terms thereof, appoints the petitioner to employ proper persons to take down the whole of the said west gable and the said pillars and arches, and to remove and clear out the materials, and sell the same; and grants warrant to officers of Court to remove tenants and occupants so far as necessary, and decerns."

In addition to the appeal Messrs M'Kellar and Swan presented a note of suspension and interdict, which the Junior Lord Ordinary reported to the Inner House, and the whole matter came before the Second Division at the same time. The appellants maintained that the danger had been exaggerated, and produced additional reports by Messrs Peddie and Pilkington, and other architects and men of skill, to that effect.

J. CAMPBELL SMITH for the appellants.

SOLICITOR-GENERAL for the respondent.

The Court held that as the tenement was admittedly insecure they ought not to interfere even with the interim execution of the order of the Dean of Guild; but as the report of Messrs Peddie and Pilkington had not been judicially considered by the Dean of Guild, they remitted to him to consider the suggestions therein made, but under the express condition that this should not be held to interfere with the interim execution of his order.

LORD BENHOLME was of opinion that the interlocutor should be affirmed.

Agent for Appellants—Mr Spalding, W.S.
Agent for Respondent—Mr R. B. Johnston, W.S.

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*Tuesday, July* 16.

## FIRST DIVISION.

### GEORGE ABERDEIN *v.* ROBERT WILSON.

*Process—Appeal—Competency—Statute* 16 and 17 *Vict. c.* 80, § 24.

Where a Sheriff-court case concluded *ad facta præstanda*, failing which to decern and ordain the respondent to pay the sum of £20, or such other sum as shall be ascertained to be the price or value, &c.—*Held* that appeal was not excluded on the ground of the conclusion being under £25.

This was an appeal taken from the Sheriff-court of Fife in a summary petition, whereof the prayer was as follows—"To decern and ordain the respondent instantly to deliver to the petitioner the fleeces of fifty Leicester ewes or sheep, and the fleece of one Lincoln tup or sheep, the property of the petitioner, and carried off by the respondent from the petitioner's premises at Pitkinnie farm-steading upon the 24th day of June 1871, as before mentioned. And failing the respondent doing so within such period as your Lordship shall appoint, to decern and ordain the respondent to pay to the petitioner the sum of £20 sterling, as the price or value of the said fleeces of wool, or such other sum as shall be ascertained to be the price or value thereof."

The Sheriff found the respondent not liable to restore said fleeces, and dismissed the petition.

The petitioner appealed to the First Division of the Court of Session.

When the case came before their Lordships the objection was raised that the appeal was incompetent, in respect of the value of the cause being below £25. Minutes of debate were ordered to be prepared and laid before the Judge of the Second Division and the permanent Lord Ordinary, in order to obtain their opinion in writing upon this question.

It was pleaded for the appellant—"The question arises under the Act 16 and 17 Vict. c. 80, entitled 'An Act to facilitate Procedure in the Sheriff-courts of Scotland,' and which took effect on 1st November 1853. By section 24 of said Act it is enacted, 'that 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 procedure, or any interlocutor giving interim decree for payment of money, and any interlocutor disposing of the whole merits of a cause, though no decision has been given as to expenses, or though the expenses, if such have been found due, have not been modified or decerned for.' The appellant has first to remark, that, in so far as a prior decision may be held finally to settle any question, the point now involved has been settled by the decision in the appeal of the *Shotts Iron Company* v. *Kerr* (*ante*, p. 142). The conclusions in that appeal were precisely the same in form and phraseology with the conclusions in the present appeal. The point having been submitted to the Court, whether the appeal was incompetent in respect the value of the cause did not exceed £25, they held that the appeal was competent. In the case of *Galloway* v. *M'Ghie*, an objection to the competency of the appeal was taken on the same ground. The Court, however, sustained the competency of the appeal. In this case there was no pecuniary conclusion. In the advocation of *Purves* v. *Brock*, an objection to the competency of the advocation that the value of the cause was under £25 was repelled. In this case also there was no pecuniary conclusion. Various other decisions to the same effect have been pronounced; and the appellant humbly apprehends that, from the reasons given in pronouncing these decisions, it may be held as law that the element of pecuniary value does not apply with reference to appeals in actions *ad factum præstandum*, and the appellant submits that the present action comes under that class of cases. The leading conclusion is a conclusion for delivery of the fleeces in question. It is only failing the effect of that conclusion that the pecuniary conclusion is to come into operation. Where a party has been deprived unlawfully of his property, he is entitled to recover it. In such a case his indefeasible right to his property, and the value he puts upon that right, is not to be measured by its market or pecuniary value. The appellant has further to remark that the subordinate conclusion for payment does not state what the value of the fleeces is in such a way as absolutely to fix the value of the action as not exceeding £25. The expression used is, that failing the appellant obtaining delivery of the fleeces, the respondent is to be decerned to pay £20 as the price or value of said fleeces, or such other sum as shall be ascertained to be the price or value thereof in the event of appearance being entered. From the peculiar nature of the action, it is apprehended that, were occasion emerging, further proof might still be led in the inferior court to establish the value of the fleeces to exceed £25. It will be observed that the judgments appealed against deal entirely with the conclusion *ad factum præstandum*. It may be also observed that, as the right of appeal exists in every case, unless specially barred by statute, the

presumption *in dubio* must be in favour of the right."

