Mr Harkness. They were of opinion that, whether the obligation was a direct obligation or a cautionary one, there was at common law, and under the terms of section 8 of the Mercantile Law Amendment Act, a competent action against Mr Harkness, without the necessity of discussing or doing diligence against any other person. They indicated an opinion that, on the authority of the case of *Galloway* (*supra*), such a writing as the present constituted a direct and primary obligation against the granter. The consideration for which Mr Harkness granted the obligation was the delivery of the discharges; without it, Mr Wilson would not have given these up.

Agent for Pursuers—R. P. Stevenson, S.S.C.
Agent for Defender—W. S. Stuart, S.S.C.

Friday, October 21.

FIRST DIVISION.

HOSEASON *v.* HOSEASON.

Aliment—A father-in-law cannot be compelled to aliment the widow of a deceased son.

This was a claim of aliment made by the widow of Hosea Hoseason junior against her husband's nephew Robert Hoseason, on the ground that he represented his grandfather Hosea Hoseason senior, who, the pursuer maintained, would have been liable for her aliment if he had been alive. Hosea Hoseason senior died in 1824, leaving a settlement by which he conveyed a small heritable estate to his eldest son in liferent, and the heirs-male of his body in fee; whom failing, to his second son in liferent, and the heirs-male of his body in fee, &c.

The eldest son, the husband of the pursuer, died without male issue, and the estate has now devolved on the defender Robert Hoseason, son of the second son of the testator. The defender is absent from Scotland, and his brother Charles has been appointed judicial factor on his estate. It was admitted that the pursuer had no relations of her own able to support her.

The questions raised were, first, Whether Hosea Hoseason senior, if he had been alive, would have been liable to aliment his son's widow? and, second, Whether that obligation transmitted to his grandson, the son of a younger son, upon his coming to represent his grandfather?

The Lord Ordinary (GIFFORD) decided the first question in the negative, and accordingly assoilzied the defender, it being unnecessary to decide the second point.

The pursuer reclaimed.

SPEIRS, for her, founded chiefly on the case of *De Courcy* v. *Agnew*, 3rd July 1806, Mor. App. *voce*, "Aliment," No. 8.

CHEYNE, for the defender, referred to *Duncan* v. *Hill*, 28th Feb. 1809., F.C.; *Yule* v. *Marshall*, 21st Dec. 1815, F.C.; and *Pagan* v. *Pagan*, Jan. 27, 1838, 16 S. 399.

LORD PRESIDENT—The question here is whether, apart from special circumstances, the relation between father-in-law and daughter-in-law is such as to found a claim of aliment. It is unnecessary to impugn the decision in the case of *De Courcy*, though it has been much criticised. The ground of decision in that case was, that Sir S. Agnew was bound to support his daughter-in-law, as the mother of his heir of entail. The other cases in which the point has been raised form an unbroken series of decisions negative of the pursuer's contention.

LORD KINLOCH—Whether a father is bound to support the widow of a son is a question of positive law, not to be decided on theoretical grounds. Authority shuts us up to a negative answer.

The other Judges concurred.

The Court adhered.

Agent for Pursuer—John A. Gillespie, S.S.C.
Agents for Defender—Stuart & Cheyne, W.S.

Friday, October 21.

SECOND DIVISION.

THE SCOTTISH LEGAL BURIAL AND LOAN SOCIETY *v.* LEITCH.

18 *and* 19 *Vict.*, *c.* 63, § 40—*Appeal—Finality.* Section 40 of 18 and 19 Vict., c. 63, enacts—"every dispute between any member or members of any society established under this Act, or any of the Acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties without appeal." Leitch, the representative of a deceased member of a friendly society, sued the society and the agent of the society at Greenock. The Sheriff-Substitute dismissed the action, in respect that the secretary of the society had not been made a defender. The Sheriff-Principal having recalled this interlocutor, thereafter decerned in favour of Leitch for the amount of his claim. Appeal against this interlocutor to the Court of Session *dismissed* as incompetent.

