Tuesday, October 25.

FIRST DIVISION.

[Sheriff of Banff.

STEUART *v.* DUFF.

*Process—Appeal—Competency—*6 *Geo. IV. c.* 120—*Judicature Act, sec.* 40—*A.S.* 11*th July* 1828, *sec.* 5.

Under the 40th section of the Judicature Act appeals for jury trial must be taken within fifteen days from the date of the interlocutor allowing proof; and this provision applies even in cases where it is necessary before taking an appeal to present an application to the Sheriff under the 5th section of the A.S. 11th July 1828, in respect the value of the cause does not appear on the face of the record.

In an action raised in the Sheriff Court of Banffshire by Major Lachlan Duff Gordon Duff of Drummuir against Andrew Steuart, Esq. of Auchlunkart, to have the defender ordained to forthwith concur with and join the pursuer in clearing out a certain ditch and march drain, the Sheriff-Substitute (SCOTT MONCRIEFF) on 22d January 1881 allowed the defender a proof of certain averments and to the pursuer a conjunct probation. The pursuer appealed, and the Sheriff (BELL), after ordering a reclaiming petition and answers, adhered, by interlocutor dated 9th and promulgated 18th April.

Thereafter, on 3d May, the defender lodged a petition in terms of section 5 of the A.S. 11th July 1828, in respect the value of the cause was not disclosed on record, and the Sheriff-Substitute having on the same day ordered intimation, on 9th May ordained the defender to make his declaration as to the value of the cause. That deposition was lodged on 10th May. No further proceedings occurred until 6th July 1881, when the Sheriff-Substitute pronounced an interlocutor granting leave to the petitioner (defender) to remove the action in question to the Court of Session. In the note which he appended he said— . . . "I have delayed giving judgment in this case for some time because I understood that parties were about to refer the whole matter in dispute to arbitration. It is deeply to be regretted that this has not been done, and that such a case is to be prolonged in any Court. It appears to me to be one quite unsuited for trial by jury, but I do not think that the statute gives me power to refuse the petition on that ground."

On 19th July the defender appealed to the Court of Session.

The Act of Sederunt of 11th July 1828 provides (section 5)—"Whereas it is enacted by section 40th" (of the Judicature Act) "that in all cases originating in the Inferior Courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof shall be pronounced (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers) it shall be competent to advocate such cause to the Court of Session—it is enacted and declared that if in such causes the claim shall not be simply pecuniary, so that it cannot appear on the face of the bill that it is above £40 in amount, the party intending to advocate shall previously apply by petition to the Judge in the Inferior Court for leave to that effect, which application shall be intimated to the opposite party or his agent, and the petitioner shall be bound, if required by the Judge, to give his solemn declaration that the claim is of the true value of £40 and upwards; and on such petition being presented, and on such declaration, if required, being made to the satisfaction of the Judge, leave shall be granted to advocate, and the Clerk of the Inferior Court shall certify the same; and it is further enacted and declared that if, in either class of causes, neither party, within fifteen days in the ordinary case, and in causes before the Courts of Orkney and Shetland within thirty days after the date of such interlocutor allowing a proof, shall intimate in the Inferior Court the passing of a bill of advocation, such proof may immediately thereafter effectually proceed in the inferior Court, unless reasonable evidence shall be produced to the inferior Judge that a bill of advocation has been presented, or the Judge be satisfied that effectual measures have been taken for presenting it, in which case the inferior Judge shall prorogate the time for taking the proof for a reasonable time, not less than seven days after that fixed for the diet of proof in the ordinary case, and not less than twenty days in cases from Orkney and Shetland, and if, within these periods respectively, no intimation shall be made of any such bill of advocation, the proof shall then proceed; and the bill, if such have been presented, together with the passing thereof, shall be held to fall as if such bill had never been presented."

On the case appearing in Single Bills counsel for the respondent moved the Court to dismiss the appeal as being incompetent in point of time, more than fifteen days having elapsed between 18th April, the latest date at which the allowance of proof could be held to have been made, and 19th July, when the defender's appeal to the Court of Session was taken.

Replied for the appellant—The defender's petition to the Sheriff on 3d May was within fifteen days from the allowance of proof on 18th April. That petition, and what followed on it, constituted "effectual measures" for the presentation of an appeal. In any case, the delay which occurred was through no fault of the defender.

Authorities—*Falconer* v. *Sheills & Co.*, July 10, 1827, 5 S. 919; *Ritchie* v. *Ritchie*, Oct. 22, 1870, 9 Macph. 43; *Rain* v. *Gibb*, May 19, 1877, 4 R. 732; *Fleming* v. *Kinnes*, Jan. 15, 1881, 18 Scot. Law Rep. 245.

