tion to the complainer antecedent to the removal of the stock. The agreement embodies no condition to that effect, nor does it bear to be conditional upon Scobie obtaining his discharge, or in any other respect. Mackenzie may be held to have known that Scobie stood in the position of an undischarged bankrupt,—a fact which the complainer well knew also, for he was Scobie's principal creditor. It was, in truth, specifically arranged between the whole three parties, when the terms of the agreement and the relative letter were adjusted, that the contract between them was not to be conditional on Scobie obtaining his discharge. The condition originally inserted in the draft to that effect was struck out by the complainer himself. In this state of matters, I cannot hold with the Lord Ordinary that any intimation to the complainer was requisite to entitle the parties instantly to act on the agreement; nor can I hold that there is to be imported into it that very condition which was *ex propositu* struck out of it. Hence there appears to me no ground for holding that, when Scobie and Mackenzie proceeded to act as they did between the 24th and 30th August, they acted in any way contrary to their legal right and power, and that, consequently, the complainer's letter of 30th August 1869 could not affect the legality of the removal of the Renfrew stock to Alloa in terms of the agreement.

Such is the short view which I take of this case. No just ground exists for the interdict asked for by the complainer, with which these proceedings commenced; and although, from intervening circumstances, the agreement may not be now capable of being carried through—Mackenzie having become bankrupt and his trustee having sold the Alloa stock,—our interlocutor must be so framed as to give effect to the second plea of the respondents, that the application for interdict was unjustifiable. It will be for the complainer to vindicate his property in the Renfrew stock of goods and furniture, and to have them restored to him either by some order to be pronounced in this action, or otherwise as he may be advised.

Agents for Pursuer—G. & H. Cairns, W.S.

Agents for Defenders—Lindsay & Paterson, W.S.

Saturday, October 22.

FIRST DIVISION.

RITCHIE *v.* RITCHIE.

Process—Sheriff-court—Appeal for Jury Trial under 6 *Geo. IV. c.* 120, § 40—*A. S.* 10*th July* 1839, § 126, 137—*A. S.* 11*th July* 1828, § 5. In a summary petition, in which the value of the claim was not apparent on the face of the proceedings, the Sheriff-Substitute allowed a proof within less than fifteen free days, and refused a petition under A. S. 1828, § 5, craving leave to appeal for jury trial, on the ground that the proof had already proceeded. *Held* that the Sheriff's procedure was quite correct, that § 126 of A. S. 1839 does not apply to cases in which the value is not *ex facie* of the proceedings above £40, and that in such cases the party is bound to present his petition, under A. S. 1828, § 5, immediately upon the Sheriff's interlocutor allowing a proof, or otherwise the proof may competently go on at the time fixed by the Sheriff.

This was an appeal from the Sheriff-court of Banff against the interlocutors of the Sheriff, pronounced in a petition brought by Mrs. Ritchie, against her husband, for the purpose of recovering her antenuptial contract of marriage, in order to have it recorded. The appeal was against the final interlocutor in the case, but the grounds of appeal were mainly alleged departures from the proper course of procedure in the inferior court.

It appeared that the petition was presented upon the 12th July 1870, and upon the 20th of that month the Sheriff-Substitute allowed a proof before answer; the proof to proceed upon the 29th of July. Against the interlocutor allowing a proof the defender appealed to the Sheriff, and the appeal was disposed of upon the 26th, the Sheriff adhering to his Substitute's interlocutor. On the 30th July the Sheriff-Substitute of new appointed the proof to proceed upon August the 4th, or the fifteenth day after the date of the first interlocutor allowing a proof. Upon the 4th August neither the defender nor his procurator appeared at the proof. The petitioner's proof was led, and circumduction of the proof went out. On the 6th August a debate upon the proof was ordered, and no appearance being made for the defender, the petitioner's procurator was heard, and the Sheriff-Substitute pronounced an interlocutor upon the merits, and granted the prayer of the petition. Against this interlocutor the defender appealed to the Court of Session.

