

Tuesday, May 13.

EDUCATION (SCOTLAND) ACT.

[Sheriff Court, Aberdeen.]

ALEX. M'GILVRAY AND OTHERS.

35 and 36 Vict. c. 62—School Board—Election—Error.

Where less than seven clear days' notice was given of the names and designations of the candidates for election to a School Board in a rural parish—held that the error, not having been wilful or having affected the result, did not invalidate the election.

In this appeal, which relates to the validity of the election of the School Board of the parish of Millbrex, Sheriff WILSON has pronounced the following interlocutor:—

"Aberdeen, 13th May 1873—Having considered the cause, Finds that the Rev. James M'Gavan Smith, Mr William Malcolm, the Rev. David Wilson, Mr Alexander Forbes Douglas, and Mr Thomas Walker Mitchell, all designed in the Petition, have been duly elected members of the School Board of Millbrex: And therefore refuses the prayer of the petition, and decerns.

"Note—The election of the School Board for the parish of Millbrex is objected to on the ground that the Returning Officer failed to give seven clear days' notice before the day of election of the names, designation, and places of abode of the several candidates nominated. He is required to give this notice by section 7 of the Rules issued by the Board of Education for the conduct of elections in non-burghal parishes, and the Scotch Education Act (section 12) gives to those rules the force of statute.

"The election in question was fixed for the 15th of April. In order to have given seven clear days' notice, the requisite lists should have been affixed before midnight of the 7th of April. They were not affixed till between eight and nine in the morning of the 8th of April. The question is whether this irregularity invalidates the election. By the Act (section 14) this question has to be determined summarily by the Sheriff.

"There is an absence of authority on the question. The statute itself does not say that if everything which it prescribes be not accurately done the election be null, but the petitioners contended that as the office claimed by the respondents was entirely the creature of statute, they could not claim it unless they acquired it in the mode which the statute prescribed. It is thought, however, that this argument involves too severely accurate a view of the matter. The whole intention of the Legislature must be considered. The Act, and the regulations under it, contain provision for an immense number of matters of detail in regard to the elections, all following each other in a regular sequence, and it could never be intended that although everything was right, say on ninety-nine points, an election was to be invalid because it was wrong on the hundredth. If the petitioner's argument was right, any distinct error, however trivial, would set aside the election. If this view cannot be maintained, there must be some standard for deciding what errors will invalidate an election, and what will not, and the only standard which it

seems possible to apply is to ascertain whether the error is such that it could have had an effect in any way upon the result of the election.

"The Education Act in matters of this kind should be interpreted liberally, so as to attain the result which the Legislature intended without unnecessary waste of time or money. The Act is to be interpreted in a different way from penal Acts, or from those Acts which were referred to, where privileges were given provided they were exercised within certain times. For instance, if a right of appeal within a specified number of days is given, the right is gone when the time expires, but that concerns merely a personal right in the appellant, who has himself to blame if he does not exercise it. But if the same strictness were exercised in the present case, the consequences would fall, not on the person who made the mistake, but on the community.

"The question then is, whether the error could have affected the result of the election? This is a question which has to be decided with reference to the particular circumstances of the case. The parish was a small one. Of the 129 electors on the roll only 15 did not vote; and while the respondents offered to prove that the want of notice had nothing to do with those 15 not voting, the petitioners would not undertake to say that a single vote had been lost through the mistake. Besides, the error was in itself a very small one. Although seven clear days did not elapse, seven clear periods of twenty-four hours elapsed between the affixing of the lists and the opening of the poll: and it seems inconceivable, looking at all these circumstances, that the want of the few hours' notice on the morning of the 8th could have done any harm.

"It is a material element in the present case that the cause of the error made by the Returning Officer was explained in such a way as to show that it was not a consequence of a wilful or careless disregard of the statutory provisions, the Returning Officer having been misled as to the meaning of seven clear days by a published commentary on the Act. Should any error occur through wilful or careless disregard, a different principle would apply, because the mere fact of such an error having occurred would throw such suspicion on the whole proceedings of the returning officer, that, even though its effect may have been outwardly imperceptible, the election might almost necessarily have to be set aside."

Agent for Appellants—O. Prosser.

Agent for School Board—F. T. Garden.

Wednesday, May 14.

FIRST DIVISION.

KERR v. TAYLOR.

Reclaiming Note—Competency—Court of Session Act, § 53.

In an action of multiplepointing the Lord Ordinary pronounced an interlocutor finding who were the claimants entitled to a share of the fund *in medio*, and the proportions to which they were entitled. The amount of the fund *in medio* had not been ascertained, and there was no decree for the amount to which

the claimants were entitled, nor any finding as to expenses. *Held* that it was incompetent, under section 53 of the Court of Session Act 1868, to reclaim against this interlocutor without leave from the Lord Ordinary.

Act. M'Laren—Alt. Pattison.

Friday, May 16.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.]

DUKE OF ARGYLL *v.* DALGLEISH'S TRUSTEES.

Mid-Superiority—Disposition—Confirmation—Mid-Impediment.

