now? That is what we are going to do by affirming the Sheriff's judgment. In short, we are going to pronounce James Fraser to be in the wrong, who I think was entirely in the right, and order him to concur with Donald Paterson in devolving the whole matter on the oversman, and that in the face of a statement that the oversman had interposed already and expressed an opinion on the subject. However, I have relieved my conscience by stating my own doubts and difficulties, and to a certain extent my own decided opinion in the matter.

The Court pronounced this interlocutor—

"Find in fact (1) That there is a disagreement or non-agreement between the valuers James Fraser and Donald Paterson as to the course of procedure in the valuation and the value of the articles which are the subject of valuation; (2) that they have not executed a minute of devolution upon Alexander Winton, the oversman, and that it is not only expedient but right and proper in the circumstances that such minute of devolution should be executed: Therefore recal the interlocutor of the Sheriff appealed against: Affirm the interlocutor of the Sheriff-Substitute of 7th December 1883," &c.

Counsel for Pursuer (Appellant)—Mackintosh—Kennedy. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Counsel for Defender (Respondent)—Guthrie Smith—M'Kechnie. Agent—W. B. Glen, S.S.C.

Saturday, July 19.

SECOND DIVISION.

BRADFORD, PETITIONER (FOR OPINION OF COURT).

Succession—Vesting—Destination-Over.

A domiciled Scotsman left an unsigned deed of settlement whereby he appointed the whole residue of his estate to belong to his daughter, and directed his trustees to secure the same for her exclusive of the rights of any husband she might marry, such residue to be enjoyed during her life, with the fee to her children. Failing her or her issue, he appointed his brother, for his liferent use and his children and their issue in fee, to be his residuary legatees. The daughter survived the testator, but died unmarried. In a Case stated for the opinion of the Court, by the Chancery Division of the High Court of Justice—*held* that, assuming, as the Court was asked to do, the validity of the settlement, the residue passed to the daughter's representative, and not to the children of the testator's brother.

This was a Case stated, in terms of the Statute 22 and 23 Vict. cap. 63. by Mr Justice Pearson in a suit depending in the High Court of Justice (Chancery Division) in England, between Wilmot Henry Bradford as plaintiff and William Baird Young and others, defendants, for the opinion of the Court of Session with reference to the law of Scotland as administered by it, and so far as the same was applicable to the facts as set forth in the Case. These facts were, that Hugh Falconar died on 23d February 1827 domiciled in Scotland, leaving a trust-disposition and settlement prepared by a Writer to the Signet in Edinburgh, but undated and unsigned, containing *inter alia* this residuary bequest—"And lastly, I appoint the whole residue and remainder of my funds and estate to belong and be paid to or secured, under the restriction after inserted, for the behoof of the said Jeanne or Jane Falconar (an illegitimate daughter of the said Hugh Falconar), whom I hereby name, constitute, and appoint my residuary legatee; and I appoint my said trustees to be the guardians of my said daughter in the care and disposal of the funds devolving on her under this my settlement, with power to them, whether or not my said daughter shall have attained majority or be married at my decease, and I hereby specially enjoin them, to secure the residue of my funds and estate falling to my said daughter so as that the same shall not fall under the right or administration of her husband, or be attachable by his creditors, or affectable by his debts or deeds, but be enjoyed by herself during her life, with the fee or remainder to her children according as she shall divide the same among them: And failing of her and her issue, the liferent of the residue to belong to and be enjoyed by her husband, if she shall have left a husband surviving her; and failing my said daughter and her issue, and on the decease of her husband, either before or after my decease, I appoint my said brother John, for his liferent use and his lawful children and their issue in fee or remainder, my residuary legatees." This unsigned trust-disposition and settlement was on 29th March 1828 admitted to probate by the Prerogative Court of Chancery in England, and as the "probate has never been revoked, it is to be assumed that according to English law the said unsigned trust-disposition and settlement is a valid testamentary disposition."

The executors realised the estate and paid the income to Jeanne or Jane Falconar during her life. She died unmarried on 10th February 1882, and the plaintiff (W. H. Bradford) was her legal personal representative appointed by her will. After her death Hugh Falconar's trustees paid his estate into the Chancery Division, where it awaited distribution.

At the date of Hugh Falconar's death he had one brother alive, who had four children. Of these two left issue. The only child of one of them died in 1874 leaving four children. The other had two children, one of whom died in 1881 leaving five children alive at the date of this Case, some of whom were married and had issue. There was thus at the death of Jeanne Falconar great-grandchildren and great-great-grandchildren of John Falconar.

