

buildings at Dennystown, and until the adoption of the General Police Act, the proprietor lighted the streets and squares at his own expense. After the adoption of the Act the subjects were assessed and rated for police purposes, and the proprietor, and tenants paid rates for these purposes, and, *inter alia*, for lighting and cleansing the subjects. The lighting and cleansing were, after the adoption of the Act, carried out by an arrangement between the proprietor and the Police Commissioners, whereby the Commissioners paid annually the sum of £15 to Mr Denny and his curators, and they, in consideration thereof, cleansed and lighted all the streets and squares of Dennystown. Mr Denny and his curators, under the arrangement, collected and sold all the fulzie, and expended the price thereof in lighting and cleansing the streets and squares. This arrangement was terminated on the 17th October 1866, when the complainer received from the clerk of the Commissioners a notice informing him that the Commissioners had resolved to take the lighting and cleansing of Dennystown under their own charge, and requesting to know the sum which the proprietor would be willing to accept for the gas-lamps and fittings-up connected therewith belonging to him in Dennystown. The curators of the minor proprietor were advised that there were doubts as to their being entitled to dispose of the gas-lamps and fittings; but they informed the Police Commissioners that they sanctioned their using them meanwhile, and matters could be arranged when Mr Denny attained his majority. The Police Commissioners, availing themselves of this permission, have, since October 1866 down to the present time, lighted the three streets of Dennystown; but they have not lighted the three squares—though they have conducted the cleansing of both streets and squares. On the 22d September 1869 the complainer, as factor of the subjects, received an intimation from the respondent, Adam Mackay, Superintendent of Police, stating that the Commissioners of Police had instructed him to require the complainer, within seven days from date, to make provision for lighting “the undermentioned private courts”—these being the three courts already referred to. On the following day an answer was returned, stating that in 1866 the Police Commissioners had taken over the lighting and cleansing of Dennystown; and that in consequence no part of Dennystown could be held to be “private” under the 130th clause of the General Police Act, but all fell to be dealt with as public under the 126th clause. No notice was taken of this answer; but, on the 30th September, the complainer received a notice from the respondent that unless he made arrangements for lighting the courts he would be summoned to attend the Police Court on the following Monday. On the 13th October, the respondent’s threat was carried out, the complainer being summoned on a charge of committing a breach of the 130th section of the General Police Act by not lighting the three squares in question. On the 18th October the complainer appeared and pleaded not guilty, and the diet was adjourned for a week. On the 20th October a petition was presented to the Sheriff by the complainer’s landlord, Mr Wm. Denny, with consent of his curators, craving that the Police Commissioners should be ordained to make provision for lighting Dennystown, and particularly the three courts already referred to. On the 25th the complainer appeared in the Police Court, and besides adhering to his former plea of not guilty,

moved the Court, in respect of the dependence of the action before the Sheriff, not to proceed with the complaint against him. The magistrate (Baillie Callen) resolved, however, to proceed, and the case was gone into. The result was that the magistrate found the complainer guilty, and fined him as already stated, whereupon the complainer made this application for advocacy and interdict.

SOLICITOR GENERAL and THOMS for him.

LANCASTER in answer.

At advising—

LORD COWAN—It is pleaded that this advocacy is incompetent, in respect that under section 430 of the General Police Act, where a party complains of oppression, corruption, or want of jurisdiction of the Judge in any matter of this kind, he must appeal to the next Circuit Court of Justiciary of the district. I am of opinion that this objection is well-founded. The whole matter began with the order upon the complainer contained in the letter of 22d September 1869. It was said in argument that this was not a proper order under the Act, but there seems to me to be nothing in that objection, because there is no special form required by the Act, and I know of no other or more formal way than by letter.

Now, by section 397 of the Police Act any person complaining of such an order as this may appeal to the Sheriff within seven days, but this remedy was not adopted here. The complainer pleads to us that there was oppression on the part of the magistrates in deciding the case against him, pending his appeal to the Sheriff.

This resolves itself into an appeal on the ground of oppression or want of jurisdiction of the Judge, but such appeals must go, under sec. 430, to the next Circuit Court of Justiciary of the district—that is Glasgow. The 437th section makes this even more clear. There are no regulations laid down by the Circuit Court for the regulation of such appeals, and I give no opinion on the question, whether this appeal might still be competently carried to the next Circuit Court of Justiciary at Glasgow.