It was pleaded for the respondent—"By our earlier law the prohibition against review seems to have had no application to causes other than those concluding merely for a pecuniary payment (*vide* statutes, 1641, c. 42, and 1663, c. 9). But the Act 20 Geo. II. c. 43, sec. 38, in which there are employed words identical with those of the 22d section of the 1853 Act, did away with the distinction which, as regards review, existed between actions *ad facta præstanda*, and actions for payment of money. It is therefore incorrect to suppose that the mere fact of an action being one *ad factum præstandum*, takes it out of the category of unappealable causes. The only distinction which exists between such a case and the ordinary one of an action for debt is, that unless it appears from the conclusions of the summons that the value of that which is sought does not exceed £25, the Court do not refuse to entertain the appeal, but proceed upon the principle that, unless it can be established from the conclusions that the value of the cause does not exceed £25 sterling, they will not regard the action as being struck at by the statutory prohibition. But if it appears from the conclusions of the action that the cause is one not exceeding £25 in value, it matters not whether the action is or is not an action *ad factum præstandum;* for value is the only criterion which is recognised by the presently existing law. The question at issue therefore truly is, Is the present cause one which exceeds in value £25 sterling? If it does not, it is not competent to appeal it. The decided cases are in accordance with the view which has just been stated. See *Buie* v. *Stiven*, Dec. 5, 1863, 2 Macph. 208; *Wilson* v. *Wallace*, March 6, 1858, 20 D. 764; *Robertson* v. *Wilson*, March 3, 1857, 19 D. 594; *Drummond* v. *Hunter*, Jan. 12, 1869, 7 Macph. 347; *Brydon* v. *Macfarlane*, Nov. 2, 1864, 2 Macph. 7; *Inglis* v. *Smith*, May 17, 1859, 21 D. 822; *Purves* v. *Brock*, July 9, 1867, 5 Macph. 1003. These cases were decided on the ground that the true value of the cause, as appearing from the summons or other initiatory writ, was not shown to be under £25 sterling. In not one of them was the competency sustained, because it was an action *ad factum præstandum*. What, then, is the true value of the present cause? It is not the case of a petition containing an alternative prayer for delivery or payment, and where therefore it might be said that, like the pursuer of an action with alternative conclusions, the petitioner was entitled to take his choice as to which of them he would proceed with. The petitioner selects his remedy, and fixes the value of the fleeces as in a question with the respondent. (See the case of *Wyher and Others* v. *Hendrie*, Sept. 17, 1849, J. Shaw's Justiciary Reports, 265.) In the event of the respondent having failed to make delivery of the fleeces within such time as might have been appointed by the Sheriff, the petitioner could only have taken an order (if he had not already obtained it) for payment of £20. He could have enforced a decree obtained by him only for payment of £20, or at most for delivery of the fleeces or payment of the £20. Had £20 and expenses been tendered by the respondent, that tender must have ended the action (*vide* Lord Cowan in *Cameron* v. *Smith*, Feb. 24, 1857, 19 D. 517). Or had the appellant obtained decree in terms of the prayer of his petition, he would have been bound to discharge it on payment by the respondent of £20 and expenses, which, it may be observed, would necessarily have been taxed according to the scale applicable to causes below £25."

The following Opinions were returned by the consulted Judges:—

The Opinion of the Lord Justice-Clerk and Lords Cowan, Neaves, Jerviswoode, and Mackenzie.

The question in the present case is, Whether the appeal is incompetent in respect of the provision contained in the 22d section of the Sheriff-court Act of 1853, that it shall not be competent to bring under the review of the Court of Session "any cause not exceeding the value of £25 sterling?" And it is to be kept in view, in order that the application of some of the decisions to be referred to may be appreciated, that the same question frequently occurred to be considered by the Court under the provisions in the Act of George II., limiting the power of appeal to the Circuit Court of Justiciary in civil cases to causes not exceeding £25 in value.

