that the statutory limitation of section 26 of the Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 95) would apply, as more than six months had expired since the contraventions, but they submitted that the portion of section 22 of the Gold and Silver Plate (Scotland) Act 1836 (6 and 7 Will. IV. cap. 69) from "it shall be lawful for such justices or sheriff" down to "unless such penalties . . . shall be sooner paid or satisfied" was permissive and alternative. It was to be observed that section 6 of the Summary Jurisdiction Act preserved the right of suing for penalties. The penalties incurred under the Gold and Silver Plate Act, like those under similar Acts, were civil debts and were recoverable by ordinary action—*Campbell* v. *Young*, February 24, 1835, 13 S. 535; *Dunlop* v. *Hart*, June 20, 1835, 13 S. 1173; *M'Donald* v. *Gray*, February 17, 1844, 2 Broun 107; *MacDonald* v. *Young*, January 20, 1862, 4 Irv. 154; *Caledonian Railway Company* v. *M'Gregor*, May 13, 1909, 46 S.L.R. 721; Moncrieff's Review in Criminal Cases, 273 and 279.

Argued for the defenders — The only method of procedure allowed under the Gold and Silver Plate Act, section 22, was by summary proceeding, and that had not been followed. Procedure by ordinary action was incompetent. Reference was made to *Glasgow City and District Railway Company* v. *Hutchison*, March 20, 1884, 5 Coup. 420.

LORD PRESIDENT—I think that the result to which the Sheriffs have come is right, although I am not quite certain that I have come to that conclusion on the same grounds as the Sheriffs did, because in their notes they have touched upon many topics which are not necessary for the disposal of the action.

The question must necessarily turn upon what is the true interpretation of section 22 of the Gold and Silver Plate Act. Now I think when one reads that section it is quite clear that the only procedure which is contemplated in that section is procedure of a summary character, and that it is not meant there to give ordinary civil action—it may be for very large sums of money—with a privative jurisdiction to the Sheriff Court or the Court of the Justices of the Peace. If that is so, the right view of the procedure that is contemplated by section 22 is that it was meant to be a summary application, and then all difficulty is really at an end. There might have been difficulties as to review under the earlier law, but under the existing law—as the result of the two statutes, the Sheriff Court Act of 1907 and the Summary Jurisdiction Act of 1908—it is quite clear that the proceedings must be taken under the forms of the Summary Jurisdiction Act, because there is nothing else left.

Now, admittedly, this procedure has not been taken under the form of the Summary Jurisdiction Act, and therefore I think the action fails, there being no warrant for the form in which it has been brought.

LORD JOHNSTON—I agree with your Lordship. I have come to the same conclusion as the Sheriffs, although I do not wish to be held as endorsing everything that they say on the subject. Section 22 gives right to sue for a penalty, and, as I read it, says that if you do sue you must sue in the following way, and that following way is a summary way. Whether the suit is civil or criminal we do not need to decide, but it certainly cannot be entertained under the ordinary civil procedure of the Sheriff Court.

LORD SKERRINGTON—I concur.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

The Court dismissed the appeal.

Counsel for the Pursuers (Appellants)—The Solicitor-General (Anderson, K.C.)—Wark. Agents—Gill & Pringle, W.S.

Counsel for the Defenders (Respondents)—Morison, K.C.—T. G. Robertson. Agent—Dugald Maclean, Solicitor.

Wednesday, June 12.

FIRST DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Hawick.

MELROSE PARISH COUNCIL *v.* HAWICK PARISH COUNCIL.

Sheriff — Process — Appeal — Competency—Value of Cause—Continuing Liability no longer Involved—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, c.* 51), *sec.* 28.

In an action raised in the Sheriff Court by the parish of M. against the parish of H. for (1) repayment of a sum of £17 odd expended by them for behoof of Y., a patient in the district asylum, and (2) relief of future advances, the Sheriff assoilzied the defenders. At the date of the judgment Y. had recovered and had left the asylum. On the pursuers appealing to the Court of Session objection was taken to the competency of the appeal on the ground that as Y. had recovered no question of future liability was involved and that accordingly the value of the cause was beneath the statutory limit.

Held that the appeal was incompetent.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 28, enacts—"Subject to the provisions of this Act, it shall be competent to appeal to the Court of Session against a judgment of a Sheriff-Substitute or of a Sheriff, but that only if the cause exceeds fifty pounds . . ."

