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 Balnafroig, 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 pursuers' 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-

ance of scientific witnesses resident in Edinburgh and Glasgow, except for the actual days of trial.

This was a note of objections for the pursuers to the auditor's report on their account of expenses.

The pursuer M'Dougall, manufacturing chemist, had sued Robert Girdwood, wool-broker, for damages on account of infringement of patent. The pursuer described his invention as consisting in the "use of heavy oil of tar, or dead oil, or crude carbolic acid, or creosote, obtained in the destructive distillation of carbonaceous substances. These materials I heat with an alkali, and add a saponifiable fatty substance." The object of the composition was to destroy the vermin on sheep. The defence was that the "Improved Melossoon, or Sheep Protecting Dip," sold by the defender was not substantially the same as the pursuer's invention, but was different in composition. The case was set down for trial on 4th April last, and was called on Monday, 8th April. Several chemists were examined on either side. The jury, on 10th April, returned a verdict for the pursuer. The defender presented a bill of exceptions, which was discussed on 25th June last, along with a rule for a new trial. The Court disallowed the exceptions, and discharged the rule. The pursuer's account of expenses was given in and taxed by the auditor. In taxing the account the auditor taxed off—From 110 guineas, paid to the pursuer's senior counsel for the trial, a sum of 55 guineas; from 80 guineas, paid to a second counsel, he taxed off 40 guineas; and from 30 guineas, paid to a third counsel, he taxed off 13 guineas.

The pursuer had charged for 61 analyses of different runnings of pitch oil, of different samples of oil of tar, of samples of Girdwood's Original Melossoon Dip, &c., by chemists called by the pursuer to give evidence as to the infringement of his patent by the defender. The charge made for each analysis was three guineas. The auditor only allowed the expense of 18 analyses.

The pursuer had charged for six days' attendance of Dr Stevenson Macadam, Edinburgh, as witness at the trial, from 4th to 10th April, 12 guineas—the auditor struck off six guineas; for seven days' attendance by Professor Penney, Glasgow, the pursuer charged 14 guineas—the auditor struck off six guineas.

The pursuer also charged for the attendance at the trial of two witnesses, to prove samples of the Original Melossoon Dip. The auditor disallowed the charge.

The auditor reserved for the consideration of the Court the question whether this was a case for allowing the expense of a third counsel at the trial, and at the discussion on the rule. With regard to the rate of fees allowed to counsel, he thought that the higher rate of fees allowed in *Duke of Buccleuch* v. *Cowan and others*, 17th July 1867, 5 Macph. 1054, and here claimed by the pursuer, ought only to be allowed in cases of the greatest magnitude and difficulty, and that the present case fell rather under the rule sanctioned in *Cooper and Wood* v. *N. B. Railway Company*, 2 Macph. 346, and *Hubback* v. *N. B. Railway Company*, 2 Macph. 1291.

The pursuer objected to the auditor's report, in so far as he had taxed off the items mentioned, amounting to £291.

Balfour, for pursuer, cited *Duke of Buccleuch* v. *Cowan and Others*, and also *Steven* v. *M'Dowall's Trustees*, 19th March 1867; 3 Scot. Law Rep., 320.

Watson in reply.

Lord President—As I tried this case, and as I had also the misfortune to try the *Esk Pollution* case, I may as well at once state my impression. First, as regards the propriety of having three counsel, I do not entertain any doubt that the case was such as fairly to justify either party in having the benefit of three counsel. The only point on that head attended with any difficulty is, whether the expense of the third counsel should go beyond the actual trial, for the auditor's report brings up the question whether that expense should be allowed in the discussion on the motion for a new trial, and on the bill of exceptions. I am rather inclined to take the more liberal view in this particular case, because, if this case had gone to a second trial, on the ground of miscarriage in law or unsatisfactory evidence, it would have been of great importance to the pursuer that his counsel, who were to conduct his case at the second trial, should have heard the discussion on the motion and bill of exceptions. I am therefore disposed to allow the expense of the third counsel at the discussion as well as at the trial.

But as regards the charges for counsel at the trial and for consultation, I have a great disinclination to disturb what the auditor has done. The rule laid down by the late Lord President in *Cooper* and *Wood* is a very salutary and just rule. It recognises that in many cases a party may have an interest and a very proper inclination to pay his counsel a larger fee than he can charge against his opponent; and we know well that such things often occur in practice. The question determined in that case was a general question. It was what, in ordinary circumstances, is a fair charge as between party and party. And when that case was brought under our notice in the Second Division, while I sat there, in the case of *Hubback*, we adopted it; and, therefore, it may be taken as settling the general practice. No doubt, there are exceptional cases where it is fair to allow larger fees, but these are rare. One of these is the case which has been referred to, the *Esk Pollution* case. Now, I think that case may be said to be almost a singular case. I do not remember any case involving so many points of difficulty, and requiring so much professional work, as that case. And no one who is practically acquainted with that case would compare it with the present in the matter of chemical analysis, for that case required more analyses than any other I ever knew. The state of the water required to be ascertained at different seasons of the year, and not only so, but on different days, and in different weeks, and months, and at a hundred different points of the river, so that the amount of analyses there required was enormous. And that was only one element in the case. And while the Second Division did what I think was quite right in allowing double fees in that case, there is no reason why we should here depart from the ordinary rule. When three counsel are allowed 112 guineas for a case lasting a little over two days, that is as much as the losing party can be called on to pay.

