

therein was not, or might not, be sweet milk, the case might have been different, but a mere verbal statement to the appellant, whom he knew to be a sanitary inspector purchasing for the purpose of analysis, was not sufficient.

Counsel for the respondent was not called on.

LORD JUSTICE-CLERK—The question here is, whether the Sheriff erred in acquitting the respondent, he being satisfied that the respondent warned the appellant that the milk in that particular barrel was not his, and that the appellant supplied the article which the respondent insisted on getting. In these circumstances the Sheriff thought proper to acquit the respondent. Now, I can understand that the carrying of two barrels with different qualities of milk, one for sale to inspectors and the other for sale to customers in general, opens the way for fraud. But until there is some proof of fraud by its being shown that customers were actually supplied with the inferior quality we cannot consider it. This is a stringent statute. Many dealers in milk have to buy milk from other dealers when their own supply gives out, and a statute so stringent as this is not to be pressed further than is reasonable.

Where fraud is suspected I suggest that the right way to proceed would be to take means to ascertain whether the person accused has sold to customers any quantities of the article sold to the inspector. If he is found doing so he can then be convicted of the previous sale on evidence as to the specimen bought by the prosecutor.

But to convict of a sale where the person selling could not legally refuse to sell, and where the person selling distinctly intimated that he could not sell the article as being what was demanded, would, I think, be most unjust.

LORD M'LAREN — I am of the same opinion. If this were a case of a dairyman selling his own milk or milk of which he had knowledge, I would be inclined to hold that the statement by the seller that he did not warrant the milk was a mere evasion and could not be accepted. But this is not the case here. The Sheriff has found in fact that the respondent started with an ample supply of his own milk, but that, on running short, he had bought two gallons — not a large quantity — from another dairyman to eke out his own supply. When the inspector came he told him he could not guarantee the quality of the milk in that particular barrel owing to the circumstances mentioned. I think that the Sheriff was justified in holding that there was here a *bona fide* sale of an article, the quality of which was not, and could not be, guaranteed, and that the dairyman was not chargeable with a contravention of the statute.

LORD PEARSON concurred.

The Court dismissed the appeal.

Counsel for the Appellant — Fleming.  
Agents—Tods, Murray, & Jamieson, W.S.  
Counsel for the Respondent — Blair.  
Agent—Charles Garrow, Solicitor.

## COURT OF SESSION.

Wednesday, February 13.

### SECOND DIVISION.

[Sheriff of Lanarkshire.

#### BOWMAN'S TRUSTEES v. SCOTT'S TRUSTEES.

*Process—Appeal—Competency—Appeal on a Question of Expenses merely—Expenses.*

Held that an appeal from a Sheriff Court on a question of expenses merely is competent, but (*diss.* Lord Trayner) that the Court will not sustain such an appeal unless that is necessary to prevent a miscarriage of justice.

In June 1899 the testamentary trustees of the late Walter Bowman, auctioneer, Glasgow, raised an action in the Sheriff Court at Glasgow against the testamentary trustees of the late James Scott, pawnbroker, Glasgow, praying for decree for various sums, amounting in all to £878, 18s., alleged to be due by Scott to Bowman, less the sum of £343, 2s. 2d. due by Bowman to Scott.

On 27th February 1900 the Sheriff-Substitute (GUTHRIE) pronounced this interlocutor:—"In respect parties concur in stating that the action has been settled, except as regards the question of expenses, and on joint motion, sends the case to the motion roll of this day week."

Thereafter on 17th March the Sheriff-Substitute pronounced an interlocutor by which he found, *inter alia*, as follows:—"Finds the defender entitled to expenses since the debate; *quoad ultra* finds no expenses due."

The pursuers appealed to the Sheriff (BERRY), who on 18th June 1900 recalled the Sheriff-Substitute's finding as to expenses, and in lieu thereof found the pursuers entitled to expenses, including those of the appeal, subject to a deduction of one-third from the taxed amount, allowed an account thereof to be lodged, and remitted to the Auditor to tax and to report to the Sheriff-Substitute, and to the Sheriff-Substitute to decern for the taxed amount.

Thereafter on 15th November 1900 the Sheriff-Substitute, after disposing of objections to the Auditor's report, found the defenders liable to the pursuers in the sum of £19, 19s. 7d. of expenses, being two-thirds of the taxed amount of the pursuers' expenses after giving effect to certain objections to the Auditor's report which the Sheriff-Substitute had sustained; and further found the pursuers entitled to the sum of £1, 10s. as the expense of the debate on the objections to the Auditor's report.

The defenders appealed to the Court of Session.

