previous proceedings, which had been boxed more than two years ago, had not been again boxed or furnished to the Judges, as required by A.S. 24th Dec. 1838, *repelled*.

Counsel for Reclaimers—Mr Macdonald. Agents—Mr Thomas Ranken, S.S.C.

Counsel for Respondent—Mr Thoms. Agents—Messrs Lindsay & Paterson, W.S.

This was an objection to the competency of a reclaiming note founded on section 12 of the Act of Sederunt, 24th December 1838, which enacts as follows:—"As it is provided by section 77 of the Act of Sederunt, 11th July 1828, that when any of the proceedings or documents in a cause have once been printed and boxed to the Judges, it shall not be necessary at any subsequent stage of the cause to box the same again, but only to refer to them; and this regulation having been found inconvenient after a lapse of time, it is therefore enacted that this regulation shall be held to apply only to proceedings or documents which have been boxed within two years previous to the date at which they shall be again referred to, after which printed copies of the former proceedings shall be boxed or furnished to the Judges of the Inner House, before which the cause may be again brought." In this case no documents had been boxed for more than two years, and the reclaiming note was presented bearing a reference to the documents formerly boxed, but these had not been again boxed or furnished to the Judges of the Division. It was therefore objected that the note was incompetent, The cases of Thomson *v.* Forbes (9 D. 1061) and Fraser *v.* Lovat (20 D. 1185) were cited. It was answered that the enactment founded on was a mere provision for the convenience of the Judges with which the opposite party had no concern; and the reclaimers were ready, if necessary, to furnish the Judges with fresh copies of the previous documents.

The Court repelled the objection. It was observed that the two cases cited seemed inconsistent with each other; but in the latter case the general question raised by the present objection had been fully considered and disposed of. The respondent was found liable in £5, 5s. of expenses.

RANKIN *v.* BUCHANAN.

Proof—Reference to Oath. Opinions that where it had been finally held that a defence of compensation could not be established in an action, the defender in referring the remainder of the case to the pursuer's oath, should notwithstanding refer the whole cause, *i.e.*, the whole of the cause that then remains.

Counsel for Pursuer—Mr Gloag. Agents—Messrs Wilson, Burn, & Gloag, W.S.

Counsel for Defender—Mr J. C. Smith. Agent—Mr Alex. Morison, S.S.C.

This was a question as to the competency of a reference to oath. The action was one for payment of a bill. The defences were—(1) that no value was given; (2) that the pursuer was due to the defender a counter-claim; and (3) that the pursuer had granted to a co-obligant on the bill a discharge of the debt contained in it. On 23d December 1865, the Lord Ordinary (Barcaple) found (1) that the averment of no value was too vague and indefinite to entitle the defender, for proving the same, to get access to the books and papers of the pursuer by means of a diligence; (2) that the counter-claim averred was illiquid, and cannot be established in this action, but must be constituted in a separate action; and (3) that the defender was entitled to a diligence for recovery of writing to prove the discharge averred. The defender thereupon lodged a minute referring the whole cause to the oath of the pursuer. This reference the Lord Ordinary refused to sustain. He then lodged another minute referring to the pursuer's oath the whole cause, "in so far as the same has not been disposed of by interlocutor dated 23d December 1865, now final." The Lord Ordinary refused to sustain this reference also. The defender reclaimed, and explained that he never intended that the counter claims alleged, and which it had been held finally he could not establish in this action, should be referred to the pursuer's oath. The pursuer argued that the reference should be of the two defences of no value and discharge. The object of the pursuer seemed to be to exclude questions as to statements by the defender to the effect that the bill was one of a series of transactions betwixt him and the pursuer. After considerable discussion the interlocutors of the Lord Ordinary were recalled, and the first minute of reference was sustained, the defender having added to it, on the suggestion of Lord Deas, the words, "the defender, admitting that his counter-claims cannot be constituted or inquired into in this action."

