pronounced by a Lord Ordinary may apply for a review of it within twenty-one days by printing and putting into the boxes a reclaiming-note, enacts—"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."

The Act of Sederunt, 11th July 1828, sec. 77, provides that reclaiming-notes 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."

The pursuer objected to the competency of the reclaiming-note on the ground that the requirements of the Judicature Act and the Act of Sederunt 1828, had not been complied with in respect that a printed copy of the record had not been appended to the reclaiming-note.—*M'Evoy* v. *Brae's Trustees*, January 16, 1891, 18 R. 417; and *Wallace* v. *Braid*, February 16, 1899, 36 S.L.R. 419, referred to.

The defenders argued that the provisions of the Judicature Act and the Act of Sederunt were directory, not imperative—*Allan's Trustee* v. *Allan & Sons*, October 23, 1891, 19 R. 15; and that the case of *Wallace*, *ut sup.*, was distinguished from the present by the fact that there copies of the record had not been boxed to the judges. The defenders also cited *Campbell's Trustees* v. *Campbell*, March 7, 1868, 6 Macph. 563; and *Harris* v. *Haywood Gas Coal Company*, May 12, 1877, 4 R. 714.

At advising, the opinion of the Court was delivered to the following effect by

LORD PRESIDENT—The Court find this case to be ruled by that of *M'Evoy*, and accordingly hold the reclaiming-note incompetent.

The Court refused the reclaiming-note as incompetent.

Counsel for the Pursuer—Guy. Agent—William Fraser, S.S.C.

Counsel for the Defenders—M. P. Fraser. Agent—John Martin, L.A.

Saturday, May 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CONLON *v.* CORPORATION OF GLASGOW.

Master and Servant—Employment—Constitution of Relationship — Reparation — Collaborateur.

A tramway driver raised against the proprietors of a tramway an action of damages for injuries received by him from a car driven by one of the defenders' servants. The defenders pleaded "*collaborateur.*" The proof showed that the pursuer was on the defenders' list of "spare men" who were in the habit of reporting themselves at the depôt at 7 a.m. and waiting on till 9 a.m. on the chance of taking the place of the regular drivers if the latter failed to turn up. If the spare man, after reporting himself at 7, waited on till 9 without getting a job, he received one shilling from the defenders, but if before 9 he went away or got a job elsewhere he received nothing from them. On the morning in question the pursuer had reported himself at the tramway depôt, and was standing waiting when the accident happened.

Held that the pursuer was not in the employment of the defenders at the time when the accident happened, and case remitted to the Sheriff to proceed.

Matthew Conlon, tramway driver, 50 Cavendish Street, Glasgow, raised an action for £200 damages against the Corporation of the City of Glasgow.

The pursuer averred—"(Cond. 2) On 5th October 1898 the pursuer, who at the time of the accident after mentioned was out of employment, was standing at or near the gateway of defenders' tramway stables at Pollokshaws waiting for employment, when without warning, and in a careless and reckless manner, a servant in defenders' employment drove a car past the spot where pursuer was standing, causing him to be jammed between the car and the pillar of the gateway, whereby pursuer was severely crushed about the chest and ribs, and has been rendered unfit for work. . . . Pursuer was not in defenders' employment at the time of the accident, and was standing where he had a right to be. Pursuer had left defenders' employment, and was paid off and discharged before said accident."

The defenders averred, *inter alia*, "that it was a fellow driver of the pursuer who was driving the car between which and the gate the pursuer was at the time of the occurrence; and pleaded "(2) *Collaborateur.*"

On 22nd November 1898 the Sheriff-Substitute (GUTHRIE) allowed the pursuer a proof of his averment that he had been discharged from the defenders' service before the accident occurred, and to the defenders a conjunct probation."

The proof brought out the following facts:—The pursuer was a "spare man." A "spare man" was one who at 7 a.m. came to the Tramway depôt of the Glasgow Corporation and reported his arrival. He then waited on till 9 a.m. on the chance of one of the regular drivers of the tramway cars not turning up, and his taking his place. If he waited on from 7 till 9 and got no job he received one shilling from the tramway department; if he got a job as driver he got a full day's pay, viz., 3s. 10d. If the spare man, after reporting himself at 7 o'clock, got a job elsewhere under some other person, he was entitled to take it, but if he left for any reason before 9 o'clock, he did not get one shilling from the Corporation Tramways Department. The Tram-

ways Department kept a list of spare men, and if well behaved these spare men got on the permanent list as vacancies occurred on the regular staff. On the morning in question the pursuer had gone to the depôt at a quarter to five and had obtained a job of driving a car to Gordon Street and back, returning to the depôt at 6·42. He earned 9d. for this journey, but this sum was not paid till October 12th. After his return he reported himself at 7 o'clock as a spare man, and was standing waiting to see whether he would get a job when the accident occurred.

