day. I think a great reason of the unpopularity of jury trials has been the practice of continuing the trial over the one day, and thus increasing the expense against the losing party.

The Court dismissed the first objection, and sustained the second.

Counsel for Objector—C. Smith. Agent—A. Shiell, S.S.C.

Counsel for Respondent—Trayner. Agents—Horne, Horne, & Lyell, W.S.

Tuesday, December 2.

FIRST DIVISION.

HANNAY AND OTHERS, PETITIONERS.

Titles to Land Consolidation Act, 1868—*Females as Instrumentary Witnesses.*

A judicial factor produced on his appointment a bond of caution in which the signature of the cautioner was attested by two female witnesses. The Principal Clerk of Session declined to certify the sufficiency, on the ground that it was doubtful whether under the Act of 1868 it was lawful for females to act as instrumentary witnesses in deeds other than those relating to heritage. The preamble of the Act sets forth that—"Whereas it is expedient . . . to make certain changes upon the law of Scotland in regard to heritable rights, and to the succession to heritable securities in Scotland: Be it enacted," &c. The 149th section provides that—"All deeds and conveyances, and all documents whatever, *mentioned or not mentioned in this Act*, and *whether relating or not relating to land*, having a testing clause, may be partly written and partly printed," &c. The 139th section, on the other hand, enacting the competency of females to act as instrumentary witnesses, is in these terms—"It shall be competent for any female person of the age of fourteen years or upwards, and not subject to any legal incapacity, to act as an instrumentary witness in the same manner as any male person of that age, who is subject to no legal incapacity, can act according to the present law and practice, and it shall not be competent to challenge any deed or conveyance or writing or document of whatever nature, whether exercised before or after the passing of this Act, on the ground that any instrumentary witness thereto was a female."

The matter having been brought under the notice of the Lord Ordinary (SHAND), he reported the matter to the First Division of the Court. *Held* that under the statute females were empowered to act as instrumentary witnesses to any document whatever, whether relating to land or not.

Authorities referred to by the Lord Ordinary—Dickson, 689, 1775; Ersk. (Nicolson), i. i., 49; Broom's Com., pp. 4 to 6; *Simsour and Ors.* v. *The Vestry of St Leonards*, 28 L. J. Com. Pl., 290; *Lees* v. *Summersgill*, 17 Vesey, 508.

Counsel for Petitioners—M'Laren. Agents—Ronald, Ritchie, & Ellis, W.S.

Wednesday, December 3.

SECOND DIVISION.

[Sheriff of Fifeshire.

MILLER *v.* M'ARTHUR.

Trespass.

The penalties of the Act 1686, c. 11, *held* to apply to the case of trespass by sheep in a garden partially unenclosed.

This was an appeal from a deliverance of the Sheriff of Fifeshire on a petition at the instance of John M'Arthur, butcher, Cowdenbeath, against William Millar, miner, Cowdenbeath, for delivery of two sheep belonging to the petitioner, which had been seized upon by the respondent; or alternatively for a sum in name of damages.

The facts were briefly these—that on the 6th June 1873 the respondent found several sheep in his garden, two of which he pounded in virtue of the Act 1686, c. 11. They belonged to the petitioner, who was sub-tenant of a park adjoining the respondent's garden, and they had made their way through a gap in the dyke, as there was no herd with them.

