the testator, and keep in view the whole circumstances of the case. Now, doing that as much as we can upon the evidence before us, I really have no difficulty whatever in holding that the testator intended his grand-daughter to enjoy under the liferent which he gave her not only the agricultural rents of the subject, but the mineral rents. And I reach that conclusion upon the considerations which have been suggested by your Lordships. In the first place, this is an old colliery. We have leases as far back as 1816, and I think it appears from the proof that it was a going colliery long before that. It was not a new colliery opened, it was not an unwrought mineral subject, but a colliery which had been producing some kind of produce from time immemorial. Then it was a colliery always under a lease; and that is a very important point, for another set of elements might have come in if it had been wrought by the proprietor himself to a limited extent, or for certain limited purposes. In the second place, the deed of settlement confers a universal liferent. It is a liferent of a third of the whole estate. That is a very important element, for I rather concur with the argument of Mr Millie, that a liferent of this kind is always nearer a liferent by reservation than a liferent by constitution. The thing he gives is what he was enjoying himself, and in the deed he says, "Reserving my own liferent in the premises." In the third place, there is no provision and no direction for accumulation. That is the only alternative which was contended for on the other side; because it could hardly be said that there was anything illegal either in receiving the current mineral rents under the leases current at the testator's death, or in renewing these leases afterwards. No trustees are appointed who might be the instruments for accumulation, with directions where the funds were to be put, and there is no presumption of any kind that there was to be such accumulation. Then, if the existing lease was for behoof of the liferentrix, as I think it must be held to be, it would be very strong indeed to hold that she could put an end to this old colliery when that existing lease came to an end. Therefore, in the whole circumstances, I think it was the intention of the testator that his grand-daughter should enjoy the liferent, and as there was no illegality in it, the intention must receive effect. I agree that there is no necessity in this case for going into the question of *bona fide* perception and consumption, but I cannot help saying that I agree with Lord Neaves that if it had been necessary to decide that question, as there has been unquestionably *bona fides* here, there has been sufficient to protect the liferenter from repetition.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for John Wardlaw against Lord Young's interlocutor of 21st October 1874—Refuse said note, and adhere to the interlocutor complained of: Find the reclaimer liable in expenses since the date of the Lord Ordinary's interlocutor, and remit to the Auditor to tax the same and to report; further, remit the cause to the Lord Ordinary to proceed with the same, and with power to decern for the expenses now found due."

Counsel for Pursuer—Dean of Faculty (Clark) Q.C. and Pearson. Agents—Dewar & Deas, W.S.

Counsel for Defender—Solicitor-General and Millie. Agents—Macgregor & Ross, S.S.C.

Friday, January 15.

FIRST DIVISION.

[Lord Gifford, Ordinary.

HAMILTON *v.* GARRAWAY AND OTHERS.

Municipal Elections—35 *and* 36 *Vict. c.* 33, § 22, *subsection* 2—25 *and* 26 *Vict. c.* 101, § 48—3 *and* 4 *Will. IV., c.* 76.

Held that the 48th section of "the General Police and Improvement (Scotland) Act, 1862" is not repealed by sub-section 2 of the 22d section of "the Ballot Act 1872."

Municipal Election—35 *and* 36 *Vict. c.* 33, § 22, *subsection* 2—25 *and* 26 *Vict. c.* 101, § 50.

Held that the annual elections of Commissioners in a town which has adopted the "General Police and Improvement Scotland Act, 1862" are rightly held on the same day of the same month as the first election, in terms of section 50 of the said Act, which is not in that respect repealed by subsection 2 of section 22 of the Ballot Act.

Process—Summons—Competency—Party.

Held that objections to the manner of conducting an election of Commissioners of Police for a burgh, which if sustained would have the effect of annulling the entire election, could not be disposed of under a summons which only called one of the Commissioners, the clerk to the Commissioners of the burgh, for himself and as representing them and the returning officer.

This was an action of reduction and declarator at the instance of Gavin Hamilton, writer, Dunoon, against James Garraway, Dunoon, and David Gray, clerk to and on behalf of the Commissioners of Police of the burgh of Dunoon, for himself and as representing them, under "The General Police and Improvement (Scotland) Act, 1862; and Robert Leslie Smith, Dunoon, senior magistrate and returning officer for the election of commissioners for the said burgh on 20th October, 1873. The reduction and declaratory conclusions of the summons were to the following effect—"That is to say, the said defenders to bring with them, exhibit and produce before our said Lords, the packets of counted and rejected ballot papers, tendered votes list, list of votes marked by presiding officer, statements relating thereto, declarations of inability to read, and packets of counterfoils, and marked copies of register, specified or referred to in 'The Ballot Act, 1872,' and in use at the election on the taking of the poll for the election of Commissioners for the burgh of Dunoon on the 20th day of October last 1873; as also a pretended declaration of the poll, or other writing or minute, whereby the defender, Robert Leslie Smith, the senior magistrate and returning officer foresaid, on or about the said 20th day of October, declared that William Campbell, builder, William Whitesmith, feuar, John Martin, draper, and Robert Walkinshaw Young, Royal Renfrewshire Militia, Dunmore, Kirn, had been elected Commissioners for said

