

Tuesday, Feb. 13, and Thursday, Feb. 15.

STRANG v. STEUART.

Property—March Fence—Common Property—Proof.

Held (aff. Court of Session) that a pursuer who alleged that there was a march fence betwixt his and his neighbour's lands consisting of a hedge and a ditch, which were therefore common property, had failed to prove his averments.

Counsel for Appellant—Mr Bovill, Q.C., and Mr Coleridge, Q.C. Agents—Messrs Hill, Reid, & Drummond, W.S.; and Messrs Grahames & Wardlaw, London.

Counsel for Respondent—Mr Rolt, Q.C., and Mr Archibald Broun. Agents—Mr Thomas Sprot, W.S., and Mr William Robertson, London.

This is an appeal from an interlocutor of the Second Division of the Court of Session, pronounced in an action of declarator, in which the appellant was pursuer, and the respondent defender. The question at issue between the parties is, whether a march fence, in the legal sense of the term, exists between their respective farms of Brieich and Brieichdyke; and if so, whether it is their common property, and also whether it is constituted by a certain hedge and ditch, or by the hedge alone.

The farms of Brieich and Brieichdyke formed at one time a part of Sir Alexander Cunynghame's lands of Livingstone, in the county of Linlithgow, and were sold by him in 1791 to a Mr Wilkie. They had till then remained undivided; but during Mr Wilkie's proprietorship he caused a ditch to be dug, and upon the excavated earth thrown up by its side a thorn hedge to be planted, for the purpose of dividing the farms, and of protecting that of Brieich from the surface water of Brieichdyke, which stood upon a higher elevation. Whether, however, Mr Wilkie in so dividing the property intended that the hedge or the ditch, or a line drawn between the two, should form the boundary of each farm, is quite uncertain. Thereafter Mr Wilkie sold Brieich to the Rev. Thomas Kennedy, in whose hands it continued till purchased by Mr Strang in 1844. Brieichdyke he also shortly after sold to a Mr Smith, and Mr Steuart eventually acquired it in 1848. The title-deeds of the respective parties made no reference to the hedge or ditch, but simply describe the properties as bounded by each other—Brieich by Brieichdyke and Brieichdyke by Brieich. In this state of matters Mr Strang and Mr Steuart came to be at variance as to what constituted the march fence between their farms; the former contending that it consisted of both hedge and ditch, which were therefore common property; the latter, that it consisted of the hedge alone, and that he had an exclusive property in the ditch, which he might fill up or plough over at his pleasure. Prior to the statutes to be presently mentioned, it would appear that no obligation existed at common law to compel neighbouring heritors to concur in the erection or maintenance of march fences, and trespass was prevented simply by means of herding the cattle. There was, indeed, the brief of perambulation, by which the bounds of estates might be fixed at the sight of the judge ordinary of the locality in which the controverted marches lay, with the assistance of a jury; and there was also the action of molestation, competent when a heritor's possession was injuriously interfered with, which was also to be prosecuted before the judge ordinary of the bounds and an inquest. Neither of those proceedings, however, were similar in their nature to those authorised by the statutes in the seventeenth century, which introduced for the first time, with a view to the encouragement of closing and planting, those regulations and consequent obligations upon heritors which have been attended with so much benefit to the agricultural improvement of Scotland. The first of these statutes (1661, cap. 41) declares that all enclosed

