ing any power to the Court to effect transfers or complete titles to ships. Farther, it seems to be contemplated that the order should be granted at once, and for the purpose of carrying out the order of sale, section 63 enacts that every order of sale shall contain a declaration vesting the right to transfer the ship or share so to be sold in a nominee of the Court, who shall thereupon be entitled to transfer as if he were registered owner. Section 64 limits the time within which an application for sale may be made. All that is quite clear, but the proceeding is very summary and rapid, and it may naturally occur that, in the course of this summary procedure, there are persons who have an interest and a title to interfere. The case is an anomalous one altogether, and accordingly it appears to me that section 65 is intended entirely for the purpose of providing for that case. When you read the section, every term in it corresponds with that idea. The very term "interested person," suggests there may be any kind of interest entitling one to interfere betwixt the nominee and the unqualified person. It would be most unsafe to define what kind of interest is necessary. Indeed, I abstain from illustrating the matter. I think it means any person who can establish a *prima facie* interest of any kind. But, farther, what kind of prohibition is to be issued under section 65? Not what we are asked to grant in this petition, but it is to be for a time to be named —that is, until proper inquiry can be made. Besides, what is the subject, the dealing with which is to be prohibited? It is "such ship or share," to which words it is impossible, on any principle of construction, to find an antecedent except in the preceding sections. On these grounds I am clear that this petition is incompetent.

The other Judges concurred, and the petition was therefore refused as incompetent, with expenses.

Agent for Petitioner—John Henry, S.S.C.

Agents for Respondents — Wilson, Burn, & Gloag, W.S.

Saturday, March 9.

SECOND DIVISION.

MACLEAN AND HOPE *v.* FLEMING (*ante*, p. 270).

Process—Evidence (Scotland) Act, 1866—*Commission—Witnesses Abroad—Jury Trial—Act of Sederunt*, 1841. Held (repeating the judgment of the Court of Feb. 23, 1867) that commission to examine witnesses beyond the jurisdiction of the Court in terms of the Evidence (Scotland) Act 1866, must be preceded by affidavit and adjusted interrogatories, it being the intention of the Act to assimilate its practice to that applicable to jury trial, and the latter being fixed by the Act of Sederunt of 1841.

In this case, on 23d February last, the Court recalled an interlocutor of the Lord Ordinary (Kinloch), who granted a commission to the Vice-Consul at Constantinople to examine the witnesses in the cause that were to be obtained there. The case was set down for trial before the Lord Ordinary under the Evidence Act of 1866. The Court on that occasion held that, under the Evidence Act it was only competent to take on commission the *whole* evidence in the cause, and that, either upon cause shown to the Court, or of consent of parties; and that, if commission should be granted to examine any witness who is resident beyond the jurisdiction of the Court, that could only be done with reference to the existing practice. The pursuers then made a motion to the Lord Ordinary that they were entitled to get a commission for the purpose of examining certain witnesses named, without either making affidavit according to the practice applicable to jury trial, or preparing interrogatories for the examination of the witnesses. The defender having objected to the motion, the Lord Ordinary reported the case.

CLARK and WATSON, for the defender, argued —The object of the Evidence Act in dispensing with proof by commission is as far as possible to assimilate its practice to that applicable to jury trial. That practice is fixed by the 17th section of the Act of Sederunt of 1841, which provides that such examination as is here craved by the pursuers shall proceed upon affidavit and interrogatories; and, it being so fixed, it is not within the discretion of the Court to dispense with these formalities.

YOUNG and MACKENZIE, in answer—The Act says nothing as to the practice of jury trial. In the 10th section of the Sheriff Court Act there is a provision in terms the same as the third exception in the second clause of the Evidence Act, and affidavit and interrogatories are unknown in the practice of the Sheriff Court. Further, the system of examination by affidavit and interrogatories is highly inconvenient, and is not to be enforced by implication when it is not *per expressum* enjoined.

At advising,

LORD JUSTICE-CLERK—Since the discussion yesterday, we are in a condition to say that, in the view of the majority of the Court at the time of the former decision in the case, their judgment was influenced by the assumed application of the Act of Sederunt of 1841. But, as the view taken by the Court rested upon grounds not necessarily involving an adoption of the Act of Sederunt as the basis of judgment, as the Court is now differently constituted, and as the case is anxiously pressed as involving an important rule in procedure under a new statute, I have thought it right to form and express the judgment to which I have come independently of authority.

The application is made with reference to a case set down for trial upon a day fixed before the Lord Ordinary. In the ordinary course of proceedings the party who makes the application would have to bring all his witnesses before the Judge, who on that day was to try the cause as a jury would under other circumstances have done. I do not attach any consequence to the question as to whether such a case could have been tried otherwise than by a jury prior to the passing of the Act. The rule as to trial where formerly no other than a jury was competent and as to trial in reference to a matter where a different method of trial might have been competent, must, I think, be precisely the same. The analogy is between proceedings set down to be tried on a day certain and by adduction of parole evidence before a Lord Ordinary, and the case where issues had been adjusted, and a trial was impending before a jury. The first section of the Act declares it incompetent to grant commissions except as hereinafter directed, and the second section contains the direction and the portion of the direction applicable to this case "to grant such commission," &c. A separate provision at the close of the section applies to proofs to lie *in retentis*. The reference to existing practice in the material part of the clause is certainly not applicable to proofs taken to lie *in retentis*. It

