Friday, October 29.

FIRST DIVISION.

MUIRHEAD, PETITIONER.

Burgh—Police Burgh—Annual Election of Commissioners—Returning Officer.

In an application for the appointment of a returning officer to act at the annual election of commissioners for a police burgh, it appeared that neither the provost nor either of the junior magistrates could competently act, and the Court, refusing an application for the appointment of one of the non-retiring commissioners of police, *nominated* the Sheriff-Substitute of the county to act as returning officer.

This was an application by the Clerk to the Commissioners of the burgh of Hillhead, in the county of Lanark, for the appointment of a returning officer at the annual election of Commissioners of Police, to be held on the 2d November next. He stated that Hillhead was a police burgh in the sense of the General Police Improvement (Scotland) Act 1862, and that its affairs were managed by a body of nine Commissioners of Police, of whom three were magistrates; that by section 50 of the said statute one-third of the commissioners annually went out of office; that among those thus going out of office on the present occasion were the provost and one of the junior magistrates, while the other junior magistrate had recently died; that neither the provost nor the surviving junior magistrate could competently act as returning officer, as both had offered themselves as candidates for re-election; and that the present difficulty arose from the death of the other junior magistrate taken in conjunction with the two other magistrates offering themselves for re-election, for which state of matters no provision had been made by 3 and 4 Will. IV. cap. 76, or any subsequent statute dealing with municipal elections.

He accordingly prayed the Court, *inter alia*, to appoint as returning officer one of the other commissioners (named in the petition) who did not retire at the present time.

Authority—*Police Commissioners of Kirriemuir*, Nov. 8, 1884, 12 R. 103.

The Court refused the prayer of the petition in so far as it prayed for the appointment of one of the non-retiring Commissioners of Police as returning officer, and appointed Sheriff Balfour, one of the Sheriff-Substitutes of Lanarkshire, whom failing the senior Sheriff-Clerk-Depute for said county, to be returning officer, allowed the petitioner his expenses, as taxed, out of the burgh funds, and in respect of the day of election being on the 2d November next allowed a certified copy of the present interlocutor to be used in place of an extract thereof.

Counsel for Petitioner—Guthrie. Agents—Morton, Neilson, & Smart, W.S.

Friday, October 29.

SECOND DIVISION.

[Sheriff of Lanarkshire.

OASTLER *v.* DILL, SMILLIE, & WILSON AND OTHERS.

Reparation—Agent and Client—Duty of Agent.

A woman instructed a law-agent to invest a sum on a first bond over heritable property. He lent it, acting both for her and for the borrower, on a second bond over property the existing burdens on which exhausted its value, and she lost her money in consequence. *Held* that he was bound to indemnify her.

Observations on the practice of an agent acting in such transactions for both parties to the loan.

Messrs Dill, Smillie, & Wilson were a firm of law-agents in Glasgow, Mr Thomas J. Smillie and Mr Archibald Cunninghame Wilson being in 1874 the sole partners. Mr Wilson was deceased at the date of this case. On 12th November 1874 two brothers of Mr Thomas J. Smillie, George and Matthew Smillie, bought a property in Braehead Street, Rutherglen Road, Glasgow. The disposition bore that the price was £1350, that £350 of the price was paid by the purchasers in cash, and that the balance, £1000, was contained in a bond and disposition in security over the property, of which the purchasers bound themselves to free and relieve the sellers. Previous to the purchase of this property, George and Matthew Smillie had procured from the first bondholder's agents a valuation of the property by a Glasgow measurer, in which the value of the property was stated at £1450, over and above the feu-duty of £15, 6s. Messrs Dill, Smillie, & Wilson were agents for a retired farmer, Mr Brownlee, who was a relative of Mr Smillie, and was also a relative of a widow Mrs Beatsy Yates or Oastler, pursuer of this action. On the 7th November 1874 Mrs Oastler along with Mrs Brownlee called by appointment upon Mr Smillie, and the former lady handed over to him the sum of £600 for investment. Part of this, viz., £200, was invested in a security over a property belonging to a certain Mr M'Kinlay. The other £400 Mr Smillie invested in a second bond over the property in Braehead Street acquired by his brothers. Interest was paid upon this bond until 1880, when it ceased to be paid.

