Thursday, July 18.

FIRST DIVISION.

TURNBULL *v.* VEITCH.

Process—Amendment of Record—Pursuer Suing in New Character—Sheriff Courts Act 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 24.

Section 24 of the Sheriff Courts Act 1876 enacts:—"The sheriff may at any time amend any error or defect in the record in any action, . . . and all such amendments as may be necessary for the purpose of determining in the action the real question in controversy between the parties shall be so made." . . .

A widow brought an action as an individual to recover certain sums which she alleged to be due to her. Thereafter, having served as executrix-dative to her deceased husband, she lodged a minute craving to be allowed to insist in the action in that character. *Held* that the proposed amendment exceeded the power conferred on the Sheriff by the Act, and the minute *refused.*

This was an action by Mrs Agnes Turnbull, widow, against James Veitch for payment of certain sums of money which she alleged to be due to her by the defender.

The pursuer, who after the raising of the action was served as executrix-dative of her deceased husband, lodged in process the following minute:—"The said Mrs Agnes Wood or Turnbull, widow, residing at 17 Exchange Street, Jedburgh, executrix-dative *qua* relict to the deceased George Turnbull, sometime tinsmith, Jedburgh, craves to be allowed to sist herself as a pursuer for all right and interest competent to the late George Turnbull in the action at the instance of Mrs Agnes Wood or Turnbull, widow, residing at No. 17 Exchange Street, Jedburgh, pursuer, against James Veitch, butcher, Ancrum, near Jedburgh, defender."

On 24th January 1889 the Sheriff-Substitute (Spiers) repelled a plea of "no title to sue" by the defender, allowed the pursuer to sist herself as craved, and allowed a proof.

The defender appealed to the Sheriff, who on 26th February recalled the Sheriff-Substitute's interlocutor of 24th January 1889; refused the crave of the minute, and refused also the pursuer's motion (made at the debate), alternatively to the said minute, to be allowed to amend the petition by adding after the pursuer's designation, the words, "as executrix of the deceased George Turnbull and as an individual."

"*Note.*—It is settled that a new pursuer cannot be sisted in an action without the consent of the defender—*Morrison* v. *Gowans*, 1 R. 116. Further, it was settled by the case of *Smith* v. *Stoddart*, 12 D. 1185, which closely resembles the present, that a summons raised by a widow in her individual capacity could not competently be amended to the effect of libelling that she sued also as executrix of her husband. In *Hislop* v. *Macritchie*, 8 R. (H. of L.) 96, Lord Watson observed that the Court of Session Act 1868, sec. 29, which is practically the same as the Sheriff Court Act 1876, sec. 24, did not alter the law on this subject, and I am of opinion that the Sheriff Court Act does not do so. I therefore hold that it is not competent for the pursuer either to have herself sisted as a new pursuer, as she asks in the minute, or to have the summons amended to the effect of allowing her character of executrix to be inserted in it. I cannot do more with the case at present, as the pursuer avers that the debt is due to her as an individual. I have accordingly remitted the cause to the Sheriff-Substitute for further procedure; but the pursuer and her advisers would do well to consider seriously whether they can succeed in this action with the instance of the summons as it at present stands. On the statements and admissions made by the pursuer's agent at the debate, it appeared to me that if any debt is due for the aliment of the defender's child during the lifetime of the pursuer's husband, that is not a debt for which the pursuer is entitled to sue as an individual, but only as executrix of her husband. I understand that the pursuer had no separate estate during her husband's lifetime, and that the said child lived in family with her husband. If this is so, then assuming the claim for aliment to be otherwise well founded, it would seem the best course for the pursuer to abandon this action and raise another at the instance of herself as executrix of her husband and as an individual. It must not be supposed, however, that I advise the raising of another action. The pursuer must consider in the light of the averments made by the defender whether she has a good case or not."

Thereafter on 6th March the pursuer lodged a second minute in these terms:—"Riddoch, for the pursuer, craves the Court to allow the pursuer to amend her petition, in order that she may sue the action at her instance as 'executrix-dative *qua* widow of the late George Turnbull, tinsmith, Jedburgh, and as an individual,' or otherwise to sist process until a supplementary action is brought at the pursuer's instance as executrix-dative of her said husband, the late George Turnbull, against the defender, in order that the actions may be conjoined."

On 21st March the Sheriff-Substitute refused to grant the crave of this minute, and on 13th June, after evidence had been led, he assoilzied the defender from the conclusions of the action.

The pursuer appealed, and argued—The question was whether the minute of the pursuer should have been granted. The terms of section 24 of the Sheriff Courts Act 1876 were broad enough to cover the amendment proposed. "Record" embraced the petition, and therefore an error in the petition might be amended. The object of the amendment was to raise the real question in controversy between the parties, which was whether the defender was liable to the pursuer in the sums claimed—*Smith* v. *Stoddart*, July 5, 1850, 12 D. 1185, *per* Lord Dundrennan, 1187; *Morrison* v. *Gowans*, November 1, 1873, 1 R. 116. It was not maintained on the merits that these sums were due to the pursuer as an individual.