burgh by a majority of votes, and that James Garraway, Franklin Villa, Hunter's Quay, in respect of his the said returning officer's casting vote, had a majority of votes over the pursuer, and whereby the said James Garraway was illegally declared to have been elected a Commissioner, along with said other Commissioners, in preference to the pursuer; as also certain minutes of the Commissioners of Police of said burgh, bearing date the 27th day of October last, recording a further illegal election by the defenders, the Commissioners of Police of said burgh, of the said James Garraway, as one of said Commissioners, and also recording the acceptance of office by the said William Campbell, William Whitesmith, John Martin, Robert Walkinshaw Young, and James Garraway; as also the grounds and warrants thereof, and of the said acts and proceedings and pretended declarations and elections respectively, or of whatever dates tenor, or contents the same may be, to be seen and considered by our said Lords, and to hear and see the same, in so far as they relate to the said pretended elections, and the said acts and proceedings and pretended elections themselves, with all that has followed or may follow thereupon, reduced, retreated, rescinded, cassed, annulled, decerned, and declared, by decree of our said Lords, to have been from the beginning, to be now and in all time coming, null and void, and of no avail, force, strength, or effect in judgment or outwith the same, and the pursuer reponed and restored thereagainst *in integrum*, for the reasons and causes set forth in the condescendence and note of pleas in law hereunto annexed: Therefore, and for other reasons to be proponed at discussing hereof, the said pretended declaration of the poll, or other minute or writing, and minute or minutes of meeting of Commissioners, and other papers, writings, and documents, in so far as they relate to the said pretended elections, and whole grounds and warrants thereof, and of the said acts and proceedings, and declarations and elections, and the said acts and proceedings, and declarations and pretended elections themselves, of the said defender James Garraway, as one of the Commissioners of Dunoon, under the foresaid General Police and Improvements (Scotland) Act 1862, with all that has followed or may follow thereupon, ought and should be reduced, retreated, rescinded, cassed, annulled, decerned, and declared, by decree of our said Lords, to have been from the beginning, to be now and in all time coming, null and void, and of no avail, force, strength, or effect in judgment or outwith the same in time coming, and the pursuer reponed and restored thereagainst *in integrum;* and it ought and should be found and declared, by decree foresaid, that the said James Garraway was not duly and lawfully elected a Commissioner of said burgh of Dunoon, and that he was not, and is not, entitled to hold that office, and that therefore a new election of a Commissioner ought and should take place, in terms of, and in accordance with, the provisions of the Act of the Session of the 3d and 4th years of the reign of King William IV., chapter 76, intituled 'An Act to alter and amend the laws for the election of the magistrates and councillors of the Royal Burghs in Scotland,' and the other Acts in force at the time of the passing of 'the Ballot Act, 1872,' as amended by said Ballot Act, or as our said Lords may be pleased to direct: Or otherwise, it ought and should be found and declared, by decree foresaid, that on a strict scrutiny and counting of the votes of electors foresaid, the pursuer had a greater number of votes in his favour than the defender, the said James Garraway, and was entitled to the office of Commissioner foresaid in preference to the said James Garraway, and that therefore the said James Garraway was not duly and lawfully elected a Commissioner, and was and is not entitled to hold that office."

The circumstances of the case were as follows:—In 1868 the inhabitants of Dunoon adopted the "General Police and Improvements (Scotland) Act 1862," and the town of Dunoon then became a police burgh. The first election of Commissioners was on 19th October 1868, and under section 50 of the Police Act the elections to fill the vacancies caused by the retirement of five commissioners who under that Act resigned annually, took place on the 19th October in each year. In 1873, the 19th of October falling on a Sunday, the poll was held on Monday the 20th, and the pursuer and the defender Garraway were both candidates for election. The defender Robert Leslie Smith acted as returning officer, and after the close of the poll declared that an equal number of votes had been given for the pursuer and Garraway—the other four candidates having been elected by a clear majority.

On 27th October the Commissioners met, and the four elected candidates accepted office. The pursuer lodged a protest against the election, and the Commissioners appointed a committee of five of their number to inquire into the disputed election, and to report. Thereafter they proceeded to determine which of the two candidates, reported by the returning officer as having an equality of votes, should be preferred, and unanimously voted for the defender Garraway. The committee subsequently reported that they were satisfied that the election had been regularly conducted.

In these circumstances, the pursuer brought this action, and he rested it, in the first place, upon the legal objection that the day upon which the election was held was contrary to statutory enactment, and even that, supposing the day of election to be unobjectionable, the only remedy in case of a double return was a new election.

Section 50 of the General Police Act 1862 provides that the annual elections of Commissioners shall be on the same day of the same month as the first election; and section 48 provides that "in case there shall be an equality of votes, the Commissioners shall determine by vote which of the candidates shall be preferred." In the election and subsequent proceedings as narrated above the Commissioners followed these enactments, but the pursuer contended that, in terms of the provisions of sec. 22 sub-sec. 2, of the Ballot Act 1872, the date of election fell to be governed by the 15th sec. of 3 and 4 Will. IV. c. 76, which enacts that municipal elections shall take place on the first Tuesday of November, and that the proceedings after the double return fell to be governed by sec. 10 of 3 and 4 Will. IV. c. 76, which provided that in such an event a new election should take place. Section 22, sub-section 2, of the Ballot Act is as follows:—"All municipal elections shall be conducted in the same manner, in all respects, in which elections of councillors in the royal burghs contained in schedule C to the Act of Session of the third and fourth years of the reign of King William the Fourth, chapter 76, intituled an Act to alter and amend the laws for the election of the

magistrates and councillors of the royal burghs in Scotland are directed to be conducted by the Acts in force at the time of passing of this Act, as amended by this Act; and all such Acts shall apply to such elections accordingly."

The pursuer also sought reduction of the election on the ground that the election had not been conducted in accordance with the provisions of the Ballot Act. The chief irregularities of this nature founded on by the pursuer were, (1) that the returning officer had impressed all the ballot papers with the official mark in the morning before going to the polling place; (2) that the presiding officer (who was also returning officer) had from time to time announced the number of voters who had voted; (3) that the back of the ballot papers were shown when the votes were counted; and (4) that one person was allowed to vote who had not paid his poor's rates.

The pursuer pleaded—"(1) The proceedings which took place in connection with the pretended elections at Dunoon on the several dates mentioned in the summons not being in compliance with, but in direct contravention of, statutory enactment, there has been no valid election of Commissioners. No valid election did or could take place for the burgh of Dunoon on said 20th October 1873, and it was *ultra vires* of the returning officer or senior magistrate to have an election of Commissioners on said day. (2) At least the said proceedings, so far as relating to the election of the defender Mr Garraway, by the proceedings at the poll, at the counting of the votes, the casting vote of the returning officer, and subsequently by open vote of the Commissioners, were altogether illegal and *ultra vires*, and his pretended election is void and null. (3) Certain of the ballot papers, counted as containing votes in favour of Mr Garraway, not being officially marked, or being defective in the other requirements of the Ballot Act founded on in the summons, the returning officer was not entitled to count them, but was bound to have rejected them; and the non-compliance of the said returning officer having affected the result of the said election, the same is void and null. (4) The pursuer having timeously disputed the election is entitled to a scrutiny of the votes tendered, and to have the votes of all disqualified persons rejected. (5) The pursuer is entitled to decree of reduction and of declarator, in one or other of the forms libelled, in respect of the irregularities and defects complained of, and in respect he had a majority of valid votes as against the defender Mr Garraway. (6) The election was not conducted in accordance with the principles laid down in the body of the Ballot Act, and the result was thereby affected, and, in consequence, the whole proceedings and elections are and should be declared to be null and void, and set aside as concluded for."