It has been settled by a series of decisions, following upon the cases of *Taylor* v. *Purves*, Nov. 17, 1824, 3. Shaw, 286, and *Giffen* v. *Orr*, Nov. 19 1825, *ib.* 301, that the only rule for determining the value of the subject-matter of the cause as to appeals is the sum concluded for in the summons. The present case originated by a petition to the Sheriff, which concludes for delivery of the fleeces of forty-one Leicester sheep as the property of the petitioner, and failing the respondent doing so within a period to be fixed by the Sheriff, that the respondent should be ordained to pay to the petitioner "the sum of £20 sterling as the price or value of the said fleeces of wool, or such other sum as shall be ascertained to be the price or value thereof, in the event of appearance being entered."

The primary conclusion is *ad factum præstandum*, and had no appearance been made for the defender, decree to that effect could have been obtained by the pursuer, on which diligence might have followed to enforce delivery. This is the very essence of such an action. No doubt the defender may appear and show that he cannot implement the demand for delivery, and thus the pursuer must have recourse to the alternative pecuniary conclusion, which, however, when expressed as in this case, cannot be held to fix the value of the action.

We are of opinion that, under a conclusion expressed as in this case, a petitioner, "in the event of appearance being entered," and a larger price or value being proved in the course of the litigation, would be entitled to obtain decree for that larger value. The petitioner, however, may enforce delivery of his property in *forma specificâ*. In the event of delivery being impossible, or, where possible, the demand for delivery not being complied with, he is, we think, entitled, according to our forms of process, to conclude for a modified sum in the event of no opposition being made, and alternatively, in the event of opposition, which may lead to protracted litigation, for such larger sum as in the course of the cause he may prove to be the true value of his property. That litigation may last for some time, and the property may rise in value. A pursuer is entitled to recover such rise in the value of his property wrongfully withheld from him by the defender, and we think that he may compe-

tently recover the same under such an indefinite conclusion as we find in the petition. Were this not the case, great injustice might be done, because the amount recovered at the close of a long litigation might, owing to the rise in value of the property, be quite insufficient to enable the pursuer to replace it by purchase.

In the case of *Lamb* v. *Henderson*, Oct. 4, 1844, 2 Broun, 311, the conclusion in a summons of count and reckoning was for £25, "or such other sum, more or less," as should appear on an accounting; and the Lord Justice-Clerk (Hope), after advising with Lord Wood, found an appeal incompetent to the Circuit Court, such appeal being by statute limited to causes not exceeding in value the sum of £25. In *Wilson* v. *Addison*, Oct. 11, 1845, 2 Broun, 519, the petitioner prayed for interdict prohibiting the respondent encroaching upon his property, and further, that the respondent should be found "liable in the sum of £10 sterling, or such other sum, less or more, as may be modified in name of damages to the petitioner," on account of the alleged encroachments. The Lord Justice-Clerk (Hope) and Lord Wood dismissed an appeal to the Circuit Court as incompetent, in respect that the competency of the appeal fell to be regulated by the prayer of the petition, and that the pecuniary conclusions were not limited within the statutory sum of £25, so that the Sheriff might competently have awarded a larger sum as damages. In the case of *Stott* v. *Gray*, June 26, 1834, 12 Shaw, 828, a summons in the Sheriff-court set forth that Stott had been engaged to manage a spirit-shop for Gray, and that when his engagement ceased "there remained due by him to the pursuer the sum of £21, 0s. 5d., being a balance unaccounted for of the goods committed to his charge in the said management, and cash arising from the ready-money sales thereof," and that the pursuer had often required payment of the said sum of £21, 0s. 5d. The summons concluded that Stott and his cautioners should be ordained to make payment to the pursuer of the said sum of £21, 0s. 5d., "or such other sum, less or more, as on a fair and accurate state of accounts shall appear to be the just and true balance of the said Alexander Stott's intromissions as manager foresaid, with interest thereof since the 2d of December last." The Sheriff, after a remit to an accountant, gave decree for £21, 1s. 10d., and the defenders took an appeal to the Circuit Court, which was objected to as incompetent, in respect of the indefinite nature of the conclusions of the summons. The case was certified to the Second Division of the Court, who found the appeal incompetent, being of opinion, as the report bears, "that the terms of the conclusions of the summons formed the text for determining whether, in the words of the statute, 'the subject-matter of the suit did not exceed in value the sum of £25 sterling:' and that, as a sum of indefinite amount had been concluded for, the action did not admit of being appealed to the Circuit Court."

We are of opinion that these decisions ought to regulate the present case, and that, in respect of the indefinite nature of the prayer of the petition, the cause exceeds the value of £25, and is not struck at by the 22d section of the Sheriff-court Act of 1853. The prayer of the petition in the case of the *Shotts Iron Company* v. *Kerr*, Dec. 6, 1871, 44 Jurist, 117, which has led to the present question being submitted for the opinions of the consulted Judges, is in similar terms to the prayer of the petition in the present case. That decision is thus a direct precedent, not to be departed from unless it were clearly inconsistent with the statutory provision or with the prior authorities. The very opposite, however, is in our opinion the correct view.

