

ever that may be, I agree with your Lordship that the Lord Ordinary has refused a proof of this particular part of the case upon a perfectly right ground. To make a corporation liable for a slander by a person in their employment it is not enough to say generally that what that person did was done in the execution of his duty. You must go on and make some averment to show what his duty was so as to make it apparent that the particular thing complained of at least belonged to the class of services which he was employed to perform. All that is said about the kind of employment that is committed to Mr Thomson, whose conduct is here complained of, is that he was employed as general manager of the public baths. Now, if he had done any wrong in the course of his management of the baths, then it may very well be that the Corporation would be responsible for it. But what he did was not an act of management of the baths in any sense. It was a communication to the Glasgow School Board of a report made to him by another person in the same employment which is said to be slanderous of the pursuer. But then the only averment which could have made that a relevant ground of complaint would have been an averment that it was part of his employment under the Corporation of Glasgow to make reports to the Glasgow School Board as to the business of the baths. If it was part of his employment to make reports, or communications of any kind, on behalf of the Corporation to the School Board, it would have been perfectly easy to say so. But that is not said. There is nothing to suggest that he was in any sense or for any purpose the mouth-piece of the Corporation. I therefore agree with your Lordship and the Lord Ordinary.

LORD PEARSON was absent.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—George Watt, K.C. — J. G. Robertson. Agent—D. Maclean, Solicitor.

Counsel for the Defenders (Respondents)—T. B. Morison, K.C. — M. P. Fraser—Crawford. Agents—Campbell & Smith, S.S.C.

Wednesday, June 17.

FIRST DIVISION.

(SINGLE BILLS.)

HUTCHISON v. HUTCHISON.

Process—Reclaiming Note—Competency—Boxing—Failure to Box Record—Court of Session (Judicature) Act 1825 (6 Geo. IV, cap. 120), sec. 18—A.S., 11th July 1828, sec. 77—Court of Session Act 1808 (48 Geo. III, cap. 151), sec. 16.

The Court of Session Act 1808, section 16, provides that if the reclaiming days shall from mistake or inadvertency have expired, it shall be competent with

leave of the Lord Ordinary to submit the interlocutor complained of by petition to the review of the Inner House.

The Court of Session Act 1825 (Judicature Act), section 18, provides that a party reclaiming shall within twenty-one days, along with the reclaiming note put into the boxes printed copies of the record.

The A.S., 11th July 1828, provides that reclaiming notes shall not be received unless there shall be appended thereto a copy of the record.

In an action of divorce for desertion the Lord Ordinary assoilzied the defender. During the currency of the reclaiming days a change of agency took place. The new agent made the mistake of assuming that the ordinary number of copies of the record had been printed. Only thirty copies had, however, been originally printed, and he was unable to procure sufficient copies to append to the reclaiming note for boxing, and, accordingly, only boxed the reclaiming note.

The Court, on the ground (1) that the mistake made was excusable, (2) that if the claimer were to go through the form of presenting a petition under the Court of Session Act 1808 the interlocutor could be submitted to review, and (3) that it was unnecessary to make him go through this form, repelled the respondent's objection to the competency of the reclaiming note, and sent the case to the roll.

M'Evoy v. Brae's Trustees, January 16, 1891, 18 R. 417, 28 S.L.R. 276; and Wallace v. Braid, February 16, 1899, 1 F. 575, 36 S.L.R. 419, distinguished.

The Court of Session Act 1808, section 16, enacts—"If the reclaiming or presenting days against an interlocutor of a Lord Ordinary shall, from mistake or inadvertency, have expired, it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor by petition to the review of the Division to which the said Lord Ordinary belongs . . ."

The Court of Session Act 1825 (Judicature Act), section 18, enacts—"When any interlocutor shall have been pronounced by the Lord Ordinary either of the parties dissatisfied therewith shall be entitled to apply for a review of it to the Inner House . . . provided that such party shall, within twenty-one days from the date of the interlocutor, print and put into the boxes appointed for receiving the papers to be perused by the Judges a note reciting the Lord Ordinary's interlocutor . . . and 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 of 11th July 1828, section 77, enacts—"Reclaiming notes . . . shall at first be moved merely as single bills and immediately ordered to the roll, and shall then be put out in the short or summar roll as the case may be: Provided always that such notes, if reclaiming 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, and also copies of the letters of suspension or advocacy, and of the summons with amendment, if any, and defences . . ."

