

pealed to the First Division of the Court of Session for jury trial.

In approving of the issue proposed by the pursuer and remitting the case to the Outer House, the LORD PRESIDENT observed—"It has been suggested in view of the provisions of section 40 of the Court of Session Act 1850 that when a case is appealed from the Sheriff Court for jury trial and is remitted to the Outer House, the judge to whom it is remitted must fix a day for the trial of the issue within three weeks. In my opinion that statutory provision has no application to appeals from the Sheriff Court for jury trial. It appears that in some cases of this sort when we have made a remit and the judge has been unable to give a diet within three weeks, notice has been given for the sittings. This is wholly unnecessary, for the judge to whom the case is remitted may try the case at any time before the next sittings. Of course these cases cannot be hung up indefinitely, and if the judge cannot give a day before the end of the session notice of trial for the sittings may be given."

Counsel for Pursuer—Spens. Agents—
Olliphant & Murray, W.S.

Wednesday, January 24.

FIRST DIVISION.

[Lord Johnston, Ordinary.

M'CARDLE, PETITIONER.

(See *ante*, January 13, 1906, 43 S.L.R. 268.)

Administration of Justice—Distribution of Business—Power to Transfer—Transfer to Another Lord Ordinary of Cause Appropriated to Junior Lord Ordinary—Jurisdiction of Judge to whom Cause was Transferred on the Appointment of a New Junior Lord Ordinary—Court of Session Act 1857 (Distribution of Business Act) (20 and 21 Vict. cap. 56), secs. 1 and 4—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 164—Act of Sederunt, 25th November 1857, sec. 29—Clerks of Session Regulation Act 1889 (52 and 53 Vict. cap. 54), sec. 3.

In a petition appropriated by statute to the Junior Lord Ordinary, a Junior Lord Ordinary intimated that having acted as counsel in the cause he desired not to exercise jurisdiction; and the Lord President transferred the cause to another Lord Ordinary.

Held (after consultation with the Judges of the Second Division) (1) that the Lord President had power so to transfer the cause under sec. 1 of the Court of Session Act 1857 (Distribution of Business Act) and (2) that on the appointment of a new Junior Lord Ordinary the cause did not revert to him unless re-transferred.

The Court of Session Act 1857 (Distribution of Business Act) (20 and 21 Vict. cap. 56) in sec. 1 enacts—"It shall be lawful for

the Lord President of the Court of Session from time to time, as it shall appear to him to be necessary or expedient with a view to promote the due despatch of the business of the Court, to transfer causes from one Division of the Court to the other, and from any one Lord Ordinary to any other Lord Ordinary, to such extent as he shall judge to be necessary or expedient, for the purpose of promoting despatch and preventing delay. . . ."

Section 4 provides—"All summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just; and in particular all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court viz., (1)... (2)... (3)... (4)... (5) . . ."

The Act of Sederunt of 25th November 1857 regulates the procedure of judicial factors under the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79). In its 29th sec. it provides—"All proceedings which in this Act are appointed to take place by or before the Court shall, although the same be addressed to the Lords of Council and Session, be brought before, dealt with and disposed of by the Junior Lord Ordinary officiating in the Outer House, or by the Lord Ordinary officiating on the Bills in time of vacation, subject to the review of the Inner House, in conformity with the 4th sec. of the statute 20 and 21 Vict. cap. 56.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 164, *inter alia*, provides—"It shall be competent to one or more creditors of parties deceased to the amount of £100, or to persons having an interest in the succession of such parties, in the event of the deceased having left no settlement appointing trustees or other parties having power to manage his estate or part thereof . . . to apply by summary petition to either Division of the Court for the appointment of a judicial factor and . . . the Court may appoint such factor. . . ."

The Clerks of Session Regulation Act 1889 (52 and 53 Vict. cap. 54), sec. 3, provides—" . . . All summary petitions and applications which are at present under the provisions of sec. 4 of" the Court of Session Act 1857 "appropriated to the Junior Lord Ordinary, shall . . . be presented and disposed of in the Bill Chamber, . . . and such applications may be made and petitions presented and disposed of and orders pronounced thereon at all times by the Junior Lord Ordinary in Session and by the Lord Ordinary on the Bills in vacation, provided that nothing herein contained shall affect the form of such applications and petitions, or of the interlocutors to be pronounced therein, or the preparation of extracts of decrees pronounced therein,

or shall increase or alter the powers presently possessed during vacation by the Lord Ordinary on the Bills, who shall have the same powers, including that of reporting to the Inner House, as are at present exercised by the Junior Lord Ordinary."

