emolument or profit from business or work of any description performed by him under the Act. (3) That, being Sheriff-clerk of Shetland, he was not entitled to act as an agent before the said Sheriff-court, or to charge agency fees for judicial proceedings in that Court."

The Sheriff-Substitute (MURE) remitted to the Auditor to fix the sum due to the pursuer of the action as remuneration for his services, and thereafter gave decree for the amount reported.

The complainers accordingly brought the present note of suspension to have the said decree and charge threatened thereon suspended.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 17th January* 1871.—The Lord Ordinary having heard the counsel for the parties, and considered the note of suspension, answers thereto, productions, and process—Refuses the note: Finds the complainer liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the auditor to tax and to report.

"*Note.*—The complainer, as clerk to and as representing the Police Commissioners of the burgh of Lerwick, in his note of suspension prays for suspension of a small debt decree for £6, 12s. 6d., and to £1, 4s. 1d. of expenses, pronounced by the Sheriff-Substitute at Lerwick against him, and of a threatened charge thereon, on the following grounds—viz., (1*st*) That the summons at the instance of the respondent, on which the decree was pronounced, is null, in respect that it was signed by the respondent as Sheriff-clerk; (2*d*) That the summons was brought before the Court when the respondent officiated as clerk; (3*d*) That the respondent was not employed as an agent, and that he did the work sued for as one of a committee of the Commissioners of Police of the burgh of Lerwick, without any stipulation for remuneration, and with a view to the adoption of the General Police and Improvement (Scotland) Act, 1862, and that he is precluded by the Burgh Police Act of 1833, and the said General Police Act of 1862, from deriving any emolument for business performed under these Acts; and (4*th*), That being Sheriff-clerk of Shetland, he could not act as agent, and make professional charges for agency in the petition to and proceedings before the Sheriff under the General Police Act of 1862, with a view to the adoption of that statute.

"All these grounds were, with the exception of the first, stated as defences to the summons in the Small-Debt Court, on which the decree complained of was pronounced.

"The complainer has presented an appeal to the next Circuit Court of Justiciary to be held at Inverness, on the same grounds as those now insisted in by him, with the exception of that second above set forth.

"The Lord Ordinary is of opinion that the note of suspension is excluded by sections 30 and 31 of the Small-Debt Act, 1 Vict., c. 41. The summons was, he considers, raised, and the decree complained of was pronounced, under the authority of that Act. Now, it is provided by section 30 that no such decree 'shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of execution,' on 'any ground or reason whatever,' other than is provided by section 31; and that section enacts that an appeal against such a decree may be taken to the next Circuit Court of Justiciary, provided always that such appeal shall be competent only when founded on the grounds therein set forth, and, among others, on 'incompetency,' which has been held as covering any incompetency in the procedure. (See opinions of the judges in *Murchie*, 1 Macph. 800.)

"The complainer maintained that the signature of the respondent as Sheriff-clerk to the summons in which he was pursuer, constituted an intrinsic nullity, and took the case out of the Small Debt Act altogether. The Lord Ordinary cannot adopt this view. The summons, the whole proceedings, and the decree, were, he considers, under the Small Debt Act. If it was incompetent in the respondent to sign as Sheriff-clerk his own summons, that incompetency could be made, and has been made, the subject of appeal to the Circuit Court. If that and the other objections stated by the complainer to the summons, procedure, and merits of the respondent's claim are competent grounds of appeal to the Circuit Court, he had his remedy by appeal. If they are incompetent, then all remedy on these grounds is, it is thought, excluded by the Act. The Lord Ordinary considers that the purpose and effect of sections 30 and 31 of the Small Debt Act were to exclude all review in the petty cases which the Sheriff is by that Act authorised to hear, try, and determine in a summary way, except on the grounds and by the appeal to the Circuit Court mentioned in the last of these sections; *Rankine* v. *Lang & Co.*, 7th Dec. 1843, 6 D. 183; *Graham* v. *Mackay*, 25th Feb. 1845, 7 D. 515, and 6 Bell's App. 214; *Louden's Trustees* v. *Pattullo*, 17th Dec. 1846, 9 D. 281; *Miller* v. *Henderson*, 2d Feb. 1850, 12 D. 656.

