Monday, November 14.

(Before Lord Kinnear, Lord Trayner, and Lord Kincairney.)

MEECH *v.* GALT.

Election Law—Lodger Franchise—Defective Claim — Representation of the People (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 48), *sec.* 19, *Schedule* (*I*), *Form No.* 1.

Thomas Meech claimed to be registered as a voter in the burgh of Ayr in respect of the occupation of lodgings. In his claim he set forth the name of the person to whom he paid rent, but not the description and residence as required by the Representation of the People (Scotland) Act 1868, Schedule (I), Form No. 1. *Held* that the claim was bad.

Counsel for the Appellant — Sol.-Gen. Asher, Q.C.—Hunter. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Respondent—Salvesen. Agents—Sturrock & Graham, W.S.

COURT OF SESSION.

Tuesday, November 15.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WILLING & COMPANY *v.* HEYS & SONS.

Process—Appeal—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40.

A case appealed under the 40th section of the Judicature Act *remitted* to a Lord Ordinary for proof, though this course was opposed by the respondent.

Opinion by Lord M'Laren, that when actions are appealed from the Sheriff Court for trial in the Court of Session, they should only in exceptional cases be sent back to the Sheriff Court.

This action was raised in the Sheriff Court at Glasgow by Willing & Company, merchants in Manchester, against Heys & Sons, calico printers in Glasgow. The pursuers concluded for declarator that they, as owners of a number of pieces of cloth specified, delivered by them to Mitchell, Johnston, & Company, printers in Glasgow, were entitled to delivery of the same from the defenders, in whose hands the pieces of cloth now were, on payment only to the defenders of any charges due to them for work done on said goods.

The defenders maintained that they should be assoilzied, in respect, *inter alia*, (1) that they were entitled, by custom of trade and course of dealing, to a general lien or retention over the cloth in question for a balance due by Mitchell, Johnston, & Company, who had stopped payment; (2) that the said goods were, in the knowledge of the pursuers, delivered to and received by the defenders on the footing that they were subject to such a general lien; and (3) that they received the said goods in the *bona fide* belief that they were the property of Mitchell, Johnston, & Company, and all along acted in that belief.

The Sheriff-Substitute having granted a proof before answer, the defenders appealed to the Court of Session under the 40th section of the Judicature Act, and on the case being called in Single Bills, moved the Court to remit it to the Outer House for proof, or alternatively to send it to trial by jury.

The pursuers opposed this motion, and asked the Court to remit the case back to the Sheriff for proof.

Argued for the defenders—It had been authoritatively established that when a case was brought here under the 40th section of the Judicature Act, it might be treated as a case which had originated in the Court of Session—*Cochrane* v. *Ewing*, July 20, 1883, 10 R. 1279. The course suggested by the defenders was therefore quite competent, and such a course had been followed by the Court against the wishes of one of the parties to a case—*Laidlaw & Sons* v. *Wilson & Armstrong*, November 24, 1874, 2 R. 148. The defenders might reasonably ask that this course should be followed, because the case being one of mixed law and fact was fitted for trial before a judge, and it was only fair that the defenders' right of appeal to the House of Lords on the facts as well as the law should be kept open. There was also a cognate case, in which they were defenders, pending before one of the Outer House Judges. The pursuers being Manchester merchants, no hardship to them was involved in the removal of the case from the Sheriff Court at Glasgow to the Court of Session.

Argued for the pursuers—Though the case of *Cochrane* v. *Ewing* decided that it was competent to deal with a case appealed under the Judicature Act as if it had originated in the Court of Session, it had never been the practice to take that course when it was opposed by the respondent—*Bethune, &c.* v. *Denham*, March 20, 1886, 13 R. 882. In *Laidlaw's* case it was the appellant who had objected to proof being taken before a judge in the Court of Session. The general practice when a case was unfitted for jury trial was to send it back to the Sheriff for proof—*Chisholm* v. *Marshall*, January 17, 1874, 1 R. 388. The present case was one of mixed law and fact, the chief question being one of law. It was therefore unfitted for jury trial, and the expedient course was to send it back to the Sheriff for proof.

