SUMMER SESSION, 1920.

COURT OF SESSION.

Thursday, May 13.

SECOND DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Glasgow.

ROSS *v.* ROSS AND OTHERS.

Sheriff — Appeal — Competency — Nomination of Arbiter under Private Contract— Administrative or Judicial.

Under a minute of agreement of copartnership it was provided that in the event of differences arising between the surviving and the representatives of a deceasing partner the same should be referred to named arbiters, whom failing an arbiter to be nominated by the sheriff or any of his substitutes. The named arbiters having declined to accept, the widow of a deceasing partner presented a petition in the Sheriff Court, which passed through the sheriff-clerk's office, in which she called as defenders the surviving partners, and craved the Court to appoint an arbiter. The sheriff-substitute appointed an arbiter and found the defenders liable in expenses. The defenders appealed, and the pursuer objected to the competency of the appeal on the ground that the sheriff-substitute had acted in an administrative capacity. *Held* that the appeal was competent.

Magistrates of Glasgow v. *Glasgow District Subway Company*, 1893, 21 R. 52, 31 S.L.R. 70, *distinguished.*

Mrs Agnes Rodger Shannon or Ross, Edinburgh, widow of David Ross junior, wholesale wine and spirit merchant, Glasgow, *pursuer*, presented a petition in the Sheriff Court of Lanarkshire at Glasgow against David Ross, George Ross, and Alexander Nicholson, all wine and spirit merchants, Glasgow, *defenders*, in which she craved the Court "to nominate and appoint such person as the Court may think fit to act as arbiter, under and in terms of minute of agreement of copartnership dated 13th June 1911, entered into by and among the defenders and the deceased David Ross junior, wine and spirit merchant, Glasgow, carrying on business in partnership as wholesale and retail wine and spirit merchants in Glasgow, under the style or firm of David Ross & Sons, and to find the defenders liable in expenses and to decern therefor."

The minute of agreement of copartnership provided, *inter alia*—"In the event of any disputes or differences arising between . . . surviving partners on the one hand, and . . . the representatives of a deceasing . . . partner on the other hand, as to the true intent and meaning of these presents or the due implement thereof, or the failure by any of the parties to implement the same or breach by them of any of the terms thereof, or the carrying on of the said business, or the winding up of the copartnership, or the paying out of any partner's interest, or otherwise, in any manner of way in connection with the copartnership and the rights and duties of the parties respectively, the same are hereby referred to the amicable decision, final sentence, and decree-arbitral of John Jackson Coats, writer in Glasgow, whom failing of William Johnstone, writer there, whom failing of an arbiter failing agreement to be nominated by the Sheriff of the County of Lanark at Glasgow, or any of his substitutes as arbiters in succession, with the power to award damages, and whose award or awards interim or final shall be conclusive and binding on all concerned."

The parties averred—"(Cond. 6) The pursuer in terms of the foregoing submission has referred the disputes to the said arbiters nominated under the said contract of copartnership. The arbiters so named have declined to accept office conform to formal letters of declinature. . . . The defenders declined to agree upon an arbiter in succession to the arbiters named in the agreement of copartnership, and it was therefore necessary to make an application to this Court for the appointment of an arbiter. (*Ans.* 6) Admitted that the arbiters nominated under the said contract of copartnership declined to accept office, and that the defenders declined to agree upon an arbiter in succession to the arbiters named therein."

On 18th March 1920 the Sheriff-Substitute (A. S. D. THOMSON) pronounced the follow-

ing interlocutor:—"Having again heard parties procurators on the cause, nominates and appoints W. A. Allan, writer, Glasgow, whom failing, W. A. D. Macintyre, writer, Glasgow, to act as arbiter under and in terms of minute of agreement of copartnership, dated 13th June 1911, entered into by and among the defenders, and the deceased David Ross junior, wine and spirit merchant, Glasgow; finds the defenders liable in expenses."

The defenders appealed to the Second Division of the Court of Session.

At the calling of the case in Single Bills the respondent objected to the competency of the appeal, and argued—The Sheriff-Substitute had acted in an administrative capacity, and his interlocutor was therefore not appealable. The appellants' only remedy was to bring a suspension—*Magistrates of Glasgow* v. *Glasgow District Subway Company*, 1893, 21 R. 52, 31 S.L.R. 70. The Sheriff-Substitute could not make this a cause by calling it one.

