Friday, May 27.

FIRST DIVISION.

[Sheriff of Haddington.

SCOTT & COMPANY *v.* WOOD.

*Process — Appeal—Bankruptcy—Bill Chamber—Vacation—*19 *and* 20 *Vict. cap.* 79, *sec.* 170.

Held that an appeal under section 170 of the Bankruptcy Act 1856, in which the Lord Ordinary on the Bills in vacation had made a remit to the Accountant in Bankruptcy, must be prosecuted before the Inner House as soon as session commences.

This was a note for the appellants in the appeal at their instance in the sequestration of John Patterson, farmer, Clerkington, Haddington. Andrew Wood, writer, Haddington, obtained his discharge as trustee in the sequestration from the Sheriff-Substitute of Haddington (SHIREFF) on 3d February 1881. Scott & Company, creditors, and G. S. Ferrier, the new trustee, appealed to the Court of Session under section 170 of the Bankrupt Statute 1856. When the appeal came to be considered the Court was in vacation, and the Lord Ordinary on the Bills (FRASER) pronounced the order remitting to the Accountant in Bankruptcy to report. The Accountant reported in session. The Lord Ordinary on the Bills (who happened to be the same Judge who had in vacation remitted to the Accountant in Bankruptcy), on being moved to consider the report, stated that there was now a difficulty in his dealing with the appeal, as the Court was now sitting, and there was no provision made in the Bankrupt Statute for him disposing of the case. In these circumstances the appellants presented this note, and craved the Court to empower the Lord Ordinary to dispose of the case, or themselves to dispose of the appeal. After hearing counsel—who cited *Grant* v. *Wilson*, 1st Dec. 1859, 22 D. 51; *Westland* v. *Ross*, 18th Nov. 1840, 3 D. 83—the Lords of the First Division held that the appeal was properly before them, the functions of the Lord Ordinary on the Bills ceasing whenever vacation ends. The case was held to be analogous to that of the Lord Ordinary on the Bills acting in vacation for the Junior Lord Ordinary in petitions under the Distribution of Business Act, which are continued and disposed of by the latter whenever session commences.

Counsel for Appellants—M'Kechnie. Agents—T. & W. A. M'Laren, W.S.

Counsel for Respondent—Dickson. Agent—W. B. Glen, S.S.C.

Tuesday, May 31.

SECOND DIVISION.

BRANDT & CO. *v.* RENNY & BROWN.

Contract—Disconformity to Contract.

In this case the pursuers, who are merchants and shippers at St Petersburg, raised action against the defenders, who are spinners at Blairgowrie, for the price of "50 tons of W. Nemiloff's fresh Rjeff flax, averaging 3rd crown, of fair average quality, of next spring's shipments," which had been shipped to their order. The defenders refused payment on the ground that the flax supplied was disconform to contract.

The case was set down for jury trial, but under a joint-minute for the parties this was dispensed with, and a proof was held before Lord Craighill.

The defenders argued—That on a sound construction of the contract the sellers had bound themselves to supply shipments of flax, of the average quality of W. Nemiloff's flax in particular, and not, as contended for by the pursuers, of flax of the average quality of that shipped by all dealers from St Petersburg.

The Lords, while giving no decision on this question, were of opinion, that although on the evidence the flax was to some small extent inferior in value to the average quality of flax shipped by all dealers from St Petersburg by £2 per ton, yet that was not sufficient disconformity to contract to entitle the defenders to reject the goods.

Counsel for Defenders—Guthrie Smith—H. Johnston. Agents — Leburn & Henderson, S.S.C.

Counsel for Pursuers — Mackintosh — Alison. Agent—W. S. Harris, L.A.

Tuesday, May 31.

FIRST DIVISION.

SCOTTISH PROPERTY INVESTMENT BUILDING SOCIETY *v.* HORNE.

*Process — Removing — Competency—*Ex facie *Absolute Disposition—Rights of Creditors—Power to Remove.*

An investment society obtained in security of advances to one of its members an *ex facie* absolute disposition of certain heritable subjects, it being provided by the rules of the society that when any member thereof who has obtained an advance allows his instalments and interest to fall into arrear to an extent equal to three months' instalments, it shall be in the power of the society, if such member shall be in the actual possession or occupancy of the premises in respect of which the advance has been made, to remove him therefrom. *Held* that a summary petition in the Sheriff Court to enforce this rule is incompetent, the possession of the premises in question being neither vicious nor precarious.

This was an appeal from the decision of the Glasgow Sheriff Court in a petition for summary ejection. The Scottish Property Building Investment Society were the pursuers in the petition, and David Horne, the respondent in this appeal, was the defender. Horne was proprietor of certain heritable subjects in Glasgow, and on the security of these obtained various loans from the society. The transactions between the parties were somewhat complicated, but it was alleged by the pursuers that at the last adjustment of accounts

between them the total indebtedness of the defender to the society was £17,000. In security of the advances made to him, Horne granted to the society an *ex facie* absolute disposition of the said heritable subjects.

