statutes are inconsistent with any other assumption than that an informer has the right to prosecute.

I hold also that the right under these statutes has not been taken away by the Summary Procedure Act 1864. A party having a right to institute proceedings is to carry them out according to the new rules provided by the Act, but his right to institute the proceedings is not affected.

Appeal dismissed.

Agents for Complainer—Hope & Mackay, W.S.
Agent for Respondent—L. Macara, W.S.

COURT OF SESSION.

Tuesday, June 18.

FIRST DIVISION.

DOW AND MANDATORY *v.* JAMIESON.

Process—Advocation—Failure to Print and Box. Advocators having failed to obtemper Lord Ordinary's interlocutor appointing them to print and box record, &c., to the Court, on report of the Lord Ordinary, respondent recommended to print and box Lord Ordinary's interlocutor, with note of advocation.

On 28th February 1867, the Lord Ordinary (BARCAPLE) pronounced this interlocutor:— "On the motion of the advocators, makes avizandum with this advocation to the Lords of the First Division, in terms of the statute; appoints them to print the record, with the notes of additional pleas in law, and such productions as may be deemed necessary, and to box the same to the Court; and grants warrant for enrolment in the Inner-House Rolls." The advocators having neither printed nor enrolled in terms of this interlocutor, the Lord Ordinary, on 5th June 1857, on the respondent's motion, appointed the advocators, within the next eight days, to print and box the record, pleas in law, and productions to the Inner-House, in terms of the previous interlocutor.

The advocators did not obey this order. The respondent then moved the Lord Ordinary to dismiss the advocation. The Lord Ordinary doubted his power to do so under the Court of Session Act 1850, 13 and 14 Vict., c. 36; sec. 32 of which enacts that the Lord Ordinary before whom the advocation is enrolled shall, at the first calling of the cause, if a motion to that effect be made by either party, appoint the record, &c., to be printed and boxed for the Inner-House, and shall report the cause to the Inner-House. His Lordship was inclined to think that he was *functus officio* after pronouncing the first interlocutor, had it not been for the case of *Miller* v. *Logan*, 20 D., 522, in which case it was held that where a Lord Ordinary had, on the motion of the respondent in an advocation, pronounced an interlocutor reporting the cause, and appointing the record, &c., to be boxed, and where the respondent became bankrupt before obtempering that order, a motion for intimation to the respondent's trustee was properly made before the Lord Ordinary.

The Lord Ordinary reported the point.

LORD PRESIDENT—It seems to be the principle of the case of *Miller* v. *Logan* that the report of the Lord Ordinary, which transmits a case to the Inner-House, is not complete by the mere pronouncing of the interlocutor making the report; and without going into the niceties of that case, but following that principle, it appears to follow that until one of the parties brings the case here, and moves that it be sent to the roll—*i. e.*, until the case is in the single bills—the reporting is not complete. It is the appearance of a case in the single bills, in the case of a written report by the Lord Ordinary, that comes in the place of the personal appearance of the Lord Ordinary at the table to report the case. The solution of the respondent's difficulty seems to be this; if he will print and box the interlocutor of the Lord Ordinary, with the note of advocation, that will appear in the single bills, and enable the Inner-House to dispose of the case, and inflict such penalties upon the advocator as may seem proper.

Agents for Respondents—Paterson & Romanes, W. S.

Tuesday, June 18.

SIDEY & CRAWFORD AND MANDATORY *v.* J. & A. PHILLIPS.

Jury Trial—New Trial—Bill of Exceptions—Commission Agent—Insurance. Motion for new trial, on the ground that the verdict was against evidence, refused. Exceptions to Judge's charge disallowed.

The defenders, J. & A. Phillips, wholesale grocers in Glasgow, gave an order to Sidey & Crawford, commission agents in Montreal, for a quantity of butter. When the butter arrived in this country, the defenders refused to take it, objecting to the price and quality. The butter was sold under a warrant from the Sheriff. Sidey & Crawford then brought an action against the defenders.

The case was tried before Lord Ormidale and a jury in March last, on the following issue:—

"Whether, on or about the 30th June 1864, the defenders ordered the pursuers to purchase and ship for them 200 packages choice dairy butter of the finest quality, and got up in the best style, and at the lowest price practicable; whether the pursuers duly implemented the said order; and whether the defenders are due and resting-owing to the pursuers the sum of £192, 4s., as the balance of the cost of said butter and relative charges, with interest as per Schedule annexed, or any part thereof?

"SCHEDULE.

"Cost of 200 packages prime Canadian dairy butter, shipped to the defenders per steamer 'St Andrew,'		$4448·47
"CHARGES.		
"Entry, cartage, wharfage, bill stamps, &c.,	$42·52	
"Insurance, 1¼ % on $5180 value, and 10 %,	64·75	
"Commission on $4448·47,	177·93	
		285·20
		$4733·67
"Exchange @ 7¾ %,		£988 9 5
"Free proceeds of sale, under warrant of the Sheriff of Lanarkshire, of the above 200 packages of butter, received on 26th Jan. 1865,		796 5 5
"Balance of cost and charges,		£192 4 0

"Interest at 5 per cent. on £988, 9s. 5d. from 29th September 1864 to 20th January 1865.
"Interest at 5 per cent. on £192, 4s. from 26th January 1865 till payment."