As to the analyses, some of them are distinguishable from others. There was one analysis of Girdwood's Original Melossoon Dip. Now, no doubt it was part of the pursuer's case, and a formidable part, to show that the defender was making a mere colourable departure from the patent preparation, and using a mixture which, though distinguishable, was substantially the same. In making that out, it was not unimportant to show that on pre-

vious occasions the defender had made attempts of the same kind, and had been obliged to withdraw his preparation from the market as an infringement of patent. Therefore, an analysis of that Original Melossoon Dip was fair, whether used at the trial or not. I am therefore disposed to allow that analysis, charged by Dr Odling and Dr Millar, of London; but as to the other analyses, the expense of which has been taxed off by the auditor, there is no ground on which they can be allowed.

As to the evidence of the chemists about the specific gravity of oil of tar at different stages of running off, that matter is perfectly well known to the scientific and commercial world, and there is no reason to differ from the auditor.

Next, as to the expenses of witnesses waiting at the trial. The scientific witnesses resident in Edinburgh cannot be allowed to charge for attendance on days when the trial is not going on. With regard to a scientific witness from Glasgow, it is pretty plain that it is time enough to summon that witness when the trial comes on, unless he is to be the first, or one of the first, witnesses. The pursuer here must have known that the chemical part of his case would not be gone on with u til a late stage.

The only other matter is the charge for the witnesses Paul and M'Dougall. As to the former, it seems to follow, from allowing the analysis of the sample of the Original Melossoon Dip, that this charge must be allowed, for Paul was necessary to prove the sample; and for a similar reason, the charge for M'Dougall must be sustained, there being no admission until the trial had begun so as to dispense with his attendance.

The result will be to allow the expense of a third counsel, the charge for the analysis of the Original Melossoon Dip by Drs Odling and Millar, and the charges for Paul and M'Dougall.

The other judges concurred.

Agents for Pursuer—Macnaughton & Finlay, W.S.

Agent for Defender—Andrew Webster, S.S.C.

Thursday, December 19.

SECOND DIVISION.

SERVICE AND OTHERS *v.* YOUNGMAN.

Promissory-Note—Protest.—Charge—Clerical Error. A protest of promissory-note was registered, through a clerical error, in the name of a wrong party as holder; in order to correct this mistake a new protest was extended and recorded next day in the name of the holder, and upon this second protest a charge was given. *Held* that this was incompetent while the former and inconsistent protest stood.

This was a suspension of a charge which had been given by George Youngman, the respondent, to Mrs Christina Lang or Service and others, the complainers. This charge was given by virtue of an extract registered protest from the Sheriff-court books of Renfrewshire, and a warrant of the Sheriff thereon, dated 11th December 1866, at the instance of the respondent, indorsee and holder of a promissory-note granted by the complainers. The payee in the promissory-note was Charles Reed, and it was blank indorsed. In respect of this blank indorsement, it was alleged that, prior to 10th December 1866, the note passed into the hands of the respondent, and on that day a protest was extended, recorded, and extracted against the complainers as at the instance of Wadeson and Malleson, solicitors in London, who, the respondent alleged, were his agents, and whose name, it was alleged, was used instead of his by a clerical error. On the following day a second protest was extended and recorded at the instance of the respondent with a view of rectifying this error; and on an extract of this second protest the present charge, now sought to be suspended, was given.

The complainers pleaded,—There having been a subsisting and recorded protest on the said note, at the instance of other parties, against the complainers, at the dates of recording of the protest, and of the charge in question, the procedure last mentioned was and is incompetent, irregular, and invalid.

The Lord Ordinary (Ormidale) sustained the reasons of suspension. In his note, his Lordship said that the facts, that the promissory-note in question was only once protested, and that an instrument of protest was first extended and recorded at the instance of Wadeson and Malleson, were sufficiently admitted on record. It was not said that there was any new or subsequent indorsation to the charger, or that the note was of new protested at his instance; nor did the charger allege that he had acquired any right to the note from Wadeson and Malleson. He did not proceed, or put himself in a position to proceed, in terms of either 12 Geo. III., c. 72, or of 1 and 2 Vict., c. 114, sec. 12. All that the charger said was, that the instrument of protest was by "a clerical mistake, it is believed, extended, recorded, and extracted at the instance of his London solicitors, Messrs Wadeson and Malleson," and that, without any new presentment and demand of payment, or noting, or protest, another instrument was, after the lapse of a day, extended and recorded at his own instance. It might possibly be true that it was by mistake (although as to this the charger did not, from the expressions he used, seem quite certain) the protest was, in the first instance, extended and recorded in the name of Wadeson and Malleson, but there was no evidence of this; there was nothing but the unsupported statement of the charger, which was opposed by and directly in contradiction of the formal, notarial, and in every respect *ex facie* regular and unobjectionable, statement in the recorded instrument of protest at the instance of Wadeson and Malleson. The Lord Ordinary was therefore unable to see how he could sustain the instrument of protest and decree at the instance of the charger as the foundation and warrant of summary diligence, but, on the contrary, he thought that they were irregular and incompetent for such a purpose. The Lord Ordinary, in coming to this conclusion, was not to be understood as giving any opinion to the effect that a bill or promissory-note might not be competently transferred by indorsation after it had fallen due, and of new protested and diligence followed out at the instance of the indorsee, although it had been previously protested, and the instrument of protest recorded at the instance of another party, nor had he found it necessary to decide anything against the validity of an instrument of protest extended without any new proceeding at the instance of a party different from that at whose instance the bill or promissory-note had been noted, although the regularity and competency of this appeared to have been questioned in the case of *Swanson* v. *Archibald*, 1838, 16 Sh., 308.

The respondent reclaimed.