where there is a sufficient number of them to constitute a recurring payment. I do not know that we have ever gone so far as to hold that a single composition of considerable amount would be treated as income, though of course a good deal might be said in support of the principle of uniformity as applicable to such cases. Then in the present case there is, however, as your Lordships have pointed out, one question which might be held to involve an element not present in the cases referred to by Lord Adam, and that is in regard to the York Street property, the question whether a proper casualty of superiority—a sum payable by heirs or singular successors, and taxed as regards the amount—is to be treated as capital or income. Well, two distinctions were suggested. The one is that such casualties are always given to the fiar, because the fiar alone has the power of entering vassals, and he is therefore entitled to the legal consideration of receiving the entry; the other element that these casualties do not occur at fixed regular intervals of time, but occur at very uncertain periods, and are never payable more than once in a generation. As to the first distinction, I think it is disposed of by the fact that a superior is no longer entitled to demand an entry, and that the sum which he now receives is not a consideration for any trouble he takes in entering the vassal, but merely compensation under the Conveyancing Statutes for the pecuniary rights which he would otherwise have lost. Then the second distinction certainly creates a difficulty, but there being no decision to the contrary, and in view of the great inconvenience, and if I may use the word, I might almost say absurdity, of treating casualties at death in one way, and casualties payable at fixed periods in another way, I agree with your Lordships that it is better to have a uniform rule, and that we ought not to treat the case of casualties occurring at uncertain periods—a case which can never arise in future contracts—as exceptional. I therefore am for answering all the questions as your Lordships have proposed.

LORD KINNEAR—I think the questions are all already decided in the cases to which your Lordships have referred, and I therefore agree in the course your Lordships propose to take.

The Court answered the first four questions in the affirmative.

Counsel for the First and Third Parties—Hunter. Agent — P. Gardiner Gillespie, S.S.C.

Counsel for the Second Parties—Horne. Agents—Mylne & Campbell, W.S.

Thursday, June 4, 1908.

OUTER HOUSE.

[Lord Johnston.

PATERSON (M'INNES' TRUSTEE) *v.* GLASGOW CORPORATION.

Public Authorities Protection—Act Done in Pursuance of Act of Parliament—Limitation of Time for Bringing Action—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38), *sec.* 166.

The Public Health (Scotland) Act 1897, section 166, enacts—". . . Every action or prosecution against any person acting under this Act on account of any wrong done in or by any action, proceeding, or operation under this Act, shall be commenced within two months after the cause of action shall have arisen. . . ."

Circumstances in which *held* that a local authority was barred by their actings from maintaining in defence to an action for damages for injury to property, that the action had not been brought within two months after the injury complained of.

On 18th July 1907 Mrs Paterson, sole trustee acting under the trust-disposition and settlement of the late Miss Mary M'Innes, who resided at 48 North Portland Street, Glasgow, brought an action against the Corporation of Glasgow, to recover damages for alleged injury to certain house property belonging to the trust through the wrongful service of a notice under the Public Health (Scotland) Act 1897.

The property in question, which had belonged to Miss M'Innes, who died on 10th February 1906, consisted of seven dwelling-houses situated and entering at 64 Rose Street, Glasgow, but having a frontage to Govan Street, there being below these houses a shop entering from Govan Street. On 28th April 1906 the Corporation served upon Mr Archibald Hamilton, the law agent of the trust, a notice that the dwelling-houses situated at 64 Rose Street, being a back land, of which premises he was therein described as owner, were in a state so dangerous and injurious to health as to be unfit for human habitation. On a representation, however, by Mr Hamilton that he was not owner of the property a second notice in similar terms, dated 4th May 1906, was served upon Miss M'Innes' trustee. It subsequently transpired, as admitted by the defenders on record, that these notices had proceeded on an error as to the identity of the property intended to be condemned, the property aimed at being in reality a back land belonging to Alexander Sim, to which access was gained by the entry at 64 Rose Street, but which was entered in the valuation roll as at No. 60 Rose Street. In spite of remonstrances by the law agent for the trust, pointing out that a mistake had been made, the defenders did not withdraw the notices, and, after endeavours to sell the property, the bondholders entered into possession and ulti-

mately sold it on 20th February 1907 for a sum alleged to be greatly below its value and insufficient to pay off the full amount of the bonds over it.

