case it was held that the buyer must have been induced by the conduct of the principal to believe, and did believe, that the agent—that is, the person through whom he got the goods—was selling on his own account. I can see nothing in this case going the least way towards establishing that position. Therefore I agree entirely in all your Lordships have said, and am clearly of opinion that the judgment of the Sheriff must be recalled and decree given to the pursuers with expenses.

The Court pronounced this interlocutor—

"Sustain the appeal, and recal the said interlocutors appealed against: Find in fact (1) that the pursuers sold and delivered to the defenders the goods specified in the accounts sued on, and that on the dates and at the prices therein specified; and (2) that the defenders are still due the amount thereof: Find in law that the defenders are liable to the pursuers for the amount claimed by them: Therefore repel the defenders' pleas-in-law, and decern against them for payment to the pursuers of the sum of £53, 7s. 11d., with interest thereon at 5 per cent. per annum from date of citation."

Counsel for Pursuers (Appellants)—Morison, K.C.—MacRobert. Agents—Graham Miller & Brodie, W.S.

Counsel for Defenders (Reclaimers)—Sandeman, K.C.—Lippe. Agents—Dove, Lockhart, & Smart, S.S.C.

Thursday, January 19.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

GARRIOCH *v.* GLASS.

Process — Appeal — Expenses—Appeal on Question of Expenses merely.

A brought an action in the Sheriff Court against B to recover £75 of principal and £75 described as bonuses. B tendered the £75 of principal with expenses to the date of tender. The tender having been refused, a proof having been allowed and taken, and an appeal to the Sheriff from his Substitute heard, A held a decree for the £75 of principal with interest from the date of citation, and, with some slight exception, the expenses. B, the defender, appealed to the Court of Session, accepting the Sheriff's judgment on the merits, but objecting to the allowance of the expenses so far as subsequent to the interlocutor allowing proof. He maintained that A should bear the whole expenses of the proof.

The Court *entertained* the appeal, although it was only concerned with expenses, on the ground that the allowance of expenses was clearly unjust, and *found* the pursuer liable in the expenses of the proof.

Alexander Garrioch, manufacturer, 31 Blackfriars Street, Edinburgh, brought an action in the Sheriff Court at Edinburgh against J. M. Glass, solicitor, 86 George Street, Edinburgh. He claimed "payment of the sum of £150 for cash advances and bonuses thereon," and craved the Court "to decern against the defender for payment of the sum of £150, with interest thereon at the rate of £5 per centum per annum from the date of citation to follow hereon till payment." The £150 was to the extent of £75 made up of three sums of £30, £30, and £15, which the pursuer averred that he had advanced to the defender on behalf of Mr James L. Addie, Glasgow, and to the extent of £75 of bonuses of equal amount on the said sums. He founded his claim upon three letters, which were in the following terms:—

"86 George Street,
"Edinburgh, 1*st July* 1907.

"Received from Mr Alexander Garrioch on behalf of Mr James L. Addie of Glasgow the sum of thirty pounds sterling, which is to be repaid with a bonus of thirty pounds when the business of the South Wales Colliery transference takes place, which is expected by the end of the month of July current or early in August. I hereby guarantee the repayment of the above sum to the extent of thirty pounds sterling. "J. M. GLASS."

"86 George Street,
"Edinburgh, 24*th August* 1907.

"Received from Mr Alexander Garrioch on behalf of Mr James L. Addie of Glasgow the sum of thirty pounds sterling, which sum is to be repaid with a bonus of thirty pounds when the business of the South Wales Colliery transference takes place, which is expected by the end of about three weeks hence. I hereby guarantee the repayment of the above sum of thirty pounds sterling. J. M. GLASS."

"86 George Street,
"Edinburgh, 15*th November* 1907.

"Received from Mr Alexander Garrioch on behalf of Mr James L. Addie of Glasgow the sum of fifteen pounds sterling, which sum is to be repaid with a bonus of fifteen pounds when the business of the Sans Lucas Company business is completed, which is expected to take place towards the end of the current month. I hereby guarantee the repayment of the sum of fifteen pounds. "J. M. GLASS."

On record the defender averred that he had all along been willing to implement the guarantee undertaken by him in the letters, and tendered the principal sum advanced by the pursuer with expenses of process to date. This offer not having been accepted, the Sheriff-Substitute (GUY) on 22nd October 1909 allowed parties a proof of their averments. The facts of the case as established by the proof are sufficiently disclosed in the interlocutor and note of the Sheriff-Principal, *infra*.