I am therefore for dismissing this suspension on the ground that we have no jurisdiction to consider it.

The other Judges concurred.

Agents for Suspender—Lindsay & Paterson, W.S.

Agents for Respondent—Murray, Beith & Murray, W.S.

COURT OF SESSION.

Saturday, February 5.

FIRST DIVISION.

CRUICKSHANK *v.* SMART.

Final Judgment—Extract—Expenses—Merits. Held (diss. Lord Kinloch) final judgment means judgment on the merits, not the last judgment in the cause; and decree for expenses, when given separately, may be extracted and a charge given thereon immediately, if twenty days have elapsed since judgment was given on the merits.

On 18th May 1869 the Sheriff-Substitute of Aberdeenshire (SKELTON) pronounced an interlocu-

to assoilzieing John Smart from the conclusions of an action against him, in which James Cruickshank, writer, Fraserburgh, was pursuer; and finding Smart entitled to expenses of process, subject to modification. On 14th June 1869 the Sheriff (JAMESON) dismissed Cruickshank's appeal, and adhered to the interlocutor of the Sheriff-Substitute. On 9th September 1869 the Sheriff-Substitute heard parties' procurators on the question of modification of expenses, and modified them to £23, 19s. 3d. On 12th November 1869 the Sheriff dismissed the appeal of Cruickshank, allowed the sum of £3, 8s. 1d. to be deducted from the amount of the taxed expenses, and decerned against Cruickshank for payment of £21, 9s. 3d., and for 8s. as expense of extracting the decrees in said action. Cruickshank intimated to the Sheriff-Clerk-Depute at Peterhead and to the agents of Smart, verbally and in writing, his intention to appeal against all the judgments. On 17th November 1869, five days after the date of the last interlocutor, Smart obtained an extract of the decrees, and charged Cruickshank for payment of £31, 9s. 3d., and 8s. as expense of extracting the decree. On 6th December 1869 Cruickshank lodged a note of suspension, praying the Lord Ordinary on the Bills to suspend the decree. The 68th section of the Court of Session Act 1868 enacts "that a party may take an appeal within the space of twenty days after the date of the judgment of which he complains, during which period of twenty days extract shall not be competent; but on the expiration of the foresaid period, if no appeal shall have been taken, the Clerk of Court may give out the extract, it being competent, however, to take such appeal at any time within six months from the date of final judgment in the cause, unless the judgment has been previously extracted or implemented." The complainant contended that under that section, it being incompetent to extract the decree within less than twenty days from the last interlocutor, and the decree here having been extracted only five days after the interlocutor awarding expenses, it was incompetently extracted, the charge following on it was incompetent, and the decree and charge should be suspended.

The Lord Ordinary on the Bills (ORMIDALE) passed the note.

The respondent reclaimed.

SHAND and ASHER for him.

SCOTT in answer.

At advising—

The majority of the Court held the extract of the decree, and the charge thereon, perfectly competent. Final judgment meant judgment on the merits, not the last interlocutor in the cause. This view cohered with the various enactments on the subject, while the opposite view could not be reconciled to them. The first enactment was 50 Geo. III., chap. 112, but as doubts arose as to what was meant by "final judgment" under it, the phrase was defined in section 1 of the Act of Sederunt of 1828. By it a final judgment was declared to mean one "where the whole merits of the cause had been disposed of, although no decision has been given as to expenses; or, if expenses have been found due, although they have not been modified or decerned for." Then came the Judicature Act (6 George IV., 120), by the 43d section of which it was provided that a party should have fifteen days after final judgment, during which he might present a bill of advocation, and before the

expiry of which extract was incompetent. It was impossible to suppose that final judgment did not mean the same in both enactments. It was said the Act of Sederunt was *ultra vires* of the Court. If so, it had certainly received a great deal of sanction by time and inveterate usage. Then came the Act of Sederunt following the Sheriff-Courts Act of 1839, by which extract was allowed after six free days had elapsed since the interlocutor on the merits, forty-eight hours having also expired since the modification of expenses. And by the following section, the 114th, extract was not to be competent for fifteen days after final judgment where the intention to advocate had been intimated. This was the ruling enactment till the Act of 1868, when the time before which extract was incompetent was changed to twenty days.

