Tuesday, June 14.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WEIR *v.* TUDHOPE.

Process—Appeal—Competency—Abandoned Appeal—Extract—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100)—*Sheriff Courts Act* 1876 (39 *and* 40 *Vict. cap.* 70).

An interlocutor pronounced in the course of an action in the Sheriff Court was appealed, but the appeal was abandoned as the interlocutor was not appealable. The action proceeded, and the pursuer obtained extracts of the succeeding interlocutors until the Sheriff by final interlocutor disposed of the case by decerning against the defender, who appealed to the Court of Session.

On objections by the respondent to the competency of the appeal—*held* (1) that the abandoned appeal being incompetent, did not make final the interlocutor to which it referred; and (2) that in spite of the Sheriff Court extracts, the appeal to the Court of Session submitted to review all the interlocutors pronounced previous to the one directly appealed against, in terms of the 69th section of the Court of Session Act of 1868.

The Act of Sederunt, 10th March 1870, provides—"4. (5) On the expiry of the said period of eight days after the appeal has been held to be abandoned as aforesaid, if the appellant shall not have been reponed, and if the respondent does not insist in the appeal, the judgment or judgments complained of shall become final, and shall be treated in all respects as if no appeal had been taken against the same, and the clerk of court shall forthwith retransmit the process to the clerk of the inferior court."

The Court of Session Act 1868 (31 and 32 Vict. cap. 100) provides—Sec. 68. "A party may take an appeal within the space of twenty days after the date of the judgment of which he complains, during which period of twenty days extract shall not be competent; but on the expiration of the foresaid period, if no appeal shall have been taken, the clerk of court may give out the extract, it being competent, however, to take such appeal at any time within the period of six months from the date of final judgment in the cause, unless the judgment has been previously extracted or implemented." Sec. 69. "Such appeal shall be effectual to submit to the review of the Court of Session the whole interlocutors and judgments pronounced in the cause."

The Sheriff Courts Act 1876, sec. 32, provides—"Notwithstanding anything contained in section 68 of the Court of Session Act 1868, extract of any judgment, decree, interlocutor, or order pronounced in the ordinary Sheriff Court may be issued at any time on the expiration of fourteen days from the date hereof, unless the same shall, if competent, have been sooner appealed against, and no extract of any such judgment, decree, interlocutor, or order shall be issued before the expiration of fourteen days from the date thereof, unless the sheriff or sheriff-substitute who pronounced the same shall allow the extract to be sooner issued."

In April 1891 William Logan Weir, manufacturer, Lesmahagow, brought an action in the Sheriff Court of Lanarkshire to have Mary Tudhope, innkeeper, Lesmahagow, interdicted from encroaching upon a certain piece of ground claimed by the pursuer, to decern her to remove all stones, wood, &c., she had put down upon the said piece of ground, and to ordain her to restore a hedge she was alleged to have removed, and to restore the ground to the condition in which it was previously.

Upon 24th July 1891 the Sheriff-Substitute (BIRNIE) found that the respondent had inverted the possession of the lane referred to, and that she was not entitled to do so, "interdicts her as craved until the rights of parties are settled by declarator or otherwise, and with these findings continues the case until the first Court day in the Winter Session, and decerns."

Against this interlocutor the defender appealed to the First Division of the Court of Session upon 7th August 1891.

Upon 24th September 1891 the process was retransmitted, "in respect of the abandonment of the appeal."

Upon 24th October 1891 the Sheriff-Substitute (DAVIDSON) pronounced this interlocutor:—"Having considered the process, decerns and ordains the defender to remove and to restore all as craved at the sight of William Clarkson, builder, Lesmahagow, within fourteen days from this date under certification, and decerns, reserving to pronounce further."

The defender appealed to the Sheriff.

Upon 8th December 1891 the Sheriff (BERRY) pronounced this judgment:—"Having heard parties' procurators, and considered the case under reference to the annexed note, Dismisses the appeal: Allows the fourteen days mentioned in the Sheriff-Substitute's interlocutor to run from this date, and remits to him for further procedure, and decerns.

