hand it seems to me that from the point of view of practical convenience and good sense the dilemma is a most unfortunate one.

It has been said—and the saying correctly represents the law of Scotland—that the Court will not advise trustees. If trustees possess a power, however difficult and delicate may be its exercise, and however serious the responsibility which they may incur either by exercising it or refusing to exercise it, the Court will not lift a finger to help them; it declines to advise them. I should have thought that a primary purpose of a supreme court of equity was to assist trustees and beneficiaries in circumstances of difficulty by aiding them in the exercise of powers which already belonged to them in circumstances where such assistance was desirable. I should further have thought that a supreme court of equity should have jurisdiction and the right to confer upon trustees powers which the testator had not conferred upon them if the circumstances made that course desirable.

The only reason which I have ever heard stated in justification of the legal theory on which our Courts proceed is that of expense—that it is undesirable that the Court in Scotland should undertake the administration of trusts because that course may lead to expense. Cheapness may be too dearly bought. It would be easy to amend the Trusts Acts first of all so as to enable the Court to intervene to assist trustees in the exercise of the powers conferred upon them by the testator, and also so as to enable the Court to confer additional powers upon trustees. Undue expense might be avoided by directing the Court, in any case where the application seemed not to be properly justified, to order that the costs should be borne by the trustees personally.

In the present case I have a suspicion that if it were competent to look into the matter it would be found that the most expedient course in the interests of all parties would be that the petition should be granted. But for the reason which I have explained I do not think that the Court has power to examine into that matter or to pronounce any opinion upon it.

LORD PRESIDENT—I concur in the opinion delivered by Lord Johnston, which I have had an opportunity of reading.

We consider that the expenses of the petitioners and the respondents ought to be paid out of the trust estate exclusive of the share of the trust estate bequeathed to Mrs M'Arthur and her children.

The Court refused the prayer of the petition.

Counsel for the Petitioners—Blackburn, K.C.—C. H. Brown. Agents—R. D. Ker & Ker, W.S.

Counsel for the Respondents—Constable, K.C.—W. T. Watson. Agents—Guild & Guild, W.S.

Friday, May 24.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

ROSS *v.* ROSS'S EXECUTOR AND OTHERS.

Process — Reclaiming — Competency — Reclaiming Note against Allowance of Proof Boxed but not Lodged on Box Day when Reclaiming Days Expired in Vacation—Court of Session (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 28—*C.A.S., C, ii,* 4, 5, *and D, i,* 4.

A reclaiming note against an interlocutor pronounced on 20th March 1918, allowing proof, was boxed but not lodged on the first box day of the Easter vacation. It was lodged two days later. *Held* that the reclaiming note was incompetent.

The Court of Session (Scotland) Act 1868 (31 and 32 Vict. cap. 100) enacts—Section 28—"Any interlocutor pronounced by the Lord Ordinary as provided for in the preceding section . . . shall be final unless within six days from its date the parties or either of them shall present a reclaiming note against it to one of the Divisions of the Court. . . ."

Section 27 (the preceding section) was altered, and the provisions of C.A.S., C, ii, 4, were substituted therefor.

C.A.S., C, ii, 5 enacts—"The provisions of the 28th section of the Court of Session Act 1868 shall apply to all the interlocutors of the Lord Ordinary referred to in the foregoing section, so far as these import an appointment of proof. . . ."

C.A.S., D, i, 4 enacts—"In all cases where the days allowed for presenting a reclaiming note against an interlocutor pronounced by a Lord Ordinary in the Outer House expire during any vacation, recess, or adjournment of the Court, such reclaiming note may be presented on the first box day occurring in said vacation, recess, or adjournment after the reclaiming days have expired. . . ."

Joseph Ross, *pursuer*, brought an action against John James Herdman, W.S., sole executor of James Scott Ross and others, *defenders*, concluding for decree of reduction of a settlement alleged to have been granted by James Scott Ross, dated 15th June 1916.

The pursuer averred—"(Cond. 7) The said James Scott Ross was, from mental decay, incapax at the date of the execution of the said settlement. He was not of a sound disposing mind, and the said settlement is not the deed of the said James Scott Ross. At and for a considerable time prior to the date of its execution, the deceased was unable to give instructions for the preparation of a will, or to execute a will, or to dispose of his estate. He left no other operative writings of a testamentary nature disposing of his estate, which is believed to amount to about £2600."

The pursuer *pleaded*—"2. The said James Scott Ross being of unsound mind at the

date of the execution of said pretended settlement, decree of reduction should be granted as craved."

On 20th March 1918 the Lord Ordinary (ORMIDALE) allowed a proof.

Thereafter on the first box-day in vacation the pursuer boxed copies of a reclaiming note; two days thereafter the reclaiming note was lodged. Counsel for the defenders objected to the competency of the reclaiming note.

