Lordship in the chair, in thinking that we can express no opinion—for my part I have no opinion—as to whether the award in the case by Mr White Millar was right or wrong. That is not a question with which we are concerned, and if it had been raised directly by parties between whom he was arbiter we could not have entertained the question. But what I hold to be wrong is the statement of a rule for fixing commission, which is said to be embodied in the letter from Mr White Millar to Messrs Tods, Murray, & Jamieson, in so far as that is to be made applicable to the question now before us. I agree with your Lordship that the rule as so applied is not a sound rule, and therefore in all that has been said on that part of the question in your Lordships' opinions I desire to concur, without saying anything at all as to the soundness of the award in the case in which it was given.

LORD PEARSON concurred.

At the close of the advising the LORD PRESIDENT added—In so far as the observations of Lord M'Laren refer to Mr White Millar's award I entirely agree. My criticisms of course were upon the way in which the award was framed, and the application that was sought to be made of it to this case. The award itself may have been perfectly right, and indeed it probably was perfectly right if as a matter of fact Brash's trustees were the true promoters.

The Court pronounced an interlocutor of new assoilzing the defenders.

Counsel for the Pursuers and Reclaimers —Younger, K.C.—D. Anderson. Agents—Welsh & Forbes, W.S.

Counsel for the Defenders and Respondents—Scott Dickson, K.C.—T. B. Morison. Agents—Gordon, Falconer, & Fairweather, W.S.

Tuesday, February 6.

FIRST DIVISION.

[Sheriff Court at Glasgow.

HORN & COMPANY, LIMITED *v.* TANGYES, LIMITED.

Process — Appeal — Competency — Sheriff Court Act 1853 (16 *and* 17 *Vict. c.* 80), *sec.* 24 — *Sisting Process — Order to Find Caution and Sisting Procedure till Caution Found—Companies Act* 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 69.

Held that an interlocutor pronounced in the Sheriff Court ordaining a limited company (in virtue of section 69 of the Companies Act 1862) to find caution for expenses of an action in which they were pursuers, and sisting procedure until such caution should be found, was an interlocutor sisting process, and therefore appealable.

The Companies Act 1862 (25 and 26 Vict. c. 89), sec. 69, enacts — "Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

The Sheriff Court Act 1853 (16 and 17 Vict. c. 80), sec. 24, enacts—"It shall be competent, in any cause exceeding the value of £25 to take to review of the Court of Session any interlocutor of a Sheriff sisting process, and any interlocutor giving interim decree for payment of money, and any interlocutor disposing of the whole merits of the cause, although no decision has been given as to expenses . . . ; but it shall not be competent to take to review any interlocutor, judgment, or decree of a Sheriff, not being an interlocutor sisting process, or giving interim decree for payment of money, or disposing of the whole merits of the cause as aforesaid. . . ."

This was an action of damages brought in the Sheriff Court of Lanarkshire at Glasgow at the instance of John Horn & Company, Limited, coalmasters, having their registered office at 79 West Regent Street, Glasgow, against Tangyes, Limited, engineers, 96 Hope Street, Glasgow, for payment of £4000 as damages for breach of contract in connection with the supplying of a pump.

The Sheriff-Substitute (DAVIDSON) having allowed a proof, the defenders lodged a minute in which they stated—"The defenders aver that the pursuers have no assets, or at least insufficient assets to pay the defenders' costs in the event of the defenders being successful in their defence, and they crave that an opportunity may be given to them (the defenders) in terms of the 69th section of the Companies Act 1862, of producing credible testimony in support of the said averment, and that upon the following statement of facts being proved to the satisfaction of the Court, the pursuers be required and ordained to find sufficient security for such costs within a certain short space, and in the event of the pursuers failing to find such security that the action be dismissed. . . ."

On 12th October 1905 the Sheriff-Substitute (DAVIDSON) allowed a proof of the averment contained in the minute.

The pursuers appealed to the Sheriff, who ordained the pursuers to answer the defenders' minute.

Thereafter, on 6th December 1905, the Sheriff (GUTHRIE) pronounced this interterlocutor—"Having considered the minute for the defenders . . . and the pursuers' answers thereto and heard parties' procurators, recals the interlocutor of 12th October last, ordains the pursuers to find caution for the expenses of process, and sists procedure until such caution shall be found."

The pursuers appealed.

