1881, 9 R. 100; *Trotter* v. *Happer*, November 24, 1888, 16 R. 141.

The defender argued—It was quite possible to appeal under the 40th section of the Judicature Act causes which were not among those appropriated for jury trial, and there was no obligation on the Court to send causes appealed under that section to jury trial. The Court did not always send causes of the appropriated kinds to trial by jury, as had been exemplified in actions for nuisance—*White, &c.* v. *Dixon*, July 9, 1875, 2 R. 904. *Hume* and *Trotter* were not cases under the 40th section of the Judicature Act. The present case was from its nature unsuited for the expensive process of trial by jury. The amount likely to be awarded would be very small, as the pursuer admitted that her son had been *versans in illicito*.

At advising—

LORD PRESIDENT—*Prima facie*, the proposal of the defender and respondent, that this action should be tried in the Sheriff Court, cannot be said to be unfit or unreasonable. But we must determine upon it with a due regard to the 40th section of the Judicature Act, and so as to give fair play to the system thereby established. This action is now in the Court of Session, and the pursuer, who has taken the appeal for the purpose of jury trial, claims to have her case so disposed of. Now, while the power of the Court to send back for trial in the Sheriff Court cases appealed under this section cannot be disputed, this power has been exercised in view of the category to which the case under consideration belonged. This is an action of damages for assault, and if it had originated in the Court of Session it would for that reason unquestionably have gone to a jury. As it is now here, under this statutory power of appeal, I think we must proceed upon this same criterion of what is to be the mode of trial. We could only adopt the opposite course if we were to form some conjecture as to the substantiality of the pursuer's case, in each action of damages for assault, and send back for trial before the Sheriff those cases which, *prima facie*, did not look well.

There is an obvious inconvenience in such a selection having to be made by the Court which might ultimately have to review the merits of the remitted cases; and it appears to me that the sound rule, and that most conformable to the statute as well as to the decisions, is to send for jury trial those cases which by the legal quality of their ground of action would be designated for jury trial if they had originated in the Court of Session. In all cases, of course, the rule is subject to the statutory condition if special cause be not shown. But the class of assault is one in which this qualification requires to be stated, rather as matter of theory than as of appreciable practical importance.

The pursuer and appellant having moved us to approve the issues proposed by her, I think our proper course is, on her motion, to do so.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court approved of the issues proposed by the pursuer, and remitted the case to a Lord Ordinary for trial by jury.

Counsel for the Pursuer—Guy. Agents—Wishart & Macnaughton, W.S.

Counsel for the Defender—Kennedy. Agents—Macpherson & Mackay, W.S.

Tuesday, March 8.

SECOND DIVISION.

[Lord Low, Ordinary on Bills.

FRASER *v.* CAMERON.

Parent and Child—Curator—Expenses—Liability of Father Concurring as Curator in Action raised by Daughter.

A girl of nineteen was cited to appear before the kirk-session of the church to which she belonged in order to answer to a *fama*. The father made repeated and urgent requests to the minister to supply him with details. In a letter which had been submitted to and approved of by the kirk-session, the minister informed the father of the nature of the *fama*, and added that he had written evidence thereanent from a respectable person whose word he had no reason to doubt. Thereafter the daughter, with the consent and concurrence of her father as her curator and administrator-in-law, raised an action of damages for defamation of character against the minister. In assoilzieing the defender, the Sheriff found the father personally liable in expenses as well as the daughter. *Held* that the Sheriff had acted within his competency.

In February 1891 Annie Fraser, New Street, Rothes, with the consent and concurrence of her father, James Fraser, as her curator and administrator-in-law, raised an action for defamation of character against the Reverend Donald Cameron, Free Church minister of Rothes. The pursuer was nineteen years of age and unmarried, and resided with her father. They both belonged to Mr Cameron's congregation. The alleged defamation was contained in a letter written by Mr Cameron to James Fraser in compliance with the latter's repeated and urgent requests to supply him with the details of a *fama*, to answer to which Annie Fraser had been cited to appear before the kirk-session. The letter had been submitted by Mr Cameron to the kirk-session and approved of by them. In the letter Mr Cameron informed James Fraser that it was currently reported that the intimacy (not meaning thereby carnal connection) between Annie Fraser and Alexander Simpson, a married man and a member of the congregation,

was of such a nature as to be matter of public scandal, that he (Mr Cameron) had in his possession written evidence on the subject from a respectable person, whose word he had no reason to doubt, and that Alexander Simpson had confessed that the *fama* was well founded.

