Thursday, February 7.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

BAIN AND ANOTHER *v.* ADAM AND ANOTHER.

Process—Reclaiming-Note—Notice of Motion to Vary Issue—Competency—Lodging and Boxing—Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 28.

Objection to the competency of a reclaiming-note and notice of motion to vary issues, on the ground that they had not been "presented" in terms of the statute, because, although "lodged," they had not been also "boxed" in due time, *repelled.*

In an action of damages for slander at the instance of Mrs Jessie Paterson or Bain and her husband against Mrs Margaret Macarthur or Adam and her husband, the Lord Ordinary on 29th January 1884 pronounced this interlocutor . . . . "Holds the issues, No. 8 of process, as adjusted and settled; approves of the same as now authenticated accordingly; and appoints the same to be the issues for the trial of the cause."

By the Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 28, and A.S. 10th March 1870, sec. 1, sub-sec. 5, and sec. 2, an interlocutor appointing proof shall be final unless within six days from its date the parties, or either of them, "shall present a reclaiming-note against it to one of the Divisions of the Court, by whom the cause shall be heard summarily: . . . . Provided always, that it shall be lawful to either party within the said period, without presenting a reclaiming-note, to move the said Division to vary the terms of any issue that may have been approved of by an interlocutor of the Lord Ordinary."

A reclaiming-note against the interlocutor of 29th January, above quoted, and a notice of motion to vary the issues, were lodged with the Clerk by the defenders on the 4th, but not boxed until the 5th of February. The pursuer objected to the competency of the reclaiming-note, and of the notice of motion, on the ground that they had not been "presented" to the Court in terms of sec. 28, because although lodged on the sixth day after the interlocutor had been pronounced they had not been "boxed" until the seventh.

Argued for the pursuers (respondents):—This was an interlocutor appointing proof—*Mason* v. *Stewart*, Feb. 21, 1877, 4 R. 513. The "lodging" of a reclaiming-note would not bring it into the Single Bills, it would require to be "boxed." In A. S. 11th July 1828, sec. 79, the word "presenting" must be construed with reference to sec. 18 of 6 Geo. IV. cap. 120, and meant "print and put into the boxes." In A. S. 24th Dec. 1838 (A. S. to regulate proceedings in the Bill Chamber), the expression in sec. 5 was "marked and boxed." In sec. 6 of the Distribution of Business Act 1857, the word "boxed" occurred alone. In sec. 3 of the Conjugal Rights Act 1861, the expression was "lodging and boxing."—*Ross* v. *Herde*, March 9, 1882, 9 R. 710, 19 S. L. R. 481.

Answered for the defenders (reclaimers):—When a reclaiming-note was "lodged" the case was brought into the Division, for the reclaiming-note was the paper which went into the hands of the clerk. In the Cessio Bonorum Act (6 and 7 Will. IV. c. 56, sec. 8) the term was "lodged,"—M'Laren's Procedure Acts, p. 251; *Robertson* v. *Levack*, May 17, 1828, 6 S. 824.

At advising—

Lord President—Where a technical objection of this kind is stated against any step in procedure, it is essential that it should have some statutory foundation on which to rest. Now, looking to the terms of the 28th section of the Court of Session Act of 1868, I cannot say that I think Mr M'Kechnie has made out his objection. Although the word "presented" may in the ordinary course be held to have the meaning of and be equivalent to both "lodging in process" and "boxing to the Court," yet as the word is used here I have great doubts whether it was intended to comprehend both acts. The words used are "shall present a reclaiming-note to one of the Divisions of the Court, by whom the cause shall be heard summarily." I do not therefore see how the statute can be held to mean more than that something is to be done which shall have the effect of putting the case in the hands of one Division of the Court. But that is accomplished by the mere act of lodging the paper with the clerk to the process. The case is thus brought to the Division. The principal note is necesarily what is lodged; it is signed by counsel on behalf of the parties. I am not able to say that the lodging of that note, signed by counsel, is not a sufficient compliance with the requirements of the section to which I have referred. Where we are dealing with technical matter of this kind, I think we must apply the language of the statute strictly. I am therefore for repelling the objection.

Lord Mure—The notice of motion to have this issue varied, and the reclaiming-note which accompanies it, appears from the date marked upon the stamps on the process copies to have been lodged on the 4th of February. I think that in ordinary language the statutory requirements as to presenting a reclaiming-note have been implemented, and that these do not imply that the papers must also be boxed to the Court.

Lord Shand—I concur in the opinions which your Lordships have delivered.

I have only to add, that while I think the lodging of a reclaiming-note in process is a presentment to that Division of the Court by whom the cause is to be heard, I do not think the parties are thereby relieved from boxing the note to the Court in due time. If the note is not boxed immediately after it has been lodged, I think there must be a penalty on the party or the agent for the omission. But while I should be sorry that there was any relaxation in regard to timeous boxing, I do not think that, looking to the terms of the 28th section of the Court of Session Act of 1863, we can sustain the objection.

Lord Deas was absent.

The Court repelled the objection.

Counsel for the Pursuers (Respondents)—M'Kechnie. Agent—H. W. Cornillon, S.S.C.

Counsel for the Defenders (Reclaimers)—Pearson. Agents—John Clerk Brodie & Sons, W.S.