Wednesday, May 17.

FIRST DIVISION.

[Lord Young, Ordinary.

MACDONALD AND OTHERS *v.* ROBERTSON AND OTHERS.

Burgh Election—Police Commissioners—Police Act, 13 *and* 14 *Vict. cap.* 33—*Ballot Act,* 35 *and* 36 *Vict. cap.* 33, *secs.* 7, 13—*Stat.* 31 *and* 32 *Vict. cap.* 102, *sec.* 5—*Valuation Roll—Qualification.*

In an election of Police Commissioners under the Acts 13 and 14 Vict. cap. 33, 31 and 32 Vict. cap. 102, 35 and 36 Vict. cap. 33—*held,* 1st, that a person with a substantial qualification as partner of a firm whose name was not on the valuation roll there having been a change in the firm since the date of the last revisal of the roll, was entitled to be nominated as a candidate; 2d, that by sec. 31 of the Act 13 and 14 Vict. cap. 33, all questions as to the improper acceptance of votes from persons alleged to be in arrear of their assessments must be finally determined by a committee of the Police Commissioners; 3d, that the provisions in the Ballot Act as to treating are not applicable to municipal elections.

Opinions, that a returning officer has no power to adjudicate on the qualification of a candidate.

Observed that bribery is a crime at common law, and therefore an allegation of bribery could always be entertained by the Court.

This was an action of reduction and declarator brought by the pursuers Dr Macdonald, John Wilson, and George Robertson Murray, householders and electors of the burgh of Maryhill, against James Robertson, John Morrison Swan, and T. M. Taylor, clerk to the Commissioners of Police for the burgh of Maryhill, for himself and as representing them.

At an election of Commissioners of Police for the burgh of Maryhill, which took place on 7th June 1875, the defenders James Robertson and John Morrison Swan were nominated as candidates along with the pursuers Dr Macdonald and John Wilson. Mr Shaw, the senior magistrate of the burgh, acted as returning officer, and declared after counting the votes that the election had fallen on the defenders Robertson and Swan.

The pursuers brought this action, concluding for reduction of this declaration of the poll, also of the minutes of the Commissioners of Police recording the election, and of all the grounds and warrant thereof; and for declarator that the defenders Robertson and Swan were not duly elected, or at least that Swan was not eligible for election, and that his pretended election was null and void, and that on a strict scrutiny of the votes being held the pursuers Macdonald and Wilson were duly elected; or otherwise, that in the event of its being found that the defenders' election was null and void, that a new election should take place.

In support of these conclusions they averred—First, That the defender Swan was not a householder in the burgh, and therefore was not eligible for election as a commissioner. That his name was not entered in the valuation roll, or in the register of voters for the time being in force in the said burgh, nor was he a partner of any company or copartnership entered in the said roll or register. He was a partner of the firm of David Swan & Sons, Maryhill, which was constituted on or about the 31st December 1874. Previous to that time there had been a firm of David Swan junior & Company, the partners of which were the defender's father David Swan and Mr John Bickers. This business was acquired by David Swan, who assumed the defender John Morrison Swan as a partner, and the firm of David Swan & Sons was then constituted. The firm of David Swan junior & Co. was entered in the said register of voters, but the firm of David Swan & Sons was not, nor was the latter firm entered in the valuation roll. The said firm of David Swan junior & Co. has ceased to exist, and the said defender never was a partner thereof.

The defenders denied this, and explained that the premises of Mr Swan's firm were duly entered in the valuation roll as of the annual value of £220, being much more than enough to afford the qualification. Mr Swan was at the time of the election, and for months previously had been, a partner of the firm, and he held due statutory authority to poll. The defender also founded on sec. 13 of the Ballot Act (35 and 36 Vict. cap. 33) "no election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act, if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election."

Secondly, The pursuers averred that a great number of persons voted at the election who were not qualified to do so, in respect that they were in arrears of their assessments.

