

material evidence to meet the defender's said counter issue, the charges referring to periods so far back as the miners' strike of 1894, out of which the present action has arisen; (2) the delicate nature of said counter issue; and (3) the delay which has taken place between the date of the slanders said to have been uttered by the defender and the raising of the present action."

The pursuer objected to the postponement of the trial.

LORD PRESIDENT—The issue in this case was only adjusted on 19th February, and the sittings for jury trials begin on the 21st March. On looking at the issues and record it is pretty plain that documentary evidence will be required, and documents must be lodged eight days before the trial. The defender could not get a diligence before the issues were adjusted. The time available for preparation would accordingly be very short indeed, and as counsel tells us on his responsibility that he cannot with justice to the case go to trial at the sittings, it seems to me that we should grant this motion for postponement. If we declined to do so we might exclude the possibility of the defender proving his counter issue.

LORD M'LAREN—I am of the same opinion, and would only further observe that the right of a pursuer to lead in a jury case is not nearly so strong when there are counter issues as when there are issues only at the instance of the pursuer.

LORD ADAM and LORD KINNEAR concurred.

The Court discharged the notice of trial.

Counsel for the Pursuer—Horne. Agent—James B. Bryson, Solicitor.

Counsel for the Defender—Hunter. Agent—D. C. Oliver, Solicitor.

Friday, March 8.

SECOND DIVISION.

[Lord Pearson, Ordinary.]

A. B. v. E. F.

Judicial Factor—Curator Bonis—Removal—Neglect of Duty.

Circumstances in which, upon a report by the Accountant of Court with regard to the conduct of a *curator bonis*, which disclosed persistent neglect by the curator of his duties as such, and failure to comply timeously with the requisitions of the accountant, the Court removed the *curator bonis* from office.

In May 1900 A. B., one of the next of kin of C. D., an *incapax*, presented a petition praying for the removal of E. F., who had been appointed *curator bonis* to C. D. on 9th December 1892.

The petitioner averred as follows:—"In connection with the management of the

estate by the said E. F. there have been various irregularities. Annual accounts have never been punctually lodged, and the Accountant of Court has frequently threatened to report the curator to the Court, and has on at least one occasion, viz., 9th February 1899, carried out his threat."

The petitioner further averred—"The date fixed by the Accountant as the date on which the curator should annually close his accounts is 31st December. Owing to various irregularities, the Accountant has not yet finally approved of the curator's accounts for the period to 31st December 1898. Further, no account has been lodged by the curator of his intromissions for the period to 31st December 1899, and this notwithstanding repeated demands made on him by the Accountant."

The respondent lodged answers, in which he opposed the prayer of the petition. He denied that there had been irregularities in connection with his management of the estate, and that the Accountant had frequently threatened to report him to the Court. He explained that in 1898 he had fallen into ill health, and that during his absence from that cause the annual return to the Accountant was overlooked by his assistants.

The petitioner produced and founded on a report by the Accountant of Court dated 9th February 1899, in which the Accountant craved the Court to recal the respondent's appointment. This report was in the following terms:—"On 9th December 1892 the said E. F. was appointed to be *curator bonis* to the ward, and having found caution he extracted the appointment and entered upon the duties of his office. On 12th July 1898 the curator, after repeated requisitions, lodged with the Accountant an account of his intromissions for year to 31st December 1897. This account was duly audited by the Accountant, and on 11th August 1898 he communicated his draft report, with notes annexed, to the curator. The draft report, with answers to the notes, ought to have been returned within twenty days from the date of issue, but this the curator failed to do despite the issue by the Accountant of the notices required by statute. The Accountant on 28th November 1898 issued a requisition upon the curator requiring him to return within three days the foresaid draft report with answers to notes annexed. The period for complying with said requisition having expired without the curator having obtempered the same, the Accountant, on 15th December 1898, by notice to the curator, intimated his intention to report the curator's disobedience or neglect to comply with the foresaid requisition to the Court in the event of the curator not lodging objections in writing, if he any had, within forty-eight hours after such notice; and the curator having failed so to lodge objections in writing, the Accountant now reports the matter to your Lordship. The estate under the curator's management consists of heritage of the annual value of £36, and moveable property amounting to £22, 9s. 4d."

Warrant had been granted to serve this report upon the respondent, but in consequence of his complying with the requisitions of the Accountant no further steps had been taken at that time.

On 9th July 1900 the Lord Ordinary (PEARSON), before answer, and with reference to the foregoing report of 9th February, remitted to the Accountant of Court to report further regarding the conduct of the *curator bonis* down to date.

