insurance upon goods in transit in addition to the 3 per cent. for accidents and incidents, and that since 1876 this allowance has been stated at £1000. The company have had no notice that the 3 per cent. must in future be held to cover loss upon goods for which they are responsible as insurers, and are not therefore put to show that the allowance is insufficient for that purpose. It appears to me therefore that sufficient reason has not been shown for altering the previous practice, and, on the other hand, no reason has been shown for increasing the allowance of £1000 to £2000.

"IV. The appellants' claim that they should be allowed a deduction of 10 per cent. on one-half of the value of their stock of rails, chairs, &c., which they have purchased and have on hand for the purpose of repairing their way is also in my opinion untenable. The deduction to which they are entitled for the expense of maintaining the permanent way is fixed by the 3d section of the Act of 1867, and by that enactment no deduction can be allowed in respect of moneys which have not been actually expended in maintaining or repairing the permanent way, and charged to revenue in the published accounts of the company. The claim in question does not satisfy these conditions.

"V. No sufficient ground has in my opinion been stated for disturbing the judgment of the assessor as to the valuation of the stations at Hawick and Airdrie, as to the manner in which he has distinguished between station and permanent way, or as to the valuation of the fences or of the slopes.

"VI. The objections which have been stated in the appeals taken by various rating bodies against the valuation of the lands belonging to the North British and Caledonian Railway Companies were in part withdrawn at the bar, and in particular it was conceded that, subject to two objections which were still insisted in, the practice which has been followed for many years of stating the value of the company's plant at 75 per cent. of the prime cost, and allowing a deduction of 25 per cent. upon that value for interest, deterioration, tenants' profits, and incidents, must be accepted for the purposes of this appeal as just and reasonable. The two points insisted in were (1) that the assessor has made a double allowance for deterioration of plant, and (2) that he is in error in making an allowance for occupiers' income-tax.

"The assessor has included in the deduction of 25 per cent. on the assumed value of plant an allowance of 5 per cent. for deterioration of plant, and has also allowed the sums entered for repair and renewal in the company's account.

"But this does not necessarily involve a double allowance, since it is assumed that the expenditure upon repairs and renewals will only bring up the plant to 75 per cent. of its original value, and the percentage of 5 per cent. is in like manner calculated upon 75 per cent. of the prime cost. The assessor therefore, following the established practice, has held that one or other of these allowances alone would be sufficient. I express no opinion on the question whether the method which has long been followed of estimating the allowance which should be made for depreciation is correct in principle, or whether the amount allowed is reasonable. The principle upon which the calculation proceeds has not been challenged except in so far as it is supposed to involve a double allowance, and no grounds have been stated to justify my interfering with the assessor's judgment in the question of amount.

"The objection as to the allowance for income-tax is of a similar kind. It is clear enough that the tenants' income-tax is not a proper deduction from the rent. But the deduction is not made on the assumed rent, but from the gross revenue, for the purpose of reaching the amount of the rent which it may be supposed that a tenant would pay. It is true that if a sufficient allowance has been already made for tenants' profits no further deduction can be made for income-tax. But the practice has been to state separately the allowance for profits and the allowance for income-tax. If the entire allowance under these two items is not excessive, it is a mere question of nomenclature whether it should be stated under two heads or one, and I am not in a position to review the assessor's judgment as to the amount. The question depends upon practical considerations which were not brought forward or discussed at the hearing of the appeal."

Counsel for Appellants—Lord Adv. Balfour, Q.C.—R. Johnstone—Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Parochial Boards and Commissioners of Supply (Appellants in Cross Appeals)—Trayner—Lang. Agents for the Commissioners of Supply of the County of Lanark—Morton, Neilson, & Smart, W.S. Agents for City Parish—W. & J. Burness, W.S. Agent for the Govan Combination—John Gill, S.S.C.

Thursday, November 20.

SECOND DIVISION.

[Sheriff-Substitute of Selkirkshire.

CAIRNS *v.* MURRAY.

Process—Sheriff—Appeal to Court of Session—Value of Cause—Competency—Sheriff Court Act 1853 (16 *and* 17 *Vict. c.* 80), *sec.* 22.

Held (*diss.* Lord Craighill) that where in an action in a Sheriff Court, which when raised is of a value exceeding £25, the sum sued for is restricted by the pursuer to an amount under that sum before the record is closed, an appeal to the Court of Session is incompetent, in respect that the cause is not of a value exceeding £25.

Opinions (*per* Lord Young and Lord Rutherfurd Clark) that litiscontestation takes place when the record is closed, and not when defences are lodged.

In August 1884 Mary Cairns raised an action of damages in the Sheriff Court at Selkirk against John Murray, manager of the South of Scotland Trade Protection Association, for alleged unjustifiable insertion in the "black list" issued by the association, of her name as a defaulting debtor to one of its members. She concluded for payment of £50 as damages. Murray defended the action.

