the authorised agent. He both may and ought to do so, taking a receipt from the creditor bearing payment to have been received by the agent's hands. If he does not do this, he has himself to blame for incurring the statutory penalty. The action here raised against the candidate was thus, as I conceive, entirely consistent with strict fulfilment of the statute. Being so, it was a competent action, and was not open to appeal on the statutory ground of incompetency. All the pleas stated in the action against payment—such as that no account was rendered within a month, that the charges are erroneous, and the like,—I consider pleas upon the merits, and therefore to afford no ground for appeal. On these pleas I desire to intimate no opinion one way or other. The appeal would still be incompetent, even if on these pleas the Sheriff's judgment was wrong. An erroneous judgment in a competent action does not warrant an appeal from a small debt decree.

With regard to the other ground of appeal urged to us—viz., deviation in point of form from the statutory enactments,—I can see no place for it in the present proceedings. I am not satisfied that there is deviation in point of form; and certainly there is none which, in the words of the statute, was wilful, and prevented substantial justice from being done. The whole case, so far as I can perceive, was before the Sheriff, and was decided by him according to his best lights. An erroneous judgment, if such was pronounced, is not sufficient to raise the statutory case; otherwise an appeal would be open in every case whatever, for the losing party always avers that substantial justice has not been done.

Agent for Appellant—A. Fleming, S.S.C.
Agent for Respondent—T. Landale, S.S.C.

Tuesday, June 15.

SECOND DIVISION.

AITCHISON *v.* FEARBY.

Sale—Transaction—Debts Recovery Act. Circumstances in which the Court (affirming judgment of Sheriff) *held* that a contract of sale libelled on had not been proved.

This was an appeal from the Sheriff-court of Roxburghshire, brought under the "Debts Recovery Act 1867." The pursuer in the court below was John Aitchison, farmer, Mountmarle, Roslin, and the defender was John Fearby, potatoe merchant, Kelso. The account sued for was for the balance of the price of a quantity of potatoes said to have been sold and delivered by the pursuer to the defender in the course of the winter of 1868. The defence was, that the potatoes in question were received by the defender to be sold on commission for the pursuer, and that on the commission transaction of the parties there was a balance due by pursuer to defender. After a proof, the Sheriff-substitute (RUSSEL) found for the pursuer. On appeal, the Sheriff (PATTISON) altered, and assoilzied the defender, holding that there was no proof of a contract of sale, and that the preponderance of evidence was in favour of a contract of commission.

The following is the Sheriff's judgment:—

"*Edinburgh, 19th May* 1869.—The Sheriff having considered the foregoing appeal, with the proof and whole process,—Recalls the interlocutor appealed from: Finds it not proved that the pursuer sold to the defender the potatoes specified in the account sued for, and therefore assoilzies the defender from the conclusions of the action: Finds him entitled to expenses, and decerns.

"*Note.*—This action is brought for a certain sum, as the balance due of the price of a quantity of potatoes (amounting to 121 bolls) said to have been '*sold and delivered*' by the pursuer to the defender. There is no dispute as to the quantity delivered, or as to the fact of delivery. The question is, Was there a sale of these potatoes by the pursuer to the defender?

"In order to establish a sale, there must be proof that the defender agreed to purchase, and that the pursuer agreed to sell, these quantities of potatoes at the price charged.

"Sale, like all other mutual contracts, requires *duorum pluriumve in idem placitum consensus et conventia.*

"And it is necessarily implied in its very nature that there be a *determinate subject* and price, and that the parties be at one as to the contract itself.

"When there is no writing, consent in a sale of moveables is generally expressed in words implying an offer of a determinate subject on the one side, and an acceptance on the other, or at least a distinct agreement to buy and sell concurred in by both, or spoken by the one and assented to by the other. Now, as to consent expressed in words in this case there is no evidence. Taking the pursuer's evidence by itself, it is deficient in many respects. He is quite indefinite as to the date when this sale took place, if it did take place. But the evidence of the defender, and his man John Shiells, speaking to the same interview, fixes it at about four days before the 13th of November. The pursuer's evidence as to what took place on this occasion is very vague. All he says is,—'Last year I sold him potatoes (no fixed quantity mentioned) at £3, 15s. per ton, to be delivered at Polton station as soon as I could send them. The bargain made about beginning of November. Defender and I were in the potatoe field at the time. No other person present.' He does not say what passed, whether the defender offered to buy, or he offered to sell, or how the matter arose. And seeing that the defender had denied that he had bought the potatoes, something more was to have been expected. He leaves it to be inferred that the defender's only purpose there was to buy potatoes, omitting as he does all mention of the bill then nearly due, which he was bound to retire, and of the defender's application to him on the subject of the bill.

"The pursuer adds 'John Shiells, Mr Fearby's man, came forward and asked whether Mr Fearby had bought them, and I said, yes. He then asked at what price, and I said £3, 15s. per ton.' If this had been corroborated, it would have been important. But it is not. The evidence of the defender and his man John Shiells is very different, and is besides much more detailed and explicit.

