quite as wide as those of the clause which came up for construction in the case of *Mackay* v. *Parochial Board of Barry*, 10 R. 1046." That case is very important, not merely because of the lucid judgment of Lord Rutherfurd Clark, but because the subsequent case of *Beattie* v. *M'Gregor*, 10 R. 1094, presented an opportunity to the late Lord President to bring together the law laid down in *Mackay* with the law established by another class of case which had occurred frequently during the previous twenty years, of which *Kirkwood* v. *Morrison*, November 6, 1877, 5 R. 72, may be taken as a type. His Lordship pointed out that in each case of the kind the question is one of construction of the contract, and turning to the clause in *Mackay's* case, he says—"Referring to that clause, Lord Rutherfurd Clark makes these observations in his very careful judgment, a report of which was laid before us—'The contracting parties may create a tribunal for settling differences which may occur in the course of executing the works, and which has no other function. But of course they may do more and extend it to the decision of any claim which may arise out of the contract.' Now, if parties would only keep in view that there are two kinds of reference, one of which includes only disputes arising in the execution of the contract, while the effect of the other is to refer to arbitration every claim and obligation that at any time arises out of the contract; if parties would only keep this in view there would be an end to cases of this class."

It appears to me that the case before us belongs to the wider class, and that effect must be given to it when disputes are shown on record to have arisen such as I have described. This leads to the result that the judgment of the Sheriff is right.

It appears from the examination of the contract which has taken place at the bar, that the arbiter has full power to issue an effective award, and therefore it is not necessary to keep the case in Court in order to give effect to the award in favour of the successful party.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent on circuit.

The Court dismissed the appeal.

Counsel for the Pursuer—A. S. D. Thomson. Agents—Shiell & Smith, S.S.C.

Counsel for the Defenders—H. Johnston—Salvesen. Agent—A. C. D. Vert, S.S.C.

Tuesday, October 27.

FIRST DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

M'GILLIVRAY *v.* MACKINTOSH AND ANOTHER.

(*Ante*, vol. xxviii., p. 488.)

Process—Appeal—Competency.

In an action raised in a Sheriff Court, the Sheriff after certain findings assoilzied the defenders and found the pursuer liable in expenses. The pursuer having appealed, the First Division on 17th March 1891 affirmed the Sheriff's interlocutor as regarded certain of its findings, assoilzied the respondent, and found the appellant liable "in the expenses in this Court." The process having been re-transmitted to the Sheriff Court, the defenders had the account of expenses incurred by them in the Sheriff Court taxed, and the Sheriff-Substitute granted decree in their favour for the taxed amount. On appeal the Sheriff adhered.

Held (1) that the interlocutor of the First Division of 17th March having exhausted the cause, the interlocutors subsequently pronounced in the Sheriff Court were incompetent; and (2) that it was competent to appeal against them.

In an action of damages for breach of promise of marriage at the instance of Hugh M'Gillivray against Mrs Mackintosh, wife of and residing with William Mackintosh, farmer, Barivan, Nairn, the Sheriff (IVORY) on 9th October 1890 pronounced an interlocutor to this effect—"That the pursuer has failed to justify his delay in insisting on the defender fulfilling her promise, and that the defender has proved that when she married William Mackintosh the contract which had been entered into between her and the pursuer had been abandoned. . . . Finds in law that the defender is not liable to the pursuer in damages: Therefore to the above extent and effect sustains the defences, assoilzies the defender, and decerns: Finds the pursuer liable to the defender in expenses, and remits to the Auditor to tax the amount thereof and report."

The pursuer having appealed, the First Division on 17th March 1891 pronounced the following interlocutor—"Affirm the interlocutor of the Sheriff dated 9th October 1890, in so far as it 'finds that the pursuer has failed to justify his delay in insisting on the defender fulfilling her promise, and that the defender has proved that when she married William Mackintosh the contract which had been entered into between her and the pursuer had been abandoned:' Find also in law, in terms of said judgment, that the defender is not liable to the pursuer in damages, and to that extent sustain the defences: Assoilzie

the defender (respondent) from the conclusions of the libel, and decern: Find the appellant liable to the respondent in expenses in this Court, and remit the account thereof to the Auditor to tax and to report."

On 13th May the Court approved of the Auditor's report on the respondent's account of expenses, and decerned against the appellant for the taxed amount.

The process having been re-transmitted to the Sheriff Court, the defenders had the account of expenses incurred by them in that Court audited, and thereafter enrolled the case, and moved the Sheriff-Substitute to decern in their favour for the taxed amount.