"*Note.*—On 24th July 1891 the Sheriff-Substitute pronounced an interlocutor, finding that the defender had inverted the possession had of the lane referred to, and that she was not entitled to do so; and he thereby interdicted her as craved until the rights of parties should be settled by declarator or otherwise. Against that interlocutor the defender presented an appeal to the First Division of the Court of Session, but afterwards abandoned it; and the case was accordingly re-transmitted in usual form to the Sheriff Court. Subsequently the Sheriff-Substitute on 24th October 1891 pronounced an interlocutor, carrying out in effect the judgment previously pronounced on 24th July. An appeal to this Court has now been taken against that interlocutor of 24th October; and the appeal cannot be said to be incompetent in as far as that interlocutor is concerned. It was stated however, at the bar for the appellant, that

the object of the appeal is to bring under review the interlocutor of 24th July, in terms of the provision of the Sheriff Court Act of 1876, section 29, which enacts that an appeal to the Sheriff 'shall be effectual to submit to the review of the Sheriff the whole interlocutors and judgments pronounced in the cause.' I am of opinion that that provision cannot be held to operate so as to bring up for review by the Sheriff an interlocutor against which an appeal had previously been taken to the Court of Session, and which had been abandoned. When an appeal has been taken to the Court of Session and abandoned, the judgment appealed against becomes, as I take it, final both in that Court and in the inferior Court. Indeed, that seems to be the import of the Act of Sederunt of 10th March 1870, section 3 (5), which provides that after an appeal has been abandoned, 'the judgment or judgments complained of shall become final.' That provision has been applied by the Court of Session in more than one case. In *Watt Brothers* v. *Foyn*, 7 R. 126, for example, where an interlocutor had become final by default, it was held incompetent to bring it under review by note of suspension or other form of appeal, and the Lord President said that what was meant by the section was, that when an appeal falls by default, the judgment of the Inferior Court becomes final, not only there, but absolutely, as if it had been reviewed on the merits. Lord Shand pointed out in the same case that were the rule different the consequences might be serious, by affording to a party desiring delay the means of procuring it to his opponent's disadvantage at a trifling cost.

"It was not contended that if the interlocutor of 24th July was to be regarded as final, the subsequent one did not properly follow as a consequence of it. The appeal therefore must be dismissed."

Upon 24th December the Sheriff-Substitute pronounced this interlocutor:—"On pursuer's motion, in respect the defender has failed to obtemper the interlocutors of dates 24th October last and 8th September current, grants warrant and authority to Mr William Clarkson, builder, Lesmahagow, to execute the removal and restoration which the defender was ordained by the said interlocutors, reserving to pronounce further, and decerns."

And again upon 18th February 1892:—"Having heard parties' procurators and made avizandum with the report by Mr Clarkson No 28/1 and whole process, finds it unnecessary to pronounce further on the merits: Decerns against the defender in favour of the pursuer for the sum of £3, 4s. 4d., being the amount incurred by the pursuers in obtempering the order of date 24th December last: Finds the defender liable to the pursuer in expenses: Remits the account to the Auditor to tax and report, and decerns."

The pursuer obtained extracts of all the interlocutors from 24th July 1891 to 24th December 1891.

The defender appealed to the Second Division of the Court of Session.

The pursuer and respondent objected to the competency of the appeal, and argued—(1) This appeal was incompetent because the interlocutor of 24th July 1881 had been already appealed to the Court of Session and abandoned. Under section 4, sub-section 5, of the Act of Sederunt, 10th March 1870, eight days after the abandonment of the appeal the judgment became final. As the case had once been abandoned it could not now be insisted in. It was true that the interlocutor appealed against on that occasion was not an appealable interlocutor, but still the appeal having been taken and abandoned it became final. (2) The appeal was incompetent because all the interlocutors from that of 24th July 1891 to that of 24th December 1891 had been extracted, and so could not be appealed. Although the Court of Session Act 1868, section 68, allowed an appeal to be taken within twenty days of the date of the interlocutor, the Court of Session Act 1876, section 32, provided that any interlocutor of the Sheriff Court might be extracted within fourteen days, and if not appealed against it became final. An extracted interlocutor could not be appealed—*Tennents* v. *Romanes*, June 22, 1881, 8 R. 824. The last interlocutor that was pronounced was merely executorial, and could not have the effect of bringing up all previously pronounced interlocutors as provided in the Court of Session Act—*Malcolm* v. *M'Intyre*, October 19, 1877, 5 R. 22.

