[HEARD *27th March*—JUDGMENT *2nd April*, 1849.]

JAMES ERSKINE WEMYSS, Esq., of Wemyss, and Others, *Appellants.*

JOHN WILSON, Tenant of the Lands of Blacketyside, *Respondent.*

Process.—6 Geo. IV. c. 120.—The proper form of interlocutor to be made by the Court of Session, in reviewing the decree of an inferior Court upon matters of fact proved by commission, where the Court agrees in the result at which the inferior Court arrived, is not to remit simpliciter, but in terms of the 49th section of the Judicature Act to specify distinctly the facts the Court finds to be established by the proof, and how far the interlocutor proceeds on the facts so found, and the points of law meant to be decided.

Appeal.—If the interlocutor appealed from, being an interlocutor upon an advocation of the decree of an inferior Court, in respect of matters proved upon Commission, does merely remit simpliciter, instead of containing specific findings of fact and of law, as required by 49 sect. 6 Geo. IV. cap. 120, the House will not entertain the merits upon the Appeal.

THIS appeal arose out of an action brought before the Sheriff by the Respondent against the Appellant (his landlord), for damages, in respect of injury done to his crops by the game preserved by the Appellant upon the lands occupied by the Respondent.

The Sheriff allowed a proof upon commission, and after advising the proof pronounced an interlocutor, containing a variety of specific findings, which, in the aggregate, found various sums of damage to be due to the Respondent.

The Appellant carried the case by advocation to the Court of Session, which, on the 2nd of December, 1847, pronounced an interlocutor in these terms:—" Having considered the revised " cases and whole process, and heard counsel repel the reasons " of advocation, remit simpliciter to the Sheriff and decern."

This interlocutor was the subject of appeal.

Mr. Attorney-General and *Mr. Anderson* for the Appellant, in the course of arguing the cause upon the merits, took an objection, suggested by a statement in the printed case for the Respondent, that the interlocutor of the Court below could not be the subject of appeal, inasmuch as it did not by its form comply with the provisions of the 49th sect. of the Judicature Act, 6 Geo. IV., cap. 120, which enacts,—" That when in " causes commenced in any of the Courts of the sheriffs, " or of the magistrates of burghs, or other inferior Courts, " matter of fact shall be disputed, and a proof shall be allowed " and taken according to the present practice, the Court of " Session shall, in reviewing the judgment proceeding on such " proof, distinctly specify in their interlocutor, the several facts " material to the case which they find to be established by the " proof, and express how far their judgment proceeds on the " matter of fact so found, or on matter of law, and the several " points of law which they mean to decide, and the judgment " on the cause thus pronounced shall be subject to appeal to " the House of Lords, in so far only as the same depends on or " is affected by matter of law, but shall in so far as relates to " the facts, be held to have the force and effect of a special " verdict of a jury, finally and conclusively fixing the several " facts specified in the interlocutor."

The House interrupted the counsel for the Appellants, and desired that the counsel for the Respondent would address themselves to the objection upon the form of the interlocutor.

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Mr. Turner and *M. A. M'Neill* for the Respondent.—The facts are specifically found by the sheriff, and the Court by the form of its interlocutor adopted these facts, and in doing so satisfies the enactment of the statute. The universal practice, when the court agrees with the interlocutor of the inferior Court, is to remit *simpliciter*, and not to reiterate the findings of the inferior Court. It could not answer any good end to do so. The Court, therefore, by adopting the findings of the Sheriff has substantially, though not in terms, complied with the directions of the statute.

The cause was allowed to stand over till the 2nd of April, upon an offer that if that were done, the Respondent's counsel would be prepared with precedents, to show that a remit *simpliciter* was the form ordinarily adopted by the Court in such cases; but on the day to which the further hearing was adjourned, no such precedents were forthcoming.

LORD CHANCELLOR.—My Lords, in this case it appears to me that there has been a non-compliance with the terms of the enactment, as set forth in the Respondent's case (6 Geo. IV. chap. 120, sect. 49).