The Sheriff-Substitute (LAMOND) pronounced the following interlocutor:—

"*Dunfermline, 11th July* 1873.—The Sheriff-Substitute having considered the closed record, proof, and productions, and heard parties' procurators, finds that the respondent is proprietor of a feu at Foulford, Cowdenbeath; that his feu adjoins on the west a field in grass tenanted by Dr Mungall; that along the west boundary of his feu the respondent erected on his own ground a stone wall; that a gap in this wall was made some time ago by a spate, and that the respondent holds the Lochgelly Iron Company, his superiors, liable for the damage: Finds that some weeks prior to 6th June 1873, Dr Mungall (who also holds under the Lochgelly Company) informed the respondent that he had sublet the field to the petitioner for sheep pasture, and requested the respondent to get the gap in his wall repaired: Finds that about a week prior to said 6th June the petitioner put sheep into the field; that the gap was not repaired; that on Sunday, 1st June, some of the sheep got into the respondent's garden through said gap, but were driven out by the petitioner; that on Monday, 2d June, the petitioner went to respondent and apologised, and offered to help him to repair the wall; that the respondent refused, alleging as his reason that until he got settled with the Lochgelly Company he was not disposed to mend the dyke; Finds that on 6th June some of the petitioner's sheep again strayed into the respondent's garden; that the respondent seized two of them, and has ever since detained them; Finds that the respondent knew to whom the sheep belonged, but took no step to inform the petitioner, who lives across the road almost opposite to him: Finds that on Saturday, 7th June, the petitioner's agent wrote to the respondent the letter No. 7 of process, which letter would in course of post be delivered on Monday morning; that notwithstanding of said letter the respondent, well knowing to whom the sheep belonged, went to Dunfermline on Monday afternoon and got handbills printed, of which No. 6 of process is a copy, and had the same posted up: Finds in law that the respondent's detention of said sheep is illegal, and that in the circumstances he is not entitled to found on the Act

1686, c. 11: Therefore decerns and ordains the respondent instantly to deliver up said sheep to the petitioner, and reserves all further questions, including that of expenses.

"*Note.*—The Sheriff-Substitute has detailed the facts in this case at length, and it appears to him to be clear that, if the respondent's garden sustained injury through these sheep getting into it, he not only had himself to blame by not mending his dyke, but actually left the gap in order that, by the sheep getting in, he might have a stronger case against the parties whom he held responsible for the damage to his dyke. If the case stopped here, the Sheriff-Substitute would have said the respondent is in the wrong, and has acted illegally. But he pleads the Act 1686, cap. 11, as authorising the poinding of the sheep. It seems to the Sheriff-Substitute to be monstrous to hold that a man who purposely seeks the damage he has sustained, and who, it may be said, invites the sheep to stray into his garden that he may use the trespass as a handle against a third party, is to take the benefit of an Act of Parliament passed for another purpose altogether, and an Act to a certain extent penal in its nature. It was the respondent's duty to have protected his own garden; and if he had done this, and the petitioner's sheep managed to trespass into it, it would have been time enough for him then to have taken the measures pointed out by the Act. But supposing the Act to apply to a garden (which may be doubted), did the respondent act up to it? He did not. He knew to whom the park belonged, and to whom the sheep belonged, and yet he made no claim for the money payment for the number of sheep straying, and he has taken no steps to recover the damage done to his crop in terms of the Act. If he is to claim the benefit of the Act as authorising what he did to his neighbour, he must act up to it himself, and this he has not done. What he has done is one of the most unneighbourly things the Sheriff-Substitute has as yet met with, and for which he can find no authority in law."

On appeal by the respondent, the Sheriff pronounced the following interlocutor:—

"*Edinburgh, 14th August* 1873.—The Sheriff having heard parties' procurators on the appeal for the respondent, and considered the record, proof, and whole cause, dismisses the said appeal, adheres to the interlocutor of the Sheriff-Substitute appealed against, and decerns; in the meantime, reserves all questions of expenses, and remits the cause to the Sheriff-Substitute.

"*Note.*—The findings in fact contained in the interlocutor of the Sheriff-Substitute are all well founded. Indeed, the discussion which took place before the Sheriff proceeded upon the assumption that they were so.

"The question which was argued was whether the respondent, in seizing and detaining the petitioner's sheep, was acting within the provisions of the Act 1686, cap. 11? This Act has not, so far as the Sheriff is aware, been recently under the consideration of the Supreme Court; but there are several cases of a more remote date where the Act received full consideration—*Govan* v. *Lang*, 18th February 1794, M. 10,499; *Lock* v. *Tweedie*, 3d July 1799, M. 10,501; *Turnbull* v. *Couts*, 23d February 1809, F.C.; *Shaw & Mackenzie* v. *Ewart*, 2d March 1809, F.C.; *Pringle* v. *Rae*, 31st January 1829, 7 Shaw, 352. Great diversity of opinion was expressed in some of these cases, but they resulted in the Act receiving a liberal construction. The Sheriff-Substitute doubts whether the Act applies to a garden or piece of ground such as that occupied by the respondent.