By rule 61 of the pursuers' society it is provided, *inter alia*, "that when any member who has obtained an advance allows his instalments and interest, or any disbursements made on his behalf, to fall into arrear to an extent equal to three months' instalments, it shall be in the power of the society, if such member shall be in the actual possession or occupancy of the premises in respect of which the advance has been made, to remove him therefrom and let the premises to others. It is further provided by the same rule that in such default of payment the society shall have full power to act in every respect as absolute proprietors of the property." It was alleged that the defender had allowed the instalments and interest payable in respect of the said advances to fall into arrear to an extent greatly exceeding three months' instalments.

The defender was in the "actual possession or occupancy" of a dwelling-house, forming part of the said heritable subjects. The annual value of the dwelling-house was £30. At a meeting of the directors of the society it was resolved that the defender should be removed from his dwelling-house; intimation of this resolution was clearly made to him by a letter under the hand of the secretary of the society. Horne refused to leave the dwelling-house, and the society thereupon brought the above-mentioned petition in the Sheriff Court.

The pursuers pleaded that they were entitled to have the defender ejected under the rules of the society, or otherwise at common law, in respect that the defender had no right or title to occupy the dwelling-house.

Proof was led and a remit made to an accountant with a view to ascertain the true state of accounts between the parties. On 17th Feb. 1881 the Sheriff-Substitute issued an interlocutor finding the process of summary ejectment incompetent.

The pursuers appealed to the First Division of the Court of Session.

The chief authority on this subject is *Wyllie* v. *Heritable Security Investment Association*, Dec. 22, 1871, 10 Macph. 253, where a process of summary ejection was, in circumstances similar to those of the present case, held to be incompetent. It was argued for the appellant that the consideration of the Judges in *Wyllie* referred to the case of a bond and disposition in security, and not to a case where a creditor has received an *ex facie* absolute disposition.

The other authorities quoted were—*Scottish Heritable Security Co.* v. *Allan, Campbell, & Co.*, Jan. 14, 1876, 3 R. 333; *Rankine* v. *Russell*, Nov. 19, 1868, 7 Macph. 126; *Watherston* v. *Russell*, June 30, 1846, 8 D. 944; *Williamson* v. *Johnston*, Dec. 23, 1848, 11 D. 332; *Halley* v. *Lang*, June 26, 1867, 5 Macph. 951.

At advising—

Lord President—The leading object of this building society, as specified in its rules, is by the subscription or payments of its members to form a fund out of which members who are desirous of erecting or acquiring dwelling-houses or other heritable property may receive advances upon heritable security by way of mortgage to enable them to do so. The defender is a member, and there have been transactions of a somewhat complicated character between him and the society. He was proprietor of certain heritable subjects, and on the security of these obtained large advances. The form of the security given was a disposition *ex facie* absolute, and there was no back-letter properly speaking. But it is quite clear that the title was in reality a security merely. I think it necessary that this should be clearly shown, as the basis of the judgment I am to propose. I beg therefore to refer to the 33d, 34th, and 35th rules of the society:—"33. Applications for advances shall be in the form No. 2 or No. 3 appended to these rules, accompanied by such specification of the security offered and other information as the directors may require; and these applications shall be recorded by the manager according to the dates at which they are received by him, in a register to be kept for that purpose; and they shall be preferred and disposed of by the directors in the order in which they are recorded. The manager shall have power, before receiving any application for an advance, to require the applicant to deposit with the society the amount of the surveyors' fees." "34. When the directors are satisfied that the property offered is a sufficient security, such property shall be conveyed to the society by absolute disposition, or by bond and disposition in security, or such other deed as the law agents of the society may require; and the same and all other necessary title-deeds relating thereto shall be deposited with the society; and the directors shall then give the party who has sold the property, or is to grant the necessary deed, an order on the society's bankers for the amount agreed to be advanced by the directors." "35. No member who has obtained an advance shall be entitled on any ground whatever to change or alter the property over which the security of the society extends without the written consent of the directors; nor shall he without such consent be entitled to take a grassum on letting any lease, or to grant any feu of such property or any portion thereof, to sell or give up any right or pertinent to the property, nor to lease the property for a longer period than five years: Provided always, that no lease granted by any member shall be held to be valid or to bind the society in the event of their having to enter into possession of the property, unless the rent fixed under the same shall have been conditioned as the fair annual value of the property. Such members shall, however, from and after the execution and delivery to the society of the requisite conveyances and title-deeds as before provided, and so long as these rules are complied with, have power to possess such property, to in-put and out-put tenants, and to draw the rents and pursue therefor, but always without prejudice to the preferable right of the society over the same." Now, it is quite clear that this 35th rule in all its parts applies equally to a security given in the form of an absolute disposition as to one in the form of a bond and disposition in security. The borrower therefore, so long as he fulfils the condition of the loan, has power to possess the property. Now, before rule 61 is put in operation the forfeiture must be established as matter of