The defenders pleaded—"(1) The pursuer's statements are unfounded in fact and insufficient in law to support the conclusions of his summons. (2) The election having been conducted in all respects in accordance with the provisions of the Ballot Act, the defenders ought to be assoilzied, with expenses. (3) The Commissioners having duly appointed a committee of their number, in terms of the 48th section of the General Police and Improvement (Scotland) Act 1862, to inquire into the merits of the election and to report, and said committee having reported that they were satisfied the proceedings at the election had been conducted regularly, the pursuer is barred by said section from insisting in this action, and the defenders are entitled to decree of absolvitor. (4) The defenders ought to be assoilzied, in respect that the defender James Garraway was duly appointed a Commissioner in terms of said 48th section of the Police Act 1862. (5) The pursuer not having timeously, or in a competent and regular manner, objected to the validity of the election, or proceedings in connection therewith, or of the votes of individual voters, the defenders should be assoilzied from the conclusions of the summons."

The Lord Ordinary pronounced this interlocutor and note:—

"*Edinburgh, 19th February* 1874.—The Lord Ordinary having heard parties' procurators, and considered the record as closed upon the summons and preliminary defences, and whole process,—finds that section 48th of 'The General Police and Improvement (Scotland) Act, 1862' (25 and 26 Vict., cap. 101), has not been repealed by 'The Ballot Act, 1872' (35 and 36 Vict., cap. 33), but that the said section is still in force; finds that, assuming the election of Commissioners of Police of Dunoon, the polling at which election took place on 20th October 1873, to be in other respects legal and valid, the pursuer in the present case is barred by the statute from challenging the proceedings of the Commissioners of Police of date 27th October 1873, and of the committee named at said meeting, and, to this effect, sustains the preliminary defences stated for the defenders, and decerns; *quoad ultra*, repels the said preliminary defences so far as preliminary, and decerns; and, before further answer, appoints the production to be satisfied by the transmission of the whole proceedings called for to the clerk of the process, and grants warrant for such transmission accordingly; declaring that the whole packets of counted and rejected ballot papers, tendered votes list, list of votes marked by presiding officer, statements relating thereto, declarations of inability to read, packets of counterfoils, and marked copies of register in use at the election and at the poll for the election of Commissioners for the burgh of Dunoon on the 20th day of October 1873, and declaration of the poll, shall be transmitted, under seal, or as they at present exist, under seal and with the seals unopened, to abide the orders of Court, and that the said sealed packets shall not be opened or their contents examined except under orders of Court, if any such orders shall be hereafter pronounced; appoints said transmission to be made and production to be satisfied within fourteen days; reserves meantime all questions of expenses, and grants leave to reclaim against this interlocutor.

"*Note.*—In the year 1868 the inhabitants of Dunoon adopted the General Police Act of 1862 (25 and 26 Vict. 101), and Dunoon was constituted a police burgh under that statute. From 1868 down to the passing of the Ballot Act in 1872 the elections of the Police Commissioners of Dunoon took place exclusively under the provisions of the said General Police Act of 1862.

"On 18th July 1872, however, the Ballot Act passed (35 and 36 Vict. 33), and this statute altered the procedure, not only at parliamentary, but also at municipal elections. Its title is, 'An Act to amend the law relating to procedure at Parliamentary and Municipal Elections.'

"By one of the interpretation clauses of this Act (sect. 29), the expression 'municipal election'

means, in Scotland, 'an election of any person to serve the office of councillor or commissioner of any municipal burgh.' 'Municipal burgh' means any place subject to the 'Municipal Corporation Acts,' or any of them; and one of the Municipal Corporation Acts is defined to be 'The General Police Act of 1862,' so that the Ballot Act applies to the election of Police Commissioners in Dunoon. There is no dispute about this, and accordingly the election which is questioned in the present action took place by ballot. The poll was taken on 20th October 1873.

"The leading enactments of the Ballot Act in reference to contested municipal elections are contained in sections 20 and 22. Section 20 enacts that 'the poll at every contested municipal election shall, so far as circumstances admit, be conducted in the manner in which the poll is by this Act directed to be conducted at a contested parliamentary election;' and section 22, which introduces modifications applicable to Scotland, enacts—'All municipal elections shall be conducted in the same manner, in all respects, in which elections of councillors in the royal burghs contained in schedule C to the Act '3 and 4 William IV. 76' are directed to be conducted by the Acts in force at the time of the passing of this Act, as amended by this Act, and all such Acts shall apply to such elections accordingly.' This seems to introduce the provisions of the 3d and 4th William IV., cap. 76, so far as not repealed or altered by the Ballot Act, and it is this enactment which occasions the leading difficulty in the present case.

"There is no question as to how the poll should be taken, nor as to the manner in which the ballot papers should be counted and the result declared, but the parties are widely at issue as to what shall be done when there is any dispute as to who has the true majority of votes, or when there happens to be an equality of votes for any candidate, and the question is whether these cases are to be regulated by the 48th section of the General Police Act of 1862, or by the 10th section of 3d and 4th William IV., c. 76? In other words, the question is whether the 48th section of the General Police Act of 1862 is repealed by the Ballot Act of 1872?

"The Lord Ordinary feels the question is attended with considerable difficulty, chiefly owing to the very complicated enactments of the Ballot Act, which, instead of containing a code in itself embracing the whole procedure, merely adopts, modifies, and varies, in a variety of ways, the provisions of a considerable number of previous statutes. On the whole, however, the Lord Ordinary is of opinion that the 48th section of the General Police Act, 1862, is not repealed—but, subject to the Ballot Act as to taking and declaring the poll—still regulates the Police Commissioners of Dunoon.

"It is necessary to read the whole statutes together, or at least to consider their purview, and a large number of their special enactments. But, avoiding all detail, the Lord Ordinary will simply indicate the grounds upon which he has come to the conclusion above mentioned.

"(1) Section 48 of the General Police Act of 1862 is not *expressly* repealed by the Ballot Act of 1872. The Ballot Act contains very carefully digested schedules of the Acts and parts of Acts repealed; and although, in schedule 5th, it specially repeals sections 46, 47, and 50 of the General Police Act of 1862, it leaves sections 48 and 49 untouched. Even sections 46, 47, and 50 are only repealed 'so far as their provisions are inconsistent with the provisions of this Act.' This very careful and partial repeal of the Police Act of 1862 is the more remarkable, as the previous General Police Act (13 and 14 Vict. 33), is dealt with in precisely the same way, the relative section of that Act being left unrepealed, while sections on both sides of it are expressly repealed.

