inquire into, if the decree you are asked to pronounce at the end is under £25.

I had some difficulty in distinguishing this case from that of *Inglis* v. *Smith*, but the cases are distinguishable. In *Inglis* v. *Smith* the principle given effect to was that the sum given credit for was for a *contra* account; but the principle of that case, I may say, I should certainly not extend.

The Court refused the appeal as incompetent.

Counsel for Pursuers (Appellants)—Kinnear—Thorburn. Agent—Horatius Bonar, W.S.

Counsel for Defender (Respondent)—Campbell Smith—Millie. Agents—Wright & Johnston, Solicitors.

Friday, October 19.

FIRST DIVISION.

[Sheriff of Argyllshire.

MALCOLM *v.* M'INTYRE.

Process—Appeal—Competency—Sheriff Court Act 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 24—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 53.

It is not competent to appeal against an interlocutor pronounced by a Sheriff "disposing of the whole merits of the cause" if it contains no finding as to expenses.

A petition was presented in the Sheriff Court under the Acts 1661, cap. 41, and 1669, cap. 17, craving the Sheriff-Substitute, *inter alia*, to authorise the petitioner to erect march-fences between his own and the respondent's property, and to ordain the latter to pay his share of the expense. *Held* that an interlocutor which authorised the building of the fence, but did not apportion the expense, was exhaustive of the "merits" or "subject-matter" of the cause, so as to be appealable to the Court of Session under the Sheriff Court Act 1853, sec. 24, and the Court of Session Act 1868, sec. 53.

This was an action raised in the Sheriff Court under the Acts 1661, cap. 41 and 1669, cap. 17, as ratified by the Act 1685, cap. 39, by one proprietor against a conterminous proprietor, praying the Sheriff to empower the petitioner to erect a fence between the properties, and to ordain the respondent to pay his share of the expense. The terms of the prayer of the petition are quoted in the opinion of the Lord President. The respondent resisted on various grounds, and after various procedure and a remit to a man of skill the Sheriff-Substitute (HOME) pronounced this interlocutor:—

"*Inveraray*, 16*th April* 1877.—The Sheriff-Substitute having heard parties' procurators and made avizandum, repels the various pleas for the respondent; authorises the petitioner to build the dyke as craved; and, with this view, to accept the estimate of Duncan Gray, No. 40 of process, or that of Archibald M'Intyre, No. 50 of process, or that of Robert Paterson, No. 44 of process, as he shall deem most expedient; and thereafter, when the dyke shall be finished, to lodge an account of the whole expense of building the same."

On appeal the Sheriff (FORBES IRVINE) simply affirmed this judgment.

The respondent appealed to the Court of Session.

When the case appeared in the Single Bills, the petitioner objected to the appeal as incompetent, in respect (1) that the interlocutor appealed against contained no finding as to expenses; and (2) that it was not a final interlocutor—founding his objections on the 24th section of the Sheriff Court Act of 1853 (16 and 17 Vict. cap. 80) and the 53d section of the Court of Session Act of 1868 (31 and 32 Vict. cap. 100).

In support of his first objection he quoted *Bannatine's Trustees* v. *Cunninghame*, January 11, 1872, 10 Macph. 317; and *Lamond's Trustees* v. *Croom*, May 14, 1872, 10 Macph. 690. [LORD PRESIDENT—There is a much more recent case than either, viz., *Russel* v. *Allan*, decided 14th June 1877. We refused the appeal in respect the Sheriff's judgment contained no finding as to expenses. The party went back to the Sheriff, and got an interlocutor in these terms, "the Sheriff-Substitute finds no expenses due to or by either party," and to-day we have sustained his appeal as competent.]

In support of the second objection, he argued that the substantial question was whether he was to be allowed to recover the expense of the fence from his opponent, and until that was disposed of no appeal was competent.

Authorities—*Gordon* v. *Graham*, June 26, 1874, 1 Rettie 1081; *Millar* v. *Parochial Board of Greenock*, May 25, 1877, 14 Scot. Law Rep. 489.

The appellant argued—The peculiarity here was that judgment had to be implemented in the middle of the process, and that took it out of the general rule. *The Duke of Roxburgh and Others*, May 26, 1875, 2 Rettie 715, was a case where the subject-matter of the cause was disposed of without the question of expenses being touched on; just so here; and as in the case of *Kirkwood* v. *Park*, July 14, 1874, 1 Rettie 1190, there was here an operative decree, and something more than a mere finding. There were two main issues in the case—(1) was there to be a fence; and (2) on whom was the expense to fall. The first of these had been disposed of, and it was really exhaustive of the merits of the case. Further, if this interlocutor was not appealable, there would really be no appeal at all on that question open to the defender.

