Wednesday, October 17.

SECOND DIVISION.

[Sheriff of Inverness-shire.

STEVENS, SON, & CO. *v.* GRANT.

Process—Appeal—Competency—Value of Cause—Sheriff Court Act 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 22.

A Sheriff Court action concluded for £20, 5s. 6d., as the balance remaining due, per account produced, on the defender's intromissions as the pursuers' agent for the sale of goods on commission. There was no other conclusion except for expenses. *Held* that an appeal to the Court of Session was excluded, under section 22 of the Sheriff Court Act 1853, as no decree that could be pronounced in the action would give the pursuer more than £20, 5s. 6d., the sum sued for, which must therefore be held to be the value of the cause.

Observations (*per curiam*) on the case of *Inglis* v. *Smith*, May 17, 1859, 21 D. 822.

Stevens, Son, & Co. raised this action against John Grant junr., concluding for £20, 5s. 6d., "being the balance remaining due to them on the defender's intromissions as their agent for the sale of certain chemical manures." An account produced by the pursuers contained sums due on both sides to a much larger amount than the sum concluded for, but the balance brought out as due by the defender was £20, 5s. 6d.

The Sheriff-Substitute (BLAIR) gave the pursuers decree for £14, 8s., with expenses. The Sheriff (IVORY), on appeal, assoilzied the defender.

The pursuers appealed to the Court of Session.

The competency of the appeal was objected to under the Sheriff Court Act 1853 (16 and 17 Vict. cap. 80), sec. 22, which excluded review where the value of the cause did not exceed £25. —*Brydon* v. *Macfarlane*, November 2, 1864, 3 Macph. 7; *Drummond* v. *Hunter*, January 12, 1869, 7 Macph. 347.

Argued for the appellant—Though the sum concluded for was under £25, still it was the balance on an account between the parties in which there were claims and counter-claims, and there was authority for holding that such cases could be appealed—*Aberdeen* v. *Wilson*, July 16, 1872, 10 Macph. 971; *Inglis* v. *Smith*, May 17, 1859, 21 D. 822.

At advising—

LORD JUSTICE-CLERK—This question as to the principle on which the value of a cause is to be determined has often arisen, and has sometimes been attended with difficulty. The general rule is that the conclusions of the summons afford the test of value, the amount, viz., which the pursuer of the action can recover under them.

Here the summons concludes for £20, 5s. 6d., which is described as the balance of a much larger account. But there are no qualifying words, and it is clear that the pursuer could only have recovered £20, and nothing more. I know of no case in which the value of such a cause has been held to be greater than the sum concluded for.

The whole of this matter was thoroughly canvassed in the case of *Aberdeen* v. *Wilson*, July 16, 1872, 10 Macph. 971. In that case the summons concluded for delivery of certain fleeces, and failing delivery, for a sum of £20, or such other sum as the Court might award. The case went to the whole Court, and it was held by a majority that, seeing there was a conclusion *ad factum præstandum*, and an indefinite conclusion for damages, the value of the cause was not below £25.

But it is quite certain, from the opinions of all the Judges, that if there had been no other conclusion in the summons in that case but one for £20, the Court would have found the appeal incompetent.

As to the case of *Inglis* (*Inglis* v. *Smith*, May 17, 1859, 21 D. 822), it was a very peculiar one. The counter-account for which the pursuer in that case gave credit, which he was not bound to do, was the result of an entirely separate transaction, and the Court held the debit side of the account to be the real substance of the action. But that is not the case with the credit items in this case, and I therefore think the value of the cause is merely £20, 5s. 6d., and that so this appeal is incompetent.

LORD ORMIDALE—I concur. The summons in this case concludes for £20, 5s. 6d., as the balance due to the pursuers on certain consignments of manure made by them to the defender "for sale on commission." The commission is in this way necessarily made an item to be taken into account in ascertaining the balance. The value of the cause to the pursuer was therefore the £20, 5s. 6d., being the balance after crediting the commission.

But the case of *Inglis* v. *Smith* is, I think, distinguishable. There a debt or balance of £92 odds was claimed as due to the pursuer on the particular transaction in question; and that balance was reduced so far by crediting, or rather setting off against it, a counter claim due to the defenders of £57 odds, and then restricting the balance to £25. But it is obvious that the claim of the pursuer, standing, as it did, independent of the counter claim, greatly exceeded £25, so that by concluding and taking decree for the balance, after making allowance for the counter claim of £57, he proceeded on the assumption that he had a good claim of his own for the balance sued for *plus* the £57. In that case, therefore, the value of the cause to the pursuer was truly the balance he took decree for, *plus* the £57. But here the commission was an item in the accounting before any balance could be ascertained; or, to put it differently, the pursuers could have no claim, and no debt could arise in their favour, without crediting that commission.

I am therefore satisfied that the case of *Inglis* v. *Smith* is distinguishable from the present, and does not stand in the way of our finding, as I think we ought, that the appeal here is incompetent in respect the cause to the pursuer must be held to be less than £25.

LORD GIFFORD—I am of the same opinion. The value of the suit does not exceed £25, and therefore it falls under the statute.

It has been said that you must inquire into both sides of the account, and see what sums are due. But it does not matter what you have to

inquire into, if the decree you are asked to pronounce at the end is under £25.

