

Friday, January 23.

## FIRST DIVISION.

[Sheriff of Roxburgh, Berwick,  
and Selkirk.

THOMSON v. LAURIE.

*Vote of Mandatory—Election of Registrar—Registration Act (17 and 18 Vict. cap. 80) §§ 8, 9, and 12—Parochial Board—Poor Law Amendment Act 1845.*

The twelfth section of the Registration Act (1855) provides that when there shall be a vacancy in the office of registrar the Parochial Board shall by a majority of the votes of the members present at a meeting specially called for that purpose, elect the registrar of the parish. In a question as to the construction of this provision—held that heritors, members of the Board, were entitled to attend and vote at that meeting by mandatory.

At a meeting of the Parochial Board of the Parish of St Boswells, held 23d August 1873, the board proceeded to elect a registrar. The names of two candidates for the office, Mr Laurie (the respondent) and Mr Turnbull, were duly proposed and seconded. Mandates from a number of members of the board were handed in. Previous to the vote being taken the chairman decided that an election of registrar by the Parochial Board could only take place by a majority of the votes of the members present at that meeting specially called for the purpose, and consequently that all the votes founded on mandate must be excluded. The result of the vote was in favour of the appellant. Thereupon Mr Thomson and others, who held mandates authorising them to vote at said meeting, protested against the validity of the election, and appealed to the Sheriff, as provided by the Registration Act, praying him to recall the appointment of the said Mr Laurie, in respect his election was illegal owing to the exclusion of the votes of the mandatories.

On 11th December 1873, the Sheriff (PATTISON) pronounced the following interlocutor:—“The Sheriff having resumed consideration of this case, recalls the deliverance of the meeting of the Parochial Board of St Boswells, held on 23d August last, declaring Mr Thomas Laurie to be elected registrar of the parish of St Boswells: Finds that heritors being members of the Parochial Board may competently vote at such meetings by an agent or mandatory duly appointed: Finds that there were several mandates from such heritors produced at the said meeting, and that the mandatories thereby appointed were not allowed to vote: Finds that there was no proper election of registrar at said meeting, and that the said Thomas Laurie was not duly elected registrar: Appoints the Inspector of Poor to call a special meeting for the purpose of electing the registrar of said parish, and that in such and the like manner as the ordinary meeting of the parochial board are called under the Act passed in the eighth and ninth years of the reign of Her present Majesty, chapter eighty-three, entitled ‘An act for the amendment and better administration of the laws relating to the relief of the poor in Scotland,’ and decerns.

“*Note.*—The question involved in the present case is one of considerable difficulty, and it is not without much and repeated consideration that the

Sheriff has arrived at the conclusion indicated by his interlocutor.

“The appointment of registrar is regulated by the statute 17 & 18 Victoria, cap. 80. The clauses to be looked to are sections 8, 9, and 12 of that statute. By section 8 it is provided that the registrar shall be elected ‘in manner hereinafter provided’ by the Parochial Board of each parish appointed and acting under the Poor Law Amendment Act, and it is declared that such Parochial Board shall be judges of the qualification of the person to be elected registrar.

“By section 9, the meetings of the Parochial Board ‘for the trial of the qualifications and election of registrar’ are appointed to be called by the Inspector of the Poor acting under said Act, in the same manner as the ordinary meetings of the Parochial Board are called under the said Act.

“By the 12th section, it is provided that when there shall be a vacancy in the office of registrar, the Parochial Board shall, subject to the provisions thereinbefore contained, by a majority of the votes of the members present at a meeting specially called for the purpose, elect the registrar of the parish.

“By these provisions the Sheriff holds that the statute of the 17 & 18th Victoria adopts the Parochial Board of the parish as an already existing body, with all its conditions and attributes, as appointed and acting under the Poor Law Act, and commits to that body the election of registrar. Now the Parochial Board, as appointed under the Poor Law Act in parishes not burghal, consists of the owners of lands and heritages of the yearly value of £20 and upwards; of the provost and bailies of any royal burgh in such parish, if any; of the kirk-session of such parish, and of such number of elected members to be elected in manner therein-mentioned, as shall be fixed by the Board of Supervision. The Parochial Board of the parish of St Boswells is accordingly a board so constituted; now, it is a condition provided by the same statute of such board, that it shall ‘be competent for any heritor being a member of the Parochial Board to appoint as heretofore, by writing under his hand, any other person to be his agent or mandatory to act and vote for him at such board, and such appointment shall remain in force till recalled, and such writing of appointment is hereby declared to be valid and lawful, although the paper whereon it is written should not be stamped.’