The respondent was not called on.

At advising—

Lord President—The only ground on which the proposition of the appellant is based is the 24th section of the Sheriff Court Act 1876. Now,

by the power of amendment permitted there, and in the Court of Session Act of 1868, there is a very valuable discretion vested in the Court, and a very expedient one if kept within reasonable bounds, but I am inclined to think it is one which must be very strictly watched, and may be carried too far, and the proposal here is, I think, to carry it far beyond the intention of the Act. The power of amendment in the Act is conferred in these terms—"The Sheriff may at any time amend any error or defect in the record in any action, upon such terms as to expenses or otherwise as to the Sheriff shall seem proper, and all such amendments as may be necessary for the purpose of determining in the action the real question in controversy between the parties shall be so made."

Now, in the first place, I do not think that an error or defect in the record is the same thing as a want of title in the pursuer as appearing on the face of record; and in the second place, this amendment cannot be made for the purpose of determining the real question in controversy between the parties, which was, whether the defender was indebted to the pursuer as an individual, which he was not. As the section of the Act does not apply, we must therefore fall back on the question whether it is competent to a pursuer to bring an action in one character and insist in it in another, and I think it is quite settled by authority that that cannot be done.

Lord Mure—The decisions quoted to us, particularly the case of *Smith* v. *Stoddart*, establish a principle which I think disposes of the proposition made by the pursuer that a party may proceed with an action in a different character from that in which he has brought it.

Lord Shand—I concur. I am disposed to think that the power of amendment which the Court receives under the Act should be very favourably construed, and I have observed that so construed it saves many new actions being brought. The present proposal, however, carries the matter too far. At the time the action was raised the pursuer did not possess the character of executrix of her deceased husband, and therefore the action was stamped as an action by herself as an individual, and could not be at her instance as executrix, as she possessed no such character. The proposal is that having acquired that character she should amend the action as brought and sue in her new character of executrix. That appears to me to go quite beyond the power of amendment in the Act, and to create an entirely new pursuer, and I am therefore of opinion that the Sheriff is right.

Lord Adam—This is simply an attempt to introduce a new pursuer as a party to the cause. There is no warrant for that in the 24th section of the Sheriff Courts Act of 1876, and I therefore think the Sheriff has reached a right conclusion.

The Court adhered to the interlocutor of the Sheriff-Principal.

Counsel for the Pursuer—Wilson. Agent—Thomas M'Naught, S.S.C.

Counsel for the Defender—A. S. D. Thomson. Agent—Adam Sheill, S.S.C.

Friday, July 19.

FIRST DIVISION.

[Lord Fraser, Ordinary.

DOMINION BANK OF TORONTO *v.* BANK OF SCOTLAND.

(*Dominion Bank* v. *Anderson & Company*, February 10, 1888, *ante*, vol. xxv., p. 324.)

Bill—Liability of Agents Employed to Collect Bill—Unauthorised Cancellation—Proof of Loss—Onus.

A bill having been protested for non-payment was afterwards forwarded to a bank agent who offered to try and obtain payment of it. The acceptors expressed their willingness to pay the amount of the bill and the protest charges on condition that they were freed from any claim for interest and expenses, and this condition was communicated to the holders. Without waiting for their reply the bank agent took payment of the amount of the bill and the protest charges, marked the bill "paid," and handed it over to the acceptors who deleted their signatures. The holders refused to agree to the condition mentioned, returned the money tendered to them in payment of the bill, and received back the cancelled bill. They then raised an action against the acceptors, in which they obtained decree for the amount of the bill and interest thereon, and for the expenses of the action. Before this decree could be enforced by summary diligence the acceptors were sequestrated.

In an action by the holders against the bank, whose agent had cancelled the bill, for payment of the bill, the interest thereon, and the expenses of the action against the acceptors—*held* (1) (*diss* Lord Mure) that the defenders were liable, it being proved that but for the cancellation of the bill, which was unauthorised, payment would have been recovered by summary diligence against the acceptors; and (2) that the defenders were not bound to proceed against the drawers before proceeding against the defenders, though the latter might be entitled to an assignation to enable them to proceed against the drawers.

Opinion (*per* Lord Mure) that the *onus* lay upon the pursuers to prove that payment could have been recovered by summary diligence on the bill against the acceptors; and *opinions* (*per* Lord Shand and Lord Adam) that the *onus* was on the defenders to prove the contrary.

The Dominion Bank, Toronto, were holders for value of a bill for £2939, 9s. 6d., dated 28th September 1886, drawn by the M'Arthur Brothers, Limited, upon and accepted by William Anderson & Company, merchants, Grangemouth. The Dominion Bank transmitted the bill to the National Bank of Scotland, Limited, London, for collection, and the latter bank presented it for payment on 7th May 1887 at the Bank of Scotland in London, where the same was payable, but payment was refused, and it was protested for non-payment.