SUMMER SESSION, 1889.

COURT OF SESSION.

Tuesday, May 14.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

DICKSON *v.* BRYAN.

Sheriff—Appeal—Competency—Value under £25 *—Sheriff Court Act* 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 22.

A Sheriff Court petition craved warrant to commit the defender to prison, therein to remain until he restored certain pointed effects, or paid to the pursuer the sum of £9, 8s. 8d., being double the appraised value of the said articles. *Held* that as the prayer of the petition showed that the value of the cause did not exceed £25, it was not competent to appeal the case to the Court of Session.

Adam Dickson, horse dealer, Edinburgh, on 8th August 1888 obtained a decree in the Small Debt Court, Edinburgh, against William Bryan then residing at 4 Lauriston Place for £4, 10s. By said decree execution was ordained to pass thereon by poinding and sale after a lapse of ten days.

On 27th August Bryan's effects were duly poinded in virtue of the decree

By the Personal Diligence (Scotland) Act 1838 (1 and 2 Vict. cap. 114), sec. 30, it is enacted, that "If any person shall unlawfully intromit with or carry off the poinded effects, he shall be liable, on summary complaint to the Sheriff of the county where the effects were poinded, or where he is domiciled, to be imprisoned until he restore the effects, or pay double the appraised value."

In January 1889 Dickson presented a petition in the Sheriff Court at Edinburgh praying that Bryan might be committed to prison and detained there until he restored the effects poinded in August 1888, or made payment of £9, 8s. 8d., being double their appraised value.

He averred that the defender had carried off the poinded effects out of the jurisdiction of the Court to Melrose where he alleged they now were.

The defender averred that his whole effects were on 28th September 1888 sequestrated for rent, that the *nexus* of sequestration was preferable to the pursuer's diligence of poinding, and that the pursuer was not entitled to sell the poinded effects without finding caution for the said rent.

The defender pleaded, *inter alia*, that the action was incompetent.

On 18th February 1889 the Sheriff-Substitute (RUTHERFURD) sustained the defender's first plea-in-law, and dismissed the action, and on 4th March 1889 the Sheriff (CRICHTON) on appeal adhered to the Sheriff-Substitute's interlocutor.

The following note was appended to the Sheriff's interlocutor:—"The Sheriff is of opinion that this petition against the defender (which is brought under 1 and 2 Vict. c. 114) for carrying off the effects poinded by the pursuer in virtue of the decree obtained against the defender under the Small Debt Act is incompetent. Proceedings should have been taken against the defender under the Summary Procedure Act of 1864 and 1881."

The Sheriff Court (Scotland) Act 1853 (16 and 17 Vict. cap. 80), sec. 22, provides—"It shall not be competent . . . to remove from a Sheriff Court, or to bring under review of the Court of Session . . . any cause not exceeding the value of £25." . . .

The pursuer appealed to the Court of Session.

On the motion that the case be sent to the roll the defender objected (1) to the competency of the appeal upon the ground that the value of the cause as shown by the prayer of the petition was under £25, and that by sec. 22 of the Sheriff Court (Scotland) Act 1853 (16 and 17 Vict. cap. 80), an appeal in such cases was incompetent—*Singer Manufacturing Company* v. *Jessiman*, May 14, 1881, 8 R. 695; (2) that under sec. 30 of the Personal Diligence Act 1838 (1 and 2 Vict. cap. 114), no provision was made for a review of the Sheriff's determination by this Court.

Argued for the appellant—The question was not a pecuniary one, but really came to be, how a creditor could work out his remedy—*Jeffrey* v. *Duncan*, February 5, 1852, 14 D. 442. The present appeal was not on the merits, but involved a question of procedure—*Purves* v. *Brock*, July 9, 1867, 5 Macph. 1003; *Wilson* v. *Aberdeen*, July 16, 1872, 10 Macph. 971; *Henry* v. *Morrison*, March 19, 1881, 8 R. 692. What the pursuer asked here was truly a decree *ad factum præstandum*, and in such cases the mere money value of the action was of no account—*Thomson* v. *Barclay*, February 27, 1883, 10 R. 694.