Besides argument on the merits of the Sheriff's judgment as to expenses, parties were heard on the question of the competency of the appeal. On the latter question Lord Young quoted the opinion of Lord Deas in *Fleming v. North of Scotland Banking Company*, October 20, 1881, 9 R. 11, at p. 13.

**LORD YOUNG**—In this case the Sheriff-Substitute on 27th February 1900 pronounced the following interlocutor:—"In respect parties concur in stating that the action has been settled except as regards the question of expenses, and on joint motion, sends the case to the motion roll of this day week." Then following up that interlocutor the Sheriff-Substitute on 17th March pronounced an interlocutor finding the defenders entitled to expenses since the debate, and *quoad ultra* finding no expenses due. That interlocutor was appealed to the Sheriff, who on 18th June recalled the Sheriff-Substitute's finding as to expenses, and found the pursuers entitled to expenses, subject to a deduction of one-third from the taxed amount, and ultimately decree was pronounced against the defenders for £19, 19s. 7d., being the amount of the expenses to which the pursuers were entitled under the Sheriff's interlocutor, and for £1, 10s. besides, as the expenses of the debate on the Auditor's report.

Now, I confess that my strong impression—indeed more than impression—is that the Sheriff would have acted more judiciously if he had abstained from interfering with the Sheriff-Substitute's judgment in the matter of expenses. But notwithstanding my impression that the Sheriff-Substitute's judgment should not have been interfered with, I have an equally strong impression against the propriety of an appeal to this Court in a case of this sort, especially as we have no precedent for such an appeal except the case of *Fleming*, where the Court, in face of a strong dissent by Lord Deas, sustained the competency of an appeal against the judgment of a Sheriff on a question of expenses merely. Although I think that the Sheriff ought not to have interfered with the Sheriff-Substitute's judgment, nevertheless upon general considerations of discretion and good sense, to which I think it well to attend in the interests of the public, I am more than indisposed to countenance an appeal to this Court upon a mere question of expenses in such circumstances and for such sums as we have here. The result is, that although I am disposed to think that I myself would have come to a different conclusion from that of the Sheriff, I am of opinion that we ought to refuse this appeal.

**LORD TRAYNER**—With regard to the competency of this appeal, I think that the case of *Fleming* is a sufficient authority for us to sustain the appeal as competently before us. Assuming the competency of the appeal, as I understand your Lordship also to do, I sympathise very strongly with

the view expressed by your Lordship as to the inexpediency of an appeal to this Court about a question as to expenses, especially where the amount is so trifling as £19. At the same time I am somewhat embarrassed in reaching the conclusion to which your Lordship has come by reason of the consideration that I think the Sheriff's judgment is wrong and that of the Sheriff-Substitute right. I cannot say that I have a very strong opinion on that point, because I do not feel confident I am fully acquainted with the circumstances and the procedure in the Sheriff Court, but looking at the case as it was presented to us here I think that the interlocutor of the Sheriff-Substitute was right. If the appeal to us is competent, and if I am to exercise my independent judgment on such materials as the parties have brought under our notice, the conclusion to which I should come would be that we should recall the Sheriff's interlocutor and revert to that of the Sheriff-Substitute.

**LORD LOW**—I am of the opinion expressed by your Lordship in the chair. I think that the case of *Fleming* is a sufficient authority for the competency of an appeal merely on a question of expenses. I think that the judgment in that case is sound, because cases may occur of such serious and obvious injustice as to make it desirable to have an appeal in order to remedy that injustice. But while I think that an appeal on a question of expenses merely is competent, I am of opinion that the Court ought not to sustain such an appeal unless that is necessary in order to set right an undoubted miscarriage of justice in the Court below. Now, in the present case my impression is that the Sheriff-Substitute dealt with the question of expenses in a very reasonable way. At the same time I am not prepared to say that the Sheriff is so clearly wrong as to make it necessary for us to interfere, especially when the amount at stake is only £19. I only wish to add that I think an appeal from the Sheriff-Substitute to the Sheriff stands, in this matter, in a very different position from an appeal from the Sheriff Court to this Court.

The LORD JUSTICE-CLERK and LORD MONCREIFF were absent.

The Court pronounced this interlocutor:—

"Dismiss the appeal: Affirm the interlocutor appealed against, and decern: Find the pursuers entitled to expenses in this Court," &c.

Counsel for the Pursuers and Respondents—Graham Stewart. Agents—Donaldson & Nisbet, S.S.C.

Counsel for the Defenders and Appellants—Clyde. Agents—Clark & Macdonald, S.S.C.