the Collector of Poor and School Rates and Customs.

LORD SALVESEN was sitting in the Second Division.

LORD MACKENZIE had not yet taken his seat in the Inner House.

The Court pronounced this interlocutor—

"Recal said interlocutor [of 15th July 1910]: Recal also the deliverance of the trustee in bankruptcy appealed against: Remit to him to rank and prefer the respective claimants as follows, viz.: *Primo loco*, (1) The Collector of Customs and Excise, Edinburgh, in the sum of £288, 19s., and (2) the Collector of Poor and School Rates, Edinburgh, in the sum of £356, 8s. 9d., together £645, 7s. 9d.; *secundo loco*, the appellant and reclaimer in the sum of £549, 11s. 4d.; and *tertio loco*, (1) the Burgh Assessments, Edinburgh, in the sum of £444, 1s., and (2) the Collector Edinburgh and District Water Trust Rates, Edinburgh, in the sum of £31, 14s. 3d., each to rank *pari passu* on any balance which may be available, and decern: Find the appellant and reclaimer entitled to the expenses of the appeal against the Collector of the Burgh Assessments and the Collector Edinburgh and District Water Trust conjunctly and severally: (2) Find the Parish Council of the City Parish of Edinburgh and the Collector of the Assessments for the Relief of the Poor and of the School Rates of said parish, entitled to expenses against the appellant to the extent of one-half, and against the said Collector of the Burgh Assessments and the said Collector of the Edinburgh and District Water Trust Rates conjunctly and severally to the extent of one-half: And (3), lastly, Find the trustee in bankruptcy entitled to the expenses of process to the date of lodging the minute No. 15 of process, and thereafter of watching the appeal, as a charge in the sequestration, and remit the accounts of said expenses respectively," &c.

Counsel for the Appellant and Reclaimer—Maclennan, K.C.—Mercer. Agents—Tait & Crichton, W.S.

Counsel for the Trustee in Wm. Turner & Sons' Sequestration — Mair. Agent—James Ayton, S.S.C.

Counsel for Parish Council of the City Parish of Edinburgh, and the Collector for the Assessments for the Relief of the Poor and of the School Rates of said Parish—Graham Stewart, K.C.—Kemp. Agents—R. Addison Smith & Company, W.S.

Counsel for the Collector of Burgh Assessments—Cooper, K.C.—W. J. Robertson. Agent—Thomas Hunter, W.S.

Counsel for Collector Edinburgh and District Water Trust—Cooper, K.C.—W. J. Robertson. Agent—William Boyd, W.S.

Friday, December 16.

FIRST DIVISION.

[Lord Dewar, Ordinary.

HENDERSON *v.* PATRICK THOMSON, LIMITED.

Process—Proof—Precognitions—Facilities for Taking Precognitions.

In an action of damages for slander against a firm of shopkeepers, before the record was closed, a motion was made before the Lord Ordinary for an order that facilities be granted to the pursuer for precognoscing the defenders' employees outwith the presence of any representative of the defenders. The Lord Ordinary having reported the point to the Inner House, *held* that the motion should be refused.

Observations (*per* the Lord President) upon the question whether such an order as that sought could be pronounced by the Court; and upon the propriety of pronouncing such an order upon an open record, *reference* made to granting diligence for recovery of documents at that stage, which would not be granted except in very special circumstances.

Opinion (*per* the Lord President) that employers have no right to insist that employees who are precognosced in a cause to which they are parties should be so precognosced in the presence of their agents.

On 14th November 1910 Miss Katherine Henderson, 1 Woodhall Terrace, Juniper Green, raised an action of damages for slander against Patrick Thomson, Limited, 15 North Bridge, Edinburgh.

Parties' averments upon the open record were as follows:—"(Cond. 2) On the afternoon of Tuesday, 8th November 1910, the pursuer visited defenders' shop at No. 15 North Bridge, Edinburgh, for the purpose of doing business in their millinery department, which is on an upper floor. At the same counter as the pursuer were one or more ladies, whose names and addresses are to the pursuer unknown, and which the defenders refuse to disclose although known to them. . . . (Cond. 3) After the pursuer had left the said counter, and while at the door making her way out of the shop, she was followed by one of the defenders' employees, William James Crear, who is believed to be in charge of said millinery department, and he there and then requested her to come back to 'clear' herself. The pursuer did not understand what he meant, and so informed him. He then explained about the loss of a purse, and asked her to accompany him back to the millinery counter, which, in compliance with his request, she did. It was thereupon explained to her by or on behalf of the defenders, that one of the ladies before referred to had lost her purse, and that she the pursuer was the only other person

