COURT OF SESSION.

Tuesday, November 20.

FIRST DIVISION.

[Dean of Guild Court, Greenock.

ALEXANDER HOGG & COMPANY *v.* GREENOCK CORPORATION.

Burgh—Dean of Guild—Jurisdiction—Objection Taken to Lining on Ground that Stance Illegally Transferred by One Department of Burgh Council to Another—Objection Taken that Proposed Buildings might Create a Nuisance.

Where in an appeal from the Dean of Guild Court of a burgh on an application by a Department of the Corporation for a lining for buildings for its branch of the municipal business, objection was taken on the ground (1) that the stance was the property of another department and that the transfer from the one department to the other was illegal and *ultra vires*, and (2) that the proposed buildings might create a nuisance, *held* that such objections were incompetent as not falling within the jurisdiction of the Dean of Guild.

Observations on the powers and functions of the Dean of Guild.

On 30th May 1906 the Corporation of Greenock Electricity Department presented a petition in the Dean of Guild Court of the burgh craving a lining for electricity generating works proposed to be erected "on ground at Dellingburn Square, Greenock, of which the petitioners are proprietors, bounded on the east by property belonging to Malcolm Campbell, 25 Regent Street, Greenock, on the west by reservoir belonging to Alexander Hogg & Company, 60 Virginia Street, Glasgow, on the south by property of Ardgowan Distillery Company, Baker Street, Greenock, Rankin & Blackmore, Baker Street, Greenock, and James M. Brodie & Company, 73 Princes Street, Port-Glasgow (for Port-Glasgow Heritable Company, Limited), and on the north by property of P. M'Callum & Sons, iron-founders, Regent Street, Greenock, John Harkness, blacksmith, Dellingburn Street, and the Corporation of Greenock Water Trust." And in June the Provost, Magistrates, and Councillors of Greenock presented a petition in which lining was craved for the erection of a refuse destructor on the same piece of ground. Objection was taken to the linings being granted by, *inter alios*, Alexander Hogg & Company, records were made up, and on 5th July the petitions were conjoined. The objectors pleaded that (1) the petitioners' operations being in contravention of their titles and of the Shaws Water Company's Act of 1825 lining should be refused; and (2) the petitioners' operations being a nuisance lining should be refused. On 12th July the Dean of Guild pronounced an interlocutor in which he ". . . finds in fact that (1) the petitioners are the proprietors of ground in Dellingburn Street, Greenock, formerly feued by the Shaws Water Joint Stock Company to Messrs Mackenzie & Walker, millers, on which ground the petitioners propose to erect electricity generating works combined with a destructor for consuming the town's refuse; (2) the objectors Alexander Hogg & Company are neighbouring proprietors holding their title from Sir Michael Shaw Stewart and not from the Shaws Water Joint Stock Company: Finds in law that the objectors have no title or interest to object to the petitioners' erections; therefore repels the objections stated by the said Alexander Hogg & Company and grants warrant to the petitioners to erect their buildings as craved according to the plans docquetted and subscribed as relative hereto. . . ."

The Dean of Guild's note, which gives the facts of the case, was as follows:—"Two petitions have been presented to the Dean of Guild Court in this case—one from the Corporation of Greenock Electricity Department for the erection of electricity generating works, and the other from the Provost, Magistrates, and Councillors of the burgh (Cleansing Department) for the erection of a refuse destructor. The two works are part of one scheme to be installed on the same plot of ground, and the petitioners are the same body, viz., the Corporation. The site for these works, known as Millstead No. 2, formerly belonged to the Shaws Water Joint-Stock Company, which was a company incorporated by the Act of 6 Geo. IV, c. 106, and said site was feued by the company in 1832 to Messrs Mackenzie & Walker, grain merchants and millers, who built a grain mill there.

"In the year 1866 the Shaws Water undertaking was acquired by purchase by the Police Board of the town of Greenock, and was vested by Act of Parliament in a public trust called the Water Trust of Greenock.

