because no party had been called in the process of valuation who was entitled to represent the cure. It appeared that the parties called were—"Charles Earle of Southesk, and David Falconer of Newtoun, as patrons of the kirks of Strickathrow and Dunlappie, now annexed together, Master John Davie, late incumbent at the said kirk, and all other present incumbents there, and the tutors and curators of such of the said defenders as are minors, if they any have, for their interest." It was mentioned that the parishes had been vacant from 1695, when the last Episcopal incumbent died, until 1701, and that in 1698 they had been declared vacant, and that during this interval Mr Davie, who was Lord Southesk's factor, had intruded himself as minister for a few months. It was admitted that unless the decree of valuation was bad, there was no free teind.

The Court held, following the recent case of Kilbirnie (*ante*, p. 123), that the minister must first raise a declarator of the invalidity of the decree, and procedure was sisted that he might do so.

The following interlocutor was pronounced:—

"*Edinburgh, 16th January* 1867.—The Lords, having heard counsel for the minister and heritors, sist proceedings that the minister may bring an action of declarator, or such action as he may be advised, to try the validity or invalidity of the decree of valuation founded upon by the heritors.

"DUN. M'NEILL, *I.P.D.*"

Counsel for Minister—Mr Clark and Mr Asher. Agents—W. H. & W. J. Sands, W.S.

Counsel for Opposing Heritors—Mr Gifford. Agent—Alexander Morison, S.S.C.

COURT OF SESSION.

Wednesday, Jan. 16.

FIRST DIVISION.

WARNE AND CO. *v.* LILLIE.

Issue—Cautionary Obligation. Form of issues adjusted to try a question of liability under a cautionary obligation, the defence being that the pursuers had "given time" to the principal obligant.

This was an action upon a cautionary obligation at the instance of Willam Warne & Co., indiarubber manufacturers, No. 9 Gresham Street, London, against James Lillie, clothier, 45 Queen Street, Glasgow, sole partner of the firm of Lillie & Ferguson, clothiers there. The defence was that the cautioner was liberated from his obligation in respect the pursuers had "given time" to the principal debtor without his knowledge or consent.

The Court to-day adjusted the following issues for trial:—

"Whether, in reliance on the letters of caution, Nos. 6 and 7 of process, or either of them, the pursuers, the said William Warne & Co., on the usual business terms, furnished goods to Edward Hardmeat, indiarubber merchant in Glasgow, therein-mentioned, sole partner of the firm of Charles Hardmeat & Co., indiarubber merchants there, conform to account, No. 8 of process? And whether, under the said letters of caution, or either of them, and in respect of the goods so furnished, the defender, as cautioner for the said Edward Hardmeat, is resting owing to the said pursuers the sum of £393, 10s. 1d., or any and what part thereof, with interest at the rate of 5 per cent. per annum, from 1st March 1866 on the sum of £379, 7s., or such other portion of the first-mentioned sum as consists of principal?"

Or,

"Whether the pursuers gave time to the said Edward Hardmeat for payment of the sums sued for, or any part thereof, beyond the usual period of credit allowed in the trade, so as to liberate the defender from liability for the sums sued for, or any and what part thereof?"

Counsel for Pursuers—Mr Millar. Agents—Adam & Sang, S.S.C.

Counsel for Defender—Mr Clark and Mr Shand. Agents—J. W. & J. Mackenzie, W.S.

Friday, Jan. 18.

FIRST DIVISION.

ADAM AND OTHERS *v.* GRIEVE AND OTHERS.

Statutory Trust—Election of Members. An Act of Parliament having declared that a certain number of persons should be elected trustees on a certain day, and two of the persons elected having declined to act, held that the election was valid, and that the places of those who declined fell to be filled up as if they had resigned.