"It was said that there was some doubt whether the appeal taken by the respondent is competent, seeing that he failed to find caution within the period prescribed by the Act of Sederunt of 10th July 1839, § 133. But if, through the complainer's neglect of the provisions of that Act of Sederunt, he has lost his remedy by appeal, he must suffer the consequences."

Manson reclaimed.

PATTISON and BURNET for him.

SHAND and BROWN in answer.

At debate the reclaimer lodged a minute withdrawing from his appeal to the Justiciary Court.

The Court (LORD BENHOLME *diss.*) recalled the interlocutor of the Lord Ordinary, and passed the note. The majority of their Lordships were of opinion that there had been here a nullity *ab origine*. The summons having been signed by an officer of Court, there was in reality no process before the Court, and all that followed was null and void.

LORD BENHOLME thought that, a proper remedy having been provided by statute, viz., appeal to the next Circuit Court of Justiciary, the Court had no power to interfere.

Agent for Pursuer—Wm. Mason, S.S.C.

Agents for Defender—J. & R. D. Ross, W.S.

Thursday, February 9.

FRASER *v.* FRASER.

Bill—Proof—Writ or Oath—Accommodation Bill. Circumstances in which *held*, on construction of a holograph document, and after parole proof, that a certain bill drawn by a deceased party on, and accepted by, the pursuer, was an accommodation bill.

This was an appeal from the Sheriff-court of

Inverness, in an action at the instance of William Fraser, innkeeper, Nairn, against the executor of the late John Fraser, farmer, Inverness, concluding for the sum of £31, 5s. 10d., being the amount of a bill drawn by John Fraser upon and accepted by the pursuer, and which bill was a renewal in part of another bill for £50, drawn and accepted by the same parties. The pursuer alleged that he was in the habit of signing accommodation bills for the late John Fraser, and that frequently, for the purpose of enabling John Fraser to discount them easily, they were accepted by the pursuer, and on 12th October 1857 an accommodation bill of this kind was accepted by the pursuer, and discounted by John Fraser. On 5th July 1868 the said bill was taken up, £20 of it being paid by John Fraser, and the bill now sued on being granted for the balance. At the date of signing the £50 bill John Fraser granted to the pursuer his holograph acknowledgment in the following terms:—

"I, the undersigned John Fraser, farmer, Redhill, bind and oblige myself to leave the whole of my effects on the mentioned farm of Redhill, as I had received an accommodation bill from Mr William Fraser, blacksmith, Newton of Petty, as my own relations has refused the same, to be as per accommodation. This document has been signed in presence of the undersigned witness, Simon Fraser. JOHN FRASER.

"*Witness*, Simon Fraser. *Redhill, Culloden.*"

The bill of £30 was retired by the pursuer on 11th January 1869, and the pursuer now sued the executor of the deceased John Fraser for the amount contained in it.

The defence was that the bill being *ex facie* the debt of the pursuer, he could only prove that he was creditor in the bill by the writ and oath of John Fraser, and that the document founded on was not a probative writ.

