What the grounds are on which proof could be allowed has already been sufficiently explained by your Lordship. To a certain extent they are adumbrated in condescendence 3 and depend upon the actual relation of the defender to the funds, either in the capacity of treasurer or in his capacity as the employer of Munro, and as a person who *de facto* and *de jure* was liable for what John Munro did or failed to do.

Accordingly it is necessary that the record should be rewritten. The plea-in-law is obviously not directed to the point which we now consider to be the relevant matter in the case. As regards the conclusion in the summons, in point of form it appears to me the conclusions are wide enough, but it is quite obvious when they are linked up with the present averments that the reference to the defender's relation with the regiment as treasurer is intended to be of a very limited character. It is for the pursuer to consider whether the wording of the conclusion should remain; that is, whether when he writes the appropriate averments he may not stretch the conclusions of the summons to an extent never intended.

LORD SKERRINGTON—I agree with your Lordships that the action fails on the principal ground upon which it is laid, namely, that the defender as former commanding officer is under a duty to account to the pursuer.

Whether or not it may be possible to convert this action into a common law action of relief I do not know, but I do not advise the pursuer rashly to throw good money after bad by amending his record for the second time. If, however, your Lordships think that he should have the opportunity of doing so, I do not dissent.

The Court recalled the interlocutor of the Lord Ordinary and continued the cause to allow the pursuer an opportunity of further amending his pleadings if so advised, reserving all questions of expenses.

Counsel for the Pursuer—Blackburn, K.C. —Macquisten. Agent—Francis S. Cownie, S.S.C.

Counsel for the Defender — Sandeman, K.C.—Wilton. Agents—Dalgleish, Dobbie, & Company, S.S.C

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*Tuesday, May* 28.

## SECOND DIVISION.

[Sheriff Court at Edinburgh.

## GENERAL GUARANTEE CORPORATION *v.* ALEXANDER.

*Process—Appeal—Sheriff—Competency of Appeal—Action ad factum præstandum.*

In an action for the delivery of a piano the pursuer averred in the condescendence that the value of the piano was £22, 2s., and in answer the defender stated that its value did not exceed £9, 17s. 6d. The Sheriff having granted decree for delivery of the piano the defender appealed to the Court of Session. *Held* that the value of the cause being below £50 the appeal to the Court of Session was *incompetent.*

The General Guarantee Corporation, Limited, Glasgow, *pursuers*, brought an action in the Sheriff Court at Edinburgh against Mrs Kate Alexander, 3 Gillespie Place, Edinburgh, *defender*, and also against her husband as her administrator-in-law, whereby they craved the Court "to ordain the female defender, within such short period as the Court shall appoint, to deliver to the pursuers a pianoforte, No. 1383/2575 Brooklyn, and failing delivery as aforesaid to grant warrant to officers of Court to search for, take possession of, and deliver the same to the pursuers; and to find the female defender in any event, and the male defender in the event of his opposing the conclusions of the writ, liable for expenses, and to decern therefor."

The pursuers averred, *inter alia*—"(Cond. 4) . . . The value of the said article is £22, 2s."

The defender averred, *inter alia*—(Ans. 4) . . . Explained that the value of the said piano is not more than £9, 17s. 6d."

On 5th March 1918 the Sheriff-Substitute (ORR) dismissed the action.

On 28th March 1918 the Sheriff (MACONOCHIE) recalled the interlocutor of the Sheriff-Substitute, and ordained the defender to deliver the piano to the pursuers within seven days.

The defender having appealed to the Court of Session the pursuers objected to the competency of the appeal, and argued —The appeal to the Court of Session was incompetent by reason of the value of the cause being less than £50. Section 7 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) so far as dealing with the value of actions *ad factum præstandum* was repealed by the Act of 1913 (2 and 3 Geo. V, cap. 28), which thereby restored the practice under the Act of 1853. The value of the cause fell to be ascertained from the conclusions of the summons or from the record or from any other appropriate source. Both the parties here admitted that the piano in question was less than £50 in value, and there was no added sentimental value attached to it. Counsel referred to the following cases:—*Purves* v. *Brock*, (1867) 5 Macph. 1003, 4 S.L.R. 174; *Henry* v. *Morrison*, (1881) 8 R. 692, 18 S.L.R. 438; *Singer Manufacturing Company* v. *Jessiman*, (1881) 8 R. 695, 18 S.L.R. 496; *Cameron* v. *Smith*, (1857) 19 D. 517; *Dickson & Walker* v. *John Mitchell & Company*, 1910 S.C. 139, *per* Lord President Dunedin at p. 145, 47 S.L.R. 110.

