

thereof the interest on the legacies was not a charge on the widow.

I am of opinion that the sum of £7, 0s. 10½d., which has been charged against the widow annually till 1847, ought not to be so charged. Although it may be quite possible, now that the improvements have been made and the amount of meliorations ascertained, to calculate their amount at the date in question, yet I think that they were not then existing debts to any extent. They were not only indefinite and uncertain, but they might never have existed at all. In any view, they were not due till the termination of the leases; but that is not all, the improvements might never have been made, and no debt of the nature of a repayment of meliorations would then have arisen. Looking to the language of this trust-deed, and to the evident intention of the trustor to secure his widow in the enjoyment of the full rents of Breda under the existing leases, and not to burden her with the interest of these legacies, if they could be otherwise provided for, I have come to the conclusion that it will not do now, after the lapse of years, to adjust the accounts in this manner, so as to employ the surplus rent in payment of anticipated and uncertain meliorations, and thus to throw the interest of the legacies on the widow, which is in my view contrary to the intention of the trust-deed. I therefore think that the Lord Ordinary's interlocutor, in so far as it deals with the second head of the fifth objection for Farquharson of Whitehouse, and the second head of the fourth objection for Mr Duncan, should be recalled, and that the sum of £7, 0s. 10½d. per annum should not be deducted from the widow's liferent or debited to the trustees in accounting. The principle which I have now explained is also applicable to the first head of the fifth objection for Whitehouse, and the first head of the fourth objection for Mr Duncan.

The next question relates to the deduction of the public burdens on the Mansion-House and Mains of Breda from the widow's liferent, being the third head of the fifth objection for Farquharson of Whitehouse, and the third head of the fourth objection for Mr Duncan.

The widow was entitled, under the trust-deed, to the "free liferent of the whole lands of Breda, or possession of all or any part thereof." The trustees left her in possession of the mansion-house and mains, and accounted to her for the rents of the remainder of the estate; and in apportioning the annual burdens, they charged against the widow the proportion thereof applicable to the lands let, but not the proportion applicable to the mansion-house and mains of which she was in possession. This mode of apportionment was objected to by Farquharson of Allargue. The accountant was of opinion that the words "free liferent" do not mean that the stipend and other public burdens should not be deducted, and that the mansion-house and mains of which the widow was in possession was in no different position than the remainder of the estate, of which she received the rents. He accordingly gave effect to Allargue's objection, and apportioned the burdens annually between the widow and the general trust, according to the amount of rent enjoyed by each, including in the widow's portion the estimated annual value of the mansion-house and mains as taken from the valuation roll of the county.

This apportionment has been objected to by Farquharson of Whitehouse and Mr Duncan, and the Lord Ordinary has repelled their objections, and concurred with the accountant.

The trustees allege that, it being doubtful whether the widow was bound to pay any of these burdens, they effected a compromise with her, whereby she agreed to pay a proportion of the burdens corresponding to the rents she received, but not to the house and lands in her possession.

I am not able to say that this compromise or agreement has been legally instructed, although there are some indications of arrangements tending thereto, which make it not improbable that there was such a compromise of a question which the trustees considered as attended with doubt and calling for adjustment. I am, however, satisfied that the trustees, taking advice from a very eminent counsel, and proceeding in the *bona fide* management of the trust-estate, acted on such agreement or understanding, and settled with the widow annually on the footing of apportioning the burdens in the manner which they have explained.

I am disposed to think that, after many years of this *bona fide* administration of the trust and actual payments to the widow in accordance with an understanding, if not an agreement, on the subject, the trustees cannot now be called on to repeat and restore to the estate the amount of these annual burdens, on the ground that they ought to have been deducted from the widow's liferent. The matter was one on which an adjustment in order to avoid a dispute was not unnatural or injudicious. Whether that adjustment stood on an agreement or compromise, or on a mere understanding, does not clearly appear; but at least it was accepted and acted on in good faith. If it is to be now disturbed, I think that the question should be tried, not between the objector, Allargue, and the trustees, but between the objector and the widow, to whom the over-payments, if made beyond her just claims, were made by the trustees in *bona fide*, and on an understanding with her.

On this point, therefore, I am of opinion that the interlocutor of the Lord Ordinary repelling the third head of the fifth objection for Farquharson of Whitehouse, and the third head of the fourth objection for Mr Duncan, should be recalled, and the apportionment of the public burdens made by the trustees should be sustained, and the objection of Allargue to that apportionment be repelled accordingly; but that Farquharson of Allargue is entitled to obtain an assignation from the trustees to any right they have to repetition of the amount of these annual burdens from the widow. The seventh objection for Mr Duncan has been conceded, and the interlocutor falls to be altered accordingly.

