funds held for the general trust purposes does not fall on all equally, there will not be an equal division. The only result of the loss must be that the sons get so much less than they would have done had it not been for the loss, because the trustees have less funds in their hands.

LORD M'LAREN was absent at the hearing.

The Court found and declared that in a question between the beneficiaries under the settlement of the late William Teacher, the loss sustained upon investments of the trust-funds made by the trustees falls to be borne by the whole children of the testator other than Adam Teacher, equally, and decerned.

Counsel for the First Parties — Low. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Second and Fourth Parties —Sir Charles Pearson—Wallace. Agents—John C. Brodie & Sons, W.S.

Counsel for the Third Parties—Asher, Q.C. —Ure. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Fifth Parties—W. Campbell. Agents—J. & A. F. Adam, W.S.

Friday, January 10.

FIRST DIVISION.

MOLLESON (PRINGLE PATTISON'S CURATOR), PETITIONER.

Curator Bonis—Power to Grant Leases and Abatements of Rent—Trusts Acts 1867, 1884, *and* 1887—*Judicial Factors Act* 1889.

A *curator bonis* has power to grant leases of agricultural subjects for a duration not exceeding twenty-one years, and to grant abatements of rent.

J. A. Molleson, C.A., who was appointed *curator bonis* to Mrs Pringle Pattison in July 1888, let a farm forming part of the ward's estate for fifteen years from Whitsunday 1889, and at the collection of rents in August 1888 he granted to the tenants of six other farms abatements of rent. Thereafter in February 1889 he presented this note craving the Court to find that he was empowered by the Trusts Acts of 1867, 1884, and 1887 to grant the lease and the abatements of rent mentioned without the necessity of applying to the Court for the sanction contemplated by section 7 of the Pupils Protection Act.

The 2nd section of the Act of 1867 gave power to certain classes of trustees to grant agricultural leases for periods not exceeding twenty-one years.

The Act of 1884, which conferred increased powers of investment upon trustees, enacted in its 2nd section that "trustee" should in the Acts of 1861 and 1867 include, *inter alia*, *curator bonis*.

Section 2 of the Act of 1887 provided that, in addition to the powers conferred upon trustees by the 2nd section of the Act of 1867, in all trusts to which that section applied trustees should have power to grant abatements of rent, and section 3 provided that abatements granted prior to the passing of the Act should not be liable to challenge.

The Lord Ordinary (WELLWOOD) reported the matter to the First Division, who, after hearing counsel for the curator and the Accountant of Court, ordered the case to be argued before Seven Judges. Before the case was heard the Judicial Factors (Scotland) Act 1889 came into operation, by section 19 of which it was enacted that the provisions of the Trusts Act of 1887 should apply to and include all trusts and trustees as defined by the 2nd section of the Act of 1884.

On 10th January 1890 the Court recalled their interlocutor ordering the case to be argued before Seven Judges as no longer necessary, and found that in terms of the Trusts Act 1867, as amended and extended by the Act of 1884, and of the Trusts Act 1887, and of the 19th section of the Judicial Factors Act 1889, the *curator bonis* was empowered to grant the lease and the abatements of rent already mentioned without the necessity of applying to the Court for the sanction required by section 7 of the Pupils Protection Act.

Counsel for the *Curator Bonis*—R. Johnstone—C. K. Mackenzie. Agent—Robert Strathern, W.S.

Counsel for the Accountant of Court—W. Campbell. Agents—Mackenzie, Innes, & Logan, W.S.

Thursday, January 16.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

MORE AND OTHERS *v.* WATT'S TRUSTEES.

Process — Reclaiming-Note — Competency— Boxing on Monday where Reclaiming-Days had Expired on Saturday—Judicature Act (6 *Geo. IV. cap.* 120), *sec.* 18.

An objection was taken to the competency of a reclaiming-note that it had been boxed on Monday, January 13, instead of on the previous Saturday, which was the last of the reclaiming-days. Objection *sustained.*

Reference made to the remedies under the Administration of Justice and Appeals Act 1808 (48 Geo. III. cap. 151), sec. 16, and *Steedman* v. *Steedman*, March 19, 1887, 14 R. 682.

By the 18th section of the Judicature Act (6 Geo. IV. cap. 120) it is provided that "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 of the Division to which the Lord Ordinary belongs, 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 praying the Court to alter the same in whole or part; . . . and the party so applying shall, along with his note as above directed, put into the boxes printed copies of the record authenticated as before, and shall at the same time give notice of his application for review by delivery of six copies of the note to the known agent of the opposite party; and it shall in no case be competent for either party, from and after the said 11th day of November 1825, to bring any interlocutor of the Lord Ordinary under review of the Inner House by the form of reclaiming-petition as now in use, but only in the mode thus directed."