LORD KINLOCH—I have arrived at a different conclusion from that which has been now expressed.

The question before us is, whether extract of the decree of 12th November 1869 was taken prematurely, having been taken before the expiry of twenty days from the date of the decree. This question is mainly to be determined by the provisions of the Court of Session Act 1868. But, in construing this Act, regard is rightly to be had to the terms of previous enactments.

By the Judicature Act of 1825, section 43, it is enacted that, when intimation is given of an intention to advocate "the space of fifteen days in the ordinary case, and thirty days in causes before the Courts of Orkney and Shetland, shall be allowed after final judgment to apply by bill of advocation to the Court of Session before extract shall be competent; but on the elapse of the foresaid terms respectively, if no bill of advocation shall have been intimated to the Clerk of Court, he may give out the extract on the application of either party, it being competent, however, to present a bill of advocation at any time before the decree has been actually extracted." By this enactment the time allowed for advocation and the time allowed for extract rightly run together. The time is fifteen days in the ordinary case, and thirty days in Orkney and Shetland; "after final judgment:" and I cannot doubt that, under this provision of the Judicature Act, advocation was competent within the specified period from and after the last judgment in the cause, whether on the merits or expenses; and that extract was superseded during the time thus allowed for advocation. I can see no ground for limiting, at this period, the term "final judgment" to any other than its usual and recognised interpretation.

By the Act of Sederunt 1828, the Court declared "that a judgment shall be reckoned a final one, to the effect of admitting advocation, when the whole merits of the cause have been disposed of, although no decision has been given as to expenses, or if expenses have been found due, although they have not been modified or decerned for." By this enactment, there is, unquestionably, a power given to advocate so soon as there is judgment on the merits, without the expenses being disposed of. But I do not think it was intended by the Court, and I think it would have been beyond their competence, to exclude review by advocation of the judgments as to expenses, if the party was willing to wait till these were pronounced, and did not wish to advocate sooner. There is a liberty to advocate at an earlier stage;

but no exclusion of the competent advocacy at the later. Beyond all doubt the judgments as to expenses were as competently reviewable by advocacy as the other judgments in the cause, if extract had not been previously taken. And as to the taking of extract, I think that when the party did not choose to advocate earlier, but waited till the cause was exhausted, he had the full fifteen days from the date of the last judgment in the cause to do so, during which period extract could not go out.

There comes to be next considered the Act of Sederunt for the Sheriff-courts of 1839, the 113th and 114th sections of which bear reference to the present subject. The 113th section declares in general terms—"Decrees may be extracted after the expiry of six free days from the day when the interlocutor is pronounced on the merits, forty-eight hours having also expired after the modification of expenses in litigated causes." Power is given to the Sheriff to extend or shorten this period, according to circumstances. The 114th section provides that where an intention to advocate the cause shall be intimated in writing to the clerk, and a bond of caution is lodged, fifteen days (or thirty in Orkney and Shetland) "shall be allowed after final judgment to apply by note of advocacy to the Court of Session before extract is competent." After this period the clerk is empowered to "give out the extract on the application of either party."

I have found considerable difficulty in construing the enactments in this Act of Sederunt satisfactorily. The first and general provision allows extract in six days, but adds "forty-eight hours having also expired after the modification of expenses in litigated causes." In other words, it seems declared that extract shall never take place in litigated causes till forty-eight hours after the modification of expenses. The 114th section allows fifteen days "after final judgment" for advocacy when intention to advocate is intimated, during which time extract is suspended, but at the end of which it is declared that extract shall go out. From what date are these fifteen days to run? The charger says from the date of the judgment on the merits, apart from expenses. But supposing it to be so, still there can be no extract at the end of the fifteen days if under the Act of Sederunt there cannot be extract taken in any litigated case till forty-eight hours after the modification of expenses. If, again, the fifteen days have expired when the decree modifying expenses is pronounced, the whole time for advocacy seems reduced to forty-eight hours. I confess I have great difficulty in threading my way through the provisions now referred to, in which the time for extract and the time for advocacy do not satisfactorily accord.