I am not aware that there are any other points on which the parties have desired a judgment at present. Great part of the Lord Ordinary's judgment has been left without objection; some concessions have been judiciously made; and probably the decision of the points to which I have adverted, with a remit to the Lord Ordinary to proceed further in the cause, is all that can be done at present.

Agent for Mr Duncan—Thomas Ranken, S.S.C.  
Agents for Allargue—Morton, Whitehead, & Greig, W.S.

Agent for Whitehouse—John Robertson. S.S.C.

## SECOND DIVISION.

COMMISSIONERS OF POLICE OF LEITH

v. CAMPBELL AND OTHERS.

General Police and Improvement Act 1862—Jurisdiction—Sheriff. Jurisdiction of Sheriff under sections 396 and 397 of Act, final and privative.

The Commissioners of Police for the Burgh of Leith, acting under "The General Police and Improvement (Scotland) Act, 1862," gave notice in terms of that statute to the effect that North Junction Street, North Leith, being a private street in the meaning of the Act, and not being properly paved and levelled, it was their intention to have this done at the expense of the owners of the property fronting or abutting on the street, and, after a conference with the proprietors, they issued an order to that effect. Against this order certain of the proprietors appealed to the Sheriff, who held that the street was not a private one, and the above order was therefore annulled.

The Commissioners thereafter brought the present action of declarator and reduction against the owners of lands fronting or abutting on North Junction Street for the purpose of having it found and declared that it was a private street in the sense of the Act; that it was not sufficiently levelled, &c.; that it should be lawful to the pursuers to have it so levelled, &c., as a private street; and further, that the interlocutors of the Sheriff should be reduced, in so far as they could be pleaded as a defence to the other conclusions.

Under the General Police Act, public streets are repaired, &c., at the expense of the community; whereas private streets are provided for in these respects by the contribution of the proprietors of tenements fronting or abutting on them.

The appeal to the Sheriff is provided for by sections 396 and 397 of the Act, and in reference thereto it is declared by the latter section that appeals are to be "disposed of summarily, and the decision of the Sheriff shall in all cases be final and conclusive, and not subject to review by suspension, reduction, or advocacy, or in any manner of way."

By section 197 similar provisions are made with regard to the finality of the Sheriff's judgments, and by section 437 it is provided that all decisions declared by the Act to be final "shall not be subject to be set aside or reviewed or affected by any Court or judicature, upon any ground or in any manner of way whatever."

The present action was brought upon the grounds that the Sheriff had exceeded his powers in not sisting process to allow of a declarator being brought to determine the question whether Junction Street was a private street; that he had pronounced his judgment without allowing a proof or making due inquiry, and that he had not applied his mind to the matter.

The defenders pleaded preliminarily against satisfying the production, *res judicata*, and want of jurisdiction. These pleas were, however, repelled so far as preliminary, and a record, under which the pleas of parties were repeated, having been made up, and, parties having been heard, Lord Ormidale (Ordinary) upon 15th February 1866 found that the action as laid was not competent or maintainable in this Court, and to that effect dismissed the action, and found the pursuers liable in expenses. In a note his Lordship said:—

"The summons in this case contains both declaratory and reductive conclusions. The latter, however, from the manner in which they are libelled, are contingent upon and insisted in merely in aid of the former. If, therefore, the declaratory conclusions cannot be maintained—and the Lord Ordinary thinks they cannot, either with or without the aid of the reductive conclusions—it follows that the action is not maintainable as regards either set of conclusions. The Lord Ordinary is also of opinion that the reductive conclusions of

the action, even if they could be dealt with apart and independently of the declaratory conclusions, could not be maintained.

"The first declaratory conclusion appears to the Lord Ordinary to be manifestly nothing more than a declarator in the abstract, separate from, and independent of any consequent right in the pursuers, or any practical object or purpose, as to the meaning of a public statute. But such a declarator has been repeatedly held to be incompetent—*Todd and Higginbotham v. Burnet*, 7th March 1854, 16 D. 794; *Gifford v. Traill*, 8th July 1829, 7 S., 854; and *Lyle, &c., v. Balfour*, 17th Nov. 1830, 9 S., 22.