By the 16th section of the Administration of Justice and Appeals Act (48 Geo. III. cap. 151) it is provided that "If the reclaiming-note or representing-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."

On 21st December 1889 the Lord Ordinary in an action of multiplepoinding pronounced the following interlocutor:— . . . "Repels the claims for the Reverend William Adam Stark, the claimants Robert Dempster and others, and the claimants Mrs Eliza Romanes Dempster or More and others, and decerns." The reclaiming-days expired on Saturday the 13th January 1890. On Saturdays the box-office is closed at 12 noon. The claimants Mrs More and others reclaimed, and on Saturday 13th January lodged but made no attempt to box the reclaiming-note.

On Monday 15th January, being twenty-two days from the date of the Lord Ordinary's interlocutor, they boxed their reclaiming-note. When the reclaiming-note was called in the Single Bills the respondents objected that it was not timeously boxed under the 18th section of the Judicature Act (6 Geo. IV. cap. 120).

Argued for the reclaimers—The reclaiming-days did not elapse until midnight on Saturday, but the box-office was not open after 12 o'clock on that day. Unless boxing was competent on Monday the reclaimers had only twenty days and a-half within which to reclaim instead of twenty-one as provided by the Judicature Act. They had lodged, and in *Bain's* case lodging was held equivalent to boxing. In *Lothian's* case there had not been delivery of copies to agents within the twenty-one days as required by the Judicature Act, but that was not held an objection—*Henderson* v. *Henderson*, October 17, 1888, 16 R. 5; *Bain* v. *Allan*, February 29, 1884, 11 R. 650; *Lothian* v. *Tod*, March 3, 1829, 7 S. 525; *Hume* v. *Maclellan*, February 21, 1855, 17 D. 477.

Argued for the respondents—The Judicature Act was clear, and the case of *Ross*, from which this case could not be distinguished, was clear. The cases referred to by the reclaimers were under different statutes with the exception of *Lothian's* case, and in that there was substantial compliance with the Judicature Act—*Ross* v. *Herde*, March 9, 1882, 9 R. 710; *Miller* v. *Simpson*, December 9, 1863, 2 Macph. 225.

At advising—

LORD PRESIDENT—I should have been very glad if we could have got over this objection. But unless we were directly to reverse our judgment in the case of *Ross* I do not see how we can avoid sustaining it, as no attempt was made to box the note on Saturday, which was the last of the reclaiming-days. I am accordingly most unwillingly but clearly of opinion that this is a good objection. The reclaimers can still avail themselves of the remedy provided by 48 Geo. III. cap. 151, sec. 16, in a case where the reclaiming-days have expired from "mistake or inadvertency."

LORD SHAND—This case is expressly determined by the case of *Ross*. The day expired at twelve o'clock on Saturday. There was nothing to prevent the party boxing his papers on that day. The box-office is open from eleven till twelve o'clock, and I cannot see that there is any peculiarity in the fact that the day on which the reclaiming-note fell to be boxed was a Saturday. The reclaimers have not even attempted to take the full benefit of that day by getting the clerk to accept copies after the hour at which the office closed, and mark them as boxed. The boxing took place on Monday—that is to say, within twenty-two days instead of within twenty-one days. If we sustain the reclaimers' argument we shall be allowing the parties twenty-two days instead of twenty-one. Accordingly, while I should have been disposed to hold if anything equivalent to boxing had taken place on Saturday that this would have been sufficient, I do not see my way to holding that boxing on the twenty-second day is boxing on the twenty-first. As your Lordship has pointed out, there is still a remedy to the parties, of which the latest illustration is the case of *Steedman*, 14 R. 682.

LORD ADAM—I cannot distinguish this case from that of *Ross*. This is just the kind of case which the provisions of 48 Geo. III. cap. 151, sec. 16, are intended to meet, and that being so, I have the less reluctance in sustaining the objection of incompetency.

