stage if the Court would assent to such a course.

LORD PRESIDENT—Two courses are before the Court—to adhere to the interlocutor passing the note, or to recal the interlocutor and refuse the note.

It appears to me that the case of *Bartholomew* is sufficient to support the Lord Ordinary's interlocutor. In the Bill Chamber it is enough to show that there is a question to be tried, and that being so I am for adhering to the interlocutor of the Lord Ordinary.

The Court would gladly aid the parties in having the merits decided, and grant the motion made if that were possible, but we must have a question to decide and be able to pronounce an operative judgment.

In the present case, as I have said, there are but two alternatives, and I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM—The alternatives are to pass the note or to refuse it. Now, we do not refuse a note unless we think there is no question to try, and we think there is a rather serious question to try here. In passing the note we are, in my opinion, following the authority of the case of *Bartholomew*.

LORD M'LAREN—I agree with what has been said by your Lordships—that there is a proper question to be tried, and that is enough to warrant us in passing the note. But the Lord Ordinary has gone somewhat further, for it is not unusual in passing a note to express an opinion as to the grounds for doing so. Now, his Lordship has pointed out the inconvenience—the possible hardship—which might result to the Caledonian Railway Company if the order which has been made against them were carried into execution before the company has had an opportunity of bringing that order under review. Nothing has been said that tends to displace in my mind the impression made by what his Lordship says; and while we can do no more than pass the note I should hope that it will not be necessary to rehear the case on the question of the proper procedure, but that the parties will accept Lord Pearson's view that there are grounds for staying execution on the interlocutor of the Sheriff-Substitute until the merits of the case can be brought competently before the Court of Appeal.

LORD KINNEAR concurred.

The Court adhered.

Counsel for Reclaimers—R. V. Campbell—Deas. Agents—W. & J. Burness, W.S.

Counsel for Respondents—Clyde. Agents—Hope, Todd, & Kirk, W.S.

Saturday, May 22.

FIRST DIVISION.

LINDSAY AND OTHERS *v.* MAGISTRATES OF LEITH.

Burgh—Revision of Boundaries—Decree in respect of No Appearance—Appeal—Burgh Police Act 1892 (55 *and* 56 *Vict. c.* 55), *secs.* 11 *and* 13.

Under section 11 of the Burgh Police Act power is given to the Sheriff, on the application of the police commissioners or council of any burgh, after due advertisement and "after hearing all parties interested, from time to time to revise, alter, extend, or contract the boundaries of such burgh for the purposes of this Act," and also to revise the boundaries of the wards of the burgh.

Section 13 provides a method of appeal for any party who may consider himself aggrieved by such a deliverance of the Sheriff.

A petition was presented by the town council of a burgh for revision of the boundaries of its wards, and after due advertisement had been made no answers were put in. The Sheriff thereafter, without inquiry, granted decree in terms of the prayer of the petition "in respect no appearance has been made to oppose the prayer of the petition." A petition was presented against this deliverance by certain ratepayers, who objected to the proposed changes.

Held that the Sheriff should have satisfied himself that the proposed changes were expedient before granting decree, that as he was exercising an administrative and not a judicial function, decree in respect of "no appearance" was incompetent; and petition *remitted* to a Lord Ordinary to direct inquiry.

Section 11 of the Burgh Police Act 1892 (55 and 56 Vict. cap. 55) provides—"Upon the application of the commissioners or of the council of any burgh, and after publication in the *Edinburgh Gazette*, and in any newspaper published in such burgh, and if no newspaper be published therein, then in a newspaper circulating in such burgh, and such other notice and inquiry as he may deem necessary, it shall be lawful for the Sheriff, after hearing all parties interested, from time to time to revise, alter, extend, or contract the boundaries of such burgh for the purposes of this Act, but so as not to encroach on the boundaries of any other burgh, and where not divided into wards, to divide the same into wards, and where divided into wards, to revise the boundaries of such wards; and where in any burgh wards exist at present, the Sheriff may increase their number or lessen their number by combination or re-arrangement, and the Sheriff shall define, in a written deliverance on such application, the new boundaries of such burgh and wards, for the purposes of this Act; and such deliverance, unless appealed against in manner

hereinafter provided, shall be final; and when recorded along with the application on which it proceeds in the Sheriff Court books of the county, shall fix and determine the boundaries of such burgh and wards for the purposes of this Act. . . . The Sheriff or Sheriffs, in revising the boundaries of a burgh, shall take into account the number of dwelling-houses within the area proposed to be included, the density of the population, and all the circumstances of the case, whether it properly belongs to and ought to form part of the burgh, and should in their judgment be included therein." . . .