is specially applicable to the case of absent or infirm witnesses, parties unable to attend the trial or not within the jurisdiction of the Court, so that a party may have the compulsitor of law to enforce attendance. I take it that where depositions were taken before issues were settled they were generally taken to lie *in retentis*. The existing practice referred to in the material portion of the clause in applications as to parties resident beyond the jurisdiction, or incapable of attending to give evidence, is certainly the practice as fixed by the A. S. 1841. I think that we are referred to the case of certain exceptional grants of commission, having, as the special object in view, the dispensation with personal attendance of witnesses at a trial, and when we find a precise course prescribed under an A. S. *in viridi observantia*, we cannot, I think, ignore it. If the application, according to existing practice in such a case, requires a previous affidavit, and the preparation of interrogatories, it seems to me impossible to depart from that practice, where a strict adherence to the rule of practice is insisted on by one of the parties, without violating the Act of Parliament. Considerations as to the expediency or inexpediency of the rule prescribed cannot affect the question. If the Act of Parliament requires an adherence to a special practice, it is immaterial whether the practice is a wise one or not. But I am by no means persuaded that the observance of the practice in the particular case of witnesses resident beyond the jurisdiction of the Court is disadvantageous. In cases where parties, owing to sudden illness or to great age, but resident in Scotland, are unable to come here to attend a trial, the preparation of interrogatories may cause delay, and lead to a form of examination more cramped and fettered both in chief and in cross, and perhaps more readily admitting of the witness being prepared for his answers, than if no interrogatories were adjusted; but in that case there is a *copia peritorum* at hand—counsel or agents who are conversant with the case may attend. But it is otherwise in reference to the examination of parties resident in distant countries, and it may be in various ports or towns scattered along a considerable extent of coast. The cost of conducting an examination without interrogatories would be very great, or the examination very unsatisfactory. The preparation of questions in chief and in cross, by insuring that the case on both sides shall be brought out, may save the journey of agents or counsel or reliance upon such instructions as can be given to parties on the spot not very able to receive or make available this instruction. In such a case as the present, I have known one instance in my own practice where the citation of the witnesses and their examination, and the return of the commission with the depositions taken, were left entirely to the official party named as commissioner. One or other of the parties, or both, may, in cases of this nature, be saved a very large amount of expense by interrogatories. I should hesitate, were it open, to dispense with them, one party requiring the form to be observed, but I hold it incompetent to do so. As to the affidavit, it is obviously here a matter of no consequence; it might have been otherwise, however, if the application had been made under one of the classes coming within the same category.

The other Judges concurred.

The Lord Ordinary was instructed in terms of the above judgment.

Agents for Pursuers—White-Millar & Robson, S.S.C.

Agent for Defender—J. Henry, S.S.C.

COURT OF JUSTICIARY.

Monday, March 11.

(Before the Lord Justice-General and Lords Cowan and Neaves.)

MORTON *v.* GORDON, JOHNSTON, AND DAVIDSON.

Day Poaching Act — Conviction — Enforcement. Held that a conviction obtained upon a complaint at the instance of the Procurator-Fiscal could be enforced after he had vacated office.

The suspender was convicted in November 1865, at the instance of Mr Johnston, the Procurator Fiscal of the Justice of Peace Court of the Stewartry of Kirkcudbright under the Day Poaching Act, 2 and 3 Will. IV., c. 68. The warrant of imprisonment in the conviction (failing payment of the penalty and costs) was put in force in January 1867. Morton presented a note of suspension and liberation on the grounds (1) that Mr Johnston had never authorised the apprehension and imprisonment; and (2) that the parish minister, to whom the penalty in the conviction was ordered to be paid, being now dead, there was no one in existence to whom the penalty could be paid so as to satisfy the conviction. Mr Johnston ceased to act as Fiscal in 1866. The parties called in addition to Mr Johnston as respondents were Gordon, on whose grounds the trespass was committed, and Davidson, as Chief Constable of the Stewartry, who, as was alleged, had instructed the enforcing of the sentence.

The Court refused the suspension, holding that it was to be presumed that the delay in enforcing the warrant arose from Morton not having been found until now; that the sentence here being a criminal sentence, the prosecutor had no option, when once it was pronounced, of enforcing or not enforcing it; and that the superintendent of police had a right to enforce the warrant against the suspender.

Counsel for Suspender—Mr Pattison. Agent—James Somerville, S.S.C.

Counsel for Respondent Gordon—The Solicitor-General (Millar) and Mr A. Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for Johnston—Mr Charles Scott. Agent—W. S. Stuart, S.S.C.

SEATON *v.* BROWN AND GRAHAM.

Embezzlement Act—Oath of Credible Witness—Alteration of Date. Held *ex parte* that a conviction was bad in respect the original warrant for apprehension which required to be preceded by an oath of a credible witness had been altered in its date, so as to make it subsequent to date of oath.

This was a suspension of a conviction under the Embezzlement Act, 17 George III., c. 56, obtained before the Justices of the Peace at Girvan, whereby the suspender was convicted of neglecting or refusing to work up certain yarn entrusted to him for the purpose of being worked up into cloth. There were various grounds of suspension, including one to the effect that the original warrant for apprehension was dated "9th February," and signed "James Crawford," whereas the oath of the credible witness, which required to precede warrant of apprehension, was dated 11th February, and emitted before John M'Cracken, and the warrant was afterwards altered so as to be of subsequent date to