The appellant argued—(1) It was admitted that the interlocutor of 24th July 1891, against which an appeal had been previously taken, was not an appealable interlocutor, so the appeal was incompetent and must have been abandoned or dismissed as incompetent. Abandonment therefore could not make the appeal final, as the appeal had never been competent. (2) The only extracted judgments which are not appealable are final judgments. An interlocutor is not a final interlocutor until the question of expenses has been disposed of. The only interlocutor which disposed of the question of expenses was that of 18th February 1892, which was now appealed against. An appeal against an interlocutor brings up all the previous interlocutors—*Cross & Sons* v. *Bordes, &c.*, May 22, 1879, 6 R. 954.

At advising—

LORD JUSTICE-CLERK—This case raises a somewhat important question of competency of appeal from the Sheriff Court. What the appellant desires is to obtain redress against an interlocutor pronounced by the Sheriff-Substitute on 24th July 1891. That interlocutor stands in this position, that an appeal was taken against it to the Court of Session, and was afterwards abandoned. It was abandoned because it was at that stage an incompetent appeal. That it was incompetent does not admit of any dispute. But although it was an incompetent appeal the Sheriff has held that he is barred from reviewing the interlocutor upon an appeal taken on a subsequent interlocutor of the Sheriff-Substitute, on

the ground that where an appeal is taken and abandoned the interlocutor becomes final under the Act of Sederunt of 10th March 1870. It appears to me that the Sheriff has erred in taking this view. If an appeal to the Court of Session against the interlocutor of 24th July was competent, then undoubtedly its abandonment would under the Act of Sederunt have given finality to the interlocutor. But if there was no right of appeal against that interlocutor at that stage, then it cannot be held a default not to proceed with the appeal. To proceed with it could only result in its being dismissed as incompetent, and if dismissed as incompetent, then the interlocutor to which it related could still be submitted to review whenever an interlocutor against which an appeal was competent should come to be pronounced. For in that case the appeal against the appealable interlocutor, whether taken to the Sheriff Court or to the Court of Session, has the effect of submitting all previous interlocutors to review, unless such interlocutors, being appealable, have not been appealed against within a certain time, and have on the lapse of that time been extracted. I am of opinion that if a party erroneously takes an appeal against an interlocutor against which it is incompetent to appeal, and on discovering its incompetency drops it, he does not thereby lose the right to have review of that interlocutor when an appeal has become competent by the pronouncing of a subsequent interlocutor.

It is not doubtful that the present appeal is competent in this sense, that it is against the first interlocutor in the case against which it was competent to take an appeal to the Court of Session subsequent to the interlocutor allowing a proof, which was acquiesced in. But another objection is stated, to the effect that the respondent has obtained extract of certain interlocutors in the cause, and that accordingly they cannot now be submitted to review. This is at first sight a formidable objection. For undoubtedly the theory of the effect of extract of an interlocutor is that it takes out of the process the matter to which the interlocutor relates. And if the respondent has validly taken out extract of these interlocutors, and if the ordinary effect of extract is allowed, then the appellant is shut out from review of these interlocutors. This would be a most anomalous result. For it would in every case put it in the power of one of the litigants absolutely to exclude his opponent from obtaining any review of interlocutors which might go to the very essence of the case. For the scheme of the statutes in regard to appeals, both within the Sheriff Court itself and from the Sheriff Court to the Court of Session, is to bar appeals except at certain stages of the cause, and when any of these stages has been reached, to empower the Court to review all previous interlocutors which were not appealable by themselves. But if while a party aggrieved is thus restrained from obtaining review of an interlocutor, his opponent can extract it, and by so doing can finally exclude review of that part of the process, then it is in the power of a litigant to render nugatory the 69th section of the Court of Session Act of 1868 and the 29th section of the Sheriff Courts Acts of 1876, by which it is declared that an appeal against an appealable interlocutor shall "be effectual to submit to review" "the whole interlocutors and judgments in the cause, not only at the instance of the appellant but also at the instance of every other party appearing in the appeal, to the effect of enabling the Court (or Sheriff) to do complete justice without hindrance from the terms of any interlocutor in the cause, and without the necessity of any counter appeal."