18 *and* 19 *Vict.*, *c.* 63, § 40—*Finality—Review—Decision of the Dispute. Held* that the finality of judgments pronounced under the above Act extended only to judgments on the merits, *i.e.*, "decisions of the dispute;" and that it was competent to appeal judgments of the Sheriff-Substitute upon questions of procedure, &c., to the Sheriff-Principal.

18 *and* 19 *Vict.*, *c.* 63, § 40—*Sheriff—Sheriff-court.* Opinions *per* Lords Justice-Clerk and Cowan, that the word "Sheriff" in the above section meant "Sheriff-court;" and that judgment on the merits was reviewable by the Sheriff.

This action was raised in the Sheriff-court of Greenock at the instance of the respondent, as executor of his mother, to recover the amount for which the deceased had insured her life with the appellants' society. The defence was a denial of the resting-owing, on the ground of misrepresentation as to the deceased's age at the time of effecting the insurance, but an offer to pay what would have been due in respect of the premium really paid, and calculating the deceased's right upon her real age and not her age as represented.

The Sheriff-Substitute (TENNENT) sustained the second plea in law for the defender, which was that the secretary of the society had not been made defender in terms of section 7 of 21 and 22 Vict., c. 101, and dismissed the action. The action had been directed against the society and its agent at Greenock. On appeal, the Sheriff recalled this interlocutor, and remitted to the Substitute to proceed with the cause. Thereafter the Sheriff-Sub-

stitute having allowed a proof of the defender's statements, the pursuer appealed. The Sheriff-Principal pronounced this interlocutor:—

"*Edinburgh*, 14*th April* 1870.—The Sheriff having considered this process, sustains the appeal for the pursuer; recalls the interlocutor appealed against; repels the third and sixth pleas for the defender: Finds that the now deceased Janet Leitch was a contributor to the Scottish Legal Burial and Loan Society: Finds that she died on 4th June 1868: Finds that on her death her executors were entitled to receive from the defenders, in respect of said contributions, the sum of £34: Finds that the pursuer has been decerned by the Commissary of Buteshire executor-dative *qua* one of the next of kin to the defunct: Therefore grants warrant, and ordains the clerk of court to pay over to the pursuer the sum of £10, 6s. in his hands, with any interest that has accrued thereon; and decerns against the defenders for the balance of the sum concluded for, being £23, 14s., with interest thereon as concluded for: Finds the pursuer entitled to expenses; allows an account thereof to be lodged; and remits the same to the auditor to tax and report.

"*Note.*—The only remaining points in this case not disposed of are the third and sixth pleas stated by the defender. These pleas are untenable. The twelfth rule says, 'if at any time it be proved, to the satisfaction of a majority of the committee, that any person or persons gained their admission by giving a false account of their age or state of health, or having any disease on them at the time of their entry, and not making the same known, they shall be expelled, and forfeit all monies paid.' The punishment here to be applied is to the contributor himself. He is to be expelled from the society, and he is to forfeit all the monies paid. The rule is inapplicable to the case of an executor after the contributor is dead. A penal clause like this ought to be rigidly construed. It is clearly implied that the contributor himself, who has been held to have done wrong, is to have an opportunity of proving his innocence to the satisfaction of the committee, which in very many cases an executor would have no means of doing."

The defenders appealed to the Court of Session.

Millar, Q.C., and Campbell, for respondent Leitch, objected to the competency of the appeal, in respect that by rule 19 of the society the decision of the dispute by the Sheriff was final. That rule is as follows:—"Every dispute between any member or members and the executors, administrators, nominee or assignee of a member, and the treasurer or other officer, or the committee of the society, shall be referred to and decided by the Sheriff of the county, or two Justices of the Peace, in the manner provided for by sections 5, 6, and 7 of 21 and 22 Vict., c. 101."

The clauses of 21 and 22 Vict., c. 101, referred to, embody section 40 of 18 and 19 Vict., c. 63, which is as follows:—"Every dispute between any member or members of any society established under this Act, or any of the Acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties without appeal."

