Saturday, January 23.

SECOND DIVISION.

[Sheriff-Substitute of Forfarshire.

ORMOND *v.* ALEXANDER HENDERSON & SONS.

Poor's Roll—Appeal from Sheriff-Substitute, and Reporters Equally Divided in Opinion.

A pursuer in a Sheriff Court action for damages for personal injury appealed direct to the Court of Session against a judgment of the Sheriff-Substitute dismissing the action as irrelevant. The pursuer applied for the benefit of the poor's roll, and the reporters on *probabilis causa* were equally divided in opinion as to the relevancy of the pursuer's averments. The Court *refused* the application.

This was an action brought in the Sheriff Court at Dundee by Samuel Ormond, jute worker, against Alexander Henderson & Sons, spinners in Dundee. The pursuer craved decree for £100 as damages for personal injuries sustained by him.

The Sheriff Substitute (CAMPBELL SMITH), by interlocutor dated 29th July 1896, dismissed the action as irrelevant.

The pursuer appealed to the Court of Session, and applied for admission to the poor's roll. The case was remitted to the reporters on the *probabilis causa litigandi* of applicants for the benefit of the poor's roll, who on 18th December reported that they were equally divided in opinion on the question whether the pursuer's averments disclosed a relevant ground of action. The pursuer moved the Court to admit. The defenders opposed the motion on the ground that when the applicant had appealed direct to the Court of Session from the judgment of the Sheriff-Substitute without taking the judgment of the Sheriff, the case must be taken to be practically in the same position as if both Sheriffs had decided against the applicant, and therefore to be governed by the rule laid down in the case of *Carr* v. *North British Railway Company*, November 1, 1885, 13 R. 113; and *Watson* v. *Callander Coal Company*, November 17, 1888, 16 R. 111, which was to the effect that when both Sheriffs were against the applicant and the reporters were equally divided, the application ought to be refused.

At advising—

The opinion of the Court was delivered by

LORD TRAYNER—This is an application for the benefit of the poor's roll, and as the reporters on *probabilis causa* are divided in opinion, the question is whether the applicant is entitled to the privilege which he seeks.

On the authorities cited to us at the discussion, it appears that the Court has laid down what I think I may venture to call a rule, that where the judgments of the Sheriff and the Sheriff-Substitute are against the applicant, and the reporters are divided in opinion, the application for admission to the benefits of the poor's roll is refused.

That rule appears to me to be a sound rule, with which I would not interfere. This case, however, is not exactly in the position of the cases to which the rule has hitherto been applied, because the applicant has appealed directly from the Sheriff-Substitute, who has found his case to be irrelevant, and has not taken advantage of the appeal to the Sheriff, which was open to him. I think that an applicant who does not avail himself of the right to appeal to the Sheriff must be held to occupy the same position as if he had exhausted the resources of the Inferior Courts—as if he had appealed to the Sheriff, who had affirmed the judgment of his Substitute. If the Sheriff on appeal had differed from the Sheriff-Substitute, there would have been no need of further appeal. The pursuer would then have had a judgment to the effect that his case was relevant. If the Sheriff had agreed with the Sheriff-Substitute and held the action irrelevant, then the pursuer would have been within the rule which I have mentioned. But as the applicant has not taken advantage of the appeal afforded by the Sheriff Court procedure, I think he must be taken as if he acknowledged that the Sheriff would on appeal have been of the same opinion as his Substitute. I am accordingly of opinion that the application should be refused.

The Court refused the application.

Counsel for the Applicant (Pursuer)—Blair. Agent—R. Macdougald, S.S.C.

Counsel for the Defenders—E. F. Macpherson. Agent—Charles T. Cox, W.S.

Thursday, January 28.

FIRST DIVISION.

FREER'S TRUSTEES *v.* FREER.

Succession—Trust—Capital or Income—Liferent Use of Residue—Profits of Law Business.

A truster directed his trustees that his widow should have during her widowhood the free liferent use and enjoyment of the residue and remainder of his whole means and estate. By a codicil the truster—who was a solicitor, at that time practising alone—authorised his trustees to make arrangements for carrying on his business till one of his sons should be ready to take it up. Before his death the truster entered into a partnership, which was to last fourteen years, with power to either party to terminate it at the end of seven. One of the conditions was, that in the case of the death of the truster

during the currency of the partnership, a certain proportion of the future profits of the business should thereafter belong to the remaining partner, and the remainder to the representatives of the truster.