Thirdly, the pursuers averred — "Further, the said defenders, in contravention of the said Acts, by themselves, or others acting on their behalf, treated the voters, with the view of influencing their votes, at the public-house kept by the defender James Robertson, or his son, in Main Street, Maryhill, and other hotels and public-houses in Maryhill, and kept a free table therein, and also in the Black Bull Inn, Maryhill, for the treating of said voters during the whole of the said polling day. A large number of voters who were so treated, and unduly influenced, voted at the said election in favour of the defenders."

The defenders, besides denying these averments, pleaded, preliminarily, that the first objection had been disposed of by the returning officer, and that his decision was final, in terms of the 12th sec. of the Police Act (13 and 14 Vict.) viz., "That in case of any difficulty arising as to the qualification or identity of any householder, the same shall be decided by such magistrate or sheriff, whose determination shall be final." The 13th rule in the first schedule of the Ballot Act provided—"The returning officer shall decide on the validity of any objection made to a nomination paper, and his decision of disallowing the objec-

tion shall be final; but if allowing, the same shall be subject to reversal on petition questioning the election or return." Further, that notice of such objection should have been given before the opening of the poll, whereas no protest had been taken for more than two hours after the poll had opened. The defenders further founded on the 31st sec. of the Act 13 and 14 Vict. cap. 33, which provides—"Every person who may consider that he ought to have been returned as a commissioner may lodge a complaint in writing, signed by him or by some person duly authorised on his behalf, with the commissioners assembled at such meeting, who shall thereupon remit to a committee of three or five of their number to inquire into the merits of such disputed election, and to report thereon to a subsequent meeting of the commissioners, and such report shall be final." The pursuers having refused to avail themselves of this remedy, must be held to have waived all objections.

The Lord Ordinary assoilzied the defenders for the reasons stated in the following opinion:—

"This action, brought to set aside the election of the defenders as commissioners of the burgh of Maryhill, and to declare that the pursuers were duly elected, is rested on three grounds:—

"1. The first ground is, that the defender Swan was ineligible, not being a householder. The objection, which appears to depend on the validity of his qualification as a member of a partnership owning and occupying premises in the burgh, was stated in writing to the returning officer at the time of the election and repelled by him after hearing parties. The senior magistrate was, as such, returning officer, and being of opinion that the objection regarded Mr Swan's qualification as a householder, I must hold that the decision of the magistrate is final by section 12 of the Police Act. It is plainly undesirable that such an objection should be the subject of litigation in this Court, and I think the Legislature meant that any such, if meant to be taken, should be stated to the magistrate at the time, and be by him finally disposed of. I do not at all found on the provision of the Ballot Act that the decision of the returning officer disallowing an 'objection made to a nomination paper' shall be final, for this implies no power to decide objections to the eligibility of a candidate, which may be very various, and have no relation whatever to the nomination paper.

"2. The second ground of action is, that in contravention of section 34 of the Act 13 and 14 Vict. c. 33, and of section 5 of the Act 31 and 32 Vict. c. 102, 'voters to the number of from 300 to 400 voted at the election' who had not paid their rates. It is not alleged that this objection was stated against any voter at the time of tendering his vote, and the proposal of the pursuers is, that the ballot papers shall be ordered to be transmitted, with a view to a scrutiny in this Court, on the general allegation now made. Such a scrutiny in a common law action of reduction and declarator would certainly be inconvenient and costly, and, I think, contrary to the spirit and meaning of the statutes regulating police burgh elections. It is provided no doubt that the votes of persons in arrear of their rates shall be null and void, but this does not affect the validity and finality of an election which is not questioned in terms of the Acts. Now, in order to promote general public convenience by excluding such a litigation as the pursuers propose, regarding a matter so temporary, and of such limited interest as the election of a commissioner under the Police Acts, it is, in my opinion, allowable to construe the Acts as meaning and intending, and in effect providing, that any election which is not challenged in the summary and commodious manner provided by section 31 of 13 and 14 Vict. c. 33, shall be deemed to be valid and final, to the exclusion of any such objection to votes as I am now considering. The procedure there provided applies only when the seat is claimed (as it is here) by a disappointed candidate, but I am disposed to think it is according to the true meaning of the Act that when no such claim is made the objection shall be final as against such an objection as that here presented. I so limit the proposition because there may be objections of a character to warrant action in this Court. I can have no doubt of the power of a committee of commissioners to recover the ballot papers. See Ballot Act, section 64 (b.a.)

