a non-commissioned officer, and also the medal for long service and good conduct. For about fifteen years of his period of service he was a non-commissioned officer. (Cond. 2) Under the regulations in force for payment of military pensions, granted at the time when pursuer was admitted to pension, the pursuer's said pension is payable quarterly in advance, each quarterly instalment being the sum of £8, 7s. 5d. The said pension was regularly paid to the pursuer up to and including the payment due at 1st January 1896, for the quarter ending March 1896. Thereafter it was intimated to the pursuer by the paymaster of pensioners for the Inverness district, where the pursuer's pension was payable, that, under instructions from the Under Secretary of State for the War Department, the pursuer's name had been struck off the pension list, and that no further issue of pension would be made to him. Notwithstanding application on the pursuer's part, no further payment has been made of his pension since that

date. The pursuer has not committed any act or offence disentitling him to the enjoyment of his said pension. (Cond. 3) At the date of the pursuer's admission to said pension he had, by reason of his said period of service, an indefeasible right to said pension under the Act 7 Geo. IV. c. 16, and the orders and regulations made by virtue thereof. . . . At the dates of the pursuer's enlistment and admission to pension, the periods of service entitling to military pensions, and the management and payment of such pensions, were regulated by rules and regulations made by Her Majesty's Secretary of State for War under and by virtue of the Act 19 Victoria chapter 15. The payment of pensions, including the said pension payable to the pursuer, is now regulated by the Pensions and Yeomanry Pay Act 1884 (47 and 48 Victoria, chapter 55) and royal warrants made by virtue thereof. By said royal warrants the Principal Secretary of State for the War Department is appointed sole administrator under said warrants.”

The defender in a separate statement of facts averred that the pursuer in 1883 was manager of the canteen groceries at Fort George subject to the orders of the canteen committee, of which Major now Colonel Hilton was the president, that he was inattentive to his duties, that a dispute arose as to the accuracy of his accounts, that he claimed a balance as due to him, but that after full investigation by the committee authorised to consider the matter, his claim was found to be groundless, and that in June 1883 he was dismissed by Colonel Hilton from his position of manager because of irregularities and deficiencies in his accounts, that he appealed to the General Officer commanding North Britain, and subsequently to the Commander-in-Chief, alleging that Colonel Hilton had swindled him out of £125, but both these authorities decided that he had no ground of complaint. “(Stat. 3) Although his allegations and claim had been fully considered, the pursuer refused to recognise and acquiesce in the decisions come to by the proper and competent authorities. He appears to have entertained a special hostility towards Colonel Hilton, and, moved thereby, he repeatedly attacked the character and reputation of that officer, writing of him in the most slanderous terms, and threatening to publish the correspondence. (Stat. 4) The pursuer in or about the year 1896 wrote letters and post-cards to Colonel Hilton and certain other persons, containing false and malicious statements reflecting on the Colonel in highly offensive and insulting language. In 1896 Colonel Hilton complained to the War Department of the libellous letters and post-cards written to him by the pursuer, and asked that a criminal prosecution should be instituted against him. In consequence of this representation the matter was submitted to the Chelsea Commissioners, who were requested to consider the advisability of warning the pursuer that if he repeated the offence steps would be taken to stop his pension. The Chelsea

Commissioners accordingly, early in February 1896, called upon the pursuer to express regret for his misconduct, and to promise abstinence from further molesting Colonel Hilton. They also reminded the pursuer of their powers in relation to pensioners guilty of gross misconduct. The pursuer, however, expressed no regret for his behaviour, and gave no such promise as was asked. On the contrary, he on 4th March 1896 wrote two libellous post-cards, containing statements wilfully false and malicious respecting Colonel Hilton, one post-card being sent to the sergeant-major and the other to the quartermaster-sergeant, both in the district of which Colonel Hilton was officer-commanding. Thereafter, by the direction of the Adjutant-General, the Chelsea Commissioners were informed that in the opinion of the Commander-in-Chief this was a case in which the pension should be stopped. In his actings the pursuer had been guilty of gross misconduct, and accordingly the Commissioners for that reason struck off his name from the pension list. This they did, acting under the authority of Article 1212 (c) of the Royal Warrant for the Pay and Non-Effective Pay of the Army. The course taken by the Commissioners was intimated to the pursuer on 23rd March 1896.