"(2) Not only is there no express repeal of section 48 of the General Police Act of 1862, but the careful repeal of sections on both sides of it seems almost equivalent to an enactment in the Ballot Act that section 48 of the Police Act shall still remain in force. At least, it creates the strongest presumption that it was not the intention of the Legislature to interfere with this section 48. Sections 46, 47, and 50 are cut down, but 48 and 49, which could not have been overlooked by the Legislature, are allowed to stand. This view has the greater force when the extreme care and minuteness of the schedules are adverted to. They deal with even particular words of particular sections, which words are repealed, the rest of the sections remaining in force. The object of the Legislature seems to have been carefully to weed out from a large number of statutes (upwards of sixty in number) everything which was inconsistent with vote by ballot, and nothing else. This, in the Lord Ordinary's opinion, is the purview of the statute, its scope and intention.

"(3) The pursuer's contention that section 48 is repealed by implication by section 22 of the Ballot Act, enacting that all municipal elections shall be conducted according to the provisions of 3 and 4 Will. IV., 76, depends entirely upon the true meaning of the word election. Now, the single word 'election' is not defined in any of the interpretation clauses, and undoubtedly, in common language, it may be used either in a narrow or in a more extended sense. Keeping in view the spirit of the Ballot Act, however, the Lord Ordinary thinks that 'election' must be confined to the choice by the constituency of its representative, either parliamentary or municipal, and must not be extended (unless a necessity arises) to proceedings which arise after the poll has been closed and declared, and which proceedings are taken, not by the constituency, but by some third party,—for example, the commissioners, the town council, or by parliament. In particular, the Lord Ordinary thinks that proceedings regarding disputed elections, or proceedings when a double return has been made, are not, in the statutory sense, part of the 'election' itself, but are separate proceedings altogether, which may or may not result in a 'new election,' or in a scrutiny or new declaration of the 'election.' In short, they are proceedings regarding an election, but are not the 'election' itself. The Ballot Act did not, in general, intend to affect such proceedings, except in so far as they were necessarily affected by secret voting. This might be illustrated by a consideration of a large number of the special provisions of the Ballot Act in reference to contested elections and otherwise.

"(4) The alleged implied repeal of section 48 must yield to what almost amounts to the express maintenance of that section, taken in combination with the scope and purport of the Ballot Act, and with the changes which it intended to effect.

"(5) There is really no reason whatever for the

repeal of section 48 of the Police Act of 1862. On the contrary, there is every reason why that section should be maintained in force as affording, in every way, a cheaper, simpler, and more summary way of deciding contested and double elections in small police burghs than that provided in the case of larger constituences and more important elections. An appeal to the Supreme Court regarding every contested election in every police burgh is not desirable, and though a committee of three or of five of the police commissioners themselves may decide very roughly on the merits of a contested election, this is obviously better than a litigation in the Court of Session, which may outlast the term of office of the competing candidates. In like manner, when a double return is made, there is an obvious expediency in the commissioners themselves choosing between the two candidates whose votes are equal, rather than sending back the matter, it may be at a great expense, to the whole constituency, and taking a new vote by ballot, as tedious, troublesome, and expensive as the election of the whole commissioners. It would require some very strong or very express enactment to abolish what seems obviously a very expedient course in such cases.

"Such being the opinion at which the Lord Ordinary has arrived, it follows that the decision of the committee of five is final, and there having been equality of votes, the decision of the commissioners that James Garraway should be preferred to the pursuer cannot now be challenged.

"The shape of the case, however, must be kept in view. The present record is only closed upon preliminary defences, objecting to satisfy the production, and the decisions of the committee of five and of the commissioners themselves, are pleaded upon as final and excluding the pursuer from any further investigation. It may be said, perhaps, that the report of the committee of five, and the vote by the commissioners, are pleaded upon as a sort of title to exclude the pursuer from claiming Mr Garraway's place. In this view, the Lord Ordinary thinks the defenders' plea well founded. He thinks the decision of the committee of five and the vote of the commissioners are in conformity with section 48, which he holds to be still in force, and are protected by its provisions, and to this extent he sustains the preliminary defences.

,'But then the pursuer does not content himself with challenging the proceedings of the committee of five, and the vote of the commissioners thereon—he challenges the whole 'election,' that is the whole polling and proceedings at the poll-taking on 20th October 1873. He says that the poll was not taken, and the result thereof not declared in terms of the Ballot Act, but that a great number of the essential provisions of the Ballot Act were violated or neglected. In consequence, the pursuer challenges not the election of Mr Garraway merely, but the election of the pursuer himself, and of all other commissioners who were elected or voted for at the poll of 20th October 1873, and he wants the whole proceedings at that poll, and all that followed on them, declared null and void. The pursuer's statements leading to this result are in articles 7, 8, and 9 of his condescendence. It was not pleaded that these statements are irrelevant, and the Lord Ordinary does not see how the pursuer can be excluded from the general challenge. If the essential provisions of the Ballot Act were not observed, then there is no help for it, the whole election must be declared null. In this view, the Lord Ordinary thinks the pursuer's action cannot be excluded by the report of the committee of five, or by the vote of the commissioners. There could be no committee of five if there was no ballot at all. There could be no equality of votes if there were no legal votes at all.

"Accordingly, the Lord Ordinary thinks that to a certain extent the production must be ordered to be satisfied, and to this extent the preliminary defences repelled as preliminary. Keeping in view, however, the provisions of the Ballot Act, he thinks the Ballot papers, tendered votes, spoiled papers, rejected votes, counterfoils, and other documents, should only be produced under seal, or with the seals unopened, for it is only in certain cases that the Court will allow them to be looked at. For example, rule 41st in schedule 1 provides that it is only by order of the House of Commons or competent tribunal that the sealed packet of counterfoils can be opened, or ballot papers inspected, and even when inspection is made care must be taken that the mode in which any particular elector has voted shall not be discovered until (1) he has been proved to have voted, and (2) his vote has been declared by a competent Court to be invalid.

"The Lord Ordinary has endeavoured in the preceding interlocutor to carry out the views now explained, and he does not think there will be any practical difficulty in holding the production satisfied, so as to enable the Court to get at the merits of the pursuer's objections to the whole election in question. The Lord Ordinary has reserved all questions of expenses *hoc statu*, in conformity with the usual practice of dealing with preliminary defences. But the defenders have been successful on the only points of law hitherto argued. As the present decision may in one view terminate the litigation, the Lord Ordinary has given leave to reclaim."

Production having been satisfied, and a proof led, the Lord Ordinary on 27th October 1874 pronounced this interlocutor:—"The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, and whole productions, including the contents of the sealed packets, which were opened on the motion of the parties, and which, after inspection, have been resealed by the Lord Ordinary—Repels the reasons of reduction; Assoilzies the defenders from the whole conclusions of the action, and decerns: Finds the defenders entitled to expenses, but subject to modification, so far as relates to the proof recently led, and debate thereon, and in the circumstances, modifies the expenses now found due by deducting from the taxed amount of such expenses one-third of the taxed amount of the defenders' expenses of and connected with the proof and debate thereon: Remits the account of said expenses to the Auditor of Court to tax the same and to report.

