The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the respondent's objection to the competency of the reclaiming note for the pursuer, repel the same and appoint the cause to be put to the roll."

Counsel for the Pursuer (Reclaimer)—Mair. Agent—W. R. Mackersy, W.S.

Counsel for the Defender (Respondent)—Wark. Agents—J. & J. Galletly, S.S.C.

Wednesday, June 17.

SECOND DIVISION.

[Lord Johnston, Ordinary.

MACKENZIE'S TRUSTEES *v.* MACKENZIE.

(For previous reports see 1907 S.C. (H.L.) 17; 44 S.L.R. 985; 1907 S.C. 139; 44 S.L.R. 126.)

Process — Curator ad litem — Minor Defender.

The Court will not, on the motion of the pursuer of an action, appoint a curator *ad litem* to a pupil or minor defender. This rule holds as well in the case of a multiplepoinding as of other actions.

In this multiplepoinding, at the instance of the trustees of the late Sir James Thompson Mackenzie, the Lord Ordinary (JOHNSTON) made the following verbal report to the Second Division with reference to a question which had arisen in the course of the action:—"My Lords, I have to ask permission to report a matter to your Lordships in the case of *Mackenzie's Trustees* v. *Mackenzie and Others*.

"This is a case which has been more than once before your Lordships' Division—a multiplepoinding under which the estate of the late Sir James Thompson Mackenzie of Glenmuick is being distributed. A question has arisen with reference to the appointment of a curator *ad litem* to one of the minor defenders, and I report it to your Lordships because it appears to me that a mistake has been made which I myself have no power to put right.

"The action was raised so far back as 1892 by the trustees of the late Sir James T. Mackenzie. The defenders called included the eldest son of the late Sir James T. Mackenzie, viz., the now also deceased Sir Allan Russell Mackenzie, and his children. At the date in 1892 when the action was raised two at any rate of these children were pupils, and were represented and their interests protected by their father as their administrator-in-law. The action has proceeded upon this footing that the various questions which have from time to time arisen in connection with Sir James' succession have been brought before the Court by separate records made up on claims and answers within the multiplepoinding. More than one of the questions has been before your Lordships, and even reached the House of Lords. During the first fifteen or sixteen years that the process has been running the younger children of Sir Allan Mackenzie made no appearance either through their father or directly, and indeed have made no appearance to this day. Sir Allan Mackenzie himself died on 19th August 1906, and as he died intestate appointing no tutors or curators to his children, the result is that from 1906 onwards the younger children of Sir Allan have been without tutors and curators. The process has gone on without consideration of the change of circumstances arising from Sir Allan's death, and during the last winter session I had before me two new branches of the case, both of which involved very large interests indeed. One of them is raised on a record which is dated March 19th, 1907, and deals with the rights of parties in the residue of the estate, which amounts to about £170,000. That question was raised by a new claim for the present Sir Victor Mackenzie, the eldest surviving son of Sir Allan, who under the settlement would have been the heir of entail of Kintail had that entail not been broken. He claims the residue, and not only claims that it has vested in him, but claims that as much of it as is free should immediately be paid over to him. He is opposed by the surviving trustee, but no appearance having been entered for the minor beneficiaries under the settlement—the beneficial contradictors, if I may so style them—the case has gone on between the present Sir Victor and the surviving trustee. I have pronounced findings in which I have, so far as the Outer House is concerned, disposed of the question of principle on which the residue is to be distributed, and the case was continued to deal with the questions of accounting that it might be ascertained how much the residue really was, and how much of it was free from prior obligations to be paid by Sir Victor. The other case also involves a claim by Sir Victor as in the position of a person who would have been heir of entail to an English estate, in which a large sum of money was directed to be invested for the purpose of a trust settlement. The claim is to the entailed money. The persons interested are Sir Victor, the present baronet, and certain substitutes. Here again, there being no appearance for anybody else, the case has proceeded between Sir Victor and the trustee. That case is in the position of the parties having been ordered, with the assistance of Professor Rankine, to adjust a case for the English Courts.

"My last interlocutors in both these cases were dated 26th February 1908. At that stage the trustee, acting I have no doubt on advice and with the object of assisting to protect, as he thought, the minor beneficiaries, made an application in which he stated that Allan Keith Mackenzie and Eric Dighton Mackenzie, the second and third surviving sons of the late Sir Allan Mackenzie, were still in minority, and that in consequence of the death of

their father he considered it proper that a curator *ad litem* should be appointed to them to protect their interests in the present process, and therefore craved the Court to make such appointment.