Trayner, in answer, admitted that there was no appeal on the merits under the statute; but this appeal was directed against the judgment of the Sheriff, which it was not within his competency to pronounce. The word "Sheriff" in the statute included Sheriff-Substitute (*Fleming* v. *Dickson*, 19th December 1862); and as the Sheriff-Substitute had pronounced a judgment which by the statute was final and without appeal, the judgment now complained of was null. The respondent could only get the judgment of the Sheriff-Principal by an appeal under the Sheriff-court Act of 1853. But such appeal was equally excluded as an appeal to the Supreme Court by the Friendly Societies Act.

At advising—

Lord Cowan—Having regard to the important general questions argued in this case I dont regret the time occupied in the discussion, but I have little difficulty in disposing of the objection taken to the competency of the appeal to this Court. I consider it well founded. The contrary view was ably argued, and undoubtedly the question is difficult and requires a consideration of principles for its solution. It is an action by a representative of a member of a Friendly Society for payment of a sum alleged to be due on the death of that member, and it was brought before the Sheriff-Substitute in the ordinary course. The Sheriff-Substitute sustained the second plea of the defender, which was not a plea upon the merits of the claim, and dismissed the action. This judgment was appealed to the Sheriff Principal and recalled. Thereafter the Sheriff-Substitute having ordered a proof, the Principal recalled this interlocutor and granted decree in terms of the conclusion of the summons. Now this is the first decision which had been pronounced on the merits of the case in the Sheriff-court. It is in fact "the decision of the dispute."

The question for us to consider is whether any appeal was competent after the first decision of the cause by the Sheriff-Substitute. I would first observe that the words of the statute are only to the effect that the decison of the dispute shall be conclusive and without appeal. I am of opinion that all the intermediate interlocutors upon procedure were appealable from the Sheriff-Substitute to the Principal. The nature of the finality of jurisdiction is that the judgment on the merits by the Sheriff of the county, acting according to the rules of his Court, shall be final. No final judgment can be reached except by the ordinary procedure of the Sheriff-court. In my opinion the word "Sheriff" means "Sheriff-court," and the decision of the "Sheriff" is the decision on the merits of the question arrived at by the ordinary procedure of the Sheriff-court.

There is a more limited view, which is sufficient for the disposal of the case, viz., that the Sheriff-Substitute has pronounced no interlocutor on the merits, and therefore that the only decision of the dispute is contained in the judgment of the Sheriff-Principal, and that judgment is final.

Lord Benholme—The best answer to the objection that this appeal is incompetent is, that the decision appealed against was pronounced by the Sheriff-Principal on appeal from the Sheriff-Substitute, and that such an appeal was incompetent under the statute. I do not think that a good answer, however, because the only finality is that attached to a decision of the dispute. The first judgment of the Substitute, viz., that dismissing the case, was an avoidance of a decision; and the other, viz., that allowing a proof, was a preparation only for a decision. Therefore the judgment of

the Sheriff-Principal is the only decision of the dispute, and it is final. As regards the larger question, whether a judgment on the merits by the Substitute would have been appealable to the Principal, I reserve my opinion.

LORD NEAVES was of the same opinion as Lord Benholme, and reserved his opinion on the question whether a judgment on the merits by the Substitute was reviewable by the Principal.

The LORD JUSTICE-CLERK was of opinion that it was the judgment of the Court, and not of the particular Judge, which was declared final. No limitation seemed to be put upon the ordinary procedure of the Sheriff-court. He was doubtful whether it was safe to say that finality was attached only to decisions on the merits. There was an exclusion of every court but the Sheriff-court, and if they held that decisions on procedure were appealable, it might be possible that they would be appealed here. This he thought was not competent, and he therefore concurred in the view of Lords Neaves and Benholme.

Appeal dismissed.

Agents for Pursuers—Campbell & Smith, S.S.C.
Agents for Defender—Neilson & Cowan, W.S.

Friday, October 21.

BARCLAY *v.* SCOBIE AND MACKENZIE.

