

Saturday, July 13.

SECOND DIVISION.

M'KELLAR AND SWAN v. JOHNSTON.

Dean of Guild Court—Interim Execution.

In an appeal from an order made by a Court of special jurisdiction on the ground of public safety, the Court refused to interfere with interim execution of the order.

On 5th July 1872 the Procurator-Fiscal of Edinburgh presented a petition to the Dean of Guild Court, stating that a tenement had become dangerous, or at least ruinous, decayed, or insecure to such an extent as to cause apprehension for the lives of the inhabitants and of the public, and craving the Court to ordain the respondents, as proprietors, to take down or render the tenement secure.

The Court, after visitation, remitted to Mr Adam Beattie, builder in Edinburgh, to inspect and report. Mr Beattie presented a report, dated 8th July 1872, in the following terms:—"In obedience with a remit from the Lord Dean of Guild and his Council, the Reporter has examined the tenement No. 98 High Street and corner of Blackfriars Street, alleged to be in a dangerous condition, and has found it to be in the state set forth in the petition. The insecurity of the building rests in the pillars and arches of the piazza, and in the west gable, which they carry. On account of the enormous weight of the west gable, the pillars and arches should have been executed in Craigleith stone, in place of the soft stone which has been used. Iron beams should also have been built into the wall over the arches, which would have tended to distribute the weight, and tie the structure together. The construction is especially faulty over the centre and southmost arches of the piazza, where the entire weight of the piers to the top of the tenement (a height of four flats) is thrown on the voids, which is a direct deviation from the original plan, which shows the weight of the masonry above equally distributed over the arches and piers. The arch stones are very much crushed and damaged, especially those in the centre arch, and the same remark is applicable to the piers which carry them—notably the southmost one—which, besides being cracked, has been thrust from its position one inch off the plumb on five feet. The stringcourses and corbels, and several of the sills and lintels of the windows, are broken, and off the level. The Reporter has considered a variety of ways by which strength and security might possibly be added to the present structure; but, after careful consideration, has come to the decision that the effectual and certain mode of overcoming the difficulty will be by taking down the west gable and the piazza to the ground. The Reporter is of opinion that the execution of the remedy suggested in this report, if approved of, should not be delayed, for if any of the arch stones which have been so severely crushed were to give way, the result might be most disastrous."

On 9th July 1872 the Dean of Guild issued the following decision, the petitioner and respondent Swan being present:—"Having resumed consideration of this petition, with the report by Mr Adam Beattie, No. 2 of process, and heard the respondent James Swan, approves of the report: Finds, in terms thereof, that the tenement in question is in the state set forth in the petition, more particularly

the pillars and arches of the piazza in front of said tenement, and the west gable thereof: Therefore ordains the respondent to take down the whole of the said west gable, and the said pillars and arches, and to remove and clear out the same; and failing their commencing to do so within the next twenty-four hours, grants warrant to the petitioner to employ proper persons to do so at the expense of the respondents; as also to sell the materials: Grants warrant to officers of Court to remove tenants and occupants if necessary; in either case appoints the work to be done at the sight and to the satisfaction of the said Adam Beattie, under such directions as he may see proper to give in the doing of it, and him to report to the Court when he sees cause during the progress of the work: *Quoad ultra* continues the cause."

On the 11th July 1872 the respondents produced and lodged in the Guild Court the following report from Messrs Peddie and Pilkington, architects:—"We have to-day examined the tenement No. 98 High Street and corner of Blackfriars Street with a view to judge of its stability. We have also read a report by Mr Adam Beattie, builder, dated the 8th of July current, under remit from the Dean of Guild Court. We have to state that we cannot concur in the description given in said report, which seems to us to convey an exaggerated expression of any insecurity which may exist in the building, and, consequently, that we cannot concur with Mr Beattie in thinking any such sweeping measure as the immediate taking down of the building in any degree called for. We are of opinion that, even granting a much greater degree of insecurity in the building than we see any grounds to suspect, the building might be made temporarily quite secure by shoring and ties, so as to admit of the carrying out of operations to insure its permanent stability." The Court having considered that report, adhered to the interlocutor of 9th July.

The defenders appealed to the Second Division of the Court. On the same day this farther minute for the Fiscal was laid before the Court:—"The Procurator-Fiscal stated to the Court that, since this case had been before the Court in the morning, notice of appeal to the Court of Session had been given on the part of the respondents, and that, in these circumstances, it was necessary that he should now move the Court to regulate matters regarding interim possession, in terms of the 79th section of the Court of Session Act 1868. In these circumstances, the petitioner moved the Court of new to appoint him to employ proper persons to execute forthwith the work appointed to be done by the interlocutor dated 9th instant, and also to clear out the materials and sell the same, and remove tenants and occupants so far as necessary, all as provided by said interlocutor." The Dean of Guild pronounced the following interlocutor:—

"*Edinburgh, 11th July 1872.*—Having considered the minute for the Procurator-Fiscal of this date, and heard the respondents' procurator, and the Procurator-Fiscal thereon, and having again inspected the tenement in question, in respect it appears to the Court that the said tenement is manifestly insecure, and the west gable thereof is in imminent danger of falling before the appeal intimated against the interlocutor of the 9th instant can be heard and disposed of, and in respect that no definite mode of putting the said gable in a state of security has been proposed by the respondents, grants the prayer of the said minute; and in

terms thereof, appoints the petitioner to employ proper persons to take down the whole of the said west gable and the said pillars and arches, and to remove and clear out the materials, and sell the same; and grants warrant to officers of Court to remove tenants and occupants so far as necessary, and decerns."