lands shall be free from every manner of taxation for the space of nineteen years thereafter; that the heritor whose cattle shall do injury to the fences of a neighbouring heritor shall be liable to a penalty of £5; that terminous proprietors shall be at an equal expense in building and planting a dyke to divide their inheritance; and recommends all lords, sheriffs, and bailies of royalties, stewards of stewardies, justices of the peace, bailies of burghs, and other judges whatsoever, to see its enactments carried into force. The next Act (1669, cap. 17) enacts that whenever a person intends to enclose his lands by building a dyke or ditch upon the march between his neighbour's land and his own, it shall be lawful for him to require the next sheriffs, bailies of royalties, stewards of stewardies, justices of the peace, or other judges ordinary, to visit the marches, to straighten them if uneven, and declares that the dyke or ditch formed thereon should be in all time to come the common march between the properties. The Act of 1685, cap. 39, ratifies and renews the two previous Acts, and increases the penalty for injuring fences to the sum of £10. In February 1860, Mr Strang presented a petition to the Sheriff of Linlithgowshire, setting forth that the farm of Brieich was divided from that of Brieichdyke by a thorn hedge and ditch, running parallel with and close to the hedge, which hedge and ditch formed together, and had constituted from time immemorial, or at least for a period of seven years, the march fence between the two properties, and that for some time past the said hedge and ditch had been much neglected, and allowed to fall into great disrepair, through the refusal of the respondent to join with the petitioner in the repairing and cleansing thereof. He therefore prayed that Mr Steuart might be ordained to join with him in all such operations as might be necessary for putting the hedge and ditch into a proper, serviceable, and fencible condition and state of repair, fit for the purposes of a march fence. To this petition the respondent put in defences, and pleaded, *inter alia*, that the process was incompetent—(1) in the Sheriff Court; (2) in the form of a summary petition; (3) in respect of the statute 10 and 11 Vict., c. 113; (4) because it was not founded on the Act of 1669, c. 17; (5) in so far as respects the petitioner's alleged right and claim to the servitude of water gang; and (6) because the action is of a declaratory nature.

In July 1860 the Sheriff-Substitute pronounced an interlocutor sustaining the prayer of the petition, with an exception as to the servitude of water-gang, and decreeing for the operations and repairs prayed for at the mutual expense of the parties. Against this interlocutor appeals were presented by both parties to the Sheriff; but all further proceedings before him were suspended by the petitioner, on the 9th November 1860, raising an action of declarator in the Court of Session. The summons in the declarator concluded that it should be found and declared that a thorn hedge and ditch running close and parallel thereto, and in length co-extensive therewith, which divided the pursuer's land of Brieich from that of Brieichdyke, belonging to the defender, formed together the march fence between the properties, and was the common or mutual property of the pursuer and defender; that the pursuer and defender were bound to uphold and maintain the said hedge and ditch at their joint expense, and that the defender was not entitled to encroach upon or fill up the said ditch by his agricultural operations or otherwise. The pursuer averred that the march fence between his property and that of the defender had from time immemorial consisted of a thorn hedge and ditch running parallel with, close to, and co-extensive with, the hedge; that the hedge and ditch formed in their original construction parts of the same operation or work, the former having been planted and having grown upon the earth excavated in forming the latter. Without the ditch the hedge could not have grown up at first, thriven afterwards, nor continued to live now; that the

