there was no question for the consideration of the arbiter any more than there is for the consideration of a jury when a pursuer has not adduced any evidence in support of his case.

Well, then, I think that we really proceed in the same way in regard to this matter, because in accordance with the Lord President's opinion, in which I concur, it is for the arbiter to consider whether this agreement between the parties was fair and reasonable, having regard to the facts known at the time. The Court will only interfere with his award if it is satisfied that there was no serious consideration of this question by the arbiter, or if the circumstances upon which his judgment was based were such that no impartial person could have come to the conclusion at which he arrived on the facts. I should not be disposed to think that in every case the question of fairness and reasonableness is one for a court of law, but in every case the arbiter himself must be fair and reasonable in his conduct, and if he ignores the statute and substitutes his own opinion as to the compensation to be awarded, then undoubtedly he has exceeded his jurisdiction and can be corrected.

LORD KINNEAR—I concur in the opinion of the Lord President.

The LORD PRESIDENT stated that the LORD JUSTICE-CLERK concurred in his opinion.

The Court pronounced this interlocutor—

"Find in answer to the question therein stated, that as the agreement tabled is challenged by the tenant as not being fair and reasonable under the circumstances, the arbiter is bound to decide that question for himself in order to determine his further procedure, but that he must bear in mind (1) that the criterion is the fairness and reasonableness of the agreement as viewed in the light of the circumstances at the time of making, and not the question as to whether it does or does not tally with the scale which the arbiter if left to himself would now apply; and (2) that the agreement being signed by both parties, it is necessary for the party seeking to hold it as not being fair and reasonable to condescend specifically on the provisions objected to, and to reasons for holding these provisions not fair and reasonable: Find and declare accordingly, and decern."

Counsel for the Appellant—T. B. Morison, K.C.—Jameson. Agents—Scott & Glover, W.S.

Counsel for the Respondent—Johnston, K.C.—Inglis. Agents—Fraser, Stodart, & Ballingall, W.S.

Wednesday, June 17.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

BEATON *v.* GLASGOW CORPORATION.

Reparation—Slander—Master and Servant—Liability of Corporation for Slander of Servant—Relevancy of Action against Corporation where no Special Averment of Duties of the Servant.

A swimming instructor raised an action for slander against the corporation of a city, in which he averred that the superintendent of certain baths in the city had as such delivered a written report to the city's general manager of public baths; that the latter in the execution of his duty as general manager had forwarded the report to the clerk of the school board of the city, who had previously employed the pursuer as swimming instructor; and that certain statements in the report were false and slanderous, and intended to bring about his dismissal.

The Court, who assumed that the report was slanderous, *held* that the averments were irrelevant, on the ground that the position of general manager of baths did not imply authority from the corporation to make communications on their behalf as to the business of the baths, especially to an outside body like the school board, and that there were no special averments that to make such reports was within the scope of his employment.

Daniel Beaton, swimming instructor, Glasgow, raised an action against the Corporation of the City of Glasgow, in which he, *inter alia*, sought to recover damages for alleged slander, said to be contained in a report written by Robert A. Murray, superintendent of Gorbals Baths, to William Thomson, general manager of the public baths, and sent by him to the Glasgow School Board.

The pursuer's averments relating to the alleged slander were, as amended, as follows (the deletions are in italics, and the amendments within brackets)—"(Cond. 1) The pursuer is a swimming instructor in Glasgow. He has the largest business of the kind in the city, and has been engaged therein for over thirty years. He has been employed by the Glasgow School Board as swimming instructor in connection with their schools for the past seven years, and he is also instructor to several swimming clubs in Glasgow. The defenders are the local authority having the control and administration of the Public Baths of Glasgow under the Glasgow Police Act 1866. . . . . (Cond. 7) *On or about 1st May* 1907 *the said Robert A. Murray wrote a letter to the Clerk of the Glasgow School Board (who employed the pursuer as swimming instructor, as before mentioned), in the following terms*—[On or about 1st May 1907 the said Robert A. Murray, as superintendent of the said

