ing to its own terms alone. I do not think it follows that the defender can be said to have failed. He has been successful on the whole case, and has got *absolvitor*, and whether that result proceeded upon one ground or another does not affect the present question. There is no one part or branch in which he has been unsuccessful.

I do not understand that the Auditor has power to interfere in such a case. It is not a general audit, nor is it a disallowance of overcharges. This part of the expense is said not to have been of any use, but that is a totally different matter. The defender must be allowed his expenses in this part of the case as in the other.

Lord Deas — There has been some misunderstanding on the part of the Auditor of the Act of Sederunt of 15th December 1835. It does not apply to a point of this kind. The Lord Ordinary is quite entitled to order a statement of this nature for the sake of getting an explanation, and the fact that he did so cannot be held to affect the question of expenses. I should have been of that opinion even if I had thought that what the Lord Ordinary ordered was unnecessary, but so far from that, I think he was quite right in the course he followed. There have been previous cases of this kind where we have held that the erection of buildings was of great importance in the consideration of the rights of parties, and we did not hold in this case that it was incompetent to have regard to them.

So far as regards the question of the propriety of procedure, the Lord Ordinary was quite right. If a party gains his case on a different plea from that to which the Lord Ordinary has given effect, that may be a ground for a modification of expenses, but not for disallowing them. In this case it was necessary to have all these facts before us, and although we found the terms of the deed sufficient for the decision of the case, we did not determine that we were excluded from inquiry into the matters brought out in this minute under direction of the Lord Ordinary.

Lords Ardmillan and Mure concurred.

The Court sustained the objection.

Counsel for Pursuers (Reclaimers) — Keir. Agents—Webster & Will, S.S.C.

Counsel for Defenders (Respondents)—Rutherfurd. Agents—Leburn, Henderson, & Wilson, S.S.C.

Thursday, February 17.

FIRST DIVISION.

Sheriff of Edinburghshire.

DICK *v.* HUTTON.

Process—Reference to Oath—Minute of Retractation—Bill—Proof.

In an action upon a bill, in which the defence was that the pursuer was not an onerous *bona fide* holder, proof was found by the Sheriff-Substitute to be limited to the pursuer's writ or oath. A minute of reference was lodged and sustained, and a diet fixed, at which, the pursuer being present, an adjournment was allowed on the defender's motion. At the adjourned diet a minute of retractation of the minute of reference was lodged.—*Held* that in the circumstances of the case the minute of reference could not be withdrawn.

This was an appeal from the Sheriff-court of Edinburghshire in an action at the instance of Matthew Watt Dick against John Hutton, for payment of £33, being the sum advanced by the pursuer on the security and in part discount of a bill accepted by the defender for £100, and placed in the pursuer's hands to be discounted.

The defence was that of non-onerosity. The other circumstances of the case, so far as material, sufficiently appear from the interlocutors quoted below.

On 16th April 1875 the Sheriff-Substitute (Gebbie) pronounced the following interlocutor:—"The Sheriff-Substitute, having heard parties' solicitors, and considered the closed record and productions, Finds that the defender can prove only by the writ or oath of the pursuer that he is not an onerous *bona fide* holder of the bill sued on, and allows the defender a proof accordingly.

"*Note.*—The pursuer is not an original party to the bill. The averment that the bill was granted for the drawer's accommodation is one which usually has no effect as against a third party. In the Sheriff-Substitute's opinion there is nothing in the averments which should take the case out of the ordinary rule as regards the mode of process. The allegation that the pursuer obtained the bill from a person who had no right to deliver it is very similar to what was dealt with in *Wilson*, 12th June 1874, 11 Macph. p. 1003. See also *Law* v. *Humphrey*, Scottish Law Reporter, p. 116, 21st Nov. 1874."

The defender then lodged a minute of reference of the whole cause to the pursuer's oath, which was sustained by the Sheriff-Substitute upon the 4th May 1875; at the same time the pursuer was appointed to appear and depone upon the 21st May. On that day, on the defender's motion, the pursuer being present, the diet was adjourned to the 28th May, of which date the Sheriff-Substitute pronounced an interlocutor allowing the defender to lodge a minute of retractation of the minute of reference to oath.

On the 2d June the following further interlocutor was pronounced:—"The Sheriff-Substitute, having heard parties' solicitors upon the defender's minute withdrawing the reference to the oath of the pursuer, No. 16 of process, Finds it in the circumstances incompetent to withdraw the said reference, and in respect the defender did not desire any other or further opportunity for taking the deposition of the pursuer, holds him as confessed, and decerns against the defender in terms of the conclusions of the libel: Finds the defender liable in expenses, &c.

"*Note.*—A reference to oath, once accepted, becomes a judicial contract, from which neither party can resile except under very favourable circumstances. Here the circumstances are not favourable for the defender, notwithstanding the reference; it was not a voluntary reference on his part, but one forced upon him by the compulsitor of a judgment fixing the mode of proof,

which in this Court is now final. Even were the defender allowed to abandon his reference to oath, it would lead to no practical relief, as the finality of the judgment could not be overcome in this Court so as to allow a different mode of proof being adopted. It is thus to him a matter of very little moment whether he be allowed to abandon his reference or not; if relief is to be had, it must be got elsewhere."