In 1899 Mrs Ellen Mullin or M'Cardle presented a petition under sec. 164 of the Bankruptcy (Scotland) Act 1856, in which she sought the appointment of a judicial factor on the estate of her deceased husband, the late James M'Cardle of Carnlough, in the county of Antrim, and 129 Trongate, Glasgow, and under it J. M. M'Leod, C.A., Glasgow, was duly appointed judicial factor. By the Act of Sederunt of 25th November 1857 (*supra*) the petition was appropriated to the Junior Lord Ordinary, who at the time of its being presented was Lord Pearson. During the proceedings following on the petition Lord Pearson was succeeded in the position of Junior Lord Ordinary by several successive Judges, before each of whom the cause from time to time came. When Lord Salvesen was appointed Junior Lord Ordinary he intimated to the Lord President his disinclination to act as Judge in the cause because he had formerly acted as counsel for one of the parties, and the Lord President therefore on 7th November 1905 transferred the cause to Lord Johnston. On Lord Mackenzie succeeding Lord Salvesen as Junior Lord Ordinary a minute was lodged by the petitioner declining the jurisdiction of Lord Johnston.

Lord Johnston reported the cause to the First Division.

Argued for the petitioner—This case fell to be dealt with by the Junior Lord Ordinary under sec. 29 of the Act of Sederunt of 1857, following on the Bankruptcy Act of 1856. The case had been treated as a Bill Chamber case. That appeared not only from the way it had been treated but from the notice of the transfer, for that notice was of a transfer of Bill Chamber causes. It was not a Bill Chamber case but a Court of Session cause appropriated by the Act of Sederunt to the Junior Lord Ordinary. The only reason for dealing with it in the manner applicable to a Bill Chamber cause was because of the provisions of sec. 29 of the Act of Sederunt 25th November 1857, sec. 4 of the Distribution of Business Act 1857, and sec. 3 of the Clerks of Session Regulation Act 1889. The transfer was not one under the Distribution of Business Act. It had nothing to do with the distribution of business, but was for a reason personal to the Judge from whom it was transferred. It was simply giving effect to Lord Salvesen's declinature—*Moubray's Trustees v. Moubray*, January 16, 1883, 10 R. 460. Whether the transfer was properly effected or not at the beginning the personal reason for declinature had ceased to exist through the appointment of a new Junior Lord Ordinary, and the case therefore must go before him.

Counsel for the judicial factor was not called on.

LORD PRESIDENT—I have looked into this matter and have also consulted with the Judges of the other Division. There are two points raised here, and the first is whether there was power under the Distribution of Business Act to transfer this case from Lord Salvesen to Lord Johnston. I must say I do not think there can be any doubt as to the existence of that power. The powers given by sec. 1 of the Distribution of Business Act are very wide, and the only question for the Lord President in deciding whether to transfer or not, is whether it is "necessary or expedient" to do so. It is true that there was no formal declinature here, but I do not think that that was necessary; I think it is quite sufficient that the Lord President should be informed that, for a reason personal to himself, the Junior Lord Ordinary does not wish to act, and I can quite understand that there may be other reasons for that wish besides the one given in this case, viz., that the Judge had formerly acted as counsel in the case. Therefore I do not doubt that what was done here when the case was remitted to Lord Johnston was properly done. I think that probably Mr Dickson had some justification for his verbal criticism of the form of the notice of transfer, namely, that this cause was not properly called a Bill Chamber cause, but I do not think there is any materiality in that objection, for this is clearly an instance where *falsa demonstratio non nocet*.

The second point is whether this case should not now go back to the Junior Lord Ordinary, a new appointment having been made to that office, and the present holder of it not being subject to the personal disqualification which attached to Lord Salvesen. It is urged that it should go back on the ground that causes which are appropriated to the Junior Lord Ordinary should be disposed of by him unless there be some existing reason for them being otherwise dealt with. This is not one of the causes enumerated in sec. 4 of the Distribution of Business Act as falling to be dealt with by the Junior Lord Ordinary, for it has its genesis under the Bankruptcy Act, but then the Act of Sederunt of 25th November 1857 provides that such petitions shall be disposed of by the Junior Lord Ordinary "in conformity with the 4th section" of the Distribution of Business Act. I do not doubt, therefore, that this is a case appropriated to the Junior Lord Ordinary, and that it falls under the general phraseology of sec. 4. But it seems to me that when a statute provides that a petition shall come before the Junior Lord Ordinary it means that it shall do so subject to the general incidents and powers which exist as to the jurisdiction of the Junior Lord Ordinary, and one of these incidents and powers is that the Lord President may transfer the cause to some other Judge if he should think fit, and that it remains before that Judge until it is taken away again. In this instance I see no reason why it should be taken away, but every reason why it should remain. It is before a Judge who is competent to try it,

and who has already considered the cause and disposed of some of the points arising in it, and I think it should remain before him until all the points are disposed of.

