months, with engines for 14 knots; and my price would be £18,500; both prices being subject to 2½ per cent. commission."

The pursuer mainly relies upon this letter. The defender resists the pursuer's claim on the following grounds:—(1.) Because the letter, on the assumption that it was written to the pursuer as an intending contractor *on his own account*, contained an offer which was not accepted. (2.) Because, on the assumption that the letter was written to the pursuer *as Mr Wigg's servant*, he was not entitled to found upon it to any effect. (3.) Because, as Mr Wigg did not accept the offer in the letter, no obligation under it arose. And (4.) because the defender did not thereby oblige himself to pay commission. Some alterations of details by which the vessel's speed was increased, on the defender's letter to the pursuer, were embodied in the contract of the 15th of November.

The Sheriff-Substitute (Strathearn) found that under the letter of 11th October the commission was earned when the pursuer procured a customer who gave the order, the alterations of details being subjects privative to the principals themselves. The case was not pronounced upon by the Sheriff, the appealing days having expired before the defender's agent discovered that the Sheriff-Substitute's interlocutor had been pronounced. After hearing parties, the Sheriff-Substitute had had the process at avizandum for five months. The Sheriff held that the appealing days having expired he had no power or discretion under the Sheriff Court Act to extend the time prescribed for lodging an appeal, or to allow an appeal to be received after an interlocutor has become final in any circumstances. His Lordship accordingly held the interlocutor of the Sheriff-Substitute final.

The defender advocated, and to-day the Court adhered to the Sheriff-Substitute's interlocutor.

Lord BENHOLME dissented on the ground that the agreement to pay commission on the 11th of October was departed from in the subsequent stipulation and concluded contract of the 15th November, and that the pursuer not being a professional broker, could not claim commission except under a special agreement.

Friday, Dec. 22.

FIRST DIVISION.

BREADALBANE SUCCESSION CASE.

CAMPBELL *v.* CAMPBELL.

Counsel for Respondent—The Solicitor-General, Mr Clark, Mr Adam, and Mr Berry. Agents—Messrs Adam, Kirk, & Robertson, W.S.

Counsel for Advocator — The Lord Advocate, Mr Patton, Mr Fraser, and Mr Gifford. Agent—Mr Henry Buchan, S.S.C.

This case was on the roll to-day for an order. The Lord President stated that the Court had given a great deal of consideration to the case, and had held several consultations in regard to it. It involved many questions of great nicety which created great difficulty; and the Court thought that, looking to the magnitude of the questions and also of the stake, it was desirable to have the case argued in writing. The Court were not without hope that they might yet receive additional assistance from the bar, and besides the case was plainly one which would not terminate in this Court; and as it would require to be argued in writing before the House of Lords, the written argument, if now given in, will be useful here as well as there. Cases were therefore ordered to be lodged by the 5th of January. The Solicitor-General, for the Respondent, mentioned that the time proposed was too short for the preparation of such a case as he would like to see submitted to the Court; but the Court thought that if exclusive attention was given, it could be easily done; and besides the party who was not in possession was willing to undertake to have his paper ready within the time proposed.

CROW *v.* FOWLIE.

Proof — Reference to Oath. A party who on reference to oath deponed *non memini*, in regard to a *proprium factum* of a recent date, held as confessed, and oath found affirmative of the reference.

Counsel for Suspender—Mr F. W. Clark. Agent —Mr L. Mackersy, W.S.

Counsel for Respondent — Mr J. F. M'Lennan. Agents—Messrs Fergusson & Junner, W.S.

This was a suspension by George Hume Crow, builder, Pitt Street, Edinburgh, of a charge on a promissory note for £7, 17s., which had been given to him by George Smith Fowlie, agent, Nicolson Square, Edinburgh. The promissory note had been granted in part payment of a composition upon a debt due by Daniel M'Farlane, grocer, Hanover Street, Edinburgh, and it was signed by the principal debtor and by his brother Thomas M'Farlane, and the suspender, as cautioners. The ground of suspension was that the note had been paid by Daniel M'Farlane, and it was not disputed that certain payments had been made by him, but it was alleged that these were made in payment of a separate debt due to the respondent on open account. The suspender attempted to prove his case by the writ of the respondent, but in this he failed, and Lord Ormidale refused the suspension, and the Court adhered. The suspender thereupon referred the whole cause to the respondent's oath. The reference was sustained and the oath taken. Parties were thereafter heard on the import thereof, and to-day the Court held that the oath was affirmative of the reference. The charge was therefore suspended, with expenses.

Lord CURRIEHILL, who delivered the leading judgment, said—The suspender's averment is that the payments he alleges were made and accepted as payments of this specific debt. The respondent depones generally that they were not, but in answer to the most of the specific questions put to him, his general answer is, "I don't recollect." This cannot be said to be an admission of the suspender's averments, and in that sense the oath is certainly not affirmative of the reference. But, on the other hand, when a party says he does not recollect in a reference to his oath, there is a distinction betwixt a thing which he cannot be expected to recollect and a thing which is a *factum proprium* and of recent date, so recent that he might reasonably be expected to remember it. In the latter case the circumstance is regarded as a refusal to depone. The party does not incur the pains of perjury, but he is held confessed as one who declines to answer. This is a well-known principle in the law of evidence. "Such negative oath when it is emitted upon a recent fact, of which the swearer cannot, from the circumstances of the case, be presumed ignorant, is considered as a concealing or dissembling of the truth." (Ersk. 4, 2, 14.) The question is, does this case fall under that rule or not? That the matter was *factum proprium* there can be no doubt. But was it of so recent a date that the charger could not reasonably be expected to remember it? I don't think he was in that position. The facts all occurred since March 1864, and the oath was emitted in November 1865. Therefore they were matters which it would be unreasonable to suppose he could have forgotten. That is enough for the decision. But it may be observed that not only were the facts recent, but during the intervening period, they were brought under the charger's notice in the record, in which they were most specifically detailed, and in which answers were judicially made for him, and of course under his instructions.

The other Judges concurred.