The Sheriff-Substitute (THOMSON) found that the pursuer had proved by the writ of the deceased John Fraser that the bill in question was for his accommodation, and accordingly decerned against the defender. He remarked in this note:—"This case is not without difficulty. The pursuer sues on a bill accepted by himself in favour of the late John Fraser, whose executor the defender is. The presumption on the face of the bill being of course in favour of the pursuer being the debtor and not the creditor, the presumption can be redargued only by writ or oath of the drawer. The latter being dead, there could be no reference to oath; but the pursuer produced a writing alleged to be (with the exception of its date) holograph of the deceased, and was allowed to prove its authenticity, and that it referred to the bill in question. The date he explains as having been somewhat foolishly inserted by himself, being the date of the bill sued on. That bill is shown to be a second renewal of the original bill, which was for a larger sum. The writ must be taken as having no date; and indeed, being holograph, it would not have proved its date if it had had one originally. The evidence supports the pursuer's averments that the document was written by the deceased at the time when the original bill was granted, and that it referred to the bill. The evidence of the banker seems to prove sufficiently that the pedigree of the bill is as the pursuer alleges. In the case of prescribed bills proved by writ to be still in force, it has been held that the writing need not be either holograph or probative, and that it may be shown by extrinsic as well as intrinsic proof to apply to the bill in question.—(See *M'Ausland* v. *Hunter*, 1851, 13 D.; *Hyslop* v. *Howden*, 1843, 5 D.; *Watson* v. *Hunter & Co.*, 1841, 3 D.; *Donaldson* v. *Murray*, M. 11,100.) The Sheriff-Substitute is not aware of any principle on which a stricter rule should apply to writs used as in the present case, than to those used in the question of the sexennial prescription. In both cases they are available as admissions by the party in whose favour the legal presumption happens to exist. The extrinsic evidence of the authenticity of this document, and of its application to the bill in question, is somewhat narrow; and the document itself, being by an illiterate person, is rather obscure; but the Sheriff-Substitute is of opinion that the document thus supported is sufficient to rebut the legal presumption. The fact proved by the banker, that at the time of the original bill being discounted the pursuer had ample funds in the bank, is scarcely admissible, and if it were, might only prove that the bill represented a debt due by the pursuer to the deceased. He might choose to pay in this manner, reserving his funds for some other purpose. It would go far to show, however, if admitted at all, that the bill was not for the pursuer's accommodation."

The Sheriff-Depute (IVORY), recalled this interlocutor, holding that the pursuer had failed to prove by the writ or oath of John Fraser that the bill was granted for accommodation of the author:—He remarked in his note:—"The pursuer admitted that as acceptor he was *ex facie* of the bill the party liable in payment. But he undertook to prove that the bill was truly granted for John Fraser's accommodation, and maintained that the writ No. 5–7 of process was sufficient to establish that John Fraser was the true debtor in the bill. After careful consideration the Sheriff has arrived at the conclusion that the pursuer has failed in establishing this. The writ in question bears a false date. The pursuer admits that he wrote the date upon it, being the same as that of the bill libelled on, viz., 6th July 1868. It appears to the Sheriff that the pursuer in writing the false date tried to imitate the handwriting of John Fraser, and did so for the purpose of making it appear that the bill libelled on was the accommodation bill referred to in the writ in question. The pursuer, however, finding that he could not succeed in establishing this, thereafter led evidence to prove that the document was written not of the date it bears, but in the month of October of the previous year, and that it referred to a totally different bill from that libelled on, viz., to a bill for £50 granted by the same parties in October 1867.

"The Sheriff entertains great doubt whether a document which has been treated by the pursuer in this way can be held of any value whatever as evidence. Further, the document does not refer to or identify the £50 bill as the accommodation bill referred to in it, and it is open to question whether, in such a case as the present, parole proof is competent to supplement what is wanting in the party's writ. But even assuming it to be established by competent evidence that the £50 bill was granted by John Fraser in October 1867 for the pursuer's accommodation, this does not appear to the Sheriff to go any length in establishing that a bill granted in July 1868, nearly a year after the date of the writ founded on, was accepted by the pursuer for a similar purpose. It is no doubt said that the last-mentioned bill was a renewal of the

former bill. But there is no proof of this by the drawer's writ or oath, and no other evidence is competent. And even supposing that other evidence was competent, there is nothing in the parole proof to show that the bill libelled on was not discounted by the pursuer, and the proceeds applied to his own use, or, if discounted by John Fraser, that the money was not at once handed to the pursuer. The bill bears to have been accepted by the pursuer 'for value received,' and the legal presumption is that the acceptor received the money as the value in respect of which he accepted. On the whole, therefore, the Sheriff is of opinion that the pursuer has failed to prove that the bill in question was granted for the accommodation of John Fraser."

The pursuer appealed.

REID for him.

MACKINTOSH in answer.

The Court unanimously sustained the appeal, recalled the interlocutor of the Sheriff-Depute, and returned to that of the Sheriff-Substitute.

Agents for Pursuer—Philip & Lang, S.S.C.

Agent for Defender—Æneas Macbean, W.S.

HIGH COURT OF JUSTICIARY.

Friday, February 3.