"Since the passing of the Town Councils (Scotland) Act 1900 the Corporation of Greenock are vested with the rights and duties of the Water Trust, and are thus the successors of the Old Shaws Water Joint-Stock Company.

In 1901 the Water Trust purchased Millstead No. 2, which is situated at Dellingburn Street, Greenock, from the judicial factor on the estate of the firm of Mackenzie & Walker.

"The objectors Messrs Alexander Hogg & Company of Glasgow, sometime sugar refiners in Greenock, are neighbouring proprietors. They own a reservoir and ground adjoining the site of the intended destructor on the north-west thereof. They also own a plot of ground in Dellingburn Street, situated about 100 yards to the north of Millstead No. 2, on which plot they have a sugar refinery and store.

"Their titles to the reservoir and ground and refinery and store are from Sir Michael Shaw Stewart, but by a contract and

mutual conveyance in 1832 between the Shaws Water Company and Tasker, Young, & Company they have the privilege of the water fall on Millstead No. 1 for the benefit of their sugar refinery, and by their mutual conveyance a lien is granted upon the property of Messrs Tasker, Young, & Company in favour of the Shaws Water Company.

"Messrs Hogg's objections to the petitioners' proposed buildings are—(1st) That the petitioners' operations are in contravention of their titles and of the Shaws Water Company's Act of 1825; and (2nd) that said operations are a nuisance.

"In support of their first objection the objectors aver that the only buildings which can competently be erected on the petitioners' feu are limited in terms of the Company's Act of 1825 to mills or manufactories containing machinery driven by water, and that the intended buildings are not of the class permitted by petitioners' titles or by the Company's Act or by the objectors' titles, which are founded on the same statute. Upon an examination of the statute I am of opinion that this objection cannot be entertained. The statute gave the old company the widest possible powers in connection with their lands and undertaking, and in no way restricted them to feu lands only for mills and manufactories containing machinery driven by water as is alleged. A reference to the Acts conferring powers on the company shows that the company had full power to contract for and to purchase lands and others, and again dispose of these if they should see cause, to hold any lands and heritages so purchased, to enter into and make contracts, bargains, and agreements touching or in any wise concerning the undertaking as they should think proper, and were generally given full power to direct and manage their affairs and business, and to execute and perform all acts and things concerning their undertaking.

"Looking to these large statutory powers I am unable to accept the contention of the objectors that the Act of 1825 expressly limits any buildings which the petitioners intend to erect on Millstead No. 2 to mills or manufactories containing machinery driven by water.

"In reference to the averments that it is not the intention of the petitioners to use water power for driving machinery in their buildings, this is a matter which only affects the Corporation as the successors of the old Water Company, and one with which the objectors have no concern at all. The obligation relates to the sale of the water, and is solely in the interest of the Corporation. But assuming that the Shaws Water Company were so restricted in the character of their buildings, I am unable to find that the objectors have any title to object. They have not produced any writ which either expressly or by implication gives them, as the successors of the original feuars, the right to control the nature and character of the buildings to be erected on the petitioners' ground.

"The second objection is that the petitioners intend to remove house and street refuse to their said premises, to collect the same there, and treat and dispose of it there, and it is averred that such operations cannot be carried on without being most offensive to the neighbourhood and a nuisance under the Public Health Act and at common law, and would greatly depreciate the value of the objectors' property.

"These averments are denied by the petitioners, who state that they do not intend to collect and treat the refuse at their works, but simply to destroy such refuse by combustion. This should not necessarily result in any nuisance, but if any nuisance should arise the objectors have a legal remedy. It is clear according to the recent decisions that the Dean of Guild Court is not the appropriate tribunal for the trial of such a question."

The objectors appealed, and on October 25, before the hearing, amended the record by adding the following plea-in-law—"(3) The erection of the proposed buildings being illegal and *ultra vires*, and in violation of the Greenock and Shaws Water Transfer Act 1866, the lining should be refused."

