

Tuesday, May 16.

DENNISTOUN v. RAINEY, KNOX & CO. AND OTHERS.

*Process—Judicature Act—Appeal—Jury Trial.* A cause having been appealed from a Sheriff Court under § 40 of the Judicature Act for trial by jury, a motion by the appellant to have the cause tried by a judge without a jury refused.

This was an appeal from the Sheriff-court of Glasgow, brought under § 40 of the Judicature Act (6 Geo. IV. c. 120). The Sheriff having ordered a proof, the pursuer appealed the cause to the Court of Session for trial by jury.

The SOLICITOR-GENERAL and SHAND, for the appellant, now moved to have the case tried by one of the Judges of the Division without a jury, or to be remitted to the Outer House, to be tried by a Lord Ordinary without a jury, inasmuch as the case was not suited for a jury.

WATSON and MACKINTOSH for the respondents.

At advising—

LORD PRESIDENT—The proposal of the appellants is that the case shall be tried by one of the Judges of this Division or a Lord Ordinary without a jury. It is important to express our views on this application. The appellant could not be here, at this stage, except under § 40 of the Judicature Act. The object of the Legislature, throughout the section, was to prevent Sheriff-court cases being appealed to the House of Lords on matters of fact. The enactments to prevent this are very carefully framed. The leading enactment is that the interlocutors of this Court on proofs taken in the inferior Courts shall be final as to matters of fact, and accordingly that the Court shall specify in the judgment the facts on which it proceeds in the form of special findings. Then power is given to the Court to supplement the proof in the inferior Court. Then at the end of the section it is provided that if a litigant in the inferior Court desires to have the facts of his cause ascertained by jury, he shall be allowed to advocate as soon as an interlocutor has been pronounced allowing proof, but if he does not avail himself of that permission he is held to have waived his right of appeal to the House of Lords against any judgment on the facts which may afterwards be pronounced by this Court. The effect of granting the appellant's motion would be that any finding in fact would be subject to the review of the House of Lords. This would be a manifest evasion of the Judicature Act. I do not desire to decide this as a question of competency. We must give full and fair effect to § 40. The appellant must either go back to the Sheriff or take an issue for jury trial.

The other judges concurred.

The Court refused the motion of the appellant; and, on the further motion of the appellant, allowed him to lodge issues.

Agents for Appellant—Hamilton, Kinnear & Beatson, W.S.

Agents for Respondents—Webster & Will, S.S.C.

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SECOND DIVISION.

STEWART v. STEWART.

*Process—Appeal—No Appearance.* In an action of filiation the Sheriff, affirming the decision of the Sheriff-Substitute, assoilized the defender. The pursuer appealed, and on the case being called in the Short Roll no appearance was made for the defender. The Court, after ascertaining that the proper intimation had been made upon him, sustained the appeal in respect of no appearance for the respondent, without hearing the counsel of the appellant. Counsel for the Appellant—Mr M'Kechnie. Agent—John A. Gillespie, S.S.C.

Tuesday, May 16.

FRENCH, PETITIONER.

*Process—Commissary Clerk—Confirmation—Caution.* The clerk of the Commissary Court, following the invariable practice of that Court, refused to appoint a woman, who had sufficient means, as cautioner in a confirmation.—*Held* that the Court should not interfere with the discretion of the clerk, although the woman proposed was seventy years of age and unmarried.

This was a petition at the instance of J. C. French and James French, presented to the Commissary of Edinburgh. The petitioners alleged that "the petitioners, as the children and nearest of kin of the said deceased John French, were lately decerned executors-dative to him, and have given up an inventory of the personal estate of the deceased, which amounts to £2547, 8s. 1d. That the petitioners, as their cautioner in the executry, have offered Miss Cameron, Edinburgh, and have furnished to the Commissary-clerk a certificate by a Justice of the Peace as to her sufficiency. The clerk, however, whilst not objecting for any other reason, has stated that Miss Cameron cannot be accepted as cautioner, on the ground that it is the rule of the Commissary Court never to accept a female as cautioner. Miss Cameron is a maiden lady upwards of seventy years of age, and there is no probability of her being married. She is amply sufficient as cautioner. Miss Cameron has agreed to become cautioner, and if your Lordship does not accept her the petitioners will be put to considerable inconvenience and loss."

The Commissary refused to order the Clerk of Court to accept of Miss Cameron as cautioner.

The petitioners appealed.

H. J. MONCREIFF for them.

The Court affirmed the Commissary's judgment. They held that they ought not to interfere with the discretion which was vested in the clerk. If they did so he would be relieved of the responsibility which rested with him. They would not interfere with what was admitted to be the invariable practice of the Commissary Court. There was no hardship in refusing to appoint in this case, as Miss Cameron could easily make a contract with some one else to become cautioner, and relieve him of responsibility.

The Court reserved their opinion as to the general question, whether a woman could become a cautioner.

Agents for Petitioner—Murray, Beith & Murray, W.S.