the Sheriff-Principal is the only decision of the dispute, and it is final. As regards the larger question, whether a judgment on the merits by the Substitute would have been appealable to the Principal, I reserve my opinion.

LORD NEAVES was of the same opinion as Lord Benholme, and reserved his opinion on the question whether a judgment on the merits by the Substitute was reviewable by the Principal.

The LORD JUSTICE-CLERK was of opinion that it was the judgment of the Court, and not of the particular Judge, which was declared final. No limitation seemed to be put upon the ordinary procedure of the Sheriff-court. He was doubtful whether it was safe to say that finality was attached only to decisions on the merits. There was an exclusion of every court but the Sheriff-court, and if they held that decisions on procedure were appealable, it might be possible that they would be appealed here. This he thought was not competent, and he therefore concurred in the view of Lords Neaves and Benholme.

Appeal dismissed.

Agents for Pursuers—Campbell & Smith, S.S.C.
Agents for Defender—Neilson & Cowan, W.S.

Friday, October 21.

BARCLAY *v.* SCOBIE AND MACKENZIE.

Agreement — Accession — Guarantee—Personal Bar. A having become bankrupt, his trustees sold to B the goodwill and stock in trade of his business. A however continued to carry on the business for behoof of B, as B alleged. Thereafter A entered into an arrangement with C for the purpose of acquiring C's business in another town. This agreement was revised by B and approved of by him. He further granted a letter to C, in which he promised, in the event of the business being sold to A, that "no sums I draw from said business (his own) shall interfere with the payments made towards your bills, until said bills for the purchase of the business be paid in full." A having proceeded to remove the stock from B's premises to those of C, B brought two actions, one of suspension and interdict, and the other a declarator of property in the stock. *Held*, after a proof, that although he was proprietor of the stock, he was barred by his accession to the agreement, and the letter above quoted, from interdicting the removal of the goods.

These were conjoined actions of suspension and interdict and declarator, the pursuer in both being George Barclay, warehouseman, Edinburgh. The following were the leading circumstances out of which the cases arose. The defender Robert Scobie, who was at one time a draper in Airdrie, executed in January 1868 a trust-deed in favour of a trustee for behoof of his creditors, of whom the pursuer was one. The trustee thereupon sold the stock in trade, book debts, and furniture of the defender Scobie, and these were purchased by the pursuer in name of William Wilson, one of his travellers. Barclay paid the price to the trustee, but for the amount he drew four bills on Robert Scobie & Co., which were accepted by Robert Scobie. On this being done, the business was carried on in Airdrie, under the firm of Robert Scobie & Co. The business was at first managed by Wilson, who made a written bargain with Scobie, by which the latter was to receive 30s. per week as his servant. On 18th March 1868 Scobie was sequestrated, and in the state of his assets no right was asserted by him or his trustee to the property of the goods in question. He alleged, however, that the stock, &c., was really purchased by Barclay for his behoof, under an arrangement whereby Barclay, in respect of his making the advance, was to receive payment of his debt in full; and he also alleged that the agreement of service was never acted on, and was a mere device to defeat any claim by the trustee in the sequestration. In May 1868 the business was removed from Airdrie to Renfrew, where it was carried on, on the same footing, by Wilson and the defender Scobie, until Wilson left in January 1869. Another arrangement was then entered into as to the business. Wilson made a written agreement with Barclay giving up all right which he had, and Barclay, on the same day, gave Scobie the following letter:—"With reference to the business of R. Scobie & Co., conducted by Mr William Wilson under that designation in Renfrew, it is understood that on Mr Wilson signing the minute of agreement executed of same date with this letter, you shall continue in full possession and management of the business, under my superintendence, until you get your discharge, and that on your obtaining your discharge, and on the debt ranked by me in your sequestration being paid in full, the business shall be handed over to you, you relieving me of all the liabilities of the firm. So long as the business proves itself to be prosperous I bind myself (until your discharge is obtained) not to do diligence against the firm."

