Saturday, March 5.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CAMPBELL *v.* FALCONER.

Executor-Dative — Competing Claims — Right of Surviving Husband.

Held (following the case of *Stewart* v. *Kerr*, decided by the Second Division, March 19, 1890, 17 R. 707) that a husband is not entitled to be decerned executor-dative to his deceased wife in competition with her next-of-kin.

Mrs Janet Perston Falconer or Campbell, 257 Crown Street, Glasgow, died there intestate and without issue on 10th January 1892. Competing petitions for the office of executor-dative were presented in the Sheriff Court at Glasgow by her husband William Campbell *qua* widower, and by her brother Alexander Bilsland Falconer, her brother, *qua* next-of-kin.

Upon 29th January 1892 the Sheriff-Substitute (BALFOUR) refused the petition by the husband, and decerned the brother executor as craved.

"*Note.*—It has been decided by the Supreme Court in the case of *Stewart* v. *Kerr*, March 19, 1890, 17 R. 707, that the next-of-kin of a person deceased has a preferable right to the office of executor-dative to that of a husband."

The husband appealed to the First Division of the Court of Session, and argued—No doubt the question had been decided by the Second Division in the case of *Stewart* v. *Kerr*, but the matter was of sufficient importance to merit reconsideration by Seven Judges or by the Whole Court. That decision had not given satisfaction to the legal profession. Where there were no children, as here, the husband had now—since the passing of the Married Women's Property (Scotland) Act 1881—a pecuniary interest equal to that of all the next-of-kin combined. That was an element to be considered—*cf. Muir*, November 3, 1876, 4 R. 74, and *Webster* v. *Shiress*, October 25, 1878. In the settled order of preference the widow would probably have been placed before the next-of-kin but for her sex.

Counsel for the respondent was not called upon.

At advising—

LORD PRESIDENT—Mr Salvesen frankly confessed that the decision in the case of *Stewart* is exactly in point, and that case was decided so recently as 19th March 1890. It would only be in the most exceptional circumstances that we should be justified in doing anything except follow a fully considered decision. I have not heard anything to lead me to think we should pronounce any decision different from the one then arrived at.

LORD ADAM concurred.

LORD M'LAREN—I agree with your Lordship on both points. I should not be disposed, even if I thought a decision doubtful in principle, to alter a question of practice authoritatively settled. Far from that, I agree with the views expressed in the previous case, and think Lord Rutherfurd Clark's argument unanswerable.

LORD KINNEAR—I am of opinion that the question has been decided by a judgment binding upon us, and which we must follow.

The Court adhered.

Counsel for the Appellant — Salvesen. Agents—Macpherson & Mackay, W.S.

Counsel for the Respondent—Jameson. Agent—James Skinner, S.S.C.

Tuesday, March 8.

FIRST DIVISION.

[Sheriff of Forfarshire.

CRABB *v.* FRASER.

Process—Appeal—Jury Cause—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40.

An action of damages for assault having been appealed by the pursuer under the 40th section of the Judicature Act for jury trial, the defender moved the Court to remit the case back to the Sheriff for proof. The Court *held* that the case should be dealt with as if it had originated in the Court of Session, and remitted it to a Lord Ordinary for trial by jury.

Mrs Crabb raised an action in the Sheriff Court at Dundee as curator and administrator-in-law for her pupil son William Crabb, against George Fraser for payment of £150 in name of damages for an assault committed by defender on her said pupil son.

The pursuer averred that her son having taken a turnip from the defender's garden, the defender had set his dog upon him, with the result that the dog had bitten him, and that the defender had also struck him and drenched him with liquid manure.

On 29th January 1892 the Sheriff-Substitute (CAMPBELL SMITH) allowed a proof.

The pursuer appealed to the Court of Session for jury trial under the 40th section of the Judicature Act, and having lodged issues she moved the Court to approve of the same and to remit the case to a Lord Ordinary for trial by jury. The defender opposed and moved the Court to send the case back to the Sheriff for proof.

The pursuer argued—The action having been removed to the Court of Session for trial there, it should be treated as if it had originated in that Court. It belonged to a class of actions appropriated for jury trial, and unless parties consented or cause were shown, it should be remitted for trial by jury—*Cochrane* v. *Ewing*, July 20, 1883, 10 R. 1279; *Hume* v. *Young, Trotter, & Company*, January 19, 1875, 2 R. 338; *M'Avoy* v. *Young's Paraffin Company*, November 5,

1881, 9 R. 100; *Trotter* v. *Happer*, November 24, 1888, 16 R. 141.

