Friday, January 19.

NICOLL *v.* BRITTEN & OWDEN.

Process—Proof—Proof on Commission.

Held that proof on commission in those of the causes enumerated in the Judicature Act of 1825 which are described in 13 and 14 Vict. c. 36, § 49, as "actions for libel or for nuisance, or properly and in substance actions of damages," is still incompetent notwithstanding the provisions of the Court of Session Act 1868, sec. 27, and relative Act of Sederunt, March 10, 1870.

In this case, which was an action of damages for wrongous use of diligence, the parties agreed to request the Lord Ordinary (MURE) to allow the proof to be taken at Aberdeen, where the circumstances in which it arose occurred. The Lord Ordinary being of opinion that this procedure would be for the advantage of the parties to the cause, reported the case to the First Division, on the point, Whether, supposing that he was satisfied of the expediency, he had power under the statutes to grant the motion.

RHIND for the pursuer.

BIRNIE for the defenders.

At advising—

LORD PRESIDENT—This is an action of damages for wrongous use of diligence, and the summons contains no conclusions except for them. The parties have concurred in asking the Lord Ordinary to grant commission for taking the evidence in the case at Aberdeen. The question on which the Lord Ordinary has reported to us is, whether he has power to grant this motion, supposing he thought it expedient to do so.

This question depends upon the construction of several clauses of the different Acts of Parliament regulating the order of taking proof in this Court. The taking of proof by commission was extended or regulated by the 49th section of 13 and 14 Vict. c. 36. By the previous Judicature Act of 1825 certain causes were appropriated to jury trial, and under that statute it was not competent to try them in any other way. But section 49 of the Act of 1850 operated a change in that rule. It enacted that it should be competent to the Lord Ordinary, with the consent of both parties, or upon the motion of one party, with the leave of the Inner House obtained upon the report of the Lord Ordinary, to appoint the evidence in any cause not falling under the causes enumerated in the Judicature Act to be taken by commission, "Provided always, that it shall be competent for the Court to allow proof on commission in any of such enumerated causes where the action is not an action for libel or for nuisance, or properly and in substance an action of damages." Now, under that section it was competent to the Lord Ordinary in the non-enumerated causes to allow a proof by commission in certain circumstances, with the leave of the Inner House obtained on report. The only difference on the previous practice introduced by this section was the requiring the leave of the Inner House, and the extension of the procedure to certain of the enumerated causes. But under that section the present case could not competently have been treated in the manner proposed. It comes under the head of those enumerated causes still excepted. And the question comes to be, whether by any subsequent statute a further change was made? The next Act dealing with matters of this kind is the Evidence Act of 1866. But it does not appear to me that this application gains any strength from its provisions. The object of that Act was to abolish proof on commission as much as possible. It did not indeed do so entirely and absolutely, but it discouraged it to the utmost. The first clause of this Act provides, "that except as hereinafter enacted, it shall not be competent in any cause depending before the Court of Session to grant commission to take proof, but when in such causes it is according to the existing practice competent to take proof by commission, and when in such causes proof shall be allowed," the evidence shall be led before the Lord Ordinary. And then it proceeds to describe how proofs are to be taken, which before its passing could have been taken on commission. Then the second section is a proviso on the first. It enacts that it shall be competent to take the depositions of havers on commission; "and also upon special cause shown, or with consent of both parties, to grant commission to take the evidence in any cause in which commission to take evidence may according to the existing law and practice be granted." Now, this exception to the rule of the first section is entirely confined to cases in which, according to the existing law and practice, it would be competent to take proof by commission. But there having been no alteration in this respect between 1850 and 1866, the cases falling under the exception remain as they were under the Act of the former year. The third section is of no importance to the present case. The fourth provides, that if both parties consent, it shall be competent to the Lord Ordinary to take proof in the manner provided by the first section in any cause depending before him, notwithstanding the provisions contained in the Judicature Act and in the 49th section of the Act of 1850. Here, undoubtedly, there is a relaxation of the rule about enumerated causes. But it is only to the effect of substituting for jury trial the new method introduced by the statute, of taking evidence before the Lord Ordinary himself, and gives no sanction to any extension of the practice of taking evidence on commission. Under this statute of 1866, therefore, there is no foundation for the application here made. The only other enactments which bear in any way upon the question are the Court of Session Act of 1868 and the subsequent Act of Sederunt of 1870. The 27th section of the Court of Session Act regulates procedure before the Lord Ordinary immediately after closing the record. It provides that if the parties shall not agree to renounce farther probation the Lord Ordinary shall appoint the cause to be debated summarily, and after hearing parties he shall determine whether farther probation should be allowed; and if he shall consider that it is necessary he shall determine whether it is to be limited to proof by writ or oath, and if not, whether it is to be taken before a jury, or in whatever manner of way. Then follow the four sub-sections, which provide, first, for the case where farther probation is refused; second, where farther probation is to be limited to writ or oath; third, where it is to be by trial before a jury; and fourth, "If the Lord Ordinary shall think farther probation should not be taken before a jury, he may pronounce an interlocutor dispensing with the adjusting of issues, and determining the manner in which proof is to be taken or inquiry to be made, and make such order as may be necessary for giving effect to such interlocutor." Now, it is contended that this fourth sub-section gives the Lord Ordi-