On 28th November 1891 the Sheriff (IVORY) recalled the interlocutor of the Sheriff-Substitute in the said action, and after certain findings in fact "finds that the pursuer has also failed to prove that the defender acted maliciously and without probable cause in what he did as above mentioned, or in making the statements referred to in the above findings; finds that the statements so made by the defender were true, and that he acted throughout solely in the discharge of his duty as minister of the congregation and moderator of the kirk-session; therefore to the above extent and effect sustains the defences: assoilzies the defender and decerns: finds the pursuer and her father, James Fraser, her curator and administrator-in-law, liable, conjunctly and severally, to the defender in expenses: further, having considered the Auditor's report on the account of the defender's expenses, approves thereof, and decerns against the pursuer and the said James Fraser, her curator and administrator-in-law, conjunctly and severally, for payment to the defender of the sum of £100, 14s. 6d. sterling, being the amount of the said account as taxed." The note appended to the Sheriff's interlocutor contained the following passage—"The pursuer's father, though not a pursuer in this action, has not only as her curator and administrator-in-law, but personally, taken a prominent and leading part in it, and the Sheriff has accordingly found him liable personally in expenses as well as the pursuer."

The Sheriff's decree was extracted by Mr Cameron, and on 4th January James Fraser and his daughter Annie Fraser were charged to make payment of the sum decerned for against them conjunctly and severally.

Thereafter James Fraser presented a note of suspension and interdict against Mr Cameron, praying the Court to suspend the said decree and charge in so far as they were directed against the complainer as an individual, and to interdict the respondent, so far as the complainer as an individual was concerned, from enforcing them.

The complainer pleaded—"(1) It was *ultra vires* of the Sheriff to pronounce any decree against the complainer as an individual in respect of him having acted in the cause as curator and administrator-at-law of his said daughter, and the charge, in so far as it seeks to enforce payment of the foresaid decrees against the complainer as an individual, should be suspended."

On 20th February 1892 the Lord Ordinary on the Bills (LOW) in respect the complainer did not offer caution refused the note.

The complainer reclaimed—When the case was called in the Inner House the parties agreed that it should be argued and decided as if the note had been passed for the trial of the cause.

Argued for the complainer—The Sheriff should not have found him liable in expenses as an individual. His daughter was a minor and not *incapax*. He had only consented as her curator to the action of defamation being brought, and there was no allegation that he had acted maliciously. He had no personal interest in the action and he would have received no pecuniary benefit if his daughter had been awarded damages. If he had declined to appear as his daughter's curator, the Court would have had to appoint a curator *ad litem* to his daughter, and it was settled law that a curator *ad litem* was not personally liable for expenses. He was in the same position as a *curator bonis* or a judicial factor, and neither of these are personally liable in the expenses of action conducted on behalf of their wards—*Forbes* v. *Morrison*, June 10, 1845, 7 D. 853; *Ferguson* v. *Murray*, December 20, 1853, 16 D. 260. And in an action against a woman and her husband for his interest, the husband was held not liable for the expense of the defences lodged on behalf of his wife, and himself as curator for his wife, except in so far as the defences were malicious, vexatious, or calumnious—*Baillie* v. *Chalmers*, April 6, 1791, 3 Pat. App. 213.

Counsel for the respondent were not called on.

At advising—

LORD JUSTICE-CLERK—I do not regard the case as one attended with any difficulty. The female pursuer and her father conducted a litigation against the defender, who is the minister of the parish in which they reside. On the face of the case the defamation is undoubtedly privileged; what was said or done was in the execution of a public duty.

The defender successfully defended himself, and now the question is whether the father was liable in the expenses found by the Sheriff. I have no doubt as to the question at all. The pursuer and her father must have combined to carry on the litigation. He conducted it in the Court below and the father took upon himself the responsibility of the litigation. He was under no obligation to take it up or carry it on. That being so, it appears to me that he is just in the position of a litigant who has raised an action successfully, and that he must pay the expenses of that action.

