COURT OF SESSION.

EXTENDED SITTINGS.

Thursday, March 21.

SECOND DIVISION.

WATSON OR M'GOWAN *v.* WATSON.

Sheriff—Petition—Delivery of Deeds—Feu-Contract—Recording—Act 1693. *Held*—(1) That a summary petition in the Sheriff Court by a party alleging an interest in them for delivery of two deeds, one being a feu-contract, was a competent proceeding. (2) That a feu-contract was properly recorded in the books of the Sheriff Court, it not falling within the operation of the Act of 1693 applicable to feu-charters.

This is an advocation from the Steward Court of Kirkcudbright. John Watson, shepherd, Torkatrine, in the parish of Urr, brought a petition in the Steward Court, praying that the respondent should be ordained to deliver up to him, upon a receipt and obligation to redeliver them, the following deeds—viz., (1) feu-contract entered into between James Gibson, Esq., of Kelton, deceased, and Robert Watson, also deceased, and his father, dated 8th May 1784; and (2) settlement of Robert Watson in favour of John Watson, the petitioner's father, Robert Watson's eldest son, and his three daughters, Margaret and Agnes, the respondents, and Mary, the petitioner's aunts, dated 25th June 1822. The petitioner alleged that Robert Watson died, leaving certain heritable property, and also a settlement leaving that property to John Watson, his eldest son, now deceased, to Agnes Watson or M'Gowan, Margaret Watson or M'Night, two of the respondents in this case, and to Mary Watson, his daughter. He further says that John Watson died intestate, and that he is his eldest and nearest and lawful heir of line; and that Mary Watson died intestate, and that he stands in the same relation to her; and also that he is the nearest and lawful heir of line of his grandfather, the said Robert Watson. The Steward (Hector), overruling a judgment of the Steward-Substitute, held that the petitioner had averred a case entitling him to have the deeds produced, and ordered their production, subject to the condition "that his agent, who may receive the same, shall undertake to have the writings duly recorded within a time to be fixed, for behoof of all parties interested." The respondents were ultimately found liable in expenses in the inferior court.

They advocated.

PATTISON and DUNDAS GRANT, for them, argued—The petition was incompetent in the Steward Court; the proper remedy was an action of exhibition. Further, it was incompetent for the Steward to order the recording of a feu-contract, for such a deed is in the same position as a feu-charter, which can only be registered in the books of Council and Session under the Act of 1693.

SOLICITOR-GENERAL and SCOTT in answer.

To-day the Court (Lord NEAVES delivering the opinion of the Court) adhered to the interlocutor of the Steward, holding that he had taken a proper view of the case in ordering the deed to be recorded, and that it was properly recorded in the Steward Court, the Act of 1693 only applying to the transmission of subaltern rights, not to the creation of new ones.

Agent for Advocator—J. Barton, S.S.C.

Agent for Respondent—W. S. Stuart, S.S.C.

Monday, March 25.

THOMSON *v.* PHILP.

Promissory Note—Payee—Reference to Oath. (1) Terms of a document which held not to be a promissory note in respect of uncertainty in the payee. (2) Held (Lord Neaves diss.) that a reference to oath which was declared negative of the reference was an implied surrender of every other form of proof, and that a party who had availed himself of it had excluded his right to all other.

This is an advocation from the Sheriff Court of Fifeshire. John Thomson, carter, Cairneyhill, for himself, and for his own right and interest in the premises, and as executor and universal legatory of the deceased Julia Paton or Young, residing at Cairneyhill, widow of William Young, feuar there, conform to last will and testament executed by her in his favour, dated the 26th of July 1862, sued the defender upon an alleged promissory-note in the following terms:—

"£40.—Twelve months after date I promise to pay to Mrs July Paton Young, or James Thomson, carter, Carnehill, or thar order, the sum of £40 sterling, with interest.

(Signed) "ROBERT PHILP.

"Carenhille, 20th Sept. 1862."

There was an alternative conclusion in the summons for alleged cash advances by the said Julia Paton or Young to the defender "in different sums and at different times (the particular sum and dates being to the pursuer unknown) prior to the 20th of September 1862," under deduction of a sum of £1 paid to account. The Sheriff-Substitute (Bell) held that the document libelled was not a promissory-note in respect it did not contain an unconditional promise to pay to a particular payee, and as to the alternative conclusion of the summons that it was defective by reason of want of specification. He therefore assoilzied the defender from the first conclusion, and dismissed the summons *quoad* the second. The Sheriff (Mackenzie) adhered to this interlocutor so far as it found that the document libelled on was not a promissory-note, but altered as to the alternative conclusion, and found that the pursuer's averment might be proved by the writ or oath of the defender. That oath was taken, and the Sheriff-Substitute found that it was negative of the reference. The Sheriff adhered. The pursuer advocated.

FRASER and SCOTT for him.

W. M. THOMSON for the respondent.

At advising,

LORD JUSTICE-CLERK—The action under advocation was brought by the advocator, who was pursuer in the inferior Court, to recover an alleged debt of £40 with interest, said to be due to the pursuer. It was rested in its first conclusion upon an alleged promissory-note for the amount. It contained an alternative conclusion for payment of the debt.

The object of the pursuer under each conclusion, as appears from the fact of alternative libelling, was to recover the alleged debt, either as proved or established by a document said to be privileged, or, if the document should not afford evidence

of the debt *per se*, then to establish it by other competent proof. The identity of the debt is clear, it is a sum of £40 for value received under the first; and under the second, the same sum with interest from the same day.