"3. The third ground of action is upon treating; but for it, as it is here stated (condescendence 12), I know of no authority, and the pursuers' counsel could refer me to none."

The pursuers reclaimed, and argued—The defender Swan's name did not appear on the valuation roll at the date of the election, nor was he a member of any firm whose name appeared thereon. He could not gain a qualification till the statutory time for revision should arrive. At the time of the election he had no qualification *ex facie* of the roll, and therefore was incapable of election. It was denied that there was any acquiescence in the return of the candidates. As to the other objections, it was evident that if the allegations were well founded, the election was not conducted according to the provisions of the Ballot Act (35 and 36 Vict. c. 33, sec. 5), and if the votes objected to were rejected there would be a majority in favour of the pursuers. Hence the election must be declared null; that was the necessary consequence of rejecting the votes.

At advising—

Lord President — There are three objections stated by the pursuer to the validity of the election in question here. The Lord Ordinary has repelled all these objections and sustained the defences, and I agree with him that none of them are well-founded. The first—as to the qualification of Mr Swan—it is objected that he was not eligible for election because he was not a householder; and the first question is, Can that be competently maintained in this Court at all? The Lord Ordinary is of opinion that the returning officer should have disposed of it. I confess I am not inclined to agree with him in that, for it seems to me that the statute supplies no mode of deciding such a question by reference to the returning officer or any other officials. There are various other things a returning officer may do, and in some his jurisdiction is not subject to review; but he has no power to adjudicate on objections to the qualification of a candidate; much less is his judgment said to be final. In

fact, he did not do so. I do not say that if the objection had been perfectly simple, as for example, that the candidate was not a shopkeeper in Maryhill, but in Edinburgh, he might not perhaps have interposed, but the objection stated was that he was not a householder in the meaning of the Act of Parliament.

If this objection was to be stated it ought to have been stated at the opening of the election, before the poll began, that everyone might have noticed that in the event of its being sustained their votes might be thrown away, and it is averred by the pursuer that it was so stated; if so, it was timeous and good notice. I am aware that this is disputed, and it is said that the poll had been open for twenty-five minutes before it was stated. I assume that the pursuers' allegation is true, but the objection is bad on its merits. The qualification, as laid down by the statute, is that the candidate shall be "a householder within the burgh," which is explained to be "a male occupier of lands or premises of the yearly value of £4 and upwards, as appearing on the valuation roll," that is, the premises must appear to be of that value. Now, what was the position of the candidate here? He was and had been for months previously to the election copartner in a firm whose premises were entered in the valuation roll as of the yearly value of £220—he was deputed by the partners to represent them—looking to the value of the property, he had sufficient to qualify him, and a great deal more. But it is said that he had acquired this qualification recently by becoming a partner in the firm of David Swan & Sons, and that no such firm is on the valuation roll. Now, that is not a good objection. The qualification is substantial. The proper firm is not named on the roll, but that is a mere accident. There has been no opportunity of revising the roll since the new firm took up these premises. It seems to me then that the entry on the valuation roll is a mere misnomer, arising *ex necessitate rei*, not from negligence or carelessness on the part of the candidate. Assuming, therefore, that the objection was stated in time, I think we have jurisdiction to consider it, and I cannot entertain it.