"The second declaratory conclusion is substantially to the same effect, and exposed to the same objection. Supposing, however, that it could be held that there are imported into it elements of a practical nature not in the first conclusion, the incompetency is not thereby obviated. For, if it be true that the street in question 'is not, together with the footways thereof, sufficiently levelled, paved, or causewayed and flagged, to the satisfaction of the pursuers, as Commissioners of Police foresaid,' the question at once occurs—Why do they not proceed to discharge their statutory duty in the way and manner provided by the Act? which is certainly not by raising an action of declarator in this Court—*Thomas v. Keating & Co.*, 18th July 1855, 17 D. 1133. A declarator to the effect that a street 'is not levelled, paved, or causewayed and flagged to the satisfaction of the pursuers,' seems to be not only a very anomalous, but a very absurd proceeding.

"The third or remaining declaratory conclusion is, in the view of the Lord Ordinary, equally incompetent as the others, and his remarks in reference to the second conclusion, are applicable alike to this third conclusion.

"It is plain, indeed, that the pursuers have resorted to the present action of declarator, in order, if possible, to get over the barrier interposed by the Sheriff's judgment, which stands against them. But, as the Sheriff's judgment is by the statute declared to be final, and not reviewable in any way or on any ground whatever, the pursuers cannot be allowed to do covertly and indirectly what they could not do avowedly and directly by any of the ordinary and recognised modes of review. Nor can it avail the pursuers to argue that, because the Sheriff has stated, in the form of a declaratory finding, the ground on which he proceeded, his judgment is in excess of his powers, and therefore reducible—*Hall v. Grant*, 19th May 1831, 9 Sh. 612. And, at any rate, the present is not a proper action brought for the purpose of setting aside a judgment of the Sheriff, irregularly or illegally pronounced, leaving it open to him to give judgment of new in due and correct form. It is, on the contrary, an action of declarator in this Court, of matters competent, as the Lord Ordinary thinks, to the Sheriff alone, and, as has been already remarked, the reductive conclusions applicable to the Sheriff's judgment are introduced merely to clear the way in the event of that being thought necessary for the exercise of the jurisdiction of this Court under the declaratory conclusions.

"It would be a singular result of the General Police Act in question, if, as was contended for by the pursuers, it were to be held necessary or competent, in reference to streets or any other of the numerous subjects to which it relates, to precede its enforcement by a declarator in the Supreme Court of its meaning and application. The Lord

Ordinary cannot think that such a course, leading, it might be, to great oppression, is either necessary or competent. It appears to him, on the contrary, to be opposed alike to the policy and provisions of the Police Act in question, and to authority—*Balfour v. Malcolm*, 4th March 1842, 1 Bell's Appeal Cases, p. 153; and *Smeaton v. Commissioners of Police of Burgh of St Andrews*, 17th May 1865, 3 Macpherson, 816. The latter of these cases arose under and in reference to the General Police Act here in question; and the circumstance that it related to drainage while the present case relates to streets, cannot affect the principle of decision.

"The Lord Ordinary is not, however, to be understood as holding that, in no circumstances, can a Sheriff's judgment, in reference to such matters as those now in dispute, be reviewed and set aside by this Court on the ground, for example, amongst others that might be suggested, of excess of power. But, in the present instance, neither excess of power, nor any other sufficient ground of reduction, is averred. All that the pursuers say against the Sheriff's judgment is—(1) That he pronounced it without allowing a proof, or making due inquiry; and (2) that he did not 'apply his mind to the matter.' What the latter, as a reason of reduction, precisely means, the Lord Ordinary does not profess to understand, and it was not explained to him. So far, however, as he can judge, it is nothing but a vague expression likely enough to be used by every party dissatisfied with an adverse judgment, and is, in no view that can be taken of it, an allegation that could be sent to probation, or otherwise sustained as a relevant challenge of a decree which is declared by statute not to be reviewable. So also, of the very general statement, that the Sheriff pronounced his judgment without formally allowing a proof. Having regard to the fact that the pursuers do not say that they asked for a proof, and the further fact that they do not state what materials and information the Sheriff had before him, or that these were not amply sufficient to enable him to advise the case, the Lord Ordinary cannot think that the allegation that he had not allowed a proof, especially when it is not said that any was asked, could, in any view of the case, be sustained as a ground of reduction. The Sheriff, it must be presumed, had the benefit of all the materials and information which the pursuers themselves possessed, when they, in the first instance, and before the appeal to the Sheriff was taken, disposed of the matter without any formal allowance of proof.

"The cases of the *Edinburgh and Glasgow Railway Company v. Lord Hopetoun*, 1st July 1840, 2 D. 1255, and *Erskine v. Kerr*, 15th December 1857, 20 D. 277, cited and relied on by the pursuers, do not appear to the Lord Ordinary to be applicable to the circumstances of the present case."