This is a suspension and interdict at the instance of George Adam, merchant and shipowner in Greenock, treasurer of the burgh of Greenock; James Tennent Caird, engineer, founder, and iron shipbuilder there; John Orr, jun., baker there; Robert Neill, writer there—all members of the Town Council of the burgh of Greenock; and Duncan Cook, chain manufacturer, Greenock; James Beith, butcher there; Benjamin Noble, merchant there; Thomas Ballantine, distiller there; and John Neilson, hatter there—being all elective members of the Board of Police of Greenock—against James Johnston Grieve, merchant in Greenock, Provost of the burgh of Greenock; Charles Grey, feuar there; James Morton, iron merchant there; John Fleming, worsted manufacturer there; John Hunter, fish merchant there—all bailies of said burgh; Thomas Muir Macfarlane, tanner and skinner; Robert Blair, sugar refiner; and John Crawford Hunter, ropemaker—all in Greenock, and all members of the Town Council of the burgh of Greenock; and Robert M'Vicar, smith; James M'Cunn, bookseller; and Charles Carbery, clothier—all in Greenock, pretending to be water trustees, and to constitute, along with the complainers Thomas Ballantine and John Neilson, "The Water Trust of Greenock," under "The Greenock and Shaws Water Transfer Act, 1866," and along with the said two complainers, to be and act as the water trustees, duly appointed under and in terms of said Act, and also against "The Board of Police of Greenock," constituted and incorporated by "The Greenock Police and Improvement Act, 1865," and the said James Johnston Grieve.

The object of the suspension is (1) To prohibit the individual respondents from acting as "water trustees" for the town of Greenock, or attempting to carry into effect any of the powers or duties conferred or imposed on the water trustees, or the water trust of Greenock, by "The Greenock and Shaws Water Transfer Act, 1866;" (2) To prohibit "the Board of Police of Greenock" from adopting or approving of any minute of a meeting

of that board, held on the 20th of November 1866, in so far as it may relate to the election of "water trustees" under the Greenock and Shaws Water Transfer Act; and (3) To prohibit the respondent, Mr Grieve, as chairman of the Board of Police of Greenock, and of the meeting held on the 20th day of November 1866, from signing any minute of that meeting, in so far as it may relate to the election of "water trustees," and it is brought in the following circumstances :—

By the 10th section of "The Greenock and Shaws Water Transfer Act," it is directed that "the Board of Police" of the town of Greenock, appointed under "The Greenock Police and Improvement Act, 1865," and which board consists of the provost and four bailies, the treasurer, and remanent members of the Town Council for the time being, and of nine elective members chosen under the provisions of the Police Act, "shall, at their first meeting after the election of elective members in the year 1866, and at their first meeting after the annual election of elective members in each year thereafter, in the manner prescribed or authorised for the election or appointment of committees of the said board, elect, for the next ensuing year, twelve of their number to be 'water trustees' of whom seven shall be members of the Town Council, and five shall be elective members; and the 'water trustees' so appointed shall go out of office at the end of a year from their being so appointed unless reappointed."

A meeting of the Board of Police having accordingly been held there on 20th November 1866, being the first meeting after the annual election of elective members, which took place on the 13th of November 1866, the board proceeded to the election of the water trustees, in compliance with the requirements of the above section of "The Greenock and Shaws Water Transfer Act." At this meeting a list of names of parties, qualified in every respect to act as water trustees, was proposed by the respondent, Mr Grieve, who was chairman *ex officio* of the Board of Police, and also, as provost of the town, chairman *ex officio* of the water trustees, and duly seconded. A counter list of names was proposed as an amendment by the complainer, Mr Caird, which was also duly seconded; and the motion and amendment having been put to the vote, the motion of the respondent was declared to be carried, and the excerpt minute, No. 19 of process, bears that the parties so proposed and carried were declared duly elected water trustees."

It is, however, averred on the part of the complainers, and substantially admitted by the respondents, that immediately after the election two of the parties chosen—viz., the complainers, Mr Ballantine and Mr Neilson, declined to act as water trustees, and that no other members of the Police Board were then appointed in their stead. It is also averred on the part of the complainers that Mr Neilson intimated his intention to decline before the vote was taken, but this is denied by the respondents, and the extract minute produced does not contain any entry to that effect.

Founding on this declinature, the present suspension has been brought by the two members of the Police Board who thus declined to act in conjunction with the other complainers—members either of the Town Council of Greenock or elective members of the Board of Police—and who, as such, appear to be expressly enjoined, by the provisions of the 10th section of the Transfer Act, to elect twelve of their number to be water trustees at the first meeting of the Police Board held after the election of elective members in the year 1866.

