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

ratify and confirm the foregoing settlement." She also executed a second codicil, which was written immediately below the other, but was undated, in the following terms:—"I hereby bequeath to Georgina, Christina, and Sophia Laing, my late brother's daughters, the sum of twenty pounds, free of legacy-duty."

Questions arose whether the legacy of £200 provided by the clauses above referred to in the deed of settlement was cancelled by the first codicil to the extent of excluding the surviving children of James Laing from participating therein or in any part thereof. The present Special Case was accordingly presented by the Rev. William Hunter Macfarlane, minister of the United Presbyterian Church in Keith, and his session, as parties of the first part, and Sophia Laing and Georgina Laing, the only surviving children of James Laing, as parties of the second part.

The following questions were submitted for the opinion and decision of the Court:—"(1) Does said codicil cancel said legacy of £200 sterling, to the effect of excluding the said Sophia Laing and Georgina Laing, being the only surviving children of the said James Laing, therefrom? (2) In the event of the first question being answered in the negative, are the said Georgina Laing and Sophia Laing entitled to the legacy of £200 sterling between them, and also to the legacies of £20 sterling each?"

Argued for the first parties.—The first codicil "cancelled and annulled" the legacy of £200, while the second codicil was intended to give them each £20 in substitution thereof.

Argued for the second parties.—The words of cancellation, while they destroyed James Laing's interest in the £200, left that of his children intact, and they were entitled to take under both codicils, *Scott* v. *Sceals*, July 20, 1865, 3 Macph. 1130.

At advising—

Lord Mure—This is a short case, but the point raised is one not by any means free from difficulty. I think that the codicil dated October 1879, and written in the testatrix's own handwriting, is substantially a recall of the fourth purpose of the deed of settlement. By it the testatrix directed that a sum of £200 should be invested so that a payment of £3 per month might be made from it to her brother so long as the money lasted, and after directing that this provision is to be alimentary the deed provides as follows—"I direct my said 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." Now, James Laing died in May 1875, and in October 1879 the testatrix makes a codicil in her own handwriting in these terms—"I hereby cancel and annul the legacy to the within designed James Laing, now deceased, but in all other respects hereby ratify and confirm the foregoing settlement." By this codicil she clearly uses words cancelling the legacy she had bequeathed to James Laing, but it is only this legacy constituted by the fourth purpose of the trust-deed that she proposes to destroy, for she says that in other respects she ratifies and confirms her settlement.

But then at the same time she executes the second codicil, which, in the absence of anything to indicate otherwise, must be presumed to be of the same date as the first, and by it she bequeaths to Georgina, Christina, and Sophia Laing, her late brother's daughters, the sum of £20 free of legacy-duty. Now, I cannot view this second codicil in any other light than as a substitution for the first, and what I think the testatrix intended to do was to substitute the provisions in it for those which she had previously made. I think, therefore, that the first question falls to be answered in the affirmative.

Lord Shand—I am of the same opinion. Under the trust-deed the only interest which these children could have taken in the event of their father surviving the testatrix was the reversion of anything that might be left of the legacy. If he had lived a year after the testator, that legacy would have been reduced by £36, and the children would have got the rest of it divided among them. On the other hand, if he predeceased, the trustee was directed not to invest the £200, but to divide it equally among them. The brother predeceased the testatrix, and accordingly if she had still desired that the £200 should be divided among his children she had only to allow the trust-deed to take effect, for under it shehad made full provision to that effect, but I think that she considered that on account of the death of her brother she ought to cancel that part of her trust-deed which related to him. That being so I can only read the words "I hereby cancel" as cancelling the only legacy which was at that time in existence, viz., the legacy of £200 in favour of James Laing's children. Then the second codicil clearly comes in I think as a substitution for it, and by it a legacy of £20 is left to these children free of legacy-duty. The whole question is one of intention, but I think we may fairly interpret this trust-deed and codicil in the way in which I have suggested. As to the case of *Scott* to which we were referred, I do not think it has any bearing on the question.

Lord Adam—The fourth purpose of this trust-deed deals with a sum of £200 which the truster desired to be invested and paid out to her brother so long as it lasted, in certain monthly proportions, in the event of his surviving her, but if he predeceased, then it was to be divided equally among his children. From this it appears that the truster at the time when she executed her trust-deed had in view the contingency of James Laing, her brother, predeceasing her.

Then we come to the first codicil. If that be read strictly as applying to James Laing it has no meaning at all. I think that the testatrix although she wrote it herself must have known that she did not require to cancel the legacy in favour of her brother—he being dead—but that she used these words to cancel the bequest in favour of his children, and she thereafter proceeds to make a separate provision by the second codicil.

I therefore agree with Lord Mure in thinking that the first question ought to be answered in the affirmative.