Argued for the defender (appellant)—The present case being an action *ad factum præstandum* the appeal was competent. An action *ad factum præstandum* was not in the same category as one involving pecuniary conclusions, where the value of the cause was to be ascertained either by reference to the conclusions of the summons or the prayer of the petition. In the present case it was impossible to ascertain from the conclusions whether the cause fell within the limit or not, and the condescendence could not be held to qualify the conclusions. The

cases of *Purves* v. *Brock* (*cit.*) and *Henry* v. *Morrison* (*cit.*) were inapplicable to the circumstances of the present case. Counsel cited—*M'Intosh* v. *Bennet & Williamson*, (1795) M. 377; *Cooper* v. *Bone*, (1823) 2 S. 598 (N.E. 511); *M'Ewan* v. *Davies, Beard, & Davies*, (1824) 2 S. 696 (N.E. 584); *Dickson* v. *Bryan*, (1889) 16 R. 673, 26 S.L.R. 511; *North British Railway Company* v. *M'Arthur*, (1889) 17 R. 30, *per* Lord Shand at p. 32, 27 S.L.R. 34.

LORD JUSTICE-CLERK—This is an appeal from the judgment of the Sheriff in a petition which craved for delivery of a piano which the defender had taken from the pursuers on the hire-purchase system, and the value of that piano was stated in the agreement to be £22, 1s., which was fixed as the full price. The total payment received by the pursuers was only £12, 11s. This action is brought to obtain delivery of the piano, the sole conclusion being, "To ordain the female defender . . . to deliver to the pursuers a pianoforte, . . . and failing delivery as aforesaid to grant warrant to officers of Court to search for, take possession of, and deliver the same to the pursuers," and for expenses. The Sheriff-Substitute dismissed the action and found the pursuers liable in expenses. On appeal the Sheriff recalled that interlocutor; found that the defender had failed to put forward a relevant defence to the crave for delivery of the piano; ordained her to deliver the pianoforte to the pursuers; and found her liable in expenses. Against that judgment this appeal has been taken, and the question is whether the appeal is competent. While the conclusions are limited to delivery of the piano, the pursuers on record, in condescendence 4, say—"The value of the said article is £22, 2s."; and in answer the defender says that the value of the piano is not more than £9, 17s. 6d., and she pleads—"(3) The crave of the writ being for delivery of an article which does not exceed in value the value which may be competently concluded for in the Small Debt Court (that is £20) the cause should be remitted to the Small Debt Court"; and "(4) In any event, the crave of the writ being for delivery of an article which does not exceed in value the value which may be competently concluded for in the Small Debt Court, small debt expenses only should be allowed."

This question falls to be primarily determined by section 7 of the Sheriff Courts Act 1907, as amended by the amending statute of 1913. Section 7 originally provided—"Subject to the provisions of this Act and of the Small Debt Acts, all causes not exceeding £50 in value, exclusive of interest and expenses, competent in the Sheriff Court shall be brought and followed forth in the Sheriff Court only, and shall not be subject to review by the Court of Session." Then there was a proviso that in actions *ad factum præstandum* "where the value of the cause is not disclosed, the same shall be deemed to exceed £50, unless in the course of the cause the Sheriff shall determine, as after provided, that the value thereof is less than £50." That proviso, I presume in consequence of certain observations which were made by Lord President Dunedin, has since been repealed, but it still leaves the affirmative enacting provision standing, which is that all causes not exceeding £50 shall be brought and followed forth in the Sheriff Court only and shall not be subject to review by the Court of Session. In determining the interpretation of that part which is still left I think we are entitled to take into account the terms of the now repealed proviso, and it appears to me quite plain that the primary enacting words were intended to cover and did cover actions *ad factum præstandum*, because the proviso is inserted just for the purpose of making special provision where necessary for the determination of the course to be followed in such actions, and that proviso begins with these words—"Provided that in actions *ad factum præstandum* where the value of the cause is not disclosed. . . . ."

I take it these words, whatever else they mean, must mean this, that the record on the face of it may disclose what the value of the cause is, and that view would be entirely in accordance with what was said by Lord President Inglis in the case of *Purvis* v. *Brock*, 1867, 5 Macph. 1003, which was brought under the corresponding section of the Sheriff Court Act 1853, where he says that "it is incumbent on a party objecting that a cause is under that value" (that is £25 as it was then) "to prove that it is so from the pleadings alone. I do not go the length of saying that the value of the cause is under all circumstances to be measured by the conclusions of the action or the prayer of the petition, for I think it is to be gathered from the whole of the record as well." And in the case of *Singer Manufacturing Company* v. *Jessiman*, 1881, 8 R. 695, similar views were expressed by Lord Deas, but it is enough to say that I adopt what Lord President Inglis said as being still sound law.

The result is where you have a statement by the pursuers that the value of the piano is £22, 2s., and by the defender that the value of the piano is £9, 17s. 6d., you have it in my opinion conclusively ascertained that the value of the cause is below £50. Even if you added the sum which has been paid, £12, 11s., to the total original value of the piano, £22, 1s., you do not get £50.

I am therefore of opinion that the Sheriff's judgment is not subject to review by the Court of Session, and I move your Lordships that we should sustain the objection to the competency of this appeal.