We would add, that the question as to the competency or incompetency of an appeal does not merely affect the party who is pursuer of the original action. The appeal may be at the instance of the defender, who had not the framing of the summons raised against him. Now, if that summons contains a conclusion which the defender may be entitled to consider as exceeding the value of £25, it is hard upon him that he should be deprived of his remedy of obtaining review of the judgment in the Supreme Court. If a summons therefore contains a conclusion *ad factum præstandum*, which may be insisted on *in forma specificâ*, the risk of such a decree being pronounced seems to give the action a value to the defender far exceeding any pecuniary amount that the pursuer chooses to put upon it in an alternative or subsidiary form. A demand for delivery of a certain ring or picture without any pecuniary conclusion would be liable to review; and the possibility of such a conclusion being given effect to is equally formidable, although a pecuniary conclusion follows for a small sum of money in a certain event. Here we think it clear that a decree *ad factum præstandum* could have been insisted on in the first instance, and that demand makes it impossible to say that the action in one of its contingencies does not exceed the statutory sum. The rule must be the same as to the power of appeal competent to either party; and therefore, as it appears to us, any action such as that here in question, where an inappreciable decree may be pronounced, must be subject to appeal at the instance of either party.

The Opinion of Lords Ormidale and Gifford.

We are of opinion that the appeal in this case is incompetent, being prohibited by the provision contained in the 22d section of 16 and 17 Vict. c. 80 (the Sheriff-court Act of 1853).

The words of the statute are (sec. 22)—"It shall not be competent, except as hereinafter specially provided for, to remove from a Sheriff-court, or to bring under review of the Court of Session, or of the Circuit Court of Justiciary, or of any other court or tribunal whatever, by advocation, appeal, suspension, or reduction, or in any other manner of way, any cause not exceeding the value of £25 sterling, or any interlocutor, judgment, or decree pronounced, or which shall be pronounced, in such cause by the Sheriff."

The exception in this provision does not apply here, and the sole question is, whether the present cause is, in the sense of the statute, a cause "exceeding the value of £25 sterling." It appears to us that the value of the present cause is less than L25 sterling, and therefore appeal is incompetent.

The difficulty arises not so much from the construction of the statutory provision itself as from the course of previous decisions, and from the rules which have been fixed by previous decisions, not only in regard to the statute in question, but also in regard to the statutes regulating appeals to the Circuit Court of Justiciary, and the bringing of actions of less value than £25 sterling, in the first instance, before inferior courts.

A very stringent interpretation has been applied to the statute of 1853, so as to admit review where-

ever it does not appear on the face of the summons or petition in the inferior court that the value of its conclusion is under £25. In short, the rule seems fixed, that unless the Court can say, from simple inspection of the summons or petition and its conclusions, that the value of the cause is under £25, review is competent. Thus, in actions where the conclusion is merely *ad factum præstandum*, without any pecuniary conclusion, review is admitted, however clearly it appears from the proof, or even from statements or admissions on record, that the value is really under £25. The object of this rule of construction is to avoid the expense of a double inquiry, first into the value of the suit, and then into its merits; but the rule has led to the admission into the Court of Session of many trifling causes, upon which it was the clear intention of the statute that the judgment of the inferior court should be conclusive. We cannot help regretting the rule, but we think it is too late to go back upon it.

It appears to us, however, that the pecuniary value of the present action has been measured and stated by the appellant himself in the petition which he presented in the inferior court. The petition first prays that the respondent be ordained to deliver to the petitioner the forty fleeces mentioned, and then it proceeds, 'And failing the respondent doing so within such period as your Lordship shall appoint, to decern and ordain the respondent to pay to the petitioner the sum of £20 sterling, as the price or value of the said fleeces of wool, or such other sum as shall be ascertained to be the price or value thereof, in the event of appearance being entered, reserving the petitioner's claim for loss or damage already sustained, or which he may yet sustain."

Now, we read this as a direct statement that £20 sterling is "the price or value of the fleeces." The petitioner is content to take that sum as the price or value; and, beyond all doubt, if the respondent had failed or declined to enter appearance, the petitioner could have got no more. The conclusion for "such other sum as shall be ascertained to be the price or value," only comes into operation "in the event of appearance being entered." The value of a suit may be fairly taken to be the utmost sum for which decree in absence may be taken, when such pecuniary decree exhausts the suit.

No doubt litigation may cause great expense, and perhaps, by delay or otherwise, great damage; but it has been solemnly decided by a majority of the whole Court that expenses of a suit are not to be taken into account in estimating value—*Hopkirk* v. *Wilson*, Dec. 21, 1855, 18 D. 299. Damages are not included in the present action, being expressly reserved.