Argued for the defenders and appellants—The interlocutor of the Sheriff-Substitute was a final judgment or interlocutor in the sense of section 28 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51). If the pursuer had followed strictly the terms of the contract of copartnery she would simply have written a letter to the Sheriff-Substitute asking him to appoint an arbiter; but she had adopted the ordinary procedure by a petition passing through the Sheriff Clerk's office. In the case of the *Magistrates of Glasgow* v. *Glasgow Subway Company*, *cit. sup.*, founded on by the respondent, though the procedure was by petition it did not pass through the sheriff-clerk's office, and in that case, further, there was no award of expenses. In the present case suspension would not be a complete remedy because of the award of expenses, which would require a reduction. There were many cases under the Arbitration (Scotland) Act 1894 (57 and 58 Vict. cap. 13) (*e.g.*, *United Creameries Company, Limited* v. *Boyd & Company*, 1912 S.C. 617, 49 S.L.R. 460), where it had been held that summary applications were not the appropriate method, but that ordinary procedure with all consequent rights of appeal was the proper way to proceed.

LORD JUSTICE-CLERK (SCOTT-DICKSON)—Mr Robertson takes objection to the competency of this appeal. He contends that the point is concluded by the case of the *Magistrates of Glasgow*, 21 R. 52. I do not think it is. The decision in the case of the *Magistrates of Glasgow* was perfectly right if I may respectfully say so, but the point of competency was not raised in that case at all, and the circumstances were materially different from those in the present case. There the process was raised, not in the statutory form appropriate to an ordinary action in the Sheriff Court, but by an application suitable to the particular circumstances of the question which had to be determined, and none of the ordinary forms of process were resorted to at all. Here the petitioner, who maintains that the appeal is incompetent, chose to select as the appropriate form of process an ordinary action in the Sheriff Court, and she craved in addition to the appointment of an arbiter that her opponent should be found liable in expenses. A record was duly made up and a decree was granted in ordinary form under which she got all she asked for, namely, the appointment of the arbiter she asked for and also a decree for expenses.

I think the appeal is quite competent. Even if I had any doubt about that I should have been of opinion that the petitioner is barred by personal exception from raising this objection to the competency of the appeal. I am therefore of opinion that we should repel the plea of incompetency and send the case to the roll.

LORD DUNDAS—I am of the same opinion. I have no wish to question the soundness of the decision in the case of the *Magistrates of Glasgow* (21 R. 52), which I think was rightly decided. But that case appears to me to be materially different from the present. There the question was not raised by way of an action in any true sense. I observe from the report that it was admitted that the petition had not passed through the Sheriff Clerk's office when it was originally presented. The session-papers disclose that the proceeding was called an "application by the Magistrates of Glasgow." The form of the "application" was not that prescribed or authorised for petitions under the then existing Sheriff Court Act of 1876, but materially different. There was, I observe, no crave for expenses. Here the petitioner has thought fit to bring her petition in the precise form and according to the precise procedure of the Sheriff Court Act now subsisting—that of 1907 as amended by the Act of 1913—and she has gone through all the procedure down to the point of getting a decree, including a decree for expenses.

I agree with your Lordship that the petitioner cannot now be heard to suggest that the proceeding is not truly a judicial one, but purely administrative. Having regard to the whole procedure I think it is enough to say that the petitioner is barred by her own conduct, as I have described it, from objecting to the competency of this appeal. The objection therefore is, in my judgment, bad. The result is satisfactory in this case, as it is obvious that the objection is of the most purely technical character, and if sustained would only lead to further expense, procedure, and trouble.

LORD SALVESEN—I agree. I adopt the grounds stated by Lord Dundas for distinguishing the case of the *Glasgow Magistrates* (21 R. 52) from the present. If this application had been made to the Sheriff in his capacity as a private citizen and without going through the Courts at all, the two cases would have been on the same footing. Instead of that we have here an application made to the Sheriff in his judicial capacity in the form prescribed for actions in the Sheriff Court, and we have the question, as one of right, litigated in the ordinary way and resulting in a final judgment, which, unless it falls under any of the excep-

tions contained in the Sheriff Court Act, is necessarily open to review here.

The fact that a decree for expenses has been pronounced which can be extracted and enforced by officers of law, marks the character of the proceeding, and if Mr Robertson were right, the appellant in order to obtain a complete remedy would have to bring two processes, both in the Court of Session, so far as I can see—one an action of suspension against the arbiter proceeding with the arbitration, and another an action of reduction of the decree of expenses as *ultra vires*, for as it stands it is extractable and can be put into the hands of a sheriff officer for enforcement.