At advising—

LORD PRESIDENT—An objection has been taken to the competency of this appeal, to the effect that being an appeal under the 40th section of the Judicature Act it comes too late. That question depends on the construction which is to be put upon the 5th section of the Act of Sederunt of 1828. The interlocutor allowing proof was pronounced by the Sheriff-Substitute on 22d January 1881. It was appealed to the Sheriff, and the Sheriff's interlocutor, adhering

to his Substitute's judgment, was not pronounced till 9th April, and was not promulgated, as it is called, till the 18th of April. That, therefore, must be held to be the date of the interlocutor allowing proof—it is the footing most favourable to the appellant, but it is also the substantially just one. Now, no appeal was taken until the 19th of July. But by the Act of Sederunt it is indispensable that a bill of advocation (which was the old form of procedure) should be intimated in the Inferior Court within fifteen days of the interlocutor allowing proof. The explanation is here made that the value of the cause does not appear on the face of the record, and it was therefore necessary to present a special appeal to the Sheriff, and the deliverance of the Sheriff on that application was not pronounced till 6th July. Whatever was the cause of delay, I think it is impossible to sustain this appeal in face of the terms of the Act of Sederunt, especially in the view of previous decisions on the subject. We have the case of *Falconer* v. *Sheills & Co.* (July 10, 1827, 5 S. 910), and the very recent case of *Fleming* v. *Kinnes* (Jan. 15, 1881, 18 Scot. Law Rep. 245), which occurred in this Division of the Court during last session. I think it was obviously contemplated that the whole proceedings necessary to enable a party to appeal, if the value of the cause does not appear on the face of the record, must be gone through within fifteen days from the date of the interlocutor allowing proof, otherwise it is imperative on the Sheriff to proceed with the proof so ordered. I think it is impossible to sustain this appeal. This is not really a section excluding review, in the proper sense of the words; I should be unwilling so to construe the Act of Sederunt. I think there is a privilege given by section 40 of the Judicature Act to a pursuer to have his case tried by a jury instead of in the ordinary way, but he must comply with all the conditions imposed upon his privilege, or else submit to go to proof.

Lord Deas—If I had been disposing of this objection by myself I should have been inclined to say that as the presumption is always in favour of the jurisdiction of this Court, the Act of Sederunt is not so clear in the direction indicated by your Lordship as to exclude the competency of this appeal. But at the same time, as your Lordship has pronounced an opposite opinion, I am not prepared to dissent.

Lord Mure concurred with the Lord President.

Lord Shand—There can be no doubt that if the value appear on the face of the record an appeal against an allowance of proof must be taken within fifteen days, and if these delays elapse first it is incompetent to appeal. But the appellant's argument would involve this, that where the value does not so appear, delays of an indefinite kind might occur, and yet there might remain a power to appeal as to procedure. I do not so read the Act of Sederunt. As I read it, if a party wishes to appeal against an interlocutor allowing proof, he must, whether the value of the cause appears *ex facie* of the record or not, appeal within fifteen days from the date of such allowance. The Act provides a summary mode of ascertaining the value of the cause where it does not appear, and all that is necessary may be readily done within fifteen days. I have no hesitation in concurring in the view that the appeal is incompetent.

The Lords dismissed the appeal as incompetent.

Counsel for Appellant — R. V. Campbell. Agents—Maitland & Lyon, W.S.
Counsel for Respondent—Trayner. Agent—Alexander Morison, S.S.C.

Tuesday, October 25.

SECOND DIVISION.

[Lord Fraser, Ordinary.

FERRIER *v.* SCHOOL BOARD OF NEW MONKLAND.

(Before the Lord Justice-Clerk, Lords Young and Adam.)

Poor—Assessment—8 and 9 Vict. cap. 83, sec. 33 (Poor Law Amendment Act 1845)—35 and 36 Vict. cap. 62, sec. 69 (Education Act 1872.)

Held that parochial boards are entitled, under the Poor Law Amendment Act of 1845, to impose an assessment to meet the provisions of the Education Act of 1872 as to the elementary education of children whose parents are unable from poverty to pay fees therefor.

By the Poor Law Amendment Act of 1845 (8 and 9 Vict. cap. 83), sec. 33, it is enacted—"That it shall be lawful for the parochial board of any parish or combination assembled at such meeting, or at any adjournment thereof, or for the parochial board of any parish or combination, at any meeting of such board called for that purpose, and of which due notice shall have been given by letter, advertisement, or otherwise, to all the persons entitled to attend, to resolve that the funds requisite for the relief of the poor persons entitled to relief from the parish or combination, including the expenses connected with the management and administration thereof, shall be raised by assessment, and if the majority of such meeting shall resolve that the funds shall be raised by assessment, such resolution shall be final, and shall be forthwith reported to the Board of Supervision, and it shall not be lawful to alter or depart from such resolution without the consent and authority of the Board of Supervision previously had and obtained." Sections 34 and 35 of the said Act set forth the modes in which the said assessment may be made.

By the 69th section of the Education (Scotland) Act 1872 it is provided that "It shall be the duty of every parent to provide elementary education in reading, writing, and arithmetic for his children between five and thirteen years of age, and if unable from poverty to pay therefor, to apply to the parochial board of the parish or burgh in which he resides, and it shall be the duty of the said board to pay out of the poor fund the ordinary and reasonable fees for the elementary education of every such child, or such