In addition to the appeal Messrs M'Kellar and Swan presented a note of suspension and interdict, which the Junior Lord Ordinary reported to the Inner House, and the whole matter came before the Second Division at the same time. The appellants maintained that the danger had been exaggerated, and produced additional reports by Messrs Peddie and Pilkington, and other architects and men of skill, to that effect.

J. CAMPBELL SMITH for the appellants.  
SOLICITOR-GENERAL for the respondent.

The Court held that as the tenement was admittedly insecure they ought not to interfere even with the interim execution of the order of the Dean of Guild; but as the report of Messrs Peddie and Pilkington had not been judicially considered by the Dean of Guild, they remitted to him to consider the suggestions therein made, but under the express condition that this should not be held to interfere with the interim execution of his order.

LORD BENHOLME was of opinion that the interlocutor should be affirmed.

Agent for Appellants—Mr Spalding, W.S.

Agent for Respondent—Mr R. B. Johnston, W.S.

Tuesday, July 16.

## FIRST DIVISION.

GEORGE ABERDEIN v. ROBERT WILSON.

Process—Appeal—Competency—Statute 16 and 17  
Vict. c. 80, § 24.

Where a Sheriff-court case concluded *ad facta præstanda*, failing which to decern and ordain the respondent to pay the sum of £20, or such other sum as shall be ascertained to be the price or value, &c.—Held that appeal was not excluded on the ground of the conclusion being under £25.

This was an appeal taken from the Sheriff-court of Fife in a summary petition, whereof the prayer was as follows—"To decern and ordain the respondent instantly to deliver to the petitioner the fleeces of fifty Leicester ewes or sheep, and the fleece of one Lincoln tup or sheep, the property of the petitioner, and carried off by the respondent from the petitioner's premises at Pitkinnie farm-steading upon the 24th day of June 1871, as before mentioned. And failing the respondent doing so within such period as your Lordship shall appoint, to decern and ordain the respondent to pay to the petitioner the sum of £20 sterling, as the price or value of the said fleeces of wool, or such other sum as shall be ascertained to be the price or value thereof."

The Sheriff found the respondent not liable to restore said fleeces, and dismissed the petition.

The petitioner appealed to the First Division of the Court of Session.

When the case came before their Lordships the objection was raised that the appeal was incompetent, in respect of the value of the cause being below £25. Minutes of debate were ordered to

be prepared and laid before the Judge of the Second Division and the permanent Lord Ordinary, in order to obtain their opinion in writing upon this question.

It was pleaded for the appellant—"The question arises under the Act 16 and 17 Vict. c. 80, entitled 'An Act to facilitate Procedure in the Sheriff-courts of Scotland,' and which took effect on 1st November 1853. By section 24 of said Act it is enacted, 'that it shall be competent, in any cause exceeding the value of £25, to take to review of the Court of Session any interlocutor of a Sheriff sisting procedure, or any interlocutor giving interim decree for payment of money, and any interlocutor disposing of the whole merits of a cause, though no decision has been given as to expenses, or though the expenses, if such have been found due, have not been modified or decerned for.' The appellant has first to remark, that, in so far as a prior decision may be held finally to settle any question, the point now involved has been settled by the decision in the appeal of the *Shotts Iron Company v. Kerr* (ante, p. 142). The conclusions in that appeal were precisely the same in form and phraseology with the conclusions in the present appeal. The point having been submitted to the Court, whether the appeal was incompetent in respect the value of the cause did not exceed £25, they held that the appeal was competent. In the case of *Galloway v. M'Ghie*, an objection to the competency of the appeal was taken on the same ground. The Court, however, sustained the competency of the appeal. In this case there was no pecuniary conclusion. In the advocacy of *Purves v. Brock*, an objection to the competency of the advocacy that the value of the cause was under £25 was repelled. In this case also there was no pecuniary conclusion. Various other decisions to the same effect have been pronounced; and the appellant humbly apprehends that, from the reasons given in pronouncing these decisions, it may be held as law that the element of pecuniary value does not apply with reference to appeals in actions *ad factum præstandum*, and the appellant submits that the present action comes under that class of cases. The leading conclusion is a conclusion for delivery of the fleeces in question. It is only failing the effect of that conclusion that the pecuniary conclusion is to come into operation. Where a party has been deprived unlawfully of his property, he is entitled to recover it. In such a case his indefeasible right to his property, and the value he puts upon that right, is not to be measured by its market or pecuniary value. The appellant has further to remark that the subordinate conclusion for payment does not state what the value of the fleeces is in such a way as absolutely to fix the value of the action as not exceeding £25. The expression used is, that failing the appellant obtaining delivery of the fleeces, the respondent is to be decerned to pay £20 as the price or value of said fleeces, or such other sum as shall be ascertained to be the price or value thereof in the event of appearance being entered. From the peculiar nature of the action, it is apprehended that, were occasion emerging, further proof might still be led in the inferior court to establish the value of the fleeces to exceed £25. It will be observed that the judgments appealed against deal entirely with the conclusion *ad factum præstandum*. It may be also observed that, as the right of appeal exists in every case, unless specially barred by statute, the