Gorbals Baths, delivered to the said William Thomson, as general manager of the public baths, a written report, in the following terms]—'Board school boys had large pond to-day. Right away at 10 o'clock 20 lads came in. Our head bathman was at the door to control them, and asked them to take dressing-boxes in rotation, but Mr Beaton interfered, and shouted to the boys, "Spread yourselves, lads," with the result that 20 boys were all over the place, and he had disorder at the very start of the day. At 12·45 he left the building, and left behind him in the pond room 4 lads from Gorbals School. You remember in June last Miss Beaton did the same thing, with the result that a girl was nearly drowned. Mr Beaton left at 4 o'clock, 45 minutes after the time, and left behind him in the pond room 12 boys from Camden Street School. In short, it looks like a repeat of last summer's performance, as Mr Beaton is allowing or winking at all regulations, and playing on his position as instructor, and if he is allowed to go on as he has begun, I must be freed of all reponsibility as to the conduct of the place.' *The said letter was handed by the said Robert A. Murray to the said William Thomson for dispatch by him, and he approved of it, and forwarded it to the said Clerk of the Glasgow School Board.* [The said report was forwarded by the said William Thomson in the execution of his duty as general manager of the public baths to the Clerk of the Glasgow School Board, who employed the pursuer as swimming instructor, as before mentioned, and particularly employed him to teach swimming at the Gorbals Baths.] The statements in the said *letter* [report] are of and concerning the pursuer, and they are false, and were intended to prejudice the pursuer, and otherwise to damage him in the eyes of the Glasgow School Board, with the view of bringing about his dismissal from their employment. In point of fact, the proper time for leaving the baths was 4 o'clock. The statements contained in said *letter* [report] are slanderous, and the said Robert A. Murray in writing and handing over the same, and the said William Thomson in dispatching the same, represented, and intended to represent, that the pursuer had been guilty of such reckless conduct as to endanger the lives of the boys under his charge, and was also guilty of contravention of the said bye-laws, and of continued misconduct in and misuse of his position as an instructor, and was unfit to occupy the position and discharge the duties of a swimming instructor. The said Robert A. Murray and William Thomson were aware of the falsity of the charge, but nevertheless maliciously, and without probable or any cause, preferred it against the pursuer, with the object of persuading the said School Board to dismiss him from their employment, which in consequence thereof, and of the illegal actings of the defenders afterwards condescended on, they did. In writing and dispatching the said *letter* [report] the said Robert A. Murray and William Thomson acted within the scope of their authority from the defenders, and in the discharge of their duties as servants of the defenders, and in the supposed furtherance of the interests of the defenders."

The defenders pleaded, *inter alia*—"(1) The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (7) The defenders not being responsible for any actings of their said servants outwith the scope of their duties and authority, are not liable for the loss or damage, if any, thereby caused to the pursuer."

On 19th March 1908 the Lord Ordinary (MACKENZIE) allowed the parties a proof of their averments other than the averments relating to the question of slander.

Opinion. — [*After dealing with other grounds of action on which the case is not reported*]—. . . "As regards the alleged slander, the averments upon this point are contained in Cond. 7 as amended. I do not doubt that the statements contained in the report by Robert A. Murray, the Superintendent of the Gorbal Baths, which he delivered to William Thomson, as general manager of the public baths, are capable of being innuendoed as set out in Cond. 7. The consequence to the pursuer was serious according to this averment, as he says in consequence of its dispatch to the School Board they dismissed him from his post of swimming instructor. The question, however, is whether the defenders can be sued by the pursuer in respect of what Murray and Thomson did. This question has come up in the recent cases of *Ellis* v. *The National Free Labour Association*, 1905, 7 F. 629; and *Agnew* v. *The British Legal Life Assurance Company*, 1906, 8 F. 422. The question is whether there is any *prima facie* case that Thomson was acting within the scope of his authority in sending this report to the School Board. In my opinion no such case has been averred. I am quite unable to see that Thomson had any authority or duty to do anything in the matter but report to his committee. Accordingly I am of opinion that the pursuer is not entitled to sue the defenders for damages for slander. . . ."

