Tuesday, October 27.

FIRST DIVISION.

FAIRBAIRN (CLERK OF GALASHIELS SCHOOL BOARD) *v.* SANDERSON (INSPECTOR OF POOR FOR GALASHIELS).

School—Elementary Education—School Fees—Appeal—Summary Prosecutions Appeals (Scotland) Act 1875 (38 *and* 39 *Vict. c.* 62)—*Education Act* 1883 (46 *and* 47 *Vict. c.* 56), *sec.* 14.

A Sheriff having ordained a parochial board to pay the school fees of certain children in respect of whom the school board had made application for such payment, the parochial board took a Case for the opinion of the Court on the question whether in the circumstances they were bound to pay the fees. The Court *dismissed* the Case as not truly involving a question of law.

The Education (Scotland) Act 1878 (41 and 42 Vict. cap. 75), sec. 22, provides that "If a parent is unable from poverty to pay for the elementary education . . . of his children between five and thirteen years of age, and if upon application the parochial board of the parish or burgh in which he resides refuses to pay out of the poor fund the ordinary and reasonable fees of such children, it shall be the duty of the School Board to apply to the Sheriff, who, after inquiry, may, if he shall think fit, grant an order on such parochial board to pay the said fees." . . .

The School Board of Galashiels applied to the Parochial Board of Galashiels under sec. 22 of the Education (Scotland) Act of 1878, as amended by sec. 5 of the Education (Scotland) Act 1883, to pay out of the poor funds fees for the elementary education in reading, writing, and arithmetic of Charles Graham and Henry Graham, the children of and residing with Mrs Margaret Graham, 266 Gala Park Road, Galashiels.

The Parochial Board refused to pay, and the Sheriff-Substitute (SPITTAL) after hearing parties ordained the Parochial Board to pay the fees.

The Parochial Board thereupon asked a Case for the opinion of the Court, which Case was stated by the Sheriff.

The facts of the case were—"Mrs Graham, aged 32, was deserted by her husband, who is a sailor, several years ago, and since his desertion has received nothing from him for her support. She has three children, who live in family with her, viz., James Walter, aged fifteen, Charles, aged eight, and Henry aged six years. The eldest is an apprentice moulder, and earns 6s. per week, which he pays to his mother. The two younger boys are at school. Mrs Graham is a mill-worker. Her earnings since October 1883 gives a weekly average of 12s. 3d., and for the half-year ended 7th July current her earnings amounted to a weekly average of 15s. She pays a house rent of £6 per annum. She is also obliged to pay a neighbour 2s. per week for looking after the children while she is absent at her work during the day. The mother and the children are obliged to take their meals at different hours It was further admitted that the ordinary wages of a labourer when fully employed are from 18s. to 19s. a-week, but that after allowing for broken time the average weekly earnings do not exceed 15s. or 16s., out of which he pays poor and school rates as well as the school fees of any children he may have."

The questions of law were—"(1st) Whether the earnings of the eldest boy, who lives in family with his mother, are in the present question to be taken into account as part of the income of the parent? and (2d) Whether, in the circumstances above set forth, the Parochial Board of the parish of Galashiels is bound to pay out of the poor funds the ordinary and reasonable fees for the elementary education in reading, writing, and arithmetic of the said Charles Graham and Henry Graham?"

Argued for the appellant—This was not a case for the interference of the Parochial Board. Mrs Graham was quite able to pay the necessary school fees. If a demand of this kind was admitted, innumerable applications would be received from those earning a similar wage.

Cases cited—*Beattie* v. *Grozier*, June 7, 1881, 8 R. 787; *Ferrier* v. *New Monkland School Board*, October 25, 1884, 9 R. 30; Education (Scotland) Act 1872; Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. c. 62).

Counsel for the respondent were not called upon.

At advising—

LORD PRESIDENT—I am of opinion that this is not a case which we can competently entertain.

The parties to the case are the Parochial Board and the School Board of Galashiels. Under the Education Act the School Board could apply to the Parochial Board to make payment of the school fees of those children whose parents are from poverty unable to pay, but if the Parochial Board refused to pay there was no procedure to compel them. By the Act of 1878 a provision was enacted enabling the parties to go before the Sheriff, but it was declared that his decision should be final. But the Education Act of 1883 altered, by its 14th section, the provisions of the Act of 1878, and provided therefor as follows—"Every prosecution for penalties . . . under this Act may take place before a court of summary jurisdiction (whose decision shall be final, but subject to the provisions of the Summary Prosecutions Appeals (Scotland) Act 1875) under the provisions of the Summary Jurisdiction Acts." . . . Now, that refers us to the Act of 1875, which provides for appeals in summary prosecutions, and what it enacts is, by section 3—"On an inferior judge hearing and determining any cause, either party to the cause may, if dissatisfied with the judge's determination as erroneous in point of law, appeal thereagainst," . . . and then follow a number of provisions as to the mode in which such appeals are to be stated, but it is always assumed that it is to be a question of law which is to be brought under review, and this appears very clearly from the terms of Schedule A annexed to the Act, which, after setting forth the form of the appeal, goes on to state, "The question of law for the opinion of the Court is." This shows that it is a question of law, and nothing but a question of law, which can by this statute be brought under review. The questions of law which it was intended should be raised by these appeals were

undoubtedly to be of a kind suitable for guiding future procedure. Now, is there any such question in the present case? I do not think that there is. We are asked to decide whether a certain party is, within the Education Acts, one who can pay for the education of her children. That is surely a question for the local board and the Sheriff to determine, and in dealing with it we should be doing the work of the board and determining a question of fact. I think therefore that we should refuse to entertain it.