In answer to these statements the pursuer denied that his allegations and claims were fully considered, and averred that no investigation or examination of witnesses in connection therewith ever took place, and that he was entitled to an investigation. (Ans. 4) "The correspondence here mentioned is referred to. The post-cards in question were written by the pursuer for the purpose of directing attention to, and securing an investigation of, the charges which he *bona fide* preferred against Colonel Hilton. The pursuer's sole object in writing said communications was to obtain such an investigation, which he had failed to obtain by his previous applications to the War Office authorities. The pursuer admits the irregularity involved in said communications and apologises for the same. The charges against Colonel Hilton mentioned in said correspondence were the same as the pursuer had previously made without his right to pension being questioned. *Quoad ultra* denied. Explained and averred that article 1212 (c) of the Royal Warrant for 1896 does not apply to the pursuer, the pursuer's right to pension being regulated by the statutes and royal warrant in force at the date of his discharge in 1879, and in particular the Acts 7 George IV. c. 16, and 19 Vict. c. 15, mentioned in condescendence 3. . . . By the warrant founded upon by the defender the pensioner is subject to forfeiture of his pension for the commission of any felonious act, gross fraud, or misconduct, only if it is proved to the satisfaction of said Commissioners of Chelsea Hospital. No proof of any conduct involving forfeiture of pension has been adduced before said Commissioners against the pursuer. No intimation was ever made to him that any proof was to be

conducted with regard to the circumstances relating to his conduct mentioned in the defender's statement, and no opportunity was given him of being heard in defence. The proof of the misconduct alleged against him turned entirely upon the question whether the complaints made by him were well founded. No opportunity has ever been given to him of establishing the truth of his said complaints. In these circumstances any alleged order of the Chelsea Commissioners finding him guilty of gross misconduct and ordering his name to be struck off the pension list was in contravention of their statutory powers, and was *ultra vires* and illegal."

The pursuer pleaded—" (1) The pension mentioned in the condescendence having been granted to the pursuer, and the pursuer having, under the statutes and royal warrants regulating military pensions, a legal right to the said pension, the pursuer is entitled to decree of declarator in terms of the declaratory conclusions of the summons. (2) The pursuer's pension having been wrongfully and illegally withheld from him, the pursuer is entitled to decree of declarator, and for payment as concluded for, with expenses. (3) The proceedings of the Chelsea Commissioners founded on in defence being in excess of their statutory powers, were *ultra vires* and illegal. (4) The defences being irrelevant, and *separatim* being, so far as material, unfounded in fact, should be repelled."

The defender pleaded—" (1) The Court has no jurisdiction to determine whether the pursuer's forfeiture of a pension was justly incurred or not. (2) The action is incompetent. (3) The pursuer's averments are immaterial and irrelevant. (4) The pursuer's pension having been legally stopped, his claims are unfounded. (5) The pursuer having forfeited his right to a pension, is not entitled to decree."

The following documents were produced :—(1) A certificate of discharge showing the length and nature of the pursuer's service.

(2) A certificate in the following terms :—" This is to certify that the out-pension described below was awarded by the Lords and others, Commissioners of Her Majesty's Royal Hospital, Chelsea, at their meeting on the 11th day of November 1879.

" By Order of the Commissioners,
Chelsea Number, GEORGE NUTT,
Secretary and Registrar.
75207
2

Name of Pensioner — Sergeant Thomas Mackin.
Corps from which discharged—79th Foot.
Rate of pension, per diem—22d.

Duration of pension—Life."

(3) A memorandum in the following terms :—

| | | |
|--------|-----------------------------------|------------------------------------|
| " From | STATION PAY-MASTER, Inverness. | To THOMAS MACKEN, late 79th. |
|--------|-----------------------------------|------------------------------------|

23rd March 1896.

" Under instructions from the Secretary of State, you are informed that your name

has been struck off the pension list, and no further issue of pension will be made to you, as you have been paid up to and for 31st March 1896.

"E. MANSCHER, Lieut.-Col.,
Station Paymaster, Inverness."

The Chelsea and Kilmainham Hospitals Act 1826 (7 Geo. IV. c. 16) enacts as follows:—Section 10. "Every soldier who shall from and after the passing of this Act become entitled to his discharge by reason of the expiration of any period of service fixed in any orders and regulations made by His Majesty in that behalf . . . shall thereupon be entitled . . . to receive such pension, allowance, or relief, as shall have been fixed in any orders or regulations made by His Majesty in relation to such cases respectively, and in force at the time of his enlistment, and for the payment whereof money shall have been voted by Parliament."