“The meaning of this plainly is, that at every meeting of the Parochial Board for whatever purpose, the heritors who are members of that board may act by their mandatories duly appointed. The act of the mandatory—in other words his presence at the meeting—is equivalent to that of the heritor. This was an essential condition in the constitution of the Parochial Board of St Boswells, as existing at the date of the Registration Acts, and in all the elections and resolutions of the board, governed of course by the majority of the votes at the meeting, such mandatories are held to be members of the meeting, not in their own right, but in the right of the mandant, and their presence and vote are equivalent to the vote and presence of the mandant.

“All this must be kept in view in considering and construing the Regulation Act. And there can be no doubt that, unless controlled by other portions of the statute, the right to act and vote at the election of registrar could be exercised by heritors, members of the Parochial Board, by mandatory duly appointed: such undoubtedly would be

the effect of the eighth section of the statute, which is the leading enactment taken by himself.

"It is said that this section is qualified by the words following shall be elected, viz.:—'in manner hereinafter provided,' and that these words refer to the provision in the 12th section, providing that the election shall be by a majority of the votes of the members present at a meeting specially called for the purpose. It is to be observed, however, that the provision in section 12 is made 'subject to the provisions hereinbefore contained,' which in like manner qualifies the provision that the election shall be by a majority of the votes of the persons present. In short, it comes to this, that the 8th, 9th, and 12th sections must be read together, for they refer to one another. Besides, the words in the 8th section 'hereinafter provided,' refer also to what follows in the same section, and to the provisions in the 9th section as to how and when the meetings of the board are to be called and held. They do not refer exclusively to section 12.

"It is very strongly urged that because of these words in section 8, and of the words in section 12, that the board should elect the registrar by a majority of the votes of the members present at a meeting specially called for that purpose, the statutory provision regulating the constitution of the Parochial Board, and giving the right to heritors to act and vote thereat by mandatories, is superseded or limited, and that the election of the registrar is confined to the individual members personally present at the election meeting.

"The Sheriff cannot adopt this rigid interpretation. He does not think that much force is to be attributed to the words 'present at the meeting.' The word board implies meetings of the board, because all boards must and do act by meetings of the persons constituting the board, and the Sheriff does not think that the words 'a majority of the votes of persons present at the meeting' is anything more than a majority of votes at a meeting of the board specially called for the purpose. For it must be remembered that this provision is accompanied with a reference back to the provisions 'hereinbefore contained,' and the previous provisions, as already remarked, deal with the Parochial Board as an existing body, with all the qualifications and conditions in its constitution under the Poor Law Statute. Reading it so, members present may fairly be held to mean present by themselves, and by their duly appointed agents or mandatories so far as that is competent. For it must be remembered that it is not every member of the Parochial Board who can act and vote by a mandatory. Neither the provost and bailies of a royal burgh—where there are such in a parish—nor the members of the kirk-session, nor the elected members of the board, can do so; these last can only vote personally at any meeting. The heritors can vote by mandatories. The provision is to be read with reference to this state of matters, that is, as to those who are heritors present by themselves, or mandatories duly authorised, and as to the others in the only way which they can act or vote—namely, in their own persons. The Sheriff is the more inclined to this interpretation, because the other interpretation would be introducing a limitation into the rights of a very important portion of the members of the Parochial Board, which is not to be lightly inferred, and would in many instances practically exclude them from voting, while the interpretation which

the Sheriff prefers, gives in his opinion due effect to the words of the section.

"It was suggested, that while the meetings of the Parochial Board as to the poor were proper parochial matters, that the election of registrar was not so, and was something, as it were, superinduced upon the proper business of the board. The Sheriff does not think there is any force in this argument. Indeed, he rather thinks that the registration of birth, deaths, and marriages was a matter of parochial administration under the old Canon Law before any Poor Law existed. Independent of that, however, he conceives there can be no business more properly connected with the parish than that of such registration.

