SUMMER SESSION, 1923.

COURT OF SESSION.

Friday, May 18, 1923.

SECOND DIVISION.

[Lord Ashmore, Ordinary.

ADAMSON *v.* GILLIBRAND.

Process — Reclaiming Note — Competency— Reclaiming Note Lodged in Error in Office of Division other than that to which the Cause Belonged—Court of Session (*No.* 2) *Act* 1838 (1 *and* 2 *Vict. cap.* 118), *sec.* 4—*Court of Session Act* 1825 (*Judicature Act*) (6 *Geo. IV, cap.* 120), *sec.* 18.

A summons was marked on the *partibus* as a Second Division cause. On a reclaiming note being taken, the note was presented *per incuriam* to the Clerk of the First Division and accepted by him. On the note appearing in the Single Bills of the First Division, the error having been discovered, the Division refused to entertain it, whereupon it was presented to the Clerk of the Second Division. On the reclaiming note appearing in the Single Bills of the Second Division the respondent objected to it as incompetent on the ground that the appropriate procedure had not been followed, and that it was now too late to remedy this defect. The Court *repelled* the objection and *appointed* the cause to be put to the roll.

The Court of Session (No. 2) Act 1838 (1 and 2 Vict. cap. 118), sec. 4, enacts—"And be it enacted that the said Lords Ordinary in the Outer House shall not be exclusively attached to either Division of the Court, but shall be attached equally to both Divisions thereof, and that the *partibus* written upon summonses . . . shall set forth the particular Division of the Court to which the cause shall belong; and in the event of the cause being afterwards removed to the Inner House by reclaiming note . . . it shall be carried to the particular Division so set forth, and the Division to which the cause is to belong shall be stated in the weekly printed rolls."

The Court of Session Act 1825 (Judicature Act (6 Geo. IV, cap. 120), sec. 18, enacts—"And be it further enacted 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 in part; and if the interlocutor of the Lord Ordinary . . . 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, 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. . . ."

Captain Frank John Adamson, Edinburgh, late Highland Light Infantry, *pursuer*, brought an action for payment of £5000 damages against Mrs Laura Gillibrand, Lutterworth Hall, Lutterworth, Leicestershire, England, against whom arrestments *ad fundandam jurisdictionem* had been used, *defender*.

The summons was marked on the *partibus* as a Second Division cause.

The defender pleaded, *inter alia*—"1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed."

On 14th March 1923 the Lord Ordinary (ASHMORE) sustained the first plea-in-law for the defender and dismissed the action.

Thereupon the pursuer timeously printed and boxed a reclaiming note, but *per incuriam* lodged it in the office of the First Division, the Clerk of that Division receiving the papers without demur.

On 16th May the reclaiming note appeared in the Single Bills of the First Division, but the attention of the Division having been drawn to the marking in the *partibus* of the summons, the Division refused to entertain the reclaiming note.

On 17th May the reclaiming note appeared in the Single Bills of the Second Division, when the reclaimer moved that the case should be sent to the roll.

Counsel for the respondent objected to the motion, and argued that it was incompetent for the Court to entertain the reclaiming note, in respect that the reclaimer had failed to follow forth the procedure enacted by the Court of Session (No. 2) Act 1838 (1 and 2 Vict. cap. 118), sec. 4, and the Court of Session Act 1825 (Judicature Act) (6 Geo. IV, cap. 120), sec. 18. *Cooper* v. *Baillie*, (1878) 5 R. 414, 15 S.L.R. 312; *Ledingham* v. *Elphinstone*, (1859) 21 D. 844; and *Boag* v. *Fisher*, (1848) 11 D. 129, were referred to.

LORD JUSTICE-CLERK—The facts in this case are as follows:—When the action was called before Lord Ashmore the *partibus* duly set forth the Division to which the cause belonged, viz.—the Second Division. The Lord Ordinary after argument dismissed the action, whereupon the pursuer, within the appropriate time, printed and boxed to the Inner House a reclaiming note setting forth the Lord Ordinary's interlocutor and praying the Court to alter it. The reclaiming note was presented to the First Division. This was a mistake on the part of the pursuer. The reclaiming note, as the *partibus* bore, should have been taken to the Second Division. The Clerk to the First Division, however, received the reclaiming note, and it duly appeared in the Single Bills of that Division on 16th May. The Division having, as I understand, their attention drawn to the *partibus*, refused to entertain the reclaiming note. On 17th May the case appeared in the Single Bills of the Second Division, when the reclaimer moved that it be sent to the roll. Counsel for the respondent, however, maintained that the reclaiming note was incompetent, on the ground that the reclaimer had in the first instance boxed to the wrong Division, and that it was now too late to remedy the mistake.