The Sheriff-Substitute at Dunfermline found that the document libelled under the first conclusion of the action was not a privileged instrument; and as it was improbative, being subscribed but not written by the party said to be under the obligation, he assoilzied from that conclusion of the action and his judgment was adhered to by the Sheriff. In that state of matters the pursuer refers to the oath of the defender.

The oath being confessedly negative of the reference, the pursuer advocates the judgments in so far as they assoilzie from the first conclusion of the libel. The respondent, besides meeting the case made against the Sheriff's judgment on the first conclusion, objects that the reference excludes the challenge.

I am of opinion that the judgments of the Sheriff-Substitute and Sheriff in reference to the document sued on under the first conclusion are sound. The form of the instrument is not one known or recognised in mercantile dealing; and it is so conceived as to introduce in reference to the payee an uncertainty which is opposed to the very essence of such commercial instruments. It is made payable to one or other of two persons, not with certainty to any one. There is no definite or fixed payee. Assuming a charge to be given by the two parties separately, or an action simultaneously brought by each, the difficulty of enforcing such obligations is apparent. Considering the freedom from solemnity in such instruments, and the rapidity of execution to which, when in proper form, they are entitled, it is obviously necessary, as Mr Bell has remarked, "to require the strictest conformity to such requisites as law and mercantile custom have established in regard to their constitution." Law, as expressed by all the leading authorities upon the subject, condemns such instruments, and in mercantile dealing no such form is to be met with.

I have no hesitation, therefore, in adhering to the judgment advocated in reference to the disposal of the first conclusion of the libel, which disposes of the case; but I confess that I should have been prepared to have sustained the respondent's objection founded upon the reference to oath had it been necessary. Viewing the subject-matter of the inquiry under the second conclusion, as going to the subsistence of the very same debt sued for under the first, I should hold that the oath which is, or ought to be, an end of strife, should terminate the dispute. If the debt under the second conclusion cannot be regarded as any other debt than that sued for under the first, surely the subject-matter of the reference under the alternative conclusion must dispose of the conclusion to which it was made. For the implied condition of a reference is the abandonment of every other description of proof by which the fact referred to oath may be proved. In referring to oath there is an implied surrender of any proof by bond, bill, or written instrument. To reserve written evidence of the facts deponed to in the shape of a promissory-note or bond of the granter would be to retain a power of contradicting the testimony obtained upon an implied condition, which seems to me to exclude any other appeal to proof than the definitive appeal made on the reference. (Stair iv., 44. 2.) The advocator should, if he desired to obtain judgment upon his legal plea on the validity of the promissory-note, have allowed judgment to go by default against him in the inferior Court, and reserved his reference until after the Court had disposed of the first conclusion.

Lord COWAN and Lord BENHOLME concurred with the Lord Justice-Clerk.

Lord NEAVES differed on the second point, and was of opinion that the conclusions were not identical, and that finding the oath to be negative of the reference in one conclusion did not exhaust the other.

Agent for Advocator—John Galletly, S.S.C.
Agent for Respondent—George Wilson, S.S.C.

Thursday, March 28.

FIRST DIVISION.

PATRICK *v.* NAPIER.

Property — Title — Angling — Servitude — Singular Successor. A proprietor of a barony conveyed a part of it in feu with a certain privilege of angling, and the feuar thereafter also acquired the superiority of the feu. Several years thereafter the barony was conveyed to a purchaser, the subjects feued being specially excepted in the disposition, but no mention being made of the privilege of angling. Held —(1) that the privilege not having been created a real burden in the purchaser's title, he was not bound to recognise it; (2) that a privilege of angling was not capable of being made a servitude in favour of a proprietor of lands discontiguous from the water in which it was to be exercised.

This is an action of declarator at the instance of Mr Patrick, the proprietor of the estate and barony of Kilmun, against Mr David Napier, of Glenshellish, which had been conjoined with a suspension and interdict betwixt the same parties. The object of the action is to have it declared that "the said David Napier has no liberty or privilege of angling or rod-fishing in the river Echaig, to the westward of the ground some time feued by John Lamont, writer in Greenock, from John Gillespie Davidson, writer to the signet, as commissioner for General Campbell of Monzie, or in Loch Eck, in virtue of a feu-contract entered into between the said James Gillespie Davidson, as commissioner foresaid, and the said defender, dated 20th and 27th June 1829, or in virtue of a disposition by the Right Hon. George Lord Abercrombie and others, trust-disponees of the said General Campbell, in favour of the said defender, dated 1834, or in virtue of any rights or titles following thereon, or in virtue of any other right or title whatever;" and also, "that the defender has no right or title to enter upon the pursuer's property of Kilmun, or to be in or to pass along the said river Echaig where it flows through or along the said property, or along the shore of the said loch where it is bounded by the pursuer's property." There are also conclusions for interdict.

The defender pleaded that the right of angling was conferred upon him by his feu-contract, dated in 1829, which contained the following clause, viz. :—"With liberty and privilege to the said David Napier and his foresaids of angling or rod-fishing in the River Echaig, to the westward of the ground feued by John Lamont, writer in Greenock, from the said James Gillespie Davidson, as commissioner foresaid, and also in Loch Eck, in common with the said Alexander Campbell the