infers revocation on a sound construction of its terms. The rules in bankruptcy law which your Lordships have referred to proceed entirely on the same lines; and on the whole matter I agree with your Lordship.

LORD PRESIDENT—LORD M'LAREN, who was present at the hearing, authorises me to say that he concurs in this judgment.

The Court recalled the interlocutor of the Lord Ordinary and ordained the defenders to lodge an account in terms of the conclusions of the summons as restricted.

Counsel for the Pursuer (Reclaimer)—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—Solicitor of Inland Revenue (P. J. Hamilton Grierson).

Counsel for the Defenders (Respondents)—Scott Dickson, K.C.—Grainger Stewart. Agents—Auld & Macdonald, W.S.

Tuesday, March 12.

FIRST DIVISION.

[Sheriff Court at Glasgow.

PAISLEY PARISH COUNCIL *v.* GLASGOW AND ROW PARISH COUNCILS.

Process—Appeal—Sheriff—Value of Cause—Continuing Liability—Competency—Sheriff Court Act 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 22.

The Sheriff Court Act 1853 enacts, section 22—"It shall not be competent . . . to remove from a Sheriff Court or to bring under review of the Court of Session . . . any cause not exceeding the value of £25 sterling."

Held that a cause in which only £11, 2s. and interest was sued for, but the decision in which would govern the chargeability for the future until another settlement were established of a pauper, a wife deserted by her husband, was open to appeal to the Court of Session.

On October 28, 1905, Paisley Parish Council brought an action in the Sheriff Court at Glasgow against the Parish Councils of Glasgow and of Row, praying the Court "to ordain the defenders to free and relieve the pursuers of the advances made and to be made by the pursuers to or on account of Elizabeth Craig Logan or Wright, a pauper, sometime residing at 16 New Stock Street, Paisley, and now at 7 Park Avenue there, and that by paying to the pursuers (*first*) the sum of £11, 2s. sterling, with the legal interest thereon from the 24th day of January 1905 till payment, or at least the legal interest on the various advances which go to make up said sum from the respective dates of disbursement thereof, commencing as from said date till payment, and (*second*) all further sums which the pursuers may have to pay subsequent to the 31st day of October 1905 to or on account of the said Elizabeth Craig Logan or Wright, with the legal interest thereon from the dates of their respective payments till repaid; and to find the defenders liable in expenses."

On 23rd November the Sheriff-Substitute (FYFE) allowed a minute of restriction by the pursuers whereby they intimated that they did not press their claim under the second conclusion, reserving their right to claim in the future; and at the same time he closed the record.

The pursuers averred "(Cond. 7) By agreement among the parties this action has been brought in this Court of consent for the purpose of having the question of law at issue decided really as between the two defenders, and for the purpose of the pursuers obtaining relief from such of the defenders as may be found liable. It is admitted by all parties (*first*) . . .; and (*sixth*) that liability is upon one or other of the defenders, and that pursuers are entitled to relief as concluded for against one or other of them accordingly."

The answer to this by both defenders was "Admitted."

The Sheriff-Substitute having given decree against the parish of Row, and the Sheriff (GUTHRIE) having adhered, that parish appealed to the Court of Session.

Glasgow Parish objected to the competency of the appeal, and argued—The appeal was incompetent as the amount sued for was below £25—Sheriff Court Act 1853, sec. 22. It did not matter that as the petition was originally drawn it was of greater value, for it must be judged of at litis-contestation, *i.e.*, the closing of the record, all restriction prior to that time taking effect as at the raising of the action—*Cairns* v. *Murray*, November 21, 1884, 12 R. 167, 22 S.L.R. 116, *distinguishing Buie* v. *Stiven*, December 5, 1863, 2 Macph. 208. But as matter of fact the conclusion which was dropped was of no avail as it must have been refused — *Den* v. *Lumsden*, November 10, 1891, 19 R. 77, 29 S.L.R. 76. There was not necessarily involved an element of continuing liability so as to bring up the amount at stake above £25, the question being of actual, not possible, liability. That being so, the appeal could not be defended as being competent—*Macfarlane* v. *Friendly Society of Stornoway*, January 27, 1870, 8 Macph. 438, 7 S.L.R. 259; *Standard Shipowners Mutual Association* v. *Taylor*, June 24, 1896, 23 R. 870, 33 S.L.R. 647; *Parish Council of Stirling* v. *Parish Council of Perth*, June 10, 1898, 25 R. 964, 35 S.L.R. 735. The alleged breach of agreement with regard to the action (Cond. 7) did not exist since the agreement had nothing to do with the form of the action.