The clause under which extract has been obtained here of interlocutors which were not appealable is clause 32 of the Sheriff Courts Act of 1876, and it is as follows—"Notwithstanding anything contained in section 68 of the Court of Session Act 1868, extract of any judgment, decree, interlocutor, or order pronounced in the ordinary Sheriff Court may be issued at any time on the expiration of fourteen days from the date thereof, unless the same shall, if competent, have been sooner appealed against, and no extract of any such judgment, decree, interlocutor, or order shall be issued before the expiration of fourteen days from the date thereof, unless the sheriff or sheriff-substitute who pronounced the same shall allow the extract to be sooner issued." The obvious purpose of this clause is to abbreviate the time within which extract is barred. It does nothing more by enacting words. If it does anything more it is by implication only. It is contended that as the words "if competent" are used in regard to the appeal, it is implied that every interlocutor or judgment as to which appeal is incompetent may be extracted after fourteen days. I do not so read the section. It appears to me that to read it so would be to give it a strained interpretation, and that it cannot be held to make interlocutors extractable which were not extractable before it was passed. To hold that it did would be to alter the law of extract by mere implication. I hold that the words of section 32 where they refer to extract do so with reference to the existing law and practice as to what interlocutors are extractable, and do not extend this power of extract so as to bar review of interlocutors against which an appeal cannot be taken, and which can only be reviewed by an appeal taken at a subsequent stage of the cause. But even if it were to be held that under section 32, if it stood alone, such interlocutors could be extracted, and with the ordinary effect of extract, I am further of opinion that the very broad and distinct terms of section 69 of the Court of Session Act lay it upon us as a duty to take up an appeal against any appealable interlocutor, as submitting to the review of this Court all previous non-appealable interlocutors, regardless of anything done which according to ordinary practice or according to any previous statute would remove them

beyond our power. No words could be broader or more clear. The appeal is declared "effectual" to submit them to review, "to the effect of enabling the Court to do complete justice without hindrance from the terms of any interlocutor in the cause." I cannot hold that the power and effect of that clause can be defeated by anything done in the Inferior Court. Our duty is prescribed to us, and we must have the power to carry out that duty. I certainly cannot hold by mere implication that a party has the power to prevent us from doing that complete justice which the Legislature has declared that it enables us and therefore directs us to do. I therefore hold that the objection to the competency of our dealing with the interlocutors in this case should be repelled. Whether the taking out of the extracts was competent may be a question, although I should be inclined to hold, on the grounds which I have already stated, that it was not. But even if competent, it cannot restrain us from the duty imposed upon us by the emphatic terms of the section under which we sit to hear this appeal. Standing that direction to the Court, no such effect can be given to any extract as to bar its operation.

I am therefore of opinion that the objection taken to the competency of this appeal should be repelled, and the respondent found liable in the expenses of the discussion.

LORD YOUNG—I am of the same opinion. I must confess for myself that I never thought either of the points raised attended with reasonable doubt. The whole question is admittedly one of mere form. Two objections have been taken to the competency of this appeal. Now, an appeal is one form of review. There are other forms—two in particular—suspension and reduction.