"Upon that request by the trustee, Lord Salvesen, who was acting on my behalf at a time when I was absent from Court, pronounced an interlocutor, treating it, as I have no doubt I should have done myself if incidentally brought before me, as a mere matter of form, appointing John Cowan, Esq., advocate, Edinburgh, to be curator *ad litem* to these two minors. Mr Cowan accepted the office and acted, but he has now presented a minute in the Outer House which has led me to make this report.

"After narrating his appointment the curator says he instructed an agent to prepare a memorial to the Right Honourable Charles Scott Dickson, K.C., for the purpose of, *inter alia*, obtaining his opinion as to whether he should advise his wards to reclaim against the interlocutors to which I have referred; that on 6th April he wrote to both Allan Keith Mackenzie and Eric Dighton Mackenzie intimating his appointment, explaining the position of matters, and stating the steps already taken in their interest; on the 10th April he received a letter (undated) from the said Allan Keith Mackenzie intimating that he did not desire an appeal to be taken. This letter is produced. The said Allan Keith Mackenzie, however, attained majority a few days aferwards—on 26th April 1908—and the curator's duties, if he any had, in regard to him were thus ended. On the 29th of April 1908 the curator also received a letter from the said Eric Dighton Mackenzie (that is, the younger boy), who is still under seventeen years of age and at Eton College, intimating that he also did not desire any appeal to be taken. That letter is also produced. On the 14th May he received Mr Dickson's opinion. The opinion, shortly stated, was to the effect that it was advisable to reclaim, and that it was the duty of the minuter to have a personal interview with his ward. On the same date the curator wrote to the said Eric Dighton Mackenzie enclosing a copy of Mr Dickson's opinion and requesting a personal interview. On 22nd May 1908 an interview between the curator *ad litem* and his ward took place in Edinburgh. At the said interview the curator explained the case and the effect of the interlocutor as fully as possible to his ward. He strongly urged the ward to concur with him in taking such steps as might be necessary for obtaining the judgment of the Inner House. The ward, however, refused his concurrence. The minuter then states that he has been advised that without the ward's concurrence it is impossible for him to take any effective steps to protect farther the ward's interest, and in these circumstances he desires to be relieved from the office of curator *ad litem* to the said Eric Dighton Mackenzie, and he craves the Court accordingly.

"Now, the reason that I have reported the matter to your Lordships is that I feel that inadvertently a mistake was made in the Court's interfering at all to appoint a curator to these two minors, but I feel also that if I am wrong in that, while it may be my duty at his request to relieve the curator Mr Cowan, it would be my duty to appoint someone else in Mr Cowan's place, and I therefore desire your Lordships' instructions in the matter.

"My reason for holding that no such step should have been taken is founded upon the position as litigants of pupils and minors. In the case of *Sinclair*, which your Lordships will find reported in 6 S. 336, the matter was very solemnly considered by the whole Court in the matter of a pupil, and your Lordships will find upon page 338 the law very carefully laid down in the opinion of eight of the consulted Judges, to the effect that where a pupil is a pursuer the opposite party may require that he be properly represented or that the action do not go on, but that where a pupil is a defender no one can compel him to come into Court, and that the appointment of a curator *ad litem* is truly an interference to compel the pupil to come into Court, so that a judgment might be pronounced against him on a different footing from that in which it would be pronounced against him were he left to himself.

"That authority has been frequently referred to, and your Lordships will find a very good example in the case of *Grieve*, 9 Macph. 582, of the result of proceeding against a pupil who had no tutor, and the position in which such pupil is entitled to be placed. It illustrates the position in which a pupil ought to find himself when he becomes major where he has been brought into Court and has not appeared, and which would be interfered with by the appointment of a curator *ad litem* at the instance of any pursuer.

"I do not find—and counsel will no doubt assist your Lordships—any case which has dealt with the matter from the point of view of a minor in the same circumstances as those of the pupil in *Sinclair's case*. But it appears to me that the same principles apply, and if it would be erroneous practice to compel a pupil to come into Court, it would be equally improper to compel a minor to come into Court by the appointment to him of a curator *ad litem*.

"I think the only case that counsel referred me to in which the position of a minor is concerned is the case of *M'Conochie*, 9 D. 791, but that was the case of a minor pursuer. The father refused to concur in the action. It was held that as the minor was a pursuer in that case, and was entitled to have her case brought before the Court, a curator *ad litem* should be appointed for the purpose of the action in consequence of the father's refusal to protect her interests.

