necessarily take the form of a proof, but there must be evidence, formal or informal, to establish that a case has arisen for the exercise of the statutory powers.

Now, agreeing with your Lordships that the Sheriff's action in the matter cannot be sustained, it appears to me that this is a case for a remit to a Lord Ordinary. The statute deals with two cases, where the Court having all the materials for decision, may pronounce a final order, and where not having them, it must remit to a Lord Ordinary "to direct inquiry into the circumstances of the case." If the Sheriff had held an inquiry, and we had before us notes of evidence taken before him, or reports from skilled persons, there might have been no necessity for further inquiry, but having nothing of this kind before us, the proper course is to remit the case to a Lord Ordinary.

LORD KINNEAR concurred.

The Court pronounced the following interlocutor :—

"Remit to Lord Stormonth Darling to inquire into the circumstances of the case, and to issue such order as his Lordship may deem requisite to determine the boundaries of the wards of the said burgh."

Counsel for the Petitioners — Balfour, Q.C. — Constable. Agents — Wallace & Pennell, W.S.

Counsel for the Respondents—A. Jameson—Salvesen. Agents—Irons, Roberts, & Co., W.S.

Thursday, May 27.

FIRST DIVISION.

ORPHOOT, PETITIONER.

Trust — Resignation of Trustee — Nobile Officium.

A testamentary trustee who could not resign under the Trusts Acts, and who had not power to resign under the settlement, *allowed* to resign, on the ground that the duties of his office as Sheriff-Substitute were such as to preclude him from giving attention to the trust business, which was arduous and complicated.

This was a petition presented by Thomas Henderson Orphoot, testamentary trustee of Sir James Naesmyth of Posso, craving the Court to grant him power and authority to resign the office of trustee.

The testator died in October 1896, and the petitioner along with two other trustees nominated by the trust - disposition and settlement accepted office.

The purposes of the trust were (1) the payment of debts, death-bed and funeral expenses, and the expenses of the trust; (2) the payment of certain legacies, including one hundred guineas free of legacy-duty, to each of his trustees who might be willing to accept office; (3) the disposal of certain articles as specific legacies; (4) the payment of the interest of the whole capital to the testator's widow, and upon her death the realisation of the capital and its payment in fixed proportions to certain charitable institutions; and (5) the sale of any heritable property of the testator which his widow might not wish to retain.

The petitioner averred—"That the total means and estate left by the truster amounted to upwards of £87,000, of which the greater portion was invested by the deceased on investments of a nature which the trustees are not entitled to retain, and that accordingly they have been and are still in the course of realising these to the best advantage with a view to the reinvestment of the funds on securities within their powers."

The petitioner further averred—"That your petitioner accepted office in ignorance of the magnitude of the trust-estate, and of the time and labour required for the proper management of so large a fund. He now finds that his official duties, which are varied and laborious, prevent him from giving proper attention to the affairs of the trust. Your petitioner is Sheriff-Substitute of the Lothians and Peebles at Peebles. He has the whole duties of his office in Peebles to discharge. In addition, upon three days of each week he requires to sit in Edinburgh in the Sheriff Summary and Bankruptcy Courts of Midlothian. On these days he has also to dispose of the whole of the miscellaneous and administrative business falling to the Sheriff-Substitutes of Midlothian, in so far as his time permits him to discharge that duty. Further, in each alternate month, in addition to the duties above mentioned, he sits in the Police Court of Edinburgh for three days of each week. These numerous and varied duties engross the whole of your petitioner's time. The result is that he cannot attend meetings of trustees, and that he is unable to bestow upon the multiplicity of questions which arise in connection with the large fund which the trustees require to administer, the time and consideration which these questions require. He is accordingly unable to discharge the duties of the office conferred upon him by the said trust-disposition and deed of settlement. It is not expedient in the interest of the trust that he should be obliged to remain in office. The trustees have only the statutory powers of investment. In these circumstances your petitioner desires to resign, and he makes this application to your Lordships for authority to do so. He has offered to repay the legacy of £105. That the trust not being a gratuitous one, the petitioner has no power to resign under the Trusts (Scotland) Act 1861, and the trust-deed does not provide for his resignation, so that if the petitioner is to be relieved of the office of trustee, he can only be so with the authority of your Lordships."