Mrs Oastler on the 17th March 1886 brought this action in the Sheriff Court of Lanarkshire, in which she called Messrs Dill, Smillie, & Wilson, and Mr Thomas Smillie as the sole partner of the firm, and Mrs Wilson as executrix-dative of her deceased husband Archibald Cunninghame Wilson, who was the only other partner of the firm, as defenders. The action concluded that the defenders should be found liable to pay the sum of £480, being the £400 and £80 as arrears of interest.

The pursuer averred that she had placed her money in Mr Smillie's hands, as a member of the firm, "with instructions to invest it in a first bond upon good heritable security," and that he having charge of the business, had invested her money, in violation of her instructions, on a second bond, which investment turned out

to be a worthless security, taken with gross and culpable negligence, since the property would not fetch the amount of the first bond. She also stated that she had relied upon Mr Smillie investing her money as a first bond, and on good security.

The defenders denied that the loan was made contrary to Mrs Oastler's instructions, and stated that Mr Brownlee had agreed with them on Mrs Oastler's behalf that her money was to be invested in this particular security, and that Mrs Oastler's visit was merely to hand over the money for the purpose of investment, and that on her call being made with the money the transaction was explained fully to her again. The bad position of the pursuer's security, they averred, was due solely to the depressed state of the house market in Glasgow, and was only temporary.

The pursuer pleaded—"(1) The said company of Dill, Smillie, & Wilson having been instructed by the pursuer to invest £400 on first bond, and having failed to do so, the defenders are liable to the pursuer in the loss, injury, and damage she has sustained. (2) The said Dill, Smillie, & Wilson having been guilty of gross and culpable negligence in taking as security for the said sum what by the exercise of ordinary care they would have known to be worthless, or at least grossly inadequate for the pursuer's protection and safety, the defenders are liable in the loss and damage she has sustained."

The defenders pleaded—"(1) *Mora.* (3) The said sum of £400 having been placed in defenders' hands for the special purpose of being invested as a second loan over the property in Braehead Street belonging to George and Matthew Smillie, and the money having been invested as instructed, the defenders are entitled to absolvitor, with expenses. (4) All the particulars connected with said security having been fully explained to the pursuer and to her friend George Brownlee, on her behalf, and she having, while fully cognisant thereof, agreed to lend said money as a second bond at the increased rate of 5 per cent., being the amount usually paid on second bonds, was bound to take the risk of the property depreciating in value, and the defenders are entitled to absolvitor, with expenses. (5) A valuation of said subjects having been procured, and the same having been submitted to the pursuer, or the said George Brownlee on her behalf, and the said property being a sufficient security for said second loan, the defenders are entitled to absolvitor, with expenses. (6) The defenders not being guilty of any gross or culpable negligence, are not liable in the alleged loss and damage sustained by the pursuer, and are entitled to absolvitor, with expenses."

The Sheriff-Substitute (LEES) allowed a proof.

At the proof Mrs Oastler deponed that she had had explained to her by a relative before the transaction the difference between first and second bonds, and that she had been warned to make sure her money was put on a first bond. "My sister Mrs Brownlee said if I had a little money to invest it with Mr Smillie. I did so. I called upon him one day with some money. Mrs Brownlee was with me. I left the £600 on that date. I gave him the money, and got a line that he had received it. I gave it to him to put on a good investment in a first bond. I was particular about that. I never authorised Mr Brownlee to find an investment for me. I had no conversation with Mr Brownlee about the investment. (Q) Would you have trusted him with the duty of investing your money?—(A) I am not sure, but he was a frail old man. I never asked him, and he gave me no advice upon the matter. I trusted Mr Smillie with the £400, and told him to put it on a first bond." She also stated that she did not receive the bond and disposition in security for two years, and that then she was greatly surprised to find her security was a postponed bond, and that she then complained to Mr Smillie, who told her she would suffer no loss by it.

Mr Smillie stated that he had told Mr Brownlee everything about the position of the property, that he (Brownlee), having rejected other investments proposed, decided on this one, that he had had no communication with the pursuer previous to her call on the 7th November, and that he assumed Mr Brownlee had told her everything, and that she was familiar with the circumstances. He denied that he had ever received instructions from Mrs Oastler to invest her money in a first bond, and stated that he received it for the specific purpose of being invested in these two loans.