The defender argued—It was quite possible to appeal under the 40th section of the Judicature Act causes which were not among those appropriated for jury trial, and there was no obligation on the Court to send causes appealed under that section to jury trial. The Court did not always send causes of the appropriated kinds to trial by jury, as had been exemplified in actions for nuisance—*White, &c.* v. *Dixon*, July 9, 1875, 2 R. 904. *Hume* and *Trotter* were not cases under the 40th section of the Judicature Act. The present case was from its nature unsuited for the expensive process of trial by jury. The amount likely to be awarded would be very small, as the pursuer admitted that her son had been *versans in illicito*.

At advising—

LORD PRESIDENT—*Prima facie*, the proposal of the defender and respondent, that this action should be tried in the Sheriff Court, cannot be said to be unfit or unreasonable. But we must determine upon it with a due regard to the 40th section of the Judicature Act, and so as to give fair play to the system thereby established. This action is now in the Court of Session, and the pursuer, who has taken the appeal for the purpose of jury trial, claims to have her case so disposed of. Now, while the power of the Court to send back for trial in the Sheriff Court cases appealed under this section cannot be disputed, this power has been exercised in view of the category to which the case under consideration belonged. This is an action of damages for assault, and if it had originated in the Court of Session it would for that reason unquestionably have gone to a jury. As it is now here, under this statutory power of appeal, I think we must proceed upon this same criterion of what is to be the mode of trial. We could only adopt the opposite course if we were to form some conjecture as to the substantiality of the pursuer's case, in each action of damages for assault, and send back for trial before the Sheriff those cases which, *prima facie*, did not look well.

There is an obvious inconvenience in such a selection having to be made by the Court which might ultimately have to review the merits of the remitted cases; and it appears to me that the sound rule, and that most conformable to the statute as well as to the decisions, is to send for jury trial those cases which by the legal quality of their ground of action would be designated for jury trial if they had originated in the Court of Session. In all cases, of course, the rule is subject to the statutory condition if special cause be not shown. But the class of assault is one in which this qualification requires to be stated, rather as matter of theory than as of appreciable practical importance.

The pursuer and appellant having moved us to approve the issues proposed by her, I think our proper course is, on her motion, to do so.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court approved of the issues proposed by the pursuer, and remitted the case to a Lord Ordinary for trial by jury.

Counsel for the Pursuer—Guy. Agents—Wishart & Macnaughton, W.S.

Counsel for the Defender—Kennedy. Agents—Macpherson & Mackay, W.S.

Tuesday, March 8.

SECOND DIVISION.

[Lord Low, Ordinary on Bills.

FRASER *v.* CAMERON.

Parent and Child—Curator—Expenses—Liability of Father Concurring as Curator in Action raised by Daughter.

A girl of nineteen was cited to appear before the kirk-session of the church to which she belonged in order to answer to a *fama*. The father made repeated and urgent requests to the minister to supply him with details. In a letter which had been submitted to and approved of by the kirk-session, the minister informed the father of the nature of the *fama*, and added that he had written evidence thereanent from a respectable person whose word he had no reason to doubt. Thereafter the daughter, with the consent and concurrence of her father as her curator and administrator-in-law, raised an action of damages for defamation of character against the minister. In assoilzieing the defender, the Sheriff found the father personally liable in expenses as well as the daughter. *Held* that the Sheriff had acted within his competency.

In February 1891 Annie Fraser, New Street, Rothes, with the consent and concurrence of her father, James Fraser, as her curator and administrator-in-law, raised an action for defamation of character against the Reverend Donald Cameron, Free Church minister of Rothes. The pursuer was nineteen years of age and unmarried, and resided with her father. They both belonged to Mr Cameron's congregation. The alleged defamation was contained in a letter written by Mr Cameron to James Fraser in compliance with the latter's repeated and urgent requests to supply him with the details of a *fama*, to answer to which Annie Fraser had been cited to appear before the kirk-session. The letter had been submitted by Mr Cameron to the kirk-session and approved of by them. In the letter Mr Cameron informed James Fraser that it was currently reported that the intimacy (not meaning thereby carnal connection) between Annie Fraser and Alexander Simpson, a married man and a member of the congregation,