Held that the interlocutor of the Sheriff was appealable to the Court of Session.

This was an appeal from a judgment of the Sheriff of Roxburgh (SALVESEN) in an action of filiation and aliment at the instance of Christina Tait, farm worker, Colmslie, Galashiels, against Richard Lees, farm servant, Kittyfield, near Melrose.

The prayer of the petition was, "To ordain the defender to pay to the pursuer —(*First*) The sum of £2, 2s., with the legal interest thereon from 13th December 1901 till payment; (*second*) the sum of £6, 10s. per annum for seven years."

The pursuer averred that she gave birth to an illegitimate child on 13th December 1901, of which the defender was the father.

On 10th April 1902 the Sheriff-Substitute (BAILLIE) closed the record and allowed a proof, which was taken on 8th May.

On 6th May the pursuer's child died, and accordingly on 10th May she lodged a minute in process, by which she restricted the conclusions of the petition to £2, 2s. of inlying expenses and the sums of £1, 12s. 6d. and 19s. 2d. as aliment for the child until its death.

On 16th May the Sheriff-Substitute assoilzied the defender from the conclusions of the action.

The pursuer appealed to the Sheriff, who on 19th June 1902 recalled the interlocutor of the Sheriff-Substitute, and decerned against the defender for payment of the sums concluded for, as restricted by the minute of 10th May.

The defender appealed to the Court of Session.

Counsel for the respondent objected that the appeal was incompetent in virtue of the provision of the Sheriff Court Act 1853, section 22 (quoted in rubric), on the ground that the sum sued for at the date when the interlocutors of the Sheriff-Substitute and the Sheriff were pronounced was less than £25, and therefore that the value of the cause was below the statutory limit—*Dobbie* v. *Thomson*, June 22, 1880, 7 R. 983, 17 S.L.R. 677; *Cairns* v. *Murray*, November 21, 1884, 12 R. 167, 22 S.L.R. 116.

Counsel for the respondent argued that the appeal was competent. Competency was to be determined by the value of the cause at the date of litiscontestation. That took place at latest when the record was closed, and the value of the cause then was above £25.

LORD PRESIDENT—It is not necessary in this case to consider whether, if the value of the cause had been limited before the record was closed and parties had joined issue, this would have affected the competency of an appeal. But here not only was the value of the cause above the limit for appeal when the record was closed, but also when the proof was taken. The case was appealable at that stage, and I do not think that anything which has since happened could affect the right of appeal.

LORD ADAM—I am of the same opinion. The Sheriff Court Act declares that it shall not be competent to appeal "any cause not exceeding the value of £25." The general rule, as I have understood, is to look at the conclusions of the action and see whether they exceed the statutory amount. Then again I think that if an appeal is competent to one of the parties it must be competent to the other, and accordingly that it cannot be in the power of a pursuer by merely restricting the conclusions of an action to deprive his opponent of a right of appeal. I agree with your Lordship that it is unnecessary in this case to consider whether or not, *in initio litis*, and before the record is closed—in other words, before the parties have joined issue—it is competent to restrict the conclusions of an action so as to render it unappealable. That was what was decided in the case of *Cairns*, and I have nothing to say against that decision. But here the record was closed and issue joined and a proof taken in an action whose conclusions as they then stood, unrestricted, clearly made it a cause exceeding in value £25. In these circumstances, notwithstanding the minute of restriction subsequently put in, I think the appeal is competent.

LORD M'LAREN—We are accustomed to consider an appeal from the Sheriff Court as a new action to certain effects, and if the Legislature had provided that the value of the cause, as originated by the note of appeal, or, according to the older practice, by bill of advocation, was to determine the competency of the appeal, that would be a perfectly intelligible limitation. But as that is not the law, and as the competency of the appeal is determined by the value of the cause in the Sheriff Court, I cannot see how that criterion can be affected by circumstances supervening after the question between the parties has been fixed by litiscontestation, or at least by closing the record.

LORD KINNEAR concurred,

The Court repelled the objection to the competency of the appeal.

Counsel for the Pursuer and Respondent —Mitchell. Agents—Winchester & Nicolson, S.S.C.

Counsel for the Defender and Appellant —MacRobert. Agent—George F. Welsh, Solicitor.

Wednesday, January 14.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

BOYLE & COMPANY *v.* MORTON & SONS.

Contract—Construction—Undertaking to Indemnify "from any legal action"—Party Giving Indemnity to have the "Conduct of the Case"—Right to Appeal.