By interlocutor dated 24th February 1910 the Sheriff-Substitute granted decree against the defender for payment of (1) £30, with interest from 1st July 1907 till payment; (2) £30 with interest from 24th August 1907 till payment; and (3) £15 with

interest thereon from 15th November 1907 till payment; *quoad ultra* he assoilzied the defender, but found him liable to the pursuer in expenses.

The defender appealed to the Sheriff (MACONOCHIE), who on 23rd March 1910 pronounced this interlocutor—"The Sheriff . . . recals the interlocutor of the Sheriff-Substitute now appealed against, sustains the appeal, and in lieu of the findings in said interlocutor Finds in fact (1) that the pursuer paid to the defender the sums of £30, £30, and £15 on the dates respectively mentioned, and on the terms set forth respectively in the documents; (2) that the said payments were made on the representation of the defender, that they were received on behalf of Mr James L. Addie of Glasgow, and that the defender had no authority from the said Mr Addie to borrow and receive the said sums on his behalf: Finds in fact and in law that the defender is liable as principal in said transactions to repay the said sums with interest from the date of citation: Therefore grants decree against the defender for payment to the pursuer of said three sums, with interest from the date of citation at five per centum per annum: *Quoad ultra* assoilzies the defender from the conclusions of the action: Finds the defender liable to the pursuer in the expenses of process down to the date of the lodging of the appeal: . . . Finds the pursuer liable to the defender in the expenses of the appeal. . . ."

Note.—". . . The Sheriff-Substitute has granted decree for the three principal sums, with interest at 5 per cent. from the dates on which the money was paid over. I do not think that it was competent for him to do so, as all that is craved is interest at 5 per cent. from the date of citation. The defender has thus been successful in the appeal, and is therefore entitled to the expenses of the appeal. The defender, however, further maintained that alternatively he should be awarded expenses up to the date of the appeal, or that no expenses should be found due to or by either party. In deciding that question it is necessary to look at the position taken up by the defender on record. In answer 6 he says that he has 'all along been willing to implement the guarantee undertaken by him in the letters set forth,' and tendered 'the principal sums advanced by him with the expenses of process to date.' He never, so far as I can see, acknowledged liability as principal in the transaction, as in fact he was, but only as guarantor, and the tender does not meet the crave as it does not mention interest, and interest is, as I have stated, asked for. Doubtless the pecuniary difference between the crave and the tender is small, and in the ordinary case I might have come to the conclusion that neither party should be found entitled to expenses. But the case here is peculiar. It was not maintained before me that the Sheriff-Substitute was wrong when he said that he regarded the documents as 'a representation that the defender, a law agent, had the power to receive money on behalf of Mr Addie, and to bind him to repay that money with the stipulated bonus,' nor was it maintained that that representation was warranted by the facts, or that the pursuer was not led to make the loans on the faith of it. When the pursuer applied for payment to Mr Addie, that gentleman repudiated liability altogether on the ground that he had never given the defender authority to use his name or to raise money on his behalf. That being so, I think that the pursuer was entitled to sift the matter thoroughly in a court of law. Looking to the terms of the letters of acknowledgment founded on, it was, I think, necessary to have a proof as to the whole matter, as it was impossible to say what might come out as affecting the whole position. On the case as it turned out I do not feel inclined to stretch a point in the defender's favour, and to find that no expenses should be given to the pursuer in the earlier stages of the case."

The defender appealed, and argued—He was entitled to expenses from the date of the Sheriff-Substitute's interlocutor allowing proof. An appeal on a question of expenses merely was undoubtedly competent—*Caldwell* v. *Dykes*, May 25, 1906, 8 F. 839, 43 S.L.R. 606. He had tendered on record the whole sum for which he was ultimately found liable. It was true that he had omitted to tender interest from the date of citation, but that was an exceedingly trifling sum. The proof had been directed towards the pursuer's establishment of right to the bonuses. In this he had been entirely unsuccessful. It was therefore right that the pursuer should bear the expense of this unnecessary proof.

Argued for the pursuer (respondent)—The tender was not for the full sum which the pursuer had ultimately been awarded. It did not include interest. The pursuer was therefore entitled to the expenses of the proof. Furthermore, it was the practice of the Court severely to discourage appeals on expenses only. Such appeals would not be entertained unless there had been a gross miscarriage of justice—*Caldwell* v. *Dykes* (*sup. cit.*); *Bowman's Trustees* v. *Scott's Trustees*, February 13, 1901, 3 F. 450, 38 S.L.R. 557. That could not be said here according to the Sheriff's view of the case.