Argued for the appellants Row Parish Council—This action had been brought, as mentioned in Cond. 7, by agreement, and the form therefore must not be too strictly examined. It was really an action of declarator as to the chargeability of the pauper for so long as she remained chargeable. That was the question originally raised. Litiscontestation was when de-

fences were lodged — Mackay's Manual, pp. 228 and 311—and the question then was the same. Restriction after litiscontestation did not affect the competency of appeal—*Tait* v. *Lees*, January 13, 1903, 5 F. 304, 40 S.L.R. 204. The real value of the cause therefore was much above £25; appeal was competent—*Drummond* v. *Hunter*, January 12, 1869, 7 Macph. 347, 6 S.L.R. 231. *Cairns* v. *Murray*, *cit. sup.*, had been decided on the erroneous assumption that the restriction preceded litiscontestation. *Buie* v. *Stiven*, *cit. supra*, really ruled the case on that point. *Den* v. *Lumsden*, *ut supra*, only decided that decree should not be granted for future aliment where the continuing nature of the obligation to aliment was hypothetical. The objection here was technical and was only taken at the last moment.

At advising—

LORD PRESIDENT—In this case the pursuers, who are the Parish Council of Paisley, and who are maintaining a pauper of the name of Elizabeth Craig or Wright, bring into Court two other parish councils, upon one or other of whom the burden is said to lie. It is a very well-known form of process. Of course, in some cases the two parties who are brought into the field argue that after all the pursuers are the persons liable; but this case does not seem to be one of that kind, the real matter of contention lying between the two defenders. Now the pursuers brought the case in the Sheriff Court and asked for decree to ordain the defenders to free and relieve the pursuers first of all of the sum of £11, 2s. with legal interest thereon from the 24th January 1905 till payment; and second, of all further sums which the pursuers may have to pay subsequent to the 31st October 1905. The condescendence attached to the petition sets forth the circumstances of the case and goes on to state that by agreement among the parties this action has been brought into Court of consent for the purpose of having the question of law at issue decided, really as between the two defenders. Then certain questions of fact which are said to be admitted are given. The answer 7 of the Glasgow Parish Council is "Admitted" subject to exceptions and explanations which do not touch the matter. The answer of the Row Parish Council is "Admitted." Now, previous to the debate, and indeed previous to the closing of the adjustments, the pursuers, probably having in view the case of *Den* v. *Lumsden* (1891, 19 R. 77), put in a minute of restriction in which they say that they do not in this action press the claim made in the second conclusion of the prayer of the petition, namely, for payment of the sums which they might have to pay subsequent to the 31st day of October 1905. The case then proceeded to a decision upon the merits. The learned Sheriff-Substitute found that the true debtors were the Parish Council of Row, and that decision was upheld by the learned Sheriff. The Row Parish Council then appealed to your Lordships, and at the calling of the case the appeal was objected to as incompetent by the Parish Council of Glasgow, upon the ground that the amount involved is underneath the £25 limit.

That objection seems to me rather strange in view of the admissions of the Glasgow Parish Council in reference to the statement which I have read as made by the pursuers. But I have come to the conclusion that there is no good objection to the competency here. There was an argument, coupled with the citation of two cases of *Stirling Parish Council* v. *Perth Parish Council* (1898, 25 R. 964) and *Tait* v. *Lees* (1903, 5 F. 304), as to the effect of the minute of restriction, that is to say, as to the precise date at which it speaks. That is a question on which there seems to have been some difference of judicial opinion. In my opinion it is rather a difficult question, and I wish to say that upon that matter I entirely reserve my opinion, because in the view I take I do not base my judgment upon the minute of restriction at all. I am content to take the action as raised upon the first conclusion of the summons.

There is a long series of cases bearing on the matter at issue, many of which were quoted to us, but I think the general principle to be deduced from them is simple enough. *Prima facie* the value of a case is to be tested by the conclusions of its summons. That is the first rule. But that rule suffers certain exceptions. If those conclusions, even although expressed in a pecuniary form, really come to be in fact conclusions *ad factum præstandum*, then the monetary limits do not apply; and, secondly, there is this other exception, that a case which is upon the face of it underneath the limit may yet by its decree determine a question the value of which, when estimated pecuniarily, is above the limit.