At advising—

LORD PRESIDENT—In this case the petition was presented to the Sheriff under the authority of the Statutes 1661, cap. 41, and 1669, cap. 17, for the purpose of compelling the respondent to concur with the petitioner in erecting a march-fence between their respective properties. The prayer of the petition craves the Sheriff "to visit the marches in question, and thereafter to authorise and empower the petitioner to build and finish the said march-fences or dykes in terms of an estimate or estimates to be received by him, to be produced in this process; and thereafter, on the expense of building and erecting the said march-fences or dykes being ascertained in the course of the process to follow hereon, to decern and ordain the respondent to make payment to the

petitioner of his share of the expense thereof, after the form and tenor of the said Acts of Parliament, and to find the respondent liable in expenses." Now, by the interlocutor under appeal, the Sheriff-Substitute "repels the various pleas for the respondent; authorises the petitioner to build the dyke as craved; and, with this view, to accept" one of various estimates lodged in process; and "thereafter, when the dyke shall be finished, to lodge an account of the whole expense of building the same." There the Sheriff stopped for the present. Now, it cannot be disputed that that interlocutor does not exhaust the whole of the prayer of the petition, and accordingly it is said that this is not a final interlocutor (1) because that portion of the prayer that craves the Sheriff "to decern and ordain the respondent to make payment to the petitioner of his share of the expense thereof, after the form and tenor of the said Acts of Parliament," has not been disposed of; and (2) because the question of expenses is not disposed of.

Now, the validity of these objections depends on the 24th section of the Sheriff Court Act of 1853 and the 53d section of the Court of Session Act of 1868. As regards the question of the absence of a finding as to expenses, that, I think, has been so frequently decided both in this Division of the Court and in the other, that if that were the only question I should have no difficulty in saying that this appeal was incompetent. But that is a defect that can easily be cured, for the appellant has only to go back to the Sheriff and procure an interlocutor dealing with the question of expenses, and then return to this Court with his appeal.

But the other objection is a much more serious one, for if it is sustained the consequences will be very unpleasant and the result very unreasonable, and one is of course anxious to avoid anything so inconvenient in consequence of regulations for the mere conduct of a process, although these are found in a statute and not merely in an Act of Sederunt. The process here is a very peculiar one; it is not possible to dispose of all the questions raised by it at once. These statutes authorise a party in the position of the petitioner to apply to the Sheriff for a warrant ordaining his neighbour to concur with him in building a march-fence; but that is very unsatisfactory if his neighbour will not concur, and accordingly it is provided that the Sheriff shall have power to order a fence to be erected and to apportion the expense of erecting it between the parties. Now it is obvious that these two things cannot be done at the same time; the second can only be done after something has been done under the first order. If this interlocutor is not appealable, the result is that a party must submit to have a dyke built and an order made against him for the cost of it. He is then to come to this Court; but what remedy can your Lordships then afford him? I hardly think you could order the dyke to be pulled down. In short, if he must wait until that time before he can appeal, the consequences will be very inconvenient.

Two cases have been cited to us in support of the competency of the appeal. That of the *Duke of Roxburgh and Others* has little application to the present, but the case of *Kirkwood* v. *Park* does give some countenance to the contention of the appellant. In that case all the conclusions of the summons were not exhausted, for there was in the summons an alternative conclusion to which the pursuer might have recourse, and what the decision there shows is, that the competency of an appeal is not to be exclusively determined by considering whether the whole conclusions of the summons have been exhausted.

The 24th section of the Sheriff Court Act of 1853 forbids us to entertain an appeal unless it be against "an interlocutor sisting process, or giving interim decree for payment of money, or disposing of the whole merits of the cause." That section, if it stood alone, would not be so difficult to construe as it is made by the provisions of the 53d section of the Court of Session Act of 1868, which defines what a final judgment shall be held to be, for the purposes alike of reclaiming notes and of appeals from the Sheriff Court. The whole cause shall be held to have been decided "when an interlocutor has been pronounced by the Lord Ordinary which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the case; but it shall not prevent a cause from being held as so decided, that expenses, if found due, have not been taxed, modified or decerned for." Now, the question comes to be—Does this interlocutor dispose of the whole subject matter of the cause, although judgment has not "been pronounced upon all the questions of law or fact raised in the case."

It is to be observed in the present case that this interlocutor repels the whole defences. That is a very long step towards the disposal of the whole "subject-matter," or, in the words of the other statute, the "merits" of the case, for it is not easy to see what merits remain when the whole of the defences have been repelled. The real dispute between the parties is at an end. It has been decided that the march-dyke is to be built, and at the mutual expense of the parties. All that remains is merely executorial, viz., firstly, to build it; secondly, to ascertain the cost; and, thirdly, to apportion the cost. But when the first has been done there is no longer any *lis pendens*.

I am therefore of opinion that in the fair meaning of the Acts of Parliament the whole merits or subject-matter of the case have been disposed of, and accordingly, by a fair construction of the Acts, this is an appealable interlocutor.

The other objection is necessarily fatal, and therefore we must refuse the appeal; but that objection, as we have lately had occasion to observe (*Miller* v. *Parochial Board of Greenock*, 14 Scot. Law Rep. 480), will easily be got the better of.