The Sheriff having on 19th September appointed parties to adjust the record on the first Court day, the pursuer on 3d October lodged a minute re-

stricting the conclusions of the action to £20. The interlocutor-sheet bore the following entries:—

"*Selkirk*, 3*d October* 1884.—Allows the pursuer to restrict the conclusion of the petition to the sum of £20 sterling."

"*Selkirk*, 3*d October* 1884.—Record closed."

Thereafter a proof was allowed, as the result of which the Sheriff-Substitute (SPITTAL) decerned against the defender "in terms of the conclusions of the summons." The defender appealed to the Court of Session.

When the cause appeared in the Single Bills, the pursuer objected to the competency of the appeal, in respect that the value of the cause was £25.

Argued for appellant—The cause when raised was of an appealable value, and was so when the record was closed—for the minute of restriction and the closing were of the same date—and certainly after defences were lodged. It was not competent for the pursuer to wait till he had seen the defences, and then restrict, with the effect of cutting off the defender's right of appeal, for he might thereby be prejudiced in his defence, which he had made on the footing of the cause being of a higher value—Mackay's Practice, i. 264; *Buie* v. *Stevenson*, December 5, 1863, 2 Macph. 208.

Replied for respondent—It was competent to restrict up to the time when the defender might be prejudiced in his defence, and that could be only when the record was closed. The order in which the interlocutors were written showed that the Sheriff meant the restriction to precede the closing of the record.

At advising—

LORD CRAIGHILL—I am of opinion that the case should be allowed to proceed. I think the question of the competency of the appeal ought to be determined according to the value of the cause at the time when the action is brought into Court and the parties have joined issue. When the defender has appeared I do not think the right of appeal can be cut off by any operation on the part of the pursuer in restricting the value of the cause to a smaller amount than the pursuer was called on to meet and has met. I do not enter on any technical question as to when the parties are to be held to have joined issue or when litiscontestation takes place. I think that when defences are lodged, and the parties have met in Court on the footing that the cause was of the value of £50, then appeal is competent though the pursuer has since restricted his claim to £20.

LORD RUTHERFURD CLARK—I am sorry to be of a different opinion. It was competent for the pursuer to restrict the amount concluded for before litiscontestation — that is to say, before the closing of the record. The pursuer has exercised that right, and restricted the sum to £20, and he having done so, no judgment could have been pronounced in his favour beyond that sum. So that this is a case in which the parties have joined issue, or rather in which there has been litiscontestation—for that is the proper expression in our law—in a cause which is of less value than £25. I therefore think the appeal is incompetent.

LORD YOUNG—I agree with Lord Rutherfurd Clark without difficulty, and certainly without regret at the result, because I think the policy of the statute is to exclude trumpery cases from this Court, and to protect parties in such cases from the costs of litigation. The language of the statute [sec. 22] is that "any cause not exceeding the value of £25 sterling" shall not be appealable to this Court. It leaves the Court to determine what is the value of the cause. The reason and policy and sense of this provision is to keep out of this Court causes which are not truly of the value of £25, and to save to litigants the expense of useless litigation. There are some judgments no doubt admitting appeals in certain cases which would seem to be against the plain sense of the statute, but I do not think there is anything to hinder us from interpreting it according to its sense and plain meaning here. I should just like to put this question—If, for example, a workman asks damages from his employer for injuries received in his service—if he asks £25, and, on the occasion of the first meeting of the parties before the Judge, restricts his claim to £20, and the cause is thereafter proceeded in as one of the value of £20, is that a cause of the value of more than £25, and therefore appealable, or is it not? I think there can be only one answer to that question. And if it be argued that defences were given in on the footing that the cause was of greater value than £25, I would ask in what respect could the defence have been different if the cause had been of the value of £20 originally? Or does the party say he would not have defended at all if it had been of the value of £20 originally? In what respect could the defence have been in any way different had the cause been of the larger or smaller value originally? None was suggested, and no one can suggest any. The pursuer had it in his power to make the cause a £20 one, and he exercised his legal right before litiscontestation, and made it a cause of that nature without any prejudice to the defender. Then why is it to be dealt with as a cause of the value of £25? Is it not still a cause "not exceeding £25 in value?"

I therefore think we would be giving effect to the reason and policy — and the only intelligible and stateable reason and policy—of the Act as to the competency of appeals by finding this appeal incompetent. It is true that if you litigate, and take a judgment in a cause of higher value than £25, and something—say the death of a party—intervenes, and the value is afterwards restricted—as in *Buie's* case—other considerations come in. I do not say now how I might decide in such a case. In *Buie's* case the Judges who had to decide such a question differed in opinion, and delivered opinions extending over many pages. But we have no case of that kind here. The facts here simply are that before litiscontestation—according to my view—the pursuer has exercised his right to restrict his conclusion from £50 to £20, and the proceedings have been conducted and the judgment given on that footing.

I agree with Lord Rutherfurd Clark that the objection to the competency of this appeal is well founded.

The LORD JUSTICE-CLERK was absent.

The Court sustained the objection and dismissed the appeal.