In August 1869 Scobie entered into negociations with the view of acquiring by purchase the stock-in-trade of John Mackenzie, a draper in Alloa, and he ultimately executed an agreement with him to this effect. The pursuer was consulted by Scobie and Mackenzie about the agreement, and saw it, and made some alterations on it, but he was not otherwise a party to it. After providing for the taking over of the business and other things, the agreement between Scobie and Mackenzie contained, *inter alia*, a clause in the following terms:—"The stock in Renfrew belonging to the said Robert Scobie to be transferred to Alloa, and an inventory of the same taken and submitted to the said John Mackenzie; and that George Barclay, warehouseman, Edinburgh, give to the said John Mackenzie a written guarantee that he will not enforce his claim against the said Robert Scobie until he has satisfied the said John Mackenzie in full, or until the said Robert Scobie has fulfilled his part of the agreement." The agreement was signed on the 24th August 1869, and of the same date the pursuer wrote and delivered a letter to Mackenzie in the following terms:—"Sir,—In the event of R. Scobie purchasing from you your business in Alloa, I agree that no sums I draw from said business shall interfere with the payments made towards your bills until said bills for the purchase of the business be paid in full." Scobie after this agreement proceeded to remove effects from the shop in Renfrew to that in Alloa.

The pursuer and suspender alleged:—"Had the arrangement been carried out for the transfer of Mackenzie's business to Scobie, it was intended that the stock-in-trade of Robert Scobie & Co. at Renfrew should be removed to Alloa, on terms being arranged with the complainer for its pur-

chase; but when he and Scobie met to arrange terms they failed to do so, and this the complainer immediately, by letter, intimated to the other respondent, and withdrew from the transaction."

The goods, however, having been removed, Barclay brought the present actions, the one an action of suspension and interdict, the other a declarator that the goods belonged to him; and claiming damages for their wrongeous removal.

These actions were conjoined; and, after various procedure, the Lord Ordinary pronounced this interlocutor:—

"13*th April* 1870.—The Lord Ordinary having heard parties' procurators, and considered the closed record in the conjoined actions, proof adduced, and whole process, Finds, *first*, that in January 1868 the defender Robert Scobie, who then carried on business as a draper in Airdrie, executed a trust-deed for behoof of his creditors, of whom the pursuer was one, in favour of Mr. Barr, an accountant in Glasgow; and that on the 25th of February 1868 the stock-in-trade, book debts, and household furniture of the said defender were sold by public roup by Mr Barr, as trustee: Finds, *second*, that the said stock-in-trade, book debts, and household furniture were purchased at the said roup, on behalf of the pursuer, by William Wilson, then a traveller in his employment, and that the price thereof was paid by the pursuer to the trustee: Finds, *third*, that upon this being done the pursuer proceeded to carry on business as a draper in Airdrie, under the name of Robert Scobie & Company, of which firm he was the sole partner: Finds, *fourth*, that the business was so carried on under the superintendence and management of the said William Wilson, who, on the 2d of March 1868, engaged the defender to act as salesman and collector in the business, at a salary of 30s. per week, and a free furnished house; and that the defender entered upon, and continued in, the employment of the said William Wilson, as manager of the said firm, from that date till January 1869: Finds, *fifth*, that about the 18th of March 1868 the estates of the said defender were sequestrated, when Mr. Barr was appointed trustee on the sequestrated estate, and that the defender is still undischarged: Finds, *sixth*, that in the state of affairs given up by the defender under his sequestration no mention is made among his assets of the stock-in-trade or business of the firm of Robert Scobie & Company, and that no claim was ever asserted on the part of the trustee, or of the creditors, to any portion of the goods or stock-in-trade of the said firm, or of the furniture in question, as belonging to the defender: Finds, *seventh*, that in the beginning of May 1868 the said business was removed from Airdrie to Renfrew, where it was carried on by the said William Wilson and the defender on the same footing as it had been carried on by them in Airdrie, until the month of January 1869, when the said William Wilson ceased to have any further charge of the business: Finds, *eighth*, that upon that taking place, the pursuer intimated to the defender that he was to carry on the business under the superintendence of the pursuer until the defender obtained his discharge, and that upon the discharge being obtained, and the debts due to the pursuer being paid, the business would be handed over to the defender, on his undertaking to relieve the pursuer of all the liabilities of the firm: Finds, *ninth*, that under this arrangement the business was continued to be carried on at Renfrew until the month of August 1869, when the present dispute arose between the parties: Finds, *tenth*, that during that time no transference was ever made by the pursuer to the defender of the said business, or of any share thereof; and that on the 30th of August 1869 the goods, stock-in-trade, household furniture, and other effects of the firm belonged to the pursuer, and were removed from Renfrew to Alloa without his knowledge or authority: Therefore repels the first, second, and sixth pleas in law for the defenders in the declarator, and decerns and declares in terms of the first declaratory conclusions of the summons: Appoints the case to be put to the roll, in order that parties may be heard upon what further order should be pronounced, with a view to the restoration of the said goods and furniture, and reserves all questions of expenses.