Here, appeal as a mode of reviewing the judgment of the Sheriff is objected to on two grounds. In the first place, it is objected to on the ground that one interlocutor leading up to another was the subject of an admittedly incompetent appeal, and that appeal was abandoned. The proposition submitted to us is this, that the abandonment of the incompetent appeal, which if not abandoned would have been dismissed, has the effect of rendering a subsequent interlocutor appealed against final. Such a proposition is extravagant on the face of it. I am not prepared on any rule of law to hold that the reasonable abandonment of an incompetent appeal will make another interlocutor which can be appealed against and has never been reviewed final. I speak of reasonable abandonment, because there is no doubt power on the part of the Court to check a system of incompetent appeal taken for delay and afterwards abandoned. I am therefore against the extravagant argument that the reasonable abandonment of an appeal, which if it had not been abandoned would have been dismissed as incompetent, makes an interlocutor final.

The second objection was that the appeal was incompetent because the interlocutors against which the pursuers have a true interest to appeal have been extracted. We had the argument advanced that extract has a marvellous effect upon an interlocutor; that the interlocutor thereby becomes almost sacred; something which appeal cannot touch. I do not think that an extract is more than a certificate that the decree extracted has been pronounced. All the extractor does is to certify that a judgment has been pronounced and a certificate that a judgment has been pronounced does not gain anything by being called an extract. There again I think the respondent's argument extravagant for the reasons which your Lordship has pointed out. It is the merest and shallowest question of form. Your Lordship pointed out that it is required by the Court of Session Act 1868 in the interests of public convenience as to the form of review that an appeal against the interlocutor submits to the review of the Court all previous interlocutors. Here the suggestion is that some other process of review must be resorted to, such as a suspension or a reduction. That is simply nonsense, and abhorrent to all my ideas of public interest and views of public expediency.

I repeat, that in the technical arguments advanced by the respondent I have not from the first entertained any doubts as to the competency of this appeal, and I am clearly of opinion that the objections to its competency should be repelled.

LORD RUTHERFURD CLARK—On the first point I have no doubt, and agree with your Lordships.

On the second point I have entertained considerable doubts, and these have not been altogether removed. But I think on the whole that the judgment which your Lordship proposes is probably the safest.

LORD TRAYNER—The matter to be determined at present is, whether this appeal is competent, and if competent, what interlocutors can thereby be brought under review. There can be no doubt that the appeal is competent so far as concerns the interlocutor directly appealed from. That interlocutor, dated 18th February 1892, is a final judgment of the cause, and therefore appealable, and the appeal has been noted within the time allowed by statute for appealing. This appeal, however, will be of no practical use to the defender unless under it he can submit to review certain interlocutors previously pronounced and of which the interlocutor of 18th February last was the logical result. The appellant submits that his appeal brings up for review "the whole interlocutors and judgments pronounced in the cause" in respect it is so provided by the 69th section of the Court of Session Act 1868. This is objected to by the respondent on two grounds—First, that as regards one of the interlocutors (that namely of 24th July 1891) an appeal had been noted which was thereafter abandoned, and that such abandonment makes that particular interlocutor final—a view which the Sheriff has adopted; and second, that as regards all the interlocutors (except that

of 18th February last) review is excluded by reason of these interlocutors having been extracted before the present appeal was taken.

The first of these grounds of objection appears to me to be untenable in the circumstances of the present case. If a party notes an appeal against an appealable interlocutor or judgment, and abandons that appeal, such abandonment will have the effect ascribed to it by the Sheriff no doubt. That interlocutor or judgment is thenceforward final against the party appealing and not insisting in the appeal, and so it was decided in *Watt's* case. But the distinction between *Watt's* case and the present is very clear, for there the appeal taken and not insisted in was from an appealable interlocutor, while here the interlocutor against which the appeal was noted was not appealable. The appeal noted in this case against the interlocutor of 24th July 1891 was incompetent—it could not have been insisted in—and being incompetent must be treated *pro non scripto.* The appellant cannot be said to have abandoned an appeal which under the statute he could not take.