The best illustration of what I have said is the case of *Drummond* v. *Hunter* (1869, 7 Macph. 347), which is a case about a lease. There the particular sum in dispute was under the limit; but inasmuch as it was a seven years' lease, the other years when taken into consideration raised the sum above the limit, and it was held that the limit did not apply. I think the true test accordingly is — can this determination, whatever it is, be *res judicata* upon a matter that will come up again? That, of course, must be subject to this consideration, that when you say a matter will come up again it must be one that is likely to come up again in the ordinary course of circumstances. It must not be something which theoretically can recur, because, of course, theoretically anything may recur; and thus I am in entire agreement with the case of *Stirling* v. *Perth*. There the question, although in one sense a question of the liability for a pauper, was not so in another sense. The sum in dispute there was a sum which had to be paid in respect that certain children had been taken charge of by the police under the provisions of the Cruelty to Children Act. Now that was a circumstance which would not in the ordinary and natural course of affairs occur again;

and therefore the Court held, and I think held very properly, that although it was a case of Poor Law settlement and of consequent liability, it was not truly a case of recurring liability, because no one could say that such a case would arise again. On the other hand, it was held in the case of *Buie* v. *Stiven* (1863, 2 Macph. 208) that where the liability was a continuing liability the limit should not apply. Now, I point out that that decision must be subject to this observation, that although it was given on the footing that the liability might occur again, and probably would occur again, there was no certainty as to that, because, of course, the pauper in question might have died, and his death would put an end to any question of relief in the future. Accordingly, the common-sense test seems to me to be simply this—in the whole circumstances of the case, is the Court asked to decide a practical question of continuing liability or is it not? I do not think that is affected by whether there is a declaratory conclusion as there was here in the second conclusion, and that is why I am not affected by the striking out of this second conclusion by the minute of restriction. On the whole matter I am of opinion that the liability here is a continuing liability, and that, accordingly, the objection to the competency of the appeal is not well founded.

LORD M'LAREN—I agree. It should be kept in view that the question of competency depends upon the statutory exclusion of the review of the Court of Session in cases below the value of £25, and therefore it lies with the party who takes the objection to the appeal to satisfy the Court that the value is less than £25; and if he is not able to do that, because the value may or may not amount to that sum, then it appears to me that he fails in his objection to the appeal. It is quite settled, as I think, by authority, that where there is a pecuniary claim, and a claim to be relieved from future payment, that is an action *ad factum præstandum*, and is not struck at by the pecuniary limitation of the right of appeal. But then I agree with your Lordships that, even where there is no express claim of relief, yet if the pecuniary claim which is the immediate subject of the action necessarily leads to the same determination in regard to future years, the decision would really be *res judicata* with regard to the liability for future years. The value of the action is then not to be limited to the sum concluded for. Now I think in coming to this result we are in no way in conflict with the principle of the case of *Den* v. *Lumsden* (1891, 19 R. 77), as expounded by the late Lord President, because there the man died in the course of the litigation, and therefore it became quite certain that no further liability could ever arise than the liability which was the subject of the conclusion of the action; but it is a very different thing to extend the principle to this case on the ground that the conclusion as to future liability is cut off by a minute of restriction. The minute of restriction does not destroy the claim. It only makes it impossible to have the matter of future liability determined in this action, but leaves the claim to be followed out if necessary by competent process in the future. Whether that restriction was put in to exclude the appeal or not, I think it does not effect the end of excluding the appeal, because, notwithstanding the restriction, it still remains a conclusion, and therefore the decision as to the claim for £11 odd will rule subsequent advances on account of the pauper. Although it is possible that the pauper may die before the advances amount to £25, yet as the time of death is a matter of uncertainty we cannot tell that the advances will not reach £25, and therefore I say it cannot be affirmed by the objector that the value of the case is less than £25, and that the appeal is excluded. I am therefore for holding that this appeal is competent.

LORD KINNEAR—I concur.

LORD PEARSON—I am of the same opinion.

The Court repelled the objection to the appeal and sent the case again to the roll.

Counsel for the Pursuers—MacRobert. Agent—A. C. D. Vert, S.S.C.

Counsel for the Appellants and Defenders (Row Parish Council)—Dean of Faculty (Campbell, K.C.)—Orr Deas—Carment. Agents—Reid & Crow, Solicitors.

Counsel for the Defenders (Glasgow Parish Council)—Clyde, K.C.—William Thomson. Agents—Mackenzie, Innes, & Logan, W.S.

Tuesday, March 12.

FIRST DIVISION.

[Lord Johnston and a Jury.

CASEY *v.* UNITED COLLIERIES, LIMITED.

Reparation—Damages for Personal Injury—Excess of Damages—New Trial.

In an action of damages for personal injury at the instance of a miner, who at the date of the accident was earning thirty-three shillings a-week, the jury found for the pursuer and assessed the damages at £750. The medical evidence for the pursuer was in direct conflict with that given for the defence; the pursuer according to the former being permanently disabled, while according to the latter he had at the date of the trial almost completely recovered, and would be fit to resume work after three or four months. The defenders moved for a new trial on the ground of excessive damages, and obtained a rule.

The Court *refused* to disturb the verdict, holding that the sum awarded, though larger than the Court sitting as a jury would have given, was not