said march fence was the common or mutual property of the pursuer and defender, who were bound to uphold and maintain it at their joint expense; that the same had been in use to be maintained and upheld at the mutual expense of themselves and of their respective predecessors in the said lands; that the said hedge and ditch, though in a state of great disrepair, were capable of being thoroughly repaired, but that the defender, though requested to contribute thereto, had refused to do so; that the lands of Briechedyke were of higher elevation than those of Brieich, and the ditch, besides forming an integral part of the march fence, was of great value to the pursuer, inasmuch as it received the surface water rising on and descending from the lands of the defender and other adjacent lands; that the said ditch, for the purpose of effectually conveying the surface water, was connected at five several places with open drains or water-courses running through the pursuer's lands, by which the water was carried from the ditch, partly to a rivulet on the opposite side of the pursuer's property, and partly to a stream flowing eastward therefrom; that the said ditch had become choked up by certain ploughing and other operations of the defender and his tenants; that the defender a few years ago tile-drained his fields contiguous to the said march fence, but that such drains were quite incapable of carrying off his surface water, and those drains being on a higher level than the ditch, increased the flow of water into it, while the pursuer's drains being on a lower level than the ditch, caused the water which ought to have been carried off by the ditch to ooze through, and find its way into the pursuer's drains; that the said march fence had always, at proper seasons in every year, been made fencible for cattle, and was capable of repair at a very moderate expense. The defender, on the other hand, averred that the hedge and ditch were made simply for the purpose of separating the uncultivated lands from those which Mr Wilkie wished to render arable; the fence was allowed to continue, but no march fence was ever constituted either by legal authority or by agreement of the parties; moreover, in order to save litigation, he (the defender) had offered to admit that the thorn hedge formed the march fence between the properties, each possessing up to the roots of the hedge; that the ditch was wholly upon his property, and that neither the pursuer nor his predecessors had ever claimed or exercised any right either of property or servitude over it; that the pursuer's lands being of lower elevation than the defender's, naturally received the surface waters from the lands of the defender, but that the water, instead of being allowed to stagnate in an open ditch, was speedily conveyed away below ground in a main drain, and from thence into the pursuer's lands at the same points as before; that he claimed the right to plough up to the roots of the hedge; and that the thorn hedge was nearly extinct and could not be renovated without a large outlay and until many years had elapsed. In July 1861 the Lord Ordinary (Kinloch) allowed the parties a proof of their averments on record, and a very voluminous proof was accordingly taken. The commission for taking the proof having been reported, his Lordship pronounced an interlocutor on the 12th November 1862, finding that the hedge and ditch, and not the hedge merely, constituted the march fence between the properties of the pursuer and defender. Against this judgment the defender presented a reclaiming note to the Second Division, when their Lordships were pleased to supersede consideration of the reclaiming note, and to remit to the Lord Ordinary to dispose of the whole conclusions of the summons. Thereafter parties were further heard before the Lord Ordinary, who, by interlocutor of the 3d December 1863, found that the defender had not sufficiently established his right to have another description of fence substituted for the hedge and ditch

libelled, and found, declared, and decerned in terms of the conclusions of the summons, with expenses. The defender also reclaimed against this judgment, and at advising the Judges of the Second Division required the Sheriff Court process, which had not been conjoined with the declarator, to be laid before them, and it having been awakened, they, on the 31st March 1864, pronounced an interlocutor, which is not appealed from, remitting the process to the Sheriff, in order that the pursuer might proceed therein if so advised, and with instructions in that case to repel of new all the preliminary pleas stated to the competency of the jurisdiction of the Sheriff, and directing him to proceed to adjudicate upon the rights of the respective parties as accorded with law; saving and reserving all the defender's objections to the said application, so far as tending to establish or enforce a right of servitude in or over the ditch in question with reference to the water-gang. Their Lordships upon the same day also pronounced the interlocutor which is the subject of the present appeal, finding that the pursuer had failed to establish that the hedge and ditch libelled formed an existing march fence between the lands of the pursuer and defender, and were their common or mutual property, and therefore absolving the defender from the whole conclusions of the libel, reserving the right of the pursuer to proceed with his application to the Sheriff if he should be so advised, or to present such other application to the Sheriff as he might judge best.

Mr BOVILL, on the part of the appellant, after apologising for coming before their Lordships upon so small a matter—a course which the obstinacy of the respondent had left them no alternative but to adopt—proceeded to review the evidence of the different witnesses examined under the commission. The hedge and ditch had been formed together at one and the same time. They were intended by Wilkie to form the march fence between the properties, and had been so regarded from their formation by every person acquainted with the farms. At the proper season in every year, too, the hedge had been placed in a proper fencible condition by one or other of the parties; and it was further proved that when the repairs required were more extensive than usual both parties had contributed to that expense. This showed such an adoption of the boundary as was sufficient of itself to constitute it a march fence by agreement of the parties. Then, with regard to the conveyance under which the appellant claimed, it seemed to be assumed that while it transferred the land it did not transfer the fence which bounded it; there was no doubt whatever that such a deed conveyed the property in a mutual fence, as it would also the half of a highway had the properties been so divided (Lord *v.* The Commissioners of the City of Sydney, 12 Moore, P.C.C. 495).

