Thursday, December 21.

FIRST DIVISION.

PURVES *v.* CARSWELL.

Administration of Justice—Trial before Lord Ordinary without a Jury—Lord Ordinary before whom Case Depending Removed to Inner House—Competency of Lord Ordinary thereafter Completing the Trial—Lunacy (Scotland) Act 1866 (29 *and* 30 *Vict. c.* 51), *sec.* 24—*Court of Session Act* 1850 (13 *and* 14 *Vict. c.* 36), *sec.* 46.

In an action of damages against a medical man for the alleged wrongful granting by him of a certificate under the Lunacy Acts, the Lord Ordinary—before whom the case was being tried without a jury, in accordance with the provisions of sec. 24 of the Lunacy Act 1866, and secs. 46 and 47 of the Court of Session Act 1850—was removed to the Inner House before hearing counsel on the proof or pronouncing his findings in fact.

Held that there was no incompetency in the Lord Ordinary, though removed to the Inner House, completing the trial of the action.

Allan v. *M'Murray*, June 20, 1855, 17 D. 969, *commented on.*

The Lunacy (Scotland) Act 1866 (29 and 30 Vict. c. 51), sec. 24, enacts—"In any action at law which may be raised against any medical person in respect of any certificate granted by him under the provisions of this Act or of any of the recited Acts, the issue or issues after being adjusted shall be tried, and the amount of damages (if any) assessed, by the Lord Ordinary before whom such action depends without a jury, and the proceedings at and consequent on the trial of such issue or issues shall be regulated by the provisions of the" Court of Session Act 1850 "with respect to the proceedings at and consequent on the trial by the Lord Ordinary without a jury of such issues as may under the provisions of that Act be so tried."

The Court of Session Act 1850 (13 and 14 Vict. c. 36), sec. 46, enacts—". . . Whenever any issue shall be tried by a Lord Ordinary without a jury, such Lord Ordinary shall take notes of the evidence, and shall hear counsel thereon, and otherwise the proceedings shall be conducted continuously and as nearly as may be in an ordinary jury trial; and within eight days after the proceedings at the trial are concluded such Lord Ordinary shall pronounce an interlocutor, in which he shall state specifically what he finds in point of fact; and it shall be competent to either party, by written note within eight days from its date, to bring such interlocutor of the Lord Ordinary under review of the Lord Ordinary upon his own notes of evidence, who shall forthwith hear parties thereon; and it shall be competent to the Lord Ordinary upon such review, and within eight days after hearing parties, either to correct his interlocutor as regards such findings in fact, or to order a new trial as he may think fit, provided always that if either of such periods of eight days extends into vacation or recess, such period shall not be held to elapse till the fourth day after the next meeting of the Lords Ordinary or the Court thereof."

This was an action at the instance of William Purves, 170 Dumbarton Road, Glasgow, against Dr John Carswell, 5 Royal Crescent, Glasgow, for £10,000 in name of damages in respect of the alleged wrongful granting by the defender of a certificate under the Lunacy Acts. There was also another similar action at the instance of the same pursuer against Dr Marion Gilchrist, Glasgow, for £10,000 damages in respect of the alleged wrongful granting of a certificate under the Lunacy Acts. These two actions by consent of parties were set down for trial on the same days, and by minutes lodged in each process it was agreed that the evidence and productions in the one cause should be held as and taken to be the evidence and productions of the other.

The action against Dr Carswell was called and depended before Lord Pearson (Ordinary) until his removal to the Inner House in December 1905. In accordance with the provisions of the Lunacy (Scotland) Act 1866, sec. 24 (quoted *supra*), an issue was adjusted for the trial of the cause, and, following thereon, proof was led before Lord Pearson by the parties on certain days of November 1905. On the conclusion of the proof the Lord Ordinary continued the case for hearing counsel till 13th and 14th December, upon which days he appointed counsel to be heard. In the interval between the conclusion of the proof and the diet appointed for the hearing of counsel Lord Pearson was removed to the Inner House. Nothwithstanding this, by consent of parties and by arrangement with Lord Pearson, the hearing took place at the appointed diet, viz., 13th and 14th December, on the footing that he would pronounce the interlocutor with the findings in fact required by sec. 46 of the Court of Session Act 1850 (quoted *supra*), and proceed to dispose of the cause as if he had continued to be the Lord Ordinary before whom the cause depended. After the hearing Lord Pearson made avizandum.

The defender Carswell presented a note to the Lord President which appeared in the Single Bills on December 21, 1905. To this note the defender annexed a copy of a minute presented on behalf of the defender to Lord Mackenzie. This minute, after narrating the facts above set forth, stated that after hearing counsel on 13th and 14th December, a question had been raised by Lord Pearson with regard to his power to pronounce an interlocutor containing the findings in fact, or to proceed further with the cause, having regard to the decision in *Allan* v. *M'Murray*, June 20, 1855, 17 D. 969.