Supposing decree in absence had passed, and then review had been sought by way of suspension, it would have been clear that the value of the suit was only £20, because the court of review could not in a suspension enlarge the sum in the decree, but could only find the letters and charge orderly proceeded. We do not think it makes any real difference as to the value of the cause that the litigation took place at once in the inferior court, instead of after a decree in absence.

At all events, regarding the statutory provision excluding review as a most beneficial one, intended to cut short and prevent litigation about trifles, and therefore a provision to be liberally, or at all events fairly, interpreted, we are not disposed to extend the very stringent rule above referred to further than it has already gone.

We are also disposed to think—although on this point we have great hesitation—that where, in a simple petitory action, a specific sum is demanded, the addition of the words, "or such other sum," or even of the words, 'or such other sum, more or less, as may be ascertained," will not entitle the pursuer to recover more than the specific sum demanded. It is quite different in a count and reckoning, for in such action the conclusion is not for a specific sum, but for a settlement of accounts; and it is only on the settlement of accounts that a balance can appear. In all other cases, at least in all cases of simple pecuniary demand, it rather appears to us that a pursuer is bound to make up his mind, and to state the highest limit of his claim. If this view is well founded, it would also be conclusive of the point that the present cause does not exceed in value £25.

The decision in the case of the *Shotts Iron Co.* v. *Kerr*, Dec. 6, 1871, is adverse to the result at which we have arrived in this case; but we understand that, in consulting the whole Court, the decision in that case is not to be held as establishing a rule, but that the point is to be taken as still an open one.

Lord Muir—As the leading conclusion of this action is one *ad factum præstandum*, it belongs to a class of cases in which advocation has generally been held to be competent, unless where there is also a pecuniary conclusion which distinctly fixes the money value of the cause at a sum below that at which advocation is competent. And it appears to have been settled by a series of decisions—(1) That questions of the present description fall to be disposed of, with reference to the conlusions of the original summons or petition under which they are raised (*Taylor*, Nov. 17, 1824; *Robertson*, March 3, 1857); and (2) That where the definite money value of the cause cannot be ascertained from those conclusions, or, in other words, where the conclusions include prospective claims of an indefinite amount, which if given effect to may bring up the value above £12 or £25, as the case may be, advocation is competent (*Brown*, Jan. 29, 1822; *Mitchell*, March 10, 1855; and *Tennent*, H.L., March 3, 1864, 2 Macph., p. 22).

Decisions based upon the same grounds have also been pronounced, in a class of cases relative to the competency of appeals to the Circuit Court of Justiciary, under the clause in the Act 20 Geo. II. c. 43, which gave a right of appeal in civil causes "where the subject-matter of the suit did not exceed in value the sum of £12,' or of £25, as extended by the 55th Geo. III. c. 67—*Stott*, June 26, 1834, 12 Sh. p. 828; *Lamb*, Oct. 4, 1844, 2 Broun, p. 311; *Wilson*, Oct. 11, 1845, 2 Broun, p. 519; in all of which cases it appears to have been very deliberately decided that where the conclusions of the action were so indefinite as to admit of a sum larger than the specific sum mentioned being recoverd under them, the appeal was incompetent. The two former of these cases were questions of accounts; the other was a petition for interdict, with a petitory conclusion for £10, which was within the statutory limit; but in which it was held, notwithstanding, that, as the petitory conclusion contained an alternative of "such other sum, less or more, as may be modified in name of damages to the petitioner on account of the alleged encroachment," the appeal was incompetent.

It having thus been for long authoritatively settled as a rule of practice, that where in any action of accounting or of damages the pecuniary conclusions of the summons or petition contain a demand for a specific sum, with an alternative of "such other sum, less or more," as shall appear to be the true balance due upon an account, or as shall be modified in name of damages, the alternative conclusion of this indefinite character is to be the measure of the competency of the advocation or appeal; the question, as I understand it, on which the opinion of the consulted Judges is now required, appears to resolve into this, whether any different rule is to be laid down with reference to a case in which the prayer of the petition concludes, not for an accounting or for damages, but for delivery of some fleeces of wool, and failing delivery to have the respondent ordained "to pay the petitioner the sum of £20 as the price or value of the said fleeces of wool, or such other sum as shall be ascertained to be the price or value thereof, in the event of appearance being entered."

On first considering this question, I was much impressed with the weight due to the argument founded on the assumption that, if decree had passed against the respondent in absence, the petitioner could not have insisted for payment of more than £20 as the alternative of failure to deliver the fleeces, and that the value of the cause seemed thus to be fixed by the petitioner himself at £20. On further consideration, however, I have come to be satisfied that this is not a ground of judgment which can be adopted consistently with the decisions in the previous cases, and more particularly in that of *Wilson* v. *Addison*, already referred to, in which the petition concluded for "£10 sterling, or such other sum, less or more, as may be modified in name of damages to the petitioner." Because in that case also, had no appearance been entered, decree would have passed for £10: but the decision nevertheless proceeded expressly upon the ground that under that conclusion "the Sheriff might competently, though erroneously, have awarded £100."