The Lord Ordinary (Mure) refused the note, with expenses, explaining his reasons as follows :—

"The grounds on which the suspension is rested are not very specifically brought out, either in the reasons of suspension or in the annexed pleas in law. But at the discussion before the Lord Ordinary, the objections taken to the proceedings seemed to resolve substantially into the two following propositions :—1st, That it was essential to the legal constitution of the "Water Trust" that the members of the Police Board appointed to discharge the duty of water trustees should be ready to accept the duties of the office, and that as two of the parties named had declined to act, and no other members of the Board of Police were elected in their room at the meeting where the declinature was intimated, the appointment of water trustees was not legally made on the day fixed by the statute, and cannot now be made until the month of November 1867; and 2d, That the whole proceeding was illegal, because the vote was taken upon a list of names put before the meeting as a whole, and not by a separate vote on the appointment of each individual on the list.

"1st, In support of the last of these objections, reference was made to certain English authorities on corporation law, and in particular to the case of King *v.* Player, 2 Barn. and Ald., p. 707, in which it was held that an election made by means of a vote taken upon a list of names was a bad election. The Lord Ordinary has, however, little difficulty in repelling this ground of suspension, because later authorities were referred to, as mentioned in "Grant on Corporations," p. 208, from which it appeared that the law of England had been considerably modified in the above respect. He is, moreover, not aware of any such rule having been acted on in Scotland; and even if it had been so in some instances, the Lord Ordinary does not think he would have been warranted in entertaining such an objection in the present case, where both parties proceeded to take the vote upon lists, and when, in so acting, they appear to have adopted a mode of election sanctioned, if not prescribed, by the 12th section of the statute, by which they were constituted a board of police.

"2d, The other objection appears to the Lord Ordinary to be attended with some difficulty. But after considering the provisions of the statute, and the position of the parties from among whom alone water trustees can competently be appointed, he has come to be of opinion that the objection founded on the declinature of two of those parties to act ought not to be given effect to by suspending the whole proceedings of the trust, more especially in a case where this is sought to be done without any offer of caution.

"The argument on which this mainly rested was founded on the provisions of the 11th and 13th sections of the Act 3 and 4 William IV., cap. 76, which require that persons elected town councillors shall attend on a fixed day and state whether they accept or decline the office, coupled with a declaration that if they decline, or do not attend without a sufficient excuse, a new election shall immediately take place; and from this it is argued that until the acceptance is intimated or the new election takes place the Council is not legally constituted. But assuming this to be a correct view of the Burgh Reform Act, it appears to the Lord

Ordinary to tell against the complainers in construing the present statute; because in it no such provisions occur, and the inference to be deduced from the insertion of such provisions in the one case, and their omission in the other, would rather seem to be that the immediate acceptance on the part of every one of a number of individuals appointed to act as statutory trustees—more especially in the case where, as here, a quorum is named—was not essential to the legality of the appointment, unless where express provision is made to that effect.

"It was argued on the part of the respondents that, as the members of the Police Board were under an imperative statutory obligation to appoint twelve of their own number to be water trustees, and were at the same time restricted in their choice to the members of their own board, all of whom had accepted office in the knowledge that they might be called on to act as water trustees, the parties appointed so to act were not entitled to decline the statutory duty; and were it not for the provisions of the 11th section of the Transfer Act, as to the manner in which vacancies arising from death or resignation were to be filled up, the Lord Ordinary would have been disposed to attach great weight to that construction of the statute. But having regard to the provisions of the 11th section, as to resignation, he is not, as at present advised, prepared to adopt it, and it is not, in his opinion, necessary to do so for the disposal of the present case. Because, assuming it to be open to a trustee to resign—when that is not done to thwart the operation of the trust—the provisions of the 11th section seem to afford a solution of any difficulty from unwillingness on the part of a member of the Police Board who is appointed a trustee to act in that capacity. And conceiving, as the Lord Ordinary does, that the appointment of water trustees was validly made at a meeting held for that purpose in November, and that the declinature of two of the thirteen trustees to act does not necessarily vitiate the election of the others, he sees no reason why that declinature should not be dealt with as a resignation, or why the Board of Police, upon the declinature being duly intimated to them in writing, should not at once proceed to fill up the vacancy in the manner prescribed by the 11th section of the statute."