The defenders, *inter alia*, pleaded—"(2) The pursuer is barred, by the 166th section of the Public Health (Scotland) Act 1897, from insisting in the present action, and the same ought to be dismissed, with expenses. (3) In any event the action is barred by the provisions of the Act—56 and 57 Vict. cap. 61 (Public Authorities Protection Act 1893). (4) The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons, decree of absolvitor should be pronounced, with expenses. (7) Any loss or damage sustained by the pursuer having been caused or materially contributed to by the failure of the said trustees, or their said law agent, to explain to the defenders and others, as it was their duty to do, that the said notice did not refer to the pursuer's said property, the defenders should be assoilzied from the conclusions of the summons. (8) In any event the sum sued for is excessive."

The pursuer, *inter alia*, pleaded—"(4) The defenders are barred by their actings from maintaining that the present action has not been timeously raised."

On 2nd January 1908 the Lord Ordinary pronounced the following interlocutor:—"Repels the first, fourth, and seventh pleas-in-law for the defenders, and before further answer allows the pursuer a proof of the averments on record in support of her fourth plea-in-law; and to the defenders a conjunct probation: Appoints the proof to proceed on a day to be afterwards fixed."

In the Lord Ordinary's note the following authorities were referred to:—That the notice was a proceeding under the Act—*Cree* v. *Vestry of St Pancras*, [1899], 1 Q.B. 693; That, if averments proved, a wrong was done of the nature of slander to property—*Bruce* v. *Smith*, December 21, 1898, 1 F. 327, 36 S.L.R. 243; That the wrong continued from day to day until the pursuer had parted with the property—*Earl of Harrington* v. *Corporation of Derby*, L.R., 1905, 1 Ch. 205, at p. 226 *et seq.*; That the defender cannot take benefit by the delay if it were occasioned by his own conduct—*Caledonian Railway Co.* v. *Chisholm*, March 17, 1886, 13 R. 773, 23 S.L.R. 539.

On a reclaiming note to the Second Division the Lords, on 23rd January 1908, refused the reclaiming note and adhered to the interlocutor of the Lord Ordinary.

LORD JUSTICE-CLERK—I think the interlocutor of the Lord Ordinary must be adhered to. This is a peculiar case both in its own circumstances, and peculiar also in respect that we have to deal with a very drastic clause in an Act of Parliament, which interferes very harshly with the ordinary rights of litigants complaining of a wrong which has been done to them. The contention of the Corporation is that while a grievous and quite inexcusable blunder has been committed by them which may have caused loss to the pursuer, the pursuer is shut out from all remedy in respect that she did not bring her action within two months from the time that the cause of action arose. I am quite unable to hold that as an abstract principle the Act applies to every case in which a person may have a notion that he has been aggrieved by something being done which the other party had no right to do, and which the other party would not have done if he had known the facts, while in point of fact he was bound to know them. But here what the Lord Ordinary has allowed a proof upon is upon the question whether the pursuer in the case was allowed through the action of the defenders to allow time to pass which in ordinary circumstances would have barred him from proceeding with his action. Now that is a matter about which I think the pursuer has made sufficiently relevant averments to entitle the Judge, as he did, to allow the case to go to proof. We have in our own authorities a case touching that very closely—namely, the case of the *Caledonian Railway Company* v. *Chisholm*, March 17, 1886, 13 R. 773, 23 S.L.R. 539, where it was distinctly held that in the matter of the prescription of a claim, which is practically the same thing as the limitation enforced by this statute of the short period of two months, where the matter was concealed from the party who had the claim, where an improper proceeding was concealed and could not be dealt with afterwards, the plea of prescription was barred from being effectively maintained.

