

Tuesday, May 17.

FIRST DIVISION.

THE FERGUSON BEQUEST FUND TRUSTEES  
v. THE EDUCATIONAL ENDOWMENT  
COMMISSIONERS.

(*Ante*, p. 441.)

*Process—Interlocutor—Correction.*

In a Special Case under the Educational Endowments (Scotland) Act 1882, the Court pronounced an interlocutor answering the question of law as originally stated in the case. An alteration, however, was made in the question, it being matter of doubt whether this alteration was formally placed on the record before or after the said interlocutor was pronounced. The effect was that the interlocutor was at variance with the opinions of the Court.

A note was then presented to the Court by the Educational Endowment Commissioners to have the interlocutor corrected. Authorities—*Cuthill v. Burns*, March 20, 1862, 24 D. 849; *Harvey v. Lindsay*, July 20, 1875, 2 R. 980; *Forrest's Trustees*, March 18, 1884, 11 R. 719; *Moncrieff v. Police Commissioners of Perth*, June 4, 1886, 13 R. 927. There was no opposition. Observed that in the ordinary case the course adopted is either that the parties consent to the alteration, or that there is a formal appeal to the House of Lords in order to get the alteration made; but held that as under the terms of the said statute an appeal to the House of Lords was incompetent, and as there was no question as to what the decision in the case was, the Court should make the correction. Interlocutor corrected accordingly.

The interlocutor as corrected was as follows:—"Find and declare that the scheme complained of is not, in respect of any of the objections maintained by the first and second parties in the particulars mentioned in the case, beyond the scope of or disconform to the provisions of the Educational Endowments (Scotland) Act 1882, and is not contrary to law."

Counsel for Petitioners—Gillespie. Agent—Donald Beith, W.S.

Wednesday, May 18.

SECOND DIVISION.

[Lord Fraser, Ordinary.]

WATSON'S TRUSTEES v. GLASGOW FEUING  
AND BUILDING COMPANY.

(*Ante*, p. 429.)

*Expenses—Several Defenders—Common Defence—Liability.*

In an action of reduction of a feu-contract, quoad certain obligations, raised by the trustees of the superior against a feuing company who had purchased from the original

feuar, two sub-feuars from the company appeared as defenders. With the action of reduction there was conjoined a petitory action, which had been previously raised by the company alone against the superior's trustees, for payment of a sum of money in respect of the superior's failure to implement the said obligations. Subsequently two other sub-feuars were sisted as defenders in the conjoined actions. The defenders were represented by the same counsel and agent, and stated a common defence. The trustees obtained decree in the action of reduction, and in the petitory action were assoiized. They were found entitled to expenses in each of the actions and in the conjoined actions. The sub-feuars maintained that decree for expenses should go out against the company only, as admittedly their appearance had caused no additional expense to the pursuers. Held (*diss.* Lord Young) that as the sub-feuars had appeared as defenders they were liable in expenses.

Arthur Watson and James Boyd, trustees of the deceased William Watson of Overlee, raised an action of reduction against the Glasgow Feuing and Building Company (Limited) for reduction of a feu-contract in so far as it imported certain obligations upon William Watson, as reported *ante*, p. 429. They called as defenders, besides the company, certain persons who had taken feus from it; two of these, Mr Barr Crawford and Mr James Follok, entered appearance as defenders. There was conjoined with the action of reduction a previous petitory action at the instance of the Feuing Company against Watson's trustees to recover the sum expended by them in consequence of Watson's failure to implement the obligation imposed upon him by the feu-contract. Two other feuars, Mr Hugh Herron and Mr David Bird, were sisted as defenders in the conjoined actions. All these feuars adopted the defences of the Feuing Company, and were represented by the same agent and counsel.

The Lord Ordinary pronounced interlocutors by which in the action of reduction his Lordship assoiized the defenders from the conclusions of the summons, and in the petitory action granted decree against Watson's trustees for a portion of the sum sued for, and found neither party entitled to expenses.

Watson's trustees reclaimed, and the Second Division pronounced this interlocutor:—"Having heard counsel for the parties on the reclaiming-note for Watson's trustees against Lord Fraser's interlocutors, . . . Recall the said interlocutors: In the action of reduction, reduce, decern, and declare in the terms of the conclusions of the libel; and in the petitory action assoiizie the defenders from the conclusions thereof: Find the said trustees entitled to expenses in each of the said actions and in the conjoined actions: Remit," &c.

On a motion by Watson's trustees for approval of the Auditor's report on the account of expenses incurred by them as defenders in the petitory action and pursuers in the action of reduction, the individual defenders, as apart from the Glasgow Feuing Company, argued—in the circumstances the company only ought

to be found liable in expenses to the pursuers. The company was the principal defender, and the others were feuars from it. One agent and counsel had been employed by the company and the individual defenders, the pleas had been the same, and no extra expense had been caused by their appearance.