Now, my Lords, when we come to look at the interlocutor appealed from, which is that of the Court of Session, we find not one of these requisites, which the Act of Parliament says must be found in the interlocutor, before this House has any jurisdiction to review it. It does not, therefore, appear to me to be necessary to go further. The affirmance of the interlocutor of the Sheriff does not find every fact that the Sheriff states, and the Act of Parliament provides that you must find that in the interlocutor of the Court of Session. There was a conclusion in the interlocutor different from anything to be found in the terms of the interlocutor of the Sheriff, showing that matter of fact is still in dispute. I proceed entirely upon the language of the Act, and I apprehend that the right course will be merely to dismiss the appeal.

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[*Mr. Attorney-General.*—I apprehend, my Lord, that the course will be to reverse the interlocutor, and remit in the terms of the statute. The Appeal is right, although the interlocutor is wrong.

Lord Chancellor.—Suppose there is no remit, and the House simply dismisses the appeal, the question then is, whether the party can apply to the Court of Session.]

LORD CAMPBELL.—My Lords, I should think that the proper course would be for your Lordships to reverse the interlocutor, upon the special ground that the Act of Parliament has not been complied with, and to remit.

[*Lord Chancellor.*—If it is clearly understood on both sides, that the only way of bringing the alteration of the interlocutor before the Court of Session, will be to reverse the interlocutor and remit, that is no doubt the course the House ought to pursue.]

I do not go so far as to say, that the Court of Session, the Inner House might not specifically, directly, and expressly have said, "We agree *in omnibus* with all that has been found by the Sheriff." If they had done so, the findings of the Sheriff would have been involved in the interlocutor, and we should only have had to deal with the interlocutor of the Court of Session on the findings of the Sheriff.

But then the Act of Parliament perhaps would not have been complied with, I should think the better course would be for the Court of Session to establish the findings originally, and to exercise their own understandings. I think the Act of Parliament is quite clear, that where there are facts contested before the Court of Session, and that are not remitted to a jury, those facts should be found specifically by the Court below, and that when the case comes by appeal before this House, this House should merely have to look at the facts thus specifically found, and be governed by those facts, and determine alone the law which those facts raise.

But, my Lords, when I look to the finding of the Sheriff, it is clear that it does not afford any compliance with the Act; it is a hotch-potch, a mixture of fact and of law; and it does not define in the slightest degree upon what grounds the matter of law proceeds. He puts the cart before the horse. He is to find the facts, and then the law that arises upon those facts. He begins by finding an abstract question of law,—" Finds " that the contract of lease is a contract, *bonæ fidei*, and that as " such it falls to be construed according to the understanding " and intention of the contracting parties at its date." Then he goes on to mix fact and law alternately.

If your Lordships come to the conclusion, that the Court of Session adopted the facts as they are found by the Sheriff, that would be an inference contrary to the fact. They have looked at the evidence, and they have rejected the witnesses, and they have not been governed by the facts.

This appeal from the interlocutor of the Court of Session is upon several grounds. One of them is, that the interlocutor is wrong in point of law. We have not looked to that ground, but there is another ground, which is, that it is not a compliance with the Act of 6 Geo. IV., c. 120. So far we may look at it; and if we do find that it is not a compliance with that Act, we may rest our judgment specifically upon that ground. I apprehend that the order of the House will be to remit, and give no opinion whatever upon the merits, but merely say that the interlocuter is not drawn up in conformity with the Act of Parliament; that the Act must be complied with, and that the Judges must find specifically the facts upon which they proceed, and the points of law which they determine, and then the case may come before your Lordships' House unpon these findings.

