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 Advocator—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 advocation 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 advocation 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 advocation, 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 advocator 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 advocator has failed to prove his case.

The other Judges concurred.

The advocation 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

the parties should not be encouraged to continue the litigation. Duncan *v*, Morrison, 16th January 1863 (1 Macph. 257), was in point. It was stated that the petitioner was twenty-two years of age and unmarried, had one child, earned elevenpence a day, and neither she nor her parents had any property of any description.

The Court refused the application.

STOBIE *v.* MELVIN.

Process—Act of Sederunt 1841—*Court of Session Act—Failure to Proceed to Trial.* Circumstances in which held that sufficient cause had been shown why a motion for absolvitor in respect of failure to proceed to trial should be refused, *Question*—Whether such a motion should be made in the Inner or Outer House?

Counsel for Pursuer—Mr Skelton. Agents—Messrs Trail & Murray, W.S.

Counsel for Defender—Mr Thoms. Agents—Messrs G. & H. Cairns, W.S.

Issues were adjusted in this case by the Inner House on 6th February 1864, when the case was remitted to the Lord Ordinary. The defender moved the Lord Ordinary under the Act of Sederunt of 1841 for absolvitor in respect of the pursuer's failure to proceed to trial within twelve months after the adjustment of issues. The Lord Ordinary reported the motion in consequence of a difficulty having occurred as to whether the motion should be made in the Outer House or in the Division. The Act of Sederunt of 1841 provides that after issues are engrossed all motions in the cause shall be made in the Division to which such cause belongs. By the Court of Session Act adjustment of issues is made equivalent to engrossment. The Second Division found, in the case of Ferguson *v.* Ferguson, 13th July 1861 (23 D. 1290), that such a motion as the present should be made in the Inner House, on the ground that the intention of the Court of Session Act was to send cases to the Lord Ordinary for the purposes of trial only, and that to all other effects the former practice remained in force. On the contrary, the First Division, in the subsequent case of Hornel *v.* Gordon, 19th February 1864 (24 D. 551), had decided that a motion for a diligence after the adjustment of issues should be made before the Lord Ordinary.

The Court adhered to the opinions they had formed in Hornel's case, but stated they would consult with the other Division on the subject. In the meantime they would deal with this case on the report of the Lord Ordinary.

It was then urged for the pursuer that although twelve months had elapsed since adjustment of issues, there was sufficient cause for the delay to justify the motion being refused. The case involved a complicated accounting, extending from 1855 to 1861. Immediately after issues were adjusted the pursuer had applied for and obtained a diligence from the Lord Ordinary, which, after various delays and adjournments, many of which were caused by the defender, was ultimately reported on 26th January 1865. Shortly thereafter, and on 18th March, the pursuer's agents wrote to the defender's agents asking them how long they would require for an examination of the documentary evidence which had been recovered. To this letter no answer was returned. The defender had therefore changed his agents. In fact the pursuer was ready to go to trial, but was delaying for the convenience of the defender and his new agents, and in the hope, too, that the case might be arranged without jury trial, for which it was not very well suited.

The Court, after asking the opinion of the Lord Ordinary, who thought that possibly the pursuer might have been misled by the abrupt close of the correspondence, the letter of 18th March not having been answered, refused the motion.

Thursday, Nov. 23.

OUTER HOUSE.

(Before Lord Kinloch.)

WILLIAM HAMILTON *v.* ALEXANDER TURNER AND OTHERS.

Reparation — Culpa — Minerals. Held (per Lord Kinloch) that every tenant of minerals is bound so to work them as to afford sufficient support to the surface, and action at the instance of the proprietor of buildings on the surface for injuries caused through failure of tenants so to work the minerals sustained as relevant against them, but dismissed as irrelevant against the proprietor, he not being responsible for the acts of his tenants.

Counsel for Pursuer—Mr Pattison and Mr Guthrie Smith. Agent—Mr James Paris, S.S.C.

Counsel for Mr Turner—The Lord Advocate and Mr Gifford.

Counsel for the Monkland Iron and Steel Company—The Solicitor-General and Mr Watson. Agents—Messrs Davidson & Syme, W.S.

By feu-disposition, dated August 12, 1856, Alexander Turner, one of the defenders in this action, disponed to the pursuer William Hamilton a piece of ground and certain houses thereon. The right to minerals was reserved by the disposition to Turner as superior, and he became bound to indemnify the disponee for any damage which might be occasioned by working them. The disposition contained, however, this qualification, that if at any time the minerals should be let, the lessee and not the superior should be liable for such damage, and the superior engaged so to bind the lessee. Prior to the pursuer's disposition by nearly two years, by a lease dated 25th April and 10th May 1854, these minerals had been let to the Monkland Iron and Steel Company, the other defenders in this action, and under this lease they became liable to pay all damages which might be occasioned by the working of the minerals, both above and below ground. The pursuer now brought an action of damages against both of the defenders on the allegation that in working the minerals no proper supports had been left for the surface ground, and thereby great damage had been occasioned to his houses and buildings. The case having been heard on the question of the relevancy, the Lord Ordinary dismissed the action as against Turner, but found it relevant as against the other defenders. In the note to his interlocutor, after narrating the facts of the case, his Lordship goes on to say—"The Lord Ordinary has had no difficulty in holding this action relevant against the mineral tenants. He considers it is as undoubted that every mineral tenant is bound so to conduct his workings as to afford sufficient support to the surface, and whatever has been lawfully placed thereon anterior to the working taking place. He is as much bound to do so as the proprietor of an under storey is bound so to conduct any operation on his property as not to injure the support afforded to the storey above."

But the pursuer also insists in his claim against his superior Mr Turner as responsible for the acts of his tenants, the Monkland Iron and Steel Company. The Lord Ordinary is of opinion that no sufficient ground has been laid for his claim in the present record. Generally speaking, a landlord is not bound for a wrongful act committed by his tenant. If, indeed, it shall appear, either indirectly or by necessary implication, that the lease was granted with the object of the tenant's working wrongfully, and to the possible injury of the surface proprietor, the landlord will be liable as an accessory to the wrong, being in that case held to act through the tenant acting without his authority.