The following objection and answer were also added:—"(Obj. 4A) The heritable subjects upon which the petitioners propose to erect a refuse destructor and an electricity generating station form part of the assets of the Water Trust of Greenock incorporated by the Greenock and Shaws Water Transfer Act 1866 (29 and 30 Vict. cap. cccviii, sec. 8). The said subjects were originally acquired by the Shaws Water Joint Stock Company, incorporated by 6 Geo. IV, cap. cvi, and were subsequently in terms of section 48 of that statute feued out by them to Messrs Mackenzie & Walker for the erection of a mill containing machinery driven by water conform to feu-contract dated 20th and 21st March 1832, upon which the feuars were infeft by instrument of sasine recorded in the Particular Register of Sasines for Renfrewshire, &c., at Glasgow on 26th April 1832. The superiority of the said subjects was transferred to and vested in the said Water Trust of Greenock by the said Act of 1866. The *dominium utile* of the said subjects was acquired by the said Water Trust of Greenock conform to disposition by the judicial factor on the estate of Mackenzie & Walker dated 11th and 13th and recorded 19th July 1901. . . . By the Greenock Burgh Extension Act 1882, sec. 32 (45 and 46 Vict. c. cliv), the Provost of Greenock *ex officio* and twelve members of the Town Council to be elected by the Council were appointed to be the Water Trust of Greenock. In virtue of section 8 of the Town Councils (Scotland) Act 1900 it is believed that the said subjects are now vested in the Town Council of Greenock but the assets of the said Water Trust being separately administered at the commencement of the said Act were not thereby amalgamated. The said assets remain subject to the trusts and purposes set forth in the said Act of 1866. The said

purposes do not include the erection of a refuse destructor and electricity generating station. The present application is an illegal attempt on the part of the Corporation of Greenock to utilise the assets of the said Water Trust for general municipal purposes. The objectors' properties are situated within the limits of compulsory supply specified in the said Act of 1866, and they are liable under the said statute to be rated, and they are rated, for the purposes of the undertaking of the said Water Trust. (Ans. 4A) The statutes and deeds mentioned are referred to for their terms. Admitted that the objectors' properties are within the limits of compulsory water supply specified in the said Act of 1866, and are rateable accordingly. *Quoad ultra* denied. Explained that the Shaws Water Joint Stock Company's Acts were repealed by the said Act of 1866, and the company's undertaking with its whole property, powers, rights, and privileges of every kind and description transferred to the Water Trust of Greenock. Thereafter by section 92 of the Greenock Corporation Order 1901, confirmed by the Greenock Corporation Order Confirmation Act 1901, the Water Trust of Greenock was dissolved and its whole rights, powers, authorities, duties, and liabilities, and its whole lands, works, and other assets, were transferred to and vested in the petitioners. The property on which the said buildings are proposed to be erected became part of the petitioners' property, and by resolution of the petitioners was sold to the Electricity Department of the Corporation as at Whitsunday 1906, at the price of £1200, subject to payment by the Electricity Department to the Water Department of the water rent and feu-duties exigible from the subjects. The erection of an electricity generating station and a refuse destructor on the subjects in question is clearly competent under the terms of the transfer thereof to the Electricity Department. By the Greenock Electric Lighting Order 1883, under which the petitioners are the local authority to supply electricity within the burgh of Greenock, the petitioners were specially authorised to acquire 10 acres of land, and the extent of land held by them for the purposes of their electrical undertaking including the subjects now in question does not amount to 10 acres in all."

The following were the minutes dealing with the transfer of the property from the one department to the other:—1. Extract from minute of meeting of Water Committee held on 8th March 1906—"The sub-committee on erection of a destructor and generating station submitted a report to the effect that they had met on 5th instant and had agreed to approach the Water Committee with the view of acquiring Millstead No. 2 for these erections at a sum of £1100, plus feu-duty on the site for last five years, with entry at Whitsunday next, and possession to be given then. The Provost moved that the subjects referred to be taken over at the sum of £1200, plus the annual feu-duty of £18, 19s. 10d., and the water rent of £172, 16s. per annum. Bailie Steel moved as an amendment that £1500 be the price for the property referred to. After consideration the committee divided, when there voted for the motion—Provost Denholm, Treasurer Brown, Councillors M'Innes, M'Neill, Buchanan, Taylor, and Swan (7); and for the amendment—Bailie Steel and Councillor Mitchell (2). Councillor Hume Chalmers declined to vote. The motion was declared carried, and the Town Clerk authorised to carry the transfer through as between the two departments at Whitsunday next."

