

legislation. It is quite true that the Guardianship of Infants Act of 1886 does not directly apply to the office of curator, but I do not think that any inference can be drawn from that circumstance unfavourable to the capacity of a married woman to act as a curator, because the direct purpose of that statute was not to remove incapacities, although as an incidental result of its provisions it was held that the incapacity of married women to act as tutors had been removed. Its purpose was to give the mother the absolute right to act as guardian in certain cases. Now, it may very well have been considered unnecessary or undesirable in giving the mother new rights as the guardian of pupil children to introduce any change into the law of Scotland with regard to curators and minors, which might have had the effect of depriving minors of the voice which they themselves had in the appointment of their own guardians. So that there is no reason in the limitation of that Act, considering what its purpose was, to the case of pupil children, that can possibly suggest an inference that the Legislature denied the capacity of married women to act as curator, while allowing them to act as tutors. But it is true that the statute does not directly provide for the case of curators, and therefore we cannot decide this case upon the ground on which *Campbell v. Maquay* was decided; but then that decision displaces entirely the ground upon which, according to all the authorities cited the incapacity of married women to act as curators is based, because it displaces the ground upon which the similar incapacity of married women to act as tutors is based. If there is no distinction with reference to its basis in law and reason between the alleged incapacity of a married woman in cases of tutory and in cases of curatory, then when the basis of the supposed disqualification in the one case is displaced the similar disqualification in the other case is left without support. There is nothing in any of the decisions to suggest that there is any distinction between the capacity of a married woman for the office of a tutor and her capacity for the office of a curator, and if the reason as regards tutory is entirely displaced in the way it has been, why should the rule as regards curatory remain?

But, on the other hand, if there is any distinction, then there is no authority against the capacity to act as curator, because all the cases cited were cases in which married women were held to be incapacitated for acting as tutors. Indeed, the first case of *Kerbechill*, which my learned brother Lord Adam considers to be still law, was a case in which the nearest male agnate was held entitled to remove a pupil child from the custody of the mother, because the mother had been married again, notwithstanding the fact that she had been appointed tutor by the father's testament. Now, that case had been directly disregarded long before the Guardianship of Infants Act was passed, in the case of *M'Callum v. M'Donald* (March

10, 1853, 15 D. 535) I think, where the Court refused to ordain a married woman to give up the custody of a child, and proceeded in considering the question, not upon any doctrine of incapacity at all, but precisely upon the same grounds on which we are now in the habit of proceeding in considering applications for the custody of children, viz., what is best for the benefit of the child, leaving it a question for judicial discretion only, which the Court had perfect power to decide according to what they thought was for the child's best interests, unrestricted by any arbitrary rule disqualifying the mother. I cannot therefore consider either that the case of *Kerbechill* or the case of *Stuart* is now the law. In regard to the case of the *Marchioness of Montrose*, I think that cannot be treated as an authority, because the question was not decided, or at all events if decided, the final judgment has not been reported. I therefore come to the conclusion that there is no sufficient reason why this lady should not be allowed to continue to act as curator, but of course that is contrary to the opinion which Lord Adam has delivered. And although I am unable to agree in the judgment which he has given, I am very far from considering that the question is free from difficulty.

LORD PRESIDENT—I entirely agree with Lord Adam. We answer the question in the negative.

LORD M'LAREN was absent.

The Court answered the question in the negative.

Counsel for the First Parties — Dundas—Abel. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second Party—W. Campbell—W. Brown. Agents—Morton, Smart, & Macdonald, W.S.

Tuesday, July 13.

## SECOND DIVISION.

[Sheriff of Lanarkshire.

MOONEY v. WILLIAM DIXON,  
LIMITED.

Process — Jury Trial — Abandonment —  
Absolutor in respect of Pursuer's Failure  
to Take Proper Steps to Cite Jury.

The pursuer in an action of damages for personal injury, whose agent had ceased to act for him, failed to pay the fee fund dues necessary, in terms of the Act of Sederunt of 18th December 1896, to enable a precept for citation of a jury to be transmitted to the Sheriff, and in consequence no jury was cited to try the cause on the day appointed for the trial. The Court, after intimation had been made to the pursuer, no reply having been received from him, *assoluzied* the defenders with expenses.