The pursuer led the evidence of persons of skill to show that in 1874 the property would be worth, after deducting £300 for the capital value of the feu-duty, from £1190 to £1240, and was now worth £809 to £938, with no prospect of great improvement.

The defenders' evidence of the same class went to show that in 1874 £1450 to £1500 would be the value, and that though it had decreased owing to the fall in the value of heritage it was still worth £1080 to £1150, with good prospect of improving in value.

The Sheriff-Substitute pronounced this interlocutor:—"Finds that in November 1874 the pursuer granted a loan of £400 on a second bond over a property in Braehead Street, which has proved a security insufficient for the loan: Finds that the pursuer has not proved that this loan was effected on the advice and responsibility of the defenders as her agents: Finds in law that in these circumstances the defenders are not responsible to compensate the pursuer for the loss she has suffered: Therefore assoilzies them from the conclusions of the action, and decerns: Finds the pursuer liable to the defenders in expenses, under deduction of one-half of the expenses of the proof, &c.

"*Note.*—The case on which the pursuer comes into Court is set forth in the second article of her condescendence, and is as follows:—'Sometime prior to 12th November 1874 the pursuer placed a sum of £400 in the hands of the defenders, Dill, Smillie, & Wilson, with instructions to invest it in a first bond upon good heritable security.' Whatever other points may be in doubt through the lapse of time, this is certain, that that statement is not true. It is clearly proved that the pursuer did not place this or any other sum in the defenders' hands with such instructions. On the contrary, the first time she saw the defenders was the day she came with the money. The loan having been resolved on, the defenders were thereon employed to carry through the transaction. Assuming that it was an imprudent loan—as I think it was—the question is, is a law-agent liable in compensation for the loss that is caused by carrying into execution an imprudent

loan which his client has resolved to grant? If, in the course of the legal services which he is called on to grant, the agent discovers some defect in the title, or ought with proper care to have discovered it, and omits to certiorate his employer of the defect, I can understand that in such circumstances an agent might be held liable. If he is employed as a lawyer, and is guilty of negligence as a lawyer, for such negligence he is responsible. But where the question is the sufficiency of the loan, the result may be different. If an agent is called upon to advise, as a man of experience in business, in regard to the sufficiency of a loan that a person who is relying on such advice for the course he is to take is disposed to grant, it may quite be that the agent, in agreeing to give such advice, and to undertake a duty for which, without the aid of a valuator, he has no sufficient *data* to go on might incur responsibility. Or if he gave advice that was so foolish that no person possessed of ordinary intelligence would have given it, then I can understand a case of liability possibly existing against him. But where the lender goes for executorial services and not for advice, it is different. The liability applicable to any class of employment begins only where such employment itself begins. Now, here the first interview the pursuer had with the defenders was on the day that she brought the money for investment. That investment had been already selected. A friend of the pursuer's was a relative of one of the defenders. That friend was looking out for a loan for the pursuer. The defenders, on behalf of clients of their own, wished such a loan. I am therefore induced to believe that whatever negotiations there were in which the defenders had any part in regard to this loan, took place before the pursuer met with them. Now, on record there is no suggestion made that the pursuer acted through her friend Mr Brownlee. The case that is set forth there is, that she put the money into the hands of the defenders, 'with instructions to invest it in a first bond upon good heritable security.' The defenders deny that they ever got such instructions. They say, on the contrary, that it was distinctly intimated at the time that the loan was to be granted on a second bond. Such a loan bore a greater risk and a higher interest. The pursuer says she did not know it was a second bond that she had got; but she admits she discovered it two years afterwards. If so, why did she not take action then? She could have called up her bond; she could have insisted on the defenders giving her a guarantee against loss; but she took no such steps. Nay, more, though the loan has yielded no interest for nearly six years, she has all that time refrained from instituting any claim against the defenders. I daresay it is probable that the presumption in regard to any heritable loan is, that it is to be on a first bond. To some extent five per cent. interest suggests a second bond. But it is matter of familiar knowledge that at that time scores of first bonds bore five per cent. interest where the security was not high class. And, on the other hand, the long silence of the pursuer seems to me strongly to favour the version of matters given by the defenders, viz., that the loan was to be granted on a second bond.