2. Extract from minute of meeting of Greenock Corporation held 20th March 1906—"The minute of the Water Committee of date 8th March was submitted, and the Provost moved and Bailie J. W. Bailey seconded its adoption. Councillor Mitchell referred to the paragraph relating to the acquisition of Millstead No. 2 for the site of proposed refuse destructor at £1200, and moved as an amendment that the price for the millstead be fixed at £1500, which was seconded by Bailie Steel. On a division there voted for the motion—Provost Denholm, Bailies M'Callum and Forbes, Treasurer Brown, Dean Bennett, Councillors M'Innes, M'Neill, Lemmon, MacOnie, Buchanan, A. M. Chalmers, T. Baxter, Robinson, Taylor, Smith, Shearer, Swan, and Cowan Shankland (18); and for the amendment—Bailie Steel, Councillors M'Millan, Hume Chalmers, and Mitchell (4); Bailies Alex. Andrew and J. W. Bailey declined to vote. The Provost declared the motion carried, and the minutes accordingly approved of, on the understanding that the transfer would be carried through at Whitsunday next."

Argued for the objectors and appellants—The agreement to sell the site in question contained in the minutes was (1) a breach of trust; (2) an illegal sale as being by the Corporation of Greenock in their statutory capacity of Water Committee to themselves in other statutory capacities as the Electricity Department and as Public Health Department. Now a corporation holding as a statutory body could not sell to itself as a statutory body constituted for other purposes. Land held for statutory purposes must be kept separate for those purposes—*Attorney-General* v. *Pontypridd Urban Council*, L.R. [1906], 2 Ch. 257, Collins (M.R.) at p. 264, and Romer (L.J.) at 267. Moreover, this sale was an amalgamation of assets, and by the Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49), sec. 8, which vested the property of the previously existing Water Trust in the Corporation, such amalgamation was expressly forbidden when such assets had been separately administered at the commencement of the Act. Further, the sale was in truth a fictitious one, being by the parties to themselves though in another capacity, and was null as being a trafficking by trustees in property of the trust—*Magistrates of Aberdeen* v. *University of Aberdeen*, March 23, 1877, 4 R. (H.L.) 48, 14 S.L.R. 490. The objectors had an interest

to object as neighbours and as ratepayers if the Corporation dissipated its assets. Their objection was that a practical prohibition of selling to the Electricity Department existed in the Corporation's title to this asset. The objections should be sustained or a sist granted.

Argued for the petitioners and respondents—The case propounded by the objectors did not exist on record, which was based on the objector's position as a neighbour, not on that of a ratepayer. Nor was the question at issue one suitable for the Dean of Guild Court, since it was one concerning title. The statutes and titles under which the Corporation held the lands in question put no restriction on their selling unnecessary land but rather empowered them to do so, and they were only operating *in suo*, and the sale was for an adequate price. The case of the *Attorney-General* v. *Pontypridd Urban Council*, *ut supra*, was distinguishable from the present case, as there the local authority had obtained funds for one purpose and was using them for another, and land had been acquired for a precise purpose which it was proposed to dedicate to one totally different. The validity of the transference of the lands in question had not been successfully challenged.

At advising—

LORD M'LAREN—This is an appeal from the Dean of Guild Court of Greenock against an interlocutor disposing of objections to the application by the present appellants and granting warrant to the petitioners to erect their buildings as craved, subject to certain structural directions which are embodied in the warrant.