In this particular case numerous authorities have been quoted to us which are extremely strong in favour of the defenders maintaining that the plea of bar is effectual to prevent an action being proceeded with. Some of these cases seem to me to go very far indeed, but I have very strong doubts as to whether it could be held to be equitable that such things should be allowed. Of course we must carry out the Act of Parliament strictly; and however unjust may be the effect of carrying out the Act of Parliament we must carry it out. What I think very strongly is that where circumstances are alleged which make it reasonable to hold that the lapsing of time did not take place in respect that the time did not begin till a later date than that intended by the defenders, we ought not to reject such a case without having properly inquired into it. If it turns out, as it may turn out, that the pursuer was not entitled to the same consideration which was given to the party in the case of the *Caledonian Railway Company* v. *Chisholm*, then of course he will be unsuccessful; but as he makes that demand I think the Lord Ordinary did right in allowing him to have an opportunity of proving what he alleges, the proof being before answer and all questions remaining over.

LORD STORMONTH DARLING—I concur with your Lordship.

LORD LOW—I would not like to go further than this; that the case appears to me to be one of extreme difficulty; but I

think it is desirable that before it is decided the whole facts should be ascertained.

LORD ARDWALL—I have little doubt that a public authority may be barred by their own actions from pleading the privilege which is afforded to them by this Act, the privilege, namely, of escaping from an action which is not raised within two months of the cause of action arising. But my difficulty has been as to whether there were sufficiently relevant averments to support such a plea of bar against them. However, I am not disposed to criticise these too strictly, and as the pursuer is willing to take the risk of going to proof upon these averments, such as they are, I am not disposed to differ from your Lordships in the matter. I therefore concur that this proof should be allowed. It is before answer, and therefore in allowing proof we are not pronouncing any opinion either upon the relevancy of the averments of bar or upon the question of law which is otherwise involved in the case.

The facts brought out at the proof sufficiently appear from the Lord Ordinary's note (*infra*).

LORD JOHNSTON—"I have now to dispose of the fourth plea-in-law for the pursuer, which is to the effect that the defenders, the Corporation of Glasgow, are barred by their actings from sheltering themselves from the pursuer's claim under the 166th section of the Public Health Act 1897. Proof having been led, I am of opinion that that plea should be sustained. The inferences which were indicated by the correspondence are amply confirmed by the proof. Those inferences were, that a mistake had been made, that the Corporation's officials obstinately persisted in that mistake though put on their inquiry, and it is now known that long after the mistake was brought home to them they, as I think, disingenuously, fenced with the question, and led the pursuer's agent to hold his hand instead of raising action at once. In these circumstances I think that the defenders are disentitled from pleading the statutory limitation of action to avoid the claim against them.

"The facts as they now appear are that Miss M'Innes, the proprietrix of certain tenement property in Govan Street, but of which the shop only enters from Govan Street, and the whole tenement houses above from a close at 64 Rose Street, a side street at right angles to Govan Street, died on 10th February 1906, and that her trustees found themselves obliged to bring her property to sale for the Whitsunday term of that year. It was fully advertised, and 9th May 1906 was fixed for the auction. But on 28th April 1906 the trustees were served, at the instance of the Corporation, with a notice under the Public Health Act 1897, and the Housing of the Working Classes Act 1890, condemning their property, and calling on them within a month 'to make the said premises fit for human habitation.' This was followed on 4th May by a fresh notice in same terms, to be substituted for the first by reason of a technical informality.