The sellers and the purchasers of an article as to which there were doubts

whether it infringed a certain patent, entered into an agreement whereby the sellers undertook to indemnify the purchasers from any legal action that might arise in connection with the use of the article by the purchasers. An action for infringement of patent was raised against the purchasers in the High Court of Justice in England, and on this being intimated to the sellers they gave a fresh undertaking to pay costs and damages, if any, "on the distinct understanding that the conduct of the case is left entirely in our hands." In the court of first instance the defence was conducted by the sellers' solicitors, and judgment was given against the purchasers. A correspondence followed between parties' agents embodying negotiations (which failed) for the adjustment of terms on which an appeal might be taken. The purchasers ultimately refused to lend their name for an appeal except upon condition of a deposit being made to meet costs and damages. The judgment pronounced became final. In an action in the Court of Session against the sellers at the instance of the purchasers for payment of the costs awarded against and paid by them in the action referred to, the defenders maintained that the pursuers, by refusing to enter an appeal except on conditions which they were not entitled to impose, had interfered with the "conduct of the case," and so were not entitled to enforce the contract of indemnity, having failed to fulfil their part of it.

Held (*rev.* judgment of Lord Stormonth Darling, Ordinary) that the pursuers were not bound under their agreement to give their name for the purposes of an appeal—*per curiam* on the ground that the correspondence after the adverse judgment showed that neither party so interpreted the contract; and *per* the Lord Justice-Clerk and Lord Young also on the ground that a party to an action who contracts to leave the conduct of the case to another is not bound to authorise an appeal.

Observations per Lord Trayner and Lord Moncreiff as to the latter ground of judgment.

This was an action at the instance of Boyle & Company, manufacturing confectioners, The Japperies, Blackburn, Lancashire, against Morton & Sons, engineers, Belhaven Works, Wishaw, Lanarkshire, in which the pursuers, founding on a contract of indemnity, sought payment from the defenders of the costs of an action which they had unsuccessfully defended.

The facts of the case, which were admitted, were as follows:— (This narrative is in part taken from the opinion of the Lord Ordinary (STORMONTH DARLING)—"The contract of indemnity arose out of a sale in 1896 by the defenders to the pursuers of a vacuum boiling-pan, as to which there was some doubt whether it infringed a patent called Kane's Patent. Accordingly, by letter to the pursuers dated 2nd December 1896 the defenders undertook to 'indemnify you from any legal action that may arise in connection with your using our vacuum pan for boiling sugar and glucose up to hard crack.' In May 1900 Kane raised an action for infringement of his patent against the pursuers in the Chancery Division of the High Court of Justice in England. The pursuers at once communicated with the defenders, and the result was a fresh undertaking by the defenders' solicitors, on their behalf (by letter dated 20th June 1900), to pay costs and damages, if any, 'on the distinct understanding that the conduct of the case is left entirely in our hands, and necessary instructions are given to us to enable us to lodge the defence in good time.'"

The pursuers accordingly authorised the defenders' solicitors to proceed with the defence of the action. In that action judgment was given against the present pursuers by Mr Justice Byrne.

On 16th May 1901 the defenders' solicitors, in intimating the result of Kane's action to the pursuers, wrote in the following terms, viz.—"We much regret that the decision was unfavourable, but we hope that as large interests are involved an appeal will be decided upon, and that you will be able to do your part by giving formal instructions if other parties will be responsible for the costs."

On 23rd May the defenders' solicitors wrote to the pursuers' solicitors as follows—"We have to-day had a consultation with counsel, who advised that the trade ought to appeal in this case, and Messrs Boyle will consult you to-morrow as to their position if they instruct us to give notice of appeal." In their letter they asked for instructions from the pursuers for an appeal, and the letter proceeded—"At a small cost, and almost no responsibility, Messrs Boyle can be of great assistance to those members of the trade who, like themselves, have used the vacuum pan. We quite agree with them that they should not ultimately undertake the responsibility of the appeal, and if the other members of the trade will not come forward and subscribe their money, and effectually guarantee Messrs Boyle against everything but their proportion, not only of their own costs but of the costs which the other side have recovered and may recover in the Court of Appeal or House of Lords, that then Messrs Boyle should withdraw."

The pursuers' solicitors replied by telegram on 24th May in the following terms—"Boyles will not appeal unless costs incurred by plaintiffs, and damages and costs to be incurred on the appeal, are at once provided for satisfactorily."