The Commissioners reclaimed, but to-day the Court held that they had no jurisdiction to entertain the action, and dismissed it.

The LORD JUSTICE-CLERK said—The question intended to be raised by this action is whether a certain street in the burgh of Leith, called Junction Street, is or is not a private street in the sense of the General Police and Improvement Act. The question we have to determine is, whether we have jurisdiction to entertain that matter. The Lord Ordinary has found it not competent or maintainable in this Court, and he has dismissed

the action. The first reason assigned by his Lordship is, that the reductive conclusions depend upon the declaratory, and that the latter can't be maintained. His Lordship states, however, an independent ground for holding that the declaratory conclusions can't be maintained—that they appear to ask nothing more than a declarator in the abstract—one separate from any right in the pursuers—that they involve nothing more than abstract propositions. Is that so? What is the thing sought to be found and declared? It is that North Junction Street is a private street in the sense of the Act. Now, while it is quite incompetent to have a declarator of a proposition in a statute, this is not that. The Act defines what shall constitute a private street; and the difference between the provisions of the statute and this declaratory conclusion is, that though the predicate is the same in both, the subjects are different. The statutory subject is, "any road, street, or place within the burgh (not being, &c.) used in a certain way," which has not been before the adoption of the Act well paved, and which has not been maintained as a public street. The subject of the action is North Junction Street. Therefore that reason for dismissing the action is clearly insufficient, and this applies to the other declaratory conclusions as well as the first. But there are other grounds of judgment involved in the Lord Ordinary's note which raise questions of great importance. There could not be much doubt that the question as to Junction Street might be made the subject of an appeal to the Sheriff. The Commissioners are to assess the proprietors adjoining for the repair of private streets, while the burden of an assessment for such purpose falls upon the general community in the case of a public street. If, then, the Commissioners assess private proprietors for the purposes of a public street, their interest to object is very obvious, and their right to do so is equally clear. If that is done, what does the statute say the parties are to do? Any one aggrieved by an order of the Commissioners, is to apply to the Sheriff. His recourse, in the first instance at all events, is to the Sheriff. But though the Sheriff has jurisdiction, two questions may be raised—Is that subject to review, and is it a privative jurisdiction? With regard to the first of these questions, I think the 397th section is conclusive against the competency of review, because it says—(his Lordship here read the portion of the clause above quoted). So that any reduction of the Sheriff's judgment, upon the ground that he has gone wrong, is plainly excluded if he had right to try the question, which I cannot doubt he had. The only remaining question, then, is whether, supposing the Sheriff to have gone altogether wrong—to have misread the Act—it is competent to come here with an action of declarator with a view to have new proceedings instituted and Junction Street dealt with afresh. A distinction of very great importance arises here between cases in which this Court has an antecedent jurisdiction and those in which it has not. In the former class of cases, very express words are required to take it away. In the latter, it is much easier to infer that it is not intended to be conferred. Now, the matters in question are things of burghal police, with which this Court has nothing to do; and the object of the General Police Act was to make the proceedings under it summary and final. On these grounds, I think that it is the fair construction of this Act, not only that there shall be no review of the Sheriff's judgments, but that his jurisdiction is privative. An illustration of

the distinction I have been drawing is to be found in the case of Miller, 5 S. 765 (N. E.)

Then the only remaining question comes to be, has the Sheriff exceeded his jurisdiction? Whatever opinion we might entertain on the merits of the question involved, it is clear that the Sheriff committed no excess of jurisdiction. I propose that, substantially, we should adhere.

Lord COWAN said—My opinion may be stated in a few words. The proceedings before the Sheriff were regularly taken before the statutory judge. The 397th and 437th sections of the Act protect his judgment from review. No reduction can be entertained, and the declaratory conclusions, as ancillary to the reductive, must fall with them. I look upon this action as a covert attempt to obtain review. I think the fifth paragraph of the Lord Ordinary's note ("It is plain, indeed," &c., down to "jurisdiction of this Court under the declaratory conclusions") contains reasons enough for the decision of this case.

Lord BENHOLME—I can't go along with the Lord Ordinary's judgment on the first ground upon which it is rested, as the object of this action is the application of a general descriptive clause of the statute to a particular subject. Nor can I think that this action seeks to have an abstract proposition declared in the sense of one of no interest to the parties. The ground upon which my opinion that this is an incompetent action proceeds is, that the Sheriff's jurisdiction is final and privative. I think it would be very inconvenient were it final and not privative.