The minute further set forth that the eight days within which the Lord Ordinary must, in terms of sec. 46 of the Court of Session Act 1850, pronounce an interlocutor with his findings in fact expired on 22nd

December. The minute craved Lord Mackenzie to verbally report the case to the First Division.

The crave of the note presented by the defender to the Lord President was "to remit the case to Lord Pearson to pronounce an interlocutor containing the findings in fact and proceed in the cause as if he were still the Lord Ordinary before whom the cause depended within the meaning and for the purposes of sec. 46 of the statute of 1850; or otherwise to give such direction or such remedy as to the Court may seem proper."

LORD PRESIDENT—The point to be decided has arisen in these circumstances. By sec. 24 of the Lunacy Act of 1866 actions of damages for wrongful incarceration in a lunatic asylum are directed to be tried under the provisions of sec. 46 and 47 of the Court of Session Act of 1850, that is to say, by a Lord Ordinary without a jury. Lord Pearson tried this case in that way, but before hearing counsel or pronouncing findings in fact, which, under the provisions of the statute, he was bound to do, Lord Pearson took his seat in this Division owing to the resignation of Lord Adam.

The course of procedure which these sections 46 and 47 of the Act of 1850 prescribe is that the Lord Ordinary, having heard the case, shall pronounce a series of findings in fact, which he must do within eight days after the trial is concluded. Another period of eight days is given to the parties during which they may lodge what is practically a reclaiming note to the Lord Ordinary against his own findings. His ultimate findings become final, but the law which he applies to them is reviewable in the Inner House.

The point which has arisen is what is to be done in the circumstances. I should not myself have been doubtful were it not for the case of *Allan* v. *M'Murray*, 17 D. 969. That case was almost parallel to this but not quite, although the method of trial was the same. Lord Curriehill had pronounced the first set of findings, but within the eight days he was removed to the Inner House. What happened then was that Lord Ardmillan, who took up the case as an Outer House Judge, reversed Lord Curriehill's findings. It was held that Lord Ardmillan's procedure was altogether inept, but it was also held that there was no way of curing the matter except by retrying the whole case from the beginning.

I do not doubt that the decision in that case was correct, that is to say, that Lord Ardmillan had no power to reverse Lord Curriehill's findings, and in that sense the judgment does not need to be attacked. But the views on which that judgment was pronounced, viz., that there was no way of curing the matter but by a re-trial from the beginning, if it is right, constitutes in my opinion something little short of a scandal in our methods of procedure. But I have come to the conclusion that we are driven to no such unfortunate result. When I look at the 46th section of the Act it is abundantly clear that the whole proceedings in a trial of this kind are to take place before the same Judge. What would happen in the event of the death of a Judge it is unnecessary to inquire, but where there is no death it seems to me quite certain that the statute intends that one Lord Ordinary is to finish the whole matter. Now, I have gone through all the Procedure Acts from 1808, and what they come to is this—Originally the Court all sat as one Court, and the so-called Outer House was not really in any sense a separate Court, but was simply a place where one of the fifteen Judges sat for the preparation of cases, just as another sat in the Bill Chamber. All that was changed in 1808. The Court was made to sit in two Divisions, and the Judges were appropriated to the two Divisions, the First Division consisting of the Lord President and Seven Judges, and the Second Division of the Lord Justice-Clerk and Six Judges; and these appropriated Judges—Ordinary Judges as they were called—sat in rotation in the Outer House to prepare cases, as had been originally done by one of the old fifteen. The next alteration that came was that instead of each of the Ordinary Judges doing that work in rotation, the four Junior Judges of the First Division and the three Junior Judges of the Second were taken for the work, the others being allowed to remain in the Divisions without going to the Outer House. Inasmuch as that reform could not be carried out without the consent of the Judges concerned, there was provision made for a transition stage. And then, in the Extract Act of 1810 (50 Geo. III c. 112), section 32, it was provided "as soon as five Junior Ordinary Judges shall officiate as permanent Lords Ordinary in the manner herein directed, three Judges in either Division shall be a quorum in the Inner House, and the other Judges of the Court of Session shall be relieved from attendance in the Outer House and from performing the duties of Lords Ordinary therein," and that alteration stands to this day. Your Lordships will see that this leaves the position of the Inner House Judges just the same as it was in the days of the old fifteen excepting that they are not compellable to do ordinary Outer House work. But so far as competency goes, I have no doubt that all the Judges of the Court of Session can do Outer House work; I have no doubt that the Presidents of the Divisions are competent to do it.

The result is that there is no incompetency in a Lord Ordinary going on and finishing his Outer House work though in the meantime he has become an Inner House Judge. There might be a difficulty if Lord Pearson, standing upon the section of the Act, refused to go to the Outer House, for I do not see how we could compel him to do so. But I have no doubt that Lord Pearson will do what the Act of 1850 prescribes and pronounce his findings.