who had been at the counter at the time the purse was discovered to have been lost, and the inference, and the only inference, which she drew and could draw was that she was charged with the theft of it, and had to 'clear' herself. The pursuer indignantly denied the charge, which was entirely false. During the course of the interview the pursuer happened to let drop a magazine which she was carrying, and the same was immediately picked up by the said William James Crear, or another of the defenders' servants, who proceeded to shake out the said magazine, as though for the purpose of seeing whether anything were concealed in it. Despite the pursuer's said denial, the defenders, or those for whom they are responsible, insisted on her name and address being taken before allowing her to depart. (Ans. 3) Admitted that after the pursuer had left the counter and was making her way to the door she was followed by William James Crear, who was and still is in charge of the defenders' millinery department. Admitted that the said William James Crear addressed the pursuer, and that she went back to the counter. *Quoad ultra* denied, under reference to the following explanations. The said William James Crear said to the pursuer when they were alone, and out of earshot of any bystander, 'Would you mind coming back for your own satisfaction and for the satisfaction of the lady upstairs who has lost something?' and the pursuer instantly complied with his request. On arriving at the millinery counter the said William James Crear said, referring to a lady customer who was also there, 'This lady has lost her purse.' The pursuer then said, 'Do you accuse me of taking this lady's purse?' and the said William James Crear replied, 'No, we do not accuse you of taking the purse.' The pursuer then said, 'You may search me,' but it was explained to her that as no accusation had been made against her (the pursuer) such a suggestion was out of the question. The defenders' managing director then asked the pursuer whether she had been attended to, and asked for her name and address, which the pursuer gave without demur. (Cond. 4) The said request to the pursuer to come back and clear herself and the whole actings of the defenders' servants at the said interview were made and carried through by the said William James Crear and the other servants concerned, acting on behalf of and in the interests of the defenders, and within the scope of his and their authority, and the said request and actings falsely, calumniously, and maliciously represented, and were intended to represent, that the pursuer had dishonestly appropriated the purse before mentioned, and had thus been guilty of the crime of theft. . . . (Cond. 5) The charge made against the pursuer has caused her serious loss and damage in her character and reputation, and has also occasioned her much mental distress and suffering. The pursuer has applied to the defenders for reparation and solatium, but they have refused to entertain the claim, and the present action has been rendered necessary for the vindication of the pursuer's character. The sum sued for is a reasonable estimate of the reparation and solatium to which the pursuer is entitled in the circumstances condescended on."

A motion was made for the pursuer before the Lord Ordinary (DEWAR) that his Lordship should "decern and ordain the defenders within one week to grant all reasonable facilities to the pursuer for precognoscing persons in their employment who were witnesses of any of the incidents referred to on record, and in particular to furnish to the pursuer's agents the names and addresses of the said persons, and to allow such persons to be precognosced on behalf of the pursuer outwith the presence of the defenders or of anyone representing them, and without adjecting any terms or conditions relative to such precognition."

On 14th December the Lord Ordinary having heard counsel and reported the pursuer's motion to the First Division parties were heard before the Lord President, Lord Kinnear, and Lord Johnston.

Argued for the pursuer—It was proper that the pursuer should precognosce the defenders' servants before the closing of the record in order that the true question might be presented to the Court, and it was the duty of the defenders to facilitate this—*Barrie* v. *Caledonian Railway Company*, November 1, 1902, 5 F. 30, 40 S.L.R. 50. The order sought was in accordance with the manner in which a motion such as the present had been dealt with in the Outer House in a recent case—*M'Phee* v. *Corporation of Glasgow*, 1910, 1 S.L.T. 381.

Argued for the defenders—Even if its terms were more specific the order sought would not be granted. It could not be considered more favourably than a diligence for the recovery of documents, which would not be granted before the closing of the record.