The Court, however, thought that the general reference was sufficient without this addition. The proper and only competent reference after a cause was decided was a reference of the whole cause. Under such a reference it was only competent to ask questions as to what was the cause, and, of course, the defence as to counter-claims which a final interlocutor had decided could not be established in any way in this action was now out of the cause. It was difficult to see that the circumstance that this reference was tendered before the decision of the cause made any difference. The defender might wait until the action was decided against him, and then tender a reference of the whole cause, but the pursuer had no interest to insist that he should take this course. If the matter as to the bill sued for being one of a series of transactions was properly averred on record, then the defender might ask the pursuer questions about it. If it was not, then he could not do so.

PET.—W. R. MONTIGNANI AND HIS WIFE.

Nobile Officium—Judicial Factor. Certain funds belonging to a married woman in liferent, and her pupil child in fee, having been lent to her husband on the security of heritable property belonging to him, and the husband desiring to repay the money, a judicial factor was (alt. Lord Benholme) appointed over the fee of the money in order that the husband might be discharged and the money re-invested.

Counsel for Petitioners—Mr Donald Mackenzie. Agent—Mr John Stewart, W.S.

This was a petition for the appointment of a judicial factor over the fee of three sums of money belonging to a party's wife and child, but which had been lent to him on the security of certain heritable property belonging to him. It was now intended to repay a portion of the money, and the object of asking the appointment was to reinvest it under the same destination as at present. The petition was refused by Lord Benholme, and the petitioners having reclaimed, they were ordered on 24th November 1865 to give in a minute stating the grounds on which they support their application.

A minute was accordingly given in, in which it was argued—The destination in each of the said three bonds and dispositions in security is to the said Mrs Jane Dobson or Montignani in liferent, for her liferent use allenarly, and exclusive of the *jus mariti* and right of administration of the petitioner, the said William Robert Montignani, and of any future husband she may marry, and to Maria Louisa Montignani, only child, and to such other lawful child or children as may thereafter be born of the said Mrs Jane Dobson or Montignani, in such proportions as she shall appoint, and failing such appointment, equally amongst them, and their heirs and assignees, in fee. In virtue, therefore, of the said three bonds and dispositions in security, the petitioner Mrs Montignani, for her liferent use allenarly (expressly exclusive of the *jus mariti* and right of administration of the said William Robert Montignani, or of any future husband she may

