Thursday, November 21.

FIRST DIVISION.

[Lord Stormonth Darling. Ordinary.

GLEN *v.* THOMSON.

GLEN *v.* STEWART.

Process—Reponing—Decree by Default—Failure to Lodge Issues—Act of Sederunt 15th July 1865, *sec.* 12—*Act of Sederunt 10th March* 1870, *sec.* 1, *sub-sec.* 5.

The pursuer in an action of damages having obtained the consent of the defenders to a continuation for adjustment of issues misunderstood the scope of the consent and failed to lodge issues before the day appointed for adjustment. The Lord Ordinary, in respect of that failure, assoilzied the defenders. On a reclaiming-note the Court *reponed* the pursuer.

Observed (*per* Lord Kinnear), and concurred in by the Lord President and Lord M'Laren, that unless in a particular case it has been expressly taken away by statutory enactment, the Court has power to repone at common law.

In two cognate actions of damages for slander at the instance of Robina Glen against Thomas Stewart and against William Brown Thomson respectively, the Lord Ordinary (STORMONTH DARLING) on 8th November 1901 assigned the 15th of that month for the adjustment of issues.

The Act of Sederunt of 15th July 1865 enacts as follows:—Section 12—"All appointments for the lodging or adjustment of issues shall be held to be peremptory, and if the issue or issues be not lodged within the time appointed it shall be competent to the opposite party to enrol the cause and to take decree by default, which decree by default shall not be opened up by consent of parties, but only on a reclaiming-note. And it shall not be competent by any consent of parties to delay the adjustment of the issues beyond the second statutory meeting, but if issues shall not then be adjusted it shall be in all cases imperative on the Lord Ordinary to report the case to the Inner House in terms of the statute."

The Act of Sederunt of 10th March 1870, sec. 1, sub-sec. 5, enacts as follows:—"In every case in which proof is to be taken before a jury issues shall be adjusted either at the time of proof being appointed in the cause, or on a day to be fixed not later than eight days thereafter, and the parties shall lodge the issues respectively proposed by them two days before the day so fixed."

On 14th November the agents for the pursuer wrote to the agents for the defenders in the following terms:—"Dear Sirs,—We shall be unable to send you the p.p. of closed records in these cases for revisal until the afternoon, and we are afraid prints cannot be lodged in process in time for the adjustment of issues to-morrow. We purpose, accordingly, instructing our counsel to ask for a continuation, and assume you have no objection to same being granted.—Yours faithfully, CLARK & MACDONALD"

The agents for the defenders replied on the same day as follows:—"Dear Sirs,—We have received your letter of this date, and have no objection to your obtaining a continuation for the adjustment of issues.—Yours faithfully, MACPHERSON & MACKAY."

The pursuer relying on the letter quoted as referring to the time for lodging as well as adjusting issues, lodged no issues, but appeared on 15th November and moved for a continuation. The defenders moved for absolvitor, in deference to an opinion indicated by his Lordship that that was the appropriate motion in the circumstances. Thereupon, of the same date, in both actions the Lord Ordinary (Stormonth Darling) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel, in respect of the pursuer's failure timeously to lodge her issues, assoilzies the defender from the conclusions of the summons, and decerns."

The pursuer reclaimed, and asked to be reponed.

Argued for the pursuer and reclaimer—section 12 of the Act of Sederunt of 15th July 1865 expressly afforded the means of obtaining the remedy sought by reclaiming-note. Section 1, sub-section 5, of the Act of Sederunt of 10th March 1870 was not peremptory but directory as to the lodging of issues according to the existing practice as illustrated by the Outer House judgment in *Weston* v. *Caledonian Railway Company*, October 13, 1895, 3 S.L.T. 232. Before moving for decree by default it was necessary to enrol for the purpose and give notice of the enrolment—Act of Sederunt 15th July 1865, sec. 12. The Court only refused the remedy of reponing in cases where there had been some more serious fault than mere failure to lodge a paper—*Arthur* v. *Bell*, June 16, 1866, 4 Macph. 841, 2 S.L.R. 88; *M'Kean* v. *Lorimer*, January 27, 1877, 14 S.L.R. 274. In this case there had been a mere misunderstanding on the part of the pursuer's agent as to the scope of the consent to a continuation, and against the consequences of such a misunderstanding the pursuer was entitled to be reponed—*Anderson* v. *Garson*, December 16, 1875, 3 R. 254, 13 S.L.R. 166; *Morrison* v. *Smith*, October 18, 1876, 4 R. 9, 14 S.L.R. 17; *M'Carthy* v. *Emery*, February 27, 1897, 24 R. 610, 34 S.L.R. 455; *Bainbridge* v. *Bainbridge*, January 18, 1879, 6 R. 541, 16 S.L.R. 284; *Greig* v. *Sutherland*, November 3, 1888, 8 R. 41, 18 S.L.R. 39.