It appeared from the evidence that the pursuers did not keep any stock of butter, but merely purchased on order. The purchases of the butter in question were not made in Montreal, but in the district of country in the neighbourhood of Brockville, in Upper Canada, mostly by a person of the name of Landon, on the employment of the pursuers. The pursuer Sidey, in examination, being asked to state the items of which the charge of $4448·47 in the schedule annexed to the issue was made up, deponed—"The said sum of $4448·47 is the amount charged to the defenders for said butter, being at the rate of 22½ cents per pound, to which rate we restricted the price, the actual value being somewhat greater, as appears by the following statement of the items of which it is composed. The 200 packages in question were sent to the defenders in two invoices of 100 packages each, one of which consisted of 9994 lbs. net of butter, and the other of 9774 lbs. The items comprising the actual value of the first invoice were:—

1. First cost of the butter at 20¼ cents per lb., ... $2023·78
2. Landon's commission, including railway freight, 1 cent per lb., . . 99·94
3. Interest, discount, and bank commission paid bank, ... 13·87
   This was on acceptances granted and money advanced for the purchase of the butter.
4. Travelling expenses, postage, telegrams, &c., ... 4·86
   This the proportion allotted to this lot of butter for my expenses incurred on purchase of it, and other lots for Glasgow.
5. Loss on inferior qualities retained and resold, ... 47·90
   This is a charge always incurred, from the necessity buyers are under of taking the whole make of dairymen at once, as the dairymen will usually only sell in that way, and by which means there are always some inferior kegs in large invoices purchased.
6. Fire risks on parcels in various places—dealers' stores, dairies, railroad stations, in transit, and at the point, St Charles Station, Montreal, . . 63·30
   This risk was undertaken by ourselves as the money was advanced, and no insurance office would have taken the risk at even 6 per cent., while we did so at 3 per cent. I may also mention that if the butter after purchase had been destroyed, we would not have recovered the amount from the defenders.
7. Extra cartage, ... 5·00

The jury returned a verdict for the pursuers.

The defenders obtained a rule on the pursuers to show cause why the verdict should not be set aside as against evidence, and a new trial granted. The parties were also heard on a bill of exceptions to the Judge's charge.

Lord Ormidale charged the jury; and having, in the course of his charge, brought under their notice the various items of claims, of which the first article annexed to the issue as to the cost of the butter in dispute was composed, directed them, in regard to the claim for insurance or fire risk, that it was for them to consider and determine, with reference to the usage of the trade, and whole other evidence bearing on the matter, whether the pursuers were or were not entitled to include under the expression "cost" of the butter in question a reasonable sum as for insurance against fire of the butter from the time it was purchased in the country district till it was collected and shipped at Montreal, and whether the sum claimed by the pursuers as for such insurance was fair and reasonable in the circumstances.

The defenders excepted, and asked a direction "that the pursuers were not entitled to charge any sum against the defenders on account of insurance of the butter in question, if an insurance of the butter was not in fact effected by them."

Lord Ormidale refused to give that direction, assuming that it meant, as the defenders said it did, that no sum could be charged by the pursuers as for insurance unless an insurance of the butter had been actually effected with an insurance office or other third party. Whereupon the defenders excepted.

A. R. Clark and Watson for defenders.

Young, Shand, and Asher for pursuers.

Lord President—The terms of the order given by the defenders to the pursuers are not disputed. They are set out in the issue. The question is, whether the pursuers duly implemented that order, or failed in implementing it, so as to entitle the defenders to reject the butter and get quit of the contract?

When the bills of lading arrived the defenders refused to take them or accept bills for the price until they should see the butter; and, when the butter came, they rejected it. It is clear that the main ground of this was, that it was not of such quality as they wanted; something was also said about the price; but the great objection was on the head of quality. The consequence of the rejection of these goods was, that they were judicially sold under a warrant from the Sheriff, and they produced a smaller amount in money than the contract price by £192. The question is not whether the pursuers' charges, in the invoice of the butter, are not in any one part objectionable, so as to entitle the defenders to strike out an item; but whether the price charged is a breach of contract on the part of the pursuers, so as to entitle the defenders to rescind the contract. The case was presented to the jury, and was argued to us on that footing.

