Saturday, January 17.

FIRST DIVISION.

[Sheriff of Argyllshire.

CHISHOLM *v.* MARSHALL.

Inspector of Poor—Title to sue—Judicature Act, § 40.

In a case where the Inspector of Poor of a parish once forming part of a combination of parishes, now dissolved, brought an action against a sheriff-officer to recover certain arrears of poor rates which the latter had been employed to collect—*held* (1) that the pursuer had a good title to sue; (2) that the defender having appealed under section 40 of the Judicature Act, it was in the discretion of the Court to send the case back to the Sheriff.

Peter Chisholm, the pursuer in this action, was Inspector of Poor in the Islay Combination of Parishes, and James Marshall, the defender, was a sheriff officer who had been employed between 1864 and 1869 to recover certain arrears of poor rates due to the Islay Combination, now dissolved, but represented by the three parishes which formerly made up the Combination. It was averred that the defender had failed to account for about £46 of the money which he had recovered, and the summons called for an account of his intromissions during the period above mentioned.

The defender pleaded—"*Preliminary*—(1) No title to sue. (2) Prescription. (3) *Mora* and taciturnity. (4) The defender having yearly settled and fitted his accounts with the said Parochial Board of the said Islay Combination of Parishes, and duly paid them all sums recovered by him, the said accounts cannot now be opened up, nor can the accounting and settlement which has taken place between the parties now be challenged. (5) The pursuer's whole statements and pleas are not relevant or sufficient in law to support the conclusions of the action. (6) The said Islay Combination having settled and fitted the defender's account in the full knowledge of the premises, cannot now open up the said accounts on the ground that the charges made were contrary to public statute law. *On the merits.*—(7) The said preliminary pleas are repeated. (8) The pursuer's statement and pleas being false in fact and untenable in law, the defender is entitled to absolvitor, with expenses. (9) The defender is entitled to compensation for any sum that may be found due to him, in the event of any sum being found due by him to the pursuer, or otherwise to retain the same."

The Sheriff-Substitute (HOME) repelled the preliminary pleas, and ordered a proof, and his judgement was affirmed by the Sheriff (CLEGHORN). The defender appealed with a view to jury trial under section 40 of the Judicature Act.

Argued for him:—(1) A combination of parishes is not a legal *persona* entitled to sue as a corporation—8 and 9 Vict. cap. 83, sec. 16: 24 and 25 Vict. cap. 18, sec. 5. (2.) The Board of Supervision has power not only to determine questions but to confer rights of property, and until they have done so here by apportioning to each parish its share of the sum concluded for, it cannot be said that any member of the combination has a title to sue, nor has the pursuer, Chisholm, a title to sue until it is conferred on him by the Board of Supervision. (3) The defender was not employed by the inspector, but by the collector, who is the party who ought to sue; the defender for four years dealt with the collector, who passed his accounts. (4) The pursuer has not averred the terms of the contract of service, which he was bound to do. (5) Having come to the Court of Session under section 40 of the Judicature Act, the defender is entitled to have his case disposed of there, and not sent back to the Sheriff.

ADAM, for the respondent, was not called upon.

At advising—

LORD PRESIDENT—This is rather a peculiar case. The arrears to be collected were due to a combination of parishes, which combination is now dissolved, but the action is brought by the Parochial Board, which represents the combination. The Board sues through the inspector of poor—or rather three boards do so—and if they have not a title to sue, I really do not see who has. 24 and 25 Vict. c. § 5. has no application to the case. As to the question of relevancy, the action seems to me to be quite well raised.

[The appellant having asked for an issue or a proof before a Lord Ordinary]—

LORD PRESIDENT—This is a matter on which I have no doubt. The defender is the person who has brought the case here, and he has been quite consistent all through in asking for an issue, but there can be no question that, if we find that the case is not one which can be properly sent to a jury there is no obligation on us to send it there. Failing that, there are only two courses open to us, either to order the proof to be taken here, or to send the case back to the Sheriff. The case of *Dennistoun*, 16th May 1871, 9 Macph. 739, shows that it would be a plain violation of the spirit of section 40 of the Judicature Act to have the proof taken here, and so we must send it back to the Sheriff, before whom the proof will be taken.

The Court pronounced the following interlocutor:—

"Affirm the interlocutor of the Sheriff in so far as it affirms the interlocutor of the Sheriff-Substitute repelling the preliminary pleas: Find that this case is not suited to be tried by jury; therefore refuse the appeal, and remit the case to the Sheriff to proceed, and decern: Find the appellant liable in expenses, under deduction of £5, 5s. as the expenses of the appellant's appearance on the tenth instant, when the respondent failed to appear: Allow an account of the expenses now found due to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Marshall—Asher and M'Kechnie. Agent—David Cook, S.S.C.

Counsel for Chisholm—Adam. Agents—Murray Beith & Murray, W.S.