The suspenders reclaimed.

MACKENZIE (D. F. MONCREIFF with him), argued for them—1. The election was bad because two of the members elected declined to act—Kidd *v.* Magistrates of Anstruther, 17 Dec. 1852, 15 D. 257; White *v.* Scott, 26th Nov. 1851, 14 D. 105; 3 and 4 William IV. c. 76. 2. It was bad because the members proposed should have been voted upon one by one.

YOUNG and GIFFORD, for the respondents, were not called on.

The LORD PRESIDENT said—I don't think this interlocutor should be altered. I think these two persons, Neilson and Ballantine, were elected, and this appears from the complainers' own statement, because they say that the Provost declared their election. Then being elected, they might resign, and section 11 of the statute provides for the election of others in such a case. But I think farther, that the thing goes deeper than that; and I am very doubtful of the power of two or three of the commissioners to paralyse the statute and render it inoperative. But that question is not now before us. It is quite sufficient for the decision that there was here a valid election of a sufficient number.

Lord CURRIEHILL and Lord DEAS concurred, and in doing so observed that they were not prepared to apply to a statutory body of trustees such as this the rule whereby it was once held that if there was a flaw in the election of one councillor of a burgh the election of all the others was vitiated, and the burgh was disfranchised. This result produced so much inconvenience that a declaratory Act was passed for the purpose of removing the difficulty.

Lord ARDMILLAN also concurred, and said that the object of the suspension was to create a nullity in the election, to frustrate the objects of the statute, and to cause a wrong which, for one year at least, was without a remedy. He was glad that he was able to construe the statute so as to avoid so unfortunate a result.

Agents for Complainers — Murray, Beith, & Murray, W.S.

Agent for Respondents—John Ross, S.S.C.

Friday, Jan. 18.

SECOND DIVISION.

QUEEN *v.* CAIRD.

Tax—Horse Duty—16 *and* 17 *Vict., c.* 88, *s.* 15—*Special Case.* 1. Held incompetent to remit a case to the Quarter Sessions for re-statement. 2. Circumstances in which held that a contravention of 16 and 17 Vict., c. 88, s. 15, had been incurred.

This is an appeal by James Caird, innkeeper, Cullen, Banffshire, from a deliverance of the Quarter Sessions of that county, by which, affirming a judgment of the Petty Sessions held at Cullen on the 2d of March 1866, he was convicted of a contravention of the 15th section of the Act 16 and 17 Vict., c. 88. The following case was stated by the Quarter Sessions for the opinion and direction of the Court of Exchequer:—

At the Petty Sessions held at Cullen, in the county of Banff, on the 2d day of March 1866, an information begun and prosecuted by order of the Honourable the Commissioners of Inland Revenue, was heard before six Justices, by which the defendant, James Caird, was charged: For that he, contrary to the statute 16 and 17 Vict., c. 88, sec. 15, on the 1st day of January last past, at the parish of Cullen, having a license under and by virtue of said Act, which specified, as the greatest number of horses which he was authorised to keep at one time to be let for hire, to be two horses, did keep at one time to be let for hire certain horses—to wit, three horses—being a greater number of horses than he was by said license authorised to keep at one time to be let for hire, whereby he had, as alleged, forfeited the sum of one hundred pounds sterling. The defendant pled not guilty. Proof having been led, the Justices, by a majority of three, found the information proven, convicted the defendant, and found him liable in said penalty, which they mitigated to twenty-five pounds sterling.

The defendant appealed to the Quarter Sessions held at Banff on the 1st day of May 1866. When the appeal was taken up on that day, the defendant appeared, and having become aware that four of the Justices who had sat on the case at the Petty Sessions were going to take part in the hearing and decision of the appeal, he objected to their right to do so, and maintained that it was incompetent for them to review their own judgment;