"In these circumstances I have reported the matter to your Lordships, and the only other question is this. This is an action of multiplepoinding—not an ordinary action—and it was maintained to me by the counsel for the trustee that a multiplepoinding must be treated on a different

footing from an ordinary action, because it involved the exoneration of the pursuer, and that the pursuer was entitled to compel everyone to attend, for their interest, for the purpose of enabling him to get his exoneration. I venture to think that this is a consideration which ought not to vary the result. If in an ordinary action a curator should not be appointed, I think in a multiplepoinding he should not be appointed either. As to the circumstance of one of the defenders being a minor preventing the trustee getting his exoneration on distributing the funds, that is a question between them, just as much as if they were parties to an ordinary action, and it seems to me that the same principle applies as in an ordinary action.

"Lastly, my reason for reporting the question is that it appears to me to be a matter with which I cannot very well deal. The interlocutor, though granted by Lord Salvesen, is really my interlocutor, for it was signed by him for me, and I cannot recal my own interlocutor; I therefore report it to your Lordships, because it is not a question on the merits—it is a question of putting right an administrative, not a contentious matter in the suit. In these circumstances I ask your Lordships to deal with the matter as your Lordships may be advised, either by disposing of it yourselves or by remitting to me with instructions to do what your Lordships deem proper."

Argued for the trustees (pursuers and real raisers)—Where a minor was convened in an action, and no curator *ad litem* was appointed to him, a decree against him was not null, but was a decree in absence. The appointment of a curator *ad litem* was not *per se* sufficient to make the decree against the pupil a decree *in foro*. It was for the curator to consider whether he should enter appearance, and if he did enter appearance, but only in that event, was the decree against the minor a decree *in foro*—*Sinclair* v. *Stark*, January 15, 1828, 6 S. 336. Accordingly the minor was in no way prejudiced by the fact that a curator had been appointed to him, and the appointment should not be recalled, or if it were recalled another curator should be appointed. The fact that the minor was nominally a defender here was of no importance. In a multiplepoinding the person who was nominally the pursuer raised the action in order that claims might be made on the fund in his hands by the parties called in the action. These parties were really pursuers, and the raiser of the action was substantially a defender—in fact a multiplepoinding was equivalent to a combination of actions against the raiser. Hence, the minor here must be treated as a pursuer, and where the pursuer was a minor the defender was entitled to have a curator appointed to him.

Argued for the curator *ad litem*—This was an attempt to force the minor to appear in a litigation, and the Court had no power to do so. The appointment was not sought in the interests of the minor, for if he desired to be reponed against an adverse decree it would be easier for him to be reponed if that decree had been pronounced in absence and not *in foro*. The authorities were against the appointment of a curator *ad litem* to a pupil or minor who was a defender—*Calderhead's Trustees* v. *Fyfe*, May 26, 1832, 10 S. 582; *Swan*, January 10, 1866, 1 S.L.R. 100. The fact that this action was a multiplepoinding made no difference, and the minor could not be treated as a pursuer because he had not entered a claim in the multiplepoinding.

LORD JUSTICE-CLERK—The question which has been reported upon to this Division by the Lord Ordinary is whether an appointment of a curator which was made to certain minors was one which should not in the circumstances have been made. The circumstances in which the question arises are these. In 1892 an action of multiplepoinding and exoneration was raised in reference to the very large estate of the late Sir James Thomson Mackenzie, Baronet, who died in August 1890. There has been protracted procedure in the case. Sir Allan Russell Mackenzie and his children were called. For many years his children did not appear in the proceedings, and up to the present time the younger children have not entered appearance. He died in 1896, and did not appoint any tutors or curators to his children.

The case has reached the stage of the rights of parties in the residue having to be settled. The eldest son of Sir Allan, Sir Victor, claims the whole residue, which is resisted by the trustees. After certain procedure had taken place, the trustees took steps to have a *curator ad litem* appointed to the other sons of Sir Allan, who were in minority. The appointment was made by Lord Salvesen, who was acting for Lord Johnston when he was absent from Court because of indisposition.

The curator appointed applied to be relieved of office in respect that Mr Allan Leith Mackenzie and Mr Eric Dighton Mackenzie, his two wards, refused to allow him to reclaim against an interlocutor as to which advice of counsel had been taken. Mr Allan having become major the curatory fell as regarded him. As regards Eric, the curator on the advice of counsel had a personal interview with him, when he found him fixed in his determination not to give his name to a reclaiming note. In these circumstances the curator desires to be relieved of office.

That being the present position of matters the Lord Ordinary desires the instruction of the Court. He is prepared to relieve the present curator, but he feels that if it was right to appoint a curator at all then the question of the appointment of another gentleman to be curator would at once arise.

