

Wednesday, November 17.

FERRIER v. CONNELL'S TRUSTEE.

Advocation—Accounts—Agent—Delivery—Expenses—Petition—Taxation. A trustee presented a petition in the Sheriff-Court to have his late agent ordained to deliver up the documents connected with the trust-estate, and to have the agent's accounts taxed. *Held* such taxation is incompetent on a petition.

Circumstances in which neither party allowed expenses in Sheriff-Court.

Mr Ferrier was for some years agent for the trustees of the late Mr Alexander Connell. Mr James Connell, the respondent in this advocation, is the sole surviving trustee; and having transferred the agency of the trust to Messrs J. & J. Milligan, S.S.C., towards the end of 1864, requested Mr Ferrier to send in his account and vouchers and the various documents belonging to the trust. But Mr Ferrier refused to deliver the latter till he received payment of his account. After much correspondence, however, he agreed to give up the documents on receiving payment of his account as taxed; and to this the respondent consented. But in the meantime an account had grown up for correspondence, duplicates, inventories, &c., in all amounting to £6, 6s. 7d., as between Mr Ferrier and Messrs Milligan, as the respondent's agents; and he insisted on payment of this account, as taxed, before delivery of the writs asked for. The respondent refused to agree to this; and on 31st May 1867 presented a petition to the Sheriff to have Mr Ferrier ordained to make the delivery requested. On 28th June he consigned the £6, 6s. 7d. in the hands of the Clerk of Court; and in respect of this consignment the Sheriff-Substitute (HALLARD) ordained Mr Ferrier to deliver up the whole documents craved for, and appointed his whole accounts to be laid before the auditor of the Court of Session for taxation. On appeal the Sheriff altered this interlocutor by restricting the accounts to be laid before the auditor to the amount for £6, 6s. 7d. Mr Connell brought an action of count and reckoning in the Sheriff-Court against Mr Ferrier; and on 29th April 1868 the Sheriff sisted procedure in the petition till this action should be settled. Thereafter he ordered payment to Mr Ferrier of £5, 8s. 3d., being the balance of the account as taxed; but found the petitioner entitled to expenses. These were taxed at £20; and on 22d July 1868 the Sheriff decreed against Mr Ferrier for payment of a modified sum of £15 of expenses.

Mr Ferrier advocated the cause, on the ground that he should not have been found liable in expenses. The Lord Ordinary (JERVISWOOD) affirmed the Sheriff's interlocutor. The advocator reclaimed.

J. C. SMITH, for him, argued—The granting of expenses by the Sheriff is inconsistent with his judgment. Mr Ferrier should get his expenses; or, at least, not have to pay the respondent's.

GIFFORD and M'KIE for the respondent.

The Court reversed the Lord Ordinary's interlocutor, holding no expenses were due by the advocator in the Sheriff-Court, and that the advocator's accounts to the trust could not be taxed on a petition; and gave the advocator the expenses of the advocation.

Agents for Advocator—Ferrier & Wilson, W.S.
Agents for Respondent—J. & J. Milligan, S.S.C.

Wednesday, November 17.

JURY TRIAL—Warranty.

TORRANCE v. PATON.

John Torrance, horsedealer in Edinburgh, claimed from David Paton, residing at Monorgan, near Dundee, £28, 8s. 5d., as being the loss he had sustained in consequence of a horse purchased by him from the defender being disconform to warranty. The pursuer purchased the horse at Perth on the 5th March. The sum paid for it was £41, and the defender gave pursuer a warranty that the horse was sound, free from vice, and a good worker. After removing the horse to Edinburgh, the pursuer resold it, but the purchaser shortly afterwards complained that it was so troublesome that he could not keep it. The pursuer was convinced that the horse was not in the condition described in the warranty, and accordingly wrote to the defender asking him to take the animal and return the purchase-money. No satisfactory answer being returned to this communication, the pursuer got the horse sold by authority of the Sheriff. The sum realised by the sale was £21, 2s., and the difference between this sum and the original cost, along with £8, 4s. 3d. for keep and maintenance of the horse for two months, and 6s. 2d. for interest, made up the claim.

The pleas in law for pursuer were—(1) The defender having sold the horse with express warranty that it was sound and free from vice, and the horse having been unsound and vicious, and disconform to warranty, at the date of sale, the defender is bound to repeat and pay back the price received by him, with interest, less the free proceeds of sale, all as concluded for. (2) The defender is bound to make payment to the pursuer of a reasonable sum for the horse's keep while in the pursuer's possession, and other expenses and charges incurred by the pursuer as above set forth. (3) The pursuer, in respect of the facts above set forth, is entitled to decree against the defender in terms of the conclusions of the action, with expenses.

The pleas-in-law for defender were—(1) The retaining the horse in the pursuer's own possession, and under his own treatment, till the 16th of April 1869, in the face of the defender's notification of non-liability, made in direct course on 25th March, constitutes such *mora* as to bar the pursuer from suing the action. (2) The statements of the pursuer as to the horse being unsound at or before the date of sale being untrue, and the action being groundless, the defender should be assoilized, with the expenses.

The issue sent to the jury was in the following terms:—"Whether on or about the 5th day of March the defender sold to the pursuer a brown horse, at the price of £41, which was then paid by the pursuer; and whether the defender warranted the said horse as sound, free from vice, and suitable for all farm work; and whether at the date of said sale the said horse was unsound, was not free from vice, and was not a good worker, or was disconform to warranty in one or more of the above particulars; and whether the said horse was offered back to the defender by the pursuer within reasonable time; and whether the defender is due and resting-owing to the pursuer the sum of £28, 8s. 5d.?"