At advising—

LORD PRESIDENT—In dealing with cases of this kind, I think, we start from the decision in the case of *Cochrane* v. *Ewing*, and if that is so, we may treat this case as if it had originated in the Court of Session, and consider what should be done with it.

It appears to me that the explanation of the nature of the cause which we have received shows that it is well adapted to trial before a judge, and we are also informed that a cognate case is now depending before one of the Judges of the Outer House. I therefore think that we should remit this case to the same Judge.

LORD ADAM concurred.

LORD M'LAREN—If this question were being argued for the first time, I should have doubted whether it was consistent with the policy of the statutes dealing with procedure to send a case back to the Sheriff after it has been removed here for trial, because it has always seemed to me that the policy of the Judicature Act and the Court of Session Act is to provide for a better distribution of business between this Court and the Courts below. Thus it is left open to any party to begin an action in the Sheriff Court irrespective of its value, but the other party is given power, if the value of the cause is over a certain amount, to remove it to this Court. I think the case of *Cochrane* v. *Ewing* recognises that the motive of the provision in the Judicature Act is to enable a party to remove a cause to this Court for trial here when its value is over a certain amount. But of course I do not say that it is incompetent to send a case back to the Sheriff, because that course has been followed by the Court in cases of small value. I think, however, that it is only exceptional cases which should be so treated, because to make a rule of doing so would be to give no effect to the right of appeal given by the statute.

LORD KINNEAR concurred.

The Court remitted the case to Lord Low for proof.

Counsel for the Pursuers—Ure. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—C. S. Dickson. Agent—F. J. Martin, W.S.

Tuesday, November 1.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

YOUNG'S MARRIAGE-CONTRACT TRUSTEES *v.* YOUNG'S TESTAMENTARY TRUSTEES.

Proof—Presumption—Marriage-Contract—Conveyance of Acquirenda—Savings from Life Interest of Wife.

A husband bound himself by an antenuptial contract to invest £1000 in heritable estate in his own and his wife's name, as trustees for behoof of his wife in liferent, and the children of the marriage in fee. On her part the wife conveyed her whole *acquirenda* to her husband and herself, as trustees for the same purposes. During the subsistence of the marriage the wife acquired certain heritable properties in her own name. She died, leaving a settlement disposing of her whole estate.

After the wife's death the heritable properties acquired by her *stante matrimonio* were claimed by trustees appointed under the marriage-contract, and also by her testamentary trustees, the latter alleging that the properties had been acquired by the wife out of savings from the liferent secured to her by the marriage-contract.

Held that there was a presumption that the properties, having been acquired *stante matrimonio*, fell under the conveyance of *acquirenda* in the marriage-contract, and that the wife's testamentary trustees had failed to adduce sufficient evidence to rebut this presumption, and therefore that the claim of the marriage-contract trustees must prevail.

Opinions by Lord Adam and Lord Stormonth Darling, that savings by the wife from the life interest which was secured to her as separate estate would not have fallen under her conveyance of *acquirenda* in the antenuptial contract.

On 30th November 1838 David Young, messenger-at-arms, and Margaret Lindsay entered into a contract of marriage, whereby David Young bound himself to invest £1000 in heritable estate, and to take the titles thereof to himself and Margaret Lindsay, and the survivor, in trust for behoof of Margaret Lindsay in liferent allenarly, and for the children of the marriage in fee. On her part Margaret Lindsay disponed to the said David Young and herself, and the survivor, as trustees for the purposes foresaid, the whole property which she then possessed or which should pertain to her during the subsistence of the marriage. The provisions in favour of the wife were declared to be exclusive of her intended husband's *jus mariti* and right of administration.

David Young and Margaret Lindsay were thereafter married, and the marriage subsisted until 1871, when Mr Young died. Mrs Young died in 1890, survived by several children, and leaving a trust-disposition and settlement disposing of her whole estate.

After Mrs Young's death her children were appointed trustees under their parents' marriage-contract, by decree of the Lords of Council and Session, and they thereafter raised an action against their mother's testamentary trustees, concluding, in the second place, for declarator that certain heritable properties acquired by Mrs Young during the subsistence of the marriage fell under the conveyance by her in the foresaid contract of marriage, and were held by her as trustee under that contract.

The defenders pleaded that they should be assoilzied, in respect that the whole of the properties in question had been ac-