Lord KINGSDOWN—But this fence was made while both properties were in the hands of one proprietor.

Mr BOVILL admitted that was so, but it was at the same time to be observed that they were in the hands of different occupiers.

Lord CHELMSFORD—There is a difference between a boundary fence and a march fence; now, as this fence was not originally a march fence, is there anything in the deed which makes it so?

Mr BOVILL said it was originally made as a march fence between different occupiers, and referred to *Berridge v. Ward* (10 C. B. N. S. 400), to show that a conveyance of land was held to include a strip of ground between it and the highway. He submitted that it was to be assumed that this was originally a march fence, the property in the half of which Mr Wilkie must be taken to have granted. If that were so, then, as was laid down in *Lockhart v. Sieveright* (*Morison's Dictionary*, p. 400), and in *Boyd's Judicial Proceedings*, the respondent, though no party to the formation of the fence, was liable to pay half the expense of keeping it in repair, since if he took the benefit of it, it thereby became common to both.

Lord CHELMSFORD—Lord Benholme, who is in your favour, says it was not common property.

Mr BOVILL said the appellant was nevertheless entitled to have a decree of declarator that it was a march fence. The learned counsel then commented on the pleas in law for the appellant (pursuer).

Lord CHELMSFORD—The pursuer puts his right to a decree entirely on the ground that the fence was common property, and not that it was a march fence. The interlocutor appealed against also proceeds upon that understanding; so that in order to obtain its reversal you must show that you were entitled to have the fence declared common property.

Mr BOVILL said all the Judges agreed that it was sufficient to show a common interest. He read and commented upon their opinions at some length, and concluded by submitting that the interlocutor of the Court below was wrong.

Mr COLERIDGE, Q.C., then followed on the same side, and proceeded to say that it was of the greatest importance to the appellant that this hedge and ditch should be declared to be a march fence, even leaving out of the calculation the heavy expenses which had been incurred in this litigation.

Lord CHELMSFORD—You want to show that it is not quite an insignificant matter?

Mr COLERIDGE thought he could do so.

Lord CHELMSFORD—A microscope might possibly have the effect of magnifying it.

Lord KINGSDOWN—We have been referred to cases in which a conveyance of land has been held to include half of the adjoining highway. Is there any case in which that rule has been applied to the half of a hedge or fence?

Mr COLERIDGE said there was not, and for this reason, that a man always made a hedge or fence upon his own ground.

Lord CHELMSFORD—Could the Sheriff have declared this to be a march fence on account of its having been the practice to repair it jointly?

Mr COLERIDGE said he could not.

Lord CHELMSFORD—I hope the Sheriff understands it better than I do.

Mr COLERIDGE proceeded to review the evidence from which he considered it quite clear that even if the hedge and ditch had not been originally constructed as a march fence, the parties had made it so by adoption. He referred to the cases of Lockhart v. Sievwright, of Dudgeon v. Howden (17 Faculty Coll. 458), Barclay's Digest (p. 755), and Hunter's Landlord and Tenant (vol. 2, p. 210), to show that by adopting it both parties became liable to keep it in repair. The doctrine of contribution known in English law ought also to apply, in explanation of which he referred to Fitzherbert and to Kent's Commentaries. The Lord Justice-Clerk, too, was wrong in saying that the Act of 1661 was the first upon the subject of march fences. There was the statute of 1457, in James the Second's reign, one also in the 6th of James the Fourth, one in 1503, and another in the 4th of James the Fifth. The learned counsel concluded by saying that this was a proper case for a declarator.

Lord CHELMSFORD—I never doubted that.

Mr COLERIDGE said he would not then enlarge upon it, but merely refer to Bell's Law Dictionary to show that the Sheriff could only deal with possessory actions.