"Neither notice was really intended for Miss M'Innes' trustees. A mistake had been made by the officials charged with the administration of the Act, thus—The Medical Officer of Health, Dr Chalmers, and his depute, Dr Archibald, had visited and condemned a neighbouring property belonging to a Mr Sim, first in the autumn of 1905 and again in March 1906, but had delayed taking any active steps till April 1906. Dr Chalmers' statutory representation is dated 17th March, and was accompanied by a memorandum of even date. The property is described by Dr Chalmers in his representation as a 'dwelling-house situated at 64 Rose Street, S.S., being a back land, of which Miss Mary M'Innes, 48 Portland Street, Glasgow, is the owner.' This entry is thus accounted for. Having marked certain premises entering from the close 64 Rose Street for condemnation in the autumn of 1905, Dr Archibald, Deputy Medical Officer, sent his clerk to the Assessor's office to ascertain the name or names of the proprietor. Now, it happened that there were three tenement properties *de facto* entering by the close 64 Rose Street, viz., M'Farlane's, M'Innes', and Sim's, but *de jure* only M'Farlane's and M'Innes' properties were entitled to that entry. Sim's property had entry by its titles by a close at No. 60 Rose Street. Hence in the Assessor's survey books and in the valuation roll Sim's property was inserted as at No. 60 and not at No. 64 Rose Street. Hence also when the clerk, Sievewright, went to ascertain the name of the proprietor of the back land at 64 Rose Street, he brought back the information that there were two properties at that number, M'Farlane's and M'Innes' (Miss M'Innes was then alive), and so reported to Dr Archibald. He naturally brought no information about Sim's property, which was the property really aimed at, as in the Assessor's books that was entered under No. 60 Rose Street. Dr Archibald having apparently forgotten that he had already made inquiry about the ownership of the back land he intended to condemn, sent again on 17th March 1906, and the same clerk brought him back the same information, but with the addition, with reference to M'Innes' property, of the words '*per* Archibald Hamilton, 170 Hope Street.' Dr Archibald assumed, and I think the clerk, from his marginal markings, had also assumed, that because M'Innes' property came second in the Assessor's books, therefore it must necessarily be the back land for the ownership of which he was in search, and he acted on that supposition. I cannot acquit Dr Archibald of adopting a careless and insufficient method of obtaining the information essential to putting in force a statute having most serious consequences to the private proprietor. This carelessness has been the occasion of injury, more or less serious as it may yet be ascertained, to the innocent owner of a property against which there was no cause of complaint. And I cannot any more acquit Dr Archi-

bald that he was following a practice established in the office instead of sending to the spot to solve the doubt which the Assessor's books created, and to ascertain that the property which he inserted in the representation was really the property described in his memorandum. Both documents, though they might pass under Dr Chalmers' hands, were really his. Nor can I accept the excuse so repeatedly urged in this case, that the Corporation of Glasgow is such a big institution with such multifarious duties, and its officials have to deal with things so in the gross, that it and they are not to be judged of in the matter of care and accuracy like other people. If the Corporation and its officials do such a big business, and do it not only in slipshod but also in autocratic fashion, it can the better afford to pay when it and they make a mistake, as from their ways, as disclosed in this case, they must occasionally do, and when the private citizen and individual proprietor is injured thereby.

"Except for his careless method Dr Archibald's mistake was excusable, for Sim's property, though properly No. 60 Rose Street applied to it, had used No 64 for years as its entry, and in fact the close No. 60 had been for several years closed up and altogether disused. But the result of it was that Dr Chalmers presented a statutory representation regarding not Sim's but M'Innes' property, and that the Corporation as Local Authority on 27th April 1906 gave notice directed to its proprietors.

"While Dr Archibald occasioned the mistake, the responsible officials in charge of these matters perpetuated it with their eyes open, or rather, I should say, with their eyes obstinately shut, notwithstanding Mr Hamilton's, the agent for Miss M'Innes' trustees, efforts to open them. These officials were Mr Lindsay, the Depute Town Clerk, and Mr Thomas Picken, his assistant. The Town Clerk, though he signs some letters, had not and could not be expected to have any personal knowledge of the matter. How far Mr Lindsay and at what time Mr Lindsay found or had reason to suspect that a mistake had been made, it does not import to inquire. I am not altogether satisfied to accept his disclaimer. But the cause of the perpetuation of the mistake was the system which Mr Lindsay had been instrumental in initiating, coupled with the remissness of his subordinate Mr Picken.

