to the competency of the appeal, and sent the case to the roll.

Counsel for Appellant — Lang. Agent — J. Young Guthrie, S.S.C.
Counsel for Respondent — Brand. Agent — Peter Douglas, S.S.C.

Thursday, October 20.

FIRST DIVISION.

[Sheriff of Forfarshire.

FLEMING *v.* NORTH OF SCOTLAND BANKING COMPANY.

Process—Appeal—Competency of Appeal on Question of Expenses only.

Held (diss. Lord Deas*)* that an appeal to the Court of Session on a question of expenses is competent.

Observations per curiam on the decisions and practice of the House of Lords as to appeals for costs only.

Alexander Gilruth Fleming, banker in Dundee, raised an action in the Sheriff Court of Forfarshire against the North of Scotland Banking Company, praying the Court "to ordain the defenders to deliver to pursuer a full copy of the account standing in their books in the name of the Standard Life Assurance Company per the pursuer, kept by the pursuer in the branch office of the defenders at Dundee (and said account commences on or about the 3d March 1874, and terminates in July 1879), and also all cheques, pay-in slips, vouchers, and other evidents and instructions of said account: Or otherwise, to deliver the said account to the pursuer, and to produce in the hands of the Clerk of Court, for his inspection, the said cheques, pay-in slips, vouchers, and other evidents; and to find the pursuer entitled to his expenses."

The Sheriff-Substitute (Cheyne) pronounced this interlocutor—"In respect it was stated by the pursuer at the recent discussion that he does not now insist upon having a copy of the account referred to anterior to 30th September 1878, up to which date the account was docquetted by him as correct in the bank ledger, and that his object in bringing the action has been served by obtaining the productions which were made along with the defences, Finds that it is unnecessary to pronounce any finding upon the merits, but that these may be held to be exhausted; and as regards the question of the expenses, Finds the defenders entitled to the expenses incurred by them subsequent to 18th April last (the date when their defences were lodged): Allows them to give in an account of these (framed on scale 1), and remits the account when lodged to the Auditor of Court to tax and report, and decerns."

The Sheriff (Trayner) adhered on appeal, adding the following note to his interlocutor:—"I would be slow in any case to interfere with the judgment of the Sheriff-Substitute where the appeal is taken simply as regards his finding *quoad* expenses. In the present case, however, I think the Sheriff-Substitute has acted rightly in finding the pursuer liable in expenses. I have formed the opinion that this action was vexatious and unnecessary, and if at all necessary, became so only through the fault of the pursuer in not keeping a pass-book for the account of which he seeks a copy, as I think he should have done."

The pursuer appealed to the Court of Session. On the case appearing in Single Bills counsel for the respondent moved the Court to dismiss the appeal on the ground that an appeal on the question of expenses only is incompetent.

At advising—

Lord President—[After quoting the prayer of the petition and the deliverance of the Sheriff-Substitute *ut supra*]—The pursuer has now brought the present appeal to the Court of Session, and it is objected on behalf of the respondents that there is nothing involved except a matter of expenses, and that it is incompetent to appeal against an interlocutor merely dealing with expenses. I am not aware of any authority for this proposition, and I think it would require a very express authority, statute, or Act of Sederunt, or an authoritative judgment of the Court, to exclude appeal on questions of expenses. In this Court, in point of practice, though it is not common, a party is entitled to lodge a reclaiming note against an interlocutor of a Lord Ordinary although it only deals with a question of expenses, and in the same way in the Sheriff Court it is quite competent to appeal an interlocutor from the Sheriff-Substitute to the Sheriff on the question of expenses. Now, what authority is there which says that there is no appeal to this Court on such a question? I am of opinion that there is not any. Reference was made to two cases — that of *Cruickshank* v. *Smart*, February 5, 1870, 8 M. 512, and the recent case of *Tennents* v. *Romanes*, June 22, 1881, 18 Scot. Law Rep. 583. But both these cases are distinguishable from the present, for in both the party appealing had lost his opportunity of appealing on the merits against the interlocutor which disposed of the merits and expenses together, because the judgment had been extracted, and the appeal in both cases was against an interlocutor decerning for the expenses already found due. I was of opinion that both those appeals were incompetent, because the interlocutor sought to be appealed merely gave decree for expenses which had been found due by the former interlocutor, which was no longer subject to review, and followed that interlocutor as a matter of course. There was nothing to bring up for our decision; it was a mere decree to enable a party to enforce his right to the expenses given by a former interlocutor which could no longer be brought up by way of appeal. I think the present case is entirely different, and that this appeal is competent.