Held that in a question with the liferentrix, the share of profits accruing to the truster's representatives fell to be treated as capital, and not as income. *Strain's Trustees* v. *Strain*, July 19, 1893, 20 R. 1025, *distinguished.*

Mr John Freer, solicitor, Melrose, died on 2nd February 1893, leaving a trust-disposition and settlement dated 16th October 1891, with two codicils annexed, both dated 13th October 1892.

By the trust-deed he disponed his whole estate to trustees, and he directed them—"*Fourth*, With regard to the residue and remainder of my whole means and estate, I direct that the said Harriette Beatrice M'Ewen or Freer shall enjoy the free liferent use and enjoyment thereof during her viduity, subject to the maintenance and education of my children, and upon her death or second marriage, that the same shall be conveyed and made over to my said children equally, share and share alike."

By the first codicil Mr Freer provided—"I, John Freer, before designed, do hereby authorise my said trustees, as they shall think best, either first, to dispose of my business in Melrose at any time, or, second, to make arrangements for carrying on the same until one or other of my sons, if they elect to follow out the profession, is ready to take it up for himself or in partnership; and in so carrying on said business I authorise my said trustees to allow any sum not exceeding two thousand five hundred pounds to remain as capital in said business on such terms as they may arrange."

The truster for many years carried on business as a solicitor and bank-agent in Melrose, at first in partnership with his father, but after the death of his father in 1881, until a few weeks before his own death, he carried on business alone.

Shortly before his death the truster assumed as a partner Mr Thomas Muir, S.S.C., the business being thenceforward carried on under the name of Freer & Muir. By the contract of copartnery, dated 31st December 1892, and 2nd January 1893, the copartnership was to endure to 31st December 1906, but with power to either party to put an end to it at 31st December 1899.

It was provided, *inter alia*—"*Eighth*, In the case of the death of the said John Freer during the currency of this contract, two-thirds of the future profits of the business shall thereafter belong to the said Thomas Temple Muir, and one-third thereof to the representatives of the said John Freer during the remaining period fixed for the endurance of the copartnership." . . . "*Ninth*, In the event of the death of the said John Freer during the currency of this contract, his representatives shall be entitled to require the said Thomas Temple Muir, at any time during its currency, or at the end of the period fixed for the endurance of the copartnership, to assume as a partner one of the said John Freer's sons, and that for a period of seven years after the date of the expiry of this contract, and to give to the son so assumed" a certain proportion of the profits, "and that on terms and conditions similar to those contained in this contract; and on such assumption taking place, the right and interest of the said John Freer's representatives in the profits of the said business shall thenceforth cease; or otherwise in lieu of such assumption it shall be in the option of the representatives of the said John Freer to require the said Thomas Temple Muir to pay to them the sum of £ *per annum* out of the profits of the said business for a period of five years after the date of the expiry of this contract."

The powers referred to in the ninth article have not yet been exercised.

A special case was raised by, *first*, Mr Freer's trustees, and, *second*, his widow, as to how the share of the profits of the business to which Mr Freer's representatives were entitled were to be treated in a question with the second party as liferentrix. The first parties contended that this share was of the nature of an annual payment out of the profits in respect of goodwill, and was intended by the testator to form part of the capital of his estate, as being merely a temporary source of income.

The second party contended that it was intended by her husband that his whole annual income should go to her, and that this share of profits formed part of the annual income, and was not a payment for goodwill of the nature of capital.

The question submitted by the parties was—"Is this share of the profits to which Mr Freer's representatives are entitled to be treated as capital or income by his trustees?"

Argued for first parties—The power given to the trustees by the codicil had been superseded by the contract of copartnery executed after it. Accordingly, the goodwill was no longer part of the residue, but had passed to the surviving partner. All that the trustees had in respect of the business was a *jus crediti*—a right to demand their proportion of the profits. The profits did not represent income accruing from residue in the hands of the trustees; nor were they profits of a business belonging to and administered by the trustees. They were merely income which the trustees by virtue of their *jus crediti* and the contract of copartnery had a right to ingather as it accrued. When profits arose from a going business which the trustees were carrying on, they were to be treated as income. But unless they were the produce of means and estate held and administered by the trustees, they could not be considered the revenue of the capital which was held by them under the will—*Strain's Trustees* v. *Strain*, July 19, 1893, 20 R. 1025, as contrasted with *Ferguson* v. *Ferguson's Trustees*, February 23,

1877, 4 R. 532; *Campbell* v. *Wardlaw*, July 6, 1883, 10 R. (H. of L.) 65.