"The official *mot d'ordre* in Mr Lindsay's office is whenever a representation is made by the medical officer, and notice served on behalf of the Corporation, peremptorily to refuse the proprietor charged all information. And Mr Picken certainly acted up to his instructions. On the receipt of the first edition of the notice Mr Hamilton called and saw Picken, and followed up his call by a letter of 1st May 1906. All I need to note is (1) the situation of M'Innes' trustees' property rendered it doubtful whether or not their tenement houses were properly described as a back land, though in a sense they might be so, and Mr Hamilton brought to Picken's notice this question which he could not solve for himself. (2) Its condition made it difficult for Hamilton to understand how it could be condemned, and he so stated. (3) Had Picken referred to the memorandum which accompanied Dr Chalmers' representation, he must have seen, that if something was not clearly wrong, there was at least something to inquire into. (4) Had he not been hidebound by the official rules, and had he exchanged a few words of explanation with Mr Hamilton, he must at once have found out then what Dr Archibald in similar circumstances did find out in February of the next year, but not till after the mischief was done, viz., that the notice had been served on the wrong parties; and (5) notwithstanding his attention having been so drawn to questions and difficulties, Mr Picken, without inquiry, on 4th May served a fresh notice as already stated.

"I pass from this episode, merely noting that there is no justification for the contention urged on behalf of the Corporation, that the whole matter at issue was whether Mr Hamilton had been properly notified as personally the proprietor or not. A reference to the letters is a complete answer to this contention. And in this relation, and with reference to the evidence generally, I must add that whenever they come into collision I have no hesitation in accepting the evidence of Mr Hamilton and Mr Crosthwaite, with which I was perfectly satisfied, in preference to that of Mr Picken and Lindsay, with which I was not.

"The mischief occasioned by Dr Archibald's mistake having been perpetuated by Mr Picken, had its complete effect on 20th February 1907, when the property was at last sold. And I remain of opinion that that is the date from which, if they are not barred from founding on the 166th section of the Public Health Act 1897, the two months' limitation of action runs in favour of the Corporation.

"At that date the Corporation were entirely in fault, and what is a material consideration, the ground of their notice being a matter of opinion, of which they alone were in possession, it was impossible for the proprietor's agent to do more than he did, or to do otherwise than, having done so, to accept the situation created by the notice. It was urged, why did not Mr Hamilton go and see Dr Chalmers or Dr Archibald when this was suggested to him? I think he did right not to go, if it ever was suggested to him, for he had gone to the proper persons, the officials responsible for the statutory notice, and he had no call, and I think no business, to be cross-questioning those who were behind those responsible officials. But even if he had done so, he would have been met with the same peremptory refusal of information.

"But on 29th February 1907 Mr Crosthwaite, the agent for a second bondholder, after a fruitless interview in January, did succeed in getting a sensible interchange of information with Dr Archibald, and at once Dr Archibald saw that a mistake had been made, and very soon satisfied himself of the explanation of that mistake. And

from that date Mr Crosthwaite knew the truth, and so did Dr Archibald, and I am convinced so did Mr Picken, if not others of the Corporation's officials. But Mr Crosthwaite was at arm's length with Mr Hamilton, and it was only in the end of March, and that with a hostile object, that he gave him any hint of what had happened. Mr Picken made no communication to Mr Hamilton, and the suspicion which I formerly had derived from the correspondence—that the officials or some of them were from this time onward engaged in trying to hush up the matter—is deepened by the evidence.

"Dr Archibald at once proceeded to set matters right by substituting a representation regarding Sim's property for the erroneous one regarding M'Innes', but ante-dated it to 17th March 1906, the date of the original notice to Mr Hamilton. The whole history of this new representation is hidden in a cloud. Dr Archibald accompanied it by no written explanation and no new memorandum, and I cannot say I like his action. At best it was even more slipshod than his original proceeding. But I fully believe him when he says that though he accompanied his new representation by no letter, he telephoned to the officials in the Sheriff-Clerk's office giving his explanation. Whether by him or by Mr Crosthwaite the true state of matters is undoubtedly brought home to Mr Picken on 20th February, the date of the sale, and three not immaterial circumstances are—the representation *re* Sim's property is acted on; the number of Sim's property in the valuation roll is changed; and there is no withdrawal of the notice to M'Innes' trustees and has been none to this day.