Mrs Janet Young, wife of William Young, baker, Hawick, was admitted as a private patient into the Roxburgh District Asylum on 24th October 1910. Her board was paid by her husband up to 24th January 1911,

when he declined to make further payment, owing, as he alleged, to inability to do so. The Asylum then called upon the Parish Council of the parish of Melrose (the parish in which the asylum was situated) to pay for her maintenance, and this they did from 24th January to 15th August 1911. The relieving parish (*pursuers*) then brought the present action against the parish of Hawick (the parish of the husband's settlement) (*defenders*) for repayment of the sum so expended.

The crave of the initial writ was as follows—"To grant a decree against said Parish Council of the parish of Hawick for payment to pursuers of Seventeen pounds, nine shillings and one penny sterling (£17, 9s. 1d), with interest from the date of citation; to ordain the defenders to free and relieve the pursuers of all further alimentary or other advances which the pursuers may make on behalf or on account of said pauper, so long as she may require parochial aid, and her parochial settlement continues to be in said parish of Hawick, with interest from the respective dates of the advances till payment, and to find the defenders liable in expenses."

At the date when the action was raised Mrs Young was still a patient in the asylum, but she subsequently recovered and left the asylum on 17th August 1911.

On 8th March 1912 the Sheriff-Substitute (BAILLIE) found that the defenders were bound to pay the pursuers' advances and granted decree therefor.

The defenders appealed to the Sheriff (CHISHOLM), who on 17th May 1912 assoilzied the defenders.

The pursuers having appealed, the defenders objected to the competency of the appeal on the ground that as Mrs Young had recovered no question of continuing liability was involved, and that accordingly the appeal was incompetent on the ground of value. They cited — *Paisley Parish Council* v. *Glasgow and Row Parish Councils*, 1907 S.C. 674, 44 S.L.R. 520; *Duke of Argyll* v. *Muir*, 1910 S.C. 96, 47 S.L.R. 67; and *David Allen & Sons' Billposting, Limited* v. *The Dundee and District Billposting Company, Limited*, 49 S.L.R. 716.

Argued for pursuers — The appeal was competent. The pursuers craved the Court to determine the question of continuing liability, and it was immaterial that the patient had recovered. Such recovery might be only temporary. The criterion of value was the conclusions of the summons, and when these were looked at it was obvious that the action was not merely one for £17 odd. They cited *Cairns* v. *Murray*, November 21, 1884, 12 R. 167, 22 S.L.R. 116, and *Tait* v. *Lees*, January 13, 1903, 5 F. 304, 40 S.L.R. 253.

LORD PRESIDENT — I think that this appeal is incompetent, and the grounds on which I do so are the grounds which I set forth in the case of the *Paisley Parish Council* v. *Glasgow and Row Parish Councils*, 1907 S.C. 674. Of course the decision there was the other way, because it practically determined a question of continuing liability, which liability in the circumstances of that case might reasonably be expected to amount to more than £25. In this case there is no question, as I understand, of continuing liability to decide, because the woman who was a lunatic has recovered, she has left the asylum, and the whole bill incurred never can amount to £50, which is now the pecuniary limitation of the right of appeal. To read a single sentence of what I said in the *Row* case—"The common-sense test seems to me to be simply this, Is the Court asked to decide a practical question of continuing liability, or is it not?"

I think that is always a practical question, and that it is so here. We are not asked to decide a question of continuing liability, and therefore I think this appeal is incompetent.

Certain cases have been quoted to us, and I wish to reserve my opinion as to whether the case of *Tait*, 5 F. 304, does not on principle really conflict with what was said in the case of *Paisley Parish Council* and in the very much later case of *Allen & Sons;* but so far as this case is concerned there is no conflict, for this very good reason—in *Tait's* case the sum on the face of the summons clearly exceeded £25, which was then the limit of value, whereas here the sum on the face of this initial writ is under £50. Accordingly, taking the first rough test of competency, viz., what is upon the face of the summons, this appeal is incompetent. In other words, you have got to say that the question is one of continuing liability in order to make the appeal competent. If, as I have already said, you look at the matter in a practical way and find that it is not a question of continuing liability, then *cadit questio.* So far as I myself am concerned, I should like to say, although it is a practical question, and although, as I put it in the *Paisley* case, it is not enough to say that it may theoretically recur, yet if I can suppose that this woman became insane again and happened to be put in an asylum in the same parish—because that is necessary to support the hypothesis—I do not think the case would be *res judicata*, because I think the decision of this Court that the appeal is incompetent in respect that no question of continuing liability is raised, reduces the matter to a mere question whether a particular sum of £17, 9s. 1d. is or is not due. On these grounds I am of opinion that the appeal is incompetent.