LORD ARDWALL—The only matter of importance which we have to decide in this case is the question who is to bear the expense of the proof which was taken in the Sheriff Court, and the conclusion to which I have come without difficulty is that that expense falls to be borne by the pursuer, inasmuch as he was responsible for that proof being taken, and was entirely unsuccessful on the only question upon which the proof could have any bearing, viz., his claim for £75 in name of bonus. The action concluded for a sum of £150, with interest at 5 per cent. from the date of citation. Of that £150, however, the defender tendered on record £75 (which may be described as the principal sum advanced by the pursuer as opposed to the bonus) and that £75 is the only sum for which the

pursuer has eventually obtained decree if we except an award of interest thereon at 5 per cent. from the date of citation. It is therefore apparent that the proof from the pursuer's point of view was entirely unsuccessful and unnecessary, and it seems to me to be only just that he should bear the expenses of it. It is true that the defender omitted to tender interest on record. In certain circumstances such a failure might have been of serious importance, because the Court has as a rule been accustomed to treat tenders strictly. But in the present case the omission does not appear to me to affect the question or to alter the fact that the responsibility for the proof rests wholly with the pursuer. Had the attention of the Sheriff or even of the defender been drawn to the fact of the omission of interest it cannot be doubted that the omission would at once have been rectified and interest included in the decree as has been done by the Sheriff.

I am accordingly of opinion that the pursuer should be found entitled to expenses down to 22nd October 1909, the date of the interlocutor ordering the proof, and that the defender should be found entitled to expenses from that date onwards both in the Sheriff Court and the Court of Session.

LORD SALVESEN—I quite agree with the opinions that have been expressed in other cases that this Court will not readily entertain appeals from the Sheriff Court where the only question is of expenses. At the same time it is not suggested that such appeals are incompetent, and in certain cases it appears to me that the Court ought to entertain them as readily as appeals on the merits—*e.g.*, where the amount of the expenses is largely in excess of the sum in controversy between the parties, or a plain error has been made. A wrong decision on the question of expenses in such circumstances might amount to serious injustice, which the Court should never hesitate to remedy. In the present case I think the decisions in the Court below on the question of expenses are not merely plainly wrong, but that they probably involve a sum in excess of the actual merits of the litigation. The action concludes for payment of £150, with interest at 5 per cent. per annum from the date of citation. Of that sum £75 represents what I may describe as principal, and £75 represents what may be described as bonus in lieu of interest. In his defences the defender admitted his liability for and tendered £75 (the principal sum), with expenses to the date of tender. He omitted, however, to tender interest on that sum from the date of citation, a very trifling sum, but it would have been quite open to the pursuer to get decree for the interest along with the principal if he had been willing to restrict his claim. Instead of doing so, the pursuer embarked upon an expensive proof, in which he was entirely unsuccessful, in the hope of establishing his right to the bonus of £75. In these circumstances the Sheriffs have awarded him the whole expenses of the proof. I think that constitutes a clear and substantial injustice to the defender, who, I think, while liable in expenses up to the date of the interlocutor allowing proof, should have been found entitled to his expenses in the Sheriff Court from that date onwards. As the defender has been entirely successful in his appeal to this Court he will of course be entitled to expenses here.

LORD SKERRINGTON concurred.

The LORD JUSTICE-CLERK and LORD DUNDAS were absent.

The Court pronounced this interlocutor—

"Find in fact and in law in terms of the findings in fact and in law in the said interlocutor appealed against, with the exception of the finding for expenses, which is hereby recalled: *Quoad ultra* affirm the said interlocutor, and of new grant decree against the defender for payment to the pursuer of the three sums of £30, £30, and £15, with interest thereon at 5 per centum per annum from the date of citation until paid, and decern: Find the pursuer entitled to expenses up to and including 22nd October 1909, and find the defender entitled to expenses in this and in the Inferior Court (including fees to counsel) since said 22nd October 1909," &c.

Counsel for the Pursuer (Respondent)—Wark. Agents—Winchester & Nicolson, S.S.C.

Counsel for the Defender (Appellant)—Morison, K.C.—Ingram. Agent—J. Munro Glass, Solicitor.

Wednesday, February 1.

FIRST DIVISION.

[Sheriff Court at Banff.

M'LAUCHLAN *v.* ANDERSON.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of and in the Course of the Employment.*"

A workman was employed as labourer in connection with loading and unloading waggons, and accompanying them while being hauled by a traction engine from one quarry to another. While sitting on a waggon which was being so hauled, he dropped his pipe, and in attempting to get down to recover it he lost his balance and fell in front of the wheels of the waggon, which went over his left leg, seriously injuring him.

Held that the accident "arose out of and in the course of the employment," within the meaning of section 1 (1) of the Workmen's Compensation Act 1906.

Mrs Jane Wilson or M'Lauchlan, widow of Peter M'Lauchlan, traction engine assistant, for her own interest and also