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;

but this objection was overruled, and the case went to trial.

The Justices at Quarter Sessions, by a majority of one, dismissed the appeal, but unanimously recommended the Commissioners of Inland Revenue to further mitigate the penalty to the sum of five pounds.

Whereupon the defendant craved, in terms of the Act 7th and 8th Geo. IV., cap. 53, sec. 84, that the Justices should state the facts of the case for the opinion of the Court of Exchequer in Scotland, and the case, under reference to the foregoing statement, is as follows :—

First, The defendant is a hotel keeper and post-horse hirer at Cullen, in the county of Banff, and held a license under and by virtue of said Act authorising him, during the period from 6th October 1865 to 5th January 1866, to keep at one time to be let for hire two horses, and he occasionally held a supplemental license for additional horses.

Second, During the period to which said license applied, four horses belonging to defendant were kept by him. Two of these horses were kept to be let for hire, and the other two horses were kept for labouring land, occupied by the defendant, and occasionally were let for hire, when the other two horses were tired, and not let for hire.

Third, On 30th December 1865, George Gray, farm-servant at Lintmill, near Cullen, called on the defendant, and wished to hire a hearse and two horses, and a dogcart and one horse, to attend the funeral of his deceased son on 1st January following. The defendant stated that he could let him the hearse and two horses on hire, but refused to let him, in addition, a dogcart and horse on hire.

Fourth, On 1st January 1866, the date mentioned in the information, a hearse and two horses, being the horses kept by the defendant to be let for hire, and a dogcart and one horse belonging to the defendant, were driven from Cullen to Lintmill by two servants of the defendant. From Linthill these vehicles and horses proceeded to Grange, with the funeral party, and then returned back to Cullen, the hearse being driven all the distance by the defendant's servant, and the dogcart being driven by one of the relatives or funeral party, from Lintmill to Grange, and from thence back to Cullen.

Fifth, The distance from Cullen to Lintmill is one mile, from Lintmill to Grange ten miles, and from Grange to Cullen eleven miles; and the defendant afforded keep to the horses during the journey.

Sixth, On 4th January 1866, the said George Gray again called on the defendant to pay him for the hire on said 1st January. The defendant charged, and received, one pound fourteen shillings as the hire of the hearse and two horses, and three shillings for his servants, and after having settled the hire for the hearse and two horses, Gray offered the defendant payment for the dogcart and horse, but the defendant refused to take anything for them, and was never paid or received anything therefor directly or indirectly.

The Justices were of opinion that it was not proved that the defendant, on the date and at the place specified in the information, had let out more than two horses on hire, but they were of opinion that it was proved that, at said date and place, the defendant kept three horses to be let for hire, being a greater number of horses than he was by said license authorised to keep at any one time for hire, dismissed the appeal, and adhered to the judgment appealed against.

Whereupon a case was craved and allowed for the opinion of the Court of Exchequer, whether defendant, in the circumstances above set forth, did, on the day libelled, contravene the statute, and is liable, as alleged, in the information.

At the discussion, the Court suggested that the facts from which the conclusion of the Justices and Quarter-Sessions was deduced might be more fully stated, and that the case might be remitted for restatement, if authority could be found for adopting that course. No precedent being adduced, the Court disposed of the case as stated.

YOUNG and SHAND, for the defendant, argued—The charge against the defendant is, that whereas he was only entitled under his certificate to keep two horses to be let for hire, he kept during the period libelled more than two horses for that purpose; but on the facts stated in the case it appears that the Justices and the Quarter Sessions have inferred that that offence was committed from his letting occasionally for hire two horses which were admittedly not kept for that purpose, and that is not competent. The 15th section of the Act distinguishes between two offences, one of which is the keeping of horses for hire, and the other the letting of them. Under proofs of occasional letting for hire beyond his certificate, the defendant cannot be convicted of keeping beyond his certificate for that purpose.

LORD ADVOCATE, SOLICITOR-GENERAL, and RUTHERFURD supported the conviction.

At advising,

LORD JUSTICE-CLERK — This special case is stated for the opinion of the Court from the Quarter Sessions of Banffshire. The information before the Justices stated that the defendant, on the 1st of January 1866, being in the position of holding a license to keep not more than two horses at one time, did let more—namely, three—whereby he incurred a penalty of £100. A great many facts are stated in the case, which we are all agreed are unavailing. The 3d, 4th, 5th, and 6th heads seem to have been created to negative a charge which is not made. But however that may be, we must throw them out of view altogether, and there remains nothing to consider, as the foundation of the conviction of the Justices and of the Quarter Sessions, except the facts stated under the 1st and 2d heads [Reads]. These are the facts from which it is deduced that at said date and place the defendant kept three horses. The reason that they limit their inference to three horses is because that number was stated in the information. It was suggested for the defendant that there was a difficulty about dates, because it is said in the information that at said date and place, on 1st January 1866, he kept more horses than he was allowed to keep by his license; whereas nothing is found either in the 1st or 2d heads except that something took place between October 1865 and January 1866. But there is no difficulty here, for two reasons, because (1) the prosecutor has by Act of Parliament a period of six months within which to prove his case; and (2) because, if the offence, the transgression of the license, which is said to be established by the facts stated in the 1st and 2d heads, amounts to the charge in the information, that offence is one which ranges over the whole period, for I attach no importance to the statement that he held a supplemental or occasional license. That cannot mean that he held at the time a license by which he could let three or four horses,