"*Note.*—The perusal of the documentary evidence in this case, in connection with that adduced before the Lord Ordinary, has tended to confirm him in the impression which he was led to entertain at the close of the debate, to the effect that the pursuer had succeeded in showing that, at the date of the defender's insolvency in 1868, he had purchased the whole stock-in-trade, book debts, and furniture which had belonged to the defender; that the defender's connection with the business afterwards carried on under the name of R. Scobie & Company was not that of a partner, and that no direct interest in that business, and no share of the goods, stock-in-trade, and furniture of the firm, had ever been acquired by the defender.

"There are, no doubt, passages in the correspondence, and isolated transactions relative to the business, which, taken by themselves, may tend to the inference that the defender had a more direct interest in the business, more particularly after the witness Wilson ceased to have the management of it, than is admitted by the pursuer. But when those passages and transactions are viewed in connection with the rest of the evidence, they do not, it is thought, warrant any such inference; and after repeated consideration of the whole evidence adduced, the Lord Ordinary has come to the conclusion that it is sufficient to establish the pursuer's claim.

"The Lord Ordinary had at first some difficulty in dealing with the case with reference to the arrangements entered into in August 1869 for the acquisition of the business carried on by the defender Mackenzie in Alloa, and the transference of the business of Scobie & Company to Alloa from Renfrew. For it appears to have been contemplated as part of that arrangement, of which the pursuer was at all events generally cognisant, that, subject to certain conditions, the stock-in-trade at Renfrew was to be removed to Alloa. But, on the other hand, no time was fixed for that being done, and no intimation appears ever to have been made to the pursuer that the defenders intended immediately to remove it. Its actual removal, therefore, was a proceeding taken without the knowledge of the pursuer, and after receipt of the letter of the 30th of August 1869, which was addressed to the defender at Renfrew, and must in the ordinary course of post have reached him before the stock was sent off. The Lord Ordinary has, therefore, come to the conclusion that in these circumstances the defender was not justified in proceeding with the removal without obtaining the express consent of the pursuer.

"There is one other portion of the evidence to

which the Lord Ordinary deems it necessary to advert in detail, viz., that relative to the granting of the promissory-notes which were delivered by the defender Scobie to the pursuer as a collateral security for his intromissions with the business of the firm of Robert Scobie & Company, and which, although it has no very direct bearing upon the merits of the present case, has, in the opinion of the Lord Ordinary, a material bearing upon the relative credibility of the parties. Both those notes are proved to be forgeries in so far as regards the signature of 'John Pollock,' who was an uncle of the defender; and it was admitted by the defender that he had directed that name to be added to the note of 20th February 1868 without his uncle's authority.

"The defender, however, said that this was done on the written request of the pursuer. But of this strange story there is no written confirmation, and no corroborative oral evidence which can, in the opinion of the Lord Ordinary, be relied on. The defender is, therefore, in the unfortunate position not only of having got his uncle's name adhibited to that note without authority, but also of having handed over to the pursuer the promissory-note of the 5th of May 1868, which is also a forgery, and which the Lord Ordinary is constrained to hold upon the evidence was, if not forged by the defender, at all events not known by him to bear the genuine signature of Mr Pollock when it was delivered to the pursuer. The circumstances under which that note was obtained are explained in the evidence of the witness Wilson, whose credibility the Lord Ordinary saw no reason to doubt; and as the account he gave of the way in which that note was got, and afterwards altered, and the date confirmed while in the defender's hands, is borne out by several of the letters written by him to the pursuer at the time. The defender's account of the matter is one which, in the opinion of the Lord Ordinary, cannot be believed.

"The Lord Ordinary has not made any order in the meantime relative to the restoration of the goods, because, having regard to the terms of the Inner House Interlocutor of the 30th of October 1869, there may be some difficulty as to the way in which that should be done; and he has therefore appointed the case to be enrolled with a view to the disposal of that matter."

The defender reclaimed.

MILLAR, Q.C., and BURNET, for the defender Scobie, and SHAND and ASHER for Mackenzie, argued (1) that the question as to the property in the goods might stand in somewhat of an anomalous position, but at any rate that the pursuer's right was by no means so clear as to entitle him to prevail in the declaratory conclusions of this action; (2) that at any rate, under the agreement to which he had acceded by his letters of guarantee, the pursuer was barred from taking the interdict which he had done.