But I do not further dwell on this Act of Sederunt, nor stay to notice the Act 1853, which adds nothing; because all difficulties appear to me to be removed by the terms of the recent Court of Session Act 1868, which brings, I think, matters back to the simplicity and harmony of the Judicature Act. By the 64th section of this Act of 1868, the process of advocacy is abolished, and thereby was also abolished whatever was connected with it merely in the way of process. Appeal is by the 65th section substituted where advocacy was formerly competent; and by section 65 it is declared: "a party may take an appeal within the space of twenty days after the date of the judg-

ment of which he complains; during which period of twenty days extract shall not be competent; but on the expiration of the foresaid period, if no appeal shall be taken, the Clerk of Court may give out the extract." I think the terms of this clause plainly prevent extract going out till twenty days after the date of the last judgment in the cause, whether on the merits or expenses; for every judgment down to the very last may be complained of, and whether it will be complained of or not, cannot be known till it be pronounced. The provision as to forty-eight hours after modification of expenses is now not repeated, for the simple reason that twenty days are allowed for appealing from the date of the judgment decerning for expenses, and twenty days comprehend forty-eight hours. There may still remain the privilege of appealing when the judgment on the merits has been pronounced, without waiting for the modification of expenses; for the view which I take does not necessarily abolish the privilege. But it appears to me simply a privilege, not a necessity. I am of opinion that if the party does not appeal at that stage, but waits till the cause is exhausted by the judgments on expenses, he is, in the first place, entitled to appeal against the whole judgments together; and, in the second place, has twenty days from the date of the last judgment to do so, during which period extract cannot be taken.

To hold anything else than this involves the immediate consequence that whenever a judgment is pronounced on the merits, and twenty days have run, it is in the power of either party, and certainly of the party in whose favour the judgment was pronounced, by taking extract of the judgment, to prevent all discussion whatever on the question of expenses; and not only so, but to prevent all appeal of the cause, because after extract no appeal is competent. The other party may be quietly awaiting the discussion of expenses, content to appeal the whole judgments in the case together, and he finds on the 21st day, not only all discussion cut short in the matter of expenses, but his whole right of appeal taken away from him, even on the merits of the case. It is no sufficient answer to say that the party taking extract may, if he please, abandon his own claim for expenses. There may be a serious claim for expenses on the part of his antagonist, although unsuccessful on the merits. The judgment may have merely appointed parties to be heard on the question of expenses; and the party unsuccessful on the merits may conceive that he has a valid demand for the whole expenses in the cause, which have been sometimes so given. But according to the doctrine of the charger, his antagonist may, by taking extract, prevent all discussion of his claim; and not only so, but at the same time cut off all his appeal on the merits, leaving him to the remedy of reduction or whatever other remedy is open.

I cannot read the Act as importing even the possibility of results such as these. It may be that the statute leaves entire the privilege of appealing when the judgment is pronounced on the merits without awaiting the discussion of expenses. But I see no ground whatever for holding that it is compulsory to appeal at this stage. It may be often in the highest degree expedient that the case should not be appealed till all the judgments are pronounced in it, both on merits and expenses. Of every one of these judgments, down to the very

last in the cause, either party is entitled to complain, and to complain by way of appeal. The statute gives him twenty days for his complaint before extract can be taken; and of this right I think he cannot be deprived by extract being taken by the other party before this period has elapsed.

The view which I have now expressed seems confirmed by the provision in the 67th section of the recent statute, that "it shall not be competent to take or sign any note of appeal after the expiration of six months from the date of final judgment, in any cause depending before the Sheriff or other inferior Court, or Judge, even although that judgment has not been extracted." There is here an absolute limitation of appeal, whether extract has been taken or not. Appeal is to be absolutely precluded after six months "from the date of final judgment." Here, again, comes the question, from what date does this limitation begin running? or, in other words, what does "final judgment" mean? It cannot be the judgment on the merits apart from any after judgments on expenses. For it may conceivably happen that more than six months may elapse between the judgments on the merits and the final judgment on expenses; and in this case the period of limitation would have entirely run, and the right of appeal have been gone, whilst the process was still depending in Court. The statutory limitation cannot be reasonably supposed to have commenced running until all the judgments have been pronounced which may competently be complained of to the higher Court. In other words, the period of limitation does not begin running till the process competent to be appealed is at an end. This interprets the term "final judgment" in the 67th section to mean the last judgment in the cause, whether on the merits or expenses. And the term "judgment of which he complains," as used in the 65th section, cannot have a different or more restricted signification.

