Sheriff had sought to protect himself under the order, and the action included a claim for damages, it might be otherwise; but an action could no more be against the magistrate than against the person who had the custody of the document or decree. The judgment of the Court of Session was therefore right, and it was to be regretted that the law of Scotland admitted of an action for such a cause being brought at all after the lapse of fourteen years.

Lord Colonsay entirely concurred in the same conclusion, and for the same reason.

The judgment of the Court below was accordingly affirmed with costs.

Agents for Appellant—James Somerville, S.S.C., and Simson & Wakeford, Westminster.

Agents for Respondent—J. A. Macrae, W.S., and J. J. Darley, Gray's Inn.

COURT OF SESSION.

Tuesday, June 2.

SECOND DIVISION.

MACKENZIE *v.* LORD HILL, *et e contra.*

Decreet Arbitral—Oversman—Failure to hear Arbiters—Valuation. Circumstances in which *held* that an oversman was not bound to hear parties' arbiters before issuing his award. *Observed* that a failure to hear parties' arbiters, which could be founded on as a ground of reducing an award, must be wrongful.

These were conjoined actions, the one of reduction and the other of payment, in which the parties were William Mackenzie, farmer, Ardross, on the one hand, and Viscount Hill and Mr Tennant, his commissioner, on the other. The question was as to the validity of a decreet-arbitral, by which John Murray, live stock agent in Edinburgh, as oversman appointed by the original arbiters, fixed the sum of £8778, 13s. 9d. as the value of the sheep stock on the farm of Moruske, Ross-shire, of which farm Mr Mackenzie was out-going tenant, and the stock on which Lord Hill had agreed to take over at valuation.

There were various grounds of objection to the oversman's award stated on behalf of Lord Hill, but of these the only one now insisted in was based on the alleged failure of the oversman either to hear parties or to hear the arbiters. It appeared that the arbiters had taken different views on several points, and *inter alia* on the question as to which markets were to be taken as regulating the price. Upon this difference emerging, they both wrote to the oversman requesting him to proceed with the reference. The letter of Mr Mackenzie's arbiter arrived first; and, upon receipt of it, the oversman wrote to Lord Hill's arbiter (Mr Mackinnon, Corry) requesting a meeting. Hearing, however, next day, from Lord Hill's arbiter, that it was desired he should proceed, he issued his award at once. It was now contended for Lord Hill that this was wrong and irregular, because, in the first place, the questions which had been raised were questions upon which parties should have been heard, and because, in the next place, and in any event, the oversman should not have proceeded with his award after he had written a letter proposing a meeting with the arbiters.

The Lord Ordinary (Ormidale) found for Mr Mackenzie. His Lordship added the following note to his interlocutor:—

"In regard to the ordinary action at the instance of Mr Mackenzie against Lord Hill and Mr Tennant, for the price of a sheep stock ascertained by the valuation or award of an oversman, there is no question, supposing the Lord Ordinary to be right in holding that Lord Hill and Mr Tennant have failed in the counter action of reduction brought by them for setting aside the award.

By final interlocutor of 13th July 1867, the Lord Ordinary repelled Lord Hill and Mr Tennant's first and fourth pleas in law, so far as involving reasons of reduction of the award, thereby leaving undisposed of the reasons, or rather the reason, for there is in reality only one involved in pleas two and three, founded on the assumption that the pursuers were not heard or allowed an opportunity of being heard by the oversman. As this ground of reduction raised a disputed question of fact, a proof was allowed and adduced, and the preceding interlocutor has been pronounced on a consideration of the proof and whole cause. It is important to keep in view the precise object and nature of the reference in which the award or decreet-arbitral in question was pronounced. Its object was the valuation of a sheep stock delivered to Lord Hill by Mr Mackenzie, the out-going tenant of a Highland farm. Such being the sole object of the parties, nothing was more natural for them than to refer the matter, as they did, to two gentlemen having knowledge and skill in the valuation of sheep, and any oversman 'they may select if they differ in opinion.'

"Accordingly, and in conformity with the acknowledged and well known usage in such valuations, the sheep were, early in 1866, examined by the referees and oversman, Mr Murray, and thereafter the referees having differed in opinion, they devolved the reference on Mr Murray.

"It need scarcely be remarked that in such a valuation neither law agents nor any other agents of the parties attended the examination of the sheep, and no proof by witnesses or written pleadings or hearings were asked or offered. The whole matter was left to the referees and oversman themselves, and Mr Mackinnon of Corry, the referee of Lord Hill, expressly says (Proof, p. 9, A, B), 'I was the only person who took charge of the valuation for Lord Hill, no other person did so.'

"In accordance with this statement, Mr Mackinnon, when he and the other referee, Mr Murdo Mackenzie differed in opinion, wrote to Mr Murray the oversman, intimating that fact, and with a statement in figures of the prices or values estimated by him of the various kinds of sheep comprising the stock, and the other referee, Mr Murdo Mackenzie, followed the same course on behalf of Mr William Mackenzie. Mr Mackinnon's letter, dated 2d November 1866 (No. 29 of Process), did not reach the oversman till the morning of the 6th November, while the other referee's letter, dated the 3d of November (No. 30 of Process), reached him on the 5th November, the day previous. On the same day, the 5th November, the oversman wrote Mr Mackinnon (No. 41 of Process), apprising him of his having received the other referee's letter, with 'list of prices,' and saying that he could not enter on the matter without a meeting with both referees. And very obviously he could not well do so without such meeting, in the absence of any list of prices or communication from Mr Mackinnon. But next morning, 6th November, Mr

Mackinnon's valuation or list of prices arrived, with a letter from that gentleman, mentioning, *inter alia*, that he and the other referee having differed in opinion, 'it remains with you, as oversman, to determine the matter, and I therefore send you annexed my valuation. Mr Mackenzie will of course send you his, and I shall be glad to know your decision as soon as you arrive at it.'