The LORD ADVOCATE and HALL for Barclay.

The Court recalled the Lord Ordinary's interlocutor, and dismissed both actions. The action of suspension and interdict because the pursuer was barred from bringing such an action in consequence of his accession to the deed of agreement, and the action of declarator because it was unnecessary. They further held that the property of the goods was in the pursuer and as they had been sold by order of the Court, the price was ordained to be paid to him. With regard to expenses, they found the pursuer liable in the expenses, subject to modification.

LORD COWAN—The interlocutor under review has been pronounced in conjoined actions of suspension and interdict and of declarator. Separate records were framed in these actions, and the conjunction of them took place only prior to the interlocutor allowing proof to both parties of their respective averments. The leading questions upon which parties were at issue, and to which their averments and proof respectively had regard, were, in the *first* place, whether the property of the stock in trade and household furniture, referred to in the pleadings and proof, belonged to the pursuer of the declarator and complainer in the suspension and interdict as he maintained: and in the *second* place, whether the interdict at his instance was rightly applied for, to prevent the removal of the articles from Renfrew to Alloa, or whether he was not debarred from insisting in the proceedings which he had adopted with that view, in respect that he had acceded to the agreement, under which the removal took place.

The interlocutor of the Lord Ordinary sets forth various facts, bearing mainly on the first of those questions, viz., the question of property; and on consideration of the proof and the argument, I do not see any ground on which these findings, so far in any substantial respect, are open to objection. I concur in thinking that the property must be held to have belonged to the suspender and pursuer, and that the first plea in law pleaded for the respondents in the suspension, and for them as defenders in the declarator, is not well founded.

The leading process, however, was the suspension and interdict; and, assuming that the second plea maintained for the respondent in that record was well founded, the application for interdict at the instance of the complainer was not justifiable, even holding that the right of property had been established to be in him. On this part of the case no special finding is contained in the interlocutor of the Lord Ordinary, but in his note he takes notice of the matter; and states that he had at first some difficulty in dealing with that part of the case, which I do not think surprising his Lordship had. In my view it is the leading matter to be inquired into towards the right disposal of the litigation. For if the complainer was substantially a party to the agreement between Scobie and Mackenzie, and if he was not entitled to recal his accession to that agreement, these legal proceedings ought never to have been commenced. And without going over the details of this part of the case, to which your Lordship has already referred, or commenting upon the documentary evidence, I have formed a clear opinion that the application for interdict was not justifiable in the circumstances.

The agreement between Mackenzie and Scobie was concluded on the 24th of August 1869. It was entered into in the full knowledge and with the concurrence of the complainer for his interest in the goods and effects proposed to be transferred from Renfrew to Alloa. The letter from him, of the same date with the agreement, taken along with the parole evidence, is, to my mind, conclusive as to this point. This being so, it appears to me that although no time was fixed for the removal of the stock by its express words, the agreement was one which, from its nature and object, the parties were entitled to act upon without any delay; and I cannot hold that there was any necessity for intima-

tion to the complainer antecedent to the removal of the stock. The agreement embodies no condition to that effect, nor does it bear to be conditional upon Scobie obtaining his discharge, or in any other respect. Mackenzie may be held to have known that Scobie stood in the position of an undischarged bankrupt,—a fact which the complainer well knew also, for he was Scobie's principal creditor. It was, in truth, specifically arranged between the whole three parties, when the terms of the agreement and the relative letter were adjusted, that the contract between them was not to be conditional on Scobie obtaining his discharge. The condition originally inserted in the draft to that effect was struck out by the complainer himself. In this state of matters, I cannot hold with the Lord Ordinary that any intimation to the complainer was requisite to entitle the parties instantly to act on the agreement; nor can I hold that there is to be imported into it that very condition which was *ex propositu* struck out of it. Hence there appears to me no ground for holding that, when Scobie and Mackenzie proceeded to act as they did between the 24th and 30th August, they acted in any way contrary to their legal right and power, and that, consequently, the complainer's letter of 30th August 1869 could not affect the legality of the removal of the Renfrew stock to Alloa in terms of the agreement.