Argued for the second party—The truster was the sole partner when he made his disposition, and his clear intention as expressed there, and in the codicil, was that the whole annual proceeds of his "residue," including the business, was to go to his widow. Though the application of the codicil was altered by the partnership deed the intention was not. The trustees had come in the truster's place in relation to the partnership to the extent of one-third. There was an annual payment coming in for a number of years, and that, coupled with the obvious intention of the testator, showed it should be treated as income. There was no such thing as "goodwill" with reference to a solicitor's business—*Bain* v. *Munro*, January 10, 1878, 5 R. 416. The case of *Ferguson* had been overruled by *Strain*, which governed this case.

LORD ADAM—The question submitted to us in this special case arises thus:—Mr Freer, who was a law-agent and solicitor, left a trust-disposition by which he conveyed his estate to trustees, and after directing certain small payments, made the following provision as to the residue—[*His Lordship here quoted the terms of the fourth purpose of the trust, and proceeded*]. He also left a codicil dated 13th October 1892, at which time he was carrying on business alone. But before his death the position of matters changed, for in December of 1892 he entered into partnership with Mr Muir, with whom he executed a contract of copartnery. That contract is not fully set out, but we see from the eighth and ninth provisions that on the death of Mr Freer two-thirds of the future profits of the business were to belong to Mr Muir, and one-third was to be paid to Mr Freer's representatives. His trustees were entitled to require Mr Muir to take into partnership one of Mr Freer's sons, and the duration of the contract was to be for fourteen years, with power to either party to break it at the end of seven.

The question before us is whether the one-third of the profits payable by Mr Muir to Mr Freer's trustees, which will be payable alternately till the year 1899 or 1906, is capital or income.

My view is that these payments are part of the residue of the estate, and that accordingly Mrs Freer is only entitled to the enjoyment of the interest on them. So far as we have seen from the contract, Mr Muir became the sole partner on Mr Freer's death. The trustees are not partners, and are not entitled to interfere with the management of the business, and accordingly Mr Muir is entitled to uplift the whole profits, and only then does the claim of the trustees to one-third come in. It appears to me that that is only a debt due by Mr Muir to the trustees, which they can enforce against him every year, and that it is like any other debt, as if he had bound himself under a bond to make such payment to the trustees. It is part of the residue, and it follows that the provisions of the codicil apply to a state of affairs which has ceased to exist. There might have been a different question if the trustees had carried on the business in accordance with the terms of the codicil, and had allowed certain capital to remain in the business, and in that case the profits might have gone to Mrs Freer. But that consideration does not apply now, and accordingly the case must be determined in accordance with the terms of the settlement and of the obligations in the contract. Construing the two together, I come to the conclusion that the share of the profits falls into the residue, and that Mrs Freer is only entitled to the income therefrom.

LORD M'LAREN—The late Mr Freer made a will and codicil some years before his death, but within a month of that event he entered into a contract of copartnery which was to endure for fourteen years, with right to himself or his partner to terminate the contract at the end of seven years.

The right of Mr Freer's representatives under the contract of copartnery is a right to receive a share of profits, and it is to last for seven years in any event, and possibly for fourteen years. Part of that time has expired, but we have to consider the case as at the testator's death. The right of the trustees at the present time is to receive one-third of the profits of the business carried on by the partner of the deceased Mr Freer, and the question is, whether this annual payment is to be made over to Mrs Freer as "liferent of residue," or whether it is to be considered residue, so that the lady shall only enjoy the annual return from this sum treated as capital or residue.

There have been, as counsel stated, decisions upon questions which are nearly related to this, but I think, in common with Lord Adam, that the questions are not identical.

A testator who wishes to give the income or interest of his estate to his widow or child may express his intention to do so in different ways. He may give a share of the income of the trust, or he may give a provision in the form of the liferent or annual return from the capital of the estate. At first sight it may seem that there is not much difference between these, but when one comes to deal with a terminable interest the distinction arises very sharply between the two forms of expression, because according to the latest decision, if the testator gives the income it would include everything coming in within the year, whether of the nature of annual return or capital payment.