By section 13 it is provided that any occupier or owner who considers himself aggrieved by the deliverance of the Sheriff may, within fourteen days, present a petition against it to the Court of Session, setting forth the grounds of his objections; "and the Court of Session may thereupon order answers, and, after answers have been lodged, may either pronounce a final order, or remit to a Lord Ordinary to direct inquiry into the circumstances of the case, and to issue such order thereupon as he may deem requisite to determine the boundaries of such burgh."

On 26th March 1897 a petition was presented in the Sheriff Court of Edinburgh by the Provost, Magistrates, and Town Council of the burgh of Leith, praying the Sheriff "to revise, alter, and readjust the boundaries of the wards of the said burgh, in accordance with the terms of section 11 of the Act." Advertisement was made but no objections were stated to the petition, and on 14th April the Sheriff (RUTHERFURD) pronounced the following interlocutor:—"The Sheriff having resumed consideration of the petition and relative productions, in respect no appearance has been made to oppose the prayer of the petition being granted, defines the new boundaries of the wards of the burgh of Leith for the purposes of the Burgh Police (Scotland) Act 1892, and for all parliamentary and municipal purposes, in manner following," viz.—[*His Lordship proceeded to define the boundaries as craved in the prayer of the petition*].

On 8th April the Town Council applied, in terms of section 44 of the Burgh Police Act, to the Secretary for Scotland for a Provisional Order to increase the number of councillors in the burgh, and the Sheriff appointed an inquiry with reference thereto. The following is a tabulated abstract of the number of electors in accordance with the existing wards; and the number of electors in accordance with the proposed re-division:—

WARDS.	No. of Representatives.	Existing Register.			WARDS.	Proposed Register.		
		M.	F.	Total.		M.	F.	Total.
First	4	1981	322	2303	First	1501	263	1764
Second	3	4154	703	4857	Second	1897	331	2228
Third	3	1462	237	1699	Third	2054	316	2370
Fourth	3	2204	440	2644	Fourth	2409	404	2813
Fifth	3	2266	437	2703	Fifth	2061	473	2534
..	..	..	..	..	Sixth	2145	352	2497
	16	12,067	2139	14,206		12,067	2139	14,206

A petition was presented by certain owners and occupiers of property within the first ward, which it was proposed should be transferred to the third ward, craving the Court "to recal the deliverance of the Sheriff complained of, and refuse the petition of the Town Council, or otherwise to remit to any Lord Ordinary to direct inquiry into the circumstances of the case, and to issue such order thereupon as he may deem requisite to determine the boundaries of the wards of said burgh."

The petitioners averred that they had inadvertently omitted to state objections to the petition before the Sheriff, and that "the deliverance was pronounced by him in absence of objections, without evidence being led as to the expediency or necessity of the proposed change." They submitted that "the proposed alterations of the boundaries are quite unnecessary and in any event unsatisfactory and not calculated to meet the purpose of the proposers." They further objected that the number of voters in the first ward would be unduly diminished, and that the effect would be "to deprive the ward of the influence it has hitherto exercised in municipal affairs."

Answers were lodged by the Provost, Magistrates, and Town Council. They maintained that the proposed change was necessary and expedient. They averred—"Admitted that the petitioners did not appear or state any objections to the petition presented to the Sheriff. *Quoad ultra* denied, and explained that although no evidence was led as to the expediency or necessity of the proposed change, a large map shewing the area was submitted to the Sheriff, and explanations afforded to him with reference thereto, which satisfied his Lordship both as to expediency and necessity of the proposed change, which indeed had been demonstrated to his Lordship by experience in recent parliamentary elections. The respondents submit that in respect the petitioners failed to appear and state objections before the Sheriff, they are not now entitled to appeal against the deliverance pronounced by him, which is a form of procedure solely intended for a party who has appeared and stated objections and is dissatisfied with the deliverance pronounced by the Sheriff, and, in any event, that there are no sufficient grounds stated for altering the Sheriff's deliverance."

Argued for petitioners—The Sheriff had made a mistake as to the kind of proceeding before him. The form of his interlocutor showed that he had treated it as a judicial proceeding and had pronounced decree in absence. But in reality he was only carrying out an act of administration, and it was incompetent for him to pronounce such a decree. Under section 11 of the Burgh Police Act the Sheriff was bound to hear all parties and to be satisfied that the change was expedient. The change proposed was a very radical one, and there was a strong feeling against it. Accordingly the proper course was to remit to a Lord Ordinary to order an inquiry.