On 6th December 1898 the Sheriff-Substitute (GUTHRIE) pronounced the following interlocutor:—"Finds that at the time when the accident condescended on happened the pursuer was in the service of the defenders as a spare tramway car driver: Finds that it is alleged by the pursuer that the accident was caused by the fault of another driver in the defenders' tramway service: Therefore sustains the defenders' second plea-in-law, dismisses the petition, and decerns," &c.

The pursuer appealed to the Sheriff (BERRY), but on 2nd February 1899 the latter adhered.

The pursuer reclaimed, and argued—He was not in the employment of the defenders at the time he was injured; he was waiting on in the chance of getting employment. There was no contract between him and the defenders that he was to remain till 9. He was entitled to leave before 9, and get employment elsewhere, and no penalty was imposed on him for leaving before 9. If he stayed on till 9 he got one shilling from the defenders, but they had no control over his movements. He could leave when he pleased.

Argued for the defenders—When the accident occurred the pursuer was a "spare man" in their employment. The criterion of employment was payment for doing something. In this case the pursuer's employment was waiting between 7 and 9 to see whether he would be required to take the place of a regular driver, and for this employment he received one shilling. He was thus employed earning one shilling from the defenders.

LORD YOUNG—I confess that I have no difficulty whatever in this case. It appears to me that the pursuer's statement on record is absolutely relevant and that the ordinary course should have been followed by the Sheriff of sending the whole case to trial, there being no good reason for his making the departure he did, and only sending to trial the question whether the pursuer was at the time of the accident in the service of the defender. I think that course was not only unsound but unprecedented as far as I know. That it is an inexpedient course admits of no doubt. The proper course to take would have been to send the whole case to trial and allow the question of *collaborateur* to be decided after proof had been taken on the whole facts.

Proof having been allowed and taken on the question whether the pursuer at the time of the accident was in the defenders' employment, I think we must pronounce judgment on the point. The Sheriff's judgment is that the pursuer was in the employment of the defenders, and that therefore the accident was caused by a fellow-labourer. My opinion on the evidence leads to the opposite result. I think on the evidence that the pursuer was not in the employment of the defenders at the time of the accident, and that the plea of *collaborateur* is unfounded. I therefore propose that we should reverse the judgment of the Sheriffs and find that at the time the accident occurred the pursuer was not in the service of the defenders, and that the car was not driven by a fellow-servant.

With that finding the case will have to go back to the Sheriff to determine the question whether there was any fault on the part of the driver of the tramcar.

LORD TRAYNER—I agree. I think that there is nothing in the evidence to support the view that the pursuer was under a contract of service to the defenders at the time of the accident.

LORD MONCREIFF—I am of the same opinion. The only difficulty which I have felt arises from the terms of the interlocutor of the Sheriff-Substitute of 22nd November. From its terms one might think that the proof was restricted to a proof of the pursuer's averment that he had been discharged by the defenders before the accident. But it would appear from the proof taken that the Sheriff-Substitute meant to allow proof on the question of employment or non-employment, and proof having been taken on this subject, the Sheriff-Substitute repelled the defenders' plea of *collaborateur*.

That being so, I agree, although the case is no doubt a peculiar one, that the pursuer when the accident occurred was not in the service of the defenders.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor—

"Sustain the appeal and recal the interlocutors of the Sheriff-Substitute and the Sheriff of Lanark dated respectively 6th December 1898 and 2nd February 1899: Find in fact that the pursuer was not in the employment of the defenders at the time when the accident happened: Therefore repel the second plea-in-law for the defenders, and remit the case to the Sheriff to proceed."

Counsel for the Pursuer—Kemp. Agents—Hutton & Jack, Solicitors.

Counsel for the Defenders—Constable. Agents—Simpson & Marwick, W.S.