have been a different case, and I do not express any opinion on it.

The Court found the pursuer entitled to the expenses of both trials.

Counsel for Pursuer—J. C. Watt, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders—G. Watt, K.C.—Constable. Agents—Simpson & Marwick, W.S.

Friday, May 25.

FIRST DIVISION.

[Sheriff Court at Falkirk.

CALDWELL *v.* DYKES.

Process—Appeal—Appeal merely on Question of Expenses—When only to be Given Effect to.

Per Lord President—"I have no hesitation in saying that I think an appeal upon mere expenses, without touching the merits, ought to be severely discouraged both in the Sheriff Court and in this Court, and that it is not too much to say that it should never be given effect to unless either there has been an obvious miscarriage of justice in the interlocutor reclaimed against, or in some of those cases where the expenses have become a great deal more valuable than the merits."

On 18th December 1904 James Thomson Caldwell, flesher, Vicar Street, Falkirk, brought an action in the Sheriff Court at Falkirk against James Dykes, flesher, High Street, Falkirk, to recover £97, 15s. 4d. alleged to be due him on an accounting; and on the 24th April 1905 the Sheriff-Substitute (MOFFAT) after a proof gave him decree for £73, 4s. 4½d. but found neither party entitled to expenses. Parties acquiesced in the Sheriff-Substitute's judgment on the merits, but the pursuer took an appeal to the Sheriff on the question merely of expenses. The Sheriff (LEES) on 21st July 1905 recalled the finding as to expenses of his Substitute and allowed the pursuer one-half of his expenses. The defender appealed to the Court of Session.

The nature of the cause appears from the following findings of the Sheriff-Substitute in his interlocutor of 24th April:—"Finds in fact—(1) That in the beginning of July 1904 the defender was engaged to act as salesman and manager to the pursuer of a flesher's business at Vicar Street, Falkirk, at a salary of £1, 10s. per week, payable weekly, with a commission of ten per cent. on profits; (2) That there was no arrangement between the pursuer and defender that the defender should take over the business as soon as he was able to pay £300, or on any other terms; (3) That it was the duty of the defender to account regularly to the pursuer for the drawings of the business; (4) That in accordance with his duty the defender up to 8th October 1904 placed the drawings of the business to the credit of the pursuer's account in bank; (5) That the pursuer was in the habit of remitting money regularly for the payment of wages; (6) That on or about 8th October 1904 the defender entered into negotiations with the pursuer to purchase the said business; (7) That these negotiations did not come to a successful termination; (8) That from the 8th October 1904 the defender failed to account to the pursuer for his intromissions; (9) That the defender was dismissed from his employment as manager for the pursuer on 19th October 1904; (10) That the defender did not leave the employment but continued to carry on business until the evening of the 24th October 1904; (11) That on the evening of the 24th October the defender handed over the key of the shop to the pursuer and left the premises: Finds in law that the defender is bound to account to the pursuer for his intromissions in the management of the business up to 24th October 1904: Finds in fact (12) That on an accounting the defender is due the pursuer the sum of £73, 4s. 4½d. sterling; (13) That the defender has already paid to the pursuer, in obedience to the interlocutor of 19th December 1904, the sum of £51, 2s. sterling." The defender had on record admitted his indebtedness to the extent of £51, 2s., and had made a tender of £85, not appearing on the record, to avoid the litigation.

Argued for the defender (appellant)—An appeal merely on the question of expenses was competent—*Fleming* v. *North of Scotland Banking Company*, October 20, 1881, 9 R. 11, 19 S.L.R. 4; *Bowman's Trustees* v. *Scott's Trustees*, February 13, 1901, 3 F. 450, 38 S.L.R. 557—and the finding of the Sheriff-Substitute was the right one in the circumstances of the case—*Critchley* v. *Campbell*, February 1, 1884, 11 R. 475, 21 S.L.R. 326; *Mavor and Coulson* v. *Grierson*, June 16, 1892, 19 R. 868, 29 S.L.R. 766. This was not a case where the pursuer was entitled as of right to expenses. The action was one of accounting, and in such a case a pursuer though successful was not entitled as of right to full expenses. The pursuer had taken the first step in appealing to the Sheriff, and therefore could not complain of this appeal.

Argued for the pursuer (respondent)—The Court would not look favourably on an appeal from the Sheriff Court merely on the question of expenses, and in this case ought not to reverse the Sheriff's judgment. The conduct of the defender had been unreasonable all through. He was under a duty to account to the pursuer, failed at first to do so, and when he did his statement of his intromissions was so unsatisfactory that the pursuer had to employ professional accountants to go into the matter. The Sheriff on these facts was justified in his interlocutor, which was indeed the only equitable one possible.