Argued for the pursuers—It did not matter even though a separate agent and counsel had not been instructed by the individual defenders; they had come into the process as defenders, and were therefore liable. The sole question here was approval of the auditor's report, and no other matter could be gone into.

At advising—

**LORD JUSTICE-CLERK**—In this matter it was stated for the individual defenders, apart from the company, that although they were unsuccessful, and failed entirely in their defence, they were nevertheless not to be found liable in expenses. It is clear that there is no ground for excusing from liability those parties who appeared to maintain their freedom from the consequences of the action. They had an interest in the action, and thought that it was a sufficient interest for them to try and put obstacles in the way of the pursuers, and they continued to do so throughout the whole litigation. It is plain that their interest is connected with the interest of the company, and they derive their title from it; but they said that they were not affected by the original negotiations by which the company acquired its right. Now, it is maintained that they are not responsible for these expenses. The interlocutor disposing of the action found that the pursuers were entitled to expenses, and I think the defenders have no ground to plead exemption. I might have been disposed to agree to some modification of the expenses, but I understand that that view does not meet with your Lordships' approbation. I see no ground for exemption.

**LORD YOUNG**—I had not the advantage of hearing this case from the beginning, but I heard the whole argument at the end, in respect of which we set aside the feu-contract which was in question. The contract which was in question was not one made between the parties to the case, but between a Mr Watson, who was dead when the action was raised, and certain other parties, and it was in that contract that the error occurred. That contract had been transferred—that is to say, a conveyance in pursuance of the contract had been prepared of the whole property to the Feuing Company. The individual defenders here were not parties to the error, nor indeed to the contract at all.

The proceedings began by the Feuing Company raising an action against the late Mr Watson's trustees to have it declared that the trustees were bound to construct roads and streets over the whole property, amounting to 17 acres, as according to the contract he was bound to do. The error was in putting that obligation upon Mr Watson. The action was to enforce the contract according to its terms. A suggestion was made in the Outer House that the question could be better tried by an action of reduction, and the reduction was raised by Watson's trustees. The pursuers called in that action, besides the com-

pany, two of their feuars of infinitesimally small portions of the ground. Other two feuars of equally small portions subsequently sisted themselves as defenders by minute, but all they did was to appear by the same counsel and agent as the Feuing Company, to state that they concurred in all their pleas, and that there was no error to be corrected as against them. Watson's trustees succeeded in their action, and were therefore found entitled to their expenses, but they could not have got their decree, and would not have got their expenses, except by calling the company as defender. The Feuing Company must therefore have been the leading defender. Why the feuars came forward I do not know, and if they had caused a farthing of expense to the pursuers I would have found them liable in expenses. But admittedly they have not caused one farthing's expense to Watson's trustees. But, because they instructed an agent and counsel, we are asked to find these four individuals liable in four-fifths of the expenses. I cannot assent to the justice of that, or the law of it. There is a discretion in the Court as to expenses, and I think that it would be in the exercise of sound discretion, and of good sense, to give Watson's trustees decree for the whole expenses against the Feuing Company only, and against no one else, because the appearance of the other defenders has caused no additional expense.

**LORD CRAIGHILL**—Watson's trustees succeeded in the litigation between themselves and the Feuing Company, and the other parties who appeared as defenders, and the consequence was that in the final interlocutor the pursuers were found entitled to their expenses. The right of Watson's trustees to decree for expenses is not disputed; the question that is in controversy is this, Are the pursuers entitled to a decree for expenses against the other defenders who appeared besides the Feuing Company, and who fought the same battle as the company? As the action was originally laid, the first defender was the Feuing Company, but there were also two individual feuars who were called in that character, and in the course of the litigation other individuals in the same character appeared also. As the record was originally made up, the defenders were the Feuing Company and two other individual feuars, but it was in the end made up with these defenders and two other feuars who had been sisted at their own request. The question to be settled is this only, Who were the antagonists of the pursuers? They were the company and the four sub-feuars; there was no distinction between the pleas of one defender or the others. All maintained that the ground of reduction alleged was erroneous. It is true, as Lord Young has said, that all the interest was in the company, but all were combined together, all stated one defence, and I think it was for these defenders to say, whether or not it was worth their while to come forward as defenders, or worth their while to take the place of the principal defender, and if they did so they must take the consequences. Moreover, they were put upon their guard here, because the form of the summons is that in any event there should be decree against the company with expenses; but as regards the individual defenders it is this, "and the other defenders in the event only of their appearing

and opposing the conclusions hereof" should be ordained to pay expenses. Well, they ought to have weighed well what would be the results to them, and they must be taken to have done so. The one question is, Who were the antagonists of pursuers in the action? and when these are found, then, according to reason and the practice of the Court, they are entitled to a decree for expenses against them.