LORD JOHNSTON—I agree that appeal is incompetent in the particular circumstances of this case. But I think it is necessary in order to arrive at a judgment really to know what the merits are. I have read the record and the judgments of the two Sheriffs, and I find that the case is this—it so happens that the district asylum for Roxburgh, Berwick, and Selkirk is situated in the parish of Melrose; a particular lunatic from Hawick was sent there as a private patient and was paid for for six months, but then her husband, pleading

inability to continue the payment, ceased the payment, and a question has arisen between the parish of Melrose, who were called upon by the Asylum authorities to accept initial responsibility after the husband ceased to pay, and the admitted parish of the lunatic's settlement as to the liability for her board. The question at issue is therefore not the ordinary question of the settlement of the lunatic. It is a question of whether the lunatic was a pauper or not. That question might have involved one of continuing liability, because the pauper might have continued a lunatic and the obligation to maintain her might have continued. But we are told that the lunatic is now well and has been removed from the asylum, and that the present obligation to pay for her has ceased. In these circumstances there is no continuing liability possible, because if she turns out only to have had a lucid interval and has to be sent back to the asylum, the question of the husband's capacity to maintain her arises *de novo* in different circumstances. While, then, the appeal is incompetent as the value at stake is below the limit, if there had been a question as to the pauper's settlement there might very well have been a question of continuing liability, because no one can tell whether the convalescence is to be permanent or is merely a lucid interval.

LORD KINNEAR—I agree with your Lordship for the same reasons. I shall only add that I think the case of *Tait* v. *Lees*, 5 F. 304, is distinguishable. In that case the parties had joined issue in the Sheriff Court as to liability for an amount which would have allowed a decision to be appealed, and after they had joined issue a minute of restriction was put in, reducing the value of the cause to less than £25. The only question was whether the restriction of the conclusions of the summons after the parties had joined issue had or had not the effect of rendering the case unappealable. I do not think that applies to any question we have to consider here.

LORD MACKENZIE was absent.

The Court sustained the objection.

Counsel for Pursuers—Kemp. Agent—James D. Turnbull, S.S.C.

Counsel for Defenders — MacRobert. Agents—Sibbald & Mackenzie, W.S.

Wednesday, June 12.

SECOND DIVISION.

CALEDONIAN RAILWAY COMPANY *v.* SYMINGTON.

Process—Proof—Diligence to Recover Writs—Primary and Secondary Evidence—Law Agent's Books in an Action against his Principal.

A respondent in an action obtained a diligence to recover the cash books of the complainers in the action, that excerpts might be taken showing transactions of a particular character, and also to recover certain documents. Failing the principals of the books and documents called for, the specification called for copies, jottings, &c. A partner of the firm of law agents who acted for the complainers was examined as a haver, when he deponed that his firm had none of the books and documents called for, and declined to produce the books of his firm. The commissioner upheld the haver's objection to produce the cash books of his firm, in which were admittedly entries of payments made on behalf of his principal, but ordained him to produce the letter books. The Lord Ordinary upheld the commissioner, and granted a new diligence covering the cash books of the law agents. On appeal the Court *recalled* the Lord Ordinary's interlocutor, *refused* the new diligence, and, on the ground that the respondent was not entitled to recover copies till he had used reasonable diligence to recover the principals, *upheld* the haver's objection to produce the letter books.

The Caledonian Railway Company, *complainers*, brought an action of suspension and interdict against Hugh Symington, contractor and quarrymaster, Coatbridge, *respondent*, in which the Lord Ordinary (CULLEN) allowed a proof, and, after sundry procedure, on 20th March 1912 granted a diligence to the respondent for the recovery of the documents contained in a specification of which articles 1, 3, 4, and 6 were as follows:—"1. All notices to treat under the Railway Clauses (Scotland) Act 1845 or Land Clauses Consolidation (Scotland) Act 1845 served by the complainers or anyone on their behalf on the proprietors of the Woodhouse estate, their tenants or lessees or anyone on their behalf, for or in connection with the formation of the Glasgow and Carlisle Railway, and all claims, valuations, reports, arbitration proceedings, awards, and decrees-arbitral following thereon, and all correspondence between said parties, or any of them, relating in any way to said notices, claims, arbitrations, or otherwise. . . . 3. The books of the complainers, including ledgers, journals, cash books, day books, account books, letter books, statement books, receipt books, voucher books, and all others, that excerpts may be taken therefrom showing, or in any way tending to show, the purchase money, compensation, and other moneys paid or payable by the complainers (*a*) to the proprietors of Woodhouse, their tenants and lessees, and (*b*) to all other landowners, their tenants and lessees, or anyone on their behalf, for or in respect of freestone or sandstone, within the county of Dumfries, acquired, taken, used, or reserved by the complainers or their contractors for or in connection with the construction of the railway and railways referred to in answer 11 for respondent between the years 1845 and 1868. 4. All notices to treat served by the complainers,