"*Note.*—The most important and the most difficult questions raised in this case were disposed of by the Lord Ordinary's interlocutor of 19th February 1874. These questions were raised under preliminary defences. A farther point of law was disposed of by interlocutor of 10th July 1874; and the Lord Ordinary thought that the remaining points were so mixed with disputed matters of fact as to make a proof before answer expedient. The interlocutors of 19th February and 10th July 1874 have not been taken to review, although leave to

reclaim was specially given. The Lord Ordinary's impression was that if the points of law were fixed, there should have been no dispute about matters of fact, which consisted of alleged irregularities more or less technical. The parties, however, have contested the case to the end, aud the whole remaining points now fall to be disposed of by final judgment.

"The Lord Ordinary, by interlocutor of 19th February 1874, held that the 48th section of 'The General Police and Improvement (Scotland) Act 1872 has not been repealed, but is still in force, and that in consequence thereof the pursuer was not entitled to challenge the proceedings of the Commissioners and their committee. This finding, which is final in the Outer House, in substance put an end to the competition between the pursuer and his rival candidate Mr Garraway, and fixed that, assuming the election to be a good election at all, Mr Garraway, and not the pursuer Mr Hamilton, had been elected a commissioner.

"The only question now remaining is in effect whether, in consequence of alleged irregularities, or alleged non-observance of statutory requisites, the whole election of Commissioners is void, so that neither Mr Garraway nor the pursuer, nor any of the other gentlemen who were elected or returned on 20th October 1873, have been validly elected.

"After fully considering the whole alleged irregularities, the Lord Ordinary is of opinion that the pursuer has not succeeded in establishing by proof any such irregularities as are sufficient under the statute to void the election. It is true that in many respects the election seems to have proceeded somewhat loosely. In various respects there was not exact and full compliance with the 'rules' which the Ballot Act prescribes for parliamentary and municipal elections. A municipal election includes the election of Commissioners in a burgh like Dunoon. Some of the irregularities were serious, and it has not been without difficulty that the Lord Ordinary has come to be of opinion that they are not fatal. If it had been shown that any of them, or any of the more material of them, were intentional and deliberate defiance of the statute, and not mere innocent mistakes, the Lord Ordinary would have annulled the election; but it is quite clear, and indeed was not seriously disputed, that the proved irregularities were the result of innocent mistake or misapprehension on the part of those who were conducting the proceedings, and the Lord Ordinary is also satisfied that none of these mistakes or irregularities affected the principles laid down in the Ballot Act, or the result of the election.

"Now it is very carefully provided by section 13 of the Ballot Act that 'No election shall be declared invalid by reason of the noncompliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act, if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such noncompliance or mistake did not affect the result of the election.'

"There is a similar provision in the General Police Act of 1862, providing that elections shall not be set aside on technical mistakes or irregularities.

"The Lord Ordinary is of opinion that the provision of section 13, and the relative provision in the Act of 1862, are sufficient to save the election in the present case from nullity, though it must be confessed that some of the irregularities deserve very severe censure. None of them affected the great principle of the Ballot Act—secret voting, and every elector had fair and full opportunity to give his secret vote. The irregularities were in matters of detail. Some of them may have affected particular votes, and might have been important had this been a question of scrutiny, but none of them in fairness, and according to the reason of the thing, are sufficient to upset the whole election. It is unnecessary to notice the whole objections insisted in by the pursuer, many of which were exceedingly trifling, but one or two of the leading objections may be instanced.

"One of the leading objections on record is, that no official stamping or marking instrument was provided or used at the election, and this implied that none of the ballot papers were officially marked. If this had been substantiated, the Lord Ordinary rather thinks he must have cut down the election, for the result would have been that not a single good vote had been given. But what turned out upon proof, and on inspection of the ballot papers, was, that every ballot paper did bear the official mark, an impressed 'R,' visible on both sides, and impressed by the presiding officer as his official mark. The irregularity is, that instead of pressing each ballot paper with the 'R' at the time of giving it to the voter, the presiding officer, Mr Smith, in the morning, and before the poll opened, impressed the whole of the ballot-papers with his official mark 'R,' retaining the whole papers and the stamping instrument in his own possession until after the election. Now this was a serious breach of the statutory rules, and the excuse for it—to save time and confusion during the voting, or when there might be a crowd of voters—is not satisfactory. But it is a very different question, whether it is to annul the whole election. The object of the provision was to prevent the introduction into the ballot box of any voting papers excepting those delivered by the presiding officer to the voters, and this object was accomplished by Mr Smith himself keeping in his own custody all his marked voting papers and his stamping instrument all through the election. There could be no stamped voting papers in the ballot box but those given out by Mr Smith. He acted from the best motives, and his act did not affect the 'principles' of the Ballot Act, or the 'result of the election.' It was just such a mistake as is saved by section 13 of the Ballot Act.

"It was no doubt very ingeniously urged for the pursuer that the irregularity in question was not only a violation of the rules in the schedule, but a violation of the Ballot Act itself (section 2) which contains, more shortly expressed, many of the rules contained in the schedule. It was argued that section 13 may save violations of the rules, but not violations of the Act itself. The Lord Ordinary thinks this is much too strict a reading. Undoubtedly the thing done was a contravention of the 'rules,' and as such it is saved by section 13, although it also occurs in the statute. The 'rules' are expressly declared parts of the statute, and it seems out of the question to hold that the non-strict compliance with everything in section 2 must, without any discretion in the Court, absolutely void every election.

"Besides, and altogether apart from section 13,

there is room for the distinction between provisions directory and provisions absolute and indispensable. Directions to the returning officer may be fulfilled by equivalents if this is innocently done,—their violation does not at least necessarily annul the election. This principle seems to have been recognised as applicable to the Ballot Act in various English cases. See among others *Pickering* v. *Starling*, 13th January 1873, 28 Law Times, 3; *Pickering* v. *James*, 10th June 1873, Law Reports, 8 C. p. 489; *Borough of Hackney*, 15th and 16th April 1874, 31 Law Times, p. 69. In these cases all the Judges seem to recognise the broad distinction between provisions which affect the 'principle' of vote by ballot, and mere details which are arbitrary, and the object of which may be accomplished in various ways. See Mr Justice Grove's opinion in the *Hackney* case.