that he had a license and a supplemental one which enabled him to do so. There seems to be a mistake as to what a supplemental license is. That is a license which is got after the year has run out, and becomes as good a license as one taken out for the whole period. It is not an occasional license which entitles a person to let out for hire on one or two occasions and no more. But on the facts found to be proved in the 2d head, two difficulties are suggested by the defendant. It was said, in the first place, that if his license entitles him to keep two horses for hire, he is entitled to take other horses not kept for hire and employ them as post-horses when the two licensed horses are disabled by the work which they have already done. In other words, the permission contained in the license is this—You may keep as many horses as you like, and let them out for hire, provided you never have out on hire at one time more than the number allowed by the license. It is scarcely necessary to remark that that is an impossible construction. It would enable a master of post-horses to carry on a greater business than he was entitled to by his license. That wont do, for it would simply be a fraud upon the revenue. But there is another objection which is certainly more difficult, and requires further consideration. It is said that in the 2d head of the case it is not found that the defendant kept any more than two horses for hire, and yet the charge is that he did so. The case says that he had four horses, that two of these were kept for hire and two for labour. [Reads 2d head.] The only question of difficulty is that the case is not well stated. But there are no means of amending that, and the question therefore is—Are the facts before us sufficient to support a conviction? I think that depends on a construction of the 15th section of the Act of Parliament [Reads]. We are all agreed that there are two offences specified in this action, but the difficulty is to define them. It was contended to us for the defendant with great plausibility, that the first offence is letting a horse for hire, and the second is keeping a horse for hire without a license, or beyond the number—that the essential difference between the offences is, that the one is letting and the other keeping for hire. If that were the true construction, we must give judgment for the defendant. But it is not the true construction. The essential difference is this, that the one offence is committed by a man who has a license, and the other by a man who has not. The question comes to be whether the facts before us are sufficient to justify a conviction of the second of these offences. I think they are. It is not found in so many words that he kept more than two horses for hire, but it is found that he kept two and let more. A man's purpose may be confined in his own breast unless it be divulged. He may tell you his intention in keeping horses or he may let them. It seems to me that the latter is the common way of arriving at the purpose. They may be kept for other purposes, but that wont relieve him of the Act of Parliament. Therefore I think, when the Justices state in the special case that two plough-horses were let for hire occasionally, they were justified in concluding that it was proved he kept for hire more horses than he had authority for in his license.

The other Judges concurred, and the conviction was accordingly affirmed.

Agent for the Crown—Solicitor of Inland Revenue.

Agent for Defendant—Alexander Morison, S.S.C.

Saturday, Jan. 19.

FIRST DIVISION.

WILSON'S EXECUTORS *v.* SOCIETY FOR THE CONVERSION OF THE JEWS AND OTHERS.

Process—M.P.—Amendments after Closing Record.

A claimant held not entitled to amend his condescendence after the record had been closed and a proof partly led.

The late Isabella Wilson, by testament, appointed the pursuers to be her executors, and *inter alia* directed them to divide the residue of her estate among four charitable societies. One of these was called in the will "The Society for the Conversion of the Jews." After Miss Wilson's death, certain persons claiming to be the next of kin to her raised this process for the purpose *inter alia* of having it determined who was in right to the foresaid bequest. They contended that the bequest was null and void from uncertainty; that there was no society bearing the title as given in the will; and while there were many societies in existence having similar designations, it was impossible to determine which Miss Wilson meant to benefit. The raisers were Mrs Ogg and others, and claimed to be related to Miss Wilson through their grandmother, who they alleged was a cousin of Miss Wilson's grandfather. They alleged that Miss Wilson's father was John Wilson, and her grandfather George Wilson. When the case came into Court a society, bearing the name of the "Scottish Society for the Conversion of Israel," &c., appeared to claim the bequest. There also appeared a claimant called James Wilson, who alleged that he was one of Miss Wilson's next of kin, and nearer than the other claimants, in respect that his grandfather was a brother of the grandfather of the testatrix. In his claim he alleged that Miss Wilson was the daughter of John Wilson and the granddaughter of another John Wilson, and that his father was James Wilson of Glasgowego. After the record was closed a debate took place as to the procedure in the cause when the Scottish Society for the Conversion of Israel objected to discuss the question as to the validity of the bequest with two sets of claimants, both of whom could not be next of kin, and who had different averments as to the testatrix's grandfather's name through relationship with whom they both claimed.

The Lord Ordinary (Ormidale) found that those claiming to be next of kin should establish their propinquity before the case went further. They were both allowed a proof of their averments, and a commission was granted to take the evidence of aged and infirm witnesses who could not attend the proof in Edinburgh. That commission has been partly executed. Thereafter the claimant, James Wilson, proposed before the diet of proof that he should be allowed to amend his record to the effect of calling the grandfather of the testatrix George in place of John, and to describe his father as of Gettyhill in place of Glasgowego. He alleged in a minute that these were mere errors "which occurred through the haste with which the first inquiries were necessarily conducted," and were afterwards discovered by the country agent in the course of his investigations.

The other claimants opposed the motion, and after hearing parties, Lord Ormidale refused it, giving the following explanation of his reasons for so doing:—"It was acknowledged on the part of the claimant Wilson, that the erroneous statements in the record, which he desires to have