Mr ROLT, Q.C., on the part of the respondent, said it was disgraceful that for a matter of little more value than ten pounds the appellant should so harass his neighbour and waste the time of the public and of their Lordships. Were there many people in Scotland like Mr Strang, every landowner would become involved in a litigation for the sake of a line without breadth. The rule of law applicable in this country, and he presumed also in Scotland, as to whom a hedge and ditch forming a boundary belonged, was that they were both the property of the person on whose land the hedge was planted. There was nothing in the law of Scotland constituting a common property in hedges. The Sheriff had

certainly jurisdiction to settle this dispute, and all the statutes referred to by Mr Coleridge to show that the Lord Justice-Clerk was wrong in saying that that of 1661 was the first, had not the slightest reference to *enclosing*, but only to *planting* the ground. It would be found that the only question the appellant was entitled to raise was that of common property. Even had the Sheriff exercised his authority or had the parties agreed to adopt the hedge and ditch as a march fence, that would never have constituted them common property. It was necessary to substantiate the conclusions of the summons, and these conclusions were all based upon the first, that the hedge and ditch were common property. Moreover, they had been made by one man for his own convenience, and had never been repaired by the parties to an extent to show that they adopted them as a march fence. There was therefore no common property in them, and no obligation mutually to repair. Then the Sheriff had ample jurisdiction, and the appellant had no right whatever to go to the Court of Session unless he could support his right to have a decree of declarator. Supposing there had been no proceedings before the Sheriff at all, and that the appellant had brought his declarator, there could be no doubt that he must have been defeated had he failed to prove common property.

LORD CHELMSFORD—The respondent in his answers to the appellant's condescendence admits that the hedge is a march fence.

Mr ROLT said only in the sense of a boundary fence, and proceeded to comment upon the judgment of Lord Cowan.

LORD CHELMSFORD—It is quite immaterial to this inquiry what the Sheriff would do.

Mr ROLT said entirely so, and concluded by submitting that as the appellant had utterly failed to support his conclusion of common property, which was essential to the relevancy and competency of a declaratory process, the interlocutor of the Court below ought to be affirmed and the appeal dismissed.

Mr BROWN followed Mr Rolt on behalf of the respondent, and contended that the pursuer's allegation of common property was essential to the competency of a declarator.

The LORD CHANCELLOR—He also alleges that the march fence consists both of hedge and ditch.

Mr BROWN said that the first—namely, common property—was a preliminary objection. The Judicature Act (6 Geo. IV, cap. 128) enacted that the pleas stated on the record should be held as the sole ground of defence in point of law, and to them also the arguments must be confined. He referred to "Darling's Forms of Process" (vol. i, p. 210), where it was said that previous to that Act summonses were often drawn in a very loose manner, their deficiencies supplied by the condescendence, and cases often decided upon grounds not included in the summons. Now, however, the practice was much more strict.

Lord CHELMSFORD—Each plea raises a separate issue.

Mr BROWN—said no doubt, but the defender's pleas would be irrelevant unless read as depending on the first, which alleged common property. He referred to "Bell's Principles" (sec. 1086) to show that common property differed from common interest.

The LORD CHANCELLOR—The language of the summons is that the hedge and ditch together form the march fence, which is common property. In his condescendence the pursuer also contends that they together form the march fence. The defender in answer says that to avoid litigation he is willing to admit that the hedge is the boundary. Now, what evidence is there as to the repair of the ditch?

Mr BROWN said there was none at all; but he would refer to the proof if their Lordships desired it.

LORD CHELMSFORD—You will refer us to the proof to show us that there is nothing to be found in it.

Mr BROWN said that as their Lordships seemed satisfied upon that point he would not occupy their time longer.

A MEMBER of the bar informed their Lordships

that both Mr Bovill and Mr Coleridge (who represent the appellant, and whose duty it was now to reply upon his behalf) were engaged before the Privy Council.