LORD BROUGHAM.—I am entirely of the same opinion with my noble and learned friend. The Act of Parliament intended that the law and the facts should be, as it were, sifted and separated the one from the other, as if by the findings in a special

verdict, so as to refer it to this House, that we might not have an appeal, either upon fact or upon fact mixed with law, but upon points of law only. When the 6 Geo. IV., c. 120, sec. 49, was passed, it was the main object of the Legislature to make that separation, and, my Lords, we have a right, by the provision of that Act of Parliament, to have the matter confined in the interlocutor of the Court of Session to an opinion upon matter of fact, and also an opinion upon matter of law, and to have the two separable and capable of being kept separate the one from the other. I do not differ in a single point from my noble and learned friend who last addressed you, as to what would be a sufficient compliance with the requisition of the statute, if the Court of Session, instead of not applying its mind to the facts at all, were merely to adopt what had been done by the other Court below, but it is not, my Lords, necessary to give an opinion upon that. That has not been done here at all. Upon the whole, I am inclined very much to think, that it would be the sounder and the better practice, that the Court of Session should specially find the facts. I think that would be the more convenient and the more correct course to pursue. But, my Lords, *non constat*, that the Court of Session adopted any one finding upon matter of fact. It is perfectly consistent with possibility, nay, it may be even very probable, that the Court of Session came to the conclusion to which they came, that is, remitting to the Sheriff, without agreeing with him in any one point of fact. It is likely, and, as my noble and learned friend near me says, it is pretty clear, that on some points they did not agree with the Sheriff, and, therefore, that question falls to the ground entirely, and it renders it wholly unnecessary to grapple with the point of how far a general agreement of the Court with the Sheriff's finding, would be a sufficient compliance with the statute. There is none here. It is not only perfectly possible, and even very probable, that they did on some points not agree with the Sheriff, but it is possible,

that upon no point did they agree with him. My Lords, I look upon this as a very important question in the practice of appeals; and it is necessary that your Lordships should take a clear course, and let it appear what our judgment is grounded upon.

I think the suggestion of my noble and learned friend who spoke last should be followed, that we should enter the very grounds specifically upon which we reverse the interlocutor, and that being done, no mistake or miscarriage further can arise. At first I thought with my noble and learned friend on the woolsack, that the best course would be to dismiss the appeal, but I now think that that would not be the right course. There must be no alteration in the interlocutor on our part, so as to deal with the question in the cause, but the order must be drawn up, so that it shall appear that it is upon the specific ground of non-compliance with the requisition of the statute, that we do reverse and upon no other.

[*Mr. Attorney General.*—I believe the form is to remit to the Court below, with direction to hear the cause before the whole Court.

Lord Chancellor.—That might be the form in substance, but it would be intimating that there is matter of great importance on the merits. We may individually think that that is so, but the House, by the order they pronounce, is not to be supposed to have looked into the merits at all. We cannot deal with the merits in any way.]

The Lords Spiritual and Temporal, in Parliament assembled, find that the interlocutor of the 2nd (signed 3rd) of December, 1847, complained of in the appeal, by which interlocutor a remit was made simpliciter to the Sheriff, was not in conformity with the provisions hereinafter mentioned, of an Act passed in the sixth year of the reign of His late Majesty King George the Fourth, intituled " An Act for " the better regulating of the forms of process in the Courts of Law in " Scotland." whereby it is enacted amongst other things, "that when

" in causes commenced in any of the Courts of the Sheriffs, or of the
" Magistrates of Burghs, or other inferior Courts, matter of fact shall
" be disputed, and a proof shall be allowed and taken according to the
" present practice, the Court of Session shall, in reviewing the judg-
" ment proceeding on such proof, distinctly specify in their inter-
" locutor the several facts material to the case which they find to be
" established by the proof, and express how far their judgment pro-
" ceeds on the matter of fact so found, or on matter of law, and the
" several points of law which they mean to decide, and the judgment
" on the cause thus pronounced shall be subject to appeal to the House
" of Lords in so far only as the same depends on or is affected by
" matter of law, but shall in so far as relates to the facts be held to
" have the force and effect of a special verdict of a jury finally and
" conclusively fixing the several facts specified in the interlocutor."
It is therefore Ordered and Adjudged, That the interlocutor of the 2nd (signed 3rd) of December, 1847, and also the interlocutor of the 17th of December, consequent thereupon, be reversed. And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just.

G. and T. W. WEBSTER—DUNN and DOBIE, Agents.