"But it was said that the words in the beginning of the 9th section, speaking of the meetings of the Parochial Board, 'for the trial of the qualifications and the election of a registrar' imply that the parties who elect must be present at the meeting for the trial, and that therefore the words of the 12th section must be limited to the members of the board actually present. But this is just *idem per idem*. For if the trial of the qualifications of the registrar is an act to be done by the Parochial Board, then by the very words of the statute the members of the board who are heritors can act in this matter,—that is, can do this by mandatories. But these words as to trial occur only in the section directing how the meetings are to be called. It is nowhere provided that the Parochial Board shall 'take trial of the qualifications' as if they were dealing with the admission of a member into an Incorporation of Tailors, or the like, whose qualifications to do any piece of work could be put to trial. The only enactment on the subject is in section 8, that the Parochial Board shall be 'judges of the qualifications of persons to be elected registrar.' It does not say how they are to qualify themselves to be judges. It does not say they are to put candidates to a trial, a thing which would not be applicable to such an office at all, and therefore this suggestion has no weight with the Sheriff."

The respondent appealed to the First Division of the Court of Session.

At advising—

LORD ARMILLAN—The question before us for consideration has arisen in the election of a registrar, occurring in the course of procedure under the Act 17 and 18 Vict., cap. 80, and especially the sections 8, 9, and 12. By the 8th section it is provided that the registrar shall be elected, in manner hereinafter provided, by the Parochial Board of the parish, appointed and acting under the Poor Law Amendment Act. By the 9th section the meetings of the Parochial Board, constituted and acting under the Poor Law Act, but required to do special service under the Registration Act, are appointed to be called by the Inspector of the Poor under the Poor Law Act, in the same manner as the ordinary meetings of the Parochial Board are called. It thus appears that the services of the Parochial Board, acting under the Poor Law Act, are called in aid and made available for the election of a registrar under the Registration Act, the meetings being held and the procedure being conducted according to the manner of ordinary meetings of the Parochial Board.

The constitution of the Parochial Board is regulated by the provisions of the Poor Law Act, and of course this Act for registration makes no change in that respect.

The board in this parish of St Boswells, and in any such parish, consists of owners to the statutory amount of lands and heritages within the parish, of the kirk-session of the parish, and of a certain number of elected members. It is provided that it shall be competent for any member of the board who sits as a heritor "to appoint, as heretofore, by writing under his hand, any other person to be his agent or mandatory to act and vote for him at such board."

Now, the person who appoints the mandatory must possess the statutory qualification, and must be a member of the board, and the mandatory, holding his appointment from the member of the board, acts and votes for him.

To this Parochial Board, so constituted by statute, composed, *inter alios*, of persons owners of lands and heritages being members of the board present and acting, or members of the board not present and represented by a mandatory, is committed the duty of electing the registrar. By the 12th section of the Registration Act it is provided that when there shall be a vacancy in the office of registrar the Parochial Board shall by "a majority of the votes of the members present" at a meeting specially called for the purpose, elect the registrar of the parish.

"Now, in this case the point in dispute is, whether heritors, being members of the board, and entitled to act and vote by mandatory, can be considered as present by their mandatories at the meeting called for election of the registrar; or must their votes be refused?"

I think this is the real question. I cannot accept the proposition or suggestion made by the respondents, that the mandatories themselves must be viewed as "members present," and as thus satisfying the words of the statute. The mandatories are personally present. But they do not possess the qualification. They are not members, and therefore are not within the statutory description of "members present." They are only present as mandatories,—as representing others, and not as members. If I were compelled to elect between the view of the appellant, which, in respect of the words of the clause, excludes mandatories altogether, and the view of the respondents, that the mandatories are themselves the "members present," I should have great difficulty in rejecting the appellant's views. But to such an alternative we are not driven: and it is not necessary for me to say more than that that construction seems to me difficult. I think that the men who give the mandates, and not the men who hold the mandates, are the members of the board.