"Another objection by the pursuer was, that the secrecy of the ballot had been infringed by the presiding officer announcing from time to time the numbers who had voted. For this, it was said, assuming the ballot papers to be consecutively numbered, would have enabled an expert note-taker to ascertain the relative numbers on the counterfoil, and so afterwards to identify any voting-paper. It was proved in evidence, however, that the numbers who had voted were only mentioned to officials, all sworn to secrecy, and when no others were present. It would require very great expertness in a note-taker or observer to count and obtain the right numbers; and it was not shown that any person had done this or attempted to do it. The only gentleman who was said might have done it was Mr Scoular, and the pursuer did not choose to call him as a witness. It has not been shown that a single vote was known to anybody but the voter himself.

"It was attempted to be shown that the presiding officer Mr Smith had not acted fairly and impartially. This objection utterly failed on proof. No doubt at eight o'clock, when the poll opened, a considerable number of voters came forward at once, and two voters who had to leave by the 8.15 boat could not get ballot papers in time, and had to leave without voting. But this was not Mr Smith's fault; he took the voters in their order, and identified and passed them as fast as he could. He rather did too much by pre-stamping the ballot papers to facilitate despatch.

"The other objections, omitting several of no moment, relate to the non-due sealing up of the papers, books, and lists used at the election. It was said that they were not sealed in separate packets, and were not sealed at the proper time. Then it is said that the rejected votes were not specially endorsed as rejected,—that at the counting the votes were not mixed, and the entire number of ballot papers were not counted before the votes were counted. Then that the declaration of the result was not made at the right time, and also that the presiding officer himself should not have voted.

"Possibly the pursuer may be right in strict form upon some of these matters. It is not quite easy to read together and correctly the various provisions of the statutes, modified, altered, partially repealed and affected as they are by the provisions of the Ballot Act, and the Lord Ordinary does not think it necessary to decide or lay down a code of procedure under the statute. It is enough that none of the objections affect the validity of the election as a whole. Some of them affect only the question of preference between the pursuer and Mr Garraway, and this matter has been finally determined under section 48 of the Police Act by the Commissioners and their committee.

"On the whole, the pursuer has entirely failed in his action, and expenses must follow; but there is room for some modification in reference to the proof and debate thereon. The pursuer has established some irregularities which the defenders in fairness should have admitted. The Lord Ordinary thinks justice will be done by deducting a third from this part of the defenders' expenses."

The pursuer reclaimed, and argued—The election was conducted in an illegal manner both as regards the day of the poll and the proceedings of the Commissioners in reference to the equality of votes. In regard to these matters, the provisions of the 48th and 50th sections of the General Police Act of 1862 had been followed, but these were repealed by sub-section 2 of the 22d section of the Ballot Act. In terms of that section the date of the election and the proceedings in case of an equality of votes fell to be governed by the Act of 3 and 4 Will. IV., c. 76, which provided that municipal elections should be held in all cases on the first Tuesday in November, and that in case of an equality of votes there should be a new election.

The irregularities which had been committed by the returning officer were such as to invalidate the election, being contrary not only to the letter but the spirit of the Ballot Act—which was to insure secret voting. In these circumstances the pursuer was entitled to ask for reduction of the election so far as regarded the defender Garraway, and it was competent for him to do so under the summons.

The defender argued—The pursuer's contention as to the repeal of sections 48 and 50 of the General Police Act was unsound, for section 48 was not repealed at all, and section 50 only to a limited extent. The Ballot Act only dealt with the mode of conducting elections, and substituted secret for open voting, and previous Acts were only repealed so far as inconsistent with this. But the fixing the day on which the election should take place, or the proceedings in case the result of the completed election should be a double return, were not matters connected with the conduct of the election, and were therefore not touched by the Ballot Act.

It was not competent for the pursuer to insist in his objections to the validity of the election under this summons, for the effect of his objection, if sustained, would be to invalidate the whole election, and entitle him to do that it would have been necessary for him to call all the candidates who were elected.

The pursuer reclaimed.

At advising—

LORD PRESIDENT—The pursuer in this action was a candidate at the election of Police Commissioners at Dunoon in 1873. He was unsuccessful, and the practical object of this action is to have it found that he ought to have been successful. The town of Dunoon—for it is not properly a burgh—adopted the General Police Act of 1862 in 1868, and in that year the first election of Police Commissioners took place on 19th October.

So Dunoon became a burgh for police purposes, governed by Police Commissioners.

The 50th section of the Act of 1862 provides that one-third of the Commissioners shall go out of office annually, on the same day of the month as that on which they were elected, and on the same day the ratepayers shall proceed to fill up the vacancies. So in this way there is an annual election, always falling upon the same day of the same month as the original election. In Dunoon the 19th day of October was the day of the original election, and so the 19th of October, or the Monday following if that day was a Sunday, fell afterwards to be the day of election. In 1873 the 19th of October was a Sunday, and the election was held on Monday the 20th, and it cannot be disputed that that was the right day unless the 50th section is repealed by the Ballot Act. That is a question which I shall consider bye-and-by.

On 20th October 1873 this election was conducted, as far as the voting and the arrangements of the polling places, &c., were concerned, ostensibly under the regulations of the Ballot Act. The result of the election was, that four out of the five vacancies were filled up by candidates who obtained a clear majority, and for the fifth place two candidates had an equal number of votes. One of these two candidates was Mr Hamilton, the pursuer of this action, and the other was Mr Garraway. In these circumstances, assuming that the mode of dealing with this double return is regulated by the Act of 1862, the provisions in regard to that are contained in section 48 of that Act. That section provides that upon the first Monday after an election the Commissioners shall hold a meeting, "and in case there shall be an equality of votes, the Commissioners shall determine by vote which of the candidates shall be preferred;" and in the same section it is provided that any candidate who maintains that he should have been returned as a Commissioner may lodge a complaint, and the Commissioners shall remit to a committee to inquire into the merits of the disputed election, and to report upon the matter, and the report of the committee shall be final.

This provision was introduced as a rough and ready way—for it is a rough and ready way—of disposing of disputed questions at these elections.

Now, it is clear that if this section applies to the present case, and if its provisions were followed, there is no possibility of a scrutiny being allowed in this or in any other Court—for the report of the committee is final. The Commissioners did meet on the Monday following the 27th October, and on that occasion Mr Gavin Hamilton lodged a complaint to the effect that he ought to have been returned, and demanding an inquiry into the merits of the disputed election. That complaint was remitted to a committee of five. The Commissioners then took up the matter of the double return, and resolved that Mr Garraway was elected Commissioner.

