SUMMER SESSION, 1885.

COURT OF SESSION.

Tuesday, May 12, 1885.

FIRST DIVISION.

[Sheriff of Lanarkshire.

STEPHENSON *v.* HUTCHESON & ANDERSON.

Process—Appeal—Sheriff—Sheriff Court Act 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 20—*Decree by Default—Reponing.*

In an appeal from the Sheriff-Substitute to the Sheriff the appellants' (defenders) agent failed to attend the diet of debate, and the Sheriff, in respect of section 20 of the Sheriff Court Act 1876, gave decree by default. The defenders appealed. The Court, in respect no sufficient reason had been shown for the failure to attend the debate, *refused* the appeal.

M'Gibbon v. *Thomson*, July 14, 1877, 4 R. 1085, followed.

This was an action raised in the Sheriff Court of Lanarkshire at Glasgow by Henry Stephenson, stockbroker, Liverpool, to recover from Hutcheson & Anderson, stockbrokers, Glasgow, the sum of £923, 15s. 5d., as the balance of transactions done for them by pursuer. The defenders admitted the employment, but denied indebtedness, and pleaded that the action was incompetent as stated. On the 26th February 1885 the Sheriff-Substitute closed the record, and allowed a proof. The defenders appealed to the Sheriff, who upon 11th March appointed the parties to debate on the appeal upon the 16th of the same month. On the 16th March the Sheriff pronounced the following interlocutor, which was signed on the 20th March:—"Having heard the agent for the pursuer, no appearance having been made for the appellants when the case was called on the Appeal Roll, applies the 20th section of the Sheriff Court Act 1876: Recals the interlocutor appealed against, and decerns as libelled."

The defenders appealed to the Court of Session. When the case appeared in the Single Bills the respondents objected to its being sent to the roll.

It was stated at the bar for the appellants that the absence of their agent in the Inferior Court was unavoidable, as he was engaged in a Small-Debt proof when the case was called by the Sheriff-Principal; that he attended on the Sheriff later on the same day (16th March), and asked to be heard, but the Sheriff refused on the ground that the pursuer's agent had left the Court; that the pursuer's agent refused to return to the Court on the ground that he was entitled to take decree by default; that on the 20th the Sheriff signed the interlocutor. It would be harsh to deprive defenders of their right to be heard on their defences because of the fault of their agent. The Court ought to grant a remedy by reponing the defenders on payment of the expenses incurred. The respondents relied upon sections 19 and 20 of Sheriff Court Act 1876, and the following authorities:—*Vickers* v. *Nibloe*, May 19, 1877, 4 R. 729; *M'Gibbon* v. *Thomson*, July 14, 1877, 4 R. 1085.

The Sheriff Court Act 1876 provides by section 19 that "it shall not be competent of consent of parties to prorogate the time for complying with any statutory enactment or order of the Sheriff, whether with reference to the making up and closing of the record, appointing a diet of proof, diet of debate, or otherwise;" and by section 20, "Where in any defended action one of the parties fails to appear by himself or his agent at a diet of proof, diet of debate, or other diet in the cause, it shall be in the power of the Sheriff to proceed in his absence, and, unless a sufficient reason appear to the contrary, he shall, whether a motion to that effect is made or not, pronounce decree as libelled, or of absolvitor (as the case may require), with expenses." . . . .

LORD PRESIDENT—This 20th section of the Sheriff Court Act of 1876 is one of a series of provisions which were intended by the Legislature to prevent delay in Sheriff Court procedure. One of the most important of these provisions is that contained in section 19, which is a statutory prohibition of all prorogations, and

section 20 naturally follows it up. In the present case I cannot help thinking that the appellants have hardly appreciated the importance of this 20th section, for it provides that when one of the parties in a defended action fails to appear personally or by his agent at any of the diets in the cause, if no satisfactory reason is assigned therefor, then the Sheriff "shall" pronounce decree as libelled, or of absolvitor. Now, looking to the objects of the statute, and to the language of these two sections, we came to the conclusion in the case of *M'Gibbon* v. *Thomson* that it would require very strong reasons indeed to induce us to make any exception to the rules thus laid down. Have the appellants in the present case, then, made out any such exceptional case as would warrant us in interfering with what has been done by the Sheriff? I do not think that they have. The excuses which they offered to the Sheriff, and which are now repeated, are not such as can be listened to for a moment, for in that case the provisions of section 20 would be most easily evaded. I think, therefore, that the present appeal falls to be refused.

