

pronounced decree by default, but on appeal the Court, while of opinion that the judgment of the Sheriff was properly pronounced, reponed the defender, subject to payment of expenses incurred since the first delay on his part, there having been also great delay on the pursuers' part.

This was an appeal in an action brought by Vickers & Sons, manure manufacturers, Manchester, and Cowper, farmer, Polcardoch, their mandatory, against Nibloe, cabinetmaker and postmaster, Stranraer, formerly agent there for Vickers & Sons, for count and reckoning of his intrusions from 23d January 1868 to 30th June 1873, and failing production by the defender of the necessary vouchers and documents, for decree for £90, being partly the value of stock unaccounted for and partly cash unaccounted for. The defence stated was that the defender had fully accounted, and that he was not responsible for deterioration of goods sent by the pursuers on sale. The action was raised on 4th November 1875, and on 20th January 1876 the Sheriff-Substitute prorogated the period for lodging defences for six days. This was twice renewed in February in respect of the illness of the defender's agent. On 6th July 1876 the action was, on pursuers' motion, revived, and on 13th July both parties obtained diligences to recover documents. On 23d November 1876 a diet for examination of havers was adjourned in respect of the family affliction of the defender's agent, and the defender having failed to appear under certification at two successive diets, decree by default for £90 with expenses was ultimately pronounced on 18th January 1877. On appeal the Sheriff-Principal adhered, describing the case as one of gross professional delays and continued disregard of the orders of Court.

The defender appealed to the Court of Session, and argued—There had been delay on both sides, but latterly the defender had lost the services of his agent, and he had now employed another agent. The papers called for were in the possession of the defender's agent.

The respondent (pursuer) referred to case of *Matheson v. Munro*, February 7, 1877, *Journal of Jurisprudence*, xxi., p. 150.

At advising—

LORD JUSTICE-CLERK—This is an example of the grossest professional delay. The action was raised in November 1875, and at the end of a year the parties had scarcely reached the first stage of inquiry. Then at two diets, of which he had notice, the defender failed to appear, writing letters instead, which he ought not to have done. The Sheriffs therefore did quite right in pronouncing decree by default. But this is an action for an unliquidated trade balance, and as there has been great delay on the pursuers' side also, I think it better to recall the judgments below, and to repon the defender on payment of all expenses subsequent to 20th January 1876, when the delay on his part first began.

LORD ORMDALE—I hope this case will be reported, to show that this Court will not tolerate such delays as have occurred here. I am afraid that even the course suggested by your Lordship may tend to shake the authority of the Sheriffs in dealing with practice of this kind.

LORD GIFFORD—It ought to be distinctly understood that we do not recall the Sheriff's judgments as not properly pronounced in the circumstances. These judgments were quite right, but we repon the defender, subject to a heavy penalty. He may possibly have some relief against the agent who misconducted the defence.

The Court reponed the appellant, on payment of all expenses subsequent to 20th January 1876.

Counsel for Appellant—J. D. Dickson. Agent—Charles Todd, S.S.C.

Counsel for Respondent—M'Laren. Agents—J. & J. Milligan, W.S.

Saturday, May 19.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.]

GIBB v. RAIN.

Process—Sheriff Court—Appeal for Jury Trial—Judicature Act, sec. 40—Value of Cause.

Held that as an action in the Sheriff Court for interdict and damages did not appear on the face of the bill to be above the value of £40, it could not be appealed for jury trial under 6 Geo. IV, sec. 40, without a certificate of value by the Sheriff in terms of Act of Sederunt 11th July 1828, sec. 5.

This was an appeal in an action brought by Rain, tenant in the lands of Corbieton, against Gibb, farmer, Milton Park, to have him interdicted from flooding Rain's fields, and for decree for £5 as damage sustained. The damage was said to be caused by the overflow of the defender's dam.

The Sheriff allowed a proof, and the defender Gibb, being desirous of appealing the case for jury trial to the Court of Session, in terms of 6 Geo. IV. c. 120, sec. 40, and "The Court of Session Act 1868," sec. 73, presented a petition to the Sheriff for leave to appeal, on the ground that the value of the cause did not appear on the original petition. In this petition he stated that he "verily believed that the value to him of the cause is more than £40." The Sheriff appointed the defender to appear and make a solemn declaration. The declaration was in these terms:—

"At Kirkcubright, on Wednesday 7th February 1877. . . .—Compared William Gibb, who being solemnly sworn and examined, deponed—I am respondent in this action. It refers to the overflowing of a mill-dam. I think the issue of that action involves to me a sum exceeding £40. The water of the mill-dam supplies my whole premises. The yearly damage I would sustain by being deprived of the water would be about £50. There are thirteen years of my lease to run.