MACDONALD and DEAS for the pursuer.

SCOTT for the defender.

Evidence was led at considerable length, which went chiefly to support the pursuer's allegations;

and LORD JERVISWOODE having summed up, the jury returned a unanimous verdict for the pursuer.
 Agent for Pursuer—John Robertson, S.S.C.
 Agent for Defender—John Galletly, S.S.C.

Friday, November 19.

FIRST DIVISION.

WARDROP'S TRUSTEES v. WARDROP AND OTHERS.

Vesting—Construction—Trust-Settlement. A father directed his trustees to convey the residue of his estate to his two children equally on the marriage or majority of the youngest. There was also a number of somewhat contradictory declarations of the rights of each child under certain contingencies, one of which occurred. *Held* that, in the absence of unmistakable declaration, the most reasonable construction must be put upon the words of the trust-settlement, and that the share of each child vested at its majority or marriage.

By antenuptial contract of marriage, in June 1842, between Henry Wardrop and Rosalie Wilhelmine Meyer, each party conveyed certain property to trustees for certain purposes. By the third purpose the trustees were directed, on the death of the survivor of the spouses, to convey certain household furniture and others, and certain heritable subjects, to the children of the marriage, in such proportions and under such conditions as Mr Wardrop should specify; failing which specification, equally. It was further provided, "in case any of the said children shall die before the said subjects are conveyed in fee as aforesaid, then the share and interest thereof of any of them so dying shall accresce to their lawful issue; whom failing, to their surviving brothers and sisters and their issue, share and share alike, the succession always being *per stirpes et non per capita*: Declaring, however, that as it is not the wish of the parties hereto that the said children shall be heritably vested with the said subjects till the youngest shall attain majority, the said trustees shall hold the said subjects or shares thereof belonging to the said children till said period, and shall apply the said rents thereof in the maintenance and education of the said children in such manner or to such amount as shall to them appear expedient, conveying the said subjects or shares thereof to the said children as aforesaid on the youngest attaining majority."

By trust-disposition and deed of settlement, dated 13th November 1851, Mr Wardrop, with the special advice and consent of Mrs Wardrop, conveyed to and in favour of Mrs Wardrop and certain other trustees his whole estate, heritable and moveable, for certain purposes. By the fourth purpose he directed the trustees to cause his children to be educated and maintained in such a manner as the trustees should think proper, till the marriage or majority of each of the children; and he provided that the expense thereof should be defrayed out of the general income of his means and estate, and not from the children's shares respectively. He further directed that the surplus income thereafter of his means and estate should be accumulated and form part of the general residue till the youngest child attained majority or was married. By the fifth purpose he directed the trustees, on the marriage or majority

of his youngest child, to convey to his daughter Rosalie Augusta Wardrop, and his son Frederick Meyer Wardrop, certain heritable subjects in specified shares; and in order that this provision might have full effect, he provided his "said son's right and interest in my means and estate shall not vest in him so as to be attachable for his debts or assignable by his deeds until six months after the period fixed for the conveyance of said estates, or until the said estates are conveyed, whichever shall first happen."

The seventh, eighth, and ninth purposes were as follows:—"Seventh, I direct the whole residue and remainder of my estates to be converted into cash, and, with all accumulations, to be equally divided betwixt my said son and daughter, or their respective children, share and share alike. Eighth, In the event of the death of either of my children without issue, I direct my trustees to convey my whole estates, after payment of the foresaid debts, legacies, expenses, and others, to the survivor and his or her foresaids, on the same terms and under the same restrictions as is provided before with regard to their several portions. Ninth, In the event of the death of both of my children without issue, and before majority or marriage, I direct my trustees to convey my said whole estates to the said Henry Cowan in liferent, and his children in fee."

By the tenth purpose he declared that, as under his antenuptial marriage-contract the provisions therein conceived to his wife and children were in lieu of terce, *jus relictae*, and legitim, that the provisions under this trust-settlement should be so also.

Mr Wardrop died on 9th December 1851, but his son ratified the trust-disposition and settlement. He was survived by his wife and two children. The elder of these, a daughter, attained majority on 29th May 1864, married Mr Gossling on 16th January 1866, and died on 13th February 1868, leaving two children. By her marriage-contract, dated 16th January 1866, she conveyed to certain trustees her whole estate, heritable and moveable, then vested in her, or that should accresce to her during the subsistence of the marriage. Mr Wardrop's younger child, Frederick Meyer Wardrop, attained majority on 4th July 1868.

Mr Cowan, the sole surviving trustee under the trust constituted by Mr Wardrop's marriage-contract, on 1st June 1864 assumed Mrs Wardrop as a trustee; and both of them are trustees under Mr Wardrop's subsequent trust-disposition and settlement. As various disputes arose as to the rights of parties under these deeds, the trustees raised a multipointing; and claims having been lodged by the parties respectively, it was found that the point at which parties were at issue was the date when the provisions vested in Mrs Gossling and Mr Frederick Meyer Wardrop.

The Lord Ordinary (ORMIDALE) found that the residue of Mr Wardrop's estate did not vest till the majority of his son; and therefore that as the daughter predeceased this period, her brother was entitled to one-half of the residue, and her children, in terms of the destination in the trust-deed, to the other half.

Mrs Gossling's marriage-contract trustees reclaimed.

WATSON and DEAS for them.

SOLICITOR-GENERAL and H. J. MONCREIFF for Mr Wardrop's trustees, Mrs Wardrop, and Mr F. M. Wardrop.