LORD PRESIDENT—I confess that this is a case to which I address myself with great regret, because I think it is deplorable that, in a case where the original claim was for

£97, where £51 was judicially admitted, and where—without going into the question of whether there was an extra-judicial offer of even more—the pursuer has been held entitled to £73, there should be an appeal first of all to the Sheriff and then to this Court, with a print of 61 pages and two appendices, and no attempt to disturb the merits of the original judgment.

I think it has been quite settled—and, I have no doubt, rightly settled—that there is no actual defect in competency either in appealing from the Sheriff-Substitute to the Sheriff or from the Sheriff to this Court upon the ground of expenses alone; because, after all, competency in this matter of appeal would have to depend upon the provisions of the various statutes which regulate appeals, or, if it was something which was not actually touched by statute, then it would have to depend upon a well-settled common law practice, and admittedly there is no statutory provision and no rule of practice that would prevent an appeal in the circumstances. But, while that is so, I have no hesitation in saying that I think an appeal upon mere expenses, without touching the merits, ought to be severely discouraged, both in the Sheriff Court and in this Court, and that it is not too much to say that it should never be given effect to unless either there has been an obvious miscarriage of justice in the interlocutor reclaimed against, or in some of those cases where the expenses have become a great deal more valuable than the merits. But, as I say, when a person sues for £97, is offered £51 and gets £73, and the judge who decides the case and decides it in that way, gives neither party their expenses, I think the case is about as far removed from the two categories that I have indicated as any case can well be.

I therefore think that the Sheriff ought not to have gone into this matter at all, as soon as he found, as his interlocutor shows, that neither party quarrelled with the merits of the judgment before him. Of course, I have the same opinion with regard to the duty of this Court, and it was not without difficulty, therefore, that I considered it right to examine the Sheriff's judgment at all upon this matter. But, after all, I think I am bound to do so, because I think the Sheriff has, as I say, contravened the rule which I have ventured to lay down; and, secondly, I find this, that the Sheriff, in dealing with the expenses in which he has altered the judgment of the Sheriff-Substitute, goes upon what I have no hesitation in saying is a radically wrong principle—that is to say, he commences with a proposition which is radically unsound. . . . [*His Lordship then gave his reasons for preferring the judgment of the Sheriff-Substitute.*] . . . In these circumstances I think the justice of the case is best met, and the view is best enforced of the great repugnance that we have to entertaining appeals like this upon mere expenses, by recalling the interlocutor of the Sheriff-Principal, reverting to the interlocutor of the Sheriff-Substitute, and finding neither party entitled to expenses since the date of the Sheriff-Substitute's interlocutor.

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

The Court pronounced an interlocutor recalling the interlocutor of the Sheriff, and reverting to and affirming the interlocutor of the Sheriff-Substitute, with no expenses to either party since its date.

Counsel for Pursuer and Respondent—C. H. Brown. Agent—F. J. Martin, W.S.

Counsel for Defender and Appellant—J. R. Christie—Fenton. Agents—R. & R. Denholm & Kerr, S.S.C.

Friday, May 25.

FIRST DIVISION.

[Justice of the Peace Court for the County of the City of Glasgow.

ALEXANDER *v.* LITTLE & COMPANY.

Process — Appeal — Competency — Finality Clause—Compensation Claimed by Seaman under sec. 166, *sub-sec.* (2), *of the Merchant Shipping Act* 1894—*Penalty or Civil Compensation—Merchant Shipping Act* 1894 (56 *and* 57 *Vict. c.* 60), *secs.* 166, *sub-sec.* (2), *and* 709—*Summary Procedure* (*Scotland*) *Act* 1864 (27 *and* 28 *Vict. c.* 53), *secs.* 3 *and* 28—*Summary Prosecutions Appeals* (*Scotland*) *Act* 1875 (38 *and* 39 *Vict. c.* 62), *secs.* 2 *and* 3.

Section 709 of the Merchant Shipping Act 1894 provides that all orders, decrees, and sentences, pronounced by any sheriff or justice of the peace in Scotland under the authority of the Act shall be final and not subject to review.

The Summary Prosecutions Appeals (Scotland) Act 1875 provides that either party to a cause, *i.e.*, a proceeding under the Summary Procedure Act 1864 or for the recovery of a penalty before an inferior judge, may appeal notwithstanding any provision contained in the Act under which the cause shall have been brought excluding review.

A seaman brought a complaint against his employers in a Justice of the Peace Court for recovery of compensation alleged to be due to him under sec. 166 (2) of the Merchant Shipping Act 1894. The complaint bore to be under the Summary Jurisdiction (Scotland) Acts 1864 and 1881. The Justices having dismissed the complaint, the seaman appealed on a case stated under the Summary Prosecutions Appeals (Scotland) Act 1875. *Held* that as the complaint was not a proceeding under the Summary Procedure Act 1864 or for the recovery of a penalty or a sum of money in the nature of a penalty in the sense of the Summary Procedure Act 1864, the Prosecutions Appeals Act 1875 did not apply, and that therefore the appeal was incompetent.