the operation of the Statute of 1617. Therefore, giving the pursuer's ancestor the full benefit of the saving clause, he is still left to the law of prescription established by the Act of 1617. It therefore appears to me that there is nothing in the saving clause which raises any separate or different point from that which is decided over and over again in the series of cases to which I have referred. The other point said to be separate was that the estate in this case is what is called an appanage, whatever that may mean, of the barony of Lovat, and could not be effectually alienated. The particular kind of right which the pursuer bases upon that allegation has not, I confess, been made clear to my mind, but assuming—and I think it a very difficult assumption to make—that there is a limitation of the kind suggested by the argument known to the law of Scotland, which should render an estate inalienable, that is only another reason for saying that the earlier grants prior to the constitution of the defender's title were not well constituted in respect of their proceeding from persons who had no power to make them. That is just the old question again, and the answer as before is the Act of 1617. There was one other point which I desire not to pass over in silence, because we had so full and able an argument for the pursuer, that it is due to the learned counsel to say that one has considered it, and that is, that the pursuer has the benefit of the saving clause in the Statute of 1617 itself which protects recorded reversions from extinction—that is, reversions recorded in the Register of Sasines. But the answer appears to me to be very clear that the pursuer does not allege any reversionary right whatever. He does not maintain that the defender holds a redeemable title, and that he is the party in right of the reversion. On the contrary, he challenges what is plainly an irredeemable right on the ground that the granters had no power to constitute it. Therefore I think it is quite hopeless to bring the pursuer's case within the saving clause of the statute of 1617. On the whole matter I entirely concur with your Lordship in thinking that the Lord Ordinary's interlocutor must be adhered to.

LORD ADAM concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer—Balfour, Q.C. —Kennedy—F. Cooper. Agents—Forbes, Dallas, & Co., S.S.C.

Counsel for the Defender the Lord Advocate—C. Johnston. Agent—Thomas Carmichael, S.S.C.

Counsel for the Defender Lord Lovat—Asher, Q.C. — Macphail. Agents — Tods, Murray, & Jamieson, W.S.

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*Tuesday, January 4.*

## OUTER HOUSE.

[Lord Stormonth Darling.

## LORD ADVOCATE *v.* SAWERS.

(Sequel of *Lord Advocate* v. *Sawers*, Dec. 3, 1897, *ante*, p. 190.)

*Revenue—Process—Exchequer Prosecution —Proof or Jury Trial — Court of Exchequer (Scotland) Act* 1856 (19 *and* 20 *Vict. c.* 56), *sec.* 6.

Under the provisions of section 6 of the Court of Exchequer (Scotland) Act 1856 the facts in an Exchequer prosecution may be ascertained either by jury trial or by a proof before the Lord Ordinary.

The circumstances of the case are stated in the previous report, *ante*, p. 190. The present case raised the question whether an inquiry into the facts stated by the defender in support of his plea of not guilty should be by jury trial before a jury or by a proof before the Lord Ordinary.

By section 6 of the Court of Exchequer (Scotland) Act 1856 (after a provision as to the form of lodging an information) it is provided as follows:—"If the said defender shall appear and shall not admit as aforesaid, the Lord Ordinary shall appoint a day for hearing the parties upon such information, where this shall appear to him to be necessary, or shall appoint a day for trying the matters put in issue by such information, without any adjustment of separate issue or issues, or shall take such other course as to him may seem proper, and when a day shall be so appointed for trial, a common or special jury (when a special jury shall be applied for and granted) shall be summoned and empanelled, as in any ordinary jury cause before the Court of Session, to be tried by a Lord Ordinary in the Outer House . . . and the verdict of the jury may be in one or other of the forms in Schedule C, hereunto annexed, or in such other form as may be applicable to the case . . . and on such verdict being given the Lord Ordinary presiding at the trial shall pronounce decree in conformity therewith, and as may be just and according to law."

The pursuer and respondent moved for a proof, and argued — Questions raised in Revenue cases had always, so far as the records of the Inland Revenue Office showed, been decided by a proof. That course had been taken in *Crookshank* v. *Lord Advocate*, July 19, 1888, 15 R. 995.

Argued for the defender and reclaimer—Section 6 of the Court of Exchequer Act 1856 limited the ascertainment of facts in a case like this to trial by jury. The whole terms of the section showed this, and contrary practice, when the question was not raised, could not abrogate the terms of a statute. In *Lord Advocate* v. *Thomson*, February 23, 1897, 24 R. 543, Lord M'Laren intimated an opinion that trial by jury was necessary.