LORD YOUNG—I am of the same opinion. I have considerable sympathy with the suspender here, who as the father of his daughter whose character has been assailed, has desired to vindicate her reputation, and I do not understand that any reflection has been cast on his conduct for taking part in the action with any impropriety.

It appears that certain reflections had been made on the daughter's conduct which were to some extent taken up by the minister. I must hold, however, that the result of the action for defamation showed that the minister was proceeding in dis-

charge of what he honestly believed to be his duty, and was not actuated by any malice towards the girl, and that the judgment of the Sheriff is well founded.

Then the question arises whether it is within the competency of the Sheriff to find not only this girl of 19, but also her father, liable in expenses. I have no doubt that it is quite within his competency, and I may further say, though the matter is not before us, that I see no reason to doubt that the Sheriff has exercised a wise discretion in finding both the father and the daughter liable, and that without trespassing on the question of the liability of an administrator or curator giving his consent to an action. Where the consent is merely to make an action formally competent, there may be good grounds for not subjecting him to liability for expenses, but here the matter is different.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court found the charge and whole grounds and warrants orderly proceeded with.

Counsel for the Complainer — Rhind — Baxter. Agent—William Officer, S.S.C.

Counsel for the Respondent—H. Johnston — W. Campbell. Agents — Boyd, Jameson, & Kelly, W.S.

Thursday, March 10.

SECOND DIVISION.

[Lord Kincairney.

DUNCAN AND OTHERS *v.* CRIGHTON AND OTHERS.

School Board—Election—Scottish Education Department General Order—Ultra Vires—Education (Scotland) Acts 1872 *and* 1878 (35 *and* 36 *Vict. cap.* 62; 41 *and* 42 *Vict. cap.* 78)—*Title to Sue.*

The Scottish Education Acts of 1872 and 1878 provide that during the period of office of a school board the remanent members, so long as a quorum exists, may supply vacancies caused by death, resignation, or disqualification of any member, and that in certain cases where the school board delays to nominate for a certain time, the supply of vacancies shall fall into the hands of the Scottish Education Department.

Section 13 of the Act of 1872 provides, *inter alia*—"And should any election not take place as required by this Act, and at the times hereinbefore specified, the Scottish Education Department may issue an order for an election at such time and place as the said Department shall determine, or may allow the existing school board to continue in office, or may nominate a school board for the parish or burgh in which the failure has occurred, in the manner hereinafter provided with respect to any parish or burgh which, on the expiration of twelve months from the passing of this Act, shall be without a school board."

On 1st October 1890 the Scottish Education Department pronounced a General Order to the effect that when the number of candidates nominated as members of a school board was less than the number to be elected, but sufficient to form a quorum, the returning officer should declare such candidates duly elected, "and they shall at their first meeting nominate and appoint as many persons to be members of the school board as shall be necessary to make up the full number of members."

The number of members of a school board had been fixed at nine. At the triennial election on 26th March 1891 there were only six candidates. These six candidates were declared duly elected by the returning officer, and intimation of their election was sent to the Scottish Education Department. These six members appointed three other electors to be members along with them so as to complete the number of the board, and intimated their election in the usual way by minutes of the board.

In an action by certain ratepayers and school board electors against the members of the alleged school board, and the returning officer at the election, for reduction of the return to the Department, also of the minutes of the board relating to the appointment of the last three members, *held* (1) that the pursuers had a title to sue although the election challenged was made in the manner directed by the Education Department of the Privy Council, who were not called as defenders; (2) that no election had taken place as required by the statutes, and that the Education Department should have proceeded under one of the provisions contained in section 13 of the Act of 1872.

Opinion reserved as to the validity of acts done by the alleged school board while it exercised the powers of a board.

Lord Young *dissented*, on the ground that the order of the Education Department was in accordance with the spirit and also the letter of the Education Statutes, and that in a matter concerning the public interest only, the Court should not interfere with the proceedings of a public officer acting under the control and subject to the orders of a Government Department.

The Education (Scotland) Act 1872, section 13, provides . . . "And should any election not take place as required by this Act, and at the times hereinbefore specified, the Scottish Education Department may issue an order for an election at such time and place as the said Department shall determine, or may allow the existing school board to continue in office, or may nominate a school board for the parish or burgh in