the operative part of the magistrates' order dismissing the petition, and it will then be for the magistrates to proceed on the footing that the right is a right of common interest, and they will still have to determine whether the proposed operations are injurious to the respondents' interests. To ascertain that there must be an investigation, which must be made by the magistrates, and as there is no averment of injury to the respondents' property nor plea to that effect, in order to lead to investigation the record must be opened up and some such averment and plea introduced. That may be done either in this Court or it may be remitted to the magistrates to do so.

Lord Deas concurred, observing that the question of injury to the respondents, who had a common interest, was the only question in the case.

Lords Mure and Shand concurred, remarking that the difficulty of the case was occasioned by the peculiar terms used in the titles, which seemed at first sight to convey more than a common interest which belongs by common law to proprietors in such a position as the petitioner and respondents here.

The respondents amended the record by adding an averment to the effect that the proposed alterations would injure their property, and pleading that, all parties having a common interest in the area, the petitioner should not be permitted to execute them.

Thereafter the following interlocutor was pronounced:—

"Recal the interlocutor of the Magistrates of 25th August 1876: Find that the area in question is not the common property of the petitioners and the respondents, but that it is the property of the petitioners, subject to a right of common interest in the respondents: Allow the respondents to add to the record the averment and plea-in-law now proposed; and the same having been made at the bar, hold the same as part of the record, and remit to the Magistrates to proceed farther in the matter of the petition as shall be just and consistent with the above finding: Find the appellants entitled to the expenses incurred by them in this Court, allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Petitioner—Asher—J. P. B. Robertson. Agents—Keegan & Welsh, S.S.C.

Counsel for Respondents—Moncrieff. Agent—James W. Moncreiff, W.S.

Friday, May 18.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

ROBB *v.* EGLIN.

Process—Sheriff—Decree by Default—Reponing—Sheriff Court Act 1876, *secs.* 20 *and* 33.

It is competent to appeal to the Court of Session for the purpose of being reponed against a decree by default pronounced by the Sheriff-Substitute, even before the expiry of the period within which it is competent to appeal to the Sheriff-Depute.

This was an appeal from the Sheriff Court of Lanarkshire in an action by James Robb, residing in Glasgow, against William Eglin, boot and shoe factor there, to recover the sum of £250 alleged to be due by the defender to the pursuer. The case was ordered to the Debate Roll in the Sheriff-Court of 27th February 1877, and when the case was called on that day no appearance was made for either party, and the Sheriff-Substitute, as directed by section 20 of the Sheriff Court Act of 1876, dismissed the action, finding no expenses due to either party.

The pursuer did not appeal to the Sheriff, but on the 10th March, while an appeal to the Sheriff was still competent under sec. 33 of the above Act, he appealed to the Court of Session.

It was stated in the Single Bills that at the time that the debate should have taken place in the Sheriff Court the process had been borrowed up to be transmitted to Edinburgh and produced in a Court of Session action pending between the same parties, which was set down for trial on the 8th of March.

The pursuer argued that the appeal was competent, and cited *Morrison* v. *Walker*, June 24, 1871, 9 Macph. 902.

The Court, in respect of the authority above cited, held that the appeal was competent, and reponed the appellant on payment of £3, 3s. of expenses to the respondent. They further remitted the cause back to the Sheriff-Substitute to be proceeded with.

Counsel for Appellant—Wallace. Agents—J. & A. Hastie, S.S.C.

Counsel for Respondent—Rhind. Agent—R. P. Stevenson, S.S.C.

Saturday, May 19.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

NIBLOE *v.* VICKERS AND MANDATORY.

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

An action of accounting was brought in the Sheriff Court in 1875, and after protracted delays on both sides the defender in 1877 failed under certification to attend adjourned diets for examination of havers. The Sheriff

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 intromissions 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 repone the defender on payment of all expenses subsequent to 20th January 1876, when the delay on his part first began.

Lord Ormidale—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 repone 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 Kirkcudbright, on Wednesday 7th February* 1877. . . .—Compeared 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