fact, and until that is done the right to possess continues. Now the question is, Is this a case for summary ejection? To warrant that the possession must either be vicious possession, that is, obtained by fraud or force, or precarious possession, *i.e.*, without a title. Now, in this case there is neither. There is no question of vicious possession. A precarious possessor is a possessor by tolerance merely. But the power is here in virtue of ownership, and under the rules of the society. The law on this is very clearly settled, and I may refer to the case of *Halley* v. *Lang*, the rubric of which is—"A petition for summary ejection which contained no allegation of vicious or precarious possession without title held incompetent." I need not quote more than the opinion of Lord Deas, who says—"The first ground on which we must dismiss this petition is that there is not set forth here any such ground of action as acoording to the form of process in the Sheriff Court will warrant an ejection. An ejection is only competent when a party is either a vicious possessor or a precarious possessor in the sense of having no title at all." I am therefore of opinion that this petition stands properly dismissed.

Lord Deas—I should have some difficulty in proceeding on my own opinion in the case of *Halley* v. *Lang*, in so far as I think that opinion seems to proceed a good deal on the action being in the Sheriff Court. Now, in this case I do not see any clear objection to the jurisdiction of the Sheriff or to the action proceeding in the Sheriff Court if otherwise competent. The jurisdiction of the Sheriff is now extended to questions of heritable right relating to subjects of not greater value than £1000. Now this question is about property of the value of £30 per annum, and therefore presumably of not greater value than £1000. I am therefore disposed to view this case in the same light as if it applied to some objection brought in this Court. I think the action is ruled to be incompetent in the case of *Wyllie*—I mean incompetent on principle. A warrant of ejection is not a decree but a diligence. Now, the question arises whether private parties can make rules for themselves applicable to diligence quite different from those of ordinary law. If that were so, they might make rules of diligence quite injurious to the interests of all the other creditors. And under its rules this society may, without any warning whatever, enter into the possession of the gentleman's property. Now, that is quite inconsistent with the ordinary rules of law. These principles are fully explained in the case of *Wyllie*—that no private parties are entitled to make rules applicable to diligence which cut out all the other creditors.

Lord Mure—The nature of this action is an ejection of the more summary kind known to law, just as in the case of *Halley*. I am of opinion with your Lordships that the forfeiture requires to be established. There are certain circumstances in which it is provided that the society may enter on the possession, and these circumstances must be shown to have taken place. I concur with your Lordship in putting my opinion on the case of *Halley*.

Lord Shand was absent.

The petition was accordingly dismissed.

Counsel for Pursuers (Appellants) — Keir Agents—Auld & Macdonald, W.S.

Counsel for Defender (Respondent)—Strachan. Agent—Peter Douglas, S.S.C.

Wednesday, June 1.

SECOND DIVISION.

[Sheriff Court of Dumfries and Galloway.

RANKINE *v.* M'CLURE.

Parent and Child—Filiation.

In this action of filiation and aliment, which was raised in the Sheriff Court of Dumfries and Galloway at the instance of Annie Rankine, residing at Barnbarroch, Wigtown, against William M'Clure, a farmer there, the Sheriff (Rhind) after proof found the facts and circumstances proved sufficient to establish that the defender was the father of her child. To this judgment the Court on appeal adhered.

Counsel for Appellant — Nevay — Gibson. Agent—William Officer, S.S.C.

Counsel for Respondent—J. A. Reid—Vary Campbell. Agents—Maitland & Lyon, W.S.

Thursday, June 2.

SECOND DIVISION.

SPECIAL CASE—FRENCH.

Succession—Trust—Vesting—Nati et nascituri.

A truster left a liferent of his estate to his widow, and further provided that after her death it should be sold and the price divided in certain proportions between the children "born or to be born" of his only daughter. *Held* that the shares vested in the children at the death of the liferentrix.

Richard French died on 3d November 1873 survived by his widow and a married daughter. In a trust-disposition and settlement he directed his trustees, *inter alia*, to pay over to his wife the rents of his whole estate for her liferent use allenarly, and secondly, "after the death of my spouse" to value the said estate and sell it to his grandson Richard Torrance French, and then to divide the price thereof so that a double share should be paid to him, and the remainder be divided equally amongst his other grandchildren "born or to be born of my said daughter." His widow died on 14th July 1877, and his daughter Mrs French had a family of seven children, of whom the said Richard Torrance French was the eldest. A dispute having arisen as to whether the period at which the estate was to be divided was to be the death of the widow, the liferentrix, or the death of Mrs French, this Special Case was presented to the Court for opinion and judgment.

The Court were of opinion that as the death of the widow was the date fixed by the truster