The questions submitted were—"(1) What interest was taken by the said Jeanne or Jane Falconar in the residuary bequest, ... and what interest is now taken by her legal representative? (2) If the said Jeanne or Jane Falconar did not take an absolute interest in the said residuary bequest, what interest, if any, therein, after her death, was taken by the children, grandchildren, great-grandchildren, and great-great-grandchildren of the said John Falconar respectively?"

Wilmot Henry Bradford, the plaintiff, presented this petition to have the opinion of the Court on these questions.

The defendants maintained with reference to the point that the deed was stated to be unsigned, that the case had not been submitted for the purpose of obtaining a decision of the Scotch Court that the deed was invalid. The fair import of the case as presented was that a decision should be obtained as to the meaning and effect in Scotland of the destination in the deed.

On the suggestion of the Court the case was argued on the assumption (1) that the deed was valid; and (2) that the case had been submitted for the purpose suggested by the defendants.

The petitioner then argued—On a sound construction of the deed, Jane Falconar took a fee of her father's estate. The deed began with an absolute gift of the residue to her, and the *onus* of showing that the posterior words restricted that gift lay with the defendants. She was the *persona prædilecta* of the settlement, and the whole of the destinations-over were to be read merely as rendering her rights more secure, and certainly not as limiting her right of fee. It would be carrying out the truster's instructions if the trustees had made her execute an antenuptial contract by which she conveyed property exclusive of the *jus mariti* of her husband, to herself in liferent and her children in fee. It was just a case where there was really a fee in the parent, but defeasible in the event of children coming into existence. As she never had any children, there was no reason why she should not get the fee. The doctrine of such defeasible vesting was firmly established in the law of Scotland—*Snell's Trustees* v. *Morrison*, March 20, 1877, 4 R. 709; *Lindsay's Trustees* v. *Lindsay, &c.*, December 14, 1880, 8 R. 281.

The defendants in reply contended that Jane Falconar's interest was only one of liferent, and relied on the case of *Duthie's Trustees* v. *Kinloch and Others*, June 5, 1878, 5 R. 858; *Mitchell's Trustees* v. *Smith, &c.*, July 7, 1880, 7 R. 1086 (Lord Young's opinion). The case of *Lindsay's Trustees* v. *Lindsay* depended on the specialty that the testator acquired large property with his first wife, by whom he had two children, and he desired for this reason to leave them more than his other children.

At advising—

Lord Young—By the law of Scotland an unsigned testamentary disposition is a nullity, and after the death of the person in whose name it runs, and who might have made it a testamentary disposition by signing it as the law requires—that is, in presence of two subscribing witnesses—incapable of acquiring validity by any treatment whatever. We are informed that this unsigned disposition was admitted to probate by the Prerogative Court of Canterbury in England, and that as the probate has not been revoked, it is to be assumed that according to English law it is a valid testamentary disposition. I make this assumption as desired. But by the law of Scotland as administered by this Court an unsigned testamentary disposition, and which by that law is a nullity, acquires no virtue by being admitted to probate in England or elsewhere, or by the law of England, or of any other country, being what it will respecting it. It must now remain a nullity by the law of Scotland. The parties were not agreed on the point whether our opinion was desired upon the validity or invalidity of the disposition in question as a testamentary instrument of a domiciled Scotsman. The counsel for the plaintiff thought it was, while the counsel for the defendants thought otherwise, and that we were only required to state our opinion on its construction and meaning assuming its validity. It seemed to me that the view of the plaintiff's counsel must also necessarily be right—for otherwise the two leading facts stated to us in the Case, viz., that Hugh Falconar died a domiciled Scotsman, and that the writing is undated and unsigned, are quite immaterial. At all events, it seems to me desirable to state my opinion to the effect that this undated and unsigned writing is not by the law of Scotland a testamentary instrument capable of affecting the succession of a domiciled Scotsman.

Had the writing been signed and valid, so as to have effect according to its terms as a Scotch instrument, I should have been of opinion that Jeanne Falconar is thereby constituted residuary legatee of the testator subject to the constitution of a trust for behoof of her husband and children, and her own protection in the event of her marriage, but with her legal right as residuary legatee otherwise unaffected, so that on her death unmarried and without issue the property passes to her legal representative, the testator's brother John and his children and issue taking nothing.

His Lordship then read the following as the opinion of the Court on the questions stated in the Case:—

> "The Lords . . . . answer as follows the questions stated in the Case:—1. We are of opinion that the words of residuary bequest referred to occurring in an unsigned writing are by the law of Scotland inoperative to affect the estate or succession of a domiciled Scotsman, and are simply worthless, and of no effect whatever. It follows that Jane Falconar took by them no interest in the succession of her father, who died a domiciled Scotsman, and that her legal representative can take none. It is in our opinion immaterial to the question on the law of Scotland that the unsigned writing was admitted to probate in England, and that it is a good testamentary disposition according to English law. It is nevertheless a nullity by the law of Scotland, and no Court administering the law of Scotland, or acting according to that law as governing the case before them, can give any effect to it. 2. For the same reason we are of opinion that the children and remoter descendants of John Falconar can take nothing by the bequest referred to. We have to add, that had the writing been signed, so as to give validity to its contents, we should in that case have been of opinion, taking it as a Scotch instrument, that Jane Falconar by surviving the testator, took an absolute interest in the property as residuary legatee, subject only to the constitution of a trust in circumstances that did not occur, and that on her death without issue, as stated in the Case, the property passed to her legal representative, the descendants of John Falconar taking nothing."