On 13th July 1891 the Sheriff-Substitute (RAMPINI) pronounced this interlocutor—"Having considered the account of expenses for the defenders, with the Auditor's report thereon, and the note of objections to the Auditor's report, Sustains the objections to the first four items, amounting to £4, 16s.: *Quoad ultra* repels the objections, and with these variations approves of the Auditor's report: Finds that the defender's expenses, as taxed and adjusted in terms of these findings, amount to the sum of £48, 1s, 3d. sterling, and decerns against the pursuer in favour of the defenders for the same."

The pursuer appealed, and on 23d September the Sheriff (IVORY) dismissed the appeal and affirmed the interlocutor appealed against; found the pursuer liable in the sum of £1, 1s. as the expenses of the appeal; and decerned against him for payment of that sum to the defenders.

The pursuer appealed to the Court of Session.

The defenders objected to the competency of the appeal, and argued—In the Sheriff Court the appellant had maintained that the account of expenses should have been audited in the Court of Session. Now he adopted a different attitude, maintaining that no expenses were due. The expenses in the Sheriff Court were carried by the decree for expenses in the Court of Session—*Sinclair* v. *Mossend Iron Co.*, May 30, 1855, 17 D. 784, and the interlocutors in the Sheriff Court were pronounced merely for the purpose of enabling the defenders to work out the decree in their favour. They were therefore not subject to review, and the appeal was incompetent—*Tennents* v. *Romanes*, June 22, 1881, 8 R. 824; *Thomson & Company* v. *King*, January 19, 1883, 10 R. 469. *Drummond's* case was different from the present, the grounds of decision there being, that when a sheriff has disposed of the merits of an action without pronouncing any finding as to expenses, he is not entitled subsequently to deal with the question of expenses.

The pursuer argued—It was not incompetent to appeal against a finding of expenses—*Fleming* v. *North of Scotland Banking Company*, October 20, 1881, 9 R. 11. Further, it was clearly established by authority that it was competent to appeal against interlocutors which had been incompetently pronounced—*Drummond* v. *Bryden*, December 10, 1869, 8 Macph. 277. In this case the interlocutors appealed against were incompetent. The interlocutor pronounced by the First Division on 17th March contained only a limited finding of expenses in the defenders' favour, and as the Sheriff Court expenses were not mentioned in that interlocutor, they must be held as not awarded—*Grant* v. *Rose*, June 30, 1835, 13 S. 1007; *Macdonald* v. *M'Eachen*, February 18, 1880, 7 R. 574. As the interlocutor of 17th March had exhausted the cause, the process ought not to have been transmitted to the Sheriff Court, and the subsequent interlocutors pronounced in the Sheriff Court were incompetent—*Hamilton* v. *Bennet, &c.*, March 3, 1832, 10 S. 426.

At advising—

LORD PRESIDENT—In considering the question raised by Mr Baillie as to the competency of this appeal, it is necessary to consider what is the substance and subject-matter of the appeal. The appeal is brought for the purpose of raising the question whether the Sheriff-Substitute had the right to deal with the question of expenses at all. The appeal therefore impeaches the competency of the Sheriff-Substitute's judgment, and that upon the ground that the judgment of this Court of 17th March 1891 disposed finally of the question of expenses, by giving the defender the expenses in the Court of Session, and by leaving the rest alone. The appellant says that after this the Sheriff had no power to take up the question of expenses at all.

With regard to the merits of the appeal, that is to say, the competency of the proceedings in the Sheriff Court, I am of opinion that the appellant is right. When we see that the question to be raised under the appeal is a question of competency, we are brought straight to the case of *Drummond* v. *Bryden*, 8 Macph. 277. That case raised the question, whether after a Sheriff-Principal has pronounced an interlocutor dismissing an action and making no finding as to expenses, it was competent for the Sheriff or the Sheriff-Substitute to pronounce further interlocutors dealing with the question of expenses? and what the Second Division found was, that the later interlocutors were incompetently pronounced, in respect that the earlier interlocutor (that is, the interlocutor dismissing the action) had exhausted the cause, and on appeal they recalled those later and incompetent interlocutors. While the ground on which the plea of incompetency is maintained here is not the same in this as in *Drummond's* case, by reason of this case having been exhausted by interlocutor pronounced in this Court, and not by interlocutor pronounced in the Sheriff Court, the principle of that case, it appears to me, applies by parity of reasoning to the present. Our decision does not interfere with the authority of the cases of *Tennent* v. *Romanes*, and *Thomson* v. *King*, quoted by Mr Baillie, in which the essential element of the incompetency

of the judgment appealed against is wanting.