The defenders objected to the competency of the appeal, and argued—The appeal was incompetent, as the interlocutor appealed against was not a final interlocutor and did not fall within the exceptions allowed by section 24 of the Sheriff Court Act of 1853 (16 and 17 Vict. cap. 80), viz., sisting process, giving interim decree, and disposing of the whole merits of the case. This was not an interlocutor sisting process. It was really an interlocutor ordaining the pursuers to find caution, although incidentally there had to be a stay of proceedings. The mere wording of an interlocutor was not conclusive—*Watson* v. *Stewart*, February 24, 1872, 10 Macph. 494, 9 S.L.R. 295; *Maxtone* v. *Bone*, May 28, 1886, 13 R. 912, 23 S.L.R 645.

Argued for pursuers—The appeal was competent. This was really an interlocutor sisting process. There was a stay of proceedings and that was equivalent to sisting process. Actions could be sisted to allow of documents being stamped—Mackay's Manual, p. 265.

LORD PRESIDENT—A preliminary point here has been taken on competency. The action is one raised by a limited company, and the defender conceived that he was in a position to have the 69th section of the Companies Act of 1862 applied. The 69th section says—[*His Lordship read the section*].

In view of that plea the defender lodged a minute in which he averred in general terms that the company was in such a condition that the assets would be insufficient to pay his costs, and he followed up that general averment by certain specific averments as to the condition of the finances of the company. That minute was answered by the pursuers, and upon consideration of the minute and answers the learned Sheriff-Substitute before whom the case depended allowed the minuter a proof of his averments. That interlocutor was appealed to the Sheriff by the pursuer, and after hearing parties the Sheriff came to the conclusion that there was enough in the pleadings to fulfil the conditions of the 69th section, and he therefore pronounced this interlocutor—he recalled the interlocutor of the Sheriff-Substitute—"ordains the pursuers to find caution for the expenses of process, and sists procedure until such caution shall be found." Against that interlocutor the pursuers have taken an appeal to your Lordships' Court, and the competency of the appeal is challenged by the defenders upon the ground first of all that it is not a final interlocutor, and that not being a final interlocutor it does not fall within the exceptions which are contained in the Sheriff Court Act 1853, sec. 24—the exceptions to the rule of non-appealability. These exceptions are—sisting process, giving interim decree, and disposing of the whole merits of the case. Now it is true that the interlocutor does not say in so many words that it sists "process;" it says "procedure"; but I am clearly of opinion that in truth and fact this is an interlocutor sisting process and nothing else. And accordingly I think there ought to be an appeal allowed upon this matter. I am much moved by this consideration, that if this is not a competent appeal I do not know when the merits of this matter could be brought up, and as I think there would clearly be, as shown by the reported cases, an appeal in England, I am disinclined to think that a different result should be arrived at in this country and in England in working out section 69 of the statute. I am therefore of opinion that your Lordships should proceed to hear the appeal.

LORD KINNEAR—I am of the same opinion. On a consideration of the statute it seems to me that if the interlocutor be not an interlocutor disposing of the case it must either be an interlocutor carrying on procedure or else an interlocutor sisting procedure. I cannot imagine any third kind of interlocutor which neither goes on with the case nor stops the case. Now this is quite clearly not an interlocutor carrying procedure on, because it stops it. Accordingly I agree that the true meaning and effect of it is simply that the proceedings are not to go on until a certain thing has happened, and it is thus an interlocutor sisting process.

LORD PEARSON—I am of the same opinion also.

LORD M'LAREN was absent.

The Court held the appeal competent and proceeded to hear it.

Counsel for Pursuers and Appellants—Hon. W. Watson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defenders and Respondents—Graham Stewart. Agents—Davidson & Syme, W.S.

Tuesday, February 6.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

MACKINTOSH'S TRUSTEE AND ANOTHER *v.* STEWART'S TRUSTEES.

Process—Reduction—Reduction of Decree—Perjury by Party—Res judicata—Competency of Action of Reduction.

An action of reduction of a decree obtained *in foro* in a preceding action between the parties, or those whom they represent, on the ground simply that the party who obtained the decree committed perjury, is incompetent, inasmuch as no matter extrinsic of the matter of the preceding action is put in issue, and the question is *res judicata.*

Hugh Stewart, 56 Newington Buildings, Causewayside, Edinburgh, as trustee on the sequestrated estate of the late Galloway Mackintosh, tweed merchant, sometime in Elgin, and Mrs Marie O'Neill or Mackintosh,