Whether this was in the old days before the Reformation and downwards a parish churchyard? I think it was a parish churchyard, and has never been anything else than a parish churchyard. It may be a mere sentimental objection that the parishioners in this parish should interfere with the erection of an Episcopal church, and the carrying on of Episcopal services in the midst of what I think—and of what they think—is an existing churchyard belonging to the parishioners. I can only say it is a sentiment which I should be very much inclined to share. Assuming always that this churchyard belongs to the Kirk of Scotland, I can quite sympathise with the opinions of those parishioners who do not desire that Episcopal services should be carried on in such a place. Therefore I think that the complainers are entitled to interdict in terms of the first part of this case, and that it is unnecessary to dispose of the remaining points."

Counsel for Complainers—Guthrie Smith—Taylor Innes. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Respondents—Mackintosh—Pearson. Agents—Dundas & Wilson, C.S.

Saturday, October 15.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MUIR *v.* MACKENZIE.

Process—Appeal—Competency—Printing of Documentary Evidence—A.S., 10th March 1870, *sec.* 3, *subsec.* 2.

It is not necessary for an appellant to print and box along with his note of appeal, record, interlocutors, and oral proof, documentary evidence forming part of his proof, and on which his case is partly founded.

In an action raised in the Sheriff Court at Glasgow by George W. Muir against George Mackenzie, both coalmasters in Glasgow, to have the defender ordained to deliver to the pursuer certain railway waggons, or failing that their equivalent money value, the Sheriff-Substitute (SPENS), after a proof, assoilzied the defender, finding, as matter of fact, that "pursuer never at any time had a right of property in the waggons in question," and therefore sustaining the defender's plea to the effect that "the pursuer has no title to sue."

On appeal the Sheriff (CLARK), on 7th July 1881, adhered, with this variation, that "instead of absolvitor being granted the action is dismissed." The pursuer appealed to the Court of Session, and the process was received by the Clerk of Court on 26th July 1881.

On the case appearing in Single Bills after the long vacation counsel for the respondent moved the Court to dismiss the appeal on the ground of incompetency and non-compliance with the provisions of the Act of Sederunt of 10th March 1870. It appeared that the proof in the Court below consisted partly of oral evidence, which had been duly printed by the appellant along with his note of appeal, as were also the record, interlocutors, &c., but that there was also a good deal of documentary evidence, which was essential to the appellant's case, a printed copy of which had not been lodged by him along with the rest of the proof. The Act of Sederunt (10th March 1870) provides (section 3, subsec. 2) that "The appellant shall during vacation, within fourteen days after the process has been received by the Clerk of Court, deposit with the said Clerk a print of the note of appeal, record, interlocutors, and proof, if any, unless" printing shall be dispensed with, as therein provided; "and the appellant shall, upon the box-day or sederunt-day next following the deposit of such print with the Clerk, box copies of the same to the Court, . . . and if the appellant shall fail within the said period of fourteen days to deposit with the Clerk of Court as aforesaid a print of the papers required, . . . or to box or furnish the same as aforesaid on the box-day or sederunt-day next thereafter, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein, except upon being reponed, as hereinafter provided." It was urged for the respondent that the appellant's failure to print along with the oral evidence the documentary part of his proof, which was also necessary to his case, amounted to a non-compliance with the above section—*Young* v. *Brown*, 19th Feb. 1875, 2 R. 456.

At advising—

LORD PRESIDENT—I quite agree with a remark made by Lord Deas, to the effect that if an appellant or reclaimer, when his case is presented to us for hearing, has not printed the documents requisite to make his case intelligible, the proper course is to dismiss his appeal or reclaiming note. But that is not the question here. The present question arises on a technical objection to this appeal under the Act of Sederunt of 10th March 1870, and the respondent says that the appellant has not complied with subsec. 2 of sec. 3 of that Act, because he has not now printed all the documents on which he founds his case. Now, if the Act said that every document which was put in evidence or founded on in the Court below must be printed along with the note of appeal, &c., this objection would have to be given effect to. But it does not say so. It only says that the appellant shall deposit a print of the "note of appeal, record, interlocutors, and proof, if any;" and I have no doubt that the intention was that if any oral proof had been led and committed to writing, that must be presented along with the rest of the appeal; but to hold that the words must necessarily include all the documentary evidence founded upon would, I think, be a hurtful and inexpedient construction. I think this objection is bad.

LORD DEAS and LORD MURE concurred.

LORD SHAND—I am quite of the same opinion. This judgment of course does not relax the rule that an appellant must take care, by the time his case comes up for disposal, to have all the necessary documents printed and laid before us.

The Lords repelled the respondent's objection

to the competency of the appeal, and sent the case to the roll.

Counsel for Appellant — Lang. Agent — J. Young Guthrie, S.S.C.
Counsel for Respondent — Brand. Agent — Peter Douglas, S.S.C.