In discussing the question raised on the evidence as to granting a new trial, the main thing to be kept in view is, that though on the face of the order the parties stood in the relation of merchants in this country granting a mandate to commission-agents in Montreal, that is not exactly the relation which lay between them. An order to agents in Montreal to buy butter in the market at the price of the day, and ship home, would constitute such relation. But here, what was contemplated was that the pursuers, being in Montreal, should procure the butter, not by buying in Montreal market, but by collecting it from various dairies in the country, when and where it was to be had, and bringing it to Montreal, and there collecting it, and putting it together, and shipping it home to the

defenders. That involves proceedings by the agents in Montreal quite different from the simple case of a commission contract, because it involved a considerable amount of personal trouble and risk on the part of those who acted nominally as commission agents; and, accordingly, the case was left to the jury on that footing, to say whether the agents were justified in the circumstances, in each of these charges, or whether each was unreasonable and not in fulfilment of the order. In the end the discussion came to turn on two items, and it is not necessary to go beyond these. From the examination of Sidey it appears that there were two lots of 100 packages each, represented by two separate invoices, and I take the first of these as a specimen. He says that the items composing the actual value of the first invoice were (1) first cost of the butter $2023·74, (2) Landon's commission, $99·94, (3) interest, discount, and bank commission, $13·07, and other small charges; and then come two items on which the discussion mainly turns, (1) "loss on inferior qualities retained and resold, $47·90. This is a charge incurred from the necessity buyers are under of taking the whole make of dairymen at once, as the dairymen will usually only sell in that way, by which means there are always some inferior kegs in large invoices purchased." While the defenders objected generally to any such charge being made against them, they objected particularly that on the evidence it was shown that in fact there was not that amount of inferior kegs of butter to justify such a charge. As to the first objection, that no such charge ought to be made at all, it seems to me that, if once you concede that the order was to be implemented by searching for the butter in the country, nothing is more natural than that, in purchasing the produce of a dairy, you must take the whole produce, and must, in that, have some inferior kegs. The other objection is more serious. It seems there were two parcels of butter out of which the butter shipped to the defenders was selected, one of 205, the other of 140 packages, and, as the defenders contend, it is shown on the evidence that in these two parcels of butter there was nothing like proportion of inferior kegs that would justify the charge made, which is one of 33 out of 100 packages. That appears plausible enough, and if there were no answer to it, it must receive some effect from the jury. But there is an answer to it which the jury were fully entitled to take. The pursuers say, we had more orders for butter from Glasgow at the same time, and we were collecting for all these orders at once, and, therefore, we thought it only fair to our customers to put it all together, and to average the inferior kegs over the whole, and to see what amount there was in the whole, and we found in the 850 packages bought for Glasgow a proportion of 143 of inferior quality, not fit to be shipped. Having ascertained that, we charged a proportion against each customer, and 33 fell to be charged against the defenders. No doubt the butter shipped to the defenders happened to be selected out of the first two parcels; but it would have been unjust to our other customers to give the full advantage to the defenders, and throw the full loss upon others.

Now I am not called on to determine that. It was a pure jury question. It seems to me that it was just for the jury to say which was the fair way of dealing with the question. And they have come to the conclusion, as men of the world and men of business, that the pursuers acted fairly and reasonably in the course which they took. I think it would be highly presumptuous in any Court to interfere with the conclusion of the jury in such a question.

(2) There remains another charge made by the pursuers, for fire risks, a charge of $67·30. This is not a very happy name; but, again, I think the jury were entitled to disregard the misnomer, and consider whether it was a fair and reasonable charge. It comes to this, that in collecting the butter, and in bringing it to Montreal, there is a risk of destruction in the transit, the risk of which is of course on the pursuers; because, until the butter is brought to Montreal and sent home, there can be no risk on the buyer, and the risk upon the pursuers must be very considerable. Whether it is accurately represented at $67·30 I do not pretend to say. That is a matter for the jury. The jury have determined it in favour of the pursuers, and we should be invading the province of the jury if we disturbed their conclusion.

That view of the evidence leaves no doubt as to the soundness of the direction given by the presiding judge. He said [quotes direction]. No doubt it is said that reference is made in this direction to usage of trade, and that there was no evidence on that led so as to justify this part of the charge. But that is not the meaning I attach to these words. I understand them to mean that the jury must consider in the circumstances whether the charge was fair and reasonable, looking to the usage of trade, that the agent at Montreal has not to go into the market there, but has to go into the country to collect butter from various dairies, and bring it down to Montreal to ship home. There does not appear to have been any miscarriage either on the part of the judge or jury. We must discharge the rule, and disallow the exceptions.

The other Judges concurred.

Rule discharged and exceptions disallowed.

Agent for Pursuers—Lockhart Thomson, S.S.C.

Agents for Defenders—J. W. & J. Mackenzie, W.S.

COURT OF TEINDS.

Wednesday, June 19.

SMITH AND OTHERS, PETITIONERS.

Church—Parish—Disjunction and Erection—Boundary. Circumstances in which the Court refused to sanction the proposed boundary of a new parish. Petitioners allowed time to amend.

This was a petition at the instance of the Endowment Scheme Committee of the Church of Scotland, and others, for disjunction and erection of Leadhills. It appeared that the parish of Crawford, in which Leadhills is situated, contains about 1500 inhabitants. About 900 of these are miners, and reside at the village of Leadhills. It was proposed to erect Leadhills into a parish; and in order to include in the new parish a sufficient portion of land, belonging to Lord Hopetoun, who is the principal heritor, to give a stipend of £68 at 3 per cent. on the rental, it was proposed to cut off from Crawford parish, and make part of the new parish, a large but thinly populated district to the south of Leadhills, containing a population variously estimated at from 50 to 100 persons.

SHAND, for parishioners and others, objected, on