Lord Deas—This is a question of very great importance. It is admitted that there is nothing here in dispute between the parties except a matter of expenses, and so the question arises quite purely—Is it competent to appeal to this Court on a mere matter of expenses? I am humbly of opinion that it is not. Expenses are not a cause; expenses are a mere incident; and when the cause ceases to exist the expenses cease to exist also. It requires no authority for that; but I think it would require strong authority for an opposite view, and I am aware of none such. I know of no case which has determined that an

appeal or a reclaiming note is competent on a mere question of expenses. The question is one of principle, and the principle has been affirmed more than once by the House of Lords, for I think no distinction can be made between the competency of taking that incidental question by appeal to the House of Lords and the case of such an appeal as the present. The question arose in the House of Lords in the case of *M'Aulay* v. *Adam and Brown* (7th May 1835, 1 S. and M. 665), and Lord Brougham in the course of his opinion says (p. 689)—"But independent of this it appears to me that the whole appeal is an appeal upon costs, and this is the last of the reasons I shall urge as a ground for recommending your Lordships to confirm the decree;" and again, later on (p. 692)—"Now, undoubtedly, though an appeal upon mere costs does not lie, yet if there is an appeal upon a substantial question, not colourable, if brought, costs may be dealt with by your Lordships." A question of costs is not a law-suit, but a mere incident of it; it would be endless if it were otherwise. The same thing was decided in *Clyne's Trs.* v. *Dunnet and Ors.* (25th Feb. 1839, M'L. and Rob. 28), where it is stated, as part of the rubric, that "It is incompetent to appeal for costs, and it is indispensably necessary to maintain the rule that parties appealing should not be permitted to mix up their appeal with matter of merits in order to cover an appeal for costs." I have always been of opinion that an appeal on a question of costs is incompetent, both to this Court and to the House of Lords.

Lord Mure—The only question here is one of expenses. The appeal from the Sheriff-Substitute to the Sheriff is in general terms, but in the reclaiming petition which the Sheriff ordered it is expressly stated to be on the matter of expenses alone; and no objection was taken before the Sheriff to the competency of such an appeal. There are certain cases, no doubt, in which an appeal from the Sheriff Court to the Court of Session is made by Act of Parliament incompetent, but I am not aware that the present case falls under that category. It is conceded that an appeal from the Sheriff-Substitute to the Sheriff is competent, and that a reclaiming note may be laid before this Court from a Lord Ordinary's judgment on the question of expenses, and I see no reason in principle why an appeal on such a question should not be competent from a Sheriff to the Court of Session, and there is no Act of Parliament or Act of Sederunt to make it incompetent. I think in principle this appeal is competent, although, no doubt, in cases of this description this Court will not without great hesitation interfere with the judgment of the Sheriff.

With regard to the practice of the House of Lords, and the authorities which have been referred to on that matter, I do not know that any opinions there expressed went further than laying down a rule that the Lords would not sustain an appeal to their House on costs merely, but in the case of *Lord Advocate* v. *Lord Douglas* (Feb. 28, 1842, 1 Bell's App. 93), where the liability of the Crown for costs was in dispute, the competency of an appeal on that subject was sustained. I do not think that the opinions and authorities referred to are such as in any way to constrain us with regard to appeals from Inferior Courts to the Court of Session. I am of opinion that this appeal is competent.

Lord Shand—I concur in the opinion of the majority of your Lordships. It has been frequently said in this Court that a party seeking review of a question of expenses only comes before us under unfavourable circumstances, and the Court will discourage appeals on reclaiming notes on that matter merely. But I know of no authority for saying that where a case of obvious or gross injustice can be made out a party is precluded from bringing such a question before us. We know from experience that very great expenses are frequently incurred in Sheriff Courts in cases, for instance, of a proof as to a patent right, and where men of skill have to be examined as witnesses, or in collision cases, and so forth, and the expenses may come to be actually larger than the amount of money originally at stake in the action; in such a case if a miscarriage of justice should occur in awarding the expenses, I see no reason why that portion of the judgment should be excluded from review. It is true the main subject of the cause would have been disposed of unobjectionably, but I cannot hold the opinion that the whole cause is entirely thereby disposed of. It is a matter of no very unfrequent occurrence that reclaiming notes are presented here which are limited entirely to the question of the Lord Ordinary's finding as to expenses, and I never heard it suggested that such reclaiming notes are incompetent, however frequently it may have been urged that the Court will not lightly interfere with the discretion of an inferior Judge on such matters. I think it would require some very direct decision or positive enactment to support a contrary view. As to the House of Lords, I do not think the principle was ever there laid down that a cause is finished by a judgment pronounced on its merits. The House of Lords have laid down a rule that they will not entertain an appeal on a question of expenses merely, but I do not think that is to affect in any way our treatment of appeals coming up to us from Inferior Courts.

Lord President—It is worth while to observe that in the case of *Inglis* v. *Mansfield* (10th April 1835, 1 S. and M. 203) Lord Brougham remarks (p. 327)—"The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is that you cannot appeal for costs alone, but if you bring an appeal on the merits, and if it is not a colourable appeal, for the purpose merely of introducing the question of costs, the Court of review may, in affirming the judgment, consider the question of costs awarded in the Court below." That seems to limit the extent of that rule to the Courts there mentioned.

The Lords repelled the objection to the competency of the appeal and sent the case to the roll, reserving the question as to expenses of this discussion.

Counsel for Appellant—Rhind. Agent—Robert Menzies, S.S.C.

Counsel for Respondents—Moncreiff. Agents—Carment, Wedderburn, & Watson, W.S.