*Tuesday, March* 16.

## FIRST DIVISION.

[Sheriff of Ayrshire.

## SCHOOL BOARD OF SORN AND OTHERS *v.* BONE.

*Sheriff—Jurisdiction—School—School Board—Education Act* 1872 (35 *and* 36 *Vict. cap.* 62), *sec.* 14.

The Education Act 1872 provides that disputes regarding the election of candidates for a School Board shall be summarily determined by the Sheriff. *Held* that the Sheriff in such a case ought not to proceed by way of making up a record as in an ordinary action.

Where the Sheriff-Substitute had made up a record and allowed a proof, and then on the appeal of one party the Sheriff had decided the case—*held* that though the procedure had been irregular, the only decision pronounced was that of a Judge having jurisdiction to determine the matter finally, and that there was no ground for interference.

At a meeting of the School Board for the parish of Sorn, held in January or February 1885, the members whose term of office was about to expire appointed 4th April 1885 for a new election of members, and appointed Robert Buchanan Conner to be returning officer.

On 1st October 1884 a General Order regulating the election of School Boards was issued by the Committee of the Lords of the Privy Council on Education in Scotland, by virtue and in pursuance of the powers vested in them under the Education Acts 1872 to 1883, and this General Order regulated the election of the School Board for the parish of Sorn.

The returning officer, Mr R. B. Conner, on or about 12th March 1885 signed and published notices, in terms of rules 6 and 7 of said General Order, bearing, *inter alia*, that the election would take place on 4th April 1885; that the last day for the nomination of candidates would be 25th March 1885; that public notice would be given of the list of candidates on or before 23d March 1885; and that any candidate's name might be withdrawn up to 4 p.m. on 26th March 1885.

Rule 8 of the General Order provides, *inter alia*, that any five electors may nominate as a candidate any person of full age, "by sending or delivering at the appointed place a nomination paper subscribed by such five electors," etc. By rule 9 of the General Order it is, *inter alia*, provided "that the returning officer shall decide whether any nomination is valid, and his decision shall be final." Various persons were nominated, and by letter dated 20th March 1885 the returning officer intimated to David Bone that he had been "duly nominated to represent this parish in the School Board of Sorn, the election for which takes place on Saturday 4th April next." On 21st March 1885 the returning officer published a notice stating that "the following candidates had been duly nominated for election as members of the School Board to be elected for the parish," and in this notice Bone's name appeared, the whole number comprising one more than the number of the board.

Eight clear days before the 4th April 1885 one of the duly nominated candidates, viz., the Rev. J. G. Baillie, was withdrawn. By rule 12 of the General Order it is provided, "that if the number of candidates nominated and not withdrawn shall equal but not exceed the number of members to be elected, such candidates shall be deemed to be elected on the day fixed for the election, and the returning officer shall on that day publish a list of the names," &c.

On 4th April the returning officer, believing from inquiries which he had made that one or more of the signatures to the nomination paper of Bone were not genuine signatures, wrote to him intimating that his nomination as a candidate was invalid.

On 5th April 1885 the returning officer published a list of those who had been elected members of the School Board. In this list the name of Bone was not included. The School Board thereafter refused to admit that he had been elected a member of the School Board, and at a meeting held on 20th April 1885 elected Mr W. P. Fleming to fill the place which they considered to be vacant by the non-election of Bone.

Bone presented this petition in the Sheriff Court of Ayr to have it declared that he had been duly elected a member of the School Board of Sorn, and that the appointment of W. P. Fleming was invalid.

The Sheriff-Substitute (Orr Paterson), after a record had been made up, allowed a proof before answer.

Against this interlocutor Bone appealed to the Sheriff. The competency of the appeal was objected to.

The Sheriff (Brand) found the appeal competent, and found that the returning officer having decided that the pursuer was duly nominated, and given public intimation thereof by his notice of 21st March could not go back on his own decision, and he therefore found that the pursuer Bone was duly elected and ought to have been returned as a member of the Board, and that Fleming was not validly appointed.