Such is the short view which I take of this case. No just ground exists for the interdict asked for by the complainer, with which these proceedings commenced; and although, from intervening circumstances, the agreement may not be now capable of being carried through—Mackenzie having become bankrupt and his trustee having sold the Alloa stock,—our interlocutor must be so framed as to give effect to the second plea of the respondents, that the application for interdict was unjustifiable. It will be for the complainer to vindicate his property in the Renfrew stock of goods and furniture, and to have them restored to him either by some order to be pronounced in this action, or otherwise as he may be advised.

Agents for Pursuer—G. & H. Cairns, W.S.

Agents for Defenders—Lindsay & Paterson, W.S.

Saturday, October 22.

FIRST DIVISION.

RITCHIE *v.* RITCHIE.

Process—Sheriff-court—Appeal for Jury Trial under 6 *Geo. IV. c.* 120, § 40—*A. S.* 10*th July* 1839, § 126, 137—*A. S.* 11*th July* 1828, § 5. In a summary petition, in which the value of the claim was not apparent on the face of the proceedings, the Sheriff-Substitute allowed a proof within less than fifteen free days, and refused a petition under A. S. 1828, § 5, craving leave to appeal for jury trial, on the ground that the proof had already proceeded. *Held* that the Sheriff's procedure was quite correct, that § 126 of A. S. 1839 does not apply to cases in which the value is not *ex facie* of the proceedings above £40, and that in such cases the party is bound to present his petition, under A. S. 1828, § 5, immediately upon the Sheriff's interlocutor allowing a proof, or otherwise the proof may competently go on at the time fixed by the Sheriff.

This was an appeal from the Sheriff-court of Banff against the interlocutors of the Sheriff, pronounced in a petition brought by Mrs. Ritchie, against her husband, for the purpose of recovering her antenuptial contract of marriage, in order to have it recorded. The appeal was against the final interlocutor in the case, but the grounds of appeal were mainly alleged departures from the proper course of procedure in the inferior court.

It appeared that the petition was presented upon the 12th July 1870, and upon the 20th of that month the Sheriff-Substitute allowed a proof before answer; the proof to proceed upon the 29th of July. Against the interlocutor allowing a proof the defender appealed to the Sheriff, and the appeal was disposed of upon the 26th, the Sheriff adhering to his Substitute's interlocutor. On the 30th July the Sheriff-Substitute of new appointed the proof to proceed upon August the 4th, or the fifteenth day after the date of the first interlocutor allowing a proof. Upon the 4th August neither the defender nor his procurator appeared at the proof. The petitioner's proof was led, and circumduction of the proof went out. On the 6th August a debate upon the proof was ordered, and no appearance being made for the defender, the petitioner's procurator was heard, and the Sheriff-Substitute pronounced an interlocutor upon the merits, and granted the prayer of the petition. Against this interlocutor the defender appealed to the Court of Session.

In the meantime, upon the 2nd August, the defender Mr Ritchie presented a petition to the Sheriff in terms of A. S. 11th July 1828, § 5, craving the Sheriff's leave to appeal to the Court of Session for the purpose of having the original case tried by jury, on the ground that, though the claim in the said action was not simply pecuniary, so that it did not appear from the conclusions that it was above £40 in value, still that such was the case. When this petition came before him, on the 8th August, the Sheriff pronounced the following interlocutor:—"Having considered the petition, and also the process ordained to be produced by the last interlocutor (*i.e.*, the process in the original action), finds that in said process a proof has been taken,; therefore dismisses the petition," &c. Against this interlocutor Mr Ritchie also appealed to the First Division of the Court of Session.

The two cases were argued together.

KEIR, for the appellant, contended that the Sheriffs' interlocutors allowing and circumducing the proof were incompetent and ought to be recalled, and that his interlocutor in the incidental petition, refusing leave to appeal for jury trial, was necessarily erroneous also, as following upon an incompetent course of procedure in the original case. The Act 6 Geo. IV. c. 120, § 40, enacts, "that in all cases originating in the inferior courts, in which the claim is in amount above forty pounds, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior courts, it shall be competent to either of the parties, who may conceive that the case ought to be tried by jury, to remove the process into the Court of Session by bill of advocation," &c. (or now by note of appeal). The 126th section of the A. S. 10th July 1839, regulating the forms of procedure in the Sheriff-court, lays down that "in all causes originating in the Sheriff-court, in which the claim is in amount above £40, when an interlocutor is pronounced allowing a proof it shall not be competent to either of the parties to take any proof, except