The second objection is that a number of bad votes were tendered, because the voters had not paid their taxes. The settlement of that question involves a scrutiny of votes, and if that be competent I have no doubt whatever that the proper tribunal is a committee of the Commissioners of Police, under the 48th section of the Police Act of 1842, and their decision is final.

The third objection rests on the allegation of treating voters. This is the first time that this has been stated as an objection to the validity of municipal elections or elections of that class. We are familiar with it in the case of Parliamentary elections, but in such cases it is dealt with by legislative enactment. If there were any such enactment as to municipal elections we should feel ourselves bound to give effect to it, but there is none. The 25th section of the Ballot Act is confined to Parliamentary elections. I do not say that such an election as this might not be set aside on the ground of bribery. Bribery is a crime; treating is a statutory and constructive bribery not known to common law as bribery is, and we have no authority for extending the law as to treating in Parliamentary elections to municipal elections.

I therefore am of opinion that these objections should be repelled, and the Lord Ordinary's judgment affirmed.

Lord Deas—The first objection is that Mr Swan had not the necessary qualification. I agree with your Lordship that we have jurisdiction to entertain this objection, but I also agree that on the face of it the objection is not well-founded. It is this, that his name does not appear on the valuation roll. Now, it is clear that it is not necessary for his name to appear so long as the name of the company of which he is a partner appears. There is nothing on the valuation roll to show that he had not the necessary qualification, and if we go beyond the valuation roll there is nothing to show it either.

The second objection is that a number of voters were allowed to vote who had not paid their taxes, and to bear out this objection we are asked to hold a scrutiny. There is certainly no other way of disposing of it but by holding a scrutiny, but I agree with your Lordship in thinking that it must proceed before a committee of the Police Commissioners.

The third objection is contained in article 12 of the condescendence. I entirely agree with your Lordship that a relevant averment of bribery would have been serious, and that we could have inquired into it. Bribery is a crime; treating is not, and is not an offence known at common law. All that the treating is said to have amounted to is, that the defender kept a free table in certain hotels in Maryhill. Had the treating come to this, that the defenders caused drunkenness among the voters, that might perhaps have been relevant, but that is not averred. It is out of the question to set aside the election on such an allegation as we find here. I am therefore of opinion that the Lord Ordinary's judgment should be affirmed.

Lord Ardmillan—I have nothing to add to your Lordship's opinion. I assume that the first objection was taken before the hour of polling; the pursuer states that it was so taken, and I am willing to assume that his statement is correct; but even on that assumption I think it ought to be repelled. I am of opinion that our jurisdiction is not excluded by any competing jurisdiction conferred on the returning officer, and if there is jurisdiction in this Court to entertain this objection, I have no doubt that it is bad; it is as vain and empty an objection as ever I heard stated. One company had been substituted for another, but the qualification was not disturbed, and the time had not arrived for altering the valuation roll. It is said that without any blunder, delay, or failure on the part of this gentleman himself, the whole qualification flew off by the mere change of name on the part of the firm. I have seldom heard a worse objection.

As to the second objection, I quite concur with your Lordship in holding that the jurisdiction is not in this Court.

Then as to the allegation of treating—that might under certain circumstances have been inquired into here, but there is no sufficient averment to bring it under our notice. I find a

sweeping or fishing averment which is not such as this Court can entertain. If they knew who were treated, they ought to have given their names and averred that they voted.

Lord Mure—I concur with your Lordship. The first objection must be dealt with on its merits. The returning officer has no power to deal with the qualification of the candidate. I have no doubt that it is bad, and on the other two objections I agree with the Lord Ordinary in thinking that they should be repelled.

The Court adhered.

Counsel for Pursuers—Scott—Strachan. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defenders—Balfour—R. V. Campbell. Agents—Maitland & Lyon. W.S.

Wednesday, May 17.

FIRST DIVISION.

[Lord Young, Ordinary.

THE CLIPPENS SHALE OIL COMPANY AND OTHERS *v.* JAMES SCOTT AND THOMAS INGLIS SCOTT.