LOED RUTHERFURD CLARK—I agree with your Lordship and Lord Craighill.

The Court approved of the Auditor's report, and granted decree for the amount of the expenses against the Glasgow Feuing and Building Company, William Barr Crawford, James Pollok, Hugh Herron, and David Bird.

Counsel for Pursuers—R. Johnstone—Alison. Agent—R. Ainslie Brown, S.S.C.

Counsel for Defenders—M'Kechnie—Shaw. Agent—Thomas Carmichael, S.S.C.

Saturday, May 21.

## SECOND DIVISION.

[Lord Lee, Ordinary.]

M'MURCHY v. CAMPBELL AND MACLULLICH.

*Reparation—Slander—Public Official—Averment of Malice—Relevancy.*

In an action of damages for slander at the instance of a police sergeant against his superior officer, in respect of statements contained in an official report—*held* that the action was irrelevant because there was no special averment of facts and circumstances from which malice could be inferred.

This was an action of damages for slander at the instance of Donald M'Murphy, sometime sergeant of police at Oban, against Peter Campbell, late inspector of police, Oban, and John Campbell MacLulich, S.S.C., Procurator-Fiscal, Inveraray.

The ground of action was that the defenders, on or about 19th September 1885, "acting in concert together or separately, or one or other of them," prepared a report concerning the pursuer, which they sent, signed by the defender Campbell, to Colin M'Kay, Chief-Constable of Argyleshire, in which there was this statement—"I have to report you alleged misconduct on the part of Sergeant M'Murphy, Oban, which, if found on investigation to be true, will seriously affect his moral character. What I am about to state is well known at Inveraray among all classes (including P.-F.), at Taynafead public-house, and the post-boys at Dalmally Hotel. On the 1st or 2d January 1884 M'Murphy took Alexander Gillies, a boy prisoner, from Bonaw to Inveraray, charged with theft, and it is alleged that while at Inveraray on that occasion, and in broad daylight, he had a woman named Jessie Luke, who is considered a prostitute with two or three illegitimate children, in Buntine's Hotel; that he pulled down the blinds, got whisky, and locked the door, and had the woman there for about two hours, and I need hardly say what is supposed to have taken place. . . . M'Murphy

took the woman Luke in the conveyance to Taynafead public-house that night, gave the driver, Angus M'Intyre, drink, and kept him waiting outside till the poor old man got benumbed, the result being that the driver was put down for being drunk, by Fraser, when he arrived at Dalmally, dismissed, and has not driven a conveyance since. Again, in June last, M'Murphy had Luke in the conveyance with him, Duncan M'Callum, driver, from Inveraray to Taynafead, where there was some delay." . . . The report concluded—"Of course an independent investigation must be made into all these allegations in the interest of the public and for the purity of the police force."

The pursuer averred—"These statements regarding the pursuer are unfounded and malicious falsehoods, and represented the pursuer to have acted as an immoral and dissolute person, and to be unworthy of employment in the police force." He stated that in consequence of the report having been sent to the Chief-Constable he had been suspended for two weeks, but that he had been reinstated after the charges had been investigated by the Police Committee at Inveraray, and found to be without foundation.

The defender Campbell stated in answer that the facts contained in the report were currently reported about Inveraray and Dalmally. This the pursuer denied. Campbell further stated, that as the pursuer's superior officer, and in the discharge of his duties, he had made the report to the Chief-Constable.

The defender MacLulich stated that he had no knowledge of the report until a copy of it was sent him in his official capacity by the Chief-Constable.

The pursuer further averred—"The above-mentioned false and calumnious charges against the pursuer were made and circulated by the defenders maliciously, and without any just or probable cause. The defenders were actuated by a feeling of ill-will against the pursuer, and a desire to damage his character and deprive him of his situation in the police force."

Campbell pleaded privilege.

Issues were ordered, and on 25th March 1887 the Lord Ordinary (LEE) found that the pursuer's allegations were not relevant and sufficient to support the action, and assoilzied the defenders.

*Note.*—When issues were ordered in this case it was understood that the question of relevancy was to be raised upon the issues, and accordingly a discussion upon the relevancy took place.

"The case is a peculiar one, but as it involves a question of general importance in actions of slander based upon statements contained in an official report, or what purports to be an official report, I shall state the grounds upon which I have arrived at the conclusion that the action is irrelevant.

"The pursuer was a sergeant in the Argyleshire police, the defender Campbell was an inspector of police in the same force, and the defender MacLulich was and is Procurator-Fiscal of the county. The only slander complained of in the issues proposed is that set forth in condensation, art. 2, and it is said to have been contained in the written report or statement there referred to. That statement or report bears to be written by the defender Campbell,