An appeal was taken to the Sheriff, who upon the 16th July pronounced the following interlocutor:—"The Sheriff having considered the appeal for the defender against the interlocutor of 2d June 1875, with the process, and heard parties' procurators, recals the interlocutor appealed against: Finds that, by interlocutor of 16th April 1875, it was found that the defender can prove that he is not an onerous *bona fide* holder of the bill sued on only by the writ or oath of the pursuer; that the defender acquiesced in the said judgment, and it is now final; that accordingly he thereafter referred the whole cause to the oath of the pursuer, and the reference was sustained, and two several days were successively appointed for taking the oath of the pursuer, at both of which diets the pursuer attended for the purpose of deponing; that the defender then put in a minute retracting the aforesaid minute of reference, and in respect the defender does not now offer to prove his defence by the oath of the pursuer or by his writ, repels the defences: Decerns against the defender in terms of the conclusions of the libel: Finds the defender liable in expenses," &c.

The defender appealed to the Court of Session, and argued—It was competent to retract the reference upon payment of previous expenses; and it was retracted here before the oath was emitted.

Authorities—Sheriff-Courts Act (16 and 17 Vict. cap. 80, secs. 17 and 19); Act of Sederunt, 10th July 1839, sec. 80; Dickson on Evidence, ii. 927; *Chalmers* v. *Jackson*, Feb. 18, 1813, F.C.; *Bennie* v. *Mack*, Jan. 28, 1832, 10 S. 255; *Hall* v. *Hardie*, March. 10, 1810, F.C. *note*; *Leitches* v. *Lochead*, 1676, M. 16,676; *Jameson* v. *Wilson*, Feb. 19, 1853, 15 D. 414.

At advising—

Lord President—The question before us in this case is whether the appellant is to be allowed to set aside the minute of reference which he lodged upon the 4th of May last. The result of the authorities which have been brought before us is, that the decision must depend upon the circumstances of the case. It is quite competent to allow it, but it is also in the discretion of the Court to refuse it. Upon the 16th April, immediately after the record was closed, the Sheriff-Substitute heard parties, and found "that the defender can prove only by the writ or oath of the pursuer that he is not an onerous *bona fide* holder of the bill sued on." The action was brought to recover the balance of the contents of a bill of exchange, and the chief defence was that the holder was not an onerous *bona fide* holder, and therefore, as regards proof, it was substantially dealt with in that interlocutor. Under the 19th section of the Sheriff Court Act of 1853 the defender was entitled to appeal that interlocutor to the Sheriff, and I think there was a great deal of force in the observation of Mr Rhind, that, on a reading of the 16th and 19th sections of that Act the interlocutor became final if not timeously appealed, and could not afterwards be brought up. What the defender did was to refer the whole cause to the pursuer's oath, and on the 4th May the Sheriff-Substitute sustains the minute of reference, and appoints the pursuer to appear upon the 21st May and depone. Upon that date the diet, on the defender's motion, is adjourned to the 28th May, and then the Sheriff-Substitute is informed that the defender proposes to withdraw or retract the minute of reference, and he is therefore allowed to lodge a minute of retractation. On the 2d June, after hearing parties, the Sheriff-Substitute finds it incompetent to withdraw the reference to oath, and the defender is further held as confessed.

On appeal the Sheriff held that the interlocutor of the 16th April was final, and that the reference to oath having been withdrawn decree must accordingly be given against the defender.

The defender now comes here and wishes to get behind all the proceedings in the Sheriff Court, and to have the interlocutor of the 16th April recalled. That right, it seems to me, to a great extent depends on what will be the consequences of the withdrawal. Suppose he satisfies us that the Sheriff-Substitute is wrong, and that he is entitled to prove by witnesses that the pursuer is not an onerous *bona fide* holder of the bill, the effect must be that all the interlocutors from the 16th April onwards must be recalled, and the parties sent back to the Sheriff Court to begin the litigation again as at the closing of the record. That is a serious result, considering that the balance due upon the bill has been under suspension for this length of time. The defender has himself to blame for any hardship he may suffer from the course he took under the interlocutor of the 16th April, and I cannot think that, in this instance, a party is entitled to have redress against his own folly and error. If the pursuer were to get expenses in the inferior court it would not restore him to the position he occupied at that date, when he was entitled to decree unless upon his own writ or oath turning out affirmative of the reference.

We should not here exercise a proper discretion if we allowed the withdrawal of this minute of reference. It ought to stand as a judicial contract between the parties, and, on these grounds, I think the Sheriff's judgment falls to be affirmed.