marry), and the said Maria Louisa Montignani, and such other lawful child or children as may hereafter be born of the said Mrs Jane Dobson or Montignani, in fee, stand duly vest and seised in security of the foresaid sums in the subjects above-mentioned. Mr Montignani has sold two of the security subjects, and is now desirous of paying off the burdens. These circumstances are fully sufficient to warrant the appointment of a judicial factor. Without such an appointment, the petitioner Mr Montignani cannot obtain a valid and sufficient discharge of the said sums and securities, and cannot therefore clear the records of the same, or grant a clear title to the purchasers. Although Mr Montignani is proprietor of the subjects over which the securities extend, Mrs Montignani can effectually discharge these bonds and dispositions in security and sums of money, so far as her liferent allenarly therein is concerned, because she holds the same exclusive of the *jus mariti* and power of administration of her husband. But Maria Louisa Montignani, their only child, is a pupil. Her natural guardian and administrator-in-law is the petitioner, Mr Montignani. His interests as debtor in the bonds are adverse to those of his said daughter, who has the rights of a creditor therein; and he cannot therefore effectually concur with his said pupil child in discharging the bonds and dispositions in security and himself of the debt thereby constituted. But further, the said pupil has not the sole right to the whole fee of the said bonds and dispositions in security and sums, but she has only right thereto along with such lawful children as may be born of Mrs Montignani by her present or by any future husband, and that, too, only in such proportions as Mrs Montignani may appoint; and failing such appointment, the destination in the bonds is equally among them and their heirs and assignees. There is therefore at present no one who can attend to the interest in the said bonds and dispositions in security of the said pupil child, and of any other child who may be born of Mrs Montignani, or who can validly and effectually discharge the said bonds and dispositions in security—uplift the sums for which the same were granted—and see to their reinvestment in such a manner as—while it gives the liferentrix the full enjoyment of the liferent thereof, shall completely secure the rights of the children in the fee. All this can be fully and effectually accomplished by the appointment of a judicial factor over the fiars' right and interest in the foresaid bonds and dispositions in security and sums of money. There is no other mode in which that can be accomplished. The purchasers will not carry through the purchase unless the records are cleared of the foresaid bonds and dispositions in security by virtue of discharges granted by Mrs Montignani as liferentrix, and by a judicial factor appointed over the fiars' interest by the Court. They will be quite satisfied with such a discharge. Both Mr and Mrs Montignani are anxious for such an appointment. Mr Montignani is anxious for it, because it will enable him to complete his contract of sale — non-implement of which may expose him to a claim of damages—and because it will enable him to get quit of the two houses, which he does not wish to hold any longer—to obtain payment of the prices of the houses—and to pay off two of the bonds. Mrs Montignani is anxious for it, because she naturally wishes that the rights of her present child, and of any future children which she may have, in the fee, may be effectually protected by the intervention of a judicial factor, while she enjoys as liferentrix the full annual proceeds arising from a proper investment of the money. When this minute was ordered the petitioners were asked whether the subjects could not be freed and disburdened by giving intimation and premonition under the provisions in the bonds to the creditors to appear and receive payment of the sums due, and thereupon to grant sufficient discharges thereof, by consignation in bank of the sums due in the event of the creditors failing to appear, and receive and grant a discharge for the same, and by thereafter, raising a summons of declarator of redemption of the subjects from the said bonds and dispositions in security, taking decree therein, and recording the decree in the register of sasines. This procedure would not in the present case effect the desired end. In the first place, it would not free the subjects of the said securities, because it is essential to the validity of such procedure that due premonition and requisition shall be made to the creditors. But here no such due intimation and premonition can be given to the fiars, because Maria Louisa Montignani is not the sole fiar, and all the other children who may be born of her mother have a right to participate therein as fiars, and because she is a pupil, and the debtor making the premonition is her father and administrator-in-law. To say the least, the validity of a discharge obtained by premonition, consignation, and decree of declarator of redemption in such circumstances would be very doubtful. It would expose the purchaser to serious questions as to its validity, and also to troublesome objections in the event of a re-sale; and if so, he is not bound to undertake such a risk. But further, it would not effect one of the principal objects which the appointment of a judicial factor would secure. The money would remain in bank at bank interest, and would not be invested, so that Mrs Montignani might not obtain the same return from it as if it were invested on heritable security, and thus would be deprived of the full enjoyment of her right of liferent. Further, if the money were so consigned, the appointment of a judicial factor would still be necessary for the protection of the fiars' interest in the consigned fund. As the money would be consigned by Mr Montignani, and as his *jus mariti* and power of administration is excluded, he could not act as administrator-in-law for his pupil child, Maria Louisa Montignani, even were she the sole fiar. But she is not the sole fiar, and her father has no right to interfere as regards the rights of children who may hereafter be born of Mrs Montignani by her marriage with him, or by any subsequent marriage which she may enter into, in the event that he should predecease her.

The petitioners referred to the cases of Gowans, 9th March 1849 (11 D. 1028); Prentice, 9th March 1849 (11 D. 1029); Johnston, 11th July 1822 (1 S. 596); Mann, 19th July 1851 (14 D. 12); Lamb, 11th March 1857 (19 D. 700).

The Court to-day granted the first alternative of the prayer of the petition, and appointed a judicial factor over the fee of the foresaid sums of money contained in the bonds and dispositions in security above-mentioned, and over the fiars' right and interest in and to the said bonds and dispositions in security, and in and to the foresaid subjects themselves, in so far as conveyed in security of the said sums for the interest of the said Maria Louisa Montignani, and of any other lawful children who may be born of the petitioner Mrs Jane Dobson or Montignani, and in order that the said sums may be invested under the same destination as they are at present.

SECOND DIVISION.

BELL *v.* BLACK AND MORRISON.

Reparation—Judicial Slander—Title to Exclude. Held that a party was not excluded from claiming damages for judicial slander by the fact of his having compromised the action in which the alleged slander was committed.

Counsel for Pursuer—Mr Monro and Mr Gordon. Agents—Messrs Murdoch, Boyd, & Henderson, W.S.

Counsel for Defenders—The Lord Advocate and Mr A. Moncrieff. Agents—Messrs Murray & Beith, W.S.

Mr Bell, farmer, Glenduckie, sometime ago raised an action of damages against the defenders, the