nary plenary power to order proof to be taken in any manner he pleases. This would certainly give a very large and extraordinary effect to words of a very general character. I think that the construction proposed is an impossible one; and if it had been intended by the Legislature to do away in this clause with the distinction between the enumerated cases and those not enumerated, there certainly would have been a direct provision on the subject. It would not have been left to implication merely from a clause couched in such general terms as these. This view receives considerable support from the fact that there is in section 62 of this Act an express repeal of a part of the Evidence Act. But the inference is that the part unrepealed is to be allowed to stand. I cannot therefore avoid the conclusion that the provisions on the subject of taking evidence by commission are unaffected by the Act of 1868.

Now, the Act of Sederunt of 1870 is liable to the same observation. It is true that the powers of the Court under the Act of 1868 to regulate procedure under the Act are very large. They are more nearly powers of legislation than have ever before been accorded. But even supposing that the Court had full legislative powers, still this Act of Sederunt, framed by them in virtue thereof, is open to the same kind of construction as the Act of Parliament itself. Now, what does this Act of Sederunt effect? In its first part it substitutes for the 27th section of the Court of Session Act several provisions of its own, the fourth of which enacts that it shall be competent for parties having a cause standing in the procedure roll, in regard to which they have come to be agreed that it should be disposed of by a proof before the Lord Ordinary, or a trial by jury or otherwise, to enroll the cause, &c. Now, it is said that there is a great deal of force in these word, "*or otherwise*," and without them the application would have no support from this Act of Sederunt. It is contended that these words sweep away all restrictions upon the taking of proof on commission. Now, this would be to assume in the Court a very violent exercise of the powers conferred upon it, not only in altering the provisions of the Act of 1868, but also those of the Acts of 1850 and 1866. I need not say that the Court in the Act of Sederunt referred to had no such intention.

The other Judges concurred.

The Lord Ordinary accordingly, having advised with the First Division of the Court, refused the motion.

Agent for Pursuer—Wm. Officer, S.S.C.
Agents for Defenders—W. &. J. Burness, W.S.

Saturday, January 20.

MRS ANNIE LAWSON OR SURTEES *v.* ROBERT WOTHERSPOON.

Process—Proof—Judicial Examination—Competency—Declarator of Marriage.

Circumstances in which the judicial examination of the defender in a declarator of marriage was refused, there being no undue concealment or suspicion attaching to him, and no necessary probability of a *penuria testium*.

Opinion by the Lord President that judicial examination is still competent after proof has been led.

This was an action of declarator of marriage founded upon promise *subsequente copulâ*, or alternatively, for damages for breach of promise of marriage.

The pursuer Mrs Lawson or Surtees averred that the defender, who was an iron merchant in Glasgow, had made her acquaintance in February 1865, had paid his addresses to her, and expressed his desire that she should become his wife. That during the following years he continued on the same footing, doing much for her two children, and executing a codicil to his will in her and their favour. That finally, in November 1867, he gave her a written promise of marriage, on which repeated acts of connection followed during the three subsequent months.

The defender, on the other hand, alleged that when he made the acquaintance of the pursuer in 1865 she was a woman of loose character. That in that and the subsequent years he frequently had connection with her, for which he always paid as to a common prostitute, and that he never stood in any other relation to her. That in consequence of her conduct he broke off even this connection towards the close of 1867. He also averred that since the present action had been threatened he had discovered that in 1863 the pursuer had brought a similar declarator of marriage against a Mr Dewar, which, though allowed to fall asleep in December 1864, was still in Court in 1870, when, on her motion, the process was wakened and the defender assoilzied. These were all the averments in the defender's own statement of facts, but it otherwise appeared that the defender admitted the written promise, while alleging that it was conditional, and that the conditions had not been purified by the pursuer, so as to be competently made the ground of an action of declarator of marriage. And denied that any copula had taken place on the faith of any such promise, or with the view of constituting marriage.

The Lord Ordinary (MACKENZIE) on 21st November 1871 pronounced the following interlocutor:—

"*Edinburgh, 21st November* 1871.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record and process, before answer allows the parties a proof of their respective averments in so far as regards the conclusions for declarator of marriage and adherence, and to the pursuer a conjunct probation; grants diligence," &c.

Thereafter on 23d December 1871 he pronounced this other interlocutor:—

"*Edinburgh, 23d December* 1871.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, allows the defender to be judicially examined, first in regard to the carnal connection of the defender with the pursuer set forth in the record; and second, in regard to the defender's knowledge, during the period between the month of January 1865 and the 5th of July 1871, of and concerning the action at the pursuer's instance against Francis Dewar, and the procedure therein, and appoints the said judicial examination to take place before the Lord Ordinary on Thursday the 11th day of January, at half-past ten o'clock.

"*Note.*—The Lord Ordinary considers that the judicial examination of the defender should be