In the meantime, upon the 2nd August, the defender Mr Ritchie presented a petition to the Sheriff in terms of A. S. 11th July 1828, § 5, craving the Sheriff's leave to appeal to the Court of Session for the purpose of having the original case tried by jury, on the ground that, though the claim in the said action was not simply pecuniary, so that it did not appear from the conclusions that it was above £40 in value, still that such was the case. When this petition came before him, on the 8th August, the Sheriff pronounced the following interlocutor:—"Having considered the petition, and also the process ordained to be produced by the last interlocutor (*i.e.*, the process in the original action), finds that in said process a proof has been taken,; therefore dismisses the petition," &c. Against this interlocutor Mr Ritchie also appealed to the First Division of the Court of Session.

The two cases were argued together.

KEIR, for the appellant, contended that the Sheriffs' interlocutors allowing and circumducing the proof were incompetent and ought to be recalled, and that his interlocutor in the incidental petition, refusing leave to appeal for jury trial, was necessarily erroneous also, as following upon an incompetent course of procedure in the original case. The Act 6 Geo. IV. c. 120, § 40, enacts, "that in all cases originating in the inferior courts, in which the claim is in amount above forty pounds, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior courts, it shall be competent to either of the parties, who may conceive that the case ought to be tried by jury, to remove the process into the Court of Session by bill of advocation," &c. (or now by note of appeal). The 126th section of the A. S. 10th July 1839, regulating the forms of procedure in the Sheriff-court, lays down that "in all causes originating in the Sheriff-court, in which the claim is in amount above £40, when an interlocutor is pronounced allowing a proof it shall not be competent to either of the parties to take any proof, except

one allowed to lie in retentis, until after the expiry of fifteen free days, in order to give time for an advocation in terms of the statute 6 Geo. IV. c. 120, § 40;" and unless the passing of a note of advocation shall be duly intimated within the said period of fifteen days, "the proof shall proceed." In consequence of this enactment, he contended that the Sheriff was wrong in allowing a proof as he did before the expiry of fifteen free days. Farther, the 5th section of the A. S. 11th July 1828 enacts, with reference to advocation for jury trial under 6 Geo. IV. 120, "that if in such cases the claim shall not be simply pecuniary, so that it cannot appear in 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," &c, 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 petitions being presented, and on such declarations, if required, being made to the satisfaction of the judge, leave shall be granted to advocate," &c. Under this clause he maintained the appellant had taken the proper course, and the Sheriff had done wrong in refusing leave, and had founded his refusal upon an erroneous view of the law of procedure in the Sheriff-court. If under the recent Court of Session Act their Lordships were able to deal with the case here, he submitted that the appellant should be allowed to state an amended defence, and proceed to proof or jury trial in this court.

ASHER, for the respondent, argued that the question was, whether it was competent to proceed with the proof on the day fixed by the Sheriff. He relied upon the 137th section of the A. S. 10th July 1839, which says, "that in all cases which require extraordinary dispatch, and where the interests of the party might suffer by abiding the ordinary *inducie*, application by summary petition may be made to the Sheriff, &c., and the procedure in such cases shall not abide the ordinary course of the court days." He submitted that under this clause of the A. S. the present case was exempt from the provisions of the other clauses quoted for the appellant, and that, even if this were not so, there was nothing in these said clauses making the proof as taken incompetent.

At advising—

LORD PRESIDENT—The first point attempted to be made by the appellant can hardly be said to be one at all, for the Sheriff-Substitute, in closing the record as he did, did nothing but comply with the Act of Parliament and the Act of Sederunt. As to the allowance of amendment, that was also a proceeding in accordance with these Acts. I have therefore no difficulty so far.

