

COURT OF SESSION.
—
EXTENDED SITTINGS.

Thursday, March 21.

SECOND DIVISION.

WATSON OR M'GOWAN v. WATSON.

Sheriff—Petition—Delivery of Deeds—Feu-Contract—Recording—Act 1693. Held—(1) That a summary petition in the Sheriff Court by a party alleging an interest in them for delivery of two deeds, one being a feu-contract, was a competent proceeding. (2) That a feu-contract was properly recorded in the books of the Sheriff Court, it not falling within the operation of the Act of 1693 applicable to feu-charters.

This is an advocacy from the Steward Court of Kirkcudbright. John Watson, shepherd, Porkarine, in the parish of Urr, brought a petition in the Steward Court, praying that the respondent should be ordained to deliver up to him, upon a receipt and obligation to redeliver them, the following deeds—viz., (1) feu-contract entered into between James Gibson, Esq., of Kelton, deceased, and Robert Watson, also deceased, and his father, dated 8th May 1784; and (2) settlement of Robert Watson in favour of John Watson, the petitioner's father, Robert Watson's eldest son, and his three daughters, Margaret and Agnes, the respondents, and Mary, the petitioner's aunts, dated 25th June 1822. The petitioner alleged that Robert Watson died, leaving certain heritable property, and also a settlement leaving that property to John Watson, his eldest son, now deceased, to Agnes Watson or M'Gowan, Margaret Watson or M'Night, two of the respondents in this case, and to Mary Watson, his daughter. He further says that John Watson died intestate, and that he is his eldest and nearest and lawful heir of line; and that Mary Watson died intestate, and that he stands in the same relation to her; and also that he is the nearest and lawful heir of line of his grandfather, the said Robert Watson. The Steward (Hector), overruling a judgment of the Steward-Substitute, held that the petitioner had averred a case entitling him to have the deeds produced, and ordered their production, subject to the condition "that his agent, who may receive the same, shall undertake to have the writings duly recorded within a time to be fixed, for behoof of all parties interested." The respondents were ultimately found liable in expenses in the inferior court.

They advocated.

PATTISON and DUNDAS GRANT, for them, argued—The petition was incompetent in the Steward Court; the proper remedy was an action of exhibition. Further, it was incompetent for the Steward to order the recording of a feu-contract, for such a deed is in the same position as a feu-charter, which can only be registered in the books of Council and Session under the Act of 1693.

SOLICITOR-GENERAL and SCOTT in answer.

To-day the Court (Lord NEAVES delivering the opinion of the Court) adhered to the interlocutor of the Steward, holding that he had taken a proper view of the case in ordering the deed to be recorded, and that it was properly recorded in the Steward Court, the Act of 1693 only applying to

the transmission of subaltern rights, not to the creation of new ones.

Agent for Advocate—J. Barton, S.S.C.

Agent for Respondent—W. S. Stuart, S.S.C.

Monday, March 25.

THOMSON v. PHILP.

Promissory Note—Payee—Reference to Oath. (1) Terms of a document which held not to be a promissory note in respect of uncertainty in the payee. (2) Held (Lord Neaves diss.) that a reference to oath which was declared negative of the reference was an implied surrender of every other form of proof, and that a party who had availed himself of it had excluded his right to all other.

This is an advocacy from the Sheriff Court of Fifeshire. John Thomson, carter, Cairneyhill, for himself, and for his own right and interest in the premises, and as executor and universal legatory of the deceased Julia Paton or Young, residing at Cairneyhill, widow of William Young, feuar there, conform to last will and testament executed by her in his favour, dated the 26th of July 1862, sued the defender upon an alleged promissory-note in the following terms:—

"£40.—Twelve months after date I promise to pay to Mrs July Paton Young, or James Thomson, carter, Carnehill, or thar order, the sum of £40 sterling, with interest.

(Signed) "ROBERT PHILP.

"Carenhill, 20th Sept. 1862."

There was an alternative conclusion in the summons for alleged cash advances by the said Julia Paton or Young to the defender "in different sums and at different times (the particular sum and dates being to the pursuer unknown) prior to the 20th of September 1862," under deduction of a sum of £1 paid to account. The Sheriff-Substitute (Bell) held that the document libelled was not a promissory-note in respect it did not contain an unconditional promise to pay to a particular payee, and as to the alternative conclusion of the summons that it was defective by reason of want of specification. He therefore assoilized the defender from the first conclusion, and dismissed the summons *quoad* the second. The Sheriff (Mackenzie) adhered to this interlocutor so far as it found that the document libelled on was not a promissory-note, but altered as to the alternative conclusion, and found that the pursuer's averment might be proved by the writ or oath of the defender. That oath was taken, and the Sheriff-Substitute found that it was negative of the reference. The Sheriff adhered. The pursuer advocated.

FRASER and SCOTT for him.

W. M. THOMSON for the respondent.

At advising,

LORD JUSTICE-CLERK—The action under advocacy was brought by the advocator, who was pursuer in the inferior Court, to recover an alleged debt of £40 with interest, said to be due to the pursuer. It was rested in its first conclusion upon an alleged promissory-note for the amount. It contained an alternative conclusion for payment of the debt.

The object of the pursuer under each conclusion, as appears from the fact of alternative libelling, was to recover the alleged debt, either as proved or established by a document said to be privileged, or, if the document should not afford evidence