At advising—

LORD PRESIDENT—A point has been reported to your Lordships by Lord Dewar, which arises in a case depending before his Lordship in the Outer House. The case is one in which a lady sues a firm of shopkeepers for damages in respect of a slanderous imputation. She sets forth in the condescendence that on a certain date she visited the defenders' place of business, which is a drapery establishment, and went to a certain counter in what is called the millinery department. At that counter she saw one or more members of the public—customers of the shop. After doing such business as she had at the counter she was leaving the shop when she was followed by one of the employees of the defenders, whose name she gives, and who is set forth to be a person in charge of the millinery department, and is, I suppose, what is known in common language applied to such persons as a shopwalker, and he requested her to go back and clear herself. She further avers that she went back,

although she says she did not understand what they meant, and when she got back to the counter she was then told that one of the other ladies at the counter had lost her purse; that the only inference that she could draw was that she had been charged with theft; that such a charge was completely false; that the matter was further aggravated by the said shopwalker or one of the others taking up a magazine which she had dropped, and shaking it to see if anything was in it; and that her name and address were then taken. She further goes on to say that this matter has caused her great pain, and is prejudicial to her character, that it is equivalent to a charge of theft, and that the defenders, as answerable for the acts of their servants, must pay £1000 of damages.

The description given of the incident, so far as the defenders are concerned, is different. I give it, although of course in all questions of relevancy and the like one must take the version of the pursuer and not that of the defender. Still I think it is necessary to give it, for it brings out what I shall afterwards have to say about the points of the case. The defenders' version is that this shopwalker did go to her and ask her to come back for the satisfaction of herself and another lady at the counter. When she got there this statement was made—"This lady has lost her purse." Then the pursuer said—"Do you accuse me of taking it?" and that the answer made by the shopwalker was—"No, we do not accuse you of taking it,"—and that thereupon the incident ended, except that her name and address were given and that she went away.

Now that being the state of the pleadings upon an open record and before the record is closed, the pursuer made a motion before Lord Dewar which may be summarised by reading the order which she asked Lord Dewar to pronounce. She asked him to pronounce an interlocutor in which he should "decern and ordain the defenders within one week to grant all reasonable facilities to the pursuer for precognoscing persons in their employment who were witnesses of any of the incidents referred to on record; and in particular to furnish to the pursuer's agents the names and addresses of the said persons, and to allow such persons to be precognosced on behalf of the pursuer outwith the presence of the defenders or of anyone representing them, and without adjecting any terms or conditions relative to such precognition." And this proposal is based upon the result of a correspondence in which she called upon the defenders to produce their shop assistants for the purposes of precognition outwith the presence of any agents, a request which in the correspondence was refused.

There are really two matters to be considered which, though germane, yet depend upon quite different considerations. The first is whether any order such as is asked could be pronounced by the Court. The second is whether, if it could, it would be right to pronounce it at this stage of the case. I take the latter first. Now the stage of the case is that the record has not been closed. A kindred topic has often been handled, viz., the propriety of granting a diligence for the recovery of documents at this stage. I think it is firmly decided that such a request will not be granted except in very special circumstances. To define exactly what constitutes special circumstances is impossible; but what it comes to is, that the request will not be granted unless the party asking it can show good cause why it should be granted; and it is not a good cause if it is a fishing diligence to enable the pursuer to make a case. It seems to me that a motion of the sort we have here must be judged according to the same standard. Now, in the present case, I can see no legitimate interest in the pursuer to have such an order granted. The action is one of slander, and the pursuer herself heard what was said and saw what was done. She has stated the facts as she says they occurred. It is obviously illegitimate to allow her to precognosce witnesses in order to enable her to re-write her record at adjustment, so as to square with what she finds other people will say. If this is not the object, then the only other object is to start a new case of slander based on statements which she did not hear. This is equally illegitimate for very obvious reasons. The Court has never been asked — much less assented — compulsorily to start inquiries in order that a pursuer may discover a case of which he is not already aware. Counsel urged that it was necessary to find out what effect the words used had on the bystanders. This argument, in my opinion, confuses proof with statement of cause of action. If the words used require innuendo, the pursuer must aver the innuendo herself. She may prove it by the views of others, but she cannot say a statement is slanderous which she herself refuses to characterise as such.

This is sufficient for the actual decision of the point before us; but as the Lord Ordinary in reporting the case stated that he was anxious to have the guidance of the Division on the more general topics which have been argued, I shall say a few more words.