Thursday, October 20.

FIRST DIVISION.

[Sheriff of Forfarshire.

FLEMING *v.* NORTH OF SCOTLAND BANKING COMPANY.

Process—Appeal—Competency of Appeal on Question of Expenses only.

Held (diss. Lord Deas*)* that an appeal to the Court of Session on a question of expenses is competent.

Observations per curiam on the decisions and practice of the House of Lords as to appeals for costs only.

Alexander Gilruth Fleming, banker in Dundee, raised an action in the Sheriff Court of Forfarshire against the North of Scotland Banking Company, praying the Court "to ordain the defenders to deliver to pursuer a full copy of the account standing in their books in the name of the Standard Life Assurance Company per the pursuer, kept by the pursuer in the branch office of the defenders at Dundee (and said account commences on or about the 3d March 1874, and terminates in July 1879), and also all cheques, pay-in slips, vouchers, and other evidents and instructions of said account: Or otherwise, to deliver the said account to the pursuer, and to produce in the hands of the Clerk of Court, for his inspection, the said cheques, pay-in slips, vouchers, and other evidents; and to find the pursuer entitled to his expenses."

The Sheriff-Substitute (Cheyne) pronounced this interlocutor—"In respect it was stated by the pursuer at the recent discussion that he does not now insist upon having a copy of the account referred to anterior to 30th September 1878, up to which date the account was docquetted by him as correct in the bank ledger, and that his object in bringing the action has been served by obtaining the productions which were made along with the defences, Finds that it is unnecessary to pronounce any finding upon the merits, but that these may be held to be exhausted; and as regards the question of the expenses, Finds the defenders entitled to the expenses incurred by them subsequent to 18th April last (the date when their defences were lodged): Allows them to give in an account of these (framed on scale 1), and remits the account when lodged to the Auditor of Court to tax and report, and decerns."

The Sheriff (Trayner) adhered on appeal, adding the following note to his interlocutor:—"I would be slow in any case to interfere with the judgment of the Sheriff-Substitute where the appeal is taken simply as regards his finding *quoad* expenses. In the present case, however, I think the Sheriff-Substitute has acted rightly in finding the pursuer liable in expenses. I have formed the opinion that this action was vexatious and unnecessary, and if at all necessary, became so only through the fault of the pursuer in not keeping a pass-book for the account of which he seeks a copy, as I think he should have done."

The pursuer appealed to the Court of Session. On the case appearing in Single Bills counsel for the respondent moved the Court to dismiss the appeal on the ground that an appeal on the question of expenses only is incompetent.

At advising—

Lord President—[After quoting the prayer of the petition and the deliverance of the Sheriff-Substitute *ut supra*]—The pursuer has now brought the present appeal to the Court of Session, and it is objected on behalf of the respondents that there is nothing involved except a matter of expenses, and that it is incompetent to appeal against an interlocutor merely dealing with expenses. I am not aware of any authority for this proposition, and I think it would require a very express authority, statute, or Act of Sederunt, or an authoritative judgment of the Court, to exclude appeal on questions of expenses. In this Court, in point of practice, though it is not common, a party is entitled to lodge a reclaiming note against an interlocutor of a Lord Ordinary although it only deals with a question of expenses, and in the same way in the Sheriff Court it is quite competent to appeal an interlocutor from the Sheriff-Substitute to the Sheriff on the question of expenses. Now, what authority is there which says that there is no appeal to this Court on such a question? I am of opinion that there is not any. Reference was made to two cases — that of *Cruickshank* v. *Smart*, February 5, 1870, 8 M. 512, and the recent case of *Tennents* v. *Romanes*, June 22, 1881, 18 Scot. Law Rep. 583. But both these cases are distinguishable from the present, for in both the party appealing had lost his opportunity of appealing on the merits against the interlocutor which disposed of the merits and expenses together, because the judgment had been extracted, and the appeal in both cases was against an interlocutor decerning for the expenses already found due. I was of opinion that both those appeals were incompetent, because the interlocutor sought to be appealed merely gave decree for expenses which had been found due by the former interlocutor, which was no longer subject to review, and followed that interlocutor as a matter of course. There was nothing to bring up for our decision; it was a mere decree to enable a party to enforce his right to the expenses given by a former interlocutor which could no longer be brought up by way of appeal. I think the present case is entirely different, and that this appeal is competent.

Lord Deas—This is a question of very great importance. It is admitted that there is nothing here in dispute between the parties except a matter of expenses, and so the question arises quite purely—Is it competent to appeal to this Court on a mere matter of expenses? I am humbly of opinion that it is not. Expenses are not a cause; expenses are a mere incident; and when the cause ceases to exist the expenses cease to exist also. It requires no authority for that; but I think it would require strong authority for an opposite view, and I am aware of none such. I know of no case which has determined that an