

that the directions of the Act under which such society was established have been duly complied with, or that the rules of the society itself respecting the making or altering rules have been observed; and upon the registrar being satisfied that the alterations are in conformity with law, he is bound to give to the society a certificate to that effect. And the Act specially provides that 'unless and until the same shall be so certified as aforesaid, such rules, alterations, and amendments shall have no force or validity whatever.'

"In the present case, the meeting at which the alterations are said to have been made was held on 8th April 1867. But the alterations said to have been made at that meeting were not transmitted to the registrar till 12th May 1869. The registrar thereafter sent a certificate in somewhat peculiar form, the effect of which, as giving force or validity to the alterations from its date, it is not necessary to consider; because this action was raised on 16th April 1869 for aliment due for a period prior to the rules having been communicated to the registrar, or his certificate received, and when, according to the express provisions of the statute, the decrease in the rate of aliment relied on by the defenders was invalid and ineffectual.

"In regard to the 28th rule of the defenders' society there is perhaps more difficulty. The rule provides for settlement of disputes by arbitration, and for an exclusion of appeal to the Civil Court against the judgments of such arbiters; and the 40th section of the Act of Parliament, already referred to, provides that all such disputes shall be decided in manner directed by the rules of such society. But, upon the whole, the Sheriff does not think that this case has been incompetently brought in this Court. A rule by which the ordinary jurisdiction of the Court is said to be excluded falls to be strictly construed. And, strictly construed, this rule does not appear to the Sheriff to apply to the present case. The rule specially deals with differences or disputes among the members. This is a difference between one of the members and the society itself. Nor is this entirely a formal distinction; it will be found to involve substantial difference. In regard to a dispute between two members, arbiters selected in the manner provided by the 28th rule might be able to apply their minds to it in the entire absence of any personal interest, and with perfect freedom from all bias. It is not so, however, in the present case. In this question all the members of the society are interested in one way or the other, and it appears to the Sheriff to be quite reasonable that the rule should provide for the former case, and not for the latter.

"Whether the reference would be rendered invalid by the absence of the names of arbiters in the special circumstances of this case it is not necessary to inquire, if the Sheriff is right in the view he has already expressed."

The defender appealed.

TRAYNER, for the respondent, objected to the competency of the appeal. The case was one which had been raised and decided in the Small-Debt Court, and if review was competent it was competent only before the Circuit Court of Justiciary (*Graham v. Mackay*, 6 Bell's App. 241). The fact that the Sheriff had remitted the case to his ordinary roll did not change its character, or make it other than a Small-Debt case, and the 14th clause of the statute (1 Vic., cap. 41), which pro-

vided that such remitted case "shall thenceforth be conducted according to the ordinary forms and proceedings in civil causes," was intended only to regulate the procedure before the Sheriff, and not to confer a right of review which was not otherwise competent.

SHAND for the appellants—The action here was raised no doubt for recovery of £5 odds in the Small-Debt Court; but the case involved more than the mere question of whether that sum was due or not. The pursuer's claim was for aliment from a friendly society, and the defence was rested upon a construction of the society's rules. This case really raised a question of future liability, as well as the extent of that liability; and judgment here would be *res judicata* between the parties. The pecuniary conclusion of an action is not the sole test of whether it can be appealed; the value of the cause is the test, and it may be much greater than the sum for which decree was sought; *Drummond*, 12th January 1869, 7 Macph. 347. The value of the present case was beyond £5, for it involved the liability of the society for the aliment of the pursuer for an indefinite period.

At advising—

LORD JUSTICE-CLERK—I am of opinion that this appeal is not competent. The case was raised in the Small-Debt Court, a circumstance which is entitled to weight in our consideration of the question before us. The conclusion is for £5, being arrears of aliment alleged to be due to the pursuer; and it appears to me that the whole question raised is, whether that sum is due to the pursuer or not. There is no question of future liability, and can be none. If the pursuer raises another action for aliment against the defenders, it will depend upon the circumstances then existing whether he will get his decree, and not at all depend upon the decision pronounced in the present case. Whether the 14th section of the statute gives a right to appeal which is otherwise excluded by the statute I do not say. But I am of opinion that the value of this case is under £25, and not appealable.