The second ground of objection stated by the respondent is attended with more difficulty, and in dealing with it regard must be had to the terms of the 68th section of the Court of Session Act 1868, and the 32nd section of the Sheriff Court Act 1876. By the former of these sections it is provided that "a party may take an appeal within the space of twenty days after the date of the judgment of which he complains, during which period of twenty days extract shall not be competent, but on the expiration of the foresaid period, if no appeal shall have been taken, the clerk of Court may give out the extract." Now, it is plain that that provision only contemplates the issuing of an extract of a judgment against which an appeal is at its date competent, but against which no appeal has been taken. If an extract is issued in such circumstances, appeal is no longer open to the party complaining, although he may have review of the judgment under a different form of process. The question then comes to be, how far this provision has been altered by the 32nd section of the Act of 1876. It provides that "Notwithstanding anything contained in section 68 of the Court of Session Act 1868, extract of any judgment, decree, interlocutor, or order pronounced in the ordinary Sheriff Court may be issued at any time on the expiration of fourteen days from the date thereof, unless the same shall, if competent, have been sooner appealed against." It is maintained for the respondent that this provision last read allows extract to be issued of any judgment pronounced by the Sheriff, fourteen days after its date, whether it is a judgment against which appeal can then competently be taken or not. If this is so, then a judgment of which extract has competently been issued would not, according to our practice, be reviewable on appeal whatever other form of review remained available to the party complaining of the judgment.

I cannot say that the mode in which the 32nd section of the Sheriff Court Act is expressed absolutely excludes the view presented by the respondent. On the contrary, the respondents' view presents what is a possible reading of that clause. But I cannot adopt that reading for several reasons. In the first place, in my opinion, the only purpose of the provision in the Sheriff Court Act was to modify the provision in the Court of Session Act as to the time within which an extract of a judgment might be issued. It made extract competent within fourteen instead of twenty days after the date of the judgment to be extracted, and as a necessary consequence changed the time for appealing from twenty to fourteen days. I think that was the only change which the provision in the Sheriff Court Act was intended to make on the previous provision of the Court of Session Act. In the second place, the clause relied on by the respondent does not deal, at least does not deal directly, with the existing rights of appeal, as these stand under the provisions of the Court of Session Act. These must therefore be taken still as regulated by that Act, under which appeal is only excluded in respect of extract, where that extract has been issued of a judgment against which it was competent at the date of that judgment to appeal. In the third place, if the clause in the Sheriff Court Act is read as having the effect contended for by the respondent, then it is put within the power of one party to an action by extracting any interlocutor or judgment—by statute not appealable at its date—to preclude his opponent from the appeal which would at a later stage of the cause be competent to him, which is in effect to allow a party to a suit, to deprive his opponent of a right of appeal conferred on him by statute. And lastly, the respondents' view cannot be sustained unless it is held that the right of appeal expressly given by the Court of Session Act has, by implication, been recalled by the provision in the Sheriff Court Act, whereas it is with us a constitutional rule that a right of appeal expressly given cannot be recalled by implication.

The present appeal has been duly brought against the first, and indeed the only interlocutor pronounced in the cause against which an appeal to this Court was competent. I am, therefore, of opinion that the appellant is entitled under this appeal to submit to review the whole interlocutors pronounced previous to the one directly appealed against, in terms of the 69th section of the Court of Session Act 1868.

It was stated in the course of the argument in this case that under the 32nd section of the Sheriff Court Act 1876 it was now competent to extract any interlocutor or order pronounced by the Sheriff, and that an interlocutor, for example, closing the record could be so extracted. I do not think the clause in question authorises anything of the kind. If it is competent to extract an interlocutor closing the record, it must be equally competent to extract an interlocutor continuing the

cause or making avizandum, which is absurd. The clause must be read in the light of existing law and practice, and what, in my opinion, it authorises is this—that extract of a decree, judgment, interlocutor, or order, may be issued within fourteen days, provided that, according to law and practice, the interlocutor or judgment is extractable.

The Court found that the appeal was competent.

Counsel for Appellant — Lees — Craigie. Agent—John B. Young, S.S.C.

