COURT OF SESSION.

Saturday, May 13.

SECOND DIVISION.

SPECIAL CASE—HARDY'S TRUSTEES AND OTHERS.

Trust Settlement—Conveyance—Titles to Land Act 1868, § 20. Terms of a holograph trust-deed which *held* sufficient under the Act of 1868 to carry the lease of a farm.

The question under this special case was whether the trust-deed of the late Mr Hardy, farmer, Muirhouse, carried the lease of the farm of Muirhouse to his trustees. This deed was holograph of the granter, and after the nomination of trustees, gave them full power "to do everything necessary for the comfort of my wife and family; that they entirely take charge of the farm, all means and moveables, until the youngest is twenty-one years of age, and then to be an equal division . . . The whole arrangements are to be wholly through the trustees. They shall also have power to retain or give up the farm, as they see it of most advantage to the family."

The lease of the farm was in favour of "William Hardy and his heirs, the eldest heir-female, on the failure of heirs-male, succeeding without division."

Mr Hardy was survived by his wife and two daughters. The factor *loco tutoris* of the elder daughter claimed the lease as heir.

SCOTT for the trustees.

H. J. MONCREIFF for Mrs Hardy.

KEIR for Misses Hardy's factor.

The case of *Pitcairn*, Feb. 25, 1870, 8 Macph. 604, was referred to in the discussion.

The Court unanimously held that the settlement was sufficient to carry the lease of the farm. Before the Act of 1868, the word "dispone," or words of *de presenti* conveyance, were required to convey heritage. That Act did not render a disposition of moveables a disposition of heritage. It did not change the meaning of words. The case of *Pitcairn* was conclusive of this, as in that case the First Division held that the word "effects" could not be construed to include lands. But in the present case the granter of the disposition intended to convey the lease of the farm to his trustees, who were empowered to give up the lease if they thought it right to do so. It was not possible to give it up unless they had acquired it.

Agent for Hardy's Trustees and for Misses Hardy's Factor—A. Duncan, S.S.C.

Agent for Mrs Hardy—G. V. Mann, S.S.C.

Saturday, May 13.

MACARTHUR (ROSS' FACTOR) *v.* BALLANTYNE.

Process—Issue—Reclaiming Note—Court of Session Act 1868, § 28—*A. S. 10th October* 1868, § 6. A pursuer presented a reclaiming note against an interlocutor, holding certain issues as adjusted and settled, and maintained that no issue should have been allowed. *Held* that it was incompetent under the Reclaiming Note to move the Court to vary the terms of the issue.

Counsel for the Pursuer—Mr Watson and Mr Gebbie. Agent—A. Macgregor, S.S.C.

Counsel for the Defenders—Mr Johnston. Agents—Menzies & Coventry, W.S.

Tuesday, May 16.

FIRST DIVISION.

JOHN MOFFAT AND ANOTHER *v.* JAMES MILLER AND OTHERS.

General Police and Improvement Act—Election—Complaint—Reduction. At an election of Commissioners of Police under the General Police and Improvement Act 1862 (25 and 26 Vict. c. 101) there were four vacancies and seven candidates. A poll was taken, and A, B, C, and D were declared to be elected. E and F stood fifth and sixth on the poll. A complaint was lodged for F in terms of sect. 48, which was referred by the Commissioners to a scrutiny committee, who reported that C was personally disqualified, and that D had a less number of legal votes than E or F, and that, consequently, E and F were elected instead of C and D.—*Held*, in a reduction of the report, at the instance of C and D, that as E had failed to lodge a complaint under sect. 48, it was *ultra vires* of the committee to declare him elected, but that their report in regard to F, being within their powers, was by the statute excluded from review on its merits.