Argued for the defenders—The interlocutor of the Lord Ordinary imported an allowance of proof and fell under the provisions of the C.A.S., C, ii, 4, which was substituted for section 27 of the Court of Session (Scotland) Act 1868 (31 and 32 Vict. cap. 100), and section 28 of the Act of 1868 applied—C.A.S., C, ii, 5. Consequently a reclaiming note would have been incompetent if the reclaiming days had expired in session unless it had been presented within six days, but the reclaiming days expired in vacation and the reclaiming note had to be presented on the first box-day—C.A.S., D, i, 4. In the present case the reclaiming note had not been presented in time; presenting meant lodging the principal signed note with the clerk of court—*Craig* v. *Jex Blake*, 1871, 9 Macph. 715, 8 S.L.R. 428; *Bain* v. *Allan*, 1884, 11 R. 650, 21 S.L.R. 389. Further, as the reclaiming note had not been presented, the copies tendered for boxing were copies of a document not before the Court, so that there had been no boxing. The statutory enactments as regards procedure were peremptory and excluded any possibility of indulgence—*Watt's Trustees* v. *More*, 1890, 17 R. 318, 27 S.L.R. 259; *Burns* v. *Waddell & Son*, 1897, 24 R. 325, 34 S.L.R. 264. *Harris* v. *Haywood Gas Coal Company*, 1877, 4 R. 714, was not an authority, for the report did not show the nature of the interlocutor reclaimed against. In any event the pursuer had been indulged by the provision allowing him to present his reclaiming note on the first box-day instead of within six days of the interlocutor reclaimed against, and he should not be given any further indulgence.

Argued for the pursuer—The practice was to receive boxing copies of reclaiming notes although the principal note had not been lodged, so that "boxing" appeared to be independent of "lodging." When the reclaiming days expired in session the matter had always been regulated by statute—Judicature Act 1825 (6 Geo. IV, c. 120), section 18; Court of Session (Scotland) Act 1850 (13 and 14 Vict. c. 36), section 11; Court of Session (Scotland) Act 1868 (*cit.*), sections 28 and 54, altered by A.S. 10th March 1870, sections 1 and 2, which were re-enacted by C.A.S., C, ii, 4, 5. But when the reclaiming days expired in vacation the matter was regulated by Act of Sederunt—A.S., 11th July 1828, section 79; A.S., 20th July 1853; A.S., 14th March 1894, now replaced by C.A.S., D, i, 4—and the Court had power to relax the provisions of an Act of Sederunt. Here, in any event, the provisions of the C.A.S., D, i, 4, which applied to the present case, should be relaxed, as the lodging of the reclaiming note had been delayed by the difficulty of getting counsel to sign it. But it was sufficient if the reclaiming note was boxed timeously. *Harris's* case (*cit.*), where the want of objection could not have cured the defect if the reclaiming note had been incompetent, was an authority. *Bain* v. *Allan* (*cit.*) merely decided that a reclaiming note duly lodged but not timeously boxed, was competent. The dicta in *Jex Blake's* case (*cit.*) were *obiter*. Further, C.A.S., D, i, 4, applied to all interlocutors where the reclaiming days expired in vacation and made no distinction between them. Yet in the case of interlocutors where the reclaiming days were twenty-one, if the prints were duly boxed, the fact that the reclaiming note was lodged late was not fatal—*M'Lachlan* v. *Nelson & Company, Limited*, 1904, 6 F. 338, 41 S.L.R. 213; *Davidson* v. *Scott*, 1915 S.C. 838. The same rule should apply to other interlocutors falling under C.A.S., D, i, 4.

LORD PRESIDENT—The objection taken to this reclaiming note is in my opinion fatal. The interlocutor sought to be reclaimed against is confessedly an interlocutor importing an allowance of proof, and by the Court of Session Act of 1868, section 28, it is provided that such an interlocutor is final unless within six days from the date parties shall present a reclaiming note against it to one of the Divisions of the Court. Now it appears that by a subsequent Act of Sederunt it was provided that if, as in the present case, the reclaiming days expire during vacation, it shall be competent to present the reclaiming note on the first box day occurring in the said vacation, recess, or adjournment after the reclaiming days have expired.

That was not done in the present case. It is common ground that not until two days after the first box day was the reclaiming note lodged or "presented"—the word used in the statute. I have no doubt whatever that the meaning of the word "presented" as used in the 28th section of the Act of 1868 is exactly as Lord President Inglis has defined it in the case of *Bain—Bain* v. *Allan*, (1884) 11 R. 650, 21 S.L.R. 389. "Although," he says, "the word 'presented' may in the ordinary case be held to have the meaning of and to be equivalent to both 'lodging in process' and 'boxing to the Court,' yet as the word is used here I have great doubts whether it was intended to comprehend both acts. The words used are 'shall present a reclaiming note to one of the Divisions of the Court, by whom the cause shall be heard summarily.' I do not therefore see how the statute can be held to mean more than that something is to be done which shall have the effect of putting the case in the hands of one Division of the Court. But that is accomplished by the mere act of lodging the paper with the clerk to the process. The case is thus brought to the Division." This reclaiming note was not thus brought to the Division, and accordingly I am afraid we must refuse it as incompetent.