The School Board appealed to the First Division of the Court of Session.

The appellants argued—This was not a question whether an *election*, but whether a *nomination*, was valid. Therefore the decision of the returning officer that Bone had not been legally nominated was final by rule 9 of the General Order. But taking it to be a question of the validity of an *election*, not of a *nomination*, then as the 14th section of 35 and 36 Vict. c. 62 (the Education Act 1872) said that the Sheriff's "determination should be final," the determination of the Sheriff-Substitute must be considered final, and the appeal to the Sheriff-Principal and his interlocutor following thereon were incompetent—Sellar's Education Acts, 7th edition, p. 165, and the cases of *Hay* v. *Kippen* and *Lowson* v. *Keddie* there quoted. Also at p. 162, the *Forteviot* case. The Bankruptcy and Registration Acts were analogous to the Education Act, and in them "Sheriff" meant either Sheriff-Substitute or Sheriff-Principal. The Court must construe the word "Sheriff" in that sense in section 14 of the Act 35 and 36 Vict. c. 62—*Balderston* v. *Richardson*, 3 D. 597, February 20, 1841, see Lord Mackenzie's opinion—*Magistrates of Portobello* v. *Magistrates of Edinburgh*, 10 R. 130, November 9, 1882. Again, this was an incompetent form of procedure, for the Sheriff-Substitute should

have disposed of the case summarily (sec. 14 of 35 and 36 Vict. c. 62), and should not have made up a record—50 Geo. III. c. 112, sec. 36.

Argued for the respondents—Taking the case as one of disputed election and as falling under section 14 of 35 and 36 Vict. c. 62, the appeal to the Sheriff-Principal was competent. The Sheriff-Substitute had given no "determination" upon the merits of the case, and had only by his interlocutor taken steps towards the determination. Therefore his interlocutors were not protected by the finality clause in section 14 of 35 and 36 Vict. c. 62—*Leitch*, October 21, 1870, 9 Macph. 40; *Otis* v. *Kidston*, January 31, 1862, 24 D. 419. But when the Sheriff-Principal took the case into his hands he pronounced an interlocutor dealing with the merits of the case. This was a "determination" in the sense of section 14 of 35 and 36 Vict. c. 62. Therefore it was final and not subject to appeal—*Fleming* v. *Dickson*, December 19, 1862, 1 Macph. 188.

At advising—

Lord President—The question raised by this appeal concerns the election of members of the School Board of the parish of Sorn, and the interlocutor sought to be brought under review is one by the Sheriff-Depute of the county, in which he finds that "the pursuer was duly elected and ought to have been returned a member of said School Board; and finds and decerns that William Peden Fleming is not a member of said School Board, and was never validly appointed a member thereof."

Now, that interlocutor was pronounced by the Sheriff in exercise of the jurisdiction conferred upon him by the 14th section of the Education (Scotland) Act 1872, which provides—[*His Lordship here read the section*]. *Prima facie*, therefore, it seems very clear that an appeal from this judgment is incompetent. This is an interlocutor pronounced by the Sheriff determining a dispute in connection with the election of a School Board, and it is the determination of a question declared by statute to be final. The question is, whether any such special circumstances are here alleged as to cause an exception to the general rule?

The only ground for that would be some serious excess of jurisdiction on the part of the Sheriff, but what is truly maintained by the appellant is that the Sheriff did not pronounce this interlocutor in proper form, that he should have pronounced his interlocutor under the 14th section of the Act of 1872, and not as an appeal from the Sheriff-Substitute, and that section 14 allows no such appeal.