LORDS MURE and SHAND concurred.

LORD ADAM was absent on Circuit.

The Court dismissed the case as one not involving a question of law.

Counsel for Parochial Board — Guthrie. Agents—Bruce & Ker, W.S.

Counsel for School Board — Asher, Q.C. — Dickson. Agent—T. Dalgleish, S.S.C.

Wednesday, October 28.

SECOND DIVISION.

[Sheriff-Substitute of Dumfries and Galloway.

THOMSON BROTHERS *v.* THOMSON.

Sale—Sale of Balance of Previous Sale—Implement.

A sold to B a quantity of flour of a particular brand, which was described in his sale-note as the balance of a lot previously sold by him to B. When the sale was made A had not in hand any flour of that brand, but he subsequently bought in the market a quantity of the same brand of flour sufficient to cover the sale. B rejected the flour as, from a test of the previous quantity bought and delivered to him, inferior to contract quality, and refused to take delivery. In an action by A against B for loss sustained by the refusal of the latter to take delivery of the flour, *held* that A had not implemented his part of the contract, and could not enforce the contract against B.

Thomson Brothers, grain and flour merchants in Glasgow, raised this action in the Sheriff Court of Dumfries and Galloway at Kirkcudbright against David Thomson, baker, Castle-Douglas, for payment of £315.

In January 1884 the defender bought and received from the pursuers delivery of 50 small bags Danube flour. He did not use it at once. On 1st May of the same year, before he had tried it, Alexander M'Kay, the pursuers' traveller, visited Castle-Douglas and saw the defender, when the contract of sale of 200 large or 400 small bags of Danube flour founded on by the pursuers of this action was made with him by M'Kay on their behalf. Of the same date the pursuers sent to the defender from Glasgow the following sale-note—"Dear Sir—We beg to confirm sale made to you to-day by our Mr M'Kay of the balance of our 'Danube' flour, limited to five hundred (500) bags 140 lbs. each at thirty-one shillings and sixpence (31s. 6d.) per 280 lbs. Delivery in 14 days."

On 5th May the defender wrote to the pursuers as follows—"Gentlemen—I tried the 'Danube' on Saturday along with my usual mixture, and found that it reduced my quality very much. To-day I tried it by itself to put it on its own merits, and I can safely say it is the most inferior I have met for a very long time. I need not say that I'll have no more of it at any price."

On 7th May the pursuers wrote to the defender declining to cancel the contract referred to in the sale-note. On the 8th the defender replied that he would refuse to take delivery of any more flour. After some further correspondence, in the course of which the defender stated that he had not received the sale-note of 1st May when he wrote the letter of the 5th, and throughout which the parties maintained the same positions towards each other, the pursuers stored 400 small bags of flour in Glasgow in neutral custody in the defender's name. The pursuers subsequently raised the present action for the price of this stored flour.

They pleaded—"(1) The pursuers having sold to defender the balance of said parcel of a cargo of flour limited as condescended on to 400 small bags, and the defender having purchased same at the price libelled on, and pursuers having stored same in defender's name, all as condescended on, pursuers are entitled to decree as craved. (2) In any case, the pursuers having implemented their part of the contract of sale between pursuers and defender, and having stored the flour in question with a neutral storekeeper in defender's name, have suffered loss and damage to the extent of Three hundred and fifteen pounds sterling, the price thereof, and are entitled to decree for said sum with expenses."

The defender stated as a preliminary plea that the pursuers should on their own statement have re-sold the flour and brought an action for the damage they might have suffered, and therefore that their action was incompetent as laid; and, *inter alia*, on the merits—"(4) No contract of sale in the terms condescended on was entered into, or if it was, the defender repudiated it before delivery. (5) The alleged contract has been departed from by the pursuers, or at least they are not entitled to recover the price, not having implemented their part of the contract by delivering the goods sold."

On 23d January 1885 the Sheriff-Substitute (NICOLSON), on the motion of the pursuers, granted warrant to sell the 400 bags of flour in store in the defender's name, and they were sold accordingly, fetching about half-a-crown per bag less than the market price.

On 20th February following (after the flour had been sold and the price lodged in the hands of the Clerk of Court), the Sheriff-Substitute, on the authority of *Warin & Craven* v. *Forrester*, 30th Nov. 1870, 4 R. 190, *aff.* 4 R (H.L) 75, sustained the defender's preliminary pleas and dismissed the action.

The pursuers appealed to the Court of Session.

The Lords, after hearing counsel, before answer appointed a proof before Lord Rutherfurd Clark.

The following was the import of the evidence:—Alexander M'Kay, the pursuers' traveller, de-