Counsel for the First Parties — Cooper. Agents—Henry & Scott, W.S.

Counsel for the Second, Third, and Fourth Parties—Macfarlane—Fleming. Agents—Morton, Smart, & Macdonald, W.S.

Saturday, March 19.

FIRST DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

MACDONALD *v.* FORSYTH.

Process — Appeal from Sheriff Court — Amendment of Record.

In an appeal for jury trial from the Sheriff Court, a pursuer *allowed* to amend his record upon payment of one guinea of expenses.

This was an action of damages raised by Robert Macdonald against Charles Forsyth for injuries sustained by the pursuer while driving from Elgin to Lossiemouth in a dog-cart hired by him from the defender.

The Sheriff-Substitute (RAMPINI) having allowed a proof, the pursuer appealed for jury trial to the Court of Session, and on 10th March 1898 obtained an order for issues.

The pursuer lodged an issue, and at the same time put in a minute setting forth certain amendments which he desired to make on the record, and he craved the Court to open up the record and allow the same to be amended in terms of the minute, and thereafter of new to close the record.

The nature of the proposed amendments will be seen from the following extracts from the record, where the amendments are indicated by brackets:—"(Cond. 4) When about two miles from Elgin, at a point on the road leading to Lossiemouth, nearly opposite Myreside Farm, the left-hand wheels of the dog-cart, which was at the time being driven by the defender's servant, left the road and went up a bank on the left-hand side of the road, with the result that the dog-cart tilted over on its right side, and the occupants were thrown, or fell, violently to the ground. [The said dog-cart had, owing to the fault of the defender as after mentioned, not been provided with lights, and it was therefore the duty of the said Robert Cameron to exercise particular care and caution in driving the said dog-cart. This he failed to do, and drove the horse in such a careless and negligent manner that the dog-cart was partially drawn off the road and was upset in manner set forth.]" "(Cond. 7) The said accident was caused by the defender's failure in duty, or negligence in not providing proper lights for the said dog-cart, or in not providing a careful, competent driver [or by the fault of the defender's servant the said Robert Cameron, or by one or more of these causes.]"

The defender submitted that, as a condition of the amendment being allowed, the pursuer should be found liable in expenses since the closing of the record.

LORD PRESIDENT—The Court will not be averse to a careful scrutiny of the record being made at this stage of the case. So in giving a guinea of expenses we do so rather as an indication that no harm is done by a close look being given to the record, and that in such circumstances we will only give such a sum as will enable the opposing party to consider the amendment.

LORD ADAM concurred.

LORD M'LAREN—I am of your Lordship's opinion. We have frequently had occasion to notice that the discussion of Sheriff Court cases is very much embarrassed by want of consideration of the record before the debate. I was glad, therefore, to see that care had been taken in this case to put the record in proper form before it was brought up for discussion.

LORD KINNEAR was absent.

The Court opened up the record, allowed the pursuer to amend the same in terms of his minute on condition of his making payment to the defender of the sum of £1, 1s., and the said amendments having been made and the defender having answered the amendments at the bar, of new closed the record and approved of the issue proposed by the pursuer as adjusted.

Counsel for the Pursuer—Jameson, Q.C. —C. D. Murray. Agent—Alex. Mustard, S.S.C.

Counsel for the Defender — Salvesen. Agents — Morton, Smart, & Macdonald, W.S.

Tuesday, November 2, 1897.

OUTER HOUSE.

[Lord Kincairney.

HODGE *v.* SCHOOL BOARD OF BALLINGRY.

Election Law — Reduction of Election — Elections (Scotland) (Corrupt and Illegal Practices) Act 1890 (53 *and* 54 *Vict. c.* 55), *sec.* 30.

Section 30 of the Elections (Scotland) (Corrupt and Illegal Practices) Act 1890, after declaring that an election may be questioned by an election petition on certain specified grounds, provides (sub-section 2)—"An election shall not be questioned on any of these grounds by way of reduction or suspension, or by any form of proceeding except by an election petition." *Held* (*per* Lord Kincairney) that the grounds specified did not include all possible sources of challenge, and that it was competent to question an election to a school board by an action of reduction in the Court of Session on grounds other than those specified in section 30.

School—School Board—Election—Returning Officer—Nomination.

