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,