I had some difficulty in distinguishing this case from that of *Inglis* v. *Smith*, but the cases are distinguishable. In *Inglis* v. *Smith* the principle given effect to was that the sum given credit for was for a *contra* account; but the principle of that case, I may say, I should certainly not extend.

The Court refused the appeal as incompetent.

Counsel for Pursuers (Appellants)—Kinnear—Thorburn. Agent—Horatius Bonar, W.S.

Counsel for Defender (Respondent)—Campbell Smith—Millie. Agents—Wright & Johnston, Solicitors.

Friday, October 19.

FIRST DIVISION.

[Sheriff of Argyllshire.

MALCOLM *v.* M'INTYRE.

Process—Appeal—Competency—Sheriff Court Act 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 24—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 53.

It is not competent to appeal against an interlocutor pronounced by a Sheriff "disposing of the whole merits of the cause" if it contains no finding as to expenses.

A petition was presented in the Sheriff Court under the Acts 1661, cap. 41, and 1669, cap. 17, craving the Sheriff-Substitute, *inter alia*, to authorise the petitioner to erect march-fences between his own and the respondent's property, and to ordain the latter to pay his share of the expense. *Held* that an interlocutor which authorised the building of the fence, but did not apportion the expense, was exhaustive of the "merits" or "subject-matter" of the cause, so as to be appealable to the Court of Session under the Sheriff Court Act 1853, sec. 24, and the Court of Session Act 1868, sec. 53.

This was an action raised in the Sheriff Court under the Acts 1661, cap. 41 and 1669, cap. 17, as ratified by the Act 1685, cap. 39, by one proprietor against a conterminous proprietor, praying the Sheriff to empower the petitioner to erect a fence between the properties, and to ordain the respondent to pay his share of the expense. The terms of the prayer of the petition are quoted in the opinion of the Lord President. The respondent resisted on various grounds, and after various procedure and a remit to a man of skill the Sheriff-Substitute (HOME) pronounced this interlocutor:—

"*Inveraray*, 16*th April* 1877.—The Sheriff-Substitute having heard parties' procurators and made avizandum, repels the various pleas for the respondent; authorises the petitioner to build the dyke as craved; and, with this view, to accept the estimate of Duncan Gray, No. 40 of process, or that of Archibald M'Intyre, No. 50 of process, or that of Robert Paterson, No. 44 of process, as he shall deem most expedient; and thereafter, when the dyke shall be finished, to lodge an account of the whole expense of building the same."

On appeal the Sheriff (FORBES IRVINE) simply affirmed this judgment.

The respondent appealed to the Court of Session.

When the case appeared in the Single Bills, the petitioner objected to the appeal as incompetent, in respect (1) that the interlocutor appealed against contained no finding as to expenses; and (2) that it was not a final interlocutor—founding his objections on the 24th section of the Sheriff Court Act of 1853 (16 and 17 Vict. cap. 80) and the 53d section of the Court of Session Act of 1868 (31 and 32 Vict. cap. 100).

In support of his first objection he quoted *Bannatine's Trustees* v. *Cunninghame*, January 11, 1872, 10 Macph. 317; and *Lamond's Trustees* v. *Croom*, May 14, 1872, 10 Macph. 690. [LORD PRESIDENT—There is a much more recent case than either, viz., *Russel* v. *Allan*, decided 14th June 1877. We refused the appeal in respect the Sheriff's judgment contained no finding as to expenses. The party went back to the Sheriff, and got an interlocutor in these terms, "the Sheriff-Substitute finds no expenses due to or by either party," and to-day we have sustained his appeal as competent.]

In support of the second objection, he argued that the substantial question was whether he was to be allowed to recover the expense of the fence from his opponent, and until that was disposed of no appeal was competent.

Authorities—*Gordon* v. *Graham*, June 26, 1874, 1 Rettie 1081; *Millar* v. *Parochial Board of Greenock*, May 25, 1877, 14 Scot. Law Rep. 489.

The appellant argued—The peculiarity here was that judgment had to be implemented in the middle of the process, and that took it out of the general rule. *The Duke of Roxburgh and Others*, May 26, 1875, 2 Rettie 715, was a case where the subject-matter of the cause was disposed of without the question of expenses being touched on; just so here; and as in the case of *Kirkwood* v. *Park*, July 14, 1874, 1 Rettie 1190, there was here an operative decree, and something more than a mere finding. There were two main issues in the case—(1) was there to be a fence; and (2) on whom was the expense to fall. The first of these had been disposed of, and it was really exhaustive of the merits of the case. Further, if this interlocutor was not appealable, there would really be no appeal at all on that question open to the defender.

At advising—

LORD PRESIDENT—In this case the petition was presented to the Sheriff under the authority of the Statutes 1661, cap. 41, and 1669, cap. 17, for the purpose of compelling the respondent to concur with the petitioner in erecting a march-fence between their respective properties. The prayer of the petition craves the Sheriff "to visit the marches in question, and thereafter to authorise and empower the petitioner to build and finish the said march-fences or dykes in terms of an estimate or estimates to be received by him, to be produced in this process; and thereafter, on the expense of building and erecting the said march-fences or dykes being ascertained in the course of the process to follow hereon, to decern and ordain the respondent to make payment to the