LORD ADAM — The first interlocutor brought under appeal is the interlocutor of the Sheriff-Substitute of 13th July 1891, whereby "he finds that the defenders' expenses . . . amount to the sum of £48, 1s. 3d. sterling, and decerns against the pursuer in favour of the defenders for the same." That interlocutor was appealed to the Sheriff, who on 23d September adhered, finding the pursuer liable in a small sum of additional expenses.

It is to be observed that these interlocutors disposed only of the question of expenses, and it is on that ground that Mr Baillie objects to the competency of the appeal, and he refers to the case of *Tennents* v. *Romanes*. That case seems to me to have no bearing on the present. It was a case in which an interlocutor was pronounced disposing of the merits of the cause, and also dealing with the question of expenses. No appeal was taken against that interlocutor, and it was extracted, and then an interlocutor was pronounced decerning for the taxed amount of the expenses. The Lord President then said—"To bring up to this Court a decree for expenses, to the effect of letting the appellant get into a review of the interlocutors upon the merits, would be by a mere evasion to set at naught the provisions of the statute"—that is to say, when the interlocutor disposing of the merits and expenses of the cause had become final, it would have been an evasion of the statute to re-open the case by an appeal against the decree for expenses. I agree with that statement of the Lord President, but the case is not the same here. The present appeal is taken on the ground that the interlocutors appealed against were incompetently pronounced, and there is authority for the view that when a decree for expenses has been incompetently pronounced it may be appealed against.

On the merits, that is to say, the question whether the interlocutors appealed against were incompetently pronounced, I agree in thinking that they were. I have no doubt that the interlocutor of this Court dated 17th March last disposed of the whole cause. After findings in fact and law it proceeds—"Assoilzie the defender respondent from the conclusions of the libel, and decern: Find the appellant liable to the respondent in expenses in this Court." That appears to me to be the only valid finding of expenses in this case. The case of *Sinclair* v. *Mossend Iron Co.*, where a general finding of expenses in this Court was held to carry expenses in the Court below, appears to me to have no bearing on the present, because where there is a special finding of expenses in favour of a party, that necessarily excludes a general finding in his favour. If that is so—as there was no remit to the Sheriff to deal with the question of expenses—I do not see what authority he had to take up the case at all. When the case was brought before him he ought to have found that he could not deal competently with it. I agree therefore that the whole proceedings in the Sheriff Court since the interlocutor of this Court of 17th March last were incompetent.

LORD M'LAREN—By its interlocutor of 17th March 1891 the Court of Session dealt with the first appeal, and, as I think, exhausted the conclusions of the action, and in doing so we pronounced a finding of expenses in this Court in favour of the defender, but nothing was said of the expenses in the Sheriff Court. It appears to me to follow that it is not competent, after that interlocutor of the Court of Session, for the Sheriff to entertain a motion on the subject of expenses, the conclusions of the action being exhausted.

On the question of authority I agree with your Lordship in the chair that there is complete parity of reasoning between this case and the case of *Drummond* v. *Bryden*. Why we did not give the defender expenses in the Sheriff Court I do not know. If the Sheriff had power to review Court of Session judgments, possibly cause might have been shown for altering our decision. The only tribunal, however, now open to the defender is the House of Lords, and I am not sure that even that remedy is available, because I believe it is a rule of that Court not to entertain appeals merely on the subject of costs.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"Find that the interlocutors pronounced in the Sheriff Court subsequent to 17th March 1891 were incompetently pronounced, in respect that the interlocutor of this Court of 17th March exhausted the cause, and the Sheriff had no further power to deal with the expenses of process: Find that this appeal is competent: Recal the interlocutors appealed against, and decern: Find the appellant entitled to the expenses in this Court and in the Sheriff Court subsequent to 17th March 1891," &c.

Counsel for the Pursuer—Rhind—Hay. Agent—William Officer, S.S.C.

Counsel for the Defenders — Baillie. Agents—Watt & Anderson, S.S.C.

Wednesday, October 28.

FIRST DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

GRAY *v.* WEIR.

Reparation—Wrongous Use of Diligence—Sequestration in Security of Rent—Warrant to Carry Back Furniture Removed by Tenant

A party who had taken a house for six months at a rent of £5, removed part of his furniture before the termination of his tenancy to a farm five