"But the crucial point on which the pursuer's fourth plea turns is now reached. In the end of March 1907 Mr Hamilton receives such explanation from Mr Crosthwaite as, if well founded, must have satisfied him that his clients had a good claim of damages against the Corporation. Was he bound to treat it as well founded and instantly to act, and how is the Corporation's plea affected by the actings of their officials?

"In judging of this matter, what follows must, I think, be viewed in the light of the prior conduct of the Corporation's officials. The responsible subordinate had, as I have pointed out, good ground to know on 20th February 1907 that a mistake, which lay at Dr Archibald's and his door, had been made. He took no steps to enlighten anybody. In fact it is most remarkable that there is no explanation of the mistake on the record, and I am persuaded that the defenders' counsel did not themselves understand the matter till the explanation came out in the evidence. Mr Hamilton was, I think, justified, looking to his relations with Mr Crosthwaite, in waiting till he had the latter gentleman committed to a statement in writing. And he then at once communicated with the Town Clerk by letter of 20th April 1907, *inter alia*, in these terms—'On this date (21st February last) it appears—the information has only now come to my knowledge — your assistant Mr Picken, and Dr Chalmers or his assistant, admitted to Mr John M. Crosthwaite, agent for the second bondholders, after anxious inquiry and pressure by him, that the notice in question although issued as applying to the trust property did not so apply, and was, as then stated for the first time, intended for another property at 64 Rose Street.'

"The answer of 22nd April 1907 contains the following statement, for which, though signed by the Town Clerk, Mr Picken and the Depute Clerk Mr Lindsay are responsible:—'I do not know what communication Mr Crosthwaite, agent for the second bondholders, had with Dr Chalmers or his assistant, but you are in error in stating that my assistant Mr Picken admitted to Mr Crosthwaite, "after anxious inquiry and pressure by him," that the notice in question did not apply to your client's property. My assistant told Mr Crosthwaite that he did not know the particular property at 64 Rose Street to which the notice applied, and that that information could only be had from the medical officer.'

"If true in the letter, this reply was at any rate in Mr Picken's knowledge false in the spirit, and was calculated to mislead; but I consider that Mr Hamilton was justified in accepting it as taking away authority from the information received by him from Mr Crosthwaite, and, recollecting the correspondence of May 1906, in seeking to obtain a specific and unqualified admission of the facts from the Corporation.

"And here the matter is complicated by two things—(*First*) The answer of 22nd April was made without any reference to the Medical Officer, but when Dr Chalmers was referred to, he, on 25th April, by some inexplicable confusion, reiterated the old mistake thus—'There are two issues raised in Mr Hamilton's letter—(1st) That the representation submitted did not apply to the trust property, but to another property at 64 Rose Street. This is quite an error. In the representation it is described as a "back land," and there is no other back land at this address.'

"And (*Second*) Dr Archibald at this date was taken ill with the spotted fever, then prevalent in Glasgow, and was not available for references for some months.

"It is in these circumstances that the letter (*v. infra*) of 30th May 1907, virtually asking that the matter may lie over in respect of Dr Archibald's illness, was written, and in face of this letter and all that had preceded it I think that it is not now in the mouths of the Corporation to maintain that, notwithstanding the conduct of their officials and notwithstanding their pleading the interposition of the illness of Dr Archibald, 'who alone is conversant with the facts of the case,' as the Town Clerk states, their opponent is to be cut off from her remedy, because two months elapse while their officials are fencing with the truth and Dr Archibald is laid aside by illness. The matter is brought to a point when the officials are passed over, and the Convener of the Committee of the Police Commissioners charged with the matter of unin-

habitable houses is referred to. He at once dealt with it with courtesy and a sense of justice, as might be expected, and Mr Hamilton's course is cleared.

"In these circumstances the Corporation cannot equitably be permitted to plead the statutory limitation of action. I have examined the cases referred to by the defenders, but I think they are all distinguishable from the present. In all of them but one there were mistakes in fact or in law, which it was as much open to the pursuers as to the defenders to find out. In the only exception to this, delay was caused by negotiations the tenor of which to my mind renders the judgment somewhat doubtful and the conclusion at best matter of impression. Here the mistake was one which could be known to one side only, and, further, a matter of opinion was involved of which one side only was master. The case of *Caledonian Railway* v. *Chisholm*, March 17, 1886, 13 R. 773, 23 S.L.R. 539, referred to in my previous judgment, is much more apposite.