Rule 9 of the General Order issued by the Education Department on 1st October 1896 for the regulation of School Board elections provides "that the returning officer shall decide whether any nomination is valid, and his decision shall be final." A party brought a reduction of an election on the ground that the returning officer after accepting his nomination paper had afterwards rejected it as invalid. He did not maintain that the nomination was valid, nor did he aver that the returning officer had decided it to be valid at the time when he accepted it. *Held* that the action was irrelevant, in respect that acceptance of a nomination paper did not constitute a decision as to its validity.

This was an action at the instance of William Hodge, miner, Lochgelly, against the Reverend David Jamie and others, who were on 6th April 1897 declared to be duly elected as the members of the School Board of Ballingry, and also against James K. Park, the returning officer, concluding for reduction of the election in question. The action was defended by the School Board. The facts of the case, and the respective pleas of the parties, are fully stated in the opinion of the Lord Ordinary.

On 2nd November 1897 the Lord Ordinary (KINCAIRNEY) assoilzied the defenders from the conclusions of the action.

Opinion.—"This is an action of reduction of an election of the School Board of Ballingry on 6th April 1897, the difficulty in which has arisen from the manner in which the rules and regulations as to such elections issued by the Education Department are expressed. I understand that these rules and regulations are issued annually, but that they have not materially varied since 1872.

"Prior to the election the five defenders were duly nominated as candidates, and their names were published as those of the only candidates nominated; and as the School Board of Ballingry consists of five members, and there were only five candidates, no poll was taken, and the returning officer on the day of election declared the defenders duly elected, all in terms of article 12 of the regulations.

"The pursuer seeks to set aside this election, not because the five defenders were not duly qualified and nominated in accordance with the regulations; and not because there was anyone else who was nominated in the manner directed by the regulations; but because a nomination paper had been delivered to and accepted by the returning officer bearing to be a nomination of the pursuer by five duly qualified electors, but which was in fact only signed by four, their fifth nominator being under age and therefore not qualified. That is averred by the defenders. It is not denied by the pursuer on record, and it was admitted at the bar.

"It is, however, maintained that the returning officer was bound to publish the pursuer's name as a sixth candidate and to take a poll on the day of election. He says, in effect, that it was his duty to give effect to a bad nomination paper, and he avers that if that had been done he would or might have been elected. The pursuer's averments are that on 22nd March 1897 a nomination paper bearing to be signed by five electors nominating the pursuer for election was handed to the returning officer; that he examined the nomination paper 'and compared it with the valuation roll. He then intimated to the pursuer and other electors that said nomination paper was all in order, and accepted the same as valid.'

"It is further averred that on 24th March the pursuer received a letter from the returning officer intimating that his nomination paper had been rejected, and that the returning officer proceeded to carry through the election as if the pursuer had not been nominated.

"The defenders explain that the returning officer's reason for rejecting the nomination paper, as expressed in his letter to the pursuer, was that he had been informed, and had ascertained, that one of the pursuer's nominators was not of lawful age, and the sufficiency of this objection in fact and law is not disputed. It may be that if the fault in the nomination paper had been detected when it was presented, it might have been remedied by another nominator being procured. At the same time the pursuer does not aver that this could have been done.

"The pursuer pleads, and has maintained, that because the returning officer had on 22nd March accepted his nomination as valid it was *ultra vires* in him to reject it afterwards, and on the other hand the defenders have maintained that the rejection of the nomination paper by the returning officer on 24th March cannot be questioned.

"Both parties found on the same sentence in the regulations issued by the Education Department, which is as follows:—'The returning officer shall decide whether any nomination is valid, and his decision shall be final.' The argument of the pursuer is, that although it is true that one of the nominators who tacitly represented himself to have reached majority, was in fact under age, and that the nomination in his favour was therefore defective, yet as implied misrepresentation escaped detection, he should have been treated as a duly nominated candidate, and that as he was not, the election was irregular and void.