"The Sheriff is inclined to think, looking to the terms of the Act and the decisions above quoted, that it does not apply to the subjects possessed by the respondent.

"The Sheriff, however, is of opinion that the specialties which occur in this case preclude the respondent from founding on the Act as entitling him to retain possession of the petitioner's sheep.

"At the time the field occupied by the petitioner was sublet to him, there was a gap in the dyke which separated it from the respondent's feu, of about two or three yards. The respondent was informed that the field was sublet to the petitioner, and that cattle or sheep were to be put on it to graze. His attention was then called to the fact that part of his dyke was down, but he said he was not disposed to repair it.

"On Sunday the 1st of June, soon after the sheep were put into the field, they got into the respondent's garden through the gap in the dyke, but they were driven out by the petitioner. On the following Monday the petitioner spoke to the respondent about repairing the dyke; the respondent not only refused to do this, but he declined the petitioner's offer to assist him in repairing it.

"The sheep in question were seized by the respondent on Friday the 6th of June, when they were in his garden. Notwithstanding what the respondent says in his deposition, the Sheriff thinks it is proved that he knew to whom the sheep belonged. Knowing this, it was his duty to give immediate intimation of the seizure of the sheep to the owner. This he did not do, but on Monday the 9th of June he got handbills printed, stating that two sheep had been found in his garden, and that if they were not claimed they would be sold to pay damages and expenses.

"In these circumstances, the Sheriff concurs with the Sheriff-Substitute in thinking that the respondent is not entitled to found upon the Act 1686 as entitling him to retain the possession of the sheep."

The respondent appealed.

It was argued for the appellant that he was entitled to keep the sheep, under the Act 1686, c. 11, until the penalty inflicted by the Act had been paid. The appellant's dyke was built entirely on his own ground, and the respondent was bound to have kept a herd to prevent his sheep from straying.

For the respondent it was argued—(1) That the statute was not intended to apply to gardens; and (2) that the appellant was not entitled to found upon it, as he had not given intimation of the seizure at once to the owner.

Authorities cited—*Govan* v. *Lang*, Feb. 18, 1794, M. 10,499; *Lock* v. *Tweedie*, July 3, 1799, M. 10,501; *Turnbull* v. *Couts*, Feb. 23, 1809, F.C.; *Shaw & Mackenzie* v. *Ewart*, March 2. 1809, F.C.; *Pringle* v. *Rae*, Jan. 31, 1829, 7 S. 352.

At advising:—

Lord Benholme—I have no doubt the Sheriff is wrong. The question depends upon the application of the statute, and I have no doubt it applies to gardens as well as other property. We must look at the case as at the time the demand for delivery was made. There was at that time no offer made to pay the penalties or the damages

and no compliance with the requirements of the statute.

LORD NEAVES—I concur. I would be sorry to countenance the doctrine contended for by the respondent. Corn and grass are protected by the statute. Are orchards not protected? and if they are, why should gardens be excluded from protection? Under the Act the burden is laid upon a person keeping a straying animal and he is bound to keep it from wandering. The other defences I consider quite irrelevant.

LORD COWAN—The first question is whether the statute 1686 is applicable to the case of a field where there are sheep adjoining a garden partially unenclosed. I concur with your Lordships that the Act does apply. I cannot see why an unenclosed garden is not to be protected as well as any other land from straying animals kept by an adjoining proprietor—the statute expressly requires that a herd shall be kept by the party owning the animals. The only other question is, If the statute applies, did the facts here entitle the appellant to poind? I am clear they did. I do not attach weight to the consideration that the appellant stood on his legal rights—he was quite entitled to say, as he did, that he would not build, and would shut up the sheep if they came on his ground. Where then did the legal obligation lie? The party putting the sheep into the field must either herd or enclose the sheep, and here there was no herd. It is quite true intimation might have been made to the owner, but that does not affect the legality of the original seizure. How then was the poinding to be loosed? I am clear the application should have been accompanied with an offer to pay the penalties and any damages.

The Court sustained the petition, and dismissed the appeal with expenses.