"Having received this letter, and being also in possession of the views of the other referee, the oversman proceeded (without waiting for any meeting), on 8th November to issue his award, and in it he appears to have taken a somewhat different view from either of the referees—a medium view of the prices or valuation of the sheep. In the meantime, the oversman's letter of 5th November to Mr Mackinnon having been received by him, he, on the 8th November (No. 32 of Process), immediately replied, not asking for a meeting or hearing, but explaining that he had written 'on 2d inst, with my valuation of the Lochcarron stock, and as you have got Mr Mackenzie's, I do not see how you can have much difficulty in saying which of us (if either of us) is right.' And again, in his evidence as a witness, he says:—'If there had been a meeting at Inverness, it would have been attended by Mr Murray, Mr Mackenzie, and myself. There would have been no occasion for anybody else, because the whole matter was referred to us. (*Q.*) Would there have been agents and counsel for the purpose of being heard? (*A.*) No; I never heard of such a thing in a sheep valuation. I was taking charge of the valuation on the part of Lord Hill. (*Q.*) And if you had attended the meeting at Inverness, would you have been attending on the part of Lord Hill? (*A.*) So far as Lord Hill was concerned; further than the pricing of the stock, I should have been doing nothing else for him. I don't think I made any other communication to Mr Murray than my two letters of the 2d and 8th November. I cannot remember of making any other.'

"Such being the nature of this case, and of the evidence bearing on it, the Lord Ordinary thinks that the award or decreet-arbitral in question is unassailable on the ground of Lord Hill not having been heard by the oversman. This view he thinks is sufficiently supported, so far as such support is necessary, on the principle recognised and given effect to by the Court in the cases of *Macgregor* v. *Stevenson*, 20th May 1847, 9 D. 1056; *Latta* v. *Macrae*, 9th March 1852, 14 D. 641; and *M'Nair and Others* v. *Roseburgh and Fauld*, 16 February 1855, 17 D. 445."

Lord Hill reclaimed.

JAMIESON for him.

CLARK and CHEYNE in answer.

The Court held that in such a case as this there was no occasion for the oversman to hear parties at all, and that he was entitled to apply his own knowledge and skill to the valuation of the stock; but even if that were otherwise, the oversman, having heard from both parties' arbiters before he pronounced his award, he had sufficiently fulfilled the duty incumbent on him. Any failure to hear must be wrongful before the Court could interfere, and there was no wrong committed here. The oversman had acted throughout with perfect fairness and impartiality.

Agents for Lord Hill—Macrae & Flett, W.S.

Agents for Mr Mackenzie—Cheyne & Stuart, W.S.

Friday, June 5.

MACLEAN & HOPE *v.* FLEMING, *et e contra.*

Ship — Charter-Party — Short Shipment — Dead Freight. Circumstances in which *held* that pursuers suing under a charter-party had failed to prove that a smaller quantity of bones had been delivered to them than had been actually shipped, and owner of ship held entitled to dead freight under the charter-party, in respect a complete cargo had not been shipped.

These are conjoined actions, in which the pursuers of the one, Maclean & Hope, sue the defender Fleming, owner of the ship "Persian," for the value of a quantity of bones. The case arises out of the following circumstances:—On 17th November 1864, Samuel Donaldson, master of the ship "Persian," belonging to Fleming, entered at Constantinople into a charter-party with Alexander Curmusi of that place. It was agreed by the charter-party that the ship should proceed to certain ports therein specified, and should load a full and complete cargo of cattle bones in bulk, to be carried on behalf of the charterer to a port in the United Kingdom—freight to be paid for the same at the rate of 35s. per ton of 20 cwt. of bones. The ship proceeded to these ports and loaded the bones, and then arrived in Aberdeen with 386 tons, 18 cwt., which were delivered to the pursuers sueing under the charter-party, which was transferred to them. Maclean & Hope, in the action at their instance, say that the quantity of bones was not delivered to them that was in point of fact shipped at the several ports. The Lord Ordinary (KINLOCH), on advising a very long proof taken in the case, held that the pursuers had failed to prove that any greater quantity was shipped than was delivered to them. His Lordship also held that the ship could have carried a further quantity of 210 tons. His Lordship accordingly assoilzied the defender. In the action at the instance of Fleming, he concludes for £377, 1s. 6d., under deduction of a sum of £300 paid to account, as the freight due on the bones carried and delivered to Maclean & Hope. He also claims £367, 10s. as the amount of freight on 210 tons of bones which would have been further yielded by the vessel if filled with a complete cargo in terms of the charter-party. The Lord Ordinary decerned for the pursuers in this action.

His Lordship added the following note to his interlocutor:—

"*Note.*—The leading question between the parties arises in the action at the instance of Messrs Maclean and Hope. In order to success in that action, it appears to the Lord Ordinary necessary that it should be proved, or assumed, that a certain quantity of bones was shipped on board the defender's vessel, the "Persian," for carriage on behalf of the pursuers, and that less than the quantity so shipped was delivered or tendered at the port of discharge. The action is in substance an action of reparation on account of the non-delivery of the alleged deficient quantity.

"In such an action the *onus* of proof lies on the pursuer; and it appears to the Lord Ordinary, on a consideration of the whole evidence, that the pursuers in the present instance have failed to establish their case. It is expressly deponed to by the captain of the vessel, and by both the first and second