Lord Mure—I am of the same opinion. There can be no doubt that one of the objects of the Sheriff Court Act was to facilitate procedure in the Inferior Court, and especially to prevent delay. In the present case four days elapsed between the date of the decision of the case and the signing of the interlocutor, and there can be no doubt that if parties had gone to the Sheriff during that interval and offered a reasonable excuse for non-attendance on the date appointed for the debate, the Sheriff would have heard them, and thereafter dealt with the case. Nothing of this kind appears to have been done, and the interlocutor now sought to be appealed against was signed upon the 20th March, or four days after it was pronounced. In these circumstances I agree with your Lordship in thinking that this appeal ought to be refused.

Lord Shand—I am entirely of the same opinion. The case of *M'Gibbon* decided that where a party failed by himself or his agent to attend any of the diets in the cause, and decree passed against him, he would not be reponed as a matter of course, but would require to show special circumstances to induce the Court to grant him that indulgence.

Now, I think in the present case that the appellants have entirely failed to show any such exceptional circumstances to account for their agent's absence as would warrant the Court in acceding to their request to be reponed.

It has been pointed out that the interlocutor was not signed for three or four days after the case was decided, and I must assume that during that time the Sheriff had carefully considered the subject, and that he had good reasons for refusing to repone the appellant. Looking to the facts of the case as disclosed on record, I cannot help thinking that the defence was stated for the object of obtaining delay. Indeed, I do not see how any procurator could have stated any argument in favour of the plea that this action was incompetent as stated. In these circumstances I do not think that this is a case in which the indulgence craved should be granted.

Lord Adam—I concur in the opinion expressed by your Lordship.

The Court refused the appeal.

Counsel for Appellants—Salvesen. Agent—T. M'Naught, S.S.C.

Counsel for Respondent—Dickson. Agents—Graham, Johnston, & Fleming, W.S.

Thursday, May 14.

FIRST DIVISION.

SPECIAL CASE—MACFARLANE AND OTHERS AND LAINGS.

Succession—Legacy—Revocation.

A testatrix directed her trustee to invest a sum of £200 for behoof of her brother, and to pay out the same to him in monthly proportions so long as the money lasted. In the event of the brother predeceasing, she directed the trustee to divide the sum so destined equally among his children. The brother predeceased. By a codicil dated subsequent to his death she "cancelled and annulled" the legacy to her brother, without mentioning his children, and by a second codicil, undated, left them each £20, —*held* (*dub* Lord President) that the first codicil cancelled the interest both of the testatrix's brother and also of his children in the legacy of £200, and that the second codicil was a provision in substitution.

The deceased Mrs Sophia Laing or Thom, widow of the late William Thom, bookseller at Keith, died upon 26th August 1883. She left a trust-disposition and settlement of date 8th July 1873, by which she conveyed to Andrew Brander, farmer, near Elgin, her whole estates for the purposes mentioned in the deed. By the fourth purpose of the deed she directed her trustee "to invest in whatever way or manner he may think proper the sum of £200 for behoof of my brother James Laing . . . and out of this sum so invested to pay to him the sum of £3 per month, commencing the first monthly payment at the expiration of one month after my death and so long as the foresaid sum so invested shall last." After providing for this fund being purely alimentary, she directed her trustee "to divide whatever balance is over of the sum so invested equally among the children of the said James Laing, and in the event of the said James Laing predeceasing me, I direct and appoint my said trustee, instead of investing the said £200, to divide the same equally among the children of the said James Laing and their heirs and successors." The last purpose of the trust was that the trustee should after the other purposes were fulfilled convey the residue to the minister or kirk-session of the U. P. Church at Keith in trust for a charitable purpose.

James Laing did predecease the testatrix, dying on 21st May 1875. In October 1879 the testatrix executed the following codicil:—"I hereby cancel and annul the legacy bequeathed to the within designed James Laing, now deceased, but in all other respects hereby