The LORD CHANCELLOR said this was the highest tribunal in the kingdom, and one or other of them ought to have been present. He immediately rose and moved the judgment of the House. He said—My Lords, with the interlocutor remitting the Sheriff Court process we have nothing to do. The only interlocutor appealed from is that pronounced in the action of declarator, whereby the appellant sought to have it found that a thorn hedge and ditch, which divide his lands from those of the respondent's, form together the march fence between the said lands, and is their common or mutual property. The question is, what is he bound to make out by the law of Scotland to support his allegation? The Sheriff has power to order counterminous proprietors, upon the petition of one of them, to erect a boundary between these lands, and to maintain that boundary at their mutual expense, when, as made under his authority, it is called a march fence. But by the law of Scotland, as it would be by that of every civilised country, if a person has divided his property into different fields by fences, and afterwards disposes of those fields to different persons, it is perfectly allowable for those parties to agree that the existing fences shall form march fences between their properties, and so take upon themselves the obligation of mutually keeping them in repair. Further, it may be that without express agreement a fence, by which adjoining properties are divided *de facto*, and which has from time immemorial been held recognised, and treated as if it had been originally erected under the statutes or under express agreement, may become a march fence, and then by implied contract the same obligations would attach. Now, both these farms were originally in the hands of one proprietor, who divided them by making a ditch, on the other side of which he threw up a mound, and planted thereon a thorn hedge. He afterwards, in 1802, sold the field nearest to the hedge to the appellant's author, and after retaining the other farm in his own hands for some time subsequent, he also sold it to the author of the respondent. This hedge and ditch have been allowed to remain ever since; but the evidence shows that the one has been for a very long time in a state of decay, and that the other has now become choked up, and also that the cattle of one proprietor, if not of both, have been in the habit of breaking through the hedge and trespassing upon the adjoining lands. It is, at all events, certain that the cattle both of the appellant and respondent have been in the habit of eating up to the roots of the hedge, and that the ditch has been altogether disregarded. Now, it was essential to the appellant's case that he should establish that this hedge and ditch, which had been erected neither under the sanction of the Sheriff nor by express agreement of the parties, had been converted into a march fence by the parties having recognised and treated it as such. Now, upon that point there is a total absence of evidence, whereas conclusive evidence would have been necessary to establish it. It is essential in any view of the case that the appellant should have substantiated that conclusion of the summons—namely, that both hedge and ditch, and not the hedge only, constituted the march fence between his property and that of the respondent. He has entirely failed to do so, and without troubling your Lordships further, I beg to move that the interlocutor of the Court below be affirmed, and the appeal dismissed.

LORD CHELMSFORD—I quite agree with my noble and learned friend that this interlocutor must be affirmed. When the facts are all understood there is no difficulty. The question is, whether the boundary fence which is the subject of this unhappy litigation was constituted originally, or at any other time what is called a march fence. In the conveyance, of Briechn to the appellant's author, the boundary is thus described—bounded "partly by a road