LORD JOHNSTON—I agree. A provision with regard to procedure in vacation has been added to the statutory provision of section 28 of the Act of 1868, and section 28 has to be read as if the words "within six days . . . shall present a reclaiming note" were "within six days, or in vacation on the first box day after the reclaiming days have expired, . . . shall present a reclaiming note." So read you do not, unfortunately for the reclaimer here, get rid of the primary declaration of section 28 that an interlocutor shall be final unless something be done. That something is defined by the statute, read in conjunction with the Act of Sederunt, and so read it still remains that what has to be done is presentation not to the Court, but to a Division of the Court, and you cannot present a note to a Division of the Court except by lodging it with the Clerk to that Division.

Now we have been favoured with a large number of citations, many of them having to do with the old Statute of 1825, the Judicature Act, and I venture to think that the difference is that now it is a case of presenting to a Division of the Court, and in those days it was a case of boxing to the Court. I am under the impression that that difference of nomenclature is really occasioned by the fact that this Court is differently constituted now from what it was then, and that a reclaiming note in those days was not a reclaiming note to the Division but to the Court. Now it is a reclaiming note to the Division that is provided for, and as the statute has used the word "final" I do not see how we can in any way assist the intending reclaimer, although I admit the hardship to him, and it might be desirable that the reclaiming note should still be received under a penalty. But that is not provided, and we have nothing to do but to apply the statute.

LORD MACKENZIE—I agree.

LORD SKERRINGTON—I concur. I express no opinion as to whether there should still be a remedy on the ground of expediency.

The Court sustained the objection and found the reclaiming note incompetent.

Counsel for the Pursuer—Watt, K.C.—W. H. Stevenson. Agents—Arch. Menzies & White, W.S.

Counsel for the Defenders—The Solicitor-General (Morison, K.C.)—A. M. Mackay. Agents—Duncan & Black, W.S.

Wednesday, May 29.

FIRST DIVISION.

[Lord Anderson, Ordinary.

REID *v.* LORD RUTHVEN.

Cautioner—Extent of Obligation—Relief—Construction — Guarantee of Debts of Person Indebted to Another as Individual and as Cautioner for Third Party.

Payment — Cautioner — Assignation — Cautioner for One Person Paying Debt of Another Person Guaranteed by the Former.

A guaranteed due payment to a bank of all sums for which B was or might become liable to the bank. At various times before and after, B guaranteed to the bank the payment of debts due by C. B at his death was due on his own account sums of money to the bank. A paid the bank the money due by B as guarantor for C, and received an assignation from the bank of the debt due by C and guaranteed by B, and the letters of guarantee by B. A thereafter sued C for repayment of the sum paid by him. *Held* (1) that A's guarantee covered and included B's indebtedness as guarantor for C, and (2) in respect that A had paid C's debt he was entitled to decree against C.

James Reid, of Tyneholm, Pencaitland, *pursuer*, brought an action against Walter James Hore Ruthven, Baron Ruthven, *defender*, concluding for payment of £2704, 13s. 1d., with interest thereon from 5th May 1916 until payment at the rate concurrently charged by banks on unsecured overdrafts.

The defender *pleaded, inter alia*—"1. No title to sue. 4. The defender not being due any sum to the pursuer is entitled to absolvitor. 5. The defender is entitled to absolvitor in respect (*a*) that the pursuer's guarantee did not extend to any debt due by the defender to the bank, but applied only to the debt due by Mr Kirk to the bank on his personal account for advances to himself, and (*b*) that the debt of Mr Kirk to the bank guaranteed by the pursuer having been satisfied and paid, the pursuer's obligation as cautioner was extinguished and the assignation founded on by him is ineffectual. 7. On the assumption that the bank professed to assign to the pursuer the defender's obligation to them, the assignation thereof is inept and ineffectual as in a question with the defender in respect (*a*) that the defender was liable only for Mr Kirk's debt to the bank, (*b*) that the bank had no claim of relief against the defender for Mr Kirk's debt, and (*c*) that in the circumstances the bank were not entitled, without the defender's consent, to assign to the pursuer the defender's obligation. 9. The pursuer having in the circumstances condescended on no right of relief against the defender, the defender is entitled to absolvitor."

On 13th November 1917 the Lord Ordinary (ANDERSON) repelled the pleas-in-law stated for the defender.