Argued for respondents—The petitioners should have appeared before the Sheriff.

He had to decide on what was before him, and if no interested parties appeared, and he was satisfied with the expediency of the change he was right in pronouncing decree. His local knowledge was sufficient, in the absence of objections, to justify him in deciding without further inquiry. No relevant objections to the change had been stated, all those stated being merely of a sentimental character, and such as would not justify inquiry.

LORD PRESIDENT—By section 11 of the Burgh Police Act of 1892 power is given to the Sheriff to revise the boundaries of the wards of burghs. He is to be moved to do so by the council or commissioners of any burgh, and it is quite plain from the terms of sections 11 and 13, and also from the subject-matter of these sections, that the Sheriff is exercising an administrative power in altering boundaries, and he is only bound to do so if satisfied that a change is expedient. The selection of the Sheriff was of course made on the ground that he was the local judge necessarily having an extensive acquaintance with the community whose interests were involved, and his duty is to preserve the *status quo* unless reason is shown for the alteration.

In the present case after advertisement had been made of the application to have these wards altered, no answers were put in. The Sheriff, when he came to resume consideration of the application, was no doubt quite entitled to have in view as an element supporting the application that there was no opposition; but that did not, in my opinion, absolve him from the duty of satisfying himself that the alteration was expedient, although it might make that duty more easy. But his judgment in so many words discloses that he proceeded on the fact that no appearance had been made to oppose the application. His judgment says so. I am unable to regard that as a judgment—*tota re perspecta*—on a full consideration of the merits and demerits of the proposal.

Certain persons now come forward by petition to this Court who say that they are aggrieved by that judgment, that the change made by the order is unnecessarily far reaching, that the redress of the balance of the burgh with a view to the increased representation assigned to it might have been effected without touching the ward they were interested in, and that they object to the change as altogether unnecessary.

Now, it seems to me that even assuming that these objections rest partly on a feeling of objection to change and of attachment to old associations, that is the kind of thing that the Sheriff is bound to consider, and that he was not excluded from weighing it by what has been offered on the other side. The question then is, are we to shut the door to persons who come forward alleging more thoroughly than I have stated the objections I have mentioned. Our duty is to remit to a Lord Ordinary to direct an inquiry.

LORD ADAM—I am of the same opinion. Nothing can be clearer than that the duty which the Sheriff has to perform here is administrative and not in any sense judicial. The duty imposed on him by statute is to satisfy himself that the proposed alterations were necesary and that the method proposed was the most expedient.

Now, I agree that, not only looking at the interlocutor, but at the whole case, it appears that the Sheriff thought that he was acting in a judicial capacity, and that, no person appearing to oppose, he was entitled to decide the question as if he were pronouncing a decree in absence in a personal litigation, because he says—[*quotes Sheriff's interlocutor*].

In the face of that expression I cannot come to any other conclusion than that the Sheriff came to form his opinion without making any inquiries to satisfy his mind not only that the change was necessary but that the mode of change proposed was the best. I agree with Mr Salvesen that a change of some sort is probably necessary, but still the question is, how is it best to be effected, having regard to the existing interests and feeling on the subject. That is what the Sheriff should have applied his mind to, and as far as I can judge he has not performed this duty.

What, then, is our position? I think we are just in the position in which the Sheriff was originally, and I can quite understand that even if the Sheriff had not applied his mind as I think he ought to have done, we might, if we were satisfied after fully hearing parties that no further inquiry was necessary, pronounce a final order. But my view is that, sitting as it were as the Sheriff in the first instance, I could not dispose of the application without further inquiry, and that inquiry we cannot under the Act conduct ourselves. The only course open to us is to do as your Lordship suggests—to remit to the Lord Ordinary to direct inquiries into the circumstances.

LORD M'LAREN—In all questions as to the determination or alteration of the powers of local authorities, or as to the enlargement of local areas, it is the settled practice that variations shall be made only after evidence as to their desirability shall have been produced to the satisfaction of the authorities by whom the order is to be made. Sometimes it is by Parliament itself, as when a private bill is promoted for the purpose of consolidating or enlarging the area of a burgh, sometimes again the order is by the Secretary for Scotland, or a report by the Sheriff, and sometimes by the Sheriff acting as a direct delegate of Parliament. Now, looking to the terms of the enactment giving powers to the Sheriff, there is no reason to suppose that it is intended that applications of this kind should be dealt with in a manner inconsistent with the established usage in all similar cases. On the contrary, it is plainly intended that the facts establishing the expediency of the proposed order should be brought to the notice of the Sheriff. The evidence required to satisfy the Sheriff does not

necessarily take the form of a proof, but there must be evidence, formal or informal, to establish that a case has arisen for the exercise of the statutory powers.

