

Thursday, December 19.

FRASER v. MACKINTOSH.

Expenses—Sheriff—Debts Recovery Act, 1867—Dismissal of action—Modification. Held that when a case is brought before a Sheriff under the "Debts Recovery Act," he exercises no new jurisdiction conferred by the Act, but merely his ordinary jurisdiction as Sheriff; and if the case turns out not to be within the Act, his duty is to dismiss it as brought in an incompetent form, with power to find the pursuer liable in expenses, not under the Act, but in the exercise of his ordinary powers as Sheriff.

This was a question of expenses, arising out of an action brought under the "Debts Recovery (Scotland) Act, 1867."

Alexander Fraser, late farmer, Boleskine, now at Balnacroich, Inverness, brought an action in the Sheriff-court of Inverness, under the "Debts Recovery Act," against John Mackintosh, farmer, Clunes, for the sum of £41, 2s., as the amount of an account for purchases made by the defender at a public sale of the complainer's effects on 12th September last. The first plea in defence was, "not a debt falling under the Act."

The pursuer moved for leave to abandon the action.

The Sheriff-substitute (THOMSON) pronounced this interlocutor:—"The Sheriff-substitute finds that the pursuer has moved for leave to abandon the action, after a note of the pleas of parties has been taken and signed by the Sheriff-substitute: Finds that, in these circumstances, he cannot be allowed to abandon except on payment of £4 of expenses, being the sum fixed by the statute for decree or judgment in a contested cause of the value of £40 and upwards: Therefore, in respect of the motion for leave to abandon, dismisses the action, and decerns: Finds pursuer liable in £4 of expenses, and decerns against him for that sum."

The pursuer appealed to the Sheriff, on the ground that the Sheriff-substitute had power to modify the expenses to such proportion as was fairly applicable to the case at the stage at which the leave to abandon was asked, and did not exercise that power.

The Sheriff (IVORY) pronounced this interlocutor:—"The Sheriff having considered the pursuer's appeal, recalls the interlocutor appealed against: Refuses the pursuer's motion for leave to abandon the action as incompetent; and remits to the Sheriff-substitute to order the case to be reheard, and to proceed further with the cause in terms of the statute."

The pursuer appealed to the First Division of the Court against both judgments.

ADAM, for appellant, contended that although £4 was the maximum amount of expenses which the Sheriff could award in such a case, he was not bound to award that amount, but had power to modify.

M'LENNAN, for respondent.

The LORD PRESIDENT intimated that the Court would consult with the other Division before advising the case.

At advising.

LORD PRESIDENT—In this case, as soon as the summons was brought into Court it was met by defences, of which the first was, that the debt sued

for did not fall under the Act. The pursuer, when that defence was stated, at once admitted that it was well founded, and moved for leave to abandon the action. It does not much matter whether the precise form of abandonment was adopted or not, but what should have happened is that the Sheriff should have dismissed the action in respect of the pursuer's motion. And, so far, his judgment is good. But then he deals with the question of expenses, and that is the only point of importance here. He finds that the pursuer [*reads interlocutor of Sheriff-substitute*]. That judgment was appealed to the Sheriff, and the Sheriff recalled that interlocutor, refused the pursuer's motion for leave to abandon the action, as incompetent, and remitted to the Sheriff-substitute to order the case to be reheard, and to proceed further with the cause in terms of the statute. Now, it is not easy to see what was the Sheriff's view of the case; but, in so far as the Sheriff-substitute's judgment was concerned, I think he was right in dismissing the action. But then as to the matter of expenses, this appeared to be a point of so much general importance, that we have consulted the judges of the other Division, and I am now to state the result of that deliberation.

The Court are of opinion that when a case of this kind is brought before the Sheriff, he is not exercising any new jurisdiction conferred by Act of Parliament, but his ordinary jurisdiction as Sheriff; and he is empowered by the Act of Parliament to entertain a case of the kind included in the statute in a summary form, provided such case be, independent of that, within his jurisdiction. Where a summons in a statutory form is brought before him, and turns out not to be a case within the statute, his duty is to dismiss it; but he does that, in the exercise of his ordinary jurisdiction, as a case brought before him in an incompetent form. In exercising that jurisdiction, we think he is entitled to find the party who brought that action before him liable in expenses, not under the statute, but in the ordinary way. Therefore, he ought here to have dismissed the action, and found the pursuer liable in expenses. Whether he ought to have modified these expenses, or remitted to the auditor, is rather a matter for consideration in the Sheriff-court. But the awarding of expenses was not within the Act at all.

The Court accordingly recalled the judgments appealed against, and remitted to the Sheriff to dismiss the action, and find the pursuer liable in expenses.

Agents for Appellant—Pearson & Robertson, W.S.
Agent for Respondent—Æneas Macbean, W.S.

Thursday, December 19.

M'DOUGALL AND MANDATORY v.

GIRDWOOD.

(*Ante* iv. 140, iii. 367.)

Expenses—Auditor—Three Counsel—Counsel's fees—Scientific witnesses—Jury trial. Circumstances in which the Court (1) allowed the expense of a third counsel at the trial, and also at the discussion on a rule (discharged) and a bill of exceptions (refused): (2) allowed fees to counsel only on the scale sanctioned in *Cooper* and *Wood*; allowed expense of certain chemical analyses; (4) disallowed expense of attend-