Section 13. "It shall and may be lawful for the said Commissioners of the said hospital at Chelsea, and they are hereby authorised and empowered, upon complaint and proof to their satisfaction being made to them of any fraud with respect to the claiming, obtaining, or receiving of any pension or other money from the said hospital at Chelsea, . . . or of other gross misconduct attempted or practised by any person being a pensioner, entitled or claiming to be a pensioner of the said royal hospital, to suspend, or take away the pension . . . of the person so offending, and to issue to the Paymaster of Out-Pensions of the said hospitals at Chelsea a notice in writing, under the hand of the secretary, of any pension being so suspended or taken away; and upon the said notice being issued to the said Paymaster of Pensions he shall suspend the payment of the pension therein mentioned according to the tenor of the said notice; anything in any other Act or herein contained to the contrary thereof in any wise notwithstanding."

On 12th January 1898 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds that no sufficient grounds have been stated in fact, or pleaded in law, to support the conclusions of the summons: Therefore assolvies the defender therefrom, and decerns."

Opinion.—"The pursuer has brought this action against the Lord Advocate, as representing the War Department, and concludes for declarator that as a soldier and non-commissioned officer he is entitled to a pension for life, and that he has not committed any fault subjecting him to forfeiture of the pension; and he concludes further for payment of various sums as being due to him in respect of his pension."

"He founds on sec. 10 of the Act 7 Geo. IV. c. 16. By that Act (sec. 3) the payment of soldiers' pensions, payable at Chelsea, is placed under the control of the Commissioners of the Chelsea Hospital. Section 10 provides—[his Lordship read the section]. I understand that these duties as to pensions are still discharged by the Chelsea Commissioners."

"There is no doubt at all that the pursuer was in the enjoyment of a pension, and there seems nothing erroneous in describing it as a pension for life so long as it is not forfeited. It is said to be for life in the certificate, and no doubt the pursuer is in a certain sense entitled to payment of his pension still, and on application at the proper quarter will receive payment of it if it has not been forfeited. The question which the pursuer tries to raise is about the forfeiture."

"I understand the defender to represent that the powers of the Chelsea Commissioners depend on the royal warrant. The pursuer prefers to rest his rights to his pension on the statutes and regulations in force when he enlisted. I do not think that question signifies very much, because the conditions under which a pension is held under article 1212 (C.) of the Royal Warrant of 1896, so far as this question is concerned, seem the same as those expressed in the 13th section of 7 Geo. IV.; because that article provides that 'a pensioner shall be subject to forfeiture of pension under the following circumstances . . . (C) for the commission of any felonious act or gross fraud or gross misconduct proved to the satisfaction of the Commissioners of Chelsea Hospital.'

"I can see, however, that the pursuer may consider that he is in a better position if he holds his pension under statute than under royal warrant. By the Act 47 and 48 Vict. cap. 55, 1884, sec. 2, Her Majesty is empowered from time to time to make, and, when made, to revoke and alter, orders relating to pensions; but the 4th sub-section of that section provides that nothing in such an order shall diminish the right of a soldier to receive such pension as was fixed by any order in force at the time of his enlistment. Further, the preamble of the royal warrant expressly saves existing 'pecuniary advantages' of retired officers and soldiers. Having regard to these provisions I lean to the view maintained by the pursuer that his right to his pension depends on the Act of 7 Geo. IV."

"What the defender avers is this—'In his actings the pursuer had been guilty of gross misconduct, and accordingly the Commissioners for that reason struck off his name from the pension list. This they did, acting under the authority of article 1212 (C) of the Royal Warrant for the Pay and Non-Effective Pay of the Army. The course taken by the Commissioners was intimated to the pursuer on 23rd March 1896.' The only intimation produced is a very informal memorandum signed by nobody, which merely intimates that the pursuer has been struck off the pension list, but does not say how, why, or by whom this has been done."

"The pursuer avers that no proof of his misconduct has been led before the Commissioners, and that he has had no opportunity of being heard in defence. I by no means say that I would be entitled to consider or overrule a decision of the Commissioners. I am of opinion that I should not; nor do I think that I could

scrutinise their methods of inquiry. I am not prepared to say that they were bound to take a formal proof; but the difficulty which I would feel—if I could entertain this action at all—is that I do not know what the Commissioners did, or whether they did anything. I have no deliverance under the hands of them or of their secretary, so that if I could entertain this action I would require to allow a proof, not about the pursuer's good conduct or misconduct, of which the Chelsea Commissioners are, it seems to me, the sole judges, but about what they had done, unless that were ascertained by admission.