"But it might be expected that unless the defenders were guilty of fraud—not of negligence, but of actual fraud (and this is not even hinted at)—their business books would have contained entries which showed or implied employment of them by the pursuer as her agents in the selection of this loan. No doubt then, as now, the borrower somewhat unfairly was saddled with the expenses attending the loan; but these expenses are only those caused by the execution of the necessary deeds. It frequently occurs, of necessity, that the lender incurs expenses for meetings and advice in regard to the question of whether the proposed loan should be granted or not. Now the first entry in the defender's books against the pursuer is writing to her naming the day when she was to call with the money, and this entry has never been priced; and in the 11½ years that have elapsed since then no account has ever been made out or presented to the pursuer, or any claim made on her by the defenders for the employment, which she now says she gave. On the other hand, the defenders' books contain full entries against the borrowers for the services rendered by the defenders from the date when they met the pursuer.

"It seems to me, therefore, on a consideration of the whole case, that the pursuer has not proved that she employed the defenders as her agents, or that they agreed to act as such, either for payment or gratuitously, at any period of the negotiations, which would imply that they were responsible to her for loss caused by negligence or imprudent advice on their part as to the sufficiency of the security.

"If these views be sound, the defenders are entitled to absolvitor. But I only give them half the expense attending the proof,—a step which I stated to them in the course of the proof I might have to take,—inasmuch as at least one-half of the evidence led by them was to show that, even if they had advised the pursuer in regard to this loan, the advice was not imprudent. In my opinion this point is hardly open to question. The property was bought at £1350, and was subject to a feu-duty of £15, 2s., and to a first bond of £1000. Whatever doubt there may be as to when a second bond is expedient, I think it is certain that by no stretch of indulgence could it be said that the property was fit a few days afterwards to bear a second bond of £400."

The pursuer appealed to the Court of Session, and argued—The agency of the defender was completely proved. The pursuer came to him, and gave him a sum of money to invest. Her instructions were to invest it on a first bond, but this he did not do, as he invested it on a second bond. The agency being proved, it was quite plain the defender had invested the pursuer's money on an insufficient security. The price paid for the property was £1350, and there was a bond of £1000 upon it. By this loan of £400 the house was actually bonded for a larger sum than had been paid for it. The defender was therefore bound to repay the pursuer the money he had so badly invested as her agent.

Argued for the defenders—This action was founded on negligence only—that was, a failure by a law-agent to inform the client of all the facts of the case—but there was no negligence here. Mr Smillie had arranged with Brownlee, who was as well able as himself to advise the pursuer as to what security the pursuer's money was to be lent over. Mr Brownlee was fully cognisant of

all the circumstances affecting the property, and when Mrs Oastler came on the 7th November it was merely to hand over the money to be invested as arranged. Mr Smillie had no choice in the matter; he had merely to make out the necessary deeds. Liability attached to an agent only where he had shown gross negligence in conducting his client's business, and here there was nothing of the sort—*Fleming* v. *Robertson*, June 17, 1859, 21 D. 982—*rev.* June 25, 1861, 23 D. (H. of L.) 8. This also was the English law on the subject, summarised in Begg's Law Agents, 243.

At advising—

Lord Justice-Clerk—It is always an unpleasant duty to decide in actions of this kind. The action is laid against certain men of business in Glasgow who are charged with having invested a client's money upon a security which, it is said, they could not but have known to be insufficient. It is not disputed, and indeed it hardly could be disputed, that they invested their client's money in a second bond for £400 over a property which was already burdened to the extent of £1000, and the value of which was only £1350, while, even taking a more favourable valuation, which they had, the margin of security for this £400 was only £50. The Sheriff-Substitute admits that this is a kind of transaction into which no prudent agent would venture, and in that admission I entirely agree. No doubt the defenders had valuations which show that the property might be expected to improve in value. But no valuation has been shown to us that would have made this a proper investment. There is no margin of security whatever, and the affair becomes the more unfavourable for the defenders when it appears that the parties in right of the property over which the client's money was lent were brothers of the man of business who conducted the loan.