On the same day the defenders' solicitors wrote as follows—"We much regret the decision communicated to us by telegram to-day, and hope that your clients will reconsider the matter. In our letter we placed the whole facts clearly before you. We left out of consideration the indemnity by Messrs Morton, as you are aware that we advised them to give the indemnity

asked last year, but the question has now passed beyond that stage. We believe that your clients agreed with Mr Horn that it was useless to hold the meeting of the trade on Tuesday, owing to the Whitsuntide holidays preventing attendance, and Messrs Morton & Sons are not in a position to bear or guarantee the costs of a possible appeal to the House of Lords any more than your clients, so that it is quite impossible for the terms of your telegram to be complied with. We feel sure that you will agree with us that the mere giving of the notice of appeal does not alter Messrs Boyle's position, or add in any way to their liabilities, as they can at any time withdraw the notice, and it in no way prejudices any claim they may have against Messrs Morton."

The pursuers ultimately demanded a deposit of £700 to meet costs and damages already incurred. This demand was not complied with, and no appeal was entered.

In the present case the pursuers pleaded—"(1) The defenders having agreed to indemnify the pursuers for the costs awarded against and paid by them in said action, are bound to repay the same to the pursuers."

The defenders pleaded—"(3) The pursuers, by their refusal to enter an appeal except upon conditions which they were not entitled to insist in, having interfered with the defenders' conduct of the case, and thereby broken their agreement with the defenders, are barred from recovering the sum sued for."

On 21st May 1902 the Lord Ordinary sustained the third plea-in-law for the defenders, and assoilzied them from the conclusions of the summons.

Opinion.—"Both parties maintain that this case can be decided on the admitted facts, and I agree with them. The question is whether the pursuers have lost the right which they had under contract with the defenders to be indemnified from the costs of an action by refusing to allow an appeal against an adverse judgment to be taken in their name."

[*After the narrative quoted above*]—"This (the undertaking of 20th June 1900) was not a new contract, but a mode of working out the old. Probably it was the mode on which the defenders would have been entitled to insist without express stipulation, but it is unnecessary to consider that, because the stipulation was admittedly agreed to. And really, as it seems to me, the sole question comes to be, whether the pursuers can be said to have left the conduct of the case entirely in the hands of the defenders, when they refused to let them appeal from the adverse decision of the Judge of first instance except upon condition of their depositing or finding security for £700.

"Now, if this be the question, I do not think that it would be elucidated in any way by a proof. A proof could not show whether there were probable grounds for an appeal. The presumption, I suppose, must always be the other way. But it is admitted by the pursuers that counsel advised an appeal, and therefore it cannot be said that the defenders were asking anything inconsistent with the ordinary 'conduct of the case' when they demanded that the pursuers should continue to give the use of their name in order to permit of counsel's advice being followed and the soundness of the judgment being tested in the regular way. An appeal within a court is, in a question of this kind, to be viewed more favourably than an appeal from one court to another altogether distinct, and in particular an appeal to the House of Lords. The one is normal, the other is exceptional. It is said that the judgment of Mr Justice Byrne made an entire change of circumstances, and justified the pursuers in demanding security, which they would not have been entitled to demand before. That the judgment made a difference in the situation I do not doubt; it made the success of the defence more doubtful, perhaps much more doubtful, than it had originally been; but there is no allegation that it affected the financial ability of the defenders to bear the consequences of failure. And if the pursuers were content at the outset of the action to rely on the defenders' solvency, I see no reason for holding that they had a right to change their attitude merely because the first judgment was adverse. In short, I see no necessary connection between the one thing and the other.

"I therefore come to the conclusion that the pursuers, by refusing to appeal except on a condition which they were not entitled to impose, failed to fulfil their own part of the contract, and so disabled themselves from demanding performance of the defenders' part. I decide nothing beyond that. In particular, I must not be held as giving any countenance to the notion indicated in the defences that the pursuers may be liable to repay to the defenders, as damages for breach of contract, the expenses paid by the latter to their own solicitors. For that would seem to imply that these sums would have been recovered if an appeal had been taken, or, in other words, that the appeal would have been successful. Now, nobody can say that. It is quite a different thing to say that the defenders ought to have been allowed the chance of succeeding, and that by refusing to give them a chance the pursuers have lost their right to take benefit by the contract. The proper plea to sustain is, I think, the third plea for the defenders, and it must carry absolvitor and expenses."