Lord President—I have some difficulty in concurring with your Lordships as to the manner

in which these questions ought to be answered. It does not appear to me that there are sufficient words of revocation to destroy the legacy of £200 in favour of the children of James Laing.

The words of cancellation are—"I hereby cancel and annul the legacy bequeathed to the within designed James Laing." Now, it would have been very easy to have added the words "and his children," or "cancel the legacy of £200," if it had been the testatrix's intention to cancel the legacy in favour of her brother's children. According to their strict meaning the only interest destroyed by these words of cancellation is that of James Laing. If James Laing survived he was by the terms of the trust-deed to have an allowance of £3 per month as long as the £200 set aside for him lasted. This was a distinct legacy in favour of James Laing, and if he lived two or three years his allowance would eat up the whole sum set aside for him. But the other event contemplated by the truster was that James Laing might predecease. In the one event the truster makes one set of arrangements, and in the other another. If he survives the testatrix the money is to be given to him in certain proportions while it lasts; if he predeceases her it is to be divided among his children.

Now, what this codicil says is that it "cancels and annuls the legacy bequeathed to James Laing." That I think clearly takes out all James Laing's interest in this bequest of £200, but I cannot see that these words affect the interest of his children. I cannot find any expression to show that the testatrix intended that the £200 which was to be given to the children in one event was not to be given to them. In that view it is only almost an unnecessary codicil. It is said by your Lordships that James Laing being dead it is a very unnecessary codicil if it only cancels his interest in the legacy, and does not recal it altogether, but I have seen in my experience that old ladies very often make unnecessary codicils. I could forgive them for that if they did not make them unintelligible, with the result as in the present case of dividing the Bench as to their true meaning.

The Court answered the first question in the affirmative, and found it unnecessary to answer the second.

Counsel for the First Parties—J. A. Reid. Agents—Philip, Laing, & Trail, S.S.C.

Counsel for the Second Parties — Craigie. Agent—A. M. Broun, W.S.

Thursday, May 14.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

TRAILL *v.* COGHILL.

Arbiter — Oversman — Award Fixing Damage "Sustained and to be Sustained"—Ultra fines compromissi.

A landlord and his agricultural tenant entered into a submission to determine whether the landlord had failed to fulfil certain obligations incumbent on him under the lease, and if so to fix what damage, if any, had been sustained by the tenant in consequence of such failure, and from time to time during the currency of the lease, or after the expiry thereof, to fix the damage that might thereafter be sustained by the tenant. The award, *inter alia*, found the landlord liable to the tenant in payment of certain annual sums payable from the date of entry, and continuing during the currency of the lease, "in respect of loss and damage sustained and to be sustained" by him in consequence of the landlord's failure to fulfil certain obligations under the lease. *Held* that the award, so far as finding the landlord liable for damage to be sustained in future years, was *ultra fines compromissi*, and fell to be reduced.

By lease dated in 1878, Thomas Traill, of Holland, in the county of Orkney, let to David Coghill from Martinmas of that year the contiguous farms of New Holland and Stratheast at a rent of £300 for the first seven years, and £350 for the remaining twelve. The farms were let with the privilege to the tenant of cutting peats for the use of himself and his servants and cottars, such cutting to be done in a specified manner, and for a certain payment to the landlord for the privilege, but reserving any servitude of peat cutting then enjoyed by any neighbouring proprietors or tenants free of charge. It was also provided by the lease that the tenant should be bound "to inform the proprietor against all trespassers so far as known to him, and to give all assistance in his power to enable the proprietor to prosecute trespassers, the proprietor being bound so far as in his power to prevent all illegal trespassing upon the said farms and lands for any purpose whatever, and also to prevent any person not having a right of servitude from using the farm roads for cartage or any other purpose."

By the third head of the lease the landlord bound himself to put the houses, offices, and other buildings upon the farms into a proper state of repair to the satisfaction of two neutral persons of skill to be mutually chosen by himself and the tenant, or otherwise as therein provided, the tenant being bound to keep them in repair thereafter. By the fourth head of the lease the landlord bound himself to enclose the farms with a stone dyke of a certain height if suitable quarries could be obtained within a reasonable distance, or with a turf dyke, where suitable turf could be obtained, with two strong galvanised wires on top properly placed and fastened, and failing both quarries and turf, with a six-wire fence of strong galvanised wire, with larch stakes not more than six feet apart, along the boundaries of the farms. The landlord also bound himself to put the whole roads, dykes, ditches, drains, gates, and enclosures on the farms in a proper state of repair, and to scour and clean the ditches, and keep the drains running clear to the satisfaction of two neutral persons chosen as aforesaid, the tenant being bound to maintain them thereafter.

In the course of the years 1879, 1880, and 1881, Coghill, the tenant, expressed himself dissatisfied with the manner in which Traill, the landlord, was implementing his obligations under the lease. In particular, Coghill complained to him by letters on various occasions that from the time of his entry to the farms numbers of persons had