Irregularities in the proceedings in the Sheriff-Court have been made out to a certain extent by the record before us, for the Sheriff-Substitute made up a record and allowed parties a proof of their averments; against that interlocutor allowing proof an appeal was taken, and under that appeal the Sheriff-Depute pronounced the interlocutor now sought to be brought under review. There was no radical defect in the jurisdiction exercised by the Sheriff, for the Sheriff is the person pointed out by section 14. I think both the Sheriff-Depute and the Sheriff-Substitute have jurisdiction to try such a complaint, but whichever pronounces judgment, his judgment is final and cannot be brought here on appeal. I am prepared to hold—and I understand your Lordships are of the same opinion—that the proceedings in the Sheriff Court were irregular, because the proceedings should have been summary. That means the Sheriff is to hear the parties and if necessary have evidence led before him and then to pronounce decree, but he is not to make up a record.

There was irregularity in making up a record and in allowing proof, and there was further irregularity in taking an appeal, and in that way bringing the case under the review of the Sheriff, but the question is, whether that was so much in excess of the jurisdiction which the statute gives the Sheriff to pronounce judgment in such cases as to require our interference? Though the case has not been tried in the proper way, yet the case has been tried by the Judge to whom the statute gives jurisdiction, and judgment having been pronounced by him, I hold appeal is incompetent. The decision in the case of *Fleming* v. *Dickson*, pronounced by the Second Division when I sat there, and referred to in the discussion, is not on all fours with the present case, but it furnishes a very good illustration of the way in which this Court will refuse to interfere with the judgment of an inferior Court, although the manner in which the proceedings in such Court were carried through was not in all respects in due form. As I said, that case is not on all fours with the present, but I think we are following the same principle in deciding the case as I propose.

Lord Shand—Section 14 of the Act 1872 provides—[*His Lordship quoted the section.*]

Now, having reference to the nature of the questions which will come before the Sheriff under the provision, it follows that either the Sheriff or the Sheriff-Substitute may take the matter up. I think the same principle applies as holds with regard to questions under the Bankruptcy Statute.

In the next place, I think, having regard to the kind of questions that will arise, and the provisions of the statute, it is intended the proceedings should be summary. There is no reason for thinking a record is to be made up. In bankruptcy proceedings there are special provisions in the statute for making up a record, and the nature of such proceedings make a record necessary for the bringing out of the allegations of parties, but here the Legislature clearly intended the Sheriff or the Sheriff-Substitute should as summarily as possible determine questions in dispute. It was therefore irregular to have a record here at all. If the Sheriff-Substitute had not sufficient information supplied him at first he should have adjourned the case, and on resuming consideration of it have disposed of it summarily.

Now, here the Sheriff has taken up the question on appeal from his Substitute, and there is no doubt such appeal was incompetent, but the Sheriff-Substitute had determined nothing—if he had, his judgment would have been final. The Sheriff has taken up the question and decided it, and although he did so at an irregular stage, I am of opinion his judgment is final.

Lord Adam—The prayer of the petition here is "to find and declare that at the election of a School Board of the parish of Sorn, on 4th April 1885, the pursuer was duly elected and ought to have been returned as a member of said School

Board ; and also to find and declare that William Peden Fleming is not a member of said School Board, and was never validly nominated or appointed a member of said School Board." The decision of the Sheriff was that the petitioner was duly elected and Fleming was not. Now, *prima facie*, there is no doubt that was a question in dispute arising out of an election of a School Board, and the Act says that in such questions the Sheriff is to take up the matter and his judgment is to be final. Here then we have *prima facie* a final decision which we have no power to review. But it is here said the Sheriff has gone entirely out of his jurisdiction and has acted in excess of his jurisdiction, and if that were made out we should certainly take up the case and rectify it. Now, the excess of jurisdiction first alleged here is that the Sheriff was acting *ultra vires*, because the returning officer had given a decision, and his decision was final.

Now, that is not the question here, the question here is as to what the returning officer had decided. Nobody questioned that if the returning officer had determined the question committed to him his decision would have been final. The question was, what had the returning officer decided, and the Sheriff has decided that the returning officer's actings amount to a deliverance that the petitioner and not Fleming is a member of the School Board, and the judgment of the Sheriff is final.