But the Sheriff has not adopted, at least not to its full extent, the construction pressed on us by the respondents; and I on the whole agree in the view taken by the Sheriff.

I think that the heritors who give the mandates are truly the members of the board, and that the Poor Law Act entitles them to attend, vote, and act as members by a mandatory representing them. Accordingly, the mandatory, in his representative character, votes for the heritor; and the heritor holding the statutory qualification votes by the mandatory. In other words, the heritor, when not present personally, may be present by proxy. He is constructively present. This phrase is recognised in the Railways Companies Clauses Act, where the expression is frequently used as applicable to shareholders attending meetings, "present personally or by proxy." In section 75 of that statute it is en-

acted that in order to constitute a meeting there shall be "present, either personally or by proxy," the prescribed quorum. In section 76 it is enacted that votes may be given either personally or by proxy, and other instances in that statute might easily be pointed out. So, also, in the bankrupt statutes, a creditor can vote by mandatory. The mandatory is not the creditor. But his vote is held as the vote of the creditor, and the creditor is held as present by his mandatory—(sect. 63 and sect. 137 of the Act 1856).

I therefore come to the conclusion, that under the Poor Law Act the heritors who give mandates are held as present by their mandatories, who act and vote for them. There is a peculiarity in the 31st section of the Poor Law Act, where the word "present" occurs. But I think that this peculiarity cannot have the effect of excluding the heritor giving the mandate from voting in the election of a chairman *pro tempore*, when he certainly can vote at other meetings, and can even vote in the election of a chairman of the board holding office for a year. The words "members present" do occur in that 31st section of the Poor Law Act, as they do in the 12th section of the Registration Act, and the question of consideration is very much the same. I cannot arrive at the conclusion that they were introduced for the purpose, or that they can have the effect, of creating so singular an exception from the ordinary rule and practice as to exclude the vote of heritors by mandate in the election of a temporary chairman, though admitted and sustained in the election of a permanent chairman. There is an apparent awkwardness in the use of the word "present;" but I think that is accounted for by the fact that "the absence of the chairman" is stated as creating the necessity for election of a temporary chairman, and those who elect the temporary chairman in such absence are not unnaturally spoken of as present. It could not be intended, and it is not, I think, the fair meaning of this clause, that, contrary to all other meetings, and all other voting of the Parochial Board, the heritors shall, in this single instance of the election of a temporary chairman, be deprived of their right to act by mandatory.

Now, the question raised in regard to the election of registrar in this Registration Act, under the 12th section, appears to me to be precisely the same as the question under the 31st section of the Poor Law Act; and unless the mandatory of a qualified heritor must be excluded in an election of a chairman of the Parochial Board *pro tempore*, he cannot be excluded in the election of a registrar under this statute. Every argument in the one case is applicable to the other.

The question is one of some nicety; for the words of both sections of both the Acts create a difficulty. But such a statute is not to be construed so as to withdraw a statutory privilege and create a special and exceptional exclusion, unless such construction be unavoidable.

After some hesitation, and giving to the subject the best consideration in my power, I have come to the conclusion that the Sheriff's judgment is right.

The other Judges concurred.

The Court accordingly adhered to the judgment of the Sheriff, and refused the appeal.

Counsel for appellant—Solicitor-General (Clark),

C. Smith, and A. J. Young. Agents—M'Call & Armstrong, S.S.C.

Counsel for Respondents—Lord Advocate (Young) and Marshall. Agents—Gibson & Strathern, W.S.

Tuesday, January 27.

## FIRST DIVISION.

[Lord Mure, Ordinary.]

JOHN STEWART v. JAMES MEIKLE.

*Building Ground—Construction of Sewer.*

The *ex facie* absolute owners of a building subject in Glasgow, which they really only held in security under a latent obligation to reconvey, gave off certain plots of ground under contracts of ground-annual, whereby the feuars were bound to maintain the common sewer opposite their own houses, but not to pay for its original construction, which had been constructed by the *ex facie* owners at the real owner's expense.—*Held* that the owner to whom the remainder of the subject had been reconveyed, under deduction of the building lots already given off, had no claim against the feuars for the cost of the construction of the sewer.