I would add that I do not think that litigants have any right to interfere with the distribution of business. The duty of the Lord President in these matters is not primarily to the litigant but to the general public, and his duty is to promote the due despatch of the business of the Court. I therefore think that this is not a matter on which the litigant should be heard at all, for he has no right in these circumstances to choose the Judge before whom he desires his case to be heard. This case is at present before Lord Johnston, and what I have to say to him in answer to the question raised by his report is that it will remain with him, as I have no intention of retransferring it.

LORD M'LAREN—I concur with your Lordship.

LORD PEARSON—I agree with all your Lordship has said.

The Court, without issuing an interlocutor, intimated that the petition remained before Lord Johnston.

Counsel for the Petitioner—Dickson, K.C.—Findlay. Agents—Gill & Pringle, W.S.

Counsel for the Judicial Factor—Wilson, K.C.—Horne. Agents—Bell, Bannerman, & Finlay, W.S.

Wednesday, January 24.

FIRST DIVISION.

[Lord Ardwall, Ordinary.]

AGNEW v. THE BRITISH LEGAL LIFE ASSURANCE COMPANY LIMITED.

Reparation—Slander—Master and Servant—Company—Letter and Statement by Official of Company—Threat if Accounts Not Settled to Report to Authorities—"Greatest Liar and Fraud"—Innuendo—Liability of Company for Letter and Statement by its Official Acting within Scope of Employment

An insurance superintendent wrote to one of the agents under him that as the latter had not appeared on the day for settling his accounts and was reported to have left the town, he would give him till the Monday morning following to settle; "failing this, I shall be obliged to report the matter to the authorities." The superintendent on the same day called, and in the presence of the agent and his wife stated that the agent was "the greatest liar and fraud that had ever come into" the town, and that if he did not settle as required he would give him "into the hands of the authorities." The agent brought an action of damages

against the company, in which he averred that the letter and statements falsely and calumniously represented that he was guilty of dishonest misappropriation, and that his conduct was such as to make it necessary to report the matter to the criminal authorities. He also averred that the letter was written and the statements made by the superintendent in the course of his employment as representing the company and as acting in its interests and for its benefit, and were false, calumnious and malicious.

Held (1) (*aff.* judgment of Lord Ardwall, Ordinary) that the letter was not slanderous and would not bear the innuendo sought to be put upon it, and (2) (contrary to the opinion of Lord Ardwall, Ordinary) that the statements by the superintendent were not slanderous.

Opinion (per Lord Ardwall, Ordinary) that it was only in special circumstances that a master was liable for the slander of his servant, and as there were no such circumstances here the company could not be held responsible. *Opinions* of the Division on this point reserved.

Citizens Life Assurance Company Limited v. Brown, [1904] A.C. 423, commented on.

On 2nd June 1905 Charles Agnew, insurance agent, 36 Hagg's Road, Pollokshaws, brought an action against the British Legal Life Assurance Company Limited, Glasgow, in which he sought to recover £300 as damages for slander. The pursuer had on 1st April 1905 been engaged by the defenders' district superintendent at Greenock, Thomas Ferguson, as a local agent and collector, and thereafter had accounted every Thursday afternoon for the premiums collected. On Thursday, 11th May, he failed to appear and to account, having left Greenock and returned home on that day owing as he alleged to ill-health.

The pursuer averred—" (Cond. 4) On the forenoon of Saturday, 13th May 1905, the pursuer received by post from the said Thomas Ferguson the following letter, written on official notepaper bearing the name and address of the defenders' company printed at the top:— "12th May 1905."

Mr Charles Agnew, 36 Hagg's Road, Pollokshaws.

'Dear Sir,—As you have failed to turn up here at your proper time, and, upon making inquiry at your lodgings, I find that you are reported to have left Greenock, and that you have been drinking, as you have failed to forward me your collections, I will give you till Monday morning, the 15th inst., to hand me every penny you have collected; failing this, I shall be obliged to report the matter to the authorities.—I am, yours, &c.,

T. FERGUSON, *Supt.*'

On the afternoon of the same day, 13th May 1905, the said Thomas Ferguson called at the pursuer's house, 36 Hagg's Road, Pollokshaws, and was shown into the room where the pursuer was still confined to bed.