There are two petitions, the first of these bearing to be the petition of the Corporation of Greenock Electricity Department, and the second being a petition at the instance of the Provost, Magistrates, and Council of Greenock as a corporation. The first application was for authority to erect buildings which are to be used as electricity generating works, and the second was for authority to put up a building described as a refuse destructor. These applications were conjoined, rightly as I think, because while it is convenient to arrange the work of the Town Council in departments in which the expenditure incurred under different sources of Parliamentary authority is kept apart, yet the proprietary title is in the Corporation, and the two petitions are really at the instance of the same petitioners, viz., the Corporation of Greenock.

The facts of the case, so far as necessary for our decision, are not in dispute, and these are very distinctly set forth in the note to the Dean of Guild's interlocutor. It is explained that the two works are part of one scheme to be installed on the same plot of ground. The site for these works formerly belonged to the Shaws Water Joint Stock Company, and were feued by the company in 1832 to Mackenzie & Walker.

In 1866 the Shaws Water undertaking was sold, and came to be vested by Act of Parliament in the Water Trust of Greenock, which is now represented by the Magistrates and Council. In 1901 the Water Trust purchased Mackenzie & Walker's feu from the judicial factor on their estate. It will thus be seen that the Corporation of Greenock are now vested in the superiority as well as the property of the lands on which it is proposed to erect the electric station and the destructor. The objectors and appellants, Alexander Hogg & Company, are neighbouring proprietors. Their title is derived not from the Shaws Water Company or their successors in title, but from Sir Michael Shaw Stewart. They have certain contract rights from the Shaws Water Company, but these do not in my judgment enter into the question before us. Their objections to the petitioners' demands, as stated in the Dean of Guild's note, were twofold—first, that the petitioners' operations are in contravention of their titles and of the Shaws Water Company's Act of 1825; and second, that the said operations are a nuisance. Under the first head they contended that the only buildings which can competently be erected on the petitioners' feu are limited in terms of the Company's Act of Parliament to mills or manufactories containing machinery driven by water. The Dean of Guild examines the grounds of this objection, and states his conclusion that the Shaws Water Company were absolutely unrestricted as to their power to purchase and dispose of lands and heritages. I see no reason to doubt the soundness of this conclusion, but I prefer to rest my opinion on the second ground of judgment indicated by the Dean of Guild. He says—"Assuming that the Shaws Water Company were so restricted in the character of their buildings, I am unable to find that the objectors have any title to object. They have not produced any writ which either expressly or by implication gives them as the successors of the original feuars the right to control the nature and character of the buildings to be erected on the petitioners' ground." This, I think, is a perfectly sound deliverance on the subject of the appellants' title to object, and I shall only add that I can find no relation either of tenure, servitude, or contract right between the appellants and the respondents or their authors which would entitle the appellants to put forward their individual objections in answer to the respondents' claim to erect such buildings as they desire to put up on their own lands. The objection of nuisance is I think rightly repelled, on the ground that the buildings proposed would not necessarily result in any nuisance, and that if a nuisance should arise the objectors have a legal remedy.

These objections were not strongly pressed in the argument before your Lordships, but a new objection was put forward to the title of the petitioners, founded on two minutes, the first being a minute of meeting of the Water Committee of the Town Council dated 8th March 1906 agreeing to sell to another Committee of the same body the property in question for the sum of £1200, plus the annual feu-duty and