Counsel for Respondent—Sym. Agent D. Lister Shand, W.S.

Tuesday, June 21.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

DUTHIE *v.* DUTHIE BROTHERS & COMPANY, AND ANOTHER.

Process — Amendment of Record — Conditions—Acceptance—Court of Session Act, 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.

If a party who is allowed to amend his record upon certain conditions, puts his amendments on record, he is barred from thereafter objecting to the conditions upon which he has been allowed to amend.

Opinions by Lord Adam and Lord M'Laren, that under the 29th section of the Court of Session Act 1868, the Lord Ordinary has power to attach other conditions to the making of amendments than the mere payment of a sum of expenses.

An action was raised at the instance of Duthie Brothers & Company, shipowners, 6 Crosby Square, London, E.C., part owners and managers of the steam-ship "Telephone" of Aberdeen, against Robert Duthie, as the owner of 5/64th shares in said steamer, for payment of sums amounting to about £500, which the pursuers alleged to be due to them by the defender as his shares of debts incurred in connection with the management of said steamship.

The defender in answer denied liability for the greater part of the sum sued for, and parties were allowed a proof of their averments, the diet being fixed for 18th February 1892.

On 18th February the diet of proof was discharged on the motion of the pursuers, and in respect it was stated that the defender desired to amend his record.

The defender thereafter proposed to make extensive amendments on his defences. In the proposed amendments he denied the pursuers' title to sue as managing owners of the "Telephone" on various grounds, and, *inter alia*, averred that the title which the pursuers had produced under a diligence consisted of three bills of sale of 13/64ths, 14/64ths, and 13/64 shares in said ship, which were granted in favour of James, William, and Alexander Duthie respectively, who were the individual partners of the firm of Duthie Brothers & Company, and conveyed no right or title in said shares to the pursuers Duthie Brothers & Company.

On 16th March the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"The Lord Ordinary having heard parties, opens up the record: Allows the defender to amend the record as proposed at the bar, on condition of the pursuers being entitled to sist the individual partners of the firm of Duthie Brothers & Company as pursuers of the action, and of the defender paying to the pursuers the expenses incurred by them connected with the diet of proof fixed for 18th February last: Allows an account of said expenses to be lodged, and remits the same to the Auditor to tax and report; and appoints the cause to be put to the Adjustment Roll."

The defender did not ask for leave to reclaim against this interlocutor, but put his proposed amendments on record and authenticated them.

A minute was thereafter lodged for James Duthie, William Duthie, and Alexander Duthie, partners of the firm of Duthie Brothers & Company, as such partners, and as individuals, craving the Lord Ordinary to sist them as pursuers.

On 17th May the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary, in respect of minute 90 of process, sists the minuters in terms thereof: Allows the pursuers to answer the defender's amendments, and the same having been done, of new closes the record on the summons and defences, Nos. 1 and 5 of process, and appoints the cause to be put to the Procedure Roll: Grants leave to reclaim."

The defender reclaimed, and argued—The Lord Ordinary had gone beyond the powers vested in him by the 29th section of the Court of Session Act in making the defender's amendment conditional on the pursuers' being entitled to alter the instance of their summons by having the individual partners of their firm sisted. When a pursuer came into Court in one capacity, he could not alter or add to it without the defender's consent—*Hislop* v. *Macritchie's Trustees*, June 23, 1881, 8 R. (H. of L.) 95 (*per* Lord Watson, 106); *Turnbull* v. *Veitch*, July 18, 1889, 16 R. 1079. The defender was not debarred from objecting to this condition by the fact that he had put his amendments on record, for the interlocutor imposing the condition could not be reclaimed against without leave, and the mere omission to ask for leave to reclaim could scarcely be held to exclude him from subsequently bringing the Lord Ordinary's interlocutor under review.

Argued for the pursuers—The defender was barred from now objecting to the conditions on which his amendments were allowed, inasmuch as he had impliedly consented to the conditions by putting his amendments on record. Further, the con-