In an action at the instance of John Patterson Hutchison, Edinburgh, against Mrs Agnes Forrest Stevenson or Hutchison, his wife, in which the pursuer sought divorce on the ground of the defender's alleged desertion, the Lord Ordinary (GUTHRIE) on 26th May 1908 pronounced an interlocutor assailing the defender.

On the last of the reclaiming days the pursuer tendered to the boxing clerk a print of the reclaiming note with a print of the closed record appended to it, but the boxing clerk refused to certify the reclaiming note with record so appended as having been boxed, since the prints of the reclaiming note which had been put into the boxes did not have copies of the record attached to them. The reclaiming note and record were accordingly separated and separately lodged, only the former being marked as having been boxed.

The claimer in moving in the Single Bills that the reclaiming note be sent to the roll stated that he thought it his duty to point out to the Court that prints of the closed record had not been appended to the prints of the reclaiming note put in the boxes. He explained that the reason of this was that a change of agency had occurred during the currency of the reclaiming days, that the new agent had assumed that the ordinary number of copies of the record had been printed, but at the lodging of the reclaiming note discovered that there were not sufficient owing to the fact that originally only thirty copies had been printed. More could not be printed in time owing to the type having been taken down.

Argued for the claimer—In the peculiar circumstances the reclaiming note should be sent to the roll. Sufficient copies of the record for the Judges of the Division had been tendered to the boxing clerk, and that really met the requirements of the Judicature Act 1825—*M'Lachlan v. Nelson & Company, Limited*, January 12, 1904, 6 F. 338, 41 S.L.R. 213.

Argued for the respondent—The omission to box copies of the record was fatal to the competency of the reclaiming note—Judicature Act 1825, section 18; A.S., 11th July 1828, section 77; *Wallace v. Braid*, February 16, 1899, 1 F. 575, 36 S.L.R. 419; *M'Evoy v. Brae's Trustees*, January 16, 1891, 18 R. 417, 28 S.L.R. 276—even when the opposite party were willing to waive the objection to the competency—*M'Evoy, cit. sup.*; *Burns v. Waddell & Son*, January 15, 1897, 24 R. 325, 34 S.L.R. 264. [LORD M'LAREN referred to section 18 of the Court of Session Act of 1808.]

LORD PRESIDENT—The point here raised

is an unusual one. This is an ordinary twenty-one days interlocutor reclaiming note, and it appears that although the reclaiming note was tendered on the last of the reclaiming days with a copy of the closed record attached to it, the boxing clerk quite properly refused to certify it as having been boxed, since the reclaiming notes which had been put into the boxes did not have copies of the record attached to them. There is no question that ordinarily this would be fatal, but here the circumstances are peculiar. A change of agency took place during the currency of the reclaiming days. The second agent quite naturally assumed that the printing of the record had been carried out in the usual way. At the lodging of the reclaiming note he sent for extra copies but discovered that the first agent had not a sufficient number, that the printer had none, and that the original number printed had been only thirty instead of sixty, with the result that there was a shortage for boxing to the Inner House, and the type had been taken down. We were referred to the cases of *M'Evoy v. Brae's Trustees*, 18 R. 417, and *Wallace v. Braid*, 1 F. 575, which embrace both Divisions of the Inner House. There is no doubt that those cases are binding upon us, but in neither of them was there any attempt to show that the mistakes which arose were really beyond the control of the agent. Lord M'Laren has pointed out that under section 18 of the Court of Session Act of 1808, if the reclaiming days have from mistake or inadvertency expired, it is competent to submit the interlocutor to review by petition, and it seems that this is a case where, if this form were gone through we could repute the claimer. That being so, we would not think nowadays of compelling a party to go through a mere form, so I propose that we should allow the reclaiming note to be received, the party undertaking to box the requisite prints in the usual way. But I wish to make it clear that this case is very special, and that I have no intention of going against the cases of *M'Evoy* and *Wallace*. If there had been no change in the agency here the case would have been an entirely different one and the result would probably have been otherwise. I put the case on this, that the second agent had the right to expect that the first agent had ordered the ordinary number of prints.

LORD M'LAREN—I agree with your Lordship. I think we have to consider the question here as being under precisely the same conditions as if a petition had been presented under section 18 of the Court of Session Act of 1808, and that we should only give relief if an excusable mistake has been made. I think that the mistake was, in the peculiar circumstances, excusable, but this decision is no encouragement to neglect precise rules of procedure.

LORD KINNEAR concurred.

LORD PEARSON was absent.