water-rent affecting the property. The second document is a minute of the Town Council itself, dated 20th March 1906, confirming the minute of the Water Committee. It was argued, too, that this was an illegal sale by the Town Council to a section of their own number, and the case was assimilated to that of the sale of trust property to a trustee. I cannot say that this objection impressed me as having any substance in it. The affairs of municipal corporations in our times include many separate undertakings, each depending on Acts of Parliament defining the undertaking, and in many cases limiting the powers of assessment and acquisition of lands. It is therefore imperative that the capital and revenue accounts of these several undertakings should he kept distinct. Assuming that the Corporation had the power to dispose of this piece of land (and no attempt was made to dispute their power to do so), if the Corporation, instead of putting up the property to sale, found it more advantageous to appropriate it to the purposes of an electric station, it would be in accordance with the ordinary principles of accounting that their electric undertaking should be debited with a sum equivalent to the value of the property which they were to acquire, and that the water undertaking, for whose purposes the property was originally acquired, should be credited with the like sum. This would not be a sale, because the property remains vested in the Corporation, but only an administrative arrangement. The objection then would seem to amount to no more than this, that the use of the terms "purchase" and "sale" is a misnomer. But even this somewhat shadowy objection vanishes, because I do not find that the words "purchase" and "sale" are used in the minutes. Instead of giving a formal negative to the appellants' contention, I propose to your Lordships that we should find that the objections stated to the Town Council's minutes do not fall within the scope of the Dean of Guild's jurisdiction. The functions of the Dean of Guild are to inquire as to the sufficiency and stability of the proposed buildings, and to dispose of objections arising out of the law of neighbourhood, such as boundaries, servitudes, and contract rights affecting the powers of the applicant, and do not extend to questions affecting the administration of corporate property where the applicant is a corporation. If any burgess or ratepayer desires to challenge the administration of the Town Council in relation to this property, the relevancy of his complaint will be open to consideration in a competent court. I move that the appeal be dismissed, but it may be necessary that the cause should be remitted, as the expenses in the Dean of Guild Court have not yet been taxed or decerned for.

LORD PEARSON—In May last the Corporation of the Burgh of Greenock applied to the Dean of Guild Court of the Burgh to sanction the erection of certain buildings on ground belonging to the Corporation. The buildings proposed were (1) electricity generating works, and (2) a refuse destructor. A separate petition was presented as regards each of these schemes, and these petitions were afterwards conjoined. The ground was described as bounded on the west by a reservoir belonging to Messrs Alexander Hogg & Company, and that firm are also owners of a sugar refinery and store in the immediate neighbourhood. Messrs Hogg & Company appeared and stated various objections to the proposal of the Corporation. These were repelled by the Dean of Guild, who found that the objectors had no title or interest to object to the proposed erections, and granted warrant to the petitioners as craved. Against this judgment Messrs Hogg & Company now appeal.

It appears that in the Dean of Guild Court the objections mainly relied on by the appellants were two in number. The first was that the petitioners' property and the appellants' property, both being situated in what is known as the Shawswater Company's Cut, were both feued out in 1832 with a right to water-power from the Cut, and with an express restriction of buildings to be erected to mills or manufactories containing machinery driven by water. It was contended that the buildings now proposed are not of the class permitted by the titles of the two properties, and that the petitions should be refused on that ground. The second objection was that the petitioners' operations, so far as regards the destructor, could not be carried on without causing a nuisance both under the Public Health Act and at Common Law. I am satisfied that the Dean of Guild was right in repelling both these objections—the former on the ground that it was not made out upon the titles, and the latter on the ground that in the circumstances of this case the Dean of Guild Court is not the appropriate tribunal for the trial of the question of nuisance.

The argument on appeal, however, raised wider and more important questions affecting the legal position and powers of the Corporation of Greenock in its various capacities. It was represented that that body acted in this matter in three different characters. First, they acquired and held the ground as Water Trustees, and a series of statutes was examined in support of the proposition that they must either use it for Water Trust purposes or sell it outright as superfluous land. Further, they petitioned the Dean of Guild in two quite separate characters, namely, as trustees for the Electrical Department and as the Public Health Authority within the burgh; and it was represented that this was an illegal attempt on the part of the Corporation to utilise the assets of the Water Trust for other municipal purposes, contrary to the provisions of the recent statutes, which had for their object to unify the administration but to keep the assets distinct. Then the minutes of the Town Council and of the committees were examined with the object of showing that this was really a pretended sale by the Corporation as

Water Trustees to itself in two other trust capacities without any statutory authority, and that such a transaction was contrary to established trust law. In order (as I apprehend) to fortify their title to state these objections, the appellants further set forth that their properties are within the limits of compulsory water supply and that they are rated for the purposes of the undertaking of the Water Trust.