The mid-superior of certain lands conveyed in 1808 the mid-superiority to the proprietor of the *dominium utile*, by a disposition containing only an *a me* manner of holding. Upon this the proprietor was infest in 1811. In 1834 the mid-superior granted to the proprietor a further disposition of the mid-superiority, bearing expressly to be in supplement of the former disposition, and containing warrant for infestment either *a me vel de me*. Upon this deed also the proprietor was infest in 1834. In 1849 the over-superior granted a deed of confirmation, both of the disposition of 1808 and the sasine of 1811 following thereon, and of the disposition of 1834 and the sasine of the same year following thereon. *Held* that the confirmation of the infestment of 1811 did not create a separate estate of mid-superiority, thereby operating as a mid-impediment to the public confirmation by the over-superior of the disposition and sasine of 1834, but that the disposition of 1808 and that of 1834 were to be read together as forming one conveyance of the mid-superiority, with a double manner of holding, and were both confirmed by the deed of 1849.

Charter of Confirmation—Validity—Error in description of Instrument of Sasine.

In a charter of confirmation an instrument of sasine to be confirmed was described as recorded on the 18th December, whereas the correct date of recording was the 18th September. The charter, after giving the erroneous date, contained the words, "or of whatever other date or tenor" the same may be. *Held* that this error did not invalidate the confirmation of the said instrument of sasine.

Instrument of Resignation ad remanentiam—Procurator—Designation, Omission of.

In an instrument of resignation *ad remanentiam*, the person who acted as procurator, though named, was not designed. *Opinions* that the omission was not fatal to the instrument.

This was an action of reduction, improbation, and declarator of non-entry, brought by the Duke of Argyll against the trustees of the late James Dalgleish of Westgrange and Ardnamurchan. The following are the circumstances which gave rise to the action:—By feu-disposition, dated 21st September 1696, Archibald Duke of Argyll conveyed the lands and barony of Ardnamurchan to Alexander Campbell of Lochnell in liferent, and to Duncan Campbell, his eldest son, in fee, for payment of 500 merks yearly of feu-duty, and for

certain services of hosting, hunting, and warding. Infestment was taken by these persons on this deed.

By contract of sub-feu, dated 12th October 1722, the said Duncan Campbell sub-feued the said lands and barony to Alexander Murray for payment of 6000 merks of feu-duty, and also for payment to the Duke of Argyll, the over-superior, of the foresaid sum of 500 merks, and for relief of all services due by him to the Duke as over-superior. Infestment was taken by Alexander Murray, and the *dominium utile* of the said lands and barony, after passing through several hands, descended to the now deceased Sir James Milles Riddell as heir of entail, who completed his title thereto by precept of *clare constat* from General Duncan Campbell as undivested mid-superior, dated 21st January and 14th July 1834, and instrument of sasine thereon, dated 21st July, and recorded 8th September 1834.

By disposition, dated 19th August 1808, General Duncan Campbell sold and disposed to Sir James Milles Riddell the foresaid estate of mid-superiority, to be holden of and under the Duke of Argyll, his heirs and successors, in feu-farm, for payment of the foresaid feu-duty of 500 merks, and also of the sum of £27, 18s. Scots money in lieu and place of the foresaid services of hosting, hunting, and warding. Sir James was infest on this disposition, conform to instrument of sasine dated 5th and 6th June, and recorded 15th July 1811.

Sir James also afterwards obtained a supplementary disposition from General Duncan Campbell of the said estate of mid-superiority, dated 13th February 1834. This deed proceeds upon the narrative of the foresaid sale and disposition of 19th August 1808, and of that disposition containing only an obligation to infest Sir James by a single manner of holding *a se*, and upon the further narrative that Sir James had requested that he should grant in Sir James' favour a supplementary disposition of the said lands containing a warrant for infesting him therein, either *a se vel de se*. On this narrative General Campbell, without prejudice to the said disposition of 1808 formerly granted by him, but in supplement thereof, sold and disposed to Sir James the said estate of mid-superiority. The said disposition contains an obligation to infest *a se vel de se* with procuratory of resignation, and precept of sasine. Sir James was infest upon this deed, conform to instrument of sasine, dated 21st July, and recorded 18th September 1834.

By charter of confirmation, dated 5th July 1849, the pursuer confirmed to and in favour of Sir James Milles Riddell, his heirs and assignees, the said lands and barony, the disposition of the mid-superiority, dated in 1808, and the sasine in 1811 thereon, the supplementary disposition of 1834, and the sasine thereon, which last-mentioned sasine is described in the charter as 'dated the 21st day of July, and recorded in the General Register of Sasines at Edinburgh the 18th day of December 1834, or of whatever other dates or tenor the said writs may be,' while the correct date of recording was 18th September 1834. This charter of confirmation bears that the said lands and barony are to be holden by Sir James and his forefathers immediately of and under the pursuer, his heirs and successors, in feu-farm fee and heritage for ever, giving therefor yearly to the pursuer and his forefathers the sum of 500 merks, and also paying to them