The Court pronounced this interlocutor—
“The Lords having heard counsel for the parties on the respondent's objection to the competency of the reclaiming note for the pursuer, repel the same and appoint the cause to be put to the roll.”

Counsel for the Pursuer (Reclaimer)—
Mair. Agent—W. R. Mackersy, W.S.

Counsel for the Defender (Respondent)—
Wark. Agents—J. & J. Galletly, S.S.C.

Wednesday, June 17.

SECOND DIVISION.

[Lord Johnston, Ordinary.]

MACKENZIE'S TRUSTEES v. MACKENZIE.

(For previous reports see 1907 S.C. (H.L.)
17; 44 S.L.R. 985; 1907 S.C. 139; 44
S.L.R. 126.)

Process—Curator ad litem—Minor Defender.

The Court will not, on the motion of the pursuer of an action, appoint a curator *ad litem* to a pupil or minor defender. This rule holds as well in the case of a multiplepounding as of other actions.

In this multiplepounding, at the instance of the trustees of the late Sir James Thompson Mackenzie, the Lord Ordinary (JOHNSTON) made the following verbal report to the Second Division with reference to a question which had arisen in the course of the action:—“My Lords, I have to ask permission to report a matter to your Lordships in the case of *Mackenzie's Trustees v. Mackenzie and Others*.

“This is a case which has been more than once before your Lordships' Division—a multiplepounding under which the estate of the late Sir James Thompson Mackenzie of Glenmuick is being distributed. A question has arisen with reference to the appointment of a curator *ad litem* to one of the minor defenders, and I report it to your Lordships because it appears to me that a mistake has been made which I myself have no power to put right.

“The action was raised so far back as 1892 by the trustees of the late Sir James T. Mackenzie. The defenders called included the eldest son of the late Sir James T. Mackenzie, viz., the now also deceased Sir Allan Russell Mackenzie, and his children. At the date in 1892 when the action was raised two at any rate of these children were pupils, and were represented and their interests protected by their father as their administrator-in-law. The action has proceeded upon this footing that the various questions which have from time to time arisen in connection with Sir James' succession have been brought before the Court by separate records made up on claims and answers within the multiple-

pounding. More than one of the questions has been before your Lordships, and even reached the House of Lords. During the first fifteen or sixteen years that the process has been running the younger children of Sir Allan Mackenzie made no appearance either through their father or directly, and indeed have made no appearance to this day. Sir Allan Mackenzie himself died on 19th August 1906, and as he died intestate appointing no tutors or curators to his children, the result is that from 1906 onwards the younger children of Sir Allan have been without tutors and curators. The process has gone on without consideration of the change of circumstances arising from Sir Allan's death, and during the last winter session I had before me two new branches of the case, both of which involved very large interests indeed. One of them is raised on a record which is dated March 19th, 1907, and deals with the rights of parties in the residue of the estate, which amounts to about £170,000. That question was raised by a new claim for the present Sir Victor Mackenzie, the eldest surviving son of Sir Allan, who under the settlement would have been the heir of entail of Kintail had that entail not been broken. He claims the residue, and not only claims that it has vested in him, but claims that as much of it as is free should immediately be paid over to him. He is opposed by the surviving trustee, but no appearance having been entered for the minor beneficiaries under the settlement—the beneficial contradictors, if I may so style them—the case has gone on between the present Sir Victor and the surviving trustee. I have pronounced findings in which I have, so far as the Outer House is concerned, disposed of the question of principle on which the residue is to be distributed, and the case was continued to deal with the questions of accounting that it might be ascertained how much the residue really was, and how much of it was free from prior obligations to be paid by Sir Victor. The other case also involves a claim by Sir Victor as in the position of a person who would have been heir of entail to an English estate, in which a large sum of money was directed to be invested for the purpose of a trust settlement. The claim is to the entailed money. The persons interested are Sir Victor, the present baronet, and certain substitutes. Here again, there being no appearance for anybody else, the case has proceeded between Sir Victor and the trustee. That case is in the position of the parties having been ordered, with the assistance of Professor Rankine, to adjust a case for the English Courts.

“My last interlocutors in both these cases were dated 26th February 1908. At that stage the trustee, acting I have no doubt on advice and with the object of assisting to protect, as he thought, the minor beneficiaries, made an application in which he stated that Allan Keith Mackenzie and Eric Dighton Mackenzie, the second and third surviving sons of the late Sir Allan Mackenzie, were still in minority, and that in consequence of the death of