Counsel for Pursuer (Respondent)—M'Lennan. Agents—Liddle & Lawson, S.S.C.

Counsel for Defender (Appellant)—M'Kechnie. Agents—Edward Nish, L.A.

Thursday, November 20.

FIRST DIVISION.

[Lord Fraser, Ordinary.

MOUNSEY *v.* PALMER.

Superior and Vassal—Casualty— Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.

The Conveyancing Act of 1874 has not enlarged the superior's rights so as to entitle him to a casualty as on an entry which he would not have been entitled to before the statute.

Superior and Vassal—Casualty — Intermediate Vassal—Effect of Payment of Casualty by Duly Entered Vassal

H, the last entered vassal in certain lands, died in 1871. At that time the lands were held in property by M, who remained in possession of them till 1875, when he sold them to P. In 1883 the superior demanded from P a casualty in respect of the death of the last entered vassal in 1871, and P paid the casualty, taking a receipt "in full of the casualty payable for the subjects on the death of the last entered vassal in 1871, viz., H." Thereafter, M having died, the superior demanded another casualty from P in repect of the death of M, and P's infeftment. *Held* that the Act of 1874 had not increased the right of the superior to demand casualties, and that as the casualty now sued for would not have been exigible under the law existing prior to the Act, the defender was entitled to absolvitor.

The Conveyancing (Scotland) Act 187 4(37 and 38 Vict. cap. 94), sec. 4, sub-sec. 2, provides—"Every proprietor who is at the commencement of this Act, or thereafter shall be, duly infeft in the lands, shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate register of sasines, duly entered with the nearest superior whose estate of superiority in such lands would, according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so infeft . . . to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice." . . . Subsec. 3 provides—"Such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due and exigible in respect of the lands at or prior to the date of such entry: . . . But provided always that such implied entry shall not entitle any superior to demand any casulty sooner than he could by the law prior to this Act, or by the conditions of the feu-right, have required the vassal to enter, or to pay such casualty irrespective of his entering."

John Little Mounsey, pursuer of this action, was lawful superior of an area of ground and buildings thereon, forming 90 Candlemaker Row, Edinburgh, situated at the head of the Cowgate of Edinburgh, on the north side of Greyfriars' Churchyard, all as fully described in the disposition in his favour granted by the Misses Sarah Shaw Whitehead, Annie Whitehead, Alice Whitehead, and Helen Whitehead, dated 25th December 1879, and duly recorded in January 1880. The disposition in his favour assigned the rents, feu-duties, and casualties, as well past due or exigible and unpaid as to become due or exigible.

David Palmer, the defender in this action, was proprietor of these subjects, having acquired them by disposition, dated and recorded in 1875, from James Miller, who acquired them in 1867 from the trustees of James M'Caskie. M'Caskie acquired them from the trustees of Charles Oliphant in 1858.

Oliphant's trustees had been entered with the superior, the pursuer's predecessor in the superiority. The last survivor of them was Robert Hunter, advocate, who died in 1871.

Miller was never expressly entered with the superior, but was proprietor at the time of the passing of the Conveyancing (Scotland) Act 1874.

On 20th April 1883 the pursuer, as superior, raised against Palmer, the present defender, an action of declarator and payment concluding that in consequence of the deaths of Oliphant's trustees, the vassals last vest and seised by the superior, a casualty of one year's rent became due to the superior on the death of Hunter, the last survivor of them, in 1871, which was still unpaid, and that defender, being the proprietor of the subjects, was bound to pay it.

Defences were not lodged, and after a correspondence, the amount of the casualty, after all proper deductions, was fixed at £60, and Palmer having paid that sum took this receipt—"Received from Mr David Palmer, corn merchant, Cowgatehead, Edinburgh, the sum of £60 sterling, in full of the casualty payable for subjects 90 Candlemaker Row, Edinburgh, on the death of the last entered vassal in October 1871, viz., R. Hunter, advocate, the last surviving trustee of the late Charles Oliphant, W.S., conform to summons at Mr Mounsey the superior's instance, against Mr Palmer, signeted 20th April last, which sum of £60 is accepted in full of the casualty sued for in said summons. (Signed) Campbell & Somervell, agents for Mr Mounsey."

Miller died on 5th June 1883.

Mr Mounsey in October 1883 raised this action of declarator and payment against Palmer to have it found that in consequence of his, "defender's, infeftment in the subjects, and of the death of James Miller, ironmonger, Princes Street, Edinburgh, the last vassal vest and seised, or held as vest and seised, by the superior in the said subjects, in respect of whose implied entry a casualty has been paid to the said superior, or of either event, a casualty, being one year's rent of the said subjects, became due to the superior of the said subjects on or about the 18th May 1875, being the date of the registration of the defender's infeftment in the appropriate register of sasines, or at least on or about the 5th June 1883, being the date of the death of the said James Miller, and that the said casualty is now exigible and still unpaid, that the defender is liable to make payment of the same to the pursuer, and that the full rents, maills, and duties of