Saturday, February 27.

FIRST DIVISION.

[Sheriff of Renfrew and Bute.

M'CARTHY *v.* EMERY.

Process — Reponing — Expenses — Appeal from Sheriff Court—Decree by Default.

An appellant against a judgment of absolvitor pronounced by default in the Sheriff Court *allowed*, as the condition of being allowed to proceed with the cause, to pay the whole expenses of his opponent in the Sheriff Court and in the Court of Session.

This was an action raised in the Sheriff Court of Renfrew and Bute by Patrick M'Carthy, Glasgow, against John Emery, contractor, Glasgow, concluding for payment of £100 as damages for injuries sustained by the pursuer.

The Sheriff-Substitute of Paisley (COWAN), on 26th December 1896, closed the record and sent the case to the roll for debate on 12th January 1897. On that date he sent the case to the roll of the next Court, and on 19th January, on the defender's motion, because of the absence of the pursuer's agent, again continued the case to the next Court. On 26th January the Sheriff pronounced the following interlocutor:—"In the absence of the pursuer, assoilzies the defender from the conclusions of the petition."

The pursuer appealed to the Court of Session.

Argued for the pursuer—The appeal was competent. A judgment by default in the Sheriff Court was appealable—Mackay's Practice, ii. 448; *Hamilton* v. *Hamilton*, Nov. 13, 1824, 3 S. 199; *Leslie* v. *Edie*, March 1, 1828, 6 S. 674. It was entirely owing to a misunderstanding that the pursuer's agent had failed to appear on the day on which absolvitor was pronounced. The more usual course, no doubt, would be to remit the case to the Sheriff, but it would be better if it were kept in the Court of Session.

Argued for the defender—The appeal was incompetent. The pursuer's agent had full notice of the day fixed for the debate, there had been two continuations, and no adequate excuse had been given for his failure to appear. It was only in very special and exceptional circumstances that a party would be reponed against a decree by default, and no such circumstances were alleged here—*Morrison* v. *Smith*, Oct. 18, 1876, 4 R. 9.

The LORD PRESIDENT pronounced the judgment of the Court to the following effect:—The Court consider that upon payment of all the expenses of process up to the present date, this absolvitor may stand aside and the case be proceeded with. The proper form seems to be, to recal the interlocutor *hoc statu*, and allow the pursuer as a condition of further procedure to make payment of the whole expenses of process. If he does that, we shall send the case to the Sheriff Court; if he does not, we shall of new assoilzie and dismiss the appeal.

The Court pronounced the following interlocutor:—

"Recal, *hoc statu*, the interlocutor of the Sheriff-Substitute of 20th January 1897: Allow the pursuer, as the condition of being allowed to proceed with the cause, to make payment of the whole expenses of the defender in both Courts."

Counsel for the Pursuer—Guy. Agents—Patrick & James, S.S.C.

Counsel for the Defender—Orr. Agents—Inglis & Orr, S.S.C.

Thursday, March 4.

FIRST DIVISION.

[Lord Low, Ordinary.

LAWSON *v.* WILKIE.

Property—Building Restriction—Interpretation—"Vacant Ground or Back-Green," whether Including Part Occupied by Outbuildings.

In a disposition of certain subjects made in 1866 they were described as consisting of, first, a tenement of four storeys "with the cellars and outhouses attached and belonging to the said tenement, . . . and the area of ground on which the said tenement, cellars, and outhouses stand;" and secondly, "the vacant ground situated to the north of the said area of ground, which vacant ground is at present occupied by said William Thorburn as a back-green." The disposition contained a building restriction, by which the disponee was prohibited from building "on the vacant ground or back-green forming part of the subjects hereby disponed, nearer to the north face of the wall forming the south boundary of said vacant ground or back-green than 10 feet."

An action was raised against the disponee's successor by an adjoining proprietor in whose favour the restriction was constituted, for the purpose of removing a wall which had been built in violation, as was alleged, of the restriction. It was not disputed by the parties that the spot where the wall was built was inside the ground which was occupied by William Thorburn as a back-green, but it was proved that in one corner of it there existed at the time the charter was granted two small buildings, and the defender maintained that the part of the back-green upon which the outhouses stood could not be described as "vacant ground," and that accordingly the building restriction must be limited to the area exclusive of the site of these buildings.

Held that the building restriction applied to the entire space contained