The pursuer reclaimed, and argued—(1) The report was capable of bearing the innuendo put upon it; the charges made therein were similar to those in *M'Kerchar* v. *Cameron*, January 19, 1892, 19 R. 383, 29 S.L.R. 320; *M'Bride* v. *Williams and Dalzell*, January 28, 1869, 7 Macph. 427, 6 S.L.R. 273; *A B* v. *C D*, November 1, 1904, 7 F. 22, 42 S.L.R. 37. (2) A corporation was liable for slanderous statements written by its servant in the course of his employment, even though that servant had no actual authority, express or implied, to make the statements complained of—*Citizen Life Assurance Co., Limited* v. *Brown*, [1904] A.C. 423, referred to with approval in *Ellis* (*cit. infra*), and *Mackenzie* (*cit. infra*). *Prima facie* on the pursuer's averments, Thomson in forwarding the report was acting within the scope of his employment. The pursuer should be given an opportunity of proving his contention to that effect, as was given in *Ellis* v. *National*

Free Labour Association, May 12, 1905, 7 F. 629, 42 S.L.R. 495, and in *Mackenzie* v. *Cluny Hill Hydropathic Co., Limited*, 1908, S.C. 200, 45 S.L.R. 139. It was impossible to say without inquiry that Thomson had acted outwith the scope of his employment.

The Court did not call upon the defenders (respondents) to reply.

LORD PRESIDENT—I have not the slightest doubt that the Lord Ordinary is quite right in not admitting these averments relating to the question of slander to proof, and in truth I think there are more objections than the Lord Ordinary has stated. I find it myself exceedingly difficult to hold that there is matter which can be innuendoed at all, but I will not go into that matter, because I shall assume—as the Lord Ordinary has come to a conclusion that they may be innuendoed—that upon that matter he is right.

But then, what are the circumstances which are averred? It is averred that the local custodier of a bath belonging to the Glasgow Corporation made a report to his superior, the general manager of the baths department, in which he commented strongly upon the conduct of the pursuer, and I will assume that the statements therein were slanderous and untrue. But none the less it was a report. Well, the general manager of the baths department then, according to the averment, sends this report, which was made to him to an outside party—the Glasgow School Board—who by that means became cognisant of these slanderous statements. Upon that the pursuer sues, not the sender of the letter, but the Glasgow Corporation.

Now it is true that it has recently been held, and I think rightly held, that a corporation may be liable for slander. It was not an easy result to arrive at, and I may remind your Lordships that there was one very eminent Judge (Lord Bramwell) who resisted it with might and main. But at anyrate it has been allowed, but I think it has been allowed within very narrow limits. And one necessary limit is that the person who is guilty of the slander or libel—a corporation, of course, is a being that cannot act by itself, and cannot act except by agents—must be acting within the scope of his authority. Now it is quite true, of course, that what is the scope of authority is a question of fact. But then none the less it is a question of fact which allows of immediate determination when you set forth the particular position that a person is in, unless you can make special averments of authority given. To illustrate my meaning, it is quite obvious that whereas the secretary of the corporation, who is the natural mouthpiece of the corporation, may be understood to have a very general authority, and therefore that the corporation may have to prove that he acted outside the scope of his authority in doing any particular thing, that could not possibly be said of the office-boy. If you suppose that the office-boy had written the letter which the secretary wrote in the *Citizens' Life Insurance Co.* v. *Brown*,]1904] A.C. 423, I take it that there would have been no case, unless of course you could make a special averment that by a mandate of the directors of the corporation — the governing body — this particular office-boy had been given these powers.

Now that is the first ground upon which these averments fail, and that is the ground on which the Lord Ordinary has gone. The general manager of the baths department is *toto coelo* removed from being the general manager or the secretary of the Glasgow Corporation. He is not the person who generally makes communications on behalf of the Glasgow Corporation, and therefore I think that when you merely table the person who wrote the letter as the general manager of the baths department you put yourself out of Court, unless you can add a special averment that he had been given special powers to make communications of this sort. Well, no such special averment is made, and therefore I do not think there is any ground for the contention which was very well urged by the counsel for the reclaimer, the contention, namely, that authority being a question of fact you ought not to determine it until the facts were known. That is quite true, but at the same time you must have a proper averment of the facts before you are allowed to go to proof upon the general issue.

But then there is another objection which is not noticed by the Lord Ordinary, but which to my mind is quite conclusive. This so-called slanderous document is a report and nothing else, and the province of a report is that it is confidential and is meant to be communicated to the superior officers to whom the report is made. If accordingly we find upon the facts averred that the report, instead of being communicated to any superior officer, was sent away to an outsider by the action of a servant, I think that shows, on the face of it, that the servant was not acting within the scope of his authority, but was going outside it—in the absence, of course, of any averment which would show that this particular act was within the instructions that had been given.

I think, therefore, that upon the pursuer's own showing, when he says that the general superintendent of the baths communicated the report he had got from his inferior officer, not to the town council but to an absolutely outside body (the Glasgow School Board), that shows that he was acting outside the scope of his authority. Therefore upon both these grounds I hold the result at which the Lord Ordinary has arrived is perfectly right.