The pursuers reclaimed, and argued—The stipulation with regard to the "conduct of the case" only meant that the defenders' solicitors were to be the sole solicitors for the defence of the action. If the agreement for indemnity gave the defenders a right to take an appeal as a step in the conduct of the case they should have done so. If they were not entitled to do so without the consent of the pursuers, then the pursuers were entitled to withhold their consent, and the Lord Ordinary's ground of judgment failed. Apart from the terms of the agreement now relied on by the defenders, the Lord Ordinary had not given due weight to the correspondence

which followed the adverse judgment, from which it appeared clearly that in the contemplation of parties a totally new arrangement had to be made.

Argued for the respondents—The letter of 20th June 1900 containing the stipulation as to the "conduct of the case" was a mere working out of the indemnity, which was given with regard to "any legal action that might arise." The pursuers having accepted that indemnity without security were not entitled afterwards to demand security. An agent entrusted with the conduct of a case in the Court of Session would be empowered to reclaim against an Outer House judgment without consulting his client. In any event, if the "conduct of the case" did not include a right to appeal, at least it deprived the pursuers of the right to refuse to enter an appeal. Any misunderstanding that arose in the correspondence carried on by the defenders' solicitors did not affect the defenders.

At advising—

LORD JUSTICE-CLERK—In this case I find myself unable to agree with the conclusion at which the Lord Ordinary has arrived. There can be no doubt that at the time when the judgment in the case regarding the patent was given, the defenders were under obligation to relieve the pursuers of the costs incurred by them in consequence of their defence and the adverse judgment. Had both they and the defenders agreed to accept that judgment and proceeded no further, the liability of the defenders to indemnify the pursuers could not have been disputed. Can then the refusal of the pursuers to take the case further by appeal unless on new terms deprive them of their right to be indemnified? It was argued that the original agreement was binding to carry the case through the Court in which it was brought, and that this must be held to have included an appeal from the single judge to a bench sitting in the same Court to hear appeals. And this is the view to which the Lord Ordinary has given effect by sustaining the defender's third plea-in-law, which is, that the pursuers, by their refusal to enter an appeal except upon conditions that they had no right to insist in, having interfered with the defenders' conduct of the case, and thereby broken their agreement with the defenders, are barred from recovering the sum sued for. The Lord Ordinary holds that the pursuers by agreeing at the outset of the litigation to leave the conduct of the case in the hands of the defenders' solicitors were bound if the defenders desired to appeal to continue to give their names on the existing terms. I have come to the opposite conclusion. The pursuers having given their consent to a case being brought in their name, were, I think, bound by their agreement while the case was pending. But when a judgment had been pronounced the case was disposed of. Final judgment was pronounced. The judgment had the qualities of an operative judgment, unless execution were stayed by a competent appeal. Therefore I do not think it can be implied that in making the agreement which they did the pursuers tied their hands, so that they were bound to take an appeal upon the same terms of indemnity as before. I think that they were entitled as a condition of proceeding further to dictate the terms upon which they would do so. I do not consider the question to be, as the Lord Ordinary puts it, whether they had a right to change their attitude. The question is, were they bound already by an agreement which covered a proceeding by appeal, so that they had no right to refuse to go on? I am of opinion that they were not.

But it is further quite clear from the correspondence that when they demurred to going on they were dealt with by the defenders upon the footing that there was no obligation upon them to go on unless terms could be adjusted. There is never a hint that they were tied up by agreement, and had no right to refuse to go further. The whole negotiations after the judgment proceeded on the footing that parties required to adjust and were endeavouring to adjust the terms on which further proceedings should be taken. The situation was treated on both sides as one in which new negotiation and new agreement were necessary. That would in my opinion be a sufficient ground for the disposal of the case. If the defenders were to take up the ground that the pursuers were already bound to appeal if they desired them to do so, that contention should have been made at the outset. The pursuers cannot, I think, be held to have broken an agreement which the other party never called on them to fulfil in the sense in which they now maintain it, because they have failed to obtain another agreement after entering into negotiations for adjusting it.

I am therefore on these grounds of opinion that the pursuers are entitled to decree.

LORD YOUNG—I am of the same opinion, and perhaps it would be sufficient for me to say that I concur, for I think it is clear that under the only concluded agreement between the parties the pursuers were under no obligation to appeal or to give their name for that purpose. Attempts were made to induce them to do so, but these attempts failed, and in any case the correspondence shows distinctly that the defenders concurred in the view that the pursuers were under no obligation to appeal.