In this view the question now raised for determination appears to me to depend upon whether, under the alternative conclusions of the present application, which is not strictly one of damages, it would have been incompetent for the Sheriff to have pronounced decree for more than £25, if the evidence as to the value of the fleeces had been sufficient to warrant a decree for that amount; and I have come to the conclusion that it would not. Because, although this form of alternative conclusion may not be very common, it appears to be recognised as a proper style in the Sheriff-court in applications for delivery of goods wrongously withheld; Soutar's Styles, p. 127. It is the same form as that used in the case of the *Shotts Iron Company*, Dec. 6, 1881; and in neither case does any objection appear to have been taken to the competency of the conclusion; which seems to be suited to the nature of a case which proceeds on the assumption that the petitioner is entitled to vindicate his property, and, failing this, to decree for the highest value which he may be able to show that he could have realised for it had possession not been improperly withheld: and for this I think that it was competent for the petitioner to insist.

Being therefore of opinion that there is, in the circumstances of the present case, no incompetency in the petitioner seeking redress in terms of the indefinite conclusions of the petition, I am further of opinion that the decision in the case of the *Shotts Iron Company* proceeded upon a sound application of the rules laid down in the earlier cases, and that the objection to the competency of the present appeal ought to be repelled.

Lord Benholme—I concur in the opinion of Lords Ormidale and Gifford. I have come to be of opinion that the case of the *Shotts Iron Co.*, mentioned above, which in principle is identical with the present, was erroneously decided. With respect to myself, I believe the desire of both parties to that case, that the jurisdiction of the Court should be sustained, prevented my considering the question with so much deliberation as I have since been constrained to give to it, under the solemn discussion before the whole Court which has recently taken place.

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When the case came before the Judges of the First Division for advising, the following opinions were delivered:—

Lord Kinloch—I am of opinion that the appeal is incompetent, on the simple ground that the pursuer of the action has, in his petition to the Sheriff, fixed the value of the case at less than £25. He concludes, failing delivery of the fleeces, for "the sum of £20 sterling as the price or value of the said fleeces of wool." It is true that he adds—"or such other sum as shall be ascertained to be the price or value thereof, in the event of appearance being entered." But I think this alternative incompetent. I conceive that there cannot be competently two conclusions in an action,—one for the case of appearance, the other for that of non-appearance of the defender; but that the conclusion must be one and the same in both cases. But, besides this, I am of opinion that, according to the law and practice of our Courts, there must always, except in the case of an accounting, be a conclusion for a definite sum, as importing the maximum of the demand. I do not doubt that decree may be obtained for a sum increasing during the process of the case, as for a growing value. This may happen any day in regard to damages, which may be sought and recovered down to the date of the verdict. And growing value is in substance just growing damage. But I do not think that this would be sustained as a reason for not concluding for a definite, though it may be an unliquidated sum of damages. The damage, even when sought down to the date of verdict, must still be scheduled at a specified sum; and beyond this sum I think the jury could not go, on a vague conception of growing damage. In short the policy of our law—and I think a wise policy—is, except where the thing is impracticable, as in an accounting, to oblige the pursuer to set forth the maximum of his demand in a distinct and definite sum. If there had been no conclusion *ad factum præstandum* in the present case, but a mere conclusion for the value of the fleeces, as in a case where restitution was impracticable, I conceive that the alternative conclusion would have been clearly incompetent. But I do not think the case varied in principle by the conclusion *ad factum præstandum* being prefixed.

Lord Ardmillan—This is an appeal from a judgment of the Sheriff of Fife, pronounced in an action in which the pursuer or petitioner, now the appellant, craved delivery of forty fleeces of

wool said to have been carried off from his premises, and, failing such delivery, craved decree for payment of £20 sterling as the price or value of said fleeces, or such other sum as shall be ascertained to be the price or value thereof in the event of appearance being entered, reserving the petitioner's claim for damages. We have now the opinion of the consulted Judges.

The question now before us is, whether this appeal is competent under the Sheriff-court Act of 1853? In other words, whether this cause exceeds in value £25 sterling? If it does not, the appeal is not competent.

The value of the cause must be ascertained from the conclusions of the action—whether summons or petition.