Lord Deas—Though this case is not of much importance in itself, it raises an important general question of law. When a reference is made to the oath of a party, and that reference is sustained, a contract is made between the parties, though not an irrevocable one, such as it becomes when the oath is emitted. There have been opinions expressed that when a reference is made and sustained it cannot be withdrawn; but the prevailing opinion is that it is not irrevocable, and under certain circumstances parties have been allowed to retract it. This is not incompetent if the Court choose to sanction it, but good cause must first be shown. I am clearly of opinion that it is not necessary that it should appear there is any improper conduct on the part of the

opposing litigant; there may be other reasons, but we must, in considering whether or not we are to allow a retractation, have regard to its effect as well as to its motive.

This case is distinguished from the cases to which reference has been made, where a retractation was allowed. I am quite of opinion with your Lordship that the appeal must be dismissed.

Lord Ardmillan — This case raises a question of form of procedure. It is important and right to distinguish between cases (1) where any evidence *prout de jure* is competent, and (2) where the pursuer is limited by law to proof by writ or oath. In the first instance, surely it would be the height of injustice to allow a pursuer who, having a bad case and knowing that the defender was aged or nervous, had referred the whole to his oath to retract that reference. In the other instance, I do not think it is incompetent to retract a reference to oath. No case could be put stronger than that put by Lord Gillies when he said (*Chambers* v. *Jackson*, Feb. 18, 1813, 17 F.C. 215), "I refer, for instance, to a man's oath that he is my trustee, because I have lost a back-bond which he gave me. He appears to depone, and I produce the back-bond which I have found in the meantime. It would be most unjust not to let me retract the reference."

In the case before us the Sheriff-Substitute decided that the defender could only prove his case by the writ or oath of the pursuer. That judgment was not appealed to the Sheriff, and nothing was done in regard to it. The party who had that judgment against him presented a minute of reference, which the Sheriff sustained. That was a judicial reference, and the interlocutor sustaining it was pronounced in May. In June following the defender proposed to withdraw or retract the minute, and the Sheriff-Substitute finds "it in the circumstances incompetent to withdraw the said reference," and decerns against the defender.

I think the Sheriff-Substitute was right, and that we should not now permit the reference to be retracted.

Lord Mure —I have come to the same conclusion. I do not think that the Sheriff-Substitute meant to hold that the withdrawal of the reference was incompetent in any case, but merely that it was so in the circumstances of the present case. Indeed the Act of Sederunt which was quoted to us contemplates that effect shall be given to a minute of retractation. All the books lay down that there must be special circumstances in the case before it can be allowed, and I do not think that these exist here.

The following interlocutor was pronounced:—

"Find that the appellant (defender) is not in the circumstances of the case entitled to retract the reference to the oath of the respondent (pursuer), contained in his minute of 4th May 1875; but in respect he now offers to proceed to take the deposition of the respondent on the said reference, appoint Saturday next the 19th instant, at twelve o'clock noon, as a diet for the respondent to appear and depone on the said reference: Grant commission to Donald Crawford, Esquire, Advocate, to take the respondent's deposition, and report the same to the Court, reserving all questions of expenses."

Counsel for Pursuer (Respondent) — Asher — Young. Agents — Millar, Allardice, Robson, & Innes, W.S.

Counsel for Defender (Appellant) — Rhind — Hunter. Agent—Robert Menzies, S.S.C.

Thursday, February 17.

FIRST DIVISION.

[Lord Young.

THOMSON AND OTHERS *v.* HAMILTON AND OTHERS.

Burgh—Stat. 3 *and* 4 *Will. IV. c.* 76—*Construction —Municipal Election.*

In a question as to a municipal election upon a construction of the Statute 3 and 4 Will. IV. c. 76—*held* (*reversing* Lord Young) (1) that the words in section 16 of that Act, "one-third, or a number as nearly as may be to one-third, of the whole council shall go out of office" each year, mean one-third when the number of councillors fixed by the set or usage of the burgh is divisible by three, and as near as may be to one-third when it is not so divisible; and (2) that when any of the members of three years' standing die in the course of the year when they would otherwise have fallen to go out of office, they are to be reckoned among the retiring third, but that when any member dies before entering on his third year of office, he is not to be so reckoned, and the retiring third must be made up of councillors of two years' standing, beginning with him who had the smallest number of votes.

This was an action of reduction, declarator, and payment at the instance of William Garth Thomson, seed merchant, Glasgow, and others, all councillors of the royal burgh of Rutherglen, and registered voters there, against Robert Hamilton, calenderer, Glasgow, and others, also councillors of that burgh, and George Gray, the town-clerk. The conclusions of the summons were—(1) for reduction of a minute of the town-council dated 5th November 1875, whereby it was set forth that the defender Hamilton had, *inter alios*, been elected a bailie of the burgh, and also for reduction of the pretended election; (2) for declarator that Hamilton was not lawfully elected, but had ceased before the 5th November 1875 to be a councillor, and should now be ordained to give up office; and (3) for payment by the defenders of £300 for wilful contravention of the Act 3 and 4 Will. IV. cap. 76.

By the usage of the burgh of Rutherglen the number of members of council was eighteen, and the election of councillors fell to be regulated, in the first place, by the Statute 3 and 4 Will. IV. cap. 76. The first Tuesday of November was the day fixed under the