"Cross-examined.—This action is to prevent my water from flooding the petitioner's field. My being prevented from flooding the petitioner's field wouldn't deprive me of my supply of water. The doing away of the dam is what would cause me damage. As long as I have the dam I am not prevented from having the water. I had it last winter and the winter before, and suffered no pecuniary loss.

"Re-examined.—I know the part of the dam

where petitioner says the water goes into the field. The remedy he asks could be effected without removal of the dam. The sum claimed in the petition is £5. That is for the flooding last winter."

On considering the declaration the Sheriff-Substitute refused the petition for leave to appeal, with expenses, adding the following note:—"The deposition of the petitioner is so distinct and candid as to the subject and the value of the cause in question as to render any comment unnecessary. That action is brought to recover the sum of £5, claimed as damages done by overflow of water from this petitioner's dam last winter. The petitioner admits that the remedy asked for to prevent the recurrence of such damage could be effected without the removal of the dam; and he also admits that the removal of the dam, and his loss thereby of his water supply, is the only thing that would cause damage to him. That damage is not only prospective, but depends on something being done which the original petition does not ask for, and the petitioner says is not required. To say therefore that the value of the cause is above the £5 claimed is an insult to common sense, and to allow the cause to go to the Supreme Court on the ground of its being above £40 in value might justly be looked on as an unparalleled absurdity."

On appeal, the Sheriff-Principal adhered. The defender then lodged two notes of appeal to the Court of Session.

The pursuer objected to the competency of the appeal, and argued—The Act 6 Geo. IV. c. 120, sec. 40, giving the right to advocate against orders for proof with a view to jury trial, is limited to causes "in which the claim is in amount above £40." The Act of Sederunt (July 11, 1828), sec. 5, provides that "if in such causes the claim shall not be simply pecuniary, so that it cannot appear on the face of the bill that it is above £40 in amount, the party intending to advocate shall previously apply by petition to the Judge of the Inferior Court for leave to that effect, which application shall be intimated to the opposite party or his agent, and the petitioner shall be bound, if required by the Judge, to give his solemn declaration that the claim is of the true value of £40 and upwards, and on such petition being presented, and on such declaration, if required, being made to the satisfaction of the Judge, leave shall be granted to advocate, and the Clerk of the Inferior Court shall certify the same." Here the certificate has been refused.

Argued for appellant—The Act of Sederunt does not apply to actions *ad facta præstanda*—*Learmonth v. Morton*, January 17, 1829, 7 Sh. 276. An appeal was there held competent in a possessory question though the action did not set forth that it was above the value of £40. [Court—That was before the Act of Sederunt came into operation.] In *Sands v. Meggan*, January 20, 1829, 7 Sh. 290, it was said the Act of Sederunt was not correctory of the statute—*Hamilton v. Hamilton*, March 20, 1877, 14 Scot. Law Rep. 438. The decisions on the Sheriff Court Act 1853, 16 and 17 Vic. cap. 23, sec. 22, such as *Aberdeen v. Wilson*, July 16, 1872, 10 Macph. 971, support this view. The declaration was not properly taken, the petitioner being put on oath, and cross-examined by his opponent.

At advising—

LORD JUSTICE-CLERK—This appeal is not competent. There is a petition for interdict, and damages are also craved. It cannot be said that the cause is *ex facie* of the value of £40, and therefore the procedure must be regulated by the Act of Sederunt. Accordingly, the defender below has made a declaration of value before the Sheriff, and the Sheriff says he is not satisfied, and has refused leave to appeal. So far as appears, the Sheriff had good grounds for reaching that conclusion, for it does not follow that if the defender be found in the wrong he will have to remove his mill-dam. However that may be, the Sheriff's certificate is final. It was argued that the language of the Act of Sederunt was satisfied by applying it to mixed actions, where there might be a conclusion for delivery and alternative conclusions for damages, but I think the section applies to all actions of which the pecuniary value does not appear to be £40.

LORD ORMDALE—I concur. In deciding this case we are following out the decision in *Hamilton v. Hamilton*, for in that case the Judges succeeded in discovering that the case was above the value of £40, but here we cannot discover the value. I may add that I doubt whether the oath and the cross-examination in the petition for leave to appeal were altogether regular, the statute requiring a solemn declaration. But the right to appeal depends on the Sheriff being satisfied, and therefore, even were the objection to this procedure good, as the Sheriff is not satisfied there would be no use in remitting the case again to the Sheriff.

LORD GIFFORD concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties, Find that the appeal is incompetent, in respect that it is not shown that the value of the cause amounts to the sum of £40: Therefore dismiss the appeal, and remit to the Sheriff to proceed further in the cause: Find the appellant liable in expenses to the respondent, and modify the same to £8, 8s.; and decern."

Counsel for Appellants—Johnstone—Goudy. Agents—Scott, Bruce, & Glover, W.S.

Counsel for Respondent—Scott. Agent—W. S. Stuart, S.S.C.