LORD COWAN—I am of the same opinion. The argument submitted for the appellants involves them in this difficulty—If the present case is merely for £5, and does not involve any question of future liability, the present appeal is incompetent; but if the case involves a question of future liability, it was not competent before the Small-Debt Court. That might have been a good ground of appeal to the Circuit Court, but not a ground of appeal to the Court of Session.

LORD BENHOLME concurred.

Appeal dismissed, with expenses.

Agents for Appellants—Morton, Whitehead & Greig, W.S.

Agent for Respondent—W. R. Skinner, S.S.C.

Friday, January 28.

## FIRST DIVISION.

FORBES v. WELSH'S EXECUTORS.

Negotiorum gestor—*Acquiescence*—*Executor*—*Rent*.  
A lady who had resided for many years with a deceased proprietor, and who was one of his heirs in *mobiliis* and executors, aided him in the management of his estate, and after his death continued the management till the heir's return, and for some time thereafter.

*Held* she had acted as *negotiorum gestor*, that the heir had acquiesced in her management, and that she was not liable for the rent of the year.

In this action Mr Forbes of Millburn, in Inverness-shire, sought to recover from Dr Forbes, of H. M. Indian Army, and Mrs Tuach, the rent of the farm and lands of Millburn and Seabank. The defenders are the executors of the late William Alves Welsh, Esq. of Millburn, of whom the pursuer is heir; and the pursuer having been abroad for several years at the time of his uncle Mr Welsh's death, was repeatedly written to by them and urged to come home. As he did not return for some time the defenders, who had been residing with Mr Welsh at Millburn house (Mrs Tuach having resided with him for about fourteen years), and who did not intend to occupy the farm and lands as tenants, thought it better to have the land sown than allowed to stand waste. Mr Forbes returned in the end of June, and they all resided together for some time.

The pursuer alleged that he did not acquiesce in the defender's actings, and that he had not taken any part through ignorance of his legal rights.

On 26th May 1869 the Sheriff-Substitute (Thomson) pronounced an interlocutor, in which he assuaged the defender, and found the pursuer liable in modified expenses.

On appeal, the Sheriff (Ivory) pronounced the following interlocutor:—

“*Edinburgh, 21st July 1869.*—The Sheriff having heard parties' procurators, and considered the appeals for the pursuer and defender respectively, with the closed record, proof, and whole process, recalls the interlocutor appealed against, in so far as it finds the pursuer liable only in modified expenses; *quod ultra*, affirms the interlocutor appealed against: Finds the pursuer liable in the full expenses of process, including the expenses of these appeals; allows an account thereof to be given in, and remits to the Auditor to tax the same and report.

“*Note.*—After giving this case the most careful consideration, the Sheriff has arrived at the conclusion that, with the exception of the finding as to modified expenses, the interlocutor of the Sheriff-Substitute is right.

“As the pursuer was abroad, it was very natural that Mrs Tuach, who had managed the farm for her uncle, and who had received from him full instructions for the sowing down of the crop in question, should, after her uncle's death in March 1866, continue in the management. But there is not the slightest evidence that she took possession of the farm at this time, or managed it subsequently solely for behoof of herself and Dr Forbes. She gives strong testimony to the contrary. And the pursuer substantially confirms her statement, admitting that, on his going to Millburn on 21st June, Mrs Tuach expressed a desire that he should relieve her at once of the whole affairs—that he told her that she had better go on as she had begun—and that she went on until she left in September, *in consequence of his desire.*

“On 21st June the pursuer took up his abode at Millburn, consuming a portion of the garden and farm produce, and assisting to some extent in managing the farm, though, finding everything going on well, he left the principal management to Mrs Tuach.