Partnership—Declarator—Relevancy—Parole Proof.

A entered into a contract of copartnery with two others. It was averred that his father B advanced the capital and managed the concern, and that A took no part in the business.—*Held* that in a question *inter socios* such averments were irrelevant to found an action of declarator of partnership against B.

Opinions that parole proof to set aside a contract of copartnery is only competent where there is an averment of a new agreement followed by actings that can be distinctly connected therewith.

This was action of declarator of partnership brought by the Clippens Shale Oil Company and two of the then partners in that company against James Scott and Thomas Inglis Scott. The company was formed by deed of copartnery dated 18th and 22d July 1871 between Robert Binning and John Binning, who were the pursuers in this action, and Thomas Inglis Scott, who was called as a defender for his interest. His father, James Scott, the defender in this action, was a party to this contract only as the legal guardian of his son.

The pursuers averred that James Scott, the father, entered on the management of the business of the Company, superintended their manufacturing operations, and entirely managed their financial transactions, supervising payment of accounts, arranging with bankers for payment of monies required, and prescribing the manner in which the books of the company were to be kept. It was also averred that he extended the works largely, and took a leading part in the selection of officials and servants. The leading averment was in the 2d article of the condescendence—that "Although Thomas Inglis Scott was the ostensible partner of the company, the defender James Scott was really the party who became partner, and implemented the obligations nominally undertaken by Thomas Inglis Scott." On the suggestion of the Lord Ordinary the following minute of amendment of this article was prepared:—"At the time when the contract was signed the pursuers believed that Thomas Inglis Scott was to be their partner, but immediately thereafter they discovered, that although Thomas Inglis Scott was the ostensible partner of the company, the defender James Scott was really the party who became the partner and implemented the obligations nominally undertaken by Thomas Inglis Scott. As soon as the contract was entered into Thomas Inglis Scott left for the Continent, and did not enter on the duties which devolved upon him under the contract, or proceed to qualify himself for assuming and taking charge of the works, as he was by the express terms of the contract bound to do. James Scott thereupon at once took up the position of being a partner in lieu of his son, and he was accepted as such by Robert Binning and John Binning, and they along with him, as copartners, have all along carried on the business of the Clippens Shale Oil Company upon the footing (as was the fact) that he was a partner of the company under the contract." For the reasons stated by the Lord Ordinary in his opinion he did not allow this amendment to be put in.

Both defenders pleaded that the averments of the pursuer were irrelevant, and the Lord Ordinary pronounced an interlocutor sustaining that plea and dismissing the action.

"*Opinion.*—The purpose of the action is to have it declared that the defender James Scott is, and since 22d July 1871 has been, a partner along with the pursuers under a contract of copartnery of that date. The contract, which is in the form of a probative deed, bears that the partners are the pursuers and Thomas Inglis Scott, and that the partnership shall endure, on the terms specified as agreed to, till 1st August 1885, being held to have commenced on 15th May 1871. As the effect of the decree of declarator concluded for would be to displace T. I. Scott from his position as a partner under the deed, and to put the defender in his place, he is called, and has appeared, as a party for his interest.

"In support of the action the pursuers aver (cond. 2) that 'although T. I. Scott was the ostensible partner of the company, the defender James Scott was really the party who became the partner and implemented the obligations nominally undertaken by T. I. Scott.' This, which is the leading averment, is followed by detailed averments regarding the defender's conduct in relation to the business of the company, from which it appears that he took an active charge of the business, so active indeed that, being also injudicious, the concern has in consequence been involved in great pecuniary difficulties.

"The pursuers asked a proof of their averments, which the defender opposed on the plea of irrelevancy. The question for decision accordingly is, whether or not the pursuers' averments are such as ought to be admitted to proof.

"The pursuers argued that a contract of copartnership was proveable by parole, and might even be inferred from the conduct of parties. The defenders, conceding this as a true general proposition, contended that it was here inapplicable because of the deed of partnership, which