"The pursuer was indebted to the defender in £48, 13s. 6d. for seed potatoes and guano, for which he had granted a bill and a renewal, and which had nearly come to maturity before this interview. He also owed him £14 for bones. And it was about the payment of this bill that the defender had the conversation with the pursuer, at which the pursuer says the sale of the potatoes was made. John Shiells says distinctly that in a morning about the beginning of November he and the defender went into the pursuer's field, and

it was in consequence of the defender asking the pursuer about his meeting the bill that, being unable to do so, the pursuer said he would 'send potatoes to cover the amount of the bill, to which the defender consented. Nothing was said as to price.' He most distinctly denies that he had the conversation, or made use of the words above quoted, deponed to by the pursuer.

"In the substance of all this Shiells is concurred in by the defender, who states in addition that it was part of what passed that he was to give the pursuer some addresses where to send the potatoes to, that he gave him one address to Manchester, to his brother, an agent there; and he also gave him an address to his salesman in Birmingham, and said he might send some potatoes there, for the bill must be met in some shape. He also says, 'not a syllable was said as to the price, except that pursuer said he would like £3, 15s. per ton. That he (the defender) said he would not buy any potatoes by weight.'

"It is impossible, upon this evidence, to say that anything passed between the parties in words which expressed a mutual agreement to buy and sell these potatoes. On the contrary, the defender declined to buy. He was not seekiug to buy potatoes of the pursuer, and the pursuer did not, and he does not say that he did, offer to sell potatoes to the defender. What he did was to offer to send him potatoes to meet the bill, as he could not pay it in money. If a price had then been named, and the quantity defined coming to an amount corresponding with the pursuer's debt to the defender (which could easily have been done), there might have been some ground to infer a sale. But nothing of the kind was done. What the pursuer did, although it might not in the proper business sense constitute an employment of the defender to sell these potatoes as a commission agent, amounted to an undertaking to intrust the defender with these potatoes to be realized on the pursuer's account, so as to meet his debt to the defender; in other words, to consign them, in the mercantile sense, to the defender for sale.

"There was nothing in the subsequent conduct of the parties on either side necessarily inferring a sale. Far from it. The pursuer obtained the addresses of the defender's agents in Manchester and Birmingham, to whom he sent the potatoes; not the course he would naturally have followed in the case of a sale. He did not send invoices to the defender of each quantity as it was sent off, but left the station agent and the agents at Manchester and Birmingham to inform the defender of the quantities. On the other hand, the defender did not, as he always did, and as it is shewn to be the practice of the trade to do in the case of potatoes bought by weight, send any person to superintend the dressing of the potatoes. This was a fact known to the pursuer. The defender did not mention the sale to his clerk Shiells, as he always did when he made a purchase, that attention might be paid to the dressing of them. The circumstance that he wrote to the agents at Manchester and Birmingham to sell these potatoes, and that they were sold, and the accounts rendered in his name, is of no weight. For the defender says that is done habitually when the potatoes are sent by him, though on behalf of another; while his conversation with the pursuer, when he asked whether he was to go on sending them, is inconsistent with the idea of a purchase of the potatoes by him.

"But another fact inconsistent with the allegation of a sale is, that there was no determinate subject sold. The pursuer himself says, 'that no fixed quantity was mentioned.' There was, therefore, no contract which could have been the foundation of an action for implement on either side. This, of itself, is conclusive against the idea of a sale. It is no answer to this to say, that upon some former occasion the pursuer says that he 'gave the defender all he had to spare.' He does not say that the contract of sale was in these terms. And he may have given him all he had to spare, and yet may have done so under a contract of sale of a *determinate* quantity. The presumption is that it was so. Besides, the defender denies that he had any dealings with the pursuer direct in the year referred to by the pursuer as that in which he gave the defender all he had to spare. He says that he bought potatoes that year from a man who had bought them from the pursuer.

"The Sheriff therefore cannot possibly sustain the action which is laid upon a contract of sale of the potatoes mentioned in the account referred to in the libel. He has the less hesitation in assoilzieing the defender, because he believes the truth of the case to be that the potatoes were taken by the defender, not as a purchase, or even as a consignation in the ordinary way of business, but simply as the means of realizing payment of a debt which he seemed to have no other way of recovering, by selling them to the best advantage. In this respect he seems to have dealt quite fairly with the pursuer, for he caused the potatoes to be sent for sale to the same market to which, and to the same agents to whom, he was sending potatoes of his own at the same time. As the pursuer has received by the retirement of his bill of £48, 13s. 6d., and his discharge of his account of £14, and the sum of £30 paid him by the defender, more than the nett proceeds which the potatoes realized, without taking into account any commission to the defender himself, the Sheriff thinks that he has got all he is entitled to, and that he has no good claim against the defender for more."

The pursuer appealed.

MACKENZIE for him.

H. SMITH in answer.

The Court adhered to the Sheriff's judgment, and substantially on the same grounds.

Agents for Appellant—Millar, Allardyce & Robson, W.S.

Agent for Respondent—J. Whitehead, S.S.C.

Friday, June 18.

FIRST DIVISION.

MAXWELL AND OTHERS *v.* MAGISTRATES OF DUMFRIES.

(*Ante*, p. 99.)

Bridge Dues—Customs—Burgh—Expenses. Observations on the duty of magistrates of a burgh, in regard to framing a table of dues, where the table proposed by them was objected to by the inhabitants of the burgh.

The Court having on 17th December 1868 remitted to the accountant to frame a table in conformity with their finding of that date, the accountant now presented to the Court a report containing a table of dues, framed in accordance with the instructions given him by the Court, and approved of by the parties.