The pursuer in this action was heritable proprietor of the lands of Violet Grove, Glasgow, from previous to the year 1859 till March 1873. During the greater part of that period, viz., from March 1859 till January 1873, the property was held by the City of Glasgow Bank on a disposition *ex facie* absolute; but in reality in security. On these lands was formed a street called Cedar Street, built by the pursuer, and for the accommodation of the feuars; he also formed a sewer along it.

The defender acquired two stances in this street by contracts of ground annual from the City of Glasgow Bank, who, as above mentioned, were *ex facie* absolute owners, and connected his drains with the sewer—no demand being made by the Bank for any part of the cost of the construction of the sewer. The Bank afterwards reconveyed the remainder of the subjects to the pursuer, and he raised this action against the defender, concluding for £33, 8s. 2d., as his share of the cost of forming the sewer.

He pleaded—“(1) The said sewer having, in accordance with the universal custom in Glasgow, been so constructed by the pursuer as to be capable of being used as mutual and common, and the defender having, in building on his property, availed himself of said sewer, and connected his drains therewith, he is bound to make payment to the pursuer of one-half of the cost or value thereof, so far as it extends opposite his frontage, with interest as concluded for. (2) The defender being resting-owing to the pursuer in the sum concluded for, the pursuer is entitled to decree therefor, with interest and expenses as libelled.”

The defender pleaded—“(1) No title to sue. (2) The statements in the condescendence are irrelevant and insufficient to warrant the conclusions of the summons. (2) The defender having acquired the right of property and use of said sewer from his authors, who held the same *in pleno dominio*, he is liable no further in connection therewith than is expressed in his titles from them, which do not impose on him liability

for the expense of its construction. (4) The defender's authors having paid the expense of constructing said sewer, so far as opposite his premises, and he having acquired right from them *justo titulo* the pursuer can have no claim against him. (5) The pursuer's averments being unfounded in fact and untenable in law, the defender should be assolizied, with expenses.”

The Lord Ordinary pronounced the following interlocutor:—

“16th September 1873.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process—sustains the third plea in law for the defender; assolizies him from the conclusions of the action, and decerns: Finds the defender entitled to expenses; of which appoints an account to be given in, and remits the same, when lodged, to the Auditor to tax and report.

“*Note.*—It is not disputed that the defender in this case has connected the drains of the houses erected by him with the sewer to which the present action relates, which is situated beyond the boundaries of the property belonging to the defender; and it is very distinctly proved that this sewer was constructed by the pursuer when the ground belonging to him was at first laid out for building purposes, and with a view to its being used as the main common sewer for the street in question. In these circumstances, it appears to the Lord Ordinary—and that apart altogether from any evidence of usage or custom—that when a party in the position of the defender acquires a feu upon property so laid out for building, and without any permission, express or implied, from the party then in right to feu the ground, connects the drains of the tenement erected by him with the main sewer, he might be compelled, as contended for by the pursuer, in an action at the instance of the grantor of the feus, either to pay a proportion of the expense of making the sewer, or to discontinue the use of it.

“That, however, in the view the Lord Ordinary takes of this case, is not the position of the defender. Because, at the date when he acquired his feu and connected his drains with the sewer, the City of Glasgow Bank were *ex facie* the absolute proprietors of the whole ground, including that in which the sewer was constructed, and were in a position to grant the defender permission to use the sewer in connection with the portion of the property sold to him. And, having regard to the terms of the contract of ground-annual founded on in defence, it appears to the Lord Ordinary that the deed is so worded as to give, by necessary implication, permission to the defender to use the sewer, as he is by that deed taken bound to pay one-half the expense of maintaining the sewer in good order and repair in all time coming in so far as opposite the steading conveyed to him. But the omission in this deed to impose any obligation on the defender to pay any part of the expense of constructing the sewer is, in the opinion of the Lord Ordinary, of itself sufficient to lead to the inference that the expense was covered by the price paid for the feu, and that the right to use the sewer was, on this footing, communicated with the right to the ground, which, it appears from the evidence, it is in some instances the practice in Glasgow to do. And even if the words of the conveyance were not sufficient to lead to this inference, the evidence of the agent who acted for