to be adhered to." The reclaiming-note was refused accordingly. That interlocutor describes the advocation as incompetent, proceeding on the decision of the First Division in the case of *M'Farlane or Graham* v. *Montrose*, and it was thus settled by a judgment of the whole Court that fifteen days from the time when an interlocutor allowing a proof had been pronounced was the time within which advocation was competent under the Act of Sederunt following the Judicature Act.

Advocation having been abolished by the Court of Session Act of 1868, I may refer to a case which occurred after the passing of that Act—*Ritchie* v. *Ritchie*, Oct. 22, 1870, 9 Macph. 43—which affords a direct authority to the effect that the appeal cannot bring up the interlocutor of 2d September.

Therefore the appellant must fall back on the interlocutor of 15th December 1880; and the ground on which he maintains that he is entitled to bring it under review is that it is a new allowance of proof. Now we must observe precisely what the procedure has been. After the original allowance of proof two other diets were successively fixed by the Sheriff-Substitute, and he thereafter pronounced this interlocutor—[*reads interlocutor of 23d October as above*]. In a note he says that he allowed the adjournment with some difficulty. The appellant appealed to the Sheriff, who did not pronounce an interlocutor till 30th November, when he dismissed the appeal. When the case came again before the Sheriff-Substitute on 15th December he assigned a new diet of proof. This was merely a matter of course; it was the right of the pursuer to have a proof. The defender had caused the delay. Mr Rhind referred to one case in support of his contention that this interlocutor of 15th December was a renewal of an order for proof. That was the case of *Murphy* v. *M'Keand*, 15th Feb. 1865, 4 Macph. 444. The question in that case was the competency of an appeal, not to this Court, but from the Sheriff-Substitute to the Sheriff. The case was sought to be made an authority in the present case on the ground that the words of the Act there in question were identical with those of the 40th section of the Judicature Act. I am willing to assume that they are the same; but what was the nature of the case of *Murphy?* It was a case in which the petitioner sought to have an interdict which would have the effect of stopping a diligence. The petitioner had been allowed great indulgence, and had done nothing, and when the Sheriff-Substitute pronounced the interlocutor appealed against the petitioner had lost his right to lead a proof. The interlocutor was a renewal of the proof previously granted, and that allowance was absolutely necessary. In my opinion I am reported to have used this expression—'I have no doubt that an interlocutor reviving allowance of proof is the same as one allowing a proof;" to that expression I adhere. It is just because this interlocutor is not an allowance of proof or a renewal of an allowance of proof that I think the appeal is incompetent.

Lords Mure and Shand concurred.

Lord Deas was absent.

The Court refused the appeal.

Counsel for Appellant (Defender)—Rhind. Agent—Robert Menzies, S.S.C.

Saturday, January 15.

FIRST DIVISION.

[Dean of Guild, Greenock.

CRAWFURD *v.* MILLER.

Process—Appeal—Competency—Leave to Appeal—Dean of Guild—Act 50 *Geo. III. cap.* 112, *sec.* 36—*Act of Sederunt* 12*th November* 1825, *cap.* 18, *sec.* 2.

Held that the Act of Sederunt 12th November 1825, cap. 18, sec. 2, was merely regulative of the mode in which leave to appeal was to be obtained in the cases specified in Act 50 Geo. III. cap 112, sec. 36, and did not make it necessary to obtain leave in any other cases than those set forth in the Act.

This was an appeal from the Dean of Guild of the burgh of Greenock. The defender objected to the jurisdiction of the Dean of Guild, on the ground that the question was one relating to a matter of heritable right, which could properly be settled only by a declarator in the Court of Session. The Dean of Guild sustained his own jurisdiction and allowed a proof. Against this interlocutor the defender appealed. The respondent objected to the competency of the appeal, on the ground that the Dean of Guild had not granted leave to appeal, which the respondent contended was essential under the 2d section of the 18th chapter of the Act of Sederunt 12th November 1825, which provided as follows:—"The liberty of advocating interlocutory sentences to the Court of Session, in the cases allowed by the Act 50 Geo. III. cap. 112, sec. 36, must be obtained upon an application by petition to the Court, which must not contain any argument, but shall merely narrate the interlocutors to be advocated."

The provision of the Act 50 Geo. III. cap. 112, sec. 36, above referred to was as follows:—"And be it enacted, That bills of advocation from the Sheriffs and other inferior Judges against interlocutory judgments shall be allowed only upon the following grounds—First, of incompetency, including defect of jurisdiction, personal objection to the judge, and privilege of party; Secondly, of contingency; Thirdly, of legal objection with respect to the mode of proof, or with respect to some change of possession, or to an interim decree for partial payment, provided that in the cases specified under this third head leave is given by the inferior Judge."