Now, agreeing with your Lordships that the Sheriff's action in the matter cannot be sustained, it appears to me that this is a case for a remit to a Lord Ordinary. The statute deals with two cases, where the Court having all the materials for decision, may pronounce a final order, and where not having them, it must remit to a Lord Ordinary "to direct inquiry into the circumstances of the case." If the Sheriff had held an inquiry, and we had before us notes of evidence taken before him, or reports from skilled persons, there might have been no necessity for further inquiry, but having nothing of this kind before us, the proper course is to remit the case to a Lord Ordinary.

LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"Remit to Lord Stormonth Darling to inquire into the circumstances of the case, and to issue such order as his Lordship may deem requisite to determine the boundaries of the wards of the said burgh."

Counsel for the Petitioners — Balfour, Q.C. — Constable. Agents — Wallace & Pennell, W.S.

Counsel for the Respondents—A. Jameson—Salvesen. Agents—Irons, Roberts, & Co., W.S.

Thursday, May 27.

FIRST DIVISION.

ORPHOOT, PETITIONER.

Trust — Resignation of Trustee — Nobile Officium.

A testamentary trustee who could not resign under the Trusts Acts, and who had not power to resign under the settlement, *allowed* to resign, on the ground that the duties of his office as Sheriff-Substitute were such as to preclude him from giving attention to the trust business, which was arduous and complicated.

This was a petition presented by Thomas Henderson Orphoot, testamentary trustee of Sir James Naesmyth of Posso, craving the Court to grant him power and authority to resign the office of trustee.

The testator died in October 1896, and the petitioner along with two other trustees nominated by the trust - disposition and settlement accepted office.

The purposes of the trust were (1) the payment of debts, death-bed and funeral expenses, and the expenses of the trust; (2) the payment of certain legacies, including one hundred guineas free of legacy-duty, to each of his trustees who might be willing to accept office; (3) the disposal of certain articles as specific legacies; (4) the payment of the interest of the whole capital to the testator's widow, and upon her death the realisation of the capital and its payment in fixed proportions to certain charitable institutions; and (5) the sale of any heritable property of the testator which his widow might not wish to retain.

The petitioner averred—"That the total means and estate left by the truster amounted to upwards of £87,000, of which the greater portion was invested by the deceased on investments of a nature which the trustees are not entitled to retain, and that accordingly they have been and are still in the course of realising these to the best advantage with a view to the reinvestment of the funds on securities within their powers."

The petitioner further averred—"That your petitioner accepted office in ignorance of the magnitude of the trust-estate, and of the time and labour required for the proper management of so large a fund. He now finds that his official duties, which are varied and laborious, prevent him from giving proper attention to the affairs of the trust. Your petitioner is Sheriff-Substitute of the Lothians and Peebles at Peebles. He has the whole duties of his office in Peebles to discharge. In addition, upon three days of each week he requires to sit in Edinburgh in the Sheriff Summary and Bankruptcy Courts of Midlothian. On these days he has also to dispose of the whole of the miscellaneous and administrative business falling to the Sheriff-Substitutes of Midlothian, in so far as his time permits him to discharge that duty. Further, in each alternate month, in addition to the duties above mentioned, he sits in the Police Court of Edinburgh for three days of each week. These numerous and varied duties engross the whole of your petitioner's time. The result is that he cannot attend meetings of trustees, and that he is unable to bestow upon the multiplicity of questions which arise in connection with the large fund which the trustees require to administer, the time and consideration which these questions require. He is accordingly unable to discharge the duties of the office conferred upon him by the said trust-disposition and deed of settlement. It is not expedient in the interest of the trust that he should be obliged to remain in office. The trustees have only the statutory powers of investment. In these circumstances your petitioner desires to resign, and he makes this application to your Lordships for authority to do so. He has offered to repay the legacy of £105. That the trust not being a gratuitous one, the petitioner has no power to resign under the Trusts (Scotland) Act 1861, and the trust-deed does not provide for his resignation, so that if the petitioner is to be relieved of the office of trustee, he can only be so with the authority of your Lordships."

Counsel for the petitioner cited *Watson* v. *Crawcour*, February 17, 1844, 6