At advising—

Lord President—This is an application under the Personal Diligence Act of 1838, and what the prayer of the petition asks is "to grant warrant to officers of Court to commit to prison the person of the defender, therein to remain until he restore the following effects poinded on 27th August 1888, at 4 Lauriston Street, Edinburgh, in virtue of a Small Debt decree, dated the 8th day of August in the same year at the pursuer's instance," and then follows the list of articles poinded, after enumerating which the prayer proceeds "or until he pays to the pursuer the sum of £9, 8s. 8d. sterling, being double the appraised value of the said articles, all as provided for in the Act 1 and 2 Vict. cap. 114, sec. 30."

Now, it is clear from the terms of this application that if the defender pays the £9, 8s. 8d. he will be free from imprisonment, and will fully implement the prayer of the petition. That being so, the case does not at all resemble alternative conclusions in a summons when there is a demand for specific implement or damages. In such a case as that the option is in the pursuer who claims the specific article or a sum instead which he deems equivalent. Here the option is with the defender, who, if he does not restore the articles poinded, is liable in double their appraised value.

The objection which has been taken to the competency of the present application is that the value of the cause is shown by the prayer of the petition to be under £25, seeing that double the appraised value of the articles poinded is only £9, 8s. 8d., and it is clear that if the defender makes payment to the pursuer of that sum he completely fulfils the prayer of the petition.

It is very difficult to dispute that a cause like the present, the value of which is so distinctly shown in the prayer of the petition, falls under section 22 of 16 and 17 Vict. cap. 80, which by very express negative words excludes the jurisdiction of this Court in every case where value does not exceed £25.

In the case of *Henry* v. *Morrison*, to which reference was made and which related to the giving up to the pursuer by the defender of certain I O U's (the total value of which was under £25), the action really was one *ad factum præstandum*, as it was clear that the vouchers might be of much more value to the parties than the mere pecuniary sum which they represented, and the competency of the action was accordingly sustained. On the other hand, in the case of *Singer* v. *Jessiman* what was demanded was the delivery of a certain machine, or alternatively, the payment of a sum much under £25. In that case the Court decided that an appeal to the Court of Session was incompetent. A comparison of these two cases helps us I think to come to a very clear decision as to what we ought to do in the present case, and I am therefore for sustaining the objection to the competency of this appeal.

Lord Shand and Lord Adam concurred.

Lord Mure was absent.

The Court refused the appeal.

Counsel for the Pursuer—M'Lennan. Agent—R. Broatch, L.A.

Counsel for the Defender—Crole. Agent—E. Nish, Solicitor.

Tuesday, May 14.

FIRST DIVISION.

[Lord Fraser, Ordinary.

DUFF *v.* THE NATIONAL TELEPHONE COMPANY (LIMITED).

Reparation—Negligence—Barrow Left in Public Place—Injury to Infant—Relevancy.

A two-wheeled barrow, which on account of its size could not be received into its owner's workshop, was left by his servants in an adjoining lane, and secured to the wall by a chain. Some children who were playing in the lane, mounted the barrow, and were swinging on it, when they slid to the back of it, and brought it suddenly down on the head of a child aged three years, who died shortly after in consequence of the injuries which he then sustained.

In an action of damages by the father—*held* that as a two-wheeled barrow was not a dangerous article no blame was to be attached to the owner for leaving it chained in the lane, and that no relevant averment of fault had been made by the pursuer to entitle him to an issue.

John Duff, house painter, Edinburgh, raised an action against the National Telephone Company (Limited) concluding for payment of £250 as damages and *solatium* for the injury and subsequent death of his son William Henry Duff, who, he alleged, was fatally injured through the fault of the defenders.

The pursuer averred—"On Sunday the 26th August 1888, about twelve o'clock noon, a child of the pursuer named William Henry Duff, three years of age, was playing with some other children in a lane leading from Gayfield Street to Broughton Court. Some of the said children were playing with a two-wheeled hurley belonging to the defenders, which had been left in the lane by the defenders' workmen. The hurley was entirely unprotected, and two of the children had got on to it, and were swinging on it, when they slid to the back of it, and brought it suddenly and violently down on the head of the said William Henry Duff. It struck the said William Henry Duff, causing a deep wound on the front part of