The Lord Ordinary's difficulty is that he has strong doubt whether in the circumstances any appointment should have been made. The point in question is, Can a person who is not major be compelled against his will to compear as a defender

in an action? On that question I have come to the conclusion that the view of the Lord Ordinary is sound. In the case of *Sinclair* (6 S. 336) the question arose very sharply, and was decided by a full Bench. And this is confirmed by the subsequent case of *Grieve* (9 Macph. 582). The principle seems to be that the rights and interests of a young person are not to be affected by an action raised against him in any way which may affect his asserting any right he may have when he comes of age to act for himself. As it is expressed in the Lord Ordinary's judgment in *Calderhead* v. *Fife* (10 S. 582) "the Judge has no power . . . to exercise any sort of jurisdiction over an absent defender. Hence he cannot appoint a curator for him." These were cases of pupils, but I see no difference in principle in the case of a minor. He of course is in one respect in a different position from a pupil, because he is not held to be incapable of contracting, but is only protected in doing so. But if he does not choose to become a defender in proceedings, then I cannot see why the opposing party should be entitled to force his hand by getting a *curator ad litem* appointed to him, he having no desire to have anything to do with the litigation.

I agree with the view expressed by the Lord Ordinary in reporting the case that the fact that the present proceedings are in the form of a multiplepoinding should not make any difference as to the result. The rights of the minor to be affected by the proceedings are just such rights as could be dealt with in an ordinary action. It is a mere accident that the existence of double distress leads to the form of the case being a multiplepoinding, which is after all a conglomeration of actions. The position of a party in a multiplepoinding is that he defends against the claims of other litigants so as not to have his own claims defeated.

I am therefore of opinion that a curator should not have been appointed to this minor, who is not and refuses to be a litigant in the cause. That he is not a pursuer is plain, for he is not a party to the litigation at all. As a defender he cannot be dealt with by the Court as having any power over him, and those who are in Court have no right to move for a curator to be appointed to him, and the Court cannot grant the appointment.

LORD STORMONTH DARLING, LORD LOW, and LORD ARDWALL concurred.

The Court remitted to the Lord Ordinary, with instructions to recal the appointment of the Curator.

Counsel for the Trustees—Fleming, K.C. —Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Curator *ad litem*—Macphail. Agents—R. R. Simpson & Lawson, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, June 18.

(Before the Lord Justice-Clerk, Lord Low, and Lord Ardwall.)

ALLAN *v.* NEILSON.

Justiciary Cases—Police Offences—"Public Show" — Range of Penny in the Slot Machines Open to the Public—Glasgow Police (Further Powers) Act 1892 (55 *and* 56 *Vict. cap.* 165), *sec.* 7.

The Glasgow Police (Further Powers) Act 1892, sec. 7, provides, *inter alia*, that no public show shall be opened or set up without permission of the magistrates, who may regulate or prohibit such public shows, and that any person contravening such regulation or prohibition shall be liable to a penalty. *Held* that an Automatic Vaudeville, consisting of premises opening directly off a public street and fitted up with a number of automatic penny in the slot machines, such as gramophones, &c., to which the public had access free of charge, was a public show within the meaning of the Act and fell to be conducted conform to regulations prescribed by the magistrates.

The Glasgow Police (Further Powers) Act 1892 (55 and 56 Vict. cap. 165), sec. 7, enacts—"No public show of any description whatever, whether in open ground, or in any house, or building, or caravan, or tent, and no swings, switchback railways, or hobby horses, and no shooting gallery, singing or dancing saloon, or bowling or ninepin alley, and no place for playing skittles (all which are hereinafter referred to as public shows or other places of entertainment) . . . shall be opened or set up without the permission of the Magistrates' Committee, and the Magistrates' Committee may regulate, restrain, remove, or prohibit all such public shows or other places of entertainment, and make regulations or prohibitions for that purpose; and if any person shall open or set up, or be concerned in opening or setting up, any such public show or place of entertainment without the permission of the Magistrates' Committee, or shall contravene any such regulation or prohibition, every such person shall for every such offence be liable to a penalty not exceeding five pounds, and also to a daily penalty of five pounds."

Norman Macleod Allan, residing at Pollokshields, was charged in the Police Court at Glasgow on 17th January 1908, at the instance of George Neilson, Procurator Fiscal of Court, on a summary complaint which set forth that he "did, on Sunday, the fifth day of January 1908, in premises on the ground floor at 28 Argyle Street, Glasgow, open and use for exhibition to, and entertainment of, a large number of persons then admitted thereto, a public show or entertainment called an Automatic Vaudeville, and consisting of automatic