Lord NEAVES—I concur that the subject of this suit is not an abstract question, and with all your Lordships upon the incompetency of this action.

Judgment accordingly, dismissing the action, and finding the pursuers liable in additional expenses.

Counsel for the Pursuers—The Solicitor-General and W. Ivory. Agent—William Mitchell, S.S.C.

Counsel for the Defenders—The Lord Advocate, Clark, Pattison, and A. Moncrieff. Agents—James Lamond, S.S.C., and Scott Moncrieff & Dalgety, W.S.

#### BONES v. MORRISON AND OTHERS.

*Executor—Next of Kin—Title to Office—Title to sue and insist in an Action—Exception to Title—Representatives of Next of Kin—4 Geo. IV., cap. 98, sec. 1.* Held by Lord Barcaple (acquiesced in and approved of), that an objection by a debtor of an executry estate to the title of the executors upon the ground that they did not possess the character ascribed to them in the decree-dative could not be sustained by way of exception. Held (alt. Lord Ormidale) that next of kin, or the representatives of such, were entitled to the office of executor, though not beneficially interested in the estate, in the absence of competition.

This was an action at the instance of persons designing themselves executrices-dative *qua* surviving next of kin of a Mrs John Maclaurin against the trustees acting under the will of the deceased John Maclaurin. The conclusions of the action were for count, reckoning, and payment with regard to one-half of the goods in communion betwixt Mr and Mrs Maclaurin at the date of her death.

Mrs Maclaurin died on 5th September 1825, childless and intestate. The pursuers were her nieces, and produced as their title a decree-dative in their favour as executrices-dative *qua* surviving next of kin of her, dated 7th October 1864. Mrs

Maclaurin was survived by her husband, who died in 1838. He left a settlement dated in 1837, under which the defenders are trustees.

The pursuers say that by Mrs Maclaurin's death as aforesaid one-half of the goods in communion devolved upon her next of kin, and that the same is now vested in them, and falls to be recovered and administered by them. They admit that at the date of Mrs Maclaurin's death they were not her next of kin, and that her nearest of kin then was their mother, Mrs Bone, who, they further admit, was survived by their father, Mr Bone, who is now also dead. The pursuers further say that they are the next of kin of their father as well as of their mother.

The defenders, on the other hand, averred that the pursuers did not represent any of those who were next of kin to Mrs Maclaurin at the time of her death; for, on the assumption that Mrs Bone, their mother, had such a claim, it was transferred to her husband *jure mariti*. They therefore pleaded—1st, As the pursuers do not represent the parties who were Mrs Maclaurin's next of kin at her death, they are not beneficially interested in her succession. 2d, The pursuers' title as libelled in the summons being not only unsupported but contradicted by their averments on record, the action should be dismissed.

In their original defences, the defenders had stated a preliminary plea in these terms—"The pursuers have no title to sue. They do not represent the parties who were Mrs Maclaurin's next of kin at her death." This plea was upon 27th June 1865 repelled by the Lord Ordinary (Barcaple) "as an objection to the title to sue," and this judgment was acquiesced in.

Parties having been heard upon the closed record, and the first two pleas in law above quoted, Lord Ormidale (Ordinary) sustained the same, and dismissed the action, and found the defenders entitled to expenses. In a note his Lordship said—

"The pursuers have brought, and now maintain, this action 'as executrices' dative *qua* 'surviving next of kin of the deceased Mrs Arabella Bell or Maclaurin.' Such is their title, and their only title libelled; and they conclude for count, reckoning, and payment of the amount of the goods in communion betwixt Mrs Bell or Maclaurin and her husband at the death of the former in 1825.

"In answer, however, to stat. 6 for the defenders, it is admitted that 'at the time of Mrs Maclaurin's death, the present pursuers were not among her next of kin, her sister, Mrs Alice Bell or Bone, the mother of the pursuers, being then alive.' The pursuers go on also to admit that at 'Mrs Maclaurin's death the pursuers' mother was married, and that she was survived by the pursuers' father, who died a few years ago.' The pursuers no doubt further add that they are executrices and next of kin of their father, as well as their mother, and that the interest which fell under their father's *jus mariti* devolves on them.

"Now, in the first place, the Lord Ordinary holds it to be clear that the pursuers can take no benefit in the present action—in the summons in which they expressly state that they sue as the next of kin or executrices dative, not of their father or mother, but of Mrs Maclaurin, who appears to have been their aunt—from the allegation introduced for the first time into their revised condescendence that they are also executrices and next of kin of their father and mother, in support of which they have neither libelled nor produced