

contended that, following the rule observed for the last two years, each case should be treated as standing by itself, and that no attempt should be made to strike a balance in favour of either party. His clients (the Conservative interest) had supported 12 appeals, and had been successful in 7; and in opposing appeals on the other side, amounting to 14 in all, they had been successful in 10. His clients had therefore, out of 26 appeals, been successful in 17.

Mr LANCASTER, in the Liberal interest, remarked that as in some instances several appeals had been disposed of in one argument, expenses should in such cases be given to the successful party as for one case only.

The Court held that though they must in point of form decide each case separately, yet considering that the same counsel and agents had been employed throughout, and that thus much discussion and time had been saved, they would modify expenses to £2, 2s. in each case.

Friday, Dec. 1.

SECOND DIVISION.

ADV.—JOHN WALKER *v.* GEORGE SIMPSON.

Sale in Bulk—Deficiency in Weight—Onus probandi.
Held that in a sale of stacks of grain, with a guarantee by the seller that each stack would yield a certain quantity, the burden of proving a deficiency lay on the purchaser. Circumstances in which held that the purchaser had failed to prove the deficiency.

Sheriff Court Act—Adjournment of Diets of Proof.
Observed that diets of proof had been adjourned without the special cause being embodied in the interlocutors, as required by the Sheriff Court Act.

Counsel for Advocate—The Solicitor-General and Mr Strachan. Agents—Messrs Maclachlan, Ivory, & Rodger, W.S.

Counsel for Respondent—Mr Shand and Mr MacLean. Agent—Mr John Leishman, W.S.

This was an advocacy of two conjoined processes from the Sheriff Court of Lanarkshire. The questions in dispute between the parties were the following:—Upon 4th April 1861, Walker had purchased from Simpson 17 stacks of grain (8 wheat and 9 oats), Simpson guaranteeing that there were 21 bolls of grain in each stack, and that should any stack contain more, he was to get credit for the surplus of any stack that should not contain that amount. The price was £425, of which Walker had paid £250 to account. Simpson, in one of the processes advocated, sued Walker for the balance, payment of which he resisted, upon the ground that there had been a short yield from the stacks to the extent of 65½ bolls, of the value of £75 odds. Walker brought a counter-action, in which he claimed payment of, *inter alia*, the sum of £77 as the value of the straw of the 9 stacks of oats which he alleged had been purchased from him by Simpson. These actions having been conjoined, a proof was allowed to both parties of their averments, which was led at considerable length at eight separate diets. Thereafter the Sheriff-Substitute and Sheriff, upon advising the same, found that Walker had failed to instruct his defence of short delivery of the grain and his claim for the price of the straw, and found Walker liable in the expenses of the conjoined processes. Walker thereupon advocated the actions; and parties having been heard in the advocacy process, the Court to-day adhered to the Sheriff's interlocutors.

The LORD JUSTICE-CLERK, after narrating the contract, said in regard to the questions raised in this advocacy, there was not much room for doubt. Under the contract the party who had the interest

to enforce the guarantee of 21 bolls to each stack was not the seller but the purchaser. If the purchaser got more than the stipulated quantity of grain in each sack, the price to be received was not increased. The seller had no interest to enforce the guarantee, but merely to give delivery and receive the price. If the buyer meant to claim under his guarantee, it was his duty to preserve distinct and satisfactory evidence of the yield of grain from each each. The *onus* of proof lay upon him. Has he so acquitted himself as to ground the present claim? The Sheriff-Substitute has found that he has failed, and in this I entirely concur. The purchaser has altogether failed to make out either the weight or the measurement of the grain, so as to ascertain whether there was any deficiency. The weighing and measuring of the grain should have been attended to by some intelligent neutral and careful person, and that at the sight of both parties. This was not done. The weighing and measuring was gone about in the loosest manner. As regards three of the stacks of wheat, the buyer admits that no measurement or weight was taken of the grain thrashed therefrom. Besides, even as to the other stacks, the produce of which was weighed or measured, there is great uncertainty as to the weighing or measurement. I think the advocate has failed to make out his case in either view; and therefore I consider it unnecessary to examine the question as to whether weight or measurement was in the view of the parties when they entered into this contract. As regards the oat straw, the only question seems to be, Was this straw resold by Walker to Simpson? The burden of proof lay entirely on Walker; and it was incumbent on him to prove the sale. There is an entire blank in the evidence on the subject, except that of the seller himself; and therefore upon this matter I also hold with the Sheriff-Substitute that the advocate has failed to prove his case.

The other Judges concurred.

The advocacy was therefore refused, with expenses.

In the course of the discussion the Court took occasion to call attention to the fact that the provisions of the Sheriff Court Act had not been complied with in this case, in so far as that whereas it was ordered in that statute that adjournments of the diets of proof should only be made on special cause shown to be embodied in an interlocutor of adjournments, the diets in this case had been adjourned, with one or two exceptions, of consent of parties only, and without any special cause being set forth in the interlocutors.

Saturday, Dec. 2.

FIRST DIVISION.

PET.—CHRISTINA FAIRGRIEVE, FOR
ADMISSION TO POOR'S ROLL.

Poor's Roll. A girl refused the benefit of the poor's roll to enable her to advocate an action of filiation and aliment which had been decided against her in the Sheriff Court.

Counsel for Petitioner—Mr C. T. Couper. Agent—Mr R. C. Bell, W.S.

Counsel for Defender—Mr Millar.

The petitioner was pursuer of an action of filiation and aliment in the Sheriff Court of Haddington, which had been decided in her favour by the Sheriff-Substitute, and against her by the Sheriff-Depute. She proposed to advocate the Sheriff's judgment on juratory caution, and applied for the benefit of the poor's roll. A remit was made to the reporters, who certified that the applicant had a *probabilis causa litigandi*. The defender objected to the petitioner being admitted to the poor's roll. It was a case betwixt two farm servants, which had already been considered by two local Judges, and