I agree with the opinion expressed by Lord Salvesen in the case quoted to us, that employers—or others—have no right to insist that persons who are precognosced should be so precognosced in the presence of their own agents; and I do not view Lord Salvesen as having gone beyond that dictum—certainly not by decision, for he did not give any decision in that case. But while I say this, I think two things must be kept in view. First, that though for reasons of public policy the Court can and will compel persons *in invitos* to give testimony, they have never asserted or tried to exercise that power as regards giving precognitions. I have never heard of a compulsory order in a civil case to submit to precognition. It is practically otherwise in the criminal court, but even there it is not, technically speaking, pre-

cognition that the lieges must submit to at the instance of the Lord Advocate or the procurator-fiscal acting for him; it is examination. Secondly, that the Court will never pronounce orders which it knows it cannot enforce. If therefore the employer only exercises an indirect influence on the servant—such as, for instance, threatening to terminate his employment if he does not give a precognition—I do not see how any order of the Court can meet such a case. The Court cannot order the employer *not* to dismiss his servant, and put him in prison if he does so. The truth is that the sanction in such cases is of a different kind. If an employee is asked for a precognition by the opponent in a case against his employer, he is like every other person free to grant it or refuse it if he likes. If he refuses, it will always furnish matter of comment to a jury on the evidence which he eventually does give; for if he gives to one litigant what he withholds from the other it savours of partisanship, and will be easily thought to tinge his evidence; and this way of thinking will be enormously strengthened when the refusal comes, not from the unwillingness of the witness himself, but from the dominating influence which has been exerted upon him by his employer. It is for that reason that I do not hesitate to say that in general cases it is right that employers should give facilities for their employees to be precognosced; and I add that in most cases it is in their own interest to do so.

The further question of communicating a name and address so that application may be made to a specified witness to see if he will consent to be precognosced, and in any event for the purpose of citation, is a different question. Such applications made after the closing of the record must be dealt with as they arise. I deprecate laying down any rule, because I cannot foresee all cases. But speaking generally, I should say that when the person is, from the circumstances, put forward as representing the person against whom the suit is raised in the matters whereon the question turns, such a demand will be legitimate. When it is a demand to get the names of those who were mere bystanders and witnesses it is illegitimate, even although they may happen to be among the ranks of employees.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD MACKENZIE was absent at the hearing.

The Lord Ordinary was directed to refuse the motion.

Counsel for the Pursuer—Sandeman, K.C.—A. M. Mackay. Agents—W. & F. Haldane, W.S.

Counsel for the Defender—Dean of Faculty (Dickson, K.C.)—Spens. Agents—Fraser, Stodart, & Ballingall, W.S.

Saturday, December 17.

FIRST DIVISION.

(SINGLE BILLS.)

BRIDGES *v.* BRIDGES.

Process—Husband and Wife—Divorce—Counter Action—Reclaiming Note—Right of Divorced Spouse to Insist in Counter Action.

A husband raised an action of divorce against his wife and she raised a counter action against him. The Lord Ordinary, pronouncing judgment in both actions on the same day, in the action brought by the husband granted decree of divorce against the wife, but in the action brought by the wife assoilzied the husband. The wife reclaimed against the decree which assoilzied the husband, but she allowed the decree of divorce against herself to become final.

Held (with the concurrence of the Second Division) that the marriage having been dissolved by the decree of divorce which had become final, the wife could not proceed further with the action brought by her, and the reclaiming note *refused*.

Thomas Bridges raised an action of divorce against Margaret Bridges, his wife, and she raised a counter action of divorce against him. The proofs were led on the same day, and on 29th October 1910 the Lord Ordinary (Dewar) pronounced judgment in both actions. In the action by Mr Bridges he granted decree of divorce, but in the counter action by Mrs Bridges he assoilzied the defender.

On 19th November 1910 Mrs Bridges reclaimed against the interlocutor which assoilzied Mr Bridges, and on 23rd November 1910 she moved the Court to send the case to the roll, but meantime the interlocutor divorcing her pronounced in the action by Mr Bridges had become final.

The respondent (defender) objected to the competency of the reclaiming note, and argued—The wife had allowed the decree of divorce to become final, and the marriage had now been dissolved. Therefore since it was impossible for her now to commence a new action of divorce, the mere fact that she had already raised this action before the decree became final, could not make any difference, and it was equally impossible for her to continue this action. The cases of *Walker* v. *Walker*, January 27, 1871, 9 Macph. 460, 8 S.L.R. 328; and *Brodie* v. *Brodie*, June 11, 1870, 8 Macph. 854, 7 S.L.R. 535, were different from this, because there the decree of divorce had been reclaimed against, and consequently the marriage continued to subsist. Moreover, in both these cases the Court sisted a reclaiming note by the wife against the decree of divorce with the express purpose of preventing the decree being affirmed and the marriage being dissolved before the action at her instance was ripe for judgment. With regard to the pursuer's