The General Police and Improvement (Scotland) Act 1862 having been adopted in the burgh of Wishaw, four Commissioners fell to be elected under the statute in September 1869. Seven candidates were proposed—Rankin, Gilchrist, Liddell, Moffat, Miller, Watt, Hudspith. A poll was taken on September 6—the result, as declared by the Sheriff, being that the candidates stood in the order just mentioned. The first four were declared to be duly elected. Before the poll began a protest was lodged for Miller against the poll being proceeded with, on the ground of Liddell being disqualified in consequence of failure to pay his rates, and also of certain irregularities in the demand for a poll. The Sheriff received and marked the protest, but gave no decision on the points raised by it. At a meeting of the Commissioners on September 13, Messrs Rankin, Gilchrist, Liddell and Moffat took their seats. Thereupon a written complaint was lodged for Watt in the following terms:—"I, James Watt, baker, Cambusnethan, hereby complain to the Commissioners of the burgh of Wishaw, assembled at their first general meeting, held on the 13th day of September 1869, after the annual election of Commissioners for said burgh, which took place on the 4th and 6th days of said month of September, that I ought to have been returned as a Commissioner at said election, and that I dispute the return of Commissioners made thereat; and I hereby request that inquiry be made into the same in terms of 'The General Police and Improvement (Scotland) Act 1862.'" Three Commissioners were nominated as a "scrutiny committee to inquire into the complaint." On September 20 the committee reported the conclusions to which their investigations had led them—"(1) That at the time of the meeting for electing Commissioners, John Liddell was not qualified to be nominated or elected; (2) that

the demand for the poll on behalf of John Liddell and John Moffat was signed by two persons who were disqualified, not having paid the assessments then due; and (3) that thirteen persons voted who were disqualified, their names not appearing on the valuation roll. Of these, ten persons voted for Mr Rankin, nine for Mr Liddell, and nine for Mr Moffat—those votes being deducted from those appearing on the poll-book on behalf of John Moffat, reduce them to 171, being three less than those voting for Mr James Miller."

They therefore reported that John Moffat and John Liddell had not been elected, and that James Miller and James Watt had been duly elected.

The report was adopted by a majority of the Commissioners, and Miller and Watt declared to be elected in place of Liddell and Moffat.

Moffat and Liddell raised the present action, calling as defenders Miller and Watt and the clerk to the Commissioners, as representing their interest. The conclusions of the summons were for reduction of the minutes of the Commissioners and of their committee which related to the election of Miller and Watt, and to have it declared that the pursuers had been duly elected Commissioners of Police for the burgh of Wishaw, and that Miller and Watt had no title to the office. They pleaded, *inter alia*, that as Miller had failed to lodge a complaint under the statute at the first meeting of the Commissioners after the election, it was *ultra vires* of the Commissioners or their committee to declare him elected; and that Watt had no title to act as Commissioner, as in any view he had a less number of votes than Miller, who alone had the interest to make the complaint.

The Lord Ordinary (MURE) pronounced the following interlocutor:—"Finds that at the meeting of Commissioners of Police for the burgh of Wishaw, held on the 13th of September 1869, no application in writing was made to the Commissioners under sect. 48 of the statute 25th and 26th Vict. cap. 101, on behalf of the defender James Miller, complaining of the election of Commissioners for the burgh: Finds in these circumstances that it was *ultra vires* of the Commissioners, or of any committee appointed by them, to inquire, under the complaint given in to the meeting at the instance of the defender James Watt, into the merits of the said election, to the extent and effect of declaring the said James Miller a Commissioner for the burgh; and that the report of the committee appointed at the meeting to consider the complaint of the said James Watt, and the resolution of the Commissioners of the 20th September 1869, adopting that report, and declaring the said James Miller to be an elected Commissioner for the burgh, was to that extent *ultra vires* and illegal, and that their report to that effect is not protected by the finality clauses of the statute: Therefore and to that extent reduces, decerns, and declares in terms of the reductive conclusions of the summons: Finds that the said James Miller has no right and title, in respect of the said report and relative resolution, to the office of Commissioner of Police for the burgh; and interdicts, prohibits, and discharges him from acting as a Commissioner: *Quoad ultra*, assoilzies the defenders from the conclusions of the action, and decerns: Finds no expenses due to either party."