The defender Smillie placed himself in what is always an unfavourable position. Smillie here acted as agent both for the borrower and the lender, and that is a position in which no man of business can with propriety put himself.

The case here stated for the defender is, that Smillie, who did not charge for the business, gave no undertaking as to the sufficiency of the security in which the money was to be invested, that he had settled the matter with Mr Brownlee, who had advised Mrs Oastler to invest her money in this security, that he was told it was to be done in this way, and that he as agent had no choice in the matter, and was not responsible for the sufficiency of the security in which Mrs Oastler wished to invest her money. It is a very peculiar kind of defence. In the first place, Smillie knew that the money that was to be invested was Mrs Oastler's and not Brownlee's, and before he took the authority of a third party for investing her money he ought to have made sure that this third party had authority to make this arrangement. It is plain to me that Brownlee was merely the introducer to the man of business of a client with money to lend, and if she is to be believed all that she did was to go to his office and place the money in his hands with instructions to place it in some good security. That is the whole transaction, and without saying that every word of Mrs Oastler's evidence is strictly accurate as to transactions that occurred so long ago, it is plain that she paid the money over to Smillie for him to put into a proper and safe investment, and that he did not do. I am therefore of opinion that the judgment of the Sheriff-Substitute should be recalled.

Lord Young—I am of the same opinion, and think the case is exceptionally clear. That the position of agent and client for lending this sum of £400 existed between the defender and the pursuer is too clear to be contested. I believe the evidence of Mrs Oastler, and therefore believe that as a matter of fact she employed the defender to lend out this sum of money upon a first bond. She did not get the bond till two years afterwards, and it is not contradicted that when she got the bond she handed it to her son-in-law who read it, and told her that it was a second bond, the nature of which she quite understood, because when her husband died she had been strongly urged to invest her money only in first bonds. Well, when she learned this she immediately went to Smillie and complained, and he told her that the security was all right. But he had lent his client's money upon a security on which no man of business was entitled to lend a client's money. The Sheriff-Substitute who decided the case in his favour, though on a different ground, is of that opinion. He says—"In my opinion this point is hardly open to question. The property was bought at £1350, and was subject to a feu-duty of £15, 2s., and to a first bond of £1000. Whatever doubt there may be as to when a second bond is expedient, I think it is certain that by no stretch of indulgence could it be said that the property was fit a few days afterwards to bear a second bond of £400." After the bond of £1000 the margin was only £350, and was entirely insufficient to cover this loan of £400, which was quite unjustifiable. But the case for the defender is, that Mr Brownlee had advised Mrs Oastler on the whole matter, and that the defender was left with no responsibility in the matter. But if Mr Brownlee did give any such instructions they are very much against the character of shrewdness which the defender attributes to Mr Brownlee. And then his defence is the special instruction of Mrs Oastler that the money was to be invested in this particular security, and in no other. I think nothing but very distinct proof that Mrs Oastler had given that instruction to Mr Smillie would be sufficient to clear him of the responsibility of making the investment which he did, and I am of opinion that no such instructions have been proved to have been given. Everything is against such instructions having been given—Mrs Oastler's evidence and that of Mr Brownlee, which we can only get at second-hand from Mrs Oastler, as he died in 1882—and the probability of the case is against it. I therefore agree with your Lordship that the Sheriff-Substitute's interlocutor ought to be recalled.

Lord Craighill—I am of the same opinion, and I think the case is quite clear. It is much to be regretted that the case has ever arisen, and I am grieved and astonished to think that this is not the first case that has come before the Court connected with the fact of the same man of business acting as agent both for the borrower and for the lender. It is hard for any man to serve two masters, especially in such a case as

the lending of money. I think that the agent should see that the fidelity he owes to the one party for whom he acts is not interfered with by any duty to the opposite party.