Agreement — Accession — Guarantee—Personal Bar. A having become bankrupt, his trustees sold to B the goodwill and stock in trade of his business. A however continued to carry on the business for behoof of B, as B alleged. Thereafter A entered into an arrangement with C for the purpose of acquiring C's business in another town. This agreement was revised by B and approved of by him. He further granted a letter to C, in which he promised, in the event of the business being sold to A, that "no sums I draw from said business (his own) shall interfere with the payments made towards your bills, until said bills for the purchase of the business be paid in full." A having proceeded to remove the stock from B's premises to those of C, B brought two actions, one of suspension and interdict, and the other a declarator of property in the stock. *Held*, after a proof, that although he was proprietor of the stock, he was barred by his accession to the agreement, and the letter above quoted, from interdicting the removal of the goods.

These were conjoined actions of suspension and interdict and declarator, the pursuer in both being George Barclay, warehouseman, Edinburgh. The following were the leading circumstances out of which the cases arose. The defender Robert Scobie, who was at one time a draper in Airdrie, executed in January 1868 a trust-deed in favour of a trustee for behoof of his creditors, of whom the pursuer was one. The trustee thereupon sold the stock in trade, book debts, and furniture of the defender Scobie, and these were purchased by the pursuer in name of William Wilson, one of his travellers. Barclay paid the price to the trustee, but for the amount he drew four bills on Robert Scobie & Co., which were accepted by Robert Scobie. On this being done, the business was carried on in Airdrie, under the firm of Robert Scobie & Co. The business was at first managed by Wilson, who made a written bargain with Scobie, by which the latter was to receive 30s. per week as his servant. On 18th March 1868 Scobie was sequestrated, and in the state of his assets no right was asserted by him or his trustee to the property of the goods in question. He alleged, however, that the stock, &c., was really purchased by Barclay for his behoof, under an arrangement whereby Barclay, in respect of his making the advance, was to receive payment of his debt in full; and he also alleged that the agreement of service was never acted on, and was a mere device to defeat any claim by the trustee in the sequestration. In May 1868 the business was removed from Airdrie to Renfrew, where it was carried on, on the same footing, by Wilson and the defender Scobie, until Wilson left in January 1869. Another arrangement was then entered into as to the business. Wilson made a written agreement with Barclay giving up all right which he had, and Barclay, on the same day, gave Scobie the following letter:—"With reference to the business of R. Scobie & Co., conducted by Mr William Wilson under that designation in Renfrew, it is understood that on Mr Wilson signing the minute of agreement executed of same date with this letter, you shall continue in full possession and management of the business, under my superintendence, until you get your discharge, and that on your obtaining your discharge, and on the debt ranked by me in your sequestration being paid in full, the business shall be handed over to you, you relieving me of all the liabilities of the firm. So long as the business proves itself to be prosperous I bind myself (until your discharge is obtained) not to do diligence against the firm."

In August 1869 Scobie entered into negociations with the view of acquiring by purchase the stock-in-trade of John Mackenzie, a draper in Alloa, and he ultimately executed an agreement with him to this effect. The pursuer was consulted by Scobie and Mackenzie about the agreement, and saw it, and made some alterations on it, but he was not otherwise a party to it. After providing for the taking over of the business and other things, the agreement between Scobie and Mackenzie contained, *inter alia*, a clause in the following terms:—"The stock in Renfrew belonging to the said Robert Scobie to be transferred to Alloa, and an inventory of the same taken and submitted to the said John Mackenzie; and that George Barclay, warehouseman, Edinburgh, give to the said John Mackenzie a written guarantee that he will not enforce his claim against the said Robert Scobie until he has satisfied the said John Mackenzie in full, or until the said Robert Scobie has fulfilled his part of the agreement." The agreement was signed on the 24th August 1869, and of the same date the pursuer wrote and delivered a letter to Mackenzie in the following terms:—"Sir,—In the event of R. Scobie purchasing from you your business in Alloa, I agree that no sums I draw from said business shall interfere with the payments made towards your bills until said bills for the purchase of the business be paid in full." Scobie after this agreement proceeded to remove effects from the shop in Renfrew to that in Alloa.

The pursuer and suspender alleged:—"Had the arrangement been carried out for the transfer of Mackenzie's business to Scobie, it was intended that the stock-in-trade of Robert Scobie & Co. at Renfrew should be removed to Alloa, on terms being arranged with the complainer for its pur-