The committee to whom Mr Hamilton's complaint was remitted examined into the disputed election, and on 29th November they made a report to the effect that they were satisfied that the proceedings at the election had been conducted regularly, and that Mr Garraway and the pursuer had an equality of votes. The effect of this report was that the fact of equality was conclusively established, and the resolution of the Commissioners preferring Garraway came into operation. It appears to me that these proceedings were regularly conducted under the 48th section of the Police Act of 1862, and so the question comes to be, whether the 48th, and also the 50th, sections of that Act remain in operation, or are repealed by the Ballot Act. Now, it is obvious that the Ballot Act had for its object to introduce a new mode of voting—the substitution of secret for open voting—and it is not clear that it had any other object. It is concerned with the mode of conducting the election in the sense of taking, recording, and summing up the votes, and declaring the result. So we should not expect to find in the Act any provisions affecting matters of a different nature. The sections referred to in debate are the 20th and 22d, which relate to the mode of conducting municipal elections, and this election is a municipal election within the meaning of these sections. Section 20 provides that "the poll at every contested municipal election shall, so far as circumstances admit, be conducted in the manner in which the poll is by this Act directed to be conducted at a contested parliamentary election." Then, by sub-section 2 of section 22, which relates only to Scotland, it is provided:—[*His Lordship here read the section.*]

Now, this provision is a little awkwardly expressed, but it means that municipal elections—including those of Police Commissioners—are to be conducted in the same way as municipal elections in Royal Burghs, by statutes in force as amended by the Ballot Act.

The way in which these statutes are amended is by the introduction of secret voting, and we must take the statutes for municipal elections with that addition as our guide to the manner in which municipal elections are to be conducted under the Act of 1862. Now, it is said that the election is no longer conducted by the mode provided in the Act of 1862, because of the provisions of this sub-section 2 of the 22d section of the Ballot Act. To that I assent, for it is clear that the manner of conducting the election is regulated by the Municipal Acts as amended by the Ballot Act. But I cannot assent to the inference which the pursuer deduces from that fact. He says that section 50 as well as section 48 of the Act of 1862 is repealed, because inconsistent with the municipal statutes. Now, if sections 48 and 50 had regulated the manner of conducting an election within the meaning of section 22 of the Ballot Act, that contention would have been sound, but I don't think these sections are of that description. Then what in the statute of 3 and 4 Will. IV. is inconsistent in the first place with the 50th section? The 15th section of 3 and 4 Will. IV. enacts that the municipal elections shall take place on the first Tuesday of November, whereas the elections under the Police Act are to be on the same day as the original election, therefore, says the pursuer, the election in this case, which took place on the 20th of October, must be invalid. Then, as to section 48, he says that it is repealed by the Ballot Act, because section 10 of 3 and 4 Will. IV. enacts that if there is an equality of votes the remedy is a new election. Now, in reference to both these cases, if we revert to the words of the 22d section of the Ballot Act we see that it refers to the Municipal Election Acts only in reference to the provisions which regulate the manner of conducting elections. What does that mean? It means that the taking and summing up

the votes, and declaring the result, are to be governed by the Ballot Act and the statutes in force at the passing of that Act. But does the fixing the day for the election or the procedure in case of equality of votes fall within this provision? Certainly not, for the one is antecedent to the election altogether, and the other is subsequent to the election, and the manner of conducting the election is not affected thereby.

It is true that section 50 of the Police Act of 1862 is repealed by the Ballot Act, but it is repealed with a qualification. The fifth schedule appended to the Ballot Act repeals the 50th section of the Police Act, "so far as their provisions are inconsistent with the provisions of this Act." Now, section 50 of the Police Act is in some respects quite inconsistent with the provisions of the Ballot Act, and to that extent it is repealed. Thus it provides that one-third of the Commissioners are annually to go out of office, and their places are to be supplied by an equal number chosen "in the manner foresaid, under all the rules, regulations, and provisions applicable to such first election." Now these rules, regulations, and provisions provided for open voting after the old fashion, and are therefore necessarily repealed. But otherwise the 50th section, not being inconsistent with the Ballot Act, is not repealed, and the Ballot Act dealing with secrecy of voting, the fixing of a day for election does not fall under its provisions.

As to the 48th section, the matter is still more clear. It is said that it is repealed, because under section 10 of 3 & 4 Will. IV., a new election is the only remedy for a double return. But what is to take place in case of a double return is not a question as to the manner of conducting the election, and so does not fall under section 22 of the Ballot Act. The manner of conducting the election comes to an end when the return is made. Here the return has been made, and the question as to the double return must be dealt with under the 48th section of the Police Act. The Police Commissioners, when they met after the election, were desired to nominate one of the two candidates who were returned as having an equal number of votes. They did so, but that was not an election, it was rather what it is called by the Act, an appointment. The election was over, and resulted in a double return, and what was done afterwards was only a remedy for the result. In like manner, the provisions of the 10th section of 3 & 4 Will. IV. have nothing to do with this. In case of a double return there is no doubt a provision that there shall be a new election, which is to be begun again from the beginning, but the providing that an election is to take place is not part either of the old or of the new election. It is very remarkable that while several sections of the Police Act of 1862 are repealed, section 48 is not mentioned at all, and, by way of contrast, that gives a very strong argument that it is still in force. I am, therefore, of opinion that, as regards the objection founded on the 22d section of the Ballot Act, the pursuer's case is not well founded.

The only other objections urged by the pursuer against the validity of the election in 1873 are founded on alleged irregularities in the manner of conducting the election under the Ballot Act. Now, each and all of these objections go to this, that if any of them are well founded the entire election must be annulled. The result would not be merely the substitution of Hamilton for Garroway. I think that the pursuer is not entitled to insist on that result under the summons here. He is not in a position to insist in objections which, if sustained, would annul the whole election. In the first place, he has not called the proper parties. In order to entitle him to challenge the whole election he must call as defenders the five candidates who were declared to be elected. But he has only called Garraway, Mr Gray, clerk to the Commissioners of Police for the burgh of Dunoon, for himself and as representing them, and Mr Smith, the returning officer. Now, it is clear that no reduction which would have the effect of ousting the other four commissioners can be sustained unless they are all called, and it does not appear to have been the intention of the pursuer to annul the whole election. There is no conclusion to that effect, but only for annulling the proceedings as regards Garraway. So the objections to the proceedings as under the Ballot Act cannot be entertained under this summons. I therefore give no opinion upon these objections. I, however, may say that I concur with the Lord Ordinary that the way in which Mr Smith dealt with stamping the Ballot papers was a very serious irregularity—whether or not it would void the election I do not say.