Counsel for Appellant — Rhind. Agent — R. Menzies, S.S.C.

Counsel for Respondent—Pearson. Agents—Dewar & Deas, W.S.

Wednesday, December 3.

SECOND DIVISION.

SPECIAL CASE—WALTER RITCHIE'S TRUSTEES AND OTHERS.

Settlement—Construction—Vesting—Liferent.

A testator left his whole estate to two of his daughters in liferent; but in event of either or both being married, he directed that their liferent should cease, and the funds be divided between them and certain other beneficiaries. Further, the deed provided that in the event of the death of either of the daughters unmarried, then "the share which would have belonged to the deceaser, had she married, should accresce and be divided equally among the whole beneficiaries." Neither of the daughters married, and on the death of one,—*held*—(1) that there was no vesting *a morte testatoris*; (2) that either the marriage or death of one of the sisters terminated the liferent; (3) that a like event vested the fee in the beneficiaries.

This was a Special Case submitted for the opinion and judgment of the Court by the following parties viz., (1) W. D. Anderson, merchant in London, sole surviving assumed and acting trustee of the late Walter Ritchie, *of the first part;* (2) Martha Ritchie, daughter of the truster, *of the second part;* (3) Thomas Ritchie, Walter William Ritchie, and Helen Ross Ritchie, sole surviving children of the deceased Agnes Ritchie, another daughter of the truster, *of the third part;* (4) Agnes Ritchie, granddaughter of the truster, and daughter of his son Thomas, *of the fourth part;* (5) Captain Edward Draper Elliot, R.H.A., and Isabella Agnes Elliot or Percival, wife of Captain Percival, only surviving children of the late Isabella Ritchie or Elliot, a daughter of the truster, and Captain Percival for his interest, *of the fifth part;* (6) The surviving, accepting, and acting trustees under Isabella Ritchie or Elliot's marriage contract, *of the sixth part;* (7) The residuary legatees of Thomas Alexander, husband of Janet Ritchie, also a daughter of the truster; the sole executrix and universal legatee of Margaret Ritchie, also a daughter of the truster; and the surviving executors of James Ritchie, son of the truster, *of the seventh part;* (8) Thomas Kenneth, James and John Ritchie, and Isabella Ritchie or Macarthur, surviving children of John Ritchie, a son of the truster; and the Rev. James Macarthur for his interest, *of the eighth part;* (9) Henrietta Ritchie, widow of Walter Adolphus Ritchie, son of the truster's son John, and her husband's sole executrix, *of the ninth part.*

The circumstances under which the Special Case came before the Court were as follows:—

Walter Ritchie, the truster, died at Greenock in November 1827, leaving a trust-disposition and settlement, by which he conveyed to trustees his whole estate, heritable and moveable. The original trustees are all dead, and William Dunlop Anderson, the party *of the first part,* is the sole surviving assumed trustee acting under the trust-deed. The purposes of the trust were, firstly, to convert the whole estate into cash, and to pay all debts, and thereafter the truster gave directions as to the residue of his estate in the following terms:—'And with regard to the residue and remainder of my estate, after the payment of my debts as aforesaid, they shall hold the same for the use and behoof of Agnes Cuthbert Ritchie, my spouse, in case she should survive me, but that in liferent, for her liferent use allenarly, and failing her, by death, for the use and behoof of Margaret Ritchie and Martha Ritchie, my two unmarried daughters, and that also in liferent, for their liferent use only; but in the event of either or both being married, their liferent right therein shall thereafter entirely cease and determine, and the fee of the said remainder and residue of the estate shall then belong to and become the absolute property of the said Margaret Ritchie and Martha Ritchie, and of Janet Ritchie, spouse of Thomas Alexander, in Greenock, and of Agnes Ritchie, spouse of John Ritchie, sometime merchant in Liverpool, my daughters, and of Catherine Noble, relict of Thos. Ritchie, my deceased son, equally among them, and share and share alike, but if any of my said daughters or the said Catherine Noble shall have then deceased, leaving a child or children, such child or children shall be entitled among them to the same share of my estate which their mother would have been entitled to had she been in life, it being my intention that, in case my daughters, or any of them, or