LORD TRAYNER—The view which the Lord Ordinary has taken of the letter of indemnity on which this action is founded is, that it proceeded upon a condition which the pursuers have not fulfilled. The condition was that the "conduct of the case" there referred to should "be left entirely" in the hands of the defenders' solicitor. The Lord Ordinary is of opinion that the condition so expressed involves the right of the defenders to appeal any judgment which was adverse to them, such appeal to run (like the original defence) in the pursuers' name, and, primarily at least, so far as damages and costs were concerned, at their risk. Having

regard to the Lord Ordinary's opinion and the argument we have heard in support of it, I cannot say that the view so taken of the letter of indemnity is altogether inadmissible. But there is another view of the letter of indemnity which I regard as at least equally admissible, and which I prefer. It is, that "the conduct of the case" meant nothing more than that the case should be conducted before the Court where it was then depending by the defenders' solicitor, without interference on the part of the pursuers or their solicitor. The defenders' solicitors were to be the judges of what defence should be stated, what counsel engaged to support the defence, and, in short, were "to conduct" the case in that sense in whatever way they thought most for the advantage of their clients. And this they were allowed to do up to the pronouncing of a judgment against them. But I am unable to read the letter as stipulating for the right to appeal in the pursuers' name against an adverse judgment by the court of first instance to the court of appeal, and possibly to the House of Lords. I cannot so read it, because I think it plain from the correspondence which passed between the parties (or their solicitors), after a judgment adverse to the defenders had been pronounced, that the parties themselves did not so read it. The correspondence appears to me to establish that the defenders fully admitted that they had no right to appeal except with the pursuers' consent, which was over and over again asked, and it is not once suggested in the correspondence that the defenders had that right in respect of the terms in which the letter of indemnity had been expressed. It seems to me sufficient to refer to the letter of 24th May 1901, written by the defenders' solicitors, in which they say that the case has "passed beyond that stage," that is, the stage in reference to which the letter of indemnity had been given. In the same letter they urge the pursuers to give notice of appeal in the hope that they (the defenders) may induce "the trade" to prosecute it, they themselves not being "in a position to bear or guarantee the costs," &c., and they conclude by saying that giving notice of appeal would not in any way add to the pursuers' liabilities, as they could at any time withdraw the notice and yet "in no way prejudice any claim" they might have against the defenders. I think this letter, as well as several others, quite inconsistent with the view now maintained by the defenders, and which the Lord Ordinary has adopted. I therefore think the judgment reclaimed against should be recalled, and decree as concluded for pronounced.

LORD MONCREIFF—If we had nothing to guide us except the correspondence which preceded the letter of indemnity and relative authority by Boyle & Co. to conduct the defence in their names, there might, I think, have been grounds for holding that the intention of parties was that the indemnity and authority were not intended to be confined to the proceedings before Mr Justice Byrne, but gave Morton & Son the discretionary power of appealing at least to the court of appeal in the event of the judgment being against them. There is no indication at that stage that Morton & Co. were not considered good for damages and costs. When a party, for instance, authorises another to use his name in defending an action in the Sheriff Court or in the Court of Session, I should say that, *prima facie*, that included a discretionary right to appeal within the Court from the Sheriff-Substitute to the Sheriff, or from the Lord Ordinary to the Inner House. Another construction might involve considerable hardship if the party lending his name were entitled arbitrarily to prevent an appeal, leaving the party to whom authority had been given saddled with damages and costs. I do not say that a change of circumstances—for instance, well-founded doubts as to the solvency of the person to whom authority was given—might not warrant the withdrawal of the authority. But, *prima facie*, the construction of such an authority is, I think, as I have stated it.

At the same time this agreement is open to construction, and I am much impressed with the terms of the correspondence which passed immediately after Mr Justice Byrne's judgment, and before Boyle & Co. had even threatened to withdraw their authority, because that correspondence shows I think plainly that Morton & Son did not consider themselves good for, or at least were not prepared to defray, the costs of the proceedings in the appeal, and they recognised that Boyle & Co. were entitled to further security. The very first letter by the defenders' agents Shaw, Tremellen, & Co. to Boyle & Co. shows this.

[*His Lordship quoted the letter of 16th May* 1901 *from the defenders' solicitors to the pursuers.*]

On these grounds, and as Morton & Sons were not prepared to find adequate security, I think the pursuers were entitled to decline to allow their names to be used, and that therefore the Lord Ordinary's interlocutor should be recalled and decree pronounced in favour of the pursuers.

The Court recalled the interlocutor reclaimed against, and granted decree for the sum sued for.

Counsel for the Pursuers and Reclaimers—Shaw, K.C.—Graham Stewart. Agents—Mylne & Campbell, W.S.

Counsel for the Defenders and Respondents—Campbell, K.C.—Horne. Agents—Fraser, Stodart, & Ballingall, W.S.