leading through the lands of Briechn, and partly by the lands of Auchernard and Wester Briechnyke farm, presently possessed by Henry Potts, upon the south." Nothing can be founded on this of the slightest advantage to the appellant; no right of property was given to the appellant's author to the north of the hedge, and the ditch consequently remained Mr Wilkie's own property. No usage has been shown which would justify any other interpretation being placed upon the language of the deed. The lands of Briechnyke were sold by Mr Wilkie's *mortis causa* trustees in 1824 to a Mr Smith, and were eventually acquired by Mr Steuart in 1848, and it is evident that whatever rights Mr Wilkie retained in 1802, Mr Steuart acquired in 1848. It is not disputed that the parties might have agreed that the hedge and ditch should form the march fence between their properties, and there is no doubt that such an agreement might have been inferred had the parties been in the habit of keeping them mutually in repair. Not one witness, however, speaks to the ditch ever having been repaired, and the evidence upon the subject of the hedge is most meagre, and would also have been quite insufficient, had it not been for the admission by the respondent in his fourth statement of fact. The appellant to make good his claim to both hedge and ditch presented a petition to the Sheriff, setting forth that the march fence between his property and that of the respondent consisted of a thorn hedge and ditch, and the respondent, in his answer, stated that the said march fence consisted of a thorn hedge, which is the admission to which I have just referred. According to my understanding of the Act of 1661, the Sheriff has no power to declare what is the march fence between two properties, but only to order the repair of the admitted march fence, and there, therefore, seemed no other course open to the appellant than to institute an action of declarator. The summons concludes that it should be found and declared that a thorn hedge and ditch formed together the march fence, and is the common or mutual property of the pursuer and defender. In the fifth article of his condescendence the pursuer makes a statement to the same effect. I should have thought it was meant that the obligation to maintain arose in consequence of the hedge and ditch being common property, but this is denied; and it is said that the obligation to repair on account of its being common property and of its being a march fence are quite independent of each other. By the Judicature Act 6 Geo. IV., cap. 120, sec. 11, it is enacted that the pleas stated on the record shall be held as the sole ground of defence in point of law, and each plea raises a separate issue. The fourth plea for the pursuer simply asserts that the defender is jointly to uphold and maintain the said hedge and ditch at their mutual expense; from which it would appear that the obligation to repair was asserted to arise from the hedge and ditch being common property; but even if it were to stand alone it would not do. I agree with all the Judges of the Second Division that the pursuer has failed in proving his allegation of common property, and I see no difference between common property and common interest. If this hedge and ditch was not a march fence originally, or became so by adoption, I cannot see how they could become common property, or common interest, with an obligation to repair. If adoption could be established, it would no doubt be sufficient; but the pursuer has not adduced a single witness to testify as to the ditch having been repaired. I therefore agree that this interlocutor must be affirmed. The process that was advocated *ob contingentiam* having been remitted back to the Sheriff, he will see as to what repairs should be executed upon the hedge.

LORD KINGSDOWN—I agree with my noble and learned friends. I am of opinion (1) That the hedge and ditch are not common property; and (2) That the march fence does not consist both of hedge and ditch. Whatever else there may be in dispute, it is

admitted that the hedge forms the boundary between the two properties; and that being so, the Sheriff will say whether it shall be repaired, or a new fence erected, or what else shall be done.

Interlocutor affirmed and appeal dismissed, with costs.

COURT OF SESSION.

Thursday, Feb. 15.

SECOND DIVISION.

DUKE OF BUCCLEUCH AND OTHERS *v.* COWAN AND OTHERS (*ante*, p. 141).

Nuisance—Pollution of Water—Issues. Form of issues in an action of nuisance caused by the pollution of water.

The following issues have been adjusted to try this case:—

- "1. Whether between 1st January 1835 and 1st October 1853, the defenders, the first-mentioned firm of Alexander Cowan & Sons, did, by discharging refuse or impure matter at or near their mills of Bank Mill, Valleyfield Mill, and Low Mill, or any of them, pollute the water of the stream or river called the North Esk, to the nuisance of the pursuers or their authors as proprietors of their respective lands aforesaid, or of one or more of them?"
- "2. Whether, between 1st October 1853 and 20th May 1864, the defenders, Alexander Cowan & Sons, the present occupants of said mills, did, by discharging refuse or impure matter at or near their said mills, or any of them, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors as proprietors of their respective lands aforesaid, or of one or more of them?"
- "3. Whether, between 1st January 1835 and 15th May 1856, the defenders, the first-mentioned firm of William Somerville & Son, did, by discharging refuse or impure matter at or near their mill called Dalmore Mill, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors as proprietors of their respective lands aforesaid, or of one or more of them?"
- "4. Whether, between 15th May 1856 and 20th May 1864, the defenders William Somerville & Son, the present occupants of said Dalmore Mill, did, by discharging refuse or impure matter at or near their said mill, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors as proprietors of their respective lands aforesaid, or of one or more of them."
- "5. Whether, between 1st January 1835 and 1st July 1856, the defenders, the first-mentioned firm of Alexander Annandale & Son, did, by discharging refuse or impure matter at or near their mills called Polton Papermills, pollute the water of the said stream or river, to the nuisance of the pursuers, the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them?"
- "6. Whether, between 1st July 1856 and 20th May 1864, the defenders, Alexander Annandale & Son, the present occupants of said Polton Papermills, did, by discharging refuse or impure matter at or near the said mills, pollute the water of the said stream or river, to the nuisance of the pursuers, the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them?"
- "7. Whether, between 15th May 1856 and 20th May 1864, the defenders, James Brown & Company, did, by discharging refuse or impure matter at