I have summarised these arguments—I hope accurately—because, in my opinion, the mere statement of them suggests strongly how inappropriate such questions are for the decision of a Dean of Guild. I understand that the Dean of Guild Court was established in Greenock under a recent statute, but it was not argued that the Dean of Guild of Greenock has any special or extended jurisdiction on the matters here in controversy, and the case was argued on the footing that his powers are not exceptional in these respects. But whatever might be our desire to aid parties in terminating this dispute, I apprehend that we cannot decide a case on appeal from a Dean of Guild Court except upon grounds which could have been competently entertained by the Dean of Guild himself. Now although the limits of the Dean of Guild jurisdiction have varied from time to time, I am not aware that so wide an extension of them as is here proposed was ever made or attempted, nor were we referred to any authority to this effect. In my opinion the decision of such questions is altogether extrinsic to the Dean of Guild jurisdiction. It is plain that such title as the appellants have to raise these questions is derived not from their neighbourhood to the proposed buildings but from their being ratepayers in the burgh, which involves a different set of considerations altogether. And as to the merits, the questions raised appear to me to be remote from the familiar topics with which Dean of Guild Courts have to do and to which their jurisdiction has hitherto been confined, at least in modern times. They are really large questions as to the powers and policy of the Town Council itself in the administration of their Water Department on the one hand and of their Cleansing and Electricity Departments on the other. I do not say that the appellants are without a remedy, but only that this is not a competent process in which to state their pleas. For anything we have heard I think the Corporation are entitled to their lining.

LORD M'LAREN intimated that LORD KINNEAR, who was absent, concurred in this judgment.

The LORD PRESIDENT was not present.

The Court dismissed the appeal.

Counsel for the Petitioners and Respondents—Guthrie, K.C.—Macmillan. Agents—Cumming & Duff, S.S.C.

Counsel for the Objectors and Appellants—The Dean of Faculty (Campbell, K.C.)—Hon. W. Watson. Agents—Webster, Will, & Company, S.S.C.

Thursday, November 22.

FIRST DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Ayr.

KILCOYNE *v.* WILSON.

Process—Appeal—Competency—Failure to Print Adjustments of Record—Duty of Sheriff to Initial Adjustments—A. S., July 10, 1839, *sec.* 45, *and March* 10, 1870, *sec.* 3 (1).

In an appeal from the Sheriff Court for Jury Trial under the 40th section of the Judicature Act, the record appended to the Note of Appeal did not contain the adjustments made at the closing of the record in the Court below. The adjustments made had not been initialed by the Sheriff.

Objection having been taken to the competency of the appeal, the Court *sustained* the objection and *remitted* the cause to the Sheriff of new to adjust and close the record, and to initial the adjustments.

The A. S., July 10, 1839, section 45, enacts:—"All alterations or additions made on the margin of the record at any period before it is closed shall be authenticated by the initials of the sheriff."

The A. S., March 10, 1870, section 3 (1), enacts:—"The appellant shall, during session, within fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal, record, interlocutor, and proof, if any, . . . and if the appellant shall fail within the said period of fourteen days to print and box . . . the papers required as aforesaid, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein, except upon being reponed as hereinafter provided."

Anthony Kilcoyne, labourer, Achil, Co. Mayo, raised in the Ayr Sheriff Court an action of damages for personal injuries, against James Wilson, timber merchant, Troon. The Sheriff-Substitute (SHAIRP) allowed a proof. The pursuer appealed for jury trial.

The copy of the record appended to the note of appeal did not contain the pursuer's adjustments made at the closing of the record. These had been put on the certified copy of the petition used in the Court below, and had been initialed by the pursuer's agent. They had not been put on the principal copy of the petition, nor had they been initialed by the Sheriff-Substitute. The defender had made no adjustments.

On the case appearing in the Single Bills counsel for the defender objected to the competency of the appeal on the ground that the record printed did not bear the pursuer's adjustments.

He argued—The case had been discussed on the certified copy of the petition which contained the adjustments. It was therefore essential that they should be on the record in the Appeal—A. S., 10th March 1870, sec. 3 (1). The Act was imperative.