Moffat and Liddell reclaimed.

SHAND and GUTHRIE SMITH, for them, argued that Watt as well as Miller should have been displaced.

WATSON and R. V. CAMPBELL, for Miller and Watt, contended that the Lord Ordinary was right in refusing to displace Watt. Mr Campbell further argued that Miller should not have been displaced; that it was a competent proceeding for the Committee to inquire into his election, as a complaint by any one of the defeated candidates must necessarily involve an investigation of the whole poll. This point was, however, given up when the senior counsel for the reclaimers was about to reply, and the respondents intimated that they acquiesced in the interlocutor of the Lord Ordinary.

At advising—

THE LORD PRESIDENT—I agree with the Lord Ordinary. The election took place on 7th September 1869. The result of the poll was that the four vacancies were filled up by Rankin, Gilchrist, Liddell and Moffat; next on the poll stood Miller and Watt. Mr Watt lodged an objection in terms of sect. 48. The complaint was remitted to a committee to examine into the merits of the disputed election. The committee have reported that Liddell and Moffat, who stood third and fourth on the list, have not been duly elected, and that Miller and Watt, who stood fifth and sixth, have been duly elected. Miller lodged no written complaint, and, accordingly, the Lord Ordinary has held that he failed to take the statutory means to claim the seat, and that, therefore, Watt alone can avail himself of the report of the committee. I am clear, with the Lord Ordinary, that unless a defeated candidate lodges a complaint, the committee cannot deal with the question of his return. In so far, then, as they declared Miller to have been duly elected, I am of opinion that they acted *ultra vires*. Next, with regard to Watt. It is clear that as he stood sixth on the list, he could not obtain a seat unless he could show that two of the successful candidates ought not to have been returned, or else that one ought not, and that he, Watt, was entitled to stand on the poll above Miller. What he has done has been to show that both Liddell and Moffat were improperly elected. The result is that he has shown himself entitled to be a commissioner. We are asked to look at the grounds of the report of the committee. I have no objection to do so, subject to the remark that we are not entitled to examine the validity of the grounds. But they are quite intelligible. The committee found Liddell personally disqualified, and, on a scrutiny, that Moffat had fewer votes than Miller or Watt. These are excellent legal grounds if they are well founded in fact, and we must hold that they are so. We cannot inquire whether or not Liddell was subject to a personal disqualification. The consequence is that Mr Watt must have his seat. The interlocutor of the Lord Ordinary gives effect to this, so far as this Court can.

The other Judges concurred.

R. V. CAMPBELL, for respondents, moved for expenses since the date of the Lord Ordinary's interlocutor.

SHAND objected, that the respondents had unsuccessfully argued against a substantial part of the Lord Ordinary's judgment.

The Court adhered, with expenses to the respondents since the date of the Lord Ordinary's interlocutor.

Agent for Appellant—Alex. Morison, S.S.C.

Agent for Respondent—Alex. Wylie, W.S.

Tuesday, May 16.

DENNISTOUN *v.* RAINEY, KNOX & CO. AND OTHERS.

Process—Judicature Act—Appeal—Jury Trial. A cause having been appealed from a Sheriff Court under § 40 of the Judicature Act for trial by jury, a motion by the appellant to have the cause tried by a judge without a jury *refused.*

This was an appeal from the Sheriff-court of Glasgow, brought under § 40 of the Judicature Act (6 Geo. IV. c. 120). The Sheriff having ordered a proof, the pursuer appealed the cause to the Court of Session for trial by jury.

The SOLICITOR-GENERAL and SHAND, for the appellant, now moved to have the case tried by one of the Judges of the Division without a jury, or to be remitted to the Outer House, to be tried by a Lord Ordinary without a jury, inasmuch as the case was not suited for a jury.

WATSON and MACKINTOSH for the respondents.