The objection is highly technical, and should not, in my opinion, be sustained unless we are constrained by statute or otherwise to do so. Whether we are or not depends in point of fact on the provisions of section 18 of the Court of Session Act 1825, and section 4 of the Court of Session Act 1838. The earlier section was enacted at a time when the Lords Ordinary belonged to one or other of the two Divisions of the Court, and it requires that a reclaiming note shall be put into the boxes of the Judges of the Division to which the Lord Ordinary belonged. That arrangement was, however, altered by section 4 of the Act of 1838. By that section it was provided that the Lords Ordinary shall be attached not to one Division but equally to both Divisions of the Court, and it proceeds—That "the *partibus* written upon summonses, letters, or notes of suspension, advocation, or other writ by which a cause shall be originated in the Outer House, shall set forth the particular Division of the Court to which the cause shall belong; and in the event of the cause being afterwards removed to the Inner House by reclaiming note, cases, or otherwise, it shall be carried to the particular Division so set forth." This reclaiming note satisfies the requirement of the section regarding the *partibus*. I assume, moreover—in the absence of suggestion to the contrary—that in accordance with the unaltered provisions of section 18 of the Act of 1825, copies of the reclaiming note were boxed, and that six copies, with the appropriate intimation, were sent to the opposite party.

It is argued, however, that the requirement that the cause "shall be carried to the particular Division so set forth" has not been observed by the reclaimer, with consequences which are fatal to his right of appeal. Now, that requirement is not by the statute in terms laid upon the litigant, as is the requirement regarding boxing and sending copies of the reclaiming note to the other party. As I read the section, it contemplates an automatic delivery of the note to the appropriate Division. Here the machinery failed, partly owing to the conduct of the litigant, partly owing to the conduct of the clerk to the First Division. But inasmuch as the reclaiming note was timeously presented to the Inner House, and copies were duly sent to the other side, and inasmuch as the statute does not enjoin that the litigant shall see that the note is carried to the appropriate Division, I am not prepared to hold, in the special circumstances of this case, that the reclaimer has forfeited all right of appeal to either Division of the Court. That is the respondent's contention. I think it revolts both common sense and equity. The view which I take receives confirmation from the case of *Ledingham* v. *Elphinstone* (21 D. 844), to which we were referred in the course of the argument. I therefore suggest to your Lordships that the respondent's objection should be repelled, and that the case should be sent to the roll.

LORD ORMIDALE—There no doubt has been a blunder here. The cause is a Second Division cause. It was called as such, the summons being marked on the *partibus* as a Second Division cause. The reclaiming note whose competency is objected to was within the period prescribed by statute removed to the Inner House, but *per incuriam* it was presented to the Clerk of the First Division. It should have been refused by him, but in error it was received by him, and the error was apparently only discovered when the case appeared in the Single Bills of the First Division on Saturday last, when the First Division refused to entertain the reclaiming note. It has now been presented to the Second Division, and the respondent objects that it is not competent for us to entertain it, on the ground that the reclaimer has failed to follow forth the procedure enacted by the Judicature Act of 1825, section 18, and by the Court of Session Act of 1838, section 4.

Now, taking section 18, the Lords Ordinary are no longer attached to a particular Division of the Inner House, and the initial provision of the section does not in terms apply, but the reclaiming note has within the prescribed period been presented to the Inner House. The other conditions as to boxing prints and delivering copies to the