"The defenders plead *in limine* that the action is incompetent in respect of section 30 of the Corrupt Practices Act 1890 (53 and 54 Vict. cap. 55). But my opinion is against that plea. That section enumerates various grounds on which an election may be challenged by election petition, and provides that an election shall not be questioned on any of these grounds in any other form, implying that it may be questioned in some other form on different grounds. But I am unable to see that the ground of this

action, which is, that a candidate has been wrongfully rejected by the illegal act of the returning officer can be comprehended under any of the heads specified in section 30. It was argued that this case might fall under head (*d*) 'That he was not duly elected by a majority of lawful votes,' which it was argued covered all cases of undue election. But I think it is impossible to accept that view, because if it were sound the specification of particular grounds would be wholly unnecessary. The ground of objection here allowed points very clearly to a scrutiny. Prior to that Act all questions whatever regarding an election fell to be summarily disposed of by the Sheriff under section 14 of the Education Act of 1872. But that section is repealed by section 53 of the Act of 1890, and I am unable to see how the right of a party challenging an election on grounds which could not be advanced in an election petition to raise an action of reduction in the Court of Session can now be denied. I am therefore of opinion that this action is competent.

"Its relevancy is however a different matter. The pursuer, proceeding on the regulations above quoted, argues that the returning officer having accepted the nomination paper could not afterwards reject it. The defenders maintain that he did not and could not decide until afterwards. The difficulty, which is considerable, arises because the regulations say nothing whatever as to the time and manner in which the returning officer's decision is to be given. Nor do they impose by express words on the returning officer any duty of making inquiry as to the validity of a nomination paper. The regulations do not say that the decision of the returning officer shall be given in writing or after objection, or in presence of any party, or after inquiry, but only that it shall be given, and that when given it shall be final.

"What the returning officer has to do is, (1), Under section 9, to receive nomination papers not later than fourteen days before the day of election, and to decide as to the validity of the nomination papers; (2) Under section 10, not later than eleven days before the day of election to publish the names, abodes, and designations of the several candidates nominated; then section 11 gives a power to the candidates or electors to withdraw not less than eight days before the election; (3) Under section 12, if the number of candidates nominated and not withdrawn equal but do not exceed the number of members to be elected, the returning officer must on the day of the election declare these candidates duly elected without a poll; but (section 13) if there be more candidates than members nominated, and not withdrawn, he shall publish their names and give notice that a poll will be taken on the day fixed for the election.

"There is, I believe, no decision of the Court of Session throwing light on the question when and how the decision of the returning officer is to be given. The only case bearing on these questions which has come before the Court seems to be *Bone* v. *The School Board of Sorn*, May 16, 1886, 13 R. 768. In that case Bone had been nominated, and the returning officer, in fulfilment of regulation 10, had published a list of eight candidates whom he stated to have been duly nominated, including Bone. Before the day of election one was withdrawn, reducing the number to seven, which was the number of the members of that school board. On the day of election the returning officer intimated to Bone that he declared and certified his nomination to be invalid; and the remaining seven candidates were then declared to be elected. Bone raised an action in the Sheriff Court, and the Sheriff (Brand) found that the returning officer having decided 'before the public notice of 21st March that the pursuer had been duly nominated, and having thereby given public intimation thereof,' it was *ultra vires* for him to go back on his own decision, and he declared that the pursuer had been duly elected. The case was brought before the Court of Session by appeal, but the decision was that the judgment of the Sheriff was final, and the Court did not in their judgment touch on the merits. It will be observed that what was held by the Sheriff here to be the decision of the returning officer was given at a later stage than the acceptance of the nomination paper, and was given in writing.

"There is a precisely similar clause in the regulations under the English Education Act. But the only case which I have been able to discover about it is one which seems to be reported only in Owen's Manual of the Education Acts, 17th ed., p. 478. It is the case of *Hedworth, Monkton, and Jarrow School Board, ex parte Richardson.* It appears that Richardson had been nominated for election, and that the returning officer had through misinformation rejected the nomination. The point which came before the Court was whether the decision of the returning officer was conclusive; and the question raised came to be whether the declaration in the regulations that the decision of the returning officer should be final was not *ultra vires.* As it was ascertained that the nomination was in fact defective, it became unnecessary to decide that point. It has, however, not been taken in this case.

"I may remark that no assistance seems obtainable from questions as to other elections. In parliamentary and municipal elections the duty of the returning officer as to nomination papers is only to decide on objections; and in certain other cases the duties of the returning officer are stated in detail in the relative regulations—Rogers on Elections, Part II. 618.