LORD DEAS concurred.

LORD ARDMILLAN—I agree in the opinion expressed by your Lordship—adhering to the Lord Ordinary's interlocutors of 19th February and 10th July 1874—and have nothing to add. On the objection urged to the impressing of the official stamp on the ballot papers, I am of opinion that in regard to the time, the place, and the mode of stamping the ballot papers there was a serious irregularity. The act was not done according to the directions of the statute. Whether that irregularity would have the effect of rendering void and null the whole procedure at the election where these ballot papers were used is a question which would require serious consideration, and on which I do not express any opinion. For I agree with your Lordship that in this action we cannot decide such a question. The pursuer has in this action challenged no right but that of Mr Garraway, and has not called as defenders those whom he was bound to call into Court if he sought to set aside their election. The only legitimate result of sustaining the objections to the irregular mode of stamping all the ballot papers is the annulling of the whole procedure and the whole election. That is not concluded for, and in the absence of the elected commissioners could not be declared or enforced. The setting aside the election of Mr Garraway only, and the substitution of the pursuer, is all that is here concluded for, and that limited conclusion is not the appropriate result of sustaining the objection, if it be well founded. The separate objection to the conduct of Mr Scoullar, and to the vote of Mr Scoullar, and to the vote of Campbell, might be important in a scrutiny. But we are not here in a scrutiny, and we cannot enter into a scrutiny in regard to objections to individual votes.

LORD MURE concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the pursuer Gavin Hamil-

ton against Lord Gifford's interlocutor, dated 27th October 1874, and also as submitting to review the two previous interlocutors pronounced by Lord Gifford, dated respectively 19th February 1874 and 10th July 1874, adhere to the whole of said interlocutors, and refuse the reclaiming note; find the defenders entitled to additional expenses since 27th October 1874; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for the Pursuer—Balfour and M'Kechnie. Agent—Robert A. Veitch, S.S.C.

Counsel for the Defender—Solicitor-General Watson) and Hunter. Agents—Skene, Webster, & Peacock, W.S.

Wednesday, January 20.

FIRST DIVISION.

[Lord Gifford, Ordinary.

WATSON *v.* WATSON'S TRUSTEES.

Expenses—Reduction—Testament—Trust-Fund.

Circumstances in which, in an action of reduction of a testamentary trust-deed on the ground of fraud and circumvention and facility, directed, *inter alia*, against the trustees under the deed—the jury having found that the testator was of sound disposing mind, but that the deed had been obtained by fraud or circumvention—the Court allowed the expenses incurred by the pursuers, and also those incurred by the trustees out of the trust-estate.

Opinions—That it is always a question of circumstances whether or not, in such a case, the defenders are entitled to the expenses out of the trust-estate.

This was an action at the instance of Robert Watson and Mrs Agnes Watson or Martin, brother and sister of the deceased James Watson, banker, Airdrie, against the said James Watson's testamentary trustees and Miss Jessie Robertson, for reduction of a codicil executed by Mr James Watson on 27th March 1873, on the ground of incapacity and impetration by fraud and circumvention. It appeared that the said James Watson left three testamentary writings—viz., two trust-dispositions and settlements, dated respectively 19th February and 11th March 1873, and the codicil under reduction, which was a codicil to the trust-deed. The codicil bore that the said James Watson thereby revoked all former settlements executed by him at any time, except the said codicil and the deed upon which it was written.

The pursuer averred that at the date of the codicil the said James Watson was in a weak and facile state of mind, and that the defender Jessie Robertson, taking advantage of his state, obtained the codicil by fraud and circumvention, to the lesion of the said James Watson and of the pursuers.

The case went to a jury on the two following issues:—"(1) Whether the codicil dated 27th March 1873, of which No. 7 of process contains an extract, is not the deed of the said James Watson? (2) Whether at the time when the said codicil was signed the said James Watson was in a weak and facile state of mind, and easily imposed upon; and whether the defender Jessie Robertson, taking advantage of his said facility, did by fraud or circumvention impetrate and obtain the said codicil from the said James Watson, to his lesion?"

The jury found for the defenders upon the first issue, and for the pursuers upon the second.

The case now came before the Court on the question of expenses, and the pursuers asked for expenses, but moved the Court to find that the defenders, the trustees, were not entitled to take the expenses out of the trust-estate.

Authorities cited—*Graham* v. *Marshall*, Nov. 22, 1860, 23 D. 41; *Chalmers' Trs.* v. *Scott*, 8 Sh. 961; *Munro* v. *Strain*, June 18, 1874, 1 Rettie, 1039.

At advising—

LORD PRESIDENT—As I tried this case perhaps your Lordships may expect that I should give my impressions upon it. The jury found for the defenders on the first issue, and so negatived the plea of incapacity; and they found for the pursuers upon the second issue, which was a finding to the effect that Jessie Robertson obtained the deed under reduction by impetration. I think that the trustees stand perfectly free as regards Jessie Robertson's share in this transaction; and I do not think that it is even suggested that they used any undue influence in regard to the legacies. The case was a very narrow one as it came out on the trial, and I should not have been surprised if the jury had returned a verdict the other way. It was thus a fair case for trial; and I think that the trustees were placed in a difficult position when they had to make up their mind whether to defend the action or not. For they had to look not only to the interests of the Robertsons, but of a number of other people, whose rights under the codicil were very different from what they would have been if the second deed had been left standing. The trustees in deciding to defend this action were acting quite within their duty, and I therefore think they are entitled to have their expenses out of the trust-fund. No general rule can be laid down which must govern cases of this sort, but each case must be judged of by its own circumstances; and I think that the circumstances of the present case are strongly in favour of the defenders.

LORD DEAS—I do not think that the fact that the Jury find that the testator was not incapacitated by imbecility or unsoundness of mind affects the question in any material degree, for it is usual in such cases to lay two issues of this nature before the jury, and it does not much affect the question of expenses that the jury find for the defenders upon the first issue and for the pursuers upon the second.

The question before us is altogether one of circumstances, and to try to extract general rules out of the case is calculated to mislead. In the present case I agree with your Lordship that the circumstances are in favour of the defenders, and that they are entitled to their expenses out of the trust estate. [LORD PRESIDENT—I mentioned the fact that the jury returned a verdict for the defenders upon the first issue, because if it had appeared from the result that the testator had not sufficient mental capacity to make a will it might have made a considerable difference, for that was probably a matter which the trustees should have enquired into and known before they resolved to defend the action.] I may explain that my remark was not suggested by anything which had fallen from the Lord President, but was a general remark