I am of opinion that in the present case the extract was taken prematurely, and that the Lord Ordinary did right in passing the note of suspension.

Agent for Suspender—David Milne, S.S.C.

Agent for Respondent—Alexander Morison, S.S.C.

Saturday, February 5.

GUNN v. BALLANTYNE & CO.

Joint-Adventure—Partner—Editor. Circumstances in which held that a person who had agreed to act as editor for a Post Office Directory at a fixed salary, was in reality a partner in the adventure, and only entitled to his salary if there should be any profits.

In this action, Alexander Gunn, Charles Street, Edinburgh, sued Messrs Ballantyne & Co., printers, for two years' salary as editor of a Post-Office Directory published by them, the amount being restricted to £50. The defence was that Gunn was a partner in the adventure, and that his share of the loss greatly exceeded the amount to which he would have been entitled had the adventure proved successful.

After a proof, the Sheriff-Substitute (CAMPBELL) pronounced the following interlocutor:—

"Edinburgh, 29th December 1869.—The Sheriff-Substitute having considered the proof, production, and whole process, and heard the solicitors

for the parties thereon, Finds in point of fact, that the New Edinburgh, Leith, and County Directory was produced and published by certain parties, who were described in the work as 'the projectors,' and consisted of the pursuer, the defenders, and a person named James Weir: Finds that the sum of £50 per annum was agreed on as a salary for editing the said Directory: Finds that the pursuer acted as editor for the years 1867-68 and 1868-69: Finds that, according to the lowest computation, the loss upon the publication of the Directory for the year 1867-68, exclusive of the editor's salary, amounted to upwards of £168, and on the publication for 1868-69 to upwards of £146; and that the defenders, who took charge of the financial affairs of the concern, never realised or were in possession of funds of the concern from which the salary of the pursuer, as editor for the two years foresaid, could be defrayed: Finds that the defenders did not individually employ the pursuer to edit the said Directory for their sole behoof, and never undertook or became liable individually to pay or see paid to the pursuer the said salary of £50 per annum for the said two years for acting as editor of the said Directory: Finds, in point of law, that the defenders are not liable to the pursuer in payment of the foresaid salary for the said two years: Therefore to that effect sustains the defences and assoilzies the defenders: Finds the defenders entitled to expenses, modifies the same to the sum of £5, 3s., and decerns against the pursuer for payment of the said sum of £5, 3s.; Finally, reserves action to the defenders for the just amount of their counter claim against the pursuer mentioned in the record and summons and relative account, and to the pursuer his defences thereagainst, as accords, and decerns.

"*Note.*—The difficulty in this case has arisen from the vague and indefinite mode in which the parties dealt with each other, and their relative positions. This may be naturally enough accounted for by the confidence they mutually reposed in each other down to a comparatively recent period. A deliberate review of the evidence, written and parole, and of the facts of the case, has led the Sheriff-Substitute to the result embodied in the foregoing interlocutor.

"It appears that the idea of starting the New Directory as a rival publication to the Letter-Carriers' or Post-Office Directory occurred to James Weir in February 1867. He mentioned the project to the pursuer, who drafted a prospectus of the New Directory. Some idea was at first entertained of employing Murray & Gibb as the printers; but just at that time Murray & Gibb were employed on a five years' contract to print the Letter-Carriers' Directory, which had up to that time been printed by the defenders. The pursuer, who was overseer of the defenders' case-room, submitted the draft prospectus to Mr Nicol, the managing partner of the defenders' firm; Nicol, on behalf of the defenders, expressed his willingness to join in the undertaking on being employed to print the work, which they had peculiar facilities for doing, as the types of the last year's Letter-Carriers' Directory were still standing in the defenders' work. About this time Nicol went to London, and before going desired that the work of the Directory might be hurried on, as the publication must take place at the ensuing Whitsunday. In the meantime Weir had been incurring certain expenses for advertising, &c., of a preliminary nature, which eventually came to amount to upwards of £26. And