"But there are prior questions. It is pleaded (1) 'the Court has no jurisdiction to determine whether the pursuer's forfeiture of a pension was justly incurred or not.' That may or may not be a good plea, but it does not arise until it is ascertained by admission or otherwise that the forfeiture has been incurred at all; that is to say, whether it has been imposed by the Chelsea Commissioners.

"It is further pleaded that the action is incompetent, and under that plea the defender, as I understood the argument, maintained (1) that no action lies for a soldier's pension at all, and (2) that no such action lies against the War Department. Now, on these points I am not able to distinguish practically between this case and the recent case of *Smith v. Lord Advocate*, in which my judgment assailing the defender was adhered to in the Second Division, 25th November 1897, 35 S.L.R. 121.

"That case, no doubt, raised certain questions which do not arise here, but in that case one of the conclusions was for arrears of pay, and in my judgment I quoted Clode on the Military Forces of the Crown, vol. i., p. 98, where he says that 'No suit or action can be brought against the Crown or its ministers for recovery of pay, pension, or other military service. These grants range themselves under that class of obligations described by jurists as imperfect, which want the *vincula juris*, although strong in moral equity and conscience. Their performance is to be sought for by petition, memorial, or remonstrance, and not by action in any court of law. I quoted the authorities which seemed to support that dictum, and now refer to them. It will be observed that the dictum includes pensions as well as pay, and although there may seem some anomaly in saying that a pension granted by statute cannot be recovered by action at law, still the reasons, rested on principle and public policy, seem to cover that case and to justify Mr Clode's statement. No authority to the contrary was quoted. I cannot say that in the Inner House that position was expressly adopted, but nothing was said against it.

"Supposing, however, that view to be unsound, the second question is, whether this action for a pension—supposing it to lie at all—lies against the War Department. Now, here the pursuer raises the same question practically as was raised in *Smith v. Lord Advocate*, and it appears to me to

have been decided in the Inner House against the pursuer, and I think I need do no more than follow that judgment. I cannot think that every pensioner in Britain has a right of action against the War Department for his pension. The authorities quoted in *Smith v. Lord Advocate* seem to negative that contention. I refer especially to *Gidley v. Palmerston* (1822), 3 Brod. & Bing. 275, 286, and 24 Revised Reports, 668, and also to *The Queen v. Secretary of State for War* (1891), 2 Q.B.D. 326, affirmed in the Court of Appeal 9th June 1891, 7 T.L.R. 579, referred to in this case, but not quoted in the former action. These cases seem to establish that the Secretary for War is under no obligation to a soldier or officer, but only to the Crown. I am not sure that I follow the ground on which the pursuer maintains the liability of the Secretary of State for War or the War Department. He founded on the Act 5 and 6 Vict. cap. 70, but that Act is repealed by 37 and 38 Vict. cap. 96.

"Now, if that be so, no sum can be recovered under this action, even although it were established that the Chelsea Commissioners had come to no decision at all, and that the pursuer's pension had never been forfeited. He might, in that view, have an action if he could show that any paymaster had received money for his behoof, or perhaps he may have no remedy except by appeal to the Crown. It is hardly possible to doubt that the Chelsea Commissioners have duly dealt with the pursuer's case, but in the state of the proceedings I do not see how that can be assumed, and it is perhaps to be regretted that no deliverance by them has been produced. But as the declaratory conclusions cannot, in my view, be followed up by any decree for the amount of the pensions claimed against the Lord Advocate as representing the War Department, there is no ground for entertaining them, nor does it appear that the Lord Advocate for the War Department is the proper defender. On this view, in the case of *Smith v. Lord Advocate*, the declaratory conclusions were not entertained. On the whole, I consider that I ought to follow that case."

The pursuer reclaimed.

In the course of the discussion the Solicitor-General, who appeared for the defender, stated in answer to questions from the Bench that he was in possession of a memorial containing excerpts from the minutes of the Chelsea Commissioners showing that they considered the pursuer's case and came to the conclusion that his pension ought to be forfeited.