There is more delicacy in connection with the other matter, viz., the attempt of the appellant to bring his case into the Court of Session under the 40th section of the Judicature Act. The Sheriff-Substitute allowed a proof upon 20th July 1870. Now that is the point of time at which the Judicature Act says that it shall be competent to advocate the cause to this Court for jury trial, if the claim is above £40 in value. Most certainly if it appears to a party that it is advisable to advocate the cause for jury trial, there is no need to appeal to the Sheriff against his Substitute's interlocutor. If the Sheriff recalled the interlocutor allowing proof, the party's right to come here would be at an end. An appeal to the Sheriff under these circumstances is therefore entirely misplaced. The point of time from which we must count the period allowed by the Act remains therefore the date of the Sheriff's interlocutor. In so far as concerns claims above £40, where the value appears *ex facie* of the claim, the Act of Sederunt seems to contemplate the Sheriff's postponing the proof for fifteen days; but when the value does not appear *ex facie* of the claim, it is impossible to expect that the Sheriff should do this, else if he do it in one such case he must do it in all. Section 126 of the A. S. 1839 does not apply to cases when the value does not appear *ex facie* of the proceedings. The only Act which does apply is the A. S. 1828, § 5. It appears to me that under this section it is the duty of a party desiring to remove his case to this Court for jury trial, immediately upon the Sheriff-Substitute's interlocutor to present the required petition, and if he fails or delays to do so he must take the consequences. Now, what does he do here? He makes an unnecessary appeal, and thus loses time. During that appeal the Substitute's hands were tied, but upon its decision the petitioner was entitled to require him to proceed *quam primum* —and he was bound to do so. Accordingly a proof was fixed of new for an early day, and the proof proceeded in the absence of the defender. I cannot hold that the defender can now come here under § 40 of the Judicature Act, and I think that, whether we agree with the grounds of his judgment or not, there is no doubt that the Sheriff did right in refusing the prayer of the petition for leave to appeal.

I am farther of opinion that the proof went on quite competently upon the 4th August, and that the defender should have attended the proof. However, in consequence of the peculiar circumstances of this case, and seeing that it is one which is very likely to appear before another and a very different tribunal from the present, if the appellant have any evidence to tender, which he asserts he has, I should be much disposed to give him an opportunity to lead it, without by any means setting aside the evidence already led for the opposite party. Particularly, I should like to have the evidence which he himself has to give in the premises. But I would suggest that the appellant be required to lead this evidence without the smallest delay, and in this Court.

LORD DEAS—The appellant's argument substantially referred only to two points—(1) that he had not been given a proper opportunity to state his defences. This objection hardly deserves consideration, nor can he now allege that he has any farther defence to state. (2) That his application for leave to appeal was unjustly refused. On this head I have little doubt that the section postponing proof for fifteen free days has no application to cases such as these, where the claim is not *ex facie* of the value of £40. But I do not think it necessary to go upon that ground, for I am very decidedly of opinion that the value of the claim was not above £40. The Sheriff is entitled to look at the proceedings, and if it is not then clear what the value of the claim is, it is competent to take a declaration from the party; but even then the Sheriff has to determine whether or no the claim is above £40. What was claimed here was possession of a document in order to get it put on record; and I am clearly of opinion that that claim is not above £40 in value in the present case. If the Sheriff-Substitute had chosen, he might have gone on that

ground alone, and though he did not, he seems to have had a pretty good idea of it. It would indeed lead to most extraordinary results if every action *ad factum præstandum* could be thus brought up to this Court, and delay and expense caused, when all the time the defender has it in his power to do what is wanted.

Now, however, that the case has come before us in this way, I do not object to the course proposed by your Lordship, and am ready to allow farther proof.

LORDS ARDMILLAN and KINLOCH concurred.

An interlocutor was pronounced by the Court allowing farther proof to be led at an early date.

Agent for Appellant—George Andrew, S.S.C.

Agent for Respondent — Alexander Morison, S.S.C.

Tuesday, October 25.

TENNANT & CO. *v.* THOMSON.

Process—Suspension and Interdict. Circumstances in which the note was passed, but interim interdict refused, the Court remarking that their uniform practice was to regulate interim possession in such a way that the least damage might be done in the meantime to either party; and yet that provision might be made for the due estimation of such damage, and for restitution to that party which should be eventually successful.