or near their mill, called Esk Mill, pollute the water of the said stream or river, to the nuisance of the pursuers, or their authors, as proprietors of their respective lands aforesaid, or of one or more of them?"

- "8. Whether, between 1st May 1848 and 20th May 1864, the defender, Archibald Fullerton Somerville, did, by discharging refuse or impure matter at or near his mill, called Kevock Mill, pollute the water of the said stream or river, to the nuisance of the pursuers, the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them?"
- "9. Whether, between 1st January 1843 and 20th May 1864, the defenders, William Tod & Son, did, by discharging refuse or impure matter at or near their mill, called St Leonard's Mill, pollute the water of the said stream or river, to the nuisance of the pursuers, the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid or of either of them?"

The Court repelled the plea of acquiescence stated for the defenders, and held that there were no counter issues required.

MURPHY *v.* M'KEAND.

Process—Sheriff Court Act—Leading of Proof—Appeal to Sheriff. (1) A pursuer of an action having been allowed a proof, the diet of which was twice adjourned, and having failed to attend the adjourned diet, held that, under section 10 of the Sheriff Court Act, his action fell to be dismissed; and (2) a Sheriff-Substitute having fixed a new diet of proof after the original diet had fallen, held that this was an allowance of proof and that the interlocutor might be appealed to the Sheriff under section 19 of the Sheriff Court Act.

Counsel for the Advocator—Mr Mair. Agent—Mr W. Officer, S.S.C.

Counsel for the Respondent—Mr Patison. Agent—Mr W. S. Stuart, S.S.C.

This is an advocacy from the Sheriff Court of Galloway. The advocator had presented in that Court a petition against the respondent and another, in which he applied for interdict of an intended sale of some bark under a poiding. He alleged that the poiding had been carried out unwarrantably, because the bark was not the property of the poider's debtor, but his. Interim interdict was granted, and a minute of defence was lodged to the effect (1) that the petition was vague and indefinite, and (2) that the bark was not the property of the petitioner. A variety of procedure occurred thereafter in the process, which is detailed in the annexed opinion of the Lord Justice-Clerk. The question before the Court arose out of a renewal of a diet of proof which the Sheriff-Substitute granted to the petitioner after a first diet had fallen. This interlocutor of the Sheriff-Substitute was appealed to the Sheriff (Hector), who recalled it. He also dismissed the petition, and found the petitioner liable in expenses. To-day the Court adhered to the judgment of the Sheriff.

The LORD JUSTICE-CLERK said—This is a small case, but it belongs to a class of cases of great importance, because there is no way in which more mischief can be done than by applications for interdict, and especially for interim interdict. The petitioner's application was presented on the 24th of January, interim interdict was granted of that date, and all I will say upon that point is that if the application had been made to me I would have refused it. The defender appeared, and stated his defence to be an objection to the vagueness of the petition, and a denial that the bark in question was the property of the petitioner. Upon that the Sheriff-Substitute allowed the petitioner a proof of his averments. I shall not say whether the proof ought to have been