LORD DUNDAS—I agree. The proposition maintained by Mr Maclaren for the appellant was that in order to determine the value of the cause you must only look at the summons or initial writ, and not at the condescendence. I cannot accept the proposition thus broadly stated. In this particular case, however, the point is one easy to decide, for as your Lordship has pointed out each party sets out on record his view of the value of the cause. The pursuers set the value of the piano at £22, 2s., and the defender at £9, 17s. 6d., and thus the parties

are agreed in telling us that the value is less than £50. It rather looks to me as if each party had confidently hoped and expected to win in the Court below, and that both of them had meant to preclude an appeal to this Court. But however that may be, it seems to me plain that this appeal is incompetent, and should be dismissed.

LORD SALVESEN—I am of the same opinion. The point for our decision is whether this is a case which exceeds £50 in value. I agree with the argument of Mr Maclaren that in the case of an action for delivery of an article or *ad factum præstandum*, if there are no materials on the pleadings from which you can ascertain the value of the cause—that is to say, transmute the value of the article or of the obligation sought to be enforced into money, then the older decisions must prevail, and that you cannot hold that the jurisdiction of the Sheriff Court is privative. If, therefore, the pursuers of this action had refrained from stating what was the pecuniary value of the piano, I do not think it would have been competent for us to consider whether the cause was really of a less value than £50.

But for the purpose of ascertaining the value of the cause I think it is quite legitimate to look at the pleadings of parties. If the pursuer cannot refuse to take a given sum in full of his conclusions, that sum is the value of the cause, and it seems to me perfectly clear that if he sets forth in his pleadings that the value of the piano is £22, he cannot refuse to take that sum if it is tendered. It may be otherwise if he wants the article himself and does not provide any standard by which it can be transmuted into money—he may have even in the case of subjects of apparently trivial value an interest in obtaining possession of them quite apart from their pecuniary value. Here he cannot take up that position because the contract upon which he founds in his pleadings discloses that this was an ordinary mercantile transaction, and that upon payment of certain instalments amounting *in cumulo* to £22, 1s., the property in this piano would be transferred from the pursuers to the defender. That is a peculiarity of this case which was not present, so far as I know, in any other of the cases that have been cited to us, and I do not think we are trenching in any degree upon the authority of the older decisions in reaching the decision which your Lordship in the chair has indicated. I should be very slow to go outside the record in order to ascertain the value of a cause. Then one would be in the region of more or less *ex parte* statements or of partial proof, but where the parties are agreed on the pleadings that the pecuniary value of an article delivery of which is sought is less than £50, then I think the jurisdiction of this Court is excluded.

LORD GUTHRIE—Mr Maclaren frankly admitted that his case for appeal depended upon the Court confining its attention to the conclusion and ignoring the fact that in the condescendence and answers the parties are agreed that the value of the article is below the necessary sum. The question of appealability, he said, depends on the conclusions of the summons, and if the summons contains no pecuniary conclusions the judgment is appealable because the value may be more than £50. That was argued by him on the authority of certain cases in which not only was there no pecuniary conclusion in the summons but the parties' pleadings showed no agreement as to the value of the cause being less than the sum necessary to make the judgment in the Court below appealable. But in all these cases not only do the judges point out that the summons contains no pecuniary conclusion, but also that it is impossible without inquiry to hold that the sum involved may not be such as to make the cause appealable. I refer to such cases as *Purves* v. *Brock*, 5 Macph. 1003; *Henry* v. *Morrison*, 8 R. 692; *Dickson and Walker* v. *John Mitchell & Company*, 1910 S.C. 139; *Dickson* v. *Bryson*, 16 R. 673; and *North British Railway Company* v. *M'Arthur*, 17 R. 30; and with regard to the last case, if the test applied there is applied here—for what amount of money could the defender get rid of the action—then the case is not appealable.

The Court sustained the objection, dismissed the appeal, and remitted the cause to the Sheriff to proceed therein as accords.

Counsel for the Appellant—Maclaren. Agent—Lindsay C. Steele, Solicitor.

Counsel for the Respondents—Ingram—Garrett. Agents—Mackenzie & Fortune, S.S.C.

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*Wednesday, May 29.*

## SECOND DIVISION.

[Bill Chamber.

## GREEN *v.* THE LORD ADVOCATE.

*War—Process—Interdict—Competency—Military Service—Friendly Aliens—Liability for Military Service—Military Service Act* 1916 (5 *and* 6 *Geo. V, cap.* 104), *sec.* 1—*Military Service* (*Conventions with Allied States*) *Act* 1917 (7 *and* 8 *Geo. V, cap.* 26), *secs.* 1 *and* 2 *and First Schedule*—*Army Act* 1881 (44 *and* 45 *Vict. cap.* 58), *sec.* 190 (31)—*Reserve Forces Act* 1882 (45 *and* 46 *Vict. cap.* 48), *sec.* 15.

Russian subjects resident in Scotland were in April 1918 called up for military service. They presented a note of suspension and interdict against the notices calling them up on the ground that, the Government of Russia having made peace with the Central Powers, the Agreement between Russia and Britain under which the Military Service (Convention with Allied States) Act 1917 had been applied to Russian subjects in Britain fell, and they were consequently no longer liable to military service. *Held* that the note of suspension and interdict was incompetent.