The Lord Justice-Clerk was absent.

Counsel for Petitioner—Mackintosh—Graham Murray. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Respondents—J. P. B. Robertson—Gillespie. Agents—Gillespie & Paterson, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, July 15.

(Before Lord Justice-Clerk, Lord Young, and Lord Craighill.)

CAMPBELL *v.* CADENHEAD (P.-F. OF BURGH COURT OF ABERDEEN).

Justiciary Cases—Proof—Tutoring Witness—Corruption.

A person convicted before a police court sought suspension of the sentence on the ground that of the three witnesses on whose evidence the conviction proceeded, the two first examined had, on leaving the box, communicated to the witnesses or witness still to be examined, for their direction and guidance in giving evidence, the questions asked in cross-examination and the answers given, and that the answers given in these circumstances were false, incompetent, and illegal. *Held* that these statements were not relevant, if proved, to set aside the conviction.

On 4th June 1884 James Campbell, a hotel-keeper in Aberdeen, was charged before the Burgh Court of Aberdeen, at the instance of George Cadenhead, Procurator-Fiscal of Court, with permitting or suffering drinking in his licensed premises before 8 a.m., by supplying drink before that hour to a person not a traveller or requiring to lodge in the premises.

He was convicted and fined £1, 5s., with £1, 8s. of expenses.

He brought this suspension, alleging that he had discovered the following facts since the trial:—"The first witness examined in support of the complaint was Alexander Smith, a detective of the Aberdeen City Police, who, as soon as his evidence was concluded, retired to where the second witness for the prosecution, William M'Donald, constable, was standing, and communicated to him the questions which had been asked him by the suspender's agent in cross-examination, and the answers he had given to these questions, and also, generally, what he had said during examination. This was done for the direction and guidance of the witness M'Donald when under examination. The obtaining of truthful answers to the said questions was vital to the suspender's defence to the complaint. M'Donald, the second witness, on his evidence being given, proceeded in like manner to instruct the third and last witness for the prosecution, John Manson, constable, as to what he had answered to certain questions, for his, Manson's, direction and guidance when under examination. Upon the evidence of said witnesses, thus concocted and arranged, the said Magistrate convicted the suspender of said charge, and fined him in the sum of £1, 5s., with £1, 8s. of expenses, and failing payment, ordained him to be imprisoned for eight days. The said evidence was false, and it was incompetent and illegal, and ought not to have been received. There was no other evidence in support of the complaint."

He pleaded that he was entitled to have the sentence suspended, in respect that "the evidence upon which the conviction proceeded was in the circumstances condescended on false and incompetent."

Argued for him—The charge made against the witnesses, and of which proof was asked, was one of tutoring by a witness who had been examined to a witness not yet examined. The conduct alleged was corrupt and inconsistent with a fair trial, and a conviction obtained in such circumstances could not stand.

The respondent was not called on.

At advising—

Lord Justice-Clerk—I do not say that what is said to have occurred here might not constitute a serious objection to a conviction, but we should have required much more specification than we have here. What one of these policemen said to the other before the latter gave his evidence may have been perfectly innocent. It is not said what it was, and it is not said that it had any effect in tutoring the other's mind. At the same time, while it would have required much more precise allegation to induce us to entertain this suspension, I must say that the holding of such communication in the course of the trial is far from laudable, and that it ought not to be permitted.

Lord Young—I am of the same opinion, and only wish to add that any police officer who communicates as to what has been asked in the course of the trial with witnesses either in the witness-room or while they are on their way to the witness-box, is and ought to be severely censurable. But it is one thing to say that, and quite another thing to say that such communication will of necessity set aside a conviction. If so, it would be equally true that such communication would, if proved, be sufficient to set aside a conviction obtained in the High Court or Sheriff Court. While, therefore, I guard myself by saying that the making of such communications is censurable, I cannot put it as a ground of upsetting the whole of these proceedings.

Lord Craighill concurred.

The Court refused the bill.

Counsel for Suspender—Kennedy. Agent—John Macpherson, W.S.

Counsel for Respondent—M'Kechnie. Agent—D. Hill Murray, Solicitor.