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In order to secure regularity of publication, it is occasionally necessary to insert the Reports of Cases slightly out of the order of dates on which they have been decided.

COURT OF SESSION.

Saturday, October 15.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

BROTHERSTON *v.* LIVINGSTON AND SIME.

Process—Appeal—Competency—Value of Cause—Sheriff Court Act 1853 (16 *and* 17 *Vict. c.* 80), *secs.* 22 *and* 24.

In an action where two defenders were sued in the Sheriff Court, conjunctly and severally, for a sum not exceeding £25, and one of them for an additional sum, which made the total amount claimed from him more than £25, the Sheriff, upon the preliminary pleas, directed the case to proceed against him, and assoilzied the other defender.

An appeal taken against this interlocutor by the pursuer was *held* incompetent, on the ground that it was either an interlocutor in a separate suit for less than £25, or an interlocutor which did not dispose of the whole merits of the cause.

William Alexander Sked Brotherston, Carlethan, Lasswade, brought an action in the Sheriff Court at Edinburgh against Josiah Livingston, 4 Minto Street, Edinburgh, and John Sime, Greenbank, Lasswade, praying the Court "to grant decree against the above-named defenders ordaining them, conjunctly and severally, or severally, to pay to the pursuer the sum of £22, 8s. sterling, with interest thereon at the rate of £5 per centum per annum from the 22nd day of December 1890 till payment; and to grant decree against the above-named defender John Sime, ordaining him to pay the pursuer the sum of £1, 1s. 10d. sterling, with interest thereon at said rate from said date till payment."

In an appeal upon the preliminary pleas, the Sheriff (BLAIR) assoilzied the defender Livingston from the conclusions of the action, and remitted to the Sheriff-Substitute to proceed with the cause so far as directed against the defender Sime.

Against this interlocutor the pursuer appealed to the First Division.

When the case was called the defenders objected to the competency of the appeal, on the ground (1) that the interlocutor appealed against was not an interlocutor disposing of the whole merits of the cause as required by the Sheriff Court Act of 1853, sec. 24; and (2) if it were so with regard to Livingston, the action against him was for a sum of less than £25, and therefore not appealable—Sheriff Court Act 1853, sec. 22. The sum of £1, 1s. 10d. for which Sime was sued, along with interest on the other sum, admittedly made the amount he was asked to pay more than £25, but the former sum was not in the action against Livingston, which was a separate action for less than £25. There was no community of interest between the parties, therefore the cases relied on by the appellant did not apply, and Lord Neaves' opinion in *Dykes'* case was in the respondents' favour.

Argued for the appellant—(1) There was community of interest here, and therefore really one action, which being for more than £25 was appealable—*Dykes* v. *Merry & Cuninghame*, March 4, 1869, 7 Macph. 603; *Nelson, Donkin, & Company* v. *Browne*, June 10, 1876, 3 R. 810. (2) This must be taken as a final judgment in the cause as against Livingston; if appeal were not taken now, the decree assoilzieing him would be extracted, and it would be impossible to appeal against it at a later date.

At advising—

LORD PRESIDENT—I am of opinion that this appeal is incompetent. The dilemma seems to me to be complete. If the conclusion for £1, 1s. 10d. is part of the cause in which Mr Livingston is interested, then the whole merits of that cause have not been disposed of. If, on the other hand, that sum does not form part of the action against Livingston, it is a claim for less than £25.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court dismissed the appeal as incompetent.

Counsel for the Pursuer and Appellant—M'Lennan. Agent—Robert Broatch, L.A.

Counsel for the Defenders and Respondents—Wilson. Agents—Henry Wakelin & Hamilton, S.S.C.

Friday, January 11, 1889.

SECOND DIVISION.

[Sheriff of Nairn.

DAVIDSON *v.* MACPHERSON.

Landlord and Tenant — Reclamation of Waste Lands—Right of Tenant to Repudiate Obligations of Lease in respect of Agricultural Depression—Specific Implement or Damages.

A tenant under an agricultural lease for nineteen years bound himself to reclaim certain waste lands during its currency. After partially implementing this obligation he refused to proceed with his reclamation further. In an action by the landlord to have him ordained to do so, he pleaded that the land was not adapted for reclamation, that to bring it into cultivation would involve his financial ruin, and that he was justified in abandoning the work in respect of changes in the condition of agriculture not foreseen by either of the parties when the lease was entered into. The Court *held* the defence irrelevant.

Observations per curiam as to whether the landlord's remedy in such circumstances is specific implement or damages.

By lease dated 7th January and 22nd March 1881 Hugh Davidson of Cantray let to Angus Macpherson the farm of Cantray-down in the county of Nairn. Macpherson had for about twelve years previously been tenant of the farm under an improving lease, and had expended large sums in improvements and reclamations. By the lease of 1881 he bound himself, *inter alia*—"(*Fourth*) To improve and reclaim and bring under proper cultivation such an extent of the pasture or waste land on the farm hereby let as shall, with the present extent of arable land thereon, make at Whitsunday 1891 a total extent of arable land of at least 280 imperial acres, and that by annual instalments of not less than one-tenth part of the deficiency at entry of the said total extent."

The extent of the arable land on the farm at the date of the lease was 220 acres or thereby, and in the five years between 1881 and 1886 Macpherson had only reclaimed 20 acres. The landlord accordingly in December 1886 brought an action in the Sheriff Court of Inverness, Elgin, and Nairn at Nairn, concluding that a remit be made to a person of skill to visit and inspect the farm, and report to the Court "whether the defender has up to date implemented the obligations undertaken by him in the said lease to improve, reclaim, and bring under proper cultivation the proportion of the pasture and waste land on the said farm which by the lease he bound himself by annual instalments of one-tenth part to improve, reclaim, and bring under proper cultivation, so that there should at Whitsunday 1891 be a total extent of arable land, old and new, on the farm of at least 280 imperial acres, there having been 220 acres or thereby of arable land at the commencement of the lease, and if there is not such proportion and extent reclaimed and brought under cultivation, to report what works are necessary to bring up the arable land to the extent at which it ought to stand at the date hereof, and the probable cost of such works, and to ordain the defender to execute such works at the sight and to the satisfaction of an inspector appointed by the Court; or otherwise, or failing his doing so within such period as the Court shall appoint, to grant warrant to the pursuer to execute such works at the sight and to the satisfaction of said inspector, and on the cost of the several works to be executed hereunder being ascertained and fixed by the Court, to ordain the defender to pay the same to the pursuer, including the costs of said report." There were also conclusions based upon other claims in the lease relative to the ditches and fences on the farm which need not be further referred to.

The pursuer founded upon the claim in the lease above quoted, and averred (Cond. 5) that no attempt had been made to improve or bring under cultivation any of the waste lands on the defender's farm since 1885, and that he had refused to proceed with the improvement of it as undertaken.

He pleaded—"(1) The defender having refused, or at least delayed to implement