LORD M'LAREN—I am of the same opinion.

LORD KINNEAR—I am of the same opinion. I assume with your Lordship that the words complained of might bear an innuendo. But I must say I have the greatest doubt, to put it no further, whether they can possibly bear the only innuendo which the pursuer desires to put upon them. How-

ever that may be, I agree with your Lordship that the Lord Ordinary has refused a proof of this particular part of the case upon a perfectly right ground. To make a corporation liable for a slander by a person in their employment it is not enough to say generally that what that person did was done in the execution of his duty. You must go on and make some averment to show what his duty was so as to make it apparent that the particular thing complained of at least belonged to the class of services which he was employed to perform. All that is said about the kind of employment that is committed to Mr Thomson, whose conduct is here complained of, is that he was employed as general manager of the public baths. Now, if he had done any wrong in the course of his management of the baths, then it may very well be that the Corporation would be responsible for it. But what he did was not an act of management of the baths in any sense. It was a communication to the Glasgow School Board of a report made to him by another person in the same employment which is said to be slanderous of the pursuer. But then the only averment which could have made that a relevant ground of complaint would have been an averment that it was part of his employment under the Corporation of Glasgow to make reports to the Glasgow School Board as to the business of the baths. If it was part of his employment to make reports, or communications of any kind, on behalf of the Corporation to the School Board, it would have been perfectly easy to say so. But that is not said. There is nothing to suggest that he was in any sense or for any purpose the mouthpiece of the Corporation. I therefore agree with your Lordship and the Lord Ordinary.

LORD PEARSON was absent.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—George Watt, K.C. — J. G. Robertson. Agent—D. Maclean, Solicitor.

Counsel for the Defenders (Respondents)—T. B. Morison, K.C.—M. P. Fraser—Crawford. Agents—Campbell & Smith, S.S.C.

Wednesday, June 17.

FIRST DIVISION.

(SINGLE BILLS.)

HUTCHISON *v.* HUTCHISON.

Process—Reclaiming Note—Competency—Boxing—Failure to Box Record—Court of Session (Judicature) Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 18—*A.S., 11th July* 1828, *sec.* 77—*Court of Session Act* 1808 (48 *Geo. III, cap.* 151), *sec.* 16.

The Court of Session Act 1808, section 16, provides that if the reclaiming days shall from mistake or inadvertency have expired, it shall be competent with leave of the Lord Ordinary to submit the interlocutor complained of by petition to the review of the Inner House.

The Court of Session Act 1825 (Judicature Act), section 18, provides that a party reclaiming shall within twenty-one days, along with the reclaiming note put into the boxes printed copies of the record.

The A.S., 11th July 1828, provides that reclaiming notes shall not be received unless there shall be appended thereto a copy of the record.

In an action of divorce for desertion the Lord Ordinary assoilzied the defender. During the currency of the reclaiming days a change of agency took place. The new agent made the mistake of assuming that the ordinary number of copies of the record had been printed. Only thirty copies had, however, been originally printed, and he was unable to procure sufficient copies to append to the reclaiming note for boxing, and, accordingly, only boxed the reclaiming note.

The Court, on the ground (1) that the mistake made was excusable, (2) that if the reclaimer were to go through the form of presenting a petition under the Court of Session Act 1808 the interlocutor could be submitted to review, and (3) that it was unnecessary to make him go through this form, *repelled* the respondent's objection to the competency of the reclaiming note, and sent the case to the roll.

M'Evoy v. *Brae's Trustees*, January 16, 1891, 18 R. 417, 28 S.L.R. 276; and *Wallace* v. *Braid*, February 16, 1899, 1 F. 575, 36 S.L.R. 419, *distinguished.*

The Court of Session Act 1808, section 16, enacts—"If the reclaiming or presenting 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 . . ."

The Court of Session Act 1825 (Judicature Act), section 18, enacts—"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 . . . 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 if the interlocutor has been pronounced without cases the party so applying shall, along with his note as above directed, put into the boxes printed copies of the record authenticated as before . . ."

The Act of Sederunt of 11th July 1828, section 77, enacts—"Reclaiming notes . . . shall at first be moved merely as single bills and immediately ordered to the roll, and shall then be put out in the short or summar roll as the case may be: Provided always that such notes, if reclaiming against