I am of opinion that, in a proper petitory action the sum concluded for is the measure of the value of the cause, and that sum must be held as the maximum of the pursuer's claim. Whether the words "or such other sum as shall be ascertained," or even the words "or such other sum, more or less, as may be ascertained," are or are not added, I think that in such an action, with such a conclusion, no sum can be recovered beyond the sum concluded for. The conclusion furnishes the measure of the value of the cause; and the conclusion must be definite. It is only in an action of accounting, with demand for payment of a balance to be ascertained on adjusting accounts, that a general conclusion for such sum, less or more as may be ascertained, can receive effect in extending the pursuer's claim beyond the sum expressly concluded for. I am not aware that a departure from this rule has ever been sanctioned. No instance has been cited to us from the Bar, and I have not been able to discover any instance where, in a petitory action with pecuniary conclusion, a sum exceeding what is stated in the conclusion has ever been awarded. In such a case, accordingly, an appeal to this Court cannot be competent where the summons concludes for less than £25. This rule in proper petitory actions is, I think, sound and well settled. I am not prepared to disregard it or to alter it.

But the question now before us is not precisely the same. In the present case the primary conclusion of the action in the Sheriff-court is for restoration or delivery of certain fleeces of wool, of which, in the event of failure to restore, the value is estimated by the pursuer at £20, or such other sum as shall be ascertained to be the price or value thereof. I think that the appellant rightly represents this as primarily an action *ad factum præstandum*. I agree with Lord Ormidale and Lord Gifford in the opinion that where the conclusion is merely *ad factum præstandum*, without any pecuniary conclusion, then review on appeal is competent, because the jurisdiction of this Court is open so far as not excluded, and can only be excluded on grounds appearing on the face of the summons. But then there is here a further conclusion in the event of failure to restore the fleeces —a conclusion for £20 as the price or value thereof, or such other sum as may be ascertained to be the price or value thereof. This, it has been observed, is not the same as a mere petitory conclusion. Nor is it the same as a conclusion merely *ad factum præstandum*. There is a primary conclusion *ad factum præstandum*, and then there is added a petitory conclusion for a certain sum, which sum is less than £25. It is here that the point arises on which the present question of competency turns.

I cannot say that the question of the competency of this appeal, in such an action with such a primary conclusion *ad factum præstandum*, is free from difficulty. The opinions which we have received from the consulted Judges make it sufficiently manifest that there is difficulty, and difference of opinion.

Had the question been quite open—had there been no decision by the Second Division of the Court,—my opinion would have been against the competency of the appeal. The leading view pressing on my mind would have been that the value of the cause must be found within the conclusions whenever there is a petitory conclusion for a pecuniary value. Nothing more than £20 could, I think, have been here recovered under the conclusion for payment. That was the value put by the pursuer on the fleeces; that was the sum at which the pursuer estimated the pecuniary value of what he sought to have restored,—that is, of the fact of restoration, that of which he primarily craved performance. In my opinion, therefore, this appeal is not competent. I am satisfied by the reasoning in the opinions of Lord Ormidale and Lord Gifford.

But the question is not thus open. There stands in the way a judgment which I think we are bound to respect.

The Judges of the Second Division have pronounced a decision which is quite in point. In the case of the *Shotts Iron Co.* v. *Kerr*, Dec. 6, 1871, the Judges of the Second Division pronounced a decision in favour of the competency of the appeal, where the conclusion was primarily for delivery of certain lambs, and thereafter for payment of £10 sterling, as the price or value of the lambs, "or such other sum as shall be ascertained to be the price or value thereof." That was a unanimous judgment, given after careful consideration; and I must say that it appears to me to be quite in point, the words being nearly the same as here, and the primary conclusion being for a sum smaller in amount. I am unable to find any sufficient distinction between that case and the present. Indeed, no distinction has been urged, and scarcely has any distinction been suggested. No intelligible distinction between the two cases has been presented. We have been called on to decide, and we must resolve whether we ought to decide, this question according to, or directly and clearly contrary to, the recent judgment of the Second Division.

The construction of the statute, in so far as applicable to the nature and structure of this action, is plainly a matter on which there is not only doubt, but much doubt, and reasonable room for doubt, and for diversity of opinion.

I am much impressed by the delicacy of the position which we occupy in regard to this recent judgment of the Second Division, and I am not quite satisfied that there is a *nodus vindice dignus*—a ground sufficient to sustain a disregard of that judgment.

It is important that there be a settled rule of practice on the subject of such appeals. It does not appear to me equally important that the rule be laid down according to my view, and not according to the view of the Judges of the Second Division. The question, whether the rule of practice should be for or against the competency of this appeal, is not so important as that a rule of practice in the matter shall be settled and well understood. Therefore, though my own opinion is against the competency of this appeal, I do not at all regret

that a majority of the Judges are in favour of the view taken by the Second Division.

LORD DEAS—I agree so far with Lord Ardmillan that the case of the *Shotts Iron Company* is quite a case in point as to the question of the competency of this appeal. The circumstances of the two cases are very similar, in fact there is no substantial difference between them. Now, I am unable to see any good reason for holding that that case was badly decided; on the contrary, I think that all the authorities are in favour of it. I have no hesitation, therefore, in agreeing with the majority of the other Division.