It appears to me that there is no difficulty as regards the first question that comes before us in this case. The duty of the defender Mr Smillie was to advise his client Mrs Oastler as to the sufficiency of the security on which her money was to be lent. Of course it is a different thing if nothing is left to his own discretion. If all he had to do as regards this transaction was to draw the deeds and pay over the money, then he has no responsibility. But here the facts are not so, and the pursuer is entitled to look to her agents to see that they invest her money upon a good and sufficient security. Accordingly the defenders confess that the security upon which Mrs Oastler's money was invested was not a good and sufficient security. But they say that it had been agreed between Brownlee and the pursuer that her money should be laid out in this special security. I do not believe that any such agreement had ever been entered into. The burden of proof is upon the defenders to show that they really had no discretion in the matter, and the presumption raised by the evidence is all the other way. I concur in thinking that the judgment should be for the pursuer.

LORD RUTHERFURD CLARK—I agree.

The Court pronounced this interlocutor:—

"Find in fact—(1) That in November 1874 the pursuer employed the defenders as her agents to invest a sum of £600, then placed by her in their hands; (2) that she did not authorise the defenders to invest the said sum, or any part of it, on a second or postponed security, but instructed them to invest it as a first charge on good heritable security; (3) that the defenders, in disregard of these instructions, lent £400 of the said sum to two brothers of the defender Thomas J. Smillie, on a bond and disposition in security of subjects in Braehead Street, Rutherglen Road, Glasgow, then recently acquired by them at the price of £1350; (4) that the said subjects were charged with a feu-duty of £15, and an heritable debt of £1000, which exhausted their value, and the said sum of £400, with interest thereon to the amount of £80, has been lost to the pursuer: Find in law that the defenders are bound to indemnify the pursuer for the loss thus sustained by her: Therefore sustain the appeal: Recal the judgment of the Sheriff-Substitute appealed against: Ordain the defenders, jointly and severally, to make payment to the pursuer of the sum of Four hundred and eighty pounds sterling, with the legal interest thereof from the date of citation to this action till paid, the pursuer being bound thereupon to deliver to the defenders, at their expense, an assignation to the said heritable debt: Find the pursuer entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Pursuer — Lorimer. Agent — William Black, S.S.C.

Counsel for Defenders—Comrie Thomson—Orr. Agents—W. & F. C. M'Ivor, S.S.C.

Saturday, October 30.

OUTER HOUSE.

[Lord Fraser, Ordinary.

MITCHELL INNES AND OTHERS.

Process—Choosing Curators—Caution—Caution Restricted by Lord Ordinary.

This was an action of choosing curators. The pursuers were the minor children of the late William Mitchell Innes.

Two curators were nominated by the pursuers and accepted office, and their nomination was sustained by the Court. Thereafter inventories were given up, and the curators ordained to find caution in due form of law.

The rental of the heritage belonging to one of the pursuers, the only son of the deceased, was £26,196, 6s. 5d., and his moveable estate was of the value of £17,865, 0s. 4d., the moveable estate of the others amounting to £3037, 5s. 2d.

The curators and the pursuers moved the Lord Ordinary to restrict the caution to £5000, or to such other sum as to the Lord Ordinary should seem proper.

The Lord Ordinary pronounced this interlocutor:—"Having heard counsel for the pursuers and curators, and considered the minute for them, restricts the caution to be found by the curators to the sum of £9500 sterling."

Counsel for Pursuers—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, October 30.

SECOND DIVISION.

[Lord Lee, Ordinary.

URQUHART *v.* M'KENZIE.

Reparation — Slander — Probable Cause — Relevancy.

A person was sued for damages for having, as was alleged, falsely and maliciously had the pursuer arrested on a criminal charge. Nature of averments which were *held* relevant to entitle the pursuer to an issue. Lord Rutherfurd Clark *dissented*, holding that the pursuer's own averments showed that the defender had probable cause for acting as the pursuer alleged.

This was an action by Donald Urquhart, a farmer at Lamington, near Tain, against Alexander M'Kenzie, hotel-keeper, Bonarbridge, Sutherlandshire, in which the defender claimed £500 as damages for injury to his character by the pursuer having, as he alleged, wrongfully caused him to be apprehended on a criminal charge. The pursuer stated on record that he had attended a market at Ardgay, near Bonarbridge, and stayed over the night in the defender's hotel; that in the morning he rose early to attend the market, and went out without paying his bill, but meeting the defender at the market, offered payment, which defender refused to accept, saying he could not then tell the amount; that it was his intention