Argued for the pursuer—(1) The case of *Smith v. Lord Advocate*, November 23, 1897, 25 R. 112, was distinguished from the present. Here the pursuer was suing upon a statutory right. The authorities could not deprive the pursuer of the pension to which he was entitled by statute except in the way provided by statute. No decision of the Chelsea Commissioners was produced, and in the absence of such a decision, proceeding upon and in conformity with the Chelsea and Kilmainham Hospitals Act 1826, section 13, there was nothing to show

that the pursuer had been duly and lawfully deprived of his pension. Until he had been so duly and lawfully deprived of it he was entitled to it by statute. (2) It would be strange if a statutory right could not be enforced by a court of law, and it was not so. It was true that there was no case in which a decree had been granted for a soldier's pay or pension. But where a statutory power was given, as here, to the Chelsea Commissioners, reduction or a petitory action was competent in the event of a deviation from the provisions of the statutes, under which alone power was given to act—*Macfarlane v. Mochrum School Board*, November 9, 1875, 3 R. 88, and in accordance with that general principle the present action was competent. The statement in Clode's Military Forces of the Crown, referred to by the Lord Ordinary, was not supported by the authorities there cited. There was no decision to the effect that although the right to a pension was conferred by statute, as in the present instance, that right was not enforceable by action. In *Macdonald v. Steele*, 1873, 1 Peake 233, 3 R. R. 680, there was no statutory right to the half-pay which was stopped. In *Gidley v. Lord Palmerston*, 1822, 3 Brod. and Bing. 275, 24 R. R. 668, there was no statutory right, and what the decision really negatived was the personal liability of the Secretary for War, which was contended for by the plaintiff. In *Gibson v. East India Company*, 1839, 5 Bing. (N.C.) 262, the decision proceeded upon there being no contract under seal, and the general question was not decided. (3) The Lord Advocate as representing the War Department was the proper defender. In *Gidley v. Lord Palmerston*, *cit.*, the action was against Lord Palmerston personally, and there was no statutory right to enforce. In *The Queen v. Secretary of State for War*, 1891, 2 Q.B. 326, there was no statutory right upon which Colonel Mitchell could rely.

Counsel for the defender and respondent were not called upon.

LORD JUSTICE-CLERK—The pursuer asks us to find and declare that he is entitled to a pension for life, and that he has not committed any act subjecting him to forfeiture of the said pension. As regards that last conclusion, it is quite out of the question that we should pronounce such a finding without inquiry, and therefore to ask us to find that the pursuer has not committed any act subjecting him to forfeiture of his pension is just to ask us to take up the position of judges as to whether the Chelsea Commissioners were right in acting as they did. We cannot consider that question, for they are by statute appointed the final judges as to whether a pensioner has been guilty of such conduct as to involve forfeiture of his pension.

Upon the face of this record it appears that the pursuer sent abusive post-cards to an officer under whose command he had been, and that when he was called upon to express regret for what he had done and to promise to abstain from such conduct in

the future, he not only did not express regret but sent two more libellous post-cards—open post-cards—to a sergeant-major and a quartermaster-sergeant, both then serving under command of the officer libelled. I think the Commissioners were entitled to consider whether this was gross misconduct, and if they were satisfied that it was, then there is no doubt they were entitled to give judgment declaring the pursuer's pension forfeited. I do not think that in coming to that conclusion they were tied up by any special rules of procedure. They are empowered to make such examination as they think proper, and if they are satisfied that the pensioner has been guilty of misconduct, to take away the pension. I do not think the pursuer has averred anything amounting to an excess or abuse of the Commissioners' statutory powers.

The only other ground of action which is founded upon is that the pursuer never received any proper intimation as to what the Chelsea Commissioners had done. I do not think he was entitled to any such intimation as he claims. Section 13 of the Statute 7 Geo. IV. cap. 16, enacts that when the Chelsea Commissioners have determined to take away a pension they may issue "to the Paymaster of Out-Pensions of the said Hospital at Chelsea a notice in writing under the hand of the secretary, of the pension being so suspended or taken away, and upon the said notice being issued to the said Paymaster of Pensions he shall suspend payment of the pension therein mentioned according to the tenor of the said notice." When that notice is issued the duties of the Commissioners are at an end. They have nothing more to do. The result naturally is that intimation is sent through the War Office to the officer who has been in use to pay the pension, and accordingly we find in this case that the Station Paymaster at Inverness received instructions with regard to the pursuer's pension from his superiors, and wrote to the pursuer that his name had been struck off the pension list. I think this was even more formal notice than the authorities were bound to give to the pursuer. It might quite well have been done by his simply being told that his name had been struck off the list when he applied for payment.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

LORD YOUNG—I am of the same opinion. It is stated in the certificate produced that the pursuer was awarded a pension by the Chelsea Commissioners at their meeting on the 11th day of November 1879. I assume that this pension was regularly awarded. I could not inquire whether it was so or not, as that is a matter committed to the judgment of the Commissioners. I therefore assume that the pension was regularly awarded. The pursuer continued to draw his pension till March 1896, when he received this letter—[His Lordship read the memorandum quoted *supra*.] Now, as