LORD PRESIDENT—I have arrived at an opposite opinion from that of your Lordship, and agree with Lord Kinloch and Lord Ardmillan, and have nothing to add to what they have said. The authorities are, I consider, all on the other side, with the exception of the case of *Shotts Iron Company*. When that case was first mentioned to us, it was unreported, and it was difficult to ascertain what had passed before the Court. But undoubtedly the decision arrived at was contrary to my opinion. The question was, however, fully deserving of reconsideration, as we find one of the Judges of the Second Division, who decided the *Shotts'* case, changing his views. I regret that I cannot agree with the majority, but it is, at any rate, satisfactory to have a point of practice like this definitely decided.

Competency of appeal sustained.

Counsel for Appellant—J. D. Grant. Agent—James Barton, S.S.C.
Counsel for Respondent—Mair and Rhind. Agents—D. Crawford & J. Y. Guthrie, S.S.C.

## *Tuesday, July* 16.

### RIGBY AND BEARDMORE *v.* DOWNIE.

(*Ante*, p. 360.)

*Expenses—Taxation—A. S., 19th December* 1835.

The Court pronounced an interlocutor "finding the pursuers entitled to expenses, subject to a deduction of £25 from the taxed amount thereof, in respect of the proceedings in which they were unsuccessful between the 17th June and the end of November 1871. The Auditor taxed off the whole of the pursuers' expenses (amounting to about £49) during the period mentioned, and from the taxed amount deducted £25. The pursuers objected that the true meaning of the interlocutor was that they should be entitled to their whole expenses, less £25. Objection *repelled.*

The LORD PRESIDENT said—There is an important Act of Sederunt, dated 19th December 1835, which provides, "that notwithstanding a party shall be found entitled to expenses generally, yet if, on the taxation of the account, it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings." Keeping in view this general rule, we have to construe our interlocutor of March 8th. We found the pursuer entitled to expenses. If no more had been said, it was the duty of the Auditor to consider whether, in any part of the case, the pursuer, the successful party on the whole, had been unsuccessful. On this we have a very plain statement in the interlocutor. It was the Auditor's duty to strike off the part of the pursuers' account for the period between 17th June and 2d November 1871. But then we found the pursuers entitled to expenses, "subject to a deduction of £25, in respect of the proceedings, &c." This is represented as a modification, a fixing, without any remit to the Auditor, of the amount to be deducted from the pursuers' account, as representing the amount of expenses for the period in which they were unsuccessful. It is not expressed as a modification. The true meaning is that we must first take the taxed account, and then deduct £25 from the taxed account. I am satisfied that it was the intention of the Court, as well as the proper meaning of the interlocutor, that the £25 should be paid to the defender for his expenses during the period in which the pursuers were unsuccessful.

The other Judges concurred.

Counsel for Pursuers — Solicitor-General and Lancaster. Agents—Jardine, Stodart, & Frasers, W.S.
Counsel for Defender—Watson and J. A Reid. Agent—P. S. Malloch, S.S.C.

## *Wednesday, July* 17.

### LINDSAY (TOD'S TRUSTEE), PETITIONER.

*Bankruptcy—Bankruptcy Act*, 1856, § 90—*Trustee—Examination relative to Bankrupt's Estate.*

*Held* that the only questions which can, in terms of the Bankruptcy Act 1856, be put to persons examined on oath under section 90, are such as relate to the bankrupt's estate or affairs.

Mr Lindsay, accountant, Edinburgh, trustee on the sequestrated estate of William James Tod, builder, Edinburgh, presented a petition to the Sheriff, praying him to grant warrant, under the 90th section of the Bankruptcy Act 1856, to the said trustee to examine upon oath certain persons who, he averred, were able to give information relative to the estate of the bankrupt, who had absconded, taking his books and papers with him.

The Sheriff (HAMILTON) granted the prayer of the petition, and the examination was accordingly proceeded with. In the course of the examination William Officer, S.S.C., formerly agent for the bankrupt, but not his agent in the sequestration, was asked—"When did you see the bankrupt last?—A. I saw him about the beginning of June current. Q. Where?—A. In London. Q. Do you know where he is now?—A. I decline to answer that question on the ground of confidentiality, unless directed to do so by the Sheriff." The Sheriff-Substitute (HAMILTON) ruled that the witness was not bound to answer the question, in respect that it had no reference to the bankrupt's affairs. The witness was then asked—"Have you received any letters from the bankrupt since he left Edinburgh?" The witness stated that he had received no letters from the bankrupt relative to his affairs, and declined to make any further answer upon that ground, and also on the ground of confidentiality. The Sheriff-Substitute disallowed the question.