The second ground on which the plea of no jurisdiction is maintained is not that the Sheriff-Court has no jurisdiction, but that the Sheriff-Substitute having decided the question, the Sheriff-Principal had no right to take it up.

I entirely agree with your Lordships that it is intended the proceedings in such cases should be very summary, and I also agree with the opinions of the Sheriffs of Fife and Perth in the cases cited [*Lowson* v. *Keddie* and *Hay* v. *Kippen*, *sup. cit.*], but I think there was here no radical want of power in the Sheriff-Principal. I think he was competent to give a judgment in this question. Either the Sheriff-Substitute or the Sheriff-Principal may entertain such questions, and I do not see why if a Sheriff-Principal were in his county he might not take up the case and give the judgment though his Substitute had ordered the case to be debated before him, though of course both cannot pronounce judgment. Here the Sheriff-Substitute had pronounced no judgment, and though irregularities were committed, the radical right was in the Judge who has given us his decision, and I think that decision is final.

Lord Mure was absent.

This interlocutor was pronounced:—

"The Lords having considered the cause, and having heard counsel for the parties on the appeal, dismiss the same as incompetent, and decern."

Counsel for Bone—J. A. Reid—Orr. Agents—Philip, Laing, & Traill, S.S.C.

Counsel for School Board—Low—Ure. Agent—D. Mackenzie, W.S.

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*Wednesday, March* 17.

## FIRST DIVISION.

Lord M'Laren, Ordinary.

## CALEDONIAN RAILWAY COMPANY *v.* CHISHOLM.

*Prescription—Triennial Prescription—Act* 1579, *c.* 83.

The Triennial Prescription Act being intended to prevent the bringing forward of claims which the creditor has neglected to pursue, it is a relevant answer to the plea that a claim has undergone the triennial prescription, to allege that it was not sooner brought forward owing to the conduct or concealment of the defender.

This was an action at the instance of the Caledonian Railway Company against John Chisholm, sack contractor, Perth, for £8105, 17s., which the pursuers alleged was due to them for the carriage of sacks.

The pursuers averred—"(Cond. 4) By minute of agreement dated 30th July and 12th August 1874 the pursuers and defender entered into a contract for the supply of sacks to be used in the conveyance of grain over the pursuers' lines of railway. The said contract commenced on 1st June 1874, and ended on 30th November 1881. All sacks supplied by the defender under said contract were carried by the pursuers free of charge, but said contract had no reference to the carriage of sacks supplied by the defender for the carriage of grain by sea, or over other lines of railway, and not passing over any of the lines or any part of the system belonging to or leased or worked by the pursuers. (Cond. 5) On 26th February 1884, being more than two years after the said contract came to an end, the defender intimated for the first time a claim against the pursuers for alleged loss of sacks supplied by him during said contract, and on 20th June 1884 he raised an action against the pursuers for the sum of £3164, 13s., as the value of 63,293 sacks alleged by him not to have been returned to him by the pursuers. After a proof had been allowed in said action access was obtained by the pursuers to the defender's books, and a long and laborious inquiry instituted by them testing the accuracy of the defender's allegations. In the course of this inquiry the pursuers ascertained for the first time from the defender's books (they themselves having no means of knowledge thereof) that during the period of the said contract a large quantity of empty sacks had been forwarded by the defender over the pursuers' railways on the pretence that these sacks were to be used for the carriage of grain on the pursuers' lines, whereas they were not used, and were not intended to be used, for this purpose, but were intended to be used, and were used, for the carriage of grain by sea or by other lines of railway; and these sacks were so used without contributing in any way to the forwarding of the pursuers' traffic ; and that in like manner large quantities of empty sacks were sent over the pursuers' lines to the defender's depots on the pretence or on the footing that they had been used for the carriage of grain and gone full over the pursuers' lines, but which sacks had not been so used, nor had they