Argued for the defenders—It was incompetent, even of consent, to delay the time for lodging issues — *Anderson* v. *Glasgow and South-Western Railway Company*, December 20, 1865, 4 Macph. 259, 1 S.L.R. 68—*Mathieson* v. *Scottish Trade Protection Society*, December 7, 1898, 1 F. 234, 36 S.L.R. 163. If the Court was of opinion that the pursuers should be reponed, then the order which should be pro-

nounced was an order of new ordering issues upon conditions as to expenses.

LORD PRESIDENT—It appears to me that under sec. 12 of the Act of Sederunt of 1865 we have power to repone in this case (whatever may be the precise form of our interlocutor), for the section says — [*His Lordship read the section*].

These last words seem plainly to indicate that on a reclaiming-note the interlocutor may be opened up, and the only question appears to be whether we should exercise that power in the present case.

Now it seems to me that we have here a case of misunderstanding and not of gross contumacy, and a case therefore different from those in which no appearance was made for one of the parties. Accordingly I think we may repone here, so as to put matters into the position which they occupied before the interlocutor reclaimed against, on condition of the payment of expenses since the date of the interlocutor ordering issues, which was the last effective order.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I also agree, and would only add that I have no doubt of our general power to repone against a decree by default, or of its application to the case in hand, unless in that particular case it has been expressly taken away by some statutory enactment. I look at the section to which our attention has been called, not for the purpose of finding whether it confers upon the Court a power to repone, but rather whether there is anything in it to limit our inherent jurisdiction. I think it recognises the power of the Court, but irrespective of that recognition I am of opinion that we have power to repone at common law.

LORD M'LAREN — I agree with Lord Kinnear as to our common law power.

LORD PRESIDENT—I also assent to that.

In each action the Court pronounced an interloctutor in the following terms:—

> "Recal said interlocutor [of 21st November 1901], and remit to the Lord Ordinary of new to assign a date for the adjustment of issues, and to proceed as may be just; Find the pursuer liable to the defender in expenses since 8th November current, and remit," &c.

Counsel for the Pursuer and Reclaimer — A. M. Anderson—Lyon Mackenzie. Agents —Clark & Macdonald, S.S.C.

Counsel for the Defenders and Respondents—T. B. Morison. Agents—Macpherson & Mackay, S.S.C.

Friday, November 22.

SECOND DIVISION.

[Lord Low, Ordinary.

BRUCE *v.* A. M. ROSS & COMPANY.

Reparation—Slander— Newspaper — Issue —Innuendo.

A newspaper published an article commenting upon the circumstances attending the removal of a patient from an hospital by orders of the medical superintendent of the hospital. The article contained the following passages —"In the interests of humanity we are reluctantly compelled to draw attention to the cruel treatment meted out to a poor invalid who was unlucky enough to fall a victim to a disgusting piece of 'red-tapeism.' . . . What we are concerned with in the public interest is the cruel treatment meted out to the invalid on the next day by Dr Bruce. A cab was sent for and the unfortunate paralytic put into it and sent to an hotel in town. The hotelkeeper naturally refused to have anything to do with such a helpless individual, and there the cab stood at the hotel door, and there it seemed it would stand unless something turned up. The poor invalid felt his position keenly. He said he would sooner be put into his coffin than be treated the way he was, and complained bitterly. After a time the man was driven back to the hospital, and after some delay was re-admitted. . . . It was a very cruel proceeding. Pure red tape; nothing else."

In an action of damages raised by the medical superintendent of the hospital against the proprietors of the newspaper for slander, alleged to be contained in this article, which was innuendoed to mean that the pursuer was guilty of cruelty to a patient, *held* (rev. judgment of Lord Low Ordinary, *diss.* Lord Young) that the action was irrelevant, in respect (1) that the facts upon which the expressions of opinion contained in the article were based were in substance admitted to be truly stated, and that expressions of opinion as to a statement of facts truly set forth are not actionable; and (2) that the article did not charge the pursuer personally with cruelty.

Opinion of Lord M'Laren in *Archer* v. *Ritchie & Co.*, March 19, 1891, 18 R. at p. 727, and 28 S.L.R. at p. 551, *approved and followed.*

This was an action of damages for slander at the instance of William Bruce, M.D., LL.D., Dingwall, against A. M. Ross & Company, proprietors and publishers of the *North Star and Farmers' Chronicle* newspaper, published in Dingwall.

The pursuer averred that he was Medical Superintendent of the Ross Memorial Hospital in Dingwall, and a consulting physician in Dingwall and Strathpeffer. He further averred as follows:—"(Cond. 6) On the placards of the issue of the defen-