“In a letter to Dr Forbes, dated 29th June 1866

(22 of process), the pursuer writes that he found everything going on well—that Mrs Tuach had had too much to attend to, adding ‘but I must try to assist her, *hitherto I have not meddled with anything, for I have not felt very well.*’ And in a letter dated 12th August (24 of process), he writes to Dr Forbes, who had just arrived in London from Canada, ‘everything has gone on well during your absence—the hay is long since cut and secured, and the turnips (about 20 acres) are about the best in this neighbourhood. Margaret (Mrs Tuach) has all the credit, as she got them all put in under her own superintendence.’

“All this appears to the Sheriff to be quite inconsistent with the pursuer's contention, that Mrs Tuach, without right or title, took possession of the farm, and managed it solely for the defender's behoof.

“After Dr Forbes' return, in the middle of August, the joint-management appears to have continued, and everything seems to have gone on pleasantly until the quarrel took place in the beginning of September, when Mrs Tuach left.

“The reason for this joint-management appears to the Sheriff to be obvious. The pursuer had not determined until after the quarrel whether he was to collate or not; and they had all continued to manage the farm together until this was arranged, without making any particular inquiry into their respective rights.

“When the quarrel took place, Mrs Tuach advised the pursuer to collate and divide the whole property among the three, but he refused. And Mrs Tuach states that it was not until the 10th September that she began to think whose the cattle were, for up to that time she thought the pursuer would collate.

“The pursuer admits that two days after Mrs Tuach left Dr Forbes told him he might have the crop if he paid for the labour, &c., expended on it.

“The sale of the crop took place on 4th October. The pursuer admits that he took ‘some little charge before the sale.’ He also says that, after or about the time of sale, he had some talk with Mr Davidson—who, according to the pursuer's own statement, was then acting as agent for him as well as for the defenders—about the land being his from Mr Welsh's death. The pursuer's account of what passed is not the same as that given by Mr Davidson, but the latter states that he told the pursuer that the crop belonged to the executors until they should be paid for their outlay in laying it down. And this quite coincides with the offer of the crop previously made to the pursuer by Dr Forbes.

“The pursuer had no doubt a good reason for declining this offer. He was probably aware that the value of the crop, in consequence of the bad season, would not be sufficient to meet the expense of the outlay incurred in laying it down. This seems, at least, to have been the opinion of many of the practical men who were examined on the subject; while the defenders themselves state that the expenses actually incurred exceeded the price obtained for the crop by £277, 6s. 11d.

“However this may be, it appears to the Sheriff that the only footing on which, in the circumstances, the pursuer could lay claim to the crop was, that he should repay the expense of seed and labour, as offered by Dr Forbes; *Sinclair v. Dalrymple*, M. 5421.

“On the pursuer declining this offer, the defenders were, it is thought, entitled to sell the

crop, with the view of reimbursing themselves for their outlay.

"If this view is sound, it does not seem to affect the case that the price of the crop was afterwards, on 18th October, included by the defenders in the inventory of the personal estate.

"In regard to expenses, the Sheriff sees no reason in the present case to depart from the usual rule. He is of opinion that the pursuer's claim for £350 of rent—based as it is on the ground that the defenders, without right or title, took possession of and managed the farm for their own behoof—is untenable in the circumstances, and that the pursuer, after all that took place between him and the defenders, ought not to have raised this action on any such footing."

The pursuer appealed.

DEAN OF FACULTY and ASHER for him.

SOLICITOR-GENERAL and MACDONALD in answer.

At advising—

LORD PRESIDENT felt satisfied that the Sheriff and Sheriff-Substitute had taken a correct view of the case. Mrs Tuach had resided with Mr Welsh, and aided him as well as she could in the management of the lands; and after his death she seemed to have conducted it just as Mr Welsh would have done, acting to the best of her ability. The corn crop and the turnip crop were sown, and the grass crop grown, and the stock fed upon it. She was doing nothing but what a *negotiorum gestor* should have done, except she should not have consumed the grass. But it would be absurd on that account to visit this excess against her, so as to saddle her with a rent that would be absurd even if the pursuer challenged what she had done. But what he did was to go and live at the farm, see everything she had done, and encourage her to go on with what she was doing. It was plain he had just adopted what she had done. Nothing therefore could be said to have been done in which he had not acquiesced. The Court had nothing to do with the accounting that was going on: and if the parties were reasonable, any good neighbour could settle it for them. The idea of charging a rent was out of the question.