At advising—

LORD PRESIDENT — The proposal of the appellants is that the case shall be tried by one of the Judges of this Division or a Lord Ordinary without a jury. It is important to express our views on this application. The appellant could not be here, at this stage, except under § 40 of the Judicature Act. The object of the Legislature, throughout the section, was to prevent Sheriff-court cases being appealed to the House of Lords on matters of fact. The enactments to prevent this are very carefully framed. The leading enactment is that the interlocutors of this Court on proofs taken in the inferior Courts shall be final as to matters of fact, and accordingly that the Court shall specify in the judgment the facts on which it proceeds in the form of special findings. Then power is given to the Court to supplement the proof in the inferior Court. Then at the end of the section it is provided that if a litigant in the inferior Court desires to have the facts of his cause ascertained by jury, he shall be allowed to advocate as soon as an interlocutor has been pronounced allowing proof, but if he does not avail himself of that permission he is held to have waived his right of appeal to the House of Lords against any judgment on the facts which may afterwards be pronounced by this Court. The effect of granting the appellant's motion would be that any finding in fact would be subject to the review of the House of Lords. This would be a manifest evasion of the Judicature Act. I do not desire to decide this as a question of competency. We must give full and fair effect to § 40. The appellant must either go back to the Sheriff or take an issue for jury trial.

The other judges concurred.

The Court refused the motion of the appellant; and, on the further motion of the appellant, allowed him to lodge issues.

Agents for Appellant — Hamilton, Kinnear & Beatson, W.S.

Agents for Respondents—Webster & Will, S.S.C.

Tuesday, May 16.

SECOND DIVISION.

STEWART *v.* STEWART.

Process—Appeal—No Appearance. In an action of filiation the Sheriff, affirming the decision of the Sheriff-Substitute, assoilzied the defender. The pursuer appealed, and on the case being called in the Short Roll no appearance was made for the defender. The Court, after ascertaining that the proper intimation had been made upon him, sustained the appeal in respect of no appearance for the respondent, without hearing the counsel of the appellant.

Counsel for the Appellant—Mr M'Kechnie. Agent—John A. Gillespie, S.S.C.

Tuesday, May 16.

FRENCH, PETITIONER.

Process—Commissary Clerk—Confirmation—Caution. The clerk of the Commissary Court, following the invariable practice of that Court, refused to appoint a woman, who had sufficient means, as cautioner in a confirmation.—*Held* that the Court should not interfere with the discretion of the clerk, although the woman proposed was seventy years of age and unmarried.

This was a petition at the instance of J. C. French and James French, presented to the Commissary of Edinburgh. The petitioners alleged that "the petitioners, as the children and nearest of kin of the said deceased John French, were lately decerned executors-dative to him, and have given up an inventory of the personal estate of the deceased, which amounts to £2547, 3s. 1d. That the petitioners, as their cautioner in the executry, have offered Miss Cameron, Edinburgh, and have furnished to the Commissary-clerk a certificate by a Justice of the Peace as to her sufficiency. The clerk, however, whilst not objecting for any other reason, has stated that Miss Cameron cannot be accepted as cautioner, on the ground that it is the rule of the Commissary Court never to accept a female as cautioner. Miss Cameron is a maiden lady upwards of seventy years of age, and there is no probability of her being married. She is amply sufficient as cautioner. Miss Cameron has agreed to become cautioner, and if your Lordship does not accept her the petitioners will be put to considerable inconvenience and loss."

The Commissary refused to order the Clerk of Court to accept of Miss Cameron as cautioner.

The petitioners appealed.

H. J. MONCREIFF for them.

The Court affirmed the Commissary's judgment. They held that they ought not to interfere with the discretion which was vested in the clerk. If they did so he would be relieved of the responsibility which rested with him. They would not interfere with what was admitted to be the invariable practice of the Commissary Court. There was no hardship in refusing to appoint in this case, as Miss Cameron could easily make a contract with some one else to become cautioner, and relieve him of responsibility.

The Court reserved their opinion as to the general question, whether a woman could become a cautioner.

Agents for Petitioner—Murray, Beith & Murray, W.S.