On 4th January 1898 the Lord Ordinary (STORMONTH DARLING) allowed a proof.

*Opinion.*—"I am informed by the counsel for the Inland Revenue Department that for a long period of years every Revenue case requiring investigation into fact has in their experience been tried before a Judge without a jury; but I agree with Mr Salvesen that the course of practice would not prevail over a distinct and peremptory statutory direction, and the question therefore is, whether there is such a direction in the Exchequer Act of 1857. Now, by section 6 of that Act, in the event of an information being brought against a defender, and the defender not admitting the truth of it, there are three courses—the proverbial three courses—open to the Lord Ordinary. He may either appoint a day for hearing parties upon the information, if he thinks necessary, or he may appoint a day for the trial of the matters put in issue by the information, in which case there is to be no issue or issues, or he may take such other course as to him may seem proper. Now, it seems to me that that latter alternative leaves my discretion unfettered. Mr Salvesen maintains the contrary, and says that does not apply to the case of disputed fact being investigated, but applies to minor questions of procedure. I do not read the statute so. I think it is on the same level as the other alternatives which are open to the Lord Ordinary—that it applies to the same stage of the case—and that it covers any course which he may think necessary by way of investigating disputed facts, so long as it seems to him to be necessary for the justice of the case. If that be so, then section 9 affords a direction to the Lord Ordinary, or rather is of the nature of guidance to the Lord Ordinary, in exercising his discretion, because it says that the procedure in all cases under a subpœna shall be, so far as not provided, regulated by the Lord Ordinary, subject to any rules which may be framed. Well, no rules have been framed; and the section goes on to say that in so far as not so regulated the procedure shall be conducted as near as may be in conformity with the procedure before the Court of Session in ordinary actions. Well, then, if I have a discretion, I am to exercise it just as I would in an ordinary action. If this were an ordinary action I should not have much hesitation in ordering a proof in preference to a jury trial. The only thing that can be said against that is—and I give full weight to it—that this is not an ordinary civil action for £50, but is quasi-criminal in its character. If I thought that a judgment against the defender would affix upon him a stigma of crime, then I should certainly be in favour of sending the case to a jury, even though the amount involved is small; but I do not take the view that the result of an adverse judgment would be of that nature. I think, practically speaking, it may leave the defender's character uninjured, and it does not seem to me therefore that there is any necessity for empanelling a jury on that account. In all other respects it seems to me a trial before the Lord Ordinary would be much cheaper and more suitable, because one cannot help seeing that, dealing with facts of this nature, the burden of a trial would really come to rest upon the Lord Ordinary's shoulders in the shape of a charge to the jury, and if so, it is much better that he should dispose both of the law and of the facts. I shall therefore allow parties a proof of their averments."

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C. — Young. Agent — Solicitor of Inland Revenue.

Counsel for the Defender — Salvesen. Agents—Gill & Pringle, W.S.

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*Wednesday, February* 16.

## FIRST DIVISION.

## MACKELLAR *v.* MACKELLAR

*Parent and Child—Custody of Children—Guardianship of Infants Act* 1886 (49 *and* 50 *Vict. c.* 27), *sec.* 5.

In a petition for the custody of the children of the marriage by a wife, who lived separately from her husband without a judicial separation, it was proved that the husband occasionally used profane language, that he had twice thrown one of the children on to the floor, and that to some extent he had taught the children to dislike their mother. The husband, who lodged answers, succeeded in proving nothing against the petitioner to disqualify her for the custody of the children.

The Court *refused* the application, on the ground that whether, as held by Lord M'Laren, the husband was to blame for the petitioner leaving him, or whether, as held by Lord Adam, the separation was unjustifiable, nothing had been proved sufficient to displace the father from his legal position as guardian of the children.

Terms of order allowing the mother access to the children.

*Expenses—Husband and Wife—Petition for Custody of Children.*

In a petition presented by a wife for the custody of children, which was ultimately refused, after a proof, the Court found the petitioner entitled to expenses down to the date of the interlocutor allowing a proof, and pronounced no further finding with regard to expenses.

*Expenses—Taxation—Taxation as between Agent and Client or Party and Party.*

In a petition presented by a wife against her husband for the custody of her children, the Court found the petitioner entitled to the expenses of part of the proceedings. *Held* that her account must be taxed as between party and party, and not as between agent and client, no motion for taxation on the latter scale having been