This was an action of damages for personal injury brought in the Sheriff Court at Glasgow by John Mooney, labourer, against his employers, William Dixon, Limited, iron and coal masters in Glasgow.

The pursuer appealed to the Court of Session for jury trial. An issue was approved for the trial of the cause on 19th May 1897, and the case was appointed to be tried on 2nd July.

Thereafter the pursuer's law-agents ceased to act for him, and the pursuer failed to pay the dues exigible in terms of the Act of Sederunt of 18th December 1896, I. 23 (5)—which enacts that law-courts' stamps for £2 must be affixed to the precept for citation of the jury before it is transmitted to the Sheriff. In consequence of this failure on his part no jury was cited and the trial did not take place on 2nd July as appointed.

On that day counsel for the defenders moved the Court for decree of absolvitor with expenses in respect of the circumstances above detailed, and referred to the case of *Gilhooly v. M'Hardy*, June 18, 1897, 34 S.L.R. 737.

The Court directed the defenders to make intimation to the pursuer that in the event of his not taking steps to go on with the jury trial they would move for absolvitor upon a certain day in the following week.

The defenders' agents on the same day sent a registered letter to the pursuer giving him notice that upon Saturday 10th they would move the Court to assoilzie the defenders with expenses in respect of the pursuer's failure to provide for citation of a jury and of his failure to appear at the trial.

No answer was received to this letter, a copy of which was lodged.

On July 13th counsel for the defenders appeared and stated that intimation had been duly made and no answer received. He moved for absolvitor with expenses.

The Court pronounced the following interlocutor:—

"The Lords, in respect of the pursuer's failure to cite a jury, and of the intimation made to him, Dismiss the appeal, and assoilzie the defenders from the conclusions of the action, and decern: Find them entitled to expenses in this and in the Inferior Court," &c.

Counsel for the Defenders — Clyde.  
Agent—W. & J. Burness, W.S.

Tuesday, July 13.

FIRST DIVISION.

[Lord Moncreiff, Ordinary.]

MACKENZIE v. FOWLER.

*Title to Sue—Trustee in Sequestration—Right of Divested Trustee to be Sisted as an Individual to Action Raised by him as Trustee.*

A trustee on a sequestrated estate raised an action on behalf of the estate in which he obtained decree. The trustee having left the country, was removed from his office by the creditors, and a new trustee was appointed. The defender in the action reclaimed, and it was sisted in order to enable the new trustee to sist himself as a party. He declined to do so, and the divested trustee moved the Court to sist him individually as a party, in respect that he still had an interest to have the judgment affirmed, so far as he had been found entitled to expenses. The Court refused the motion.

On 18th November 1892 the estates of the late John Clark, farmer, Craiglands, Cromarty, were sequestrated by the Lord Ordinary on the Bills, and on 26th November Mr Hector Rose Mackenzie, Solicitor, Inverness, was appointed trustee on the sequestrated estates.

Mr Mackenzie, as trustee, for the purpose of recovering certain sums due to the estate, raised actions in the Court of Session which were authorised by the majority of a meeting of creditors, against (1st) Mr John A. Fowler, and (2nd) Mrs Louisa Campbell Mackay or Fowler and another.

On 30th January 1896 the Lord Ordinary (MONCREIFF) pronounced interlocutors in both causes, by which he decerned against the defenders for payment of certain sums, and found the pursuer entitled to expenses.

On 23rd May the defenders in both actions reclaimed.

On the 29th May, the pursuer having left the country, a meeting of creditors was held at which it was resolved that he should be removed from the office of trustee, and at a subsequent meeting Mr David Ross, Solicitor, Inverness, was appointed in his place, which appointment was duly confirmed by the Sheriff.

On 20th June 1896 the First Division, on the motion of the defenders, with consent of the pursuer, sisted procedure in the two actions, in order that the new trustee might have an opportunity of sisting himself as a party to the actions. Mr Ross, the new trustee, presented a report to the creditors in which he declined to sist himself in the actions unless the creditors guaranteed him against personal responsibility.

A note was presented to the Court by Mr Mackenzie in both actions, in which, after narrating the above facts, he maintained that "as an individual he still had