"Construing the clause as best I can, I am of opinion that it cannot be held to impose on a returning officer the duty of deciding as to the validity of nominations at the time the papers are delivered to him. He is bound to receive nomination papers up to a certain time, and cannot receive them

afterwards. They may be and generally are delivered without the presence of any persons with opposite interests. The returning officer may be quite unable to determine as to their validity at the moment. I am not prepared to say that he may not decide as to the validity of a nomination when the nomination paper is presented. But I think it must be within his power to accept nomination papers, and consider as to their validity afterwards at such leisure as the statute allows. There is nothing against that expressed or implied in the regulations. Three days may elapse before he is required to publish the names of the candidates. There seems no reason why he should not during that time make such inquiries as he considers desirable to enable him to determine as to the validity of the nominations, and there is no direction that even in publishing the list of candidates he shall affirm the validity of the nominations. It is not clear that he may not declare a nomination invalid even up to the date of the election. Suppose that he were imposed on by a forgery, I am not prepared to say that he could not reject a nomination at any time if he discovered it. The rules give him a general power to decide, and I see no good ground for restricting him as to the time of his decision.

"The first question here is, whether it is or is not averred that the returning officer ever decided that the pursuer's nomination was valid. Whether he decided or not is not a matter of law but of fact, and it must be averred as a fact, of which perhaps the most important evidence would be that of the returning officer himself as to whether he did or did not intend to decide. I have come to the conclusion that there is no relevant averment to that effect. It is not expressly averred that the returning officer 'decided:' What is averred is that he said that the nomination paper was all in order, and accepted the same as valid. I think the pursuer's counsel gave no satisfactory answer to the question why in stating what had happened he had deviated from the language of the regulations. I asked him more than once whether he desired to amend his record, and to aver explicitly that the returning officer decided that his paper was valid, and he deliberately declined to do so. The reason must be that he was conscious that what he could prove to have been said or done by the returning officer would not amount to a decision. In short, I hold that his averment falls short of what is necessary, and that therefore the School Board should not be put to the expense of a proof of this averment.

"Further, I hold that if the truth of the pursuer's statements were assumed, this would not be enough for his case. Assume that the returning officer examined the valuation roll and said that the nomination papers were in order and accepted them, that would not foreclose him, if he had committed himself no further, from afterwards rejecting them, unless he himself had intended thereby to decide that they were valid, which is what the pursuer has failed to aver. Therefore if I accept the pursuer's averments I still consider them irrelevant.

"I am not satisfied that if the pursuer or his nominators imposed on the returning officer by a false or even a mistaken representation, express or tacit, the pursuer would be entitled to plead the finality of a decision obtained in that manner.

"Whether the returning officer could correct his own decision, if deliberately and distinctly announced with the intention of deciding, that is to say, whether his decision would be final against himself, is a point which I do not require to decide, and on which I reserve my opinion.

"It was not maintained on either side that the returning officer was not required to decide at all unless a nomination paper was objected to, and I do not require to determine that here. It occurred to me at the debate that that was suggested by the use of the word 'decide,' but on consideration I incline to think that that view could not be sustained.

"On the whole, I think there is no relevant averment that the returning officer ever so decided that the nomination paper was valid as to put it out of his power to decide afterwards when more fully informed that it was invalid, and there seems to be no doubt that he did so decide, and, as I have said, that this ultimate decision was correct."

Counsel for the Pursuer — Constable. Agent — John Veitch, Solicitor.

Counsel for the Defenders — Galloway. Agent—W. J. Lewis, S.S.C.

Friday, November 5.

OUTER HOUSE.

[Lord Kyllachy.

POLL *v.* LORD ADVOCATE.

International Law — Alien — Sovereign — Official Authority — Right of Alien to Question Administrative Acts of Sovereign.

An alien is not entitled to question in the Courts of this country an administrative act of the Sovereign, even assuming that that act is a violation of international law and of the municipal law of Scotland.

An alien has no right enforceable by action to enter the territories of another country.

Certain officials under the Fishery Board prevented the landing of fish, which had been caught by a trawler outside territorial waters but inside a line within which trawling is prohibited by the Fishery Board, at the port of Aberdeen. The master of the trawler, a German subject, brought an interdict against the officials in question and against the Lord Advocate. The respondents averred that in preventing