Of course there is no absolute rule, but according to *Strain's* case the presumption seems to be that recurrent payments fall under income. But if the annual interest which is given to the widow or child is clearly marked as the return on the capital of the estate I cannot see how such a provision could be construed so as to include capital sums coming to the trust in the shape of annual instalments.

We are not favoured with a complete copy of the contract of copartnery, and I

have no doubt the parties were well advised that it was not necessary for the question which they desired to submit that the Court should have it. Without seeing the whole contract I am unable to offer an opinion as to whether the payment which the trustees are now receiving is of the nature of goodwill or debt, or whether it is such a share of the profits as would make the trustees partners. I daresay it is not a very practical question, because a law-agent's business is usually not a hazardous one. But for the purposes of the present question it is not material to consider what is the true nature of the claim. We can at least predicate of the payment that it is one which will probably end in seven years, and that it is not derived from the investment of part of the capital of the trust-estate. It is a payment under contract, and I cannot see how an annual payment under contract can be treated as a liferent of residue. If that is so, it leads necessarily to a determination against Mrs Freer and in favour of the trustees.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court affirmed the first alternative of the question.

Counsel for the First Parties—A. S. D. Thomson. Agent—Andrew Tosh, S.S.C.

Counsel for the Second Party—Sym. Agent—James Skinner, S.S.C.

REGISTRATION APPEAL COURT.

Saturday, November 28, 1896.

(Before Lord Kinnear, Lord Trayner, and Lord Kincairney).

WALLACE *v.* BORRIE AND ANOTHER.

Election Law—Service Franchise—Policeman Residing in Barracks—Representation of the People Act 1884 (48 *Vict. c.* 3), *sec.* 3.

By section 3 of the Representation of the People Act 1884 it is provided—"Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, he shall be deemed for the purposes of this Act, and of the Representation of the People Acts, to be an inhabitant-occupier of such dwelling-house as a tenant."

A police constable, residing in barracks, occupied a separate room, of which he kept the key, and of which he had the exclusive use. He slept in the room, sat in it when off duty, and received visitors in it. Separate common rooms were provided for meals and recreation. The right of the constable to the room was contingent on his remaining in the force, and the barracks were subject to the control of the chief-constable, who might at any time remove the constable from the barracks, order him to change his room and give up the key, forbid him to receive visitors in the room, and order him to open the door to let any person in authority go in. *Held* that the constable was an inhabitant-occupier under the section.

At a Registration Court for the city of Glasgow, Robert Wallace, 4 Adelphi Street, Glasgow, objected to William Borrie and Roderick Bowie, 6 East Clyde Street, having their names retained on the roll for the Blackfriars Division of the city, as tenants and occupants of houses at that address in virtue of service.

The following joint-minute of admissions was adjusted by the parties, and states the facts of the case:—"The persons objected to are police constables in the Central Police Division, and are at present on the roll of voters for the Blackfriars and Hutchesontown Division. Each of the parties objected to have had during the whole of the qualifying period the exclusive occupation of one room. The barracks in which these rooms are situated accommodate 82 constables, each of whom has the exclusive use of one room, of which he keeps the key, and has the sole control subject to the orders of the Chief-Constable and of the inspectors. Each constable has a key for his room. He sleeps in it at night, and sits in it by day when off duty. He is entitled to receive, and does receive, visitors in it. Separate rooms are provided for meals, recreation, brushing boots, &c. These latter are common to the whole constables living in the barracks. Two police inspectors also live in the barracks, and are responsible to the Chief-Constable for the maintenance of order, but the whole control of the building lies with the chief-constable. The right to their rooms of those constables who live in the barracks is contingent on their continuance in the police force. There is deducted from the wages of each constable the sum of 1s. 9d. per week for the use of the furnished bedroom and the common rooms. They are, along with all other constables in Glasgow, whether residing in barracks or in private houses, liable to be called out at any time on any emergency arising. The two persons objected to have occupied the same rooms continuously during the whole qualifying period."

It was admitted that the Chief-Constable could (1) at any time remove a constable from the barracks, (2) order him to change his bedroom, (3) order him to keep certain hours, (4) order him not to receive visitors in his room, (5) order him not to take his meals in his room, (6) order him to give up his key on ceasing to occupy his room, (7) order him to open the door of his room if he is inside, so as to let the Chief-Constable, inspector, or other person in authority, go in.

The Sheriff (ERSKINE MURRAY) upheld the entry of the names in the roll, holding that both the parties objected to were tenants under the service