This was a reclaiming note against an interlocutor of the Lord Ordinary on the Bills (MACKENZIE) pronounced in a suspension and interdict brought by Messrs Tennant & Co. against Mr Thomson.

It appeared that Mr Thomson, who is a practical engineer, had made several inventions and improvements connected with road engines; and particularly had invented "an improved wheel for steam carriages to be used upon common roads." This invention he patented in 1867. In December 1869 he entered into an agreement with the complainers Messrs T. and M. Tennant and Co., engineers, Leith, of which the following is the substance:—

"(1) The said Robert William Thomson, in consideration of the royalty and other conditions after stipulated, hereby grants to the said second parties the sole and exclusive license, power, and authority to make, use, exercise, sell, and dispose of his said invention and patent right, and the road steamers, and apparatus connected therewith, which the said first party has by the said patent rights the exclusive right to construct, as well as the whole other powers, privileges, and authorities granted by the said letters patent . . . for and during the space of three years from the date of these presents, and that for their, the said second parties', own behoof and benefit. . . . (3) The said parties of the second part hereby oblige themselves to use their best endeavours to sell the said road steamers, and to obtain orders therefor, and will duly advertise the same, in terms to be approved by the first party. They shall do and perform all things necessary for the execution of all orders they may receive for the said invention, and with all possible despatch. They shall keep a regular and distinct account of all orders received and executed by them, which shall at all times be open to the inspection of the first party, and mark, number, and name to his approval all road steamers manufactured by them. (4) In consideration of the foresaid sole and exclusive license, power, and authority, the said second parties hereby bind and oblige themselves to pay to the said first party, and his heirs and assignees," a certain specified royalty. "(5) In the event of the said second parties being at any time subsequent to 1st July 1870 unable to make the supply of said road steamers keep pace with the demand therefor, which shall be proved by their inability to furnish one such road steamer of usual power within six weeks from receipt of the order, or to furnish twelve such road steamers within four months, then the exclusive right hereby conferred may be put an end to by the said first party. . . . (7) The said first party of the first part shall at once discontinue the manufacture of the said road steamers by himself or others on his behalf, and shall transfer to the said second parties orders for nine of said road steamers (per note annexed) which he presently holds, and the work which has been done in fulfilment of said orders, and the whole working drawings, specifications, and contracts for the said work, they paying him cost price for all said work, he reserving to himself only the royalty or premium thereon before stipulated, which orders the said second parties shall be bound to execute with all despatch under the conditions of this agreement. . . . (11) In all things relating to the subject-matter of this agreement, whether during its subsistence or at the termination thereof, and in all matters relating to the meaning of these presents, or the carrying out of the same, or any article thereof, where any question or dispute or difference of opinion shall arise between the said parties, every such question, dispute, or difference shall be, and is hereby, referred to James Leslie, C.E., whom failing to Thomas Stevenson, C.E., as arbiters in succession mutually chosen; and the parties bind and oblige themselves to implement and fulfil to each other whatever the said James Leslie, whom failing the said Thomas Stevenson, as arbiters in succession foresaid, shall determine in the premises by written awards or decrees arbitral, interim or final, under the penalty after written; and both parties bind and oblige themselves to fulfil this agreement to each other under the penalty of £500 sterling, to be paid by the party failing to the party performing or willing to perform, over and above performance. (12) The said second parties shall make no traction engines with any manner of soft or elastic tyres without Mr Thomson's approval in writing; and it is hereby agreed that if at any time the said first party should be dissatisfied with the manner in which the second parties carry out this agreement, he shall be at liberty to manufacture in his own works any engines he chooses; but the same shall not terminate the second parties' right to manufacture under this agreement."

During the period from the date of the said agreement down to 1st July 1870, the complainers received several orders for road steamers and traction engines, and executed some of them in terms of the agreement. Towards the beginning of July, however, the respondent, Mr Thomson, began to suspect that the complainers were not pushing the patent as much as he was entitled to expect under their agreement with him, but that, on the contrary, either from want of inclination or from want of machinery, &c., they were delaying the execution of some orders and losing others, in a manner very detrimental to his interest. Acting upon this