LORD M'LAREN—Two points have to be considered in coming to a decision in this matter—(1) All decrees though issued by a single judge are decrees of the Court of

Session, and the judge who pronounces them only exercises a delegated jurisdiction; (2) it is a necessary condition of the trial of a question of fact that a trial, whether by a judge and jury or by a judge alone, is an indivisible function which must be begun and finished by the same member of the Court.

If this had been a trial by a judge with a jury no one would dispute the accuracy of what I have just said. The case is not quite so clear in the case of the trial of a cause by a Lord Ordinary without a jury. But having regard to the policy of the statute there can be little doubt on the question. The statute points out the judge who is to commence the trial, but it does not make it a condition of his going on with the trial that he is to remain a Lord Ordinary in the Outer House. The only difficulty arises on the case of *Allan* v. *M'Murray*, 17 D. 969. There it was held that it was incompetent for Lord Ardmillan to review an interlocutor previously pronounced by Lord Curriehill, who after taking the evidence had been transferred to the Inner House. There the irregular intervention of the second Judge may have created a difficulty, but in the present case, where all the proceedings have been regular, it seems to me that the Lord Ordinary who began the trial should carry it out to its conclusion.

LORD KINNEAR — I am of the same opinion. With the greatest respect I am unable to agree with the reasoning of the learned Judges in *Allan* v. *M'Murray*, 17 D. 969. It is perfectly clear that the statute contemplates that the whole proceedings shall be carried out by one judge. [*His Lordship quoted sec.* 46.] That all this is to be done by one Lord Ordinary is obvious. This cannot be put more clearly than it was by Lord Colonsay in *Allan* v. *M'Murray*, where he says at 971—"The language of the 46th section is applicable throughout to successive steps to be taken by the same judge who tried the case. It is in truth a continuation of the trial. The evidence has been taken, but the verdict has not been finally adjusted. The Lord Ordinary who sits at the trial performs the function of both judge and jury. The object of the statute is to combine these functions. They are not discharged until the verdict has been adjusted. But there is nothing in the statute to imply that the adjustment of the verdict is to be left to a judge who has not heard the evidence." In this case Lord Pearson has heard the evidence, and the verdict is not yet given. Lord Pearson alone can give that verdict. He must pronounce his findings. The only difficulty that has arisen is that it is said that Lord Pearson is no longer the Lord Ordinary before whom the case is pending. But the Lord Ordinary who was trying the case was certainly the judge before whom the action depends, and it did not cease to depend before him when he was removed to the Inner House. It was still a depending cause because it had not been disposed of, and if it was depending before any judge it must have been before the judge who was still engaged in considering it. I think, if I may say so, with great respect, that it was rightly decided in *Allan* v. *M'Murray* that Lord Curriehill's successor could not competently take up the cause at the point at which Lord Curriehill left it. But that is only another form of saying that the new Lord Ordinary was not the Lord Ordinary in the cause, and if it does not pass to another Lord Ordinary it remains with the Judge who has taken the evidence but has not yet decided the case. I agree with the observation of Lord M'Laren that the case is the same with the case of a jury trial presided over by the senior Lord Ordinary who in the course of it is removed from the Outer to the Inner House by the death or resignation of one of the Inner House Judges and the appointment of a new Judge in his room. It is not suggested that in such a case the Lord Ordinary is incompetent to complete the trial.

LORD PEARSON concurred.

The Lords remitted the case to Lord Pearson to proceed therein.

Counsel for Pursuer—Crabb Watt, K.C. —Spens. Agent—Aug. M. Graham Yooll Solicitor.

Counsel for Defender—Wilson, K.C.—D. Anderson. Agents—Fraser & Davidson, W.S.

Saturday, January 13.

SECOND DIVISION.

[Lord Johnston, Ordinary.

M'CARDLE *v.* M'CARDLE'S JUDICIAL FACTOR.

Process—Reclaiming Note—Competency—Judicial Factory under sec. 164 *of The Bankruptcy (Scotland) Act* 1856, *sec.* 164—*Interlocutor Ordering Inquiry and not Disposing of Merits—Reclaiming Note Incompetent—Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 164 *and* 171—*Act of Sederunt, 25th November* 1857, *sec.* 29—*Distribution of Business Act* 1857 (20 *and* 21 *Vict. cap.* 56), *secs.* 4 *and* 6.

The Lord Ordinary, in dealing with certain objections to a report by the Accountant of Court on the accounts of a judicial factor appointed under section 164 of The Bankruptcy (Scotland) Act 1856, pronounced an interlocutor with a view to inquiry and investigation merely, and which did not finally dispose of any matter on the merits.

Held, on a consideration of The Bankruptcy (Scotland) Act 1856, secs. 164 and 171, Act of Sederunt 25th November 1857, sec. 29, Distribution of Business Act 1857, secs. 4 and 6, that a reclaiming note was incompetent.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) provides, sec. 164—