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.

The Court approved of the table.

The question of expenses was then argued.

J. MARSHALL for pursuers.

GIFFORD for defenders.

At advising—

LORD DEAS—No doubt the question of expenses is of great importance to the parties, but, having had to do with the case throughout, I have no doubt how that question should be decided. The magistrates made a table of rates in 1854, which has now been found not to be a lawful table. It had many items which have not been supported. What they are is of little moment, except as showing that substantially the action went in favour of the public. This action was not raised until 1862, and, so far as one can see, if this action had not been brought, this table would have been acted on in all time coming until some one challenged it. The magistrates were not entitled to wait until some one brought an action of reduction or declarator to have this set right. When objections were made to particular items it was the duty of the magistrates to consider them; and if they seemed illegal or doubtful, it was their duty to make a table so as to satisfy the rate-payers, or to come here to have it found and declared that the table was right. In such a case, if no public spirited individual is found to bring up the matter, it might go on for ever. I don't care whether the action was brought by the whole gentlemen of the county, or by one or two of them. It was most proper to bring it; and the natural and proper result is, that the parties opposing it and causing all this expense in getting a thing done which they ought to have done themselves, should bear the expenses. There was no disposition throughout this action to get this matter adjusted. On the contrary, when there was a remit to an accountant, and a table was framed on a certain construction of the judgment of this Court which we held was unsound, it was maintained by the defenders that that table must stand. The case is just this, that the magistrates have been very zealous to increase the revenues under their charge, and they have failed, and the ordinary consequence is that the funds for the benefit of which that was done must bear the expense of the litigation. I think the pursuers should have all their expenses in the Outer House, and the expenses in the Inner House since the date of the last interlocutor reclaimed against. The pursuers may have been unsuccessful in some points, and, of course, under the Act of Sederunt, the expenses applicable to these points will be struck off.

LORD ARDMILLAN thought that, as the preponderance of success had been in favour of the pursuers they were entitled to their expenses, with some small modification.

LORD KINLOCH—If I had been deciding this question myself, I should have found the pursuers entitled to expenses, subject to modification, reserving to myself the power to modify to such extent as I thought right. It is clear that the magistrates were wrong in holding fast by the table of 1854 as an alleged adaptation of the old table of 1772, and the pursuers were compelled to come to this Court in order to get that table rectified. On the other hand, it is undoubted that among the numerous details of the case there are several as to which the defenders have been successful; and therefore, while the pursuers are generally entitled to their expenses, I think these should be subject to some modification.

LORD PRESIDENT—My acquaintance with this case is less than that of your Lordships, but I think the pursuers are entitled to their expenses without any modification, and my reason for that is that, as Lord Ardmillan says, the great preponderance of success is on their side. In such cases I don't see how any one could expect more, for there is a great deal of detail, and much investigation necessary, and no pursuer, however prudently he conducts his case, can expect to be wholly successful. The fact that they have been so successful is the greatest compliment that could be paid them as litigants in such an action.

This interlocutor was pronounced:—

"*Edinburgh, 18th June* 1869.—The Lords having resumed consideration of this cause, with the report of Mr Charles Ogilvy, dated 28th May 1869, No. 154 of process, and heard counsel for the parties, Find that the defenders are not entitled to levy any dues which have not been in use to be levied for 40 years or time immemorial prior to the raising of this action; approve of the said report and of the table of dues appended thereto; and, in conformity therewith, find that the said table is to be the only table to regulate the levying the Dumfries Bridge Custom in all time coming: To this extent and effect repel the defences, and declare and decern in terms of the declaratory conclusions of the libel: Find it unnecessary to dispose further of any of the conclusions: Find the pursuers entitled to expenses incurred by them in the Outer House and also in the Inner House since the said interlocutor of 17th December 1868: Allow an account to be given in, and remit to the auditor to tax the account when lodged and to report."

Agents for Pursuers—Scott, Bruce & Glover, W.S.

Agent for Defenders—W. Kennedy, W. S.

Thursday, June 19.

UDNY *v.* ESSON.

Landlord and Tenant—Removing—Duration of Lease. A farm was let for nineteen years from Whitsunday 1850, the crop of 1850 being declared to be the first grain crop. *Held* that the tenant's possession continued to Whitsunday 1869.

Question as to the tenant's right to an away-going crop.

By minute of agreement dated 18th June 1852, Skinner, commissioner for Udny, of Udny and Dudwick, let to Alexander Esson and his heirs, "with reference to and under and in terms of the burdens, conditions, and others contained in the regulations established on the estate of Udny, recorded in the Sheriff-court Books of Aberdeen 25th May 1850, all and whole that croft or possession, as at present possessed by him, on the hill of South Fardine, on the estate of Udny, in the parish of Foveran, and that for nineteen years from and after the term of Whitsunday 1850, which, notwithstanding the date hereof, is hereby declared to have been the term of entry to the premises, the crop of the year 1850 being the first grain crop under this tack."

The regulations contained this clause:—"At whatever term the tenant may have entered, he shall remove as at Whitsunday of the last year of the lease, being bound to give the landlord or incoming tenant access to the garden or yard at