The respondent contended that the effect of the Act of Sederunt was to make it necessary to obtain leave from the inferior Judge, not merely in the cases specified under the third head of the Act of Parliament, but in all cases. The appellant argued that this was not the true construction, and that if it was the Act of Sederunt was *ultra vires.*

At advising—

Lord President—On the question of the competency of this appeal I confess that I do not entertain any doubt. It is an appeal from a

judgment of the Dean of Guild of the burgh of Greenock, and is brought under the 36th section of the Judicature Act (50 Geo. III. cap. 112) on the ground of defect of jurisdiction. The appellant says that the Dean of Guild cannot competently decide the questions raised in the record. Now, the 36th section of the Act provides that there may be advocation on any of the following grounds—[*reads section as above*]. This appeal is not one of the cases specified under the third head, and therefore under the Act of Parliament the appellant required no leave from the inferior Judge to come here. But it is said that the Act of Sederunt of 12th Nov. 1825, passed under the authority of a totally different Act of Parliament—that of 6 Geo. IV. cap. 120—makes it necessary to obtain leave from the inferior Judge before presenting an appeal in any of the cases specified in the 36th section of the Act of Geo. III. The provision of the Act of Sederunt is in these terms—[*reads as above*].

Now, if the effect of this provision is to take away the absolute right of appeal conferred by the 26th section of the Act of Geo. III. in regard to appeals on the ground of want of jurisdiction, it would certainly be a very serious interference with the right conferred by that statute. A judge who exceeds his jurisdiction is just the man to refuse to grant leave to appeal. An objection to the jurisdiction of the judge is just the right of all others which is most sacred. Therefore it would be very peculiar if the effect of the Act of Sederunt were to take away this right. Accordingly, I do not think that that is its meaning at all. I think the phrase "liberty of advocation," though not a very happy one, is just equivalent to the "leave" spoken of in the 36th section of the Act of Parliament. If that is the true construction, then what the Act of Sederunt does is to prescribe the form in which leave is to be obtained in those cases in which it is required; and the Act of Sederunt would read—"leave to advocate must be obtained upon an application by petition to the Court, which must not contain any argument, but shall merely relate the interlocutors to be advocated." That is the prescribed form in which leave is to be obtained. I am quite satisfied that the Act of Sederunt was not intended to go any further.

LORD MURE and LORD SHAND concurred.

LORD DEAS was absent.

The Court recalled the objection to the competency of the appeal.

Counsel for Appellant — Kinnear — Asher. Agents—T. & R. B. Ranken, W.S.

Counsel for Respondent — Robertson — M'Kechnie. Agent—W. B. Glen, S.S.C.

Wednesday, January 19.

SECOND DIVISION.

[Lord Adam, Ordinary.

GRAHAME *v.* SWAN AND OTHERS (MAGISTRATES OF KIRKCALDY).

(Sequel to case reported *supra*, vol. xvi. p. 676, and 6 R. 1066.)

Burgh—Common Good of Burgh—Encroachment by Magistrates on Burgh Property — Equitable Jurisdiction of Court where restitutio in integrum *not reasonably possible.*

The magistrates of a burgh having begun to erect municipal stables on a piece of ground which was vested in them for the common use and enjoyment of the inhabitants of the burgh, a member of the community obtained interdict against that or any other encroachment on the ground in question. Pending the proceedings for interdict the magistrates had completed the stables at a cost of £2000. The complainer thereafter raised an action concluding to have the stables removed. In defence the magistrates offered another piece of open ground, larger and more convenient for public uses. *Held* (1) that in the circumstances of the case *restitutio in integrum* was not reasonably possible, and should not be granted; (2) that the offer made by the magistrates was reasonable and sufficient, and the action therefore *dismissed.*

This was an action at the instance of James Grahame, dyer, Kirkcaldy, against Patrick Don Swan and others, the magistrates of that burgh, for declarator (1) that a portion, particularly described in the summons, of the South Links or South Commonty of Kirkcaldy was vested in the Provost, Magistrates, and Council of Kirkcaldy "on condition that the same should be kept in perpetuity for the use and enjoyment of the inhabitants of Kirkcaldy, for the purpose of bleaching clothes, recreation, and other similar purposes;" "(2) that from time immemorial, or at all events for forty years, the said portion of the said South Links or South Commonty has always been open and patent to the whole of the said burgh of Kirkcaldy, and that the said inhabitants have, for the said period, used, possessed, and enjoyed the same without hindrance, prohibition, or interruption, for drying and bleaching clothes, recreation, and other similar purposes; (3) that the defenders have no right or title to dig foundations in, or in any way to trench or cut up for building purposes, the said lands, nor to erect stables or any other buildings or erections of any kind thereon, or on any part thereof; and (4) that the erection by the defenders of stables or any other buildings or erection upon the said portion of the said South Links or South Commonty, or any part thereof, was and is illegal, unauthorised, unwarranted, and was and is to the prejudice of the rights and interests of the pursuer and other inhabitants of the burgh of Kirkcaldy in so far as regards his and their rights of bleaching, drying clothes, and other rights competent to them in, upon, or over the said lands." Further, the pursuer concluded for declarator