LORD M'LAREN—Under the Judicature Act it is clear that the first requirement is the presenting of the reclaiming-note by lodging a signed note with the clerk. There is also another requirement as to the delivery of copies. These two requirements appear to me identical as regards their obligatory character, and if the clause relating to delivery of copies to agents has been held as merely directory, and as under no sanction of nullity, I think the same applies to boxing. But by a series of decisions this requirement has been held essential to presenting. I think these decisions—if I may say so—are erroneous, as inconsistent with the other decision I have referred to. But in a point

of practice like this I think it better to adhere to these decisions, and to hold that the reclaiming-note has not been presented in time.

The Court sustained the objection.

Counsel for the Reclaimers—J. Galbraith Miller. Agent—W. G. L. Winchester, W.S.

Counsel for the Respondents—W. Campbell. Agents—Welsh & Forbes, S.S.C.

Tuesday, January 21.

OUTER HOUSE.

[Lord Kincairney.

M'KECHNIE AND OTHERS, PETITIONERS.

Process — Petition for Appointment of Curator Bonis to Lunatic—Personal Service on Lunatic dispensed with.

In a petition for the appointment of a *curator bonis* to Robert M'Kechnie, a gentleman certified to be of unsound mind and incapable of managing his affairs, presented by his wife and the whole of his next-of-kin, two medical certificates were produced, "that to serve the petition for the appointment of a curator upon him personally would have a bad effect on his mind as he is apt to become very violent," and another from the physician superintendent of the asylum in which he was confined, "that he might be excited and seriously injured by the personal service upon him of a petition for the appointment of a *curator bonis*." In the special circumstances of the case personal service was dispensed with.

Counsel for the Petitioners — Gloag. Agents — Macritchie, Bayley, & Henderson, W.S.

Wednesday, January 22.

SECOND DIVISION.

[Sheriff of the Lothians, and Peebles.

STENHOUSE *v.* TOD.

Cautioner—Co-cautioner—Communication of Benefit—Appropriation of Payment to Particular Debt—Security.

Tod was cautioner along with Gilmour for a cash account for £500, and also along with Stenhouse for a cash account for £150, both for behoof of Ritchie.

Tod and Ritchie together borrowed £600, and Tod obtained possession of the money and applied it to extinguish the first debt. He then paid the second debt and sued Stenhouse for half of the amount.

The defender maintained that Tod was bound to apply the £600 rateably in payment of the two bonds.

The Court repelled the defence, *holding* (1) that there was no agreement that the money should be so applied; and (2) that the facts of the case did not impose any obligation on Tod so to apply it.

In October 1885 James Tod, engraver, Edinburgh, and John Stenhouse junior, stockbroker, Edinburgh, for behoof of William Ritchie, stationer, Edinburgh, Tod's nephew, became joint obligants with him in a cash-credit bond to the Commercial Bank for the principal sum of £150 and interest, with the proviso that the liability of the pursuer and defender for principal and interest should not exceed £172, 10s. On this security the bank, prior to 1st November 1886, advanced to Ritchie £150 exclusive of interest. Tod in 1888 paid to the bank the sum of £172, 8s. 6d. due under the bond, and raised this action against Stenhouse for £86, 4s. 3d., the half of the sum for which he alleged they were equally bound.

The defender alleged (1) that he consented to sign the bond on the undertaking of the pursuer to relieve him of all liability thereunder. (2) It is further believed and averred that the said William Ritchie, sometime in the summer of 1888, provided funds for payment, *inter alia*, of the whole debt due under the cash-credit bond which the defender signed, and handed the same to the pursuer to pay to the bank. The defender believes and avers that the funds so provided amounted to £600, and that the said William Ritchie instructed the pursuer to apply any balance over after paying the debt for which the defender was co-cautioner towards payment of another cash-credit bond for £500 or thereabouts of his to the Commercial Bank, under which the pursuer and another party were cautioners.

He pleaded—"(1) The pursuer having agreed to keep the defender free of all liability under the cash-credit bond referred to in the condescendence, is thereby barred from insisting in the present action. (3) The pursuer having received from the principal debtor in the said cash-credit bond the sum necessary to pay the debt due thereunder, with instructions, or at least on the understanding that it was to be applied primarily to that purpose, was bound so to apply it. (4) *Separatim*, and even if the principal debtor gave the pursuer no instructions as to the application of the fund primarily to payment of the amount for which the defender was security to the bank, still the pursuer having received a sum from the principal debtor to pay to the bank on account of his indebtedness, was bound to apply it equitably so as to relieve those who were his co-cautioners proportionately, and to that extent the defender is entitled to relief."

On 11th February 1889 the Sheriff-Substitute (RUTHERFURD) found that the first ground of defence could not competently be proved *pro ut de jure*, but allowed a