opposite agent it has been held are not imperative but directory only, but in point of fact they have been implemented. No doubt the inveterate and proper practice is also to lodge the reclaiming note with the Clerk of the Division to which the cause belongs, but that is not enacted by the Act of Parliament of 1825. Nor do I find any definite statutory provision to that effect in section 4 of the 1838 Act. What that section says is—[*His Lordship read the section*]. "It shall be carried" is vague, not to say cryptic, there being no precise statement as to the person by whom the cause is to be carried, though practice has no doubt recognised it as meaning the party by whom the cause has been removed to the Inner House. The position here therefore is that the reclaimer has removed the cause to the Inner House, but he failed to carry it, in the first instance at any rate, to the Division set forth in the *partibus* and lodged the reclaiming note with the Clerk of the other Division. That was a blunder, but it was in theory at least if not practically susceptible of instant correction, it appears to me, by the Clerk, who should have refused to receive the note, and it would then, no doubt, on the error being pointed out, have been taken at once to the Clerk of the other Division and all would have been well. In the circumstances, as no imperative provision of any statute has been breached—we were not referred to any Act of Sederant—and as Mr Gilchrist admitted that the respondent had not suffered any prejudice by the blunder, I think we should repel the objection to the competency and send the case to the roll.

The view that I have expressed receives support from the case of *Ledingham* (21 D. 844), to which Mr Gilchrist, as bearing on the question, although in a sense not favourable to his own contention, very candidly and properly referred us.

LORD ANDERSON—In accordance with the procedure set forth in the Court of Session Act 1838, sec. 4, in conjunction with the statutory enactments prescribing the periods within which reclaiming notes must be taken, a reclaimer is bound to do two things—(1) to present a reclaiming note within the reclaiming days to the Inner House, and (2) to "carry" the reclaiming note to the Division named on the *partibus* of the summons. The former step was duly taken by the reclaimer's advisers, and a reclaiming note against the Lord Ordinary's judgment was timeously presented to the Inner House on the second box-day in April. A blunder, however, was made as regards the second step, because instead of lodging the reclaiming note in the office of this Division, to which the case had been marked on the *partibus* of the summons, the reclaiming note was lodged in the office of the First Division. The papers were received without demur by the Clerk of that Division, and they remained in the office of that Division until Wednesday last. In my opinion the plain implication of the 4th section of the Act of 1838 is that the reclaiming note should be "carried" to the office of the appropriate Division within the reclaiming days, and the duty of seeing that this is done is primarily on the reclaimer's agent. But it may be that the Clerk of Court is not without responsibility in the matter, and that he has a duty to examine the process to ascertain whether or not it belongs to his Division. Had the mistake been pointed out at the time of presenting the reclaiming note the reclaimer's agent could have lodged the note timeously in the office of the Second Division. This, however, was not done, and the blunder was not discovered until the case appeared in the Single Bills of the First Division. In view of the fact that an official of Court was perhaps to some extent responsible for what has occurred, I am of opinion that we may repel the objection taken to the competency of the reclaiming note.

The case of *Ledingham* (21 D. 844) is, moreover, an authority to the effect that it is within the competency of the Court to excuse a blunder of this nature, and I agree with your Lordships that in the present case this should be done and the case sent to the roll.

The Court appointed the cause to be put to the roll.

Counsel for the Pursuer (Reclaimer)—Ingram. Agents—Ketchen & Stevens, W.S.

Counsel for the Defender (Respondent)—Gilchrist. Agents—M. J. Brown, Son, & Company, S.S.C.

Saturday, May 19.

FIRST DIVISION.

(SINGLE BILLS.)

[Lord Anderson, Ordinary.

NESS *v.* MILLS' TRUSTEES.

(*Reported ante*, January 17, 1923, *supra*, p. 241.)

Process — Repetition of Judgment — Interlocutor Pronounced in Ignorance of Pursuer's Death—Sist of Pursuer's Executrix.

In an action of declarator and payment against testamentary trustees an interlocutor assoilzieing the defender was pronounced in ignorance of the pursuer's death. On the application of the pursuer's executrix the Court *sisted* her as pursuer in room of the deceased and of new *assoilzied* the defenders.

The circumstances in which the action was raised are narrated in the previous report *ut supra*.

On the 17th January 1923 the Court assoilzied the defenders. Thereafter a note was presented to the Lord President by Mrs Stewartina Mary Ness or Scott, which included the following passage:—"Since the said interlocutor [viz., the interlocutor of 17th January assoilzieing the defenders] was pronounced it has come to the knowledge of the pursuer's agents that the said Mrs Mary Stewart or Ness died on 29th November 1922. The minuter is her sole accept-