On 9th November 1900 the Accountant reported as follows:—

“In obedience to the foregoing remit the Accountant of Court has to report—That the whole process has been laid before him.

“As to the conduct of the *curator bonis*—That the *curator bonis* was most irregular in lodging his annual accounts.

Factors get one month in which to lodge account. Section IV. of Judicial Factors' Act 1849.

Requisitions.	Account ending	Due on	Lodged on
	31st Dec. 1893	31st Jan. 1894	1st Feb. 1894
	Do. 1894	Do. 1895	16th April 1895
	Do. 1895	Do. 1896	2nd July 1896
4	Do. 1896	Do. 1897	12th July 1897
4	Do. 1897	Do. 1898	12th July 1898
3	Do. 1898	Do. 1899	27th April 1899
	Do. 1899	Do. 1900	21st May 1900

“That with the exception of the first account the others were only lodged after repeated requisitions had been made therefor by the Accountant.

“That the *curator bonis* was equally remiss in returning the audit reports and in answering the Accountant's audit notes.

Factors get 20 days in which to answer audit notes.

Requisitions.	Audits Issued on	Due on	Returned
	23th Feb. 1894	20th Mar. 1894	6th June 1894
	2nd July 1895	22nd July 1895	5th Sept. 1895
3	14th Aug. 1896	3rd Sept. 1896	16th Jan. 1897
3	11th Aug. 1897	31st Aug. 1897	23rd Nov. 1897
4	11th Aug. 1898	31st Aug. 1898	15th Feb. 1899
5	14th Aug. 1899	3rd Sept. 1899	15th Mar. 1900
	20th June 1900	10th July 1900	27th June 1900

“That the audit report with answers to audit notes on the account to 31st December 1897 was only returned by the *curator bonis* on 15th February 1899, after the Accountant had served him under interlocutor in this process of 9th February 1899 with a copy of his report to the Court on the curator's conduct and craving his recall. The Accountant was thus enabled to complete the audit and further procedure was rendered unnecessary. For this the Accountant charged the *curator bonis* personally £1, 1s., and he has paid said sum.

“That on fifteen occasions he informed the *curator bonis* that his non-compliance with requests would be reported to the Court.

“That the curator's clerk wrote over twenty letters to the Accountant, giving various excuses for delay in complying with

requisitions. This disposes of the allegation by the curator that these were ‘overlooked by his assistants.’ The *curator bonis* was in town attending to other duties during the greater part of the time covered by these requisitions. The accounts are of the simplest, and the audit notes, save that referring to the law business account for £78, 5s. 9d., were such that the curator's cashier or senior clerk could have answered in a day or two, whereas from two to seven months was the time taken, except in the last audit, which was returned with answers in seven days.

“That the accounts of the *curator bonis* down to 31st December 1899 are satisfactory save as to the law account, p. £78, 5s. 9d., which is disputed.

“That in the Accountant's opinion the *curator bonis* for systematic dilatoriness in lodging his annual accounts and in answering the Accountant's audit notes, and his non-due compliance with the Accountant's repeated requisitions, has not offered, and cannot offer, any sufficient excuse, and that his conduct is deserving of the Court's censure.”

The Lord Ordinary (PEARSON) on 15th December 1900 pronounced an interlocutor whereby he disallowed the commission due to the curator down to 31st December 1899 to the extent of one-half of the total amount thereof, and *quoad ultra* dismissed the petition, and found no expenses due.

Note.—“I think this is clearly not a case for removal of the curator. The Accountant who reported the curator in February 1899 as for removal has examined his conduct down to date, and now reports only for censure; moreover removal, which is the greatest penalty, ought to be reserved for the gravest cases, and this is not one of them.

“I am reluctant even to censure an officer of Court unless his conduct has either resulted in loss to the estate or discloses some moral obliquity. In this case I understand the estate has suffered no loss, and the curator's conduct, however reprehensible, has not been morally wrong in the ordinary sense of that term, as it might have been if, for example, he had knowingly put himself in a position where his duty and his interest were in conflict.

“But I am bound in some way to mark my sense of the curator's conduct as disclosed by the investigation. I accept the expression of regret made on his behalf (somewhat tardily) at the bar, and I am also disposed to make full allowance for the period during which he was in ill-health. But when all is said, the facts reported to me disclose a protracted course of contumacy and repeated disobedience to the lawful orders of the head of one of the chief departments of the Court, whose patience in the matter reached the utmost limit.

“In such a case I am disposed to operate upon the curator through his commission, and in the circumstances I think it will be sufficient to instruct the Accountant to disallow one-half of it down to the date of

the last audit. I have ascertained that this will be equivalent to a fine of a little under twenty pounds." . . .