I assume that his pension was regularly granted, so I assume that he was regularly struck off the list of pensioners. It is not for us to inquire whether he was regularly struck off or not. But I may notice that his pension might be withdrawn at any time. That is clear from the statute founded upon by the pursuer and is not matter of dispute, and I assume that in this case the Commissioners regularly exercised the powers committed to them. I assume that when the proper Government Department do anything which is within the powers committed to them they do it regularly and properly. This pension could not have been forfeited without the decision of the Chelsea Commissioners, for the power of forfeiture is committed to them. If they were satisfied that the pursuer had been guilty of gross misconduct they were entitled to forfeit his pension, and that an action should be brought in this Court, and a proof or a jury trial allowed for the purpose of determining the question whether the Commissioners were satisfied and whether they decided that this pension should be forfeited, appears to me ridiculous.

I have no reason to think that the pursuer here has been ill-used. With every inclination to sympathise with a man in his position who has suffered injustice from his superiors—and I have the strongest sympathy for such a case—I do not see any ground for thinking that he has suffered any injustice.

Apart from that however we could do no more for him than he could do for himself. He can institute inquiries as to whether the Chelsea Commissioners have decided in his case just as well as we can.

I may observe further that in this case we have been informed by the Solicitor-General, speaking in his official capacity, that he has been provided with copies of minutes of the Chelsea Commissioners showing that they have dealt with this case and have decided that this pension should be forfeited. I am of opinion that in such circumstances no inquiry as to whether the Chelsea Commissioners have decided the case or not can be required, and if they have decided it, their judgment upon it is not subject to review by us.

LORD TRAYNER—I agree with the Lord Ordinary.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against and dismissed the action.

Counsel for the Pursuer—M'Lennan—Munro. Agent—Robert Broatch, L.A.

Counsel for the Defender—Sol.-Gen. Dickson, Q.C.—A.J. Young. Agent—James Campbell Irons, S.S.C.

Friday, March 11.

FIRST DIVISION.

BEATTIE AND OTHERS (BEATTIE'S TRUSTEES) v. MEFFAN AND ANOTHER.

Succession—Vesting—Destination to Named Children of Liferentrix, and any Other Children that may be Procreated of Her Body—Presumption as to Childbearing.

A testator directed his trustees to hold a certain fund in trust during the lifetime of the longest liver of his two daughters, and to pay to them the interest thereof, and upon the death of the longest liver of his said daughters to divide and pay the fund as follows—one-half to the children *nominatim* of each daughter “and any other child or children that may be lawfully procreated of her body.”

In a question arising when one of the daughters was 56 and the other 57 years of age, between the trustees on the one hand, and the assignees of the whole right both of liferent and fee in the fund on the other, *held* that the fund had not vested in the children of the liferentices, there being no legal presumption that either liferentrix was past childbearing.—*Ander-son v. Ainslie*, January 24, 1890, 17 R. 337, approved and followed. *Lowson's Trustees v. Dicksons*, June 19, 1886, 13 R. 1003, and *Urquhart's Trustees v. Urquhart*, November 23, 1886, 14 R. 112, overruled.

By trust-disposition and settlement, James Beattie, who died in 1873, conveyed his whole means and estate, heritable and moveable, to trustees for certain purposes.

Part of his heritable estate consisted of the Railway Hotel, Arbroath, with regard to which the testator, after directing his trustees to hold it for behoof of his widow for her liferent use only, provided that after the death of his said widow the trustees should hold it in trust during the lifetime of the longest liver of his daughters, Mrs Munro and Mrs Meffan, paying the rents of the said premises to them. Upon the death of the longest liver of Mrs Munro and Mrs Meffan, he directed his trustees to sell the Railway Hotel, and to divide and pay the free proceeds thereof, as follows, viz.—“One-half . . . to and among James Munro, George Munro, Jean Munro, and Robert Munro, children of the said Elizabeth Beattie or Munro, and any other child or children that may be lawfully procreated of her body, in equal proportions, share and share alike, and the same is hereby left and bequeathed by me to them and to their heirs, and the other half . . . to and among James Meffan, Susan Meffan, John Meffan, and Alexandrina Meffan, children of the said Margaret Beattie or Meffan, and any other child or children that may be lawfully procreated of her body, in equal proportions, share