"I shall therefore sustain the pursuer's fourth plea-in-law, and continue the case for further procedure."

The letter of 30th May 1907 referred to by his Lordship was :—

"City Chambers,
"Glasgow, 30*th May* 1907.
"Archibald Hamilton, Esq., Writer,
"170 Hope Street.
"64 *Rose Street.*

"Dear Sir,—Referring to your letter of 20th ult. (already acknowledged) with regard to the above property, I have to advise you that that communication was submitted yesterday to the Committee on Uninhabitable Houses, &c., who, while repudiating all liability on behalf of the Corporation in the matter, agreed, in respect of the illness of Dr Archibald, who alone is conversant with the facts of the case, to continue consideration thereof meantime.

"When the subject has again been before the Committee I shall duly advise you of the result.—Yours truly,

"J. LINDSAY, *S.C.D.*"

This interlocutor was pronounced:—"Sustains the fourth plea-in-law for the pursuer: Repels the second and third pleas-in-law for the defenders; and decerns: Allows the pursuer a proof of her averments on record of the damage alleged to have been sustained by her as trustee of the late Miss M'Innes, and to the defenders a conjunct probation, to proceed on a day to be afterwards fixed: Finds the pursuer entitled to expenses from 2nd January 1908, so far as not already dealt with in the Inner House: Allows an account thereof," &c.

The case was settled subsequently.

Counsel for the Pursuer—G. Watt, K.C.—Munro—Valentine. Agent—D. Maclean, Solicitor.

Counsel for the Defenders—The Lord Advocate (Shaw, K.C.)—M. P. Fraser—Crawford. Agents—Campbell & Smith, S.S.C.

Friday, October 23.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

PRENTICE (HUTCHIESON'S EXECUTRIX) *v.* SHEARER.

Donation—Mortis causa Donation—Delivery—Delivery through Medium of a Third Party—Proof of Delivery.

In a *mortis causa* donation delivery need not be made to the donee personally, but may be made through the medium of a third party.

In an action by H's executrix against S for payment of a sum of money, the defender pleaded that it had been donated to himself and others *mortis causa*, and that he had distributed it according to H's directions. His evidence was that, on the request of H, who was ill and wished to settle his affairs, he took to the bank and got cashed a deposit-receipt belonging to H; that he handed the money to H, who, after counting it, redelivered it to him, saying he would tell him what to do with it; that two nights afterwards he asked H in M's presence what he was to do with the money, and H told him how to divide it, naming the donees and specifying the sums. H died the same night. M corroborated the defender as to this conversation. The pursuer maintained that the defender had failed to prove delivery, because (1) there was no evidence, except his own, of redelivery, and because (2) in any case delivery could only be made to the alleged donees personally and not through the medium of another.

Held (1) that the defender was sufficiently corroborated by the conversation spoken to by M, which implied previous delivery, and that delivery was also proved by the indorsation and delivery of the deposit-receipt, seeing that the subsequent handing of the money to H, equally with its redelivery, depended solely on the defender's evidence; (2) that delivery need not be made to the donee, but might be made through the medium of a third party.

Mrs Jane Prentice, as executrix of the deceased Andrew Hutchieson, raised an action against William Shearer, in which, *inter alia*, she sought payment of £230, 11s. 7d.

The *facts* of the case are narrated in the opinion *infra* of the Lord Ordinary (MACKENZIE), who after proof pronounced, on 27th November 1907, the following interlocutor:—"Finds that the pursuer is entitled to recover from the defender the sum of £58, 10s. 1d., with interest at five per centum per annum from the 11th day of May 1907 until payment, subject to any right of set-off competent to the defender in respect of the expenses after mentioned, and under deduction of the sum of £6, being the admitted amount of the funeral expenses