In these circumstances I entertain no doubt that this is an appealable interlocutor, but if I had any doubts on that subject I certainly should hold that the respondent is personally barred from maintaining that it is not appealable, she having chosen to invoke the jurisdiction of the Sheriff Court as such in an action for the enforcement of a right which she considered that she had under a contract. In short, she has used the ordinary Courts of the country for the enforcement of a contractual right.

The Court repelled the objection and appointed the cause to be put to the roll.

Counsel for the Pursuer and Respondent —T. Graham Robertson. Agents—Webster, Will, & Co., W.S.

Counsel for the Defenders and Appellants —D. P. Fleming. Agents—Robert White & Co., S.S.C.

Friday, May 14.

FIRST DIVISION.

THE TRUSTEES AND MANAGERS OF THE PRIME GILT BOX SOCIETY, PETITIONERS.

Process — Petition — Competency — Nobile Officium — Interdependent Craves for Exercise of Legal and Equitable Jurisdictions—Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 16.

Held that a petition which craved power to sell heritage under the Act of 1867 and also to use charitable funds for purposes cy près to those for which they were bequeathed was competently brought in the Inner House, in respect that the two craves were so intertwined as to render procedure by separate petitions in the Inner and Outer House unreasonably inconvenient.

The Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97) enacts—Section 16—"Applications to the Court under the authority of this Act shall be by petition addressed to the Court and shall be brought in the first instance before one of the Lords Ordinary..."

Alexander Kilgour and others, the trustees and managers of the Prime Gilt Box Society, Kirkcaldy, *petitioners*, brought a petition of which the prayer was "... To grant power and authority to the petitioners, as trustees and managers foresaid, (*first*) to sell and dispose at the price of £1150 by private sale to the directors of the Scottish Coast Mission of All and Whole that tenement of land, high and laigh, back and fore, under and above, outer and inner yards thereof, with the pertinents belonging thereto lying within the burgh of Kircaldy, upon the north side of the King's High Street of the same, bounded betwixt the lands sometime of the heirs of umquhile David Wilson afterwards to Michael Beveridge's heirs on the east; the lands sometime of James Mitchelson afterwards of David Clephane on the west; the lands of Smeiton on the north; and the said High Street on the south parts thereof; (*second*) to sell and dispose at the price of £30 by private sale to the Kirk session of Kirkcaldy Parish Church of the pews in Kirkcaldy Parish Church presently belonging to the petitioners: (*third*) to apply to the general purposes of the Prime Gilt Box Society of Kirkcaldy the income of the balance of the Matthew Beveridge Bequest Fund remaining after payment of the sum of £200 to the directors of the Scottish Coast Mission, for the purposes and on the conditions narrated in the petition."

The petition set forth—[*After narrating the previous history of the society, and that as the result of a litigation a constitution and rules for the society were considered by the Court*]—"Rule I provides—'The whole funds, property, and effects, heritable and moveable, belonging to the Prime Gilt Box or Prime Gilt Box Society of Kirkcaldy, shall be made over and conveyed to, and remain vested in, the present Provost and bailies of the burgh of Kirkcaldy and their successors in office, as trustees and fiduciaries to and for the use and behoof of the members of the Prime Gilt Box and persons entitled to relief out of the funds thereof, as being the poor of the seafaring population of the burgh of Kirkcaldy.'

"Rule III provides—'The persons entitled to be considered members of the Society or to claim relief from the trust funds shall be—(1) All persons who previous to the raising of the present action have paid entry-money to the Society, or rates and dues thereto, or who served for three years in ships which contributed during that period to the funds, and the widows and families of these persons wherever they may at present reside. (2) All shipmasters, seamen, ship-carpenters, and ferrymen belonging to the actual port of Kirkcaldy, or who have served for three years in ships belonging to the actual port thereof, and who have acquired or shall hereafter acquire a settlement within the parish of Kirkcaldy by a three years' residence therein, their widows and families.'

"Rule IV provides—'The sole objects of the institution, after providing for the annuitants as after mentioned, shall be to afford relief to the members when disabled from earning subsistence by sickness, old age, or accident, and the like relief to their widows and children; to which purposes the income of the institution shall be ex-