MITCHELL *v.* MACWATT.

(Before the Lord Justice-General, Lord Deas, and Lord Ardmillan.)

Suspension—Relevancy—Assault with Intent—Indecency. A charge libelling assault, especially when committed on a female in an indecent manner, and with the intent to obtain carnal knowledge of her person, but not alleging that this was against her will, *held* irrelevant, and conviction thereon *set aside.*

This was a suspension of a conviction obtained before the Sheriff and a jury at Alloa. The charge was assault with intent to ravish, or alternatively, assault, especially when committed on a female in an indecent manner, with the intent of obtaining carnal knowledge of her person. The jury found Mitchell guilty of the second charge only. He was sentenced to four months' imprisonment, with hard labour for half the period. The points on the relevancy were decided by the Sheriff-Substitute.

CAMPBELL SMITH and M'KECHNIE, for the suspender, argued that the second charge, on which alone Mitchell was convicted, was irrelevant. If it charged any crime at all, it was identical with the first charge, and an acquittal on the first charge was necessarily an acquittal on the second. But in reality there was no crime charged but assault, the aggravations not being known to the law of Scotland. Indecency is not the recognised name of any crime; it is not a crime independent of circumstances; *Mackenzie*, November 14, 1864, 4 Irvine, 570. Intent to have carnal knowledge of a woman is not a legal crime at all; it must be alleged to have been against her will. It might have been competent to convict for assault, but as it is impossible to say what part of the sentence was appropriated to the simple assault, and what to the aggravation, the whole must fall.

SOLICITOR-GENERAL and BALFOUR, in answer, contended that assault, committed in an indecent manner on a female, was a relevant point of dittay, and that the remaining words, even if they did not amount to an aggravation, could not weaken the charge, and must be read as explanatory. There must be some middle charge between simple assault and assault with intent to ravish.

The Court were of opinion that the second charge could only be viewed as an inadmissible form of charging assault with intent. A simple assault might be charged, or possibly an assault aggravated by being committed on a female in an indecent manner, though that circumstance might be proved without charging it as a special aggravation. But where the charge of assault is coupled with intent to have carnal knowledge, it must be specially libelled that it was against the woman's will.

Conviction suspended.

Agent for Suspender—Thomas Carmichael, S.S.C.

Agents for Respondent—Morton, Whitehead & Greig, W.S.

COURT OF SESSION.

Friday, February 10.

FIRST DIVISION.

WOTHERSPOON & BIRRELL *v.* CONOLLY.

Suspension—Judgments Extension Act 1868—*Jurisdiction—Citation—Process—Sist.* Suspension of a charge on an extract certificate of a judgment of the Court of Queen's Bench in Ireland, registered for execution in Scotland under the provisions of the Judgments Extension Act (31 and 32 Vict., c. 54), on the ground that the complainers were not subject to the jurisdiction of the Irish Court, and had not been validly cited,—*refused simpliciter*, but process *sisted* till the complainers should have had an opportunity of applying to the Court of Queen's Bench in Ireland to be heard on their objections.

The circumstances of this case were as follows:—The complainers, who are shipowners in Glasgow, contracted by bill of lading, dated Almeria, 19th October 1868, to deliver 60 barrels of grapes to the respondent in Dublin by the ship "Fitzwilliam." The ship arrived in Glasgow on the 3d November, and, there being a large number of packages to be delivered there, the complainers proposed to send on the grapes to Dublin by another vessel. The respondent declined to receive them except from on board the "Fitzwilliam," and, consequently, the grapes, being of a perishable nature, were sold by public auction in Glasgow for £72, 6s. 1d. The respondent thereupon commenced proceedings against the complainers in the Court of Queen's Bench in Ireland. An affidavit was made by him, setting forth the non-delivery of the grapes, and proceeding:—"Saith that the said defendants reside in Glasgow, out of the jurisdiction of this Court; that Mr William Scott, of Eden Quay, Dublin, is their agent in Ireland, and is in constant communication with the defendants; and deponent says that if a copy of the summons and plaint in this cause shall be served upon the said William Scott, for the defendants, it will be sure to reach them in due course: saith that the cause of action herein arose