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.

Tuesday, May 16.

SECOND DIVISION.

STEWART *v.* STEWART.

Process—Appeal—No Appearance. In an action of filiation the Sheriff, affirming the decision of the Sheriff-Substitute, assoilzied 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, 3s. 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.

Wednesday, May 17.

FIRST DIVISION.

ROBERTSON *v.* MITCHELL.

Bankruptcy—Trustee—Removal—Petition. A petition for the removal of the trustee in a sequestration having been presented by the bankrupt, the Court, before answer, ordered the proceedings to be laid before the creditors. The creditors resolved that the trustee should continue in his office. The resolution having been reported to the Court, the petition was dismissed.

This was a petition and complaint at the instance of Mr Robertson of Dundonnachie against Mr R. Mitchell, the trustee on his sequestrated estate, praying for his removal from the office of trustee on the ground of certain alleged fraudulent proceedings. The Court, by interlocutor dated 17th March 1871, before answer, and reserving all objections to the competency of the petition, appointed the respondent, as trustee, to call a meeting of the creditors, to lay the proceedings before them, and to report to the Court any resolution that the creditors might adopt thereanent. A meeting of the creditors was accordingly called by notice and special circulars. The meeting was held on the 8th of April. A large number of creditors were present or represented by mandatories. The whole proceedings having been laid before the meeting, a resolution was proposed and carried, with one dissentient, that "the meeting is of opinion that they should not interfere, and that the trustee should continue in his office."

The minutes of the meeting were now reported to the Court and parties heard thereon.

The SOLICITOR-GENERAL and TAYLOR INNES for the respondent.

MORRISON, for the petitioner, was proceeding to address the Court, when Mr Robertson stated that he wished to plead his own case. He accordingly addressed the Court at considerable length.

At advising—

LORD PRESIDENT—When the case was before us on a former occasion, looking to the nature of the allegations made in the complaint, it did not seem to be for the interest of parties that the complaint should be *de plano* dismissed. But the case now stands very differently. The creditors have almost unanimously expressed a very decided opinion on the matter. We must keep in mind that the whole policy of the bankruptcy laws is to make the creditors masters of the bankrupt estate, to the exclusion of the bankrupt. Among other points the election and dismissal of the trustee is left entirely in the hands of the creditors under the statute, whatever may happen at common law under very exceptional circumstances. In the present case it would not be prudent for us to interfere with the resolution to which the creditors have come. We cannot take any step of the kind asked without interfering in the most direct manner with their resolution. It is our duty to refuse this complaint.

The other Judges concurred.

The Court refused the petition and complaint, but found no expenses due.

Agent for Petitioner—R. H. Arthur, S.S.C.

Agents for Respondent—Lindsay & Paterson, W.S.

Wednesday, May 17.

SECOND DIVISION.

MACQUEEN *v.* MACDONALD.

Process—Reponing—Appeal—A. S. 10th March 1870, ⁋ 3. An appellant living in the Island of Uist having neglected to print and box the Record, or to instruct an Edinburgh agent to do so within fourteen days after the process had been received by the clerk, *reponed*, on payment of £2, 2s. of expenses, on the ground that the omission had been made *per incuriam.*

In this action, which is one of filiation from the Sheriff-Court of Inverness, the Sheriff-Substitute and the Sheriff gave decree against the defender. Against these judgments the defender minuted an appeal to the Second Division on 13th April, and the process was received by the clerk on 26th April. The time fixed by ⁋ 3 of A. S. of 10th March 1870 for the appellant printing and boxing the Record, &c. (fourteen days), having been allowed to expire *per incuriam*, the appellant moved the Court to be reponed in terms of the subdivision 3 of ⁋ 3 of the A. S., and to be allowed eight days further to print and box the Record, &c.

FRASER and SCOTT for the appellant.

RHIND for respondent.

The Court granted the motion of the appellant. The fact that the case came from the Island of Uist, from which the communication was long and uncertain, and that this was the first case which had occurred under that section of the A. S., had much influence in the judgment, and the Judges indicated opinions that they proceeded on the peculiar circumstances of the case.

The section of the A. S. was not intended to allow an appellant to change his mind after allowing the fourteen days to expire.

The Court reponed, on condition of paying £2, 2s. of expenses.

Agent for the Appellant—John Gelletly, S.S.C.

Agent for Respondent—Crawford & J. Y. Guthrie, S.S.C.

Thursday, May 18.

FIRST DIVISION.

M'ALISTER *v.* BROWN AND OTHERS.

Proof—Payment—Writ or Oath—Diligence—Receipts. Where a party sought to instruct payment by writ or oath of the payees, the Court refused to grant a diligence for the recovery of receipts said to be in the hands of the payees, as the mere fact of such receipts being in their hands, unless supplemented by parole evidence, would not prove payment, but the reverse.

This was an appeal, under the 169th section of the Bankrupt Act, against a resolution of the creditors in the sequestration of James M'Alister, glass merchant in Glasgow. The appeal was taken by M'Alister himself, not *qua* bankrupt, but as trustee of certain parties deceased, alleged to be creditors on his estate. The resolution appealed against was a resolution that the estate shall not be wound up under deed of arrangement; and the object of the appeal was to have it declared that a counter resolution, that the estate ought to be wound up under a deed of arrangement, was carried by a due majority,—that is, by a majority in