The petitioner reclaimed, and argued—The report by the Accountant showed that the curator had persistently neglected the duties of his office, and had repeatedly disregarded the remonstrances of the Accountant of Court. The case was one of such misconduct or failure in discharge of the curator's duty as called for his removal—Pupils Protection Act 1849, sec. 6; Judicial Factors (Scotland) Act 1889, sec. 7; *Mackenzie v. Gibson*, March 1, 1845, 7 D. 560; *Accountant of Court v. Jaffray*, December 20, 1851, 14 D. 292, and November 18, 1854, 17 D. 71; *Accountant of Court v. M'Allister*, December 22, 1853, 16 D. 301; *Macdonald v. Macdonald*, July 8, 1854, 16 D. 1023; *Lowe*, October 19, 1872, 11 Macph. 17; *Walker v. Buchanan*, July 20, 1888, 15 R. 1102.

The respondent, while admitting that he had been guilty of delay, maintained that, there being no proof of malversation the fine imposed by the Lord Ordinary was sufficient. At the close of the debate, however, he offered to resign his office.

LORD JUSTICE-CLERK—This is a most unusual case. If ever there can be cases short of conviction for crime where a person holding such an appointment as that held by the respondent ought to be removed, this is one such. I cannot agree with the conclusion which the Lord Ordinary has arrived at on the facts as stated by him. I think there has been persistent neglect on the part of the curator, neglect which has not been satisfactorily explained. I therefore without hesitation move your Lordships to grant the prayer of the petition.

LORD YOUNG—I must own that when I read the opinion of the Lord Ordinary I was more than surprised at the conclusion he has come to, that although it was a case for disallowing half the curator's commission it was not a case for removal. My view is that it is clearly a case for removal. I do not think that any professional man to whom such censure as the Lord Ordinary has expressed is applicable, and I think it is applicable, is fit to remain in office. I agree therefore that this is a case for removing the curator from his office, and for finding him liable to the petitioner in the expenses of the petition, and that it should be remitted to the Lord Ordinary to appoint a new curator.

LORD TRAYNER—I am of the same opinion. During the whole course of the curatory the curator has neglected his duties, and has turned a deaf ear to the remonstrances of the Accountant of Court. I think we must express our entire disapproval of his conduct by removing him from his office.

LORD MONCREIFF concurred.

The Court pronounced an interlocutor removing the respondent from the office of

curator bonis, found him liable in expenses to the petitioner, and remitted to the Lord Ordinary to appoint a new *curator bonis*.

Counsel for the Petitioner and Reclaimer—Baxter—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondent—Guthrie, K.C.—J. C. Watt. Agents—Anderson & Chisholm, Solicitors.

Tuesday, March 12.

SECOND DIVISION.

[Sheriff-Substitute at
Glasgow.]

ROBERT FORRESTER & COMPANY
v. **M'CALLUM.**

Reparation—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), First Schedule (1) (a) (1)—Amount of Compensation—Minimum of £150—Workman in Employment Less than Three Years.

Held that the minimum sum of £150 fixed by section (1) (a) (1) of the First Schedule to the Workmen's Compensation Act 1897, with reference to injuries resulting in death, was applicable to the case of a workman who had been less than three years in the employment, and that the amount of compensation which could be awarded to his dependants was not limited to 156 times his average weekly earnings where that sum was less than £150.

Opinions contra in Doyle v. Beattie & Sons, July 10, 1900, 2 F. 1166, reconsidered and disapproved.

This was an appeal in an arbitration under the Workmen's Compensation Act 1897 before the Sheriff-Substitute (STRACHAN) at Glasgow between Robert Forrester & Company, coalmasters, Glasgow, appellants, and Mrs Catherine M'Callum, widow of George Mitchell M'Callum, miner, Fauldhouse, for herself and as tutrix and guardian of her pupil children, claimant and respondent.

The admitted facts were as follows—“(1) That George Mitchell M'Callum, husband of the respondent, was on 2nd July 1900 killed while in the employment of the appellants. (2) That the said George Mitchell M'Callum had been in the employment of the appellants for a part only of two weeks prior to his death, and it was not disputed that the respondent was entitled to compensation under the Act. (3) That the average weekly wage of the said George Mitchell M'Callum was 12s., and this wage multiplied by 156 amounts to £93, 12. (4) That the respondent was wholly dependent on the said George Mitchell M'Callum at the date of his death.”

The Sheriff-Substitute held in these circumstances that the minimum sum fixed by section (1) (a) (i) of the First Schedule to the Workmen's Compensation Act 1897 was