Lord Deas—The question is—Is this a fina interlocutor in the sense of the enactments to which your Lordship has referred? That depends on whether it disposes of the whole merits or subject-matter of the cause. Now, I am clearly of opinion that there may be many cases in which the whole merits of the cause may be disposed of, and yet there may remain a good deal of procedure that must be followed out

before a decree can be obtained that finally disposes of the whole cause, and a good deal of expense may yet have to be incurred before the finding can be made operative. Take, for example, the ordinary course of procedure in Dean of Guild Courts. The question that generally arises there is, whether warrant shall be granted to erect buildings in conformity with certain plans. After that warrant is granted, there must be a remit to a man of skill; his report must be approved of, and a long course of procedure gone through; and there are expenses in Court and incidental expenses yet to be incurred. It would be an extravagant conclusion to hold that the buildings might be put up—it might be at great cost—and the question yet remain open whether any building is to be put up or not, or rather that there should be no opportunity of reviewing the warrant for their erection. That cannot be the result of these enactments.

Now, that is very much the position of affairs here. That question as to the erection of the march-fence is not only disposed of by the Sheriff, but he has got a report from a man of skill, and has approved of that report; accordingly I am of opinion that this is an appealable interlocutor. It is imperative, however, that the question of expenses should be disposed of; luckily there is an easy remedy, as your Lordship has pointed out, for that defect.

Lords Mure and Shand concurred.

The Court refused the appeal, in respect that the Sheriff's interlocutor contained no finding as to expenses.

Counsel for Petitioner (Respondent)—J. P. B. Robertson. Agents—J. C. & A. Stewart, W.S.

Counsel for Respondent (Appellant)—Balfour. Agents—M'Neill & Sime, W.S.

Friday, October 19.

SECOND DIVISION.

[Lord Young, Ordinary.

TRAILL *v.* CONNON.

Sale—Title—Implement where Title not free from doubt.

The seller of an heritable property for an adequate price obliged himself to grant a valid title to the purchaser, but subsequently found himself unable to do so owing to the circumstance that it was alleged to be burdened with a bond for £1000. The purchaser, who was formerly tenant of the property, consented to remain in possession pending the issue of an action of reduction of the bond. Eventually the Court reduced the bond. The seller thereafter raised an action against the purchaser for payment of the purchase price. The Court, in the exercise of their discretion, *held* that looking to the special circumstances of the case, and to the difficulty and nicety with which the decision of the action of reduction had been attended, payment could not be required until the expiry of the period during which an appeal might be taken to the House of Lords, unless with security against the consequences of a reversal.

Dr Traill, the pursuer in this action, sold to the defender Mrs Connon various subjects in the burgh of Kirkwall for £1300. The agreement of sale was dated 27th and 30th January 1875, and the entry was to be at Whitsunday 1875, when the price was to be paid. The pursuer bound himself to give a good title to the defender, and in the agreement of sale he specially bound himself to disencumber the subjects of a bond and disposition in security for £1000, for which sum he had formerly granted a bond and disposition in security over the property in favour of Smith's trustees. That bond had been negotiated by Messrs Scarth & Scott, W.S., who had acted as agents for both borrower and lenders. After the sale to the defender, and after the disposition in her favour had been adjusted, but before the term of payment had arrived, it was discovered, through the bankruptcy of Messrs Scarth & Scott, that Ballantyne's trustees also claimed to be lenders of the same £1000, and demanded payment thereof from Dr Traill. No bond had been granted in favour of Ballantyne's trustees, but it appeared that they had paid the £1000 to Messrs Scarth & Scott for the purpose of being lent to Dr Traill, and that the money had actually been applied for Dr Traill's use, while Smith's trustees' £1000 had apparently never reached Dr Traill, but had remained in the hands of Messrs Scarth & Scott. In these circumstances (as was alleged by the defender in this action) the pursuer was not in a position to implement the agreement of sale, and applied to the defender for delay until the competing claims for the £1000 should be settled. The defender was tenant and in personal occupation of the property, and she agreed to delay the settlement on condition of receiving the search of incumbrances, and also of the pursuer being responsible for all damages arising through the delay. The pursuer thereupon brought an action of reduction of Smith's bond; and after a troublesome and very difficult litigation obtained the judgment of the Inner House reducing the said bond, and thereafter applied to the defender for implement of the purchase, but she objected to settle unless secured against the consequences of a reversal of the decree in the House of Lords, should an appeal be taken against it. The pursuer thereupon raised the present action, concluding for payment of the price of the property with interest at 5 per cent. from 15th May 1875, and £100 damages in respect of the defender's refusal to implement. The Inner House judgment was pronounced on 3d June 1876, and consequently the defender's right of appeal would not expire, and the decree would not become final, till 3d June 1878.

The Lord Ordinary (Young), on 16th May last, pronounced an interlocutor decerning against the defender substantially in terms of the conclusions of the summons.

The defender reclaimed.

Argued for her—Where the purchaser could show that there was even a doubt about the seller's title, the Court did not require him to pay the price until this doubt was cleared up. Here the doubt was considerable, and the Court had great