The other Judges concurred.

Agents for Pursuer—Murdoch, Boyd & Co., S.S.C.

Agents for Defender—Thomson, Dickson & Shaw, W.S.

Saturday, January 29.

M'KELVIE v. BRYCE.

*Summary diligence—Bill—Composition Contract—Suspension.* A bill being *prima facie* granted as part of a composition contract, the debtor, on a charge for payment, presented a note of suspension. The Court passed the note, on the ground that in the circumstances the charger was not entitled to summary diligence.

The question here was whether A. S. Bryce, drysalter, Glasgow, was entitled to summary diligence on a bill for £183, 19s., drawn by him on the firm of M'Kelvie, Harley, & Co., dyers, Paisley, and accepted by them. The respondent at the same time granted to the complainer a letter in the following terms:—

"Glasgow, 22d June 1868.

"Messrs M'Kelvie, Harley, & Coy.,

or Mr Jno. M'Kelvie.

"GENTLEMEN,—You have this day granted me

your acceptance for £183, 19s. sterling at 15 months, say fifteen months from this date, and I bind myself to renew the same, when due, to the extent of at least £150 for say three months, and, on the expiry of said period, to renew for say £100, again renewing for £50, till the whole sum is paid off.—Yours, &c., A. S. BRYCE."

The firm of M'Kelvie, Harley, & Co. suspended payment in June 1868. On 22d June 1868 a minute was signed by certain of the creditors of the firm, including Bryce, agreeing to accept a composition of 10s. 6d. per £1 on their debts. The complainer M'Kelvie, in terms of the arrangement embodied in the minute, paid on 1st July 1868, in cash, to Bryce the sum of £64, 15s. in payment of the first instalment of 3s. 6d. on his claim, and granted two bills on 27th June 1868, each for £64, 15s., in payment of the second and third instalments. The respondent thereupon discharged his account against complainer, and the discharged account was produced. The complainer contended that the bill in question for £183, 19s. was accepted for the debt due to the respondent, but that the debt was discharged by respondent making payment of the first instalment of the composition and the granting and paying of two bills for the other two instalments. The respondent contended that the complainer agreed to make payment in full on getting time to do so, and that he granted the bill for £183, 19s., which was the difference between the sum of the composition and the full sum of the debt, £387, 7s. 1d., and granted a letter to him binding himself to renew the bill until the whole sum was paid off. He also stated that all the creditors had not accepted the offer of composition. Upon being charged for payment of the bill, M'Kelvie presented a note of suspension.

The Lord Ordinary on the Bills (ORMIDALE) pronounced the following interlocutor:—

"Edinburgh, 10th January 1870.—The Lord Ordinary officiating in the Bill-Chamber having heard counsel for the parties, and considered the argument and proceedings—Passes the note of suspension.

"Note.—It appears to the Lord Ordinary that the complainer is entitled in this case to have the note of suspension passed, in order that the questions in dispute may be cleared up, and the truth ascertained.

"The complainer's statement is that the respondent is now attempting to enforce against him payment of a debt that has been settled by a composition arrangement which has been duly implemented; and in support of this statement the complainer has produced the composition-deed (No. 3 of process), and a receipt or discharge by the respondent (No. 4 of process) of his original claim of debt, in conformity with the composition arrangement. It is not denied by the respondent that the alleged composition and relative cash and bills have been duly paid to him, or that the bill now attempted to be enforced against the complainer is for the balance of the original claim. The respondent, however, denies that he ever acceded to any composition arrangement, and avers that the payments and bills he has received from the complainer were not in implement of a composition arrangement, but in payment and satisfaction of his full claim as it originally stood. But the Lord Ordinary is unable to reconcile this view of the matter, as now presented by the respondent with the documents Nos. 3 and 4 of process, relied on by the complainer.