Counsel for the petitioner cited *Watson* v. *Crawcour*, February 17, 1844, 6

D. 687, *per* Lord Cunninghame, and *Alison*, February 3, 1886, 23 S.L.R. 362 — [LORD PRESIDENT—This application is made, is it not, on the distinct understanding that the legacy of 100 guineas is repaid?]

Counsel having answered in the affirmative, the Court granted the prayer of the petition without hearing further argument.

Counsel for the Petitioner — Cook. Agents—Strathern & Blair, W.S.

Friday, May 28.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

SMITH *v.* KIRKWOOD AND ANOTHER

Process — Suspension — Suspension as a Mode of Bringing under Review the Judgments of Inferior Courts — Competency.

Where a party, charged upon a decree in the Sheriff Court, presented a note of suspension of the charge and its warrant, on the plea that the decree had been fraudulently obtained, *held* that he was not entitled to have the decree suspended in respect that the grounds of suspension being extrinsic to the Sheriff Court process, the note of suspension did not truly bring the Sheriff's judgment under review upon its merits.

Opinion reserved whether in view of the changes introduced by the Court of Session Act 1868 in dealing with the judgments of inferior courts, suspension is still a competent mode of bringing these under review.

In 1894 decree was pronounced of consent against the defender in an action of affiliation and aliment raised in the Sheriff Court of the Lothians and Peebles by Grace Stirling Kirkwood against Andrew Smith. The sum decerned for was £2, 2s. of inlying expenses and £7 per annum of aliment.

On 26th July 1894 Kirkwood charged Smith to make payment of a sum of money in terms of said decree, and after a petition for warrant to imprison had been presented against him, Smith was on 18th September 1894 ordained, on pain of imprisonment, to pay a sum down, and to make certain payments weekly thereafter, which payments he duly satisfied as they became due.

On 21st October 1896 Smith presented a note of suspension in the Bill Chamber craving the Court to suspend the abovementioned charge and warrant to imprison, with the whole grounds and warrants thereof.

The complainer recited the proceedings against him in the Sheriff Court, and made certain averments on which he founded the following plea-in-law:—"(1) The decree in said affiliation action having been obtained by means of the fraudulent representations and actings of the respondents, the charge and warrant to imprison following thereon are inept and ought to be suspended."

The respondents, Kirkwood and her father, as her curator-at-law, denied the averments of fraud and pleaded, *inter alia* — "(1) The complainer's statements are not relevant or sufficient to support the prayer of the note, and it ought to be dismissed."

The charge and petition for warrant to imprison following thereon duly proceeded upon the Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), sec. 4, and the Civil Imprisonment (Scotland) Act 1882 (45 and 46 Vict. cap. 42), sec. 4.

The sections of the Court of Session Act 1868 (31 and 32 Vict. cap. 100) regulating the review of decisions of inferior courts are secs. 64 to 78.

On 29th January 1897 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—"Finds that the first plea-in-law for the complainer cannot be entertained in the action: Therefore repels said plea: Finds that it appears from the statement of parties that the sum charged for has been paid: Therefore suspends said charge and warrant for imprisonment: Finds the respondents entitled to expenses."

The complainer reclaimed, and argued—The note of suspension was directed not against the charge but against the decree upon which the charge was given. The time for appealing the Sheriff's judgment had long since elapsed, but suspension was a competent mode of bringing the Sheriff's judgment under review in such circumstances—Mackay's Practice, ii. 474; Ersk. iv. 3, 8; and the Court of Session Act 1868, while abolishing advocation, had not touched suspension.

The respondents' argument may be gathered from the opinions of the Judges.

LORD ADAM—[*After stating the facts his Lordship proceeded*] — The only averment I find in the suspension is that the respondents on a petition following on the said charge obtained warrant, and that the sums referred to in the warrant have been paid, and accordingly that the warrant is entirely exhausted.

Now, that is not the warrant the suspender complains of.

As I understand, the complainer does not so much object to the Lord Ordinary's interlocutor suspending that warrant, but what he says goes further, and is—I want also in this suspension the original decree against me in the Sheriff Court set aside. That is the only plea which he puts forward.

That means that the original decree is to be set aside on the ground of fraud. I have always understood that to upset a decree on the ground of fraud is to introduce extrinsic matter, and is only obtained by way of reduction. Accordingly, the Lord Ordinary seems to me to be quite