purchaser, if the property is not subject to a mortgage, will be the consideration; but if the property is subject to a mortgage at the same time when it is conveyed for a debt due to the party, then both are to be taken as making up the consideration. That, I think, is the sound construction of the statute, and I agree with your Lordship that the Commissioners are right.

Lord Shand—If this question had been to be decided on the terms of the Stamp Act of 1870, without the light of the previous legislation, I should have felt it to be attended with very great difficulty, because I think there was a great deal of room for the argument maintained on behalf of the liquidators of the bank that the word "payment" occurring in sec. 73 of the statute, used in this expression "subject either certainly or contingently to the payment of any money or stock," ought to be limited to a case in which there was a personal obligation to pay money, and would not include the case where the money or stock was a burden merely upon land without a personal obligation. But I think the difficulty is entirely removed when the previous legislation is regarded. By the Statute 16 and 17 Vict. cap. 59, passed in 1853, which amended the law as it had previously existed under the Act 55 Geo. III., it was substantially provided that where a person purchased property for a valuable consideration, subject to any mortgage or pecuniary burden, the amount of the debt or mortgage should be deemed to be a part of the consideration. The result of that statute, I think, was this, that in such a case—a case in which there was in the first place so much money paid or a debt extinguished, and in the next place the property was conveyed subject to a burden—the stamp-duty payable was to be paid upon the value of the property which the purchaser acquired, and the mode of ascertaining that value was to take, in the first place, the sum which he was paying or the amount of the debt which he was discharging, and the amount of the burden upon the property as fixed by the mortgage. That—the including of the amount of the mortgage in the consideration—was very deliberately done by the Legislature in 1853, in consequence of a decision which was pronounced, and which your Lordship has referred to; and for a period of seventeen years so stood the law. But in 1870 the statute was passed which we have now to construe, and it is to be observed that the main purpose of that statute was—while there is no doubt that to a considerable extent additional duties were given to the Crown by its provisions—its main purpose was really to consolidate the legislation in regard to the stamp-duties, with a view to the repeal of the then existing Acts, which were numerous and somewhat confusing, and which were repealed accordingly in the same session of Parliament. Now, having that in view—that this was substantially a consolidation statute, and that there is no declaration in the statute, either directly or which can be inferred from its terms, that there was any intention to go back upon that which had been done deliberately in 1853—I think, keeping that in view, there is no difficulty in the construction of the language of sec. 73. Your Lordship has fully gone over the terms of that section, and I do not mean to go into it in detail; but it appears to me, keeping in view what the existing law was, that this was intended in briefer terms to preserve the law upon that footing. The enactment is, that where the consideration is partly the discharge of a debt and partly a payment of money or stock, whether constituting a charge upon the property or not, the amount of that charge shall be a part of the consideration, and I think the word "payment" there is intended to cover the case in which the party is under an obligation to meet the burden, or it may be to give stock in return, while the words "constituting a charge or incumbrance upon the property" are intended to cover the case where that is the only way in which the burden is mentioned, although there be no obligation to pay. On the whole matter, therefore, I agree with your Lordship in thinking that the Commissioners have come to a right decision.

Lord Deas was absent.

The Court affirmed the assessment of the Commissioners.

Counsel for Liquidators of City of Glasgow Bank—Kinnear—Lorimer. Agents — Davidson & Syme, W.S.

Counsel for Inland Revenue—Dean of Faculty (Fraser, Q.C.)—Rutherfurd. Agents—D. Crole, Solicitor of Inland Revenue.

Saturday, January 15.

FIRST DIVISION.

[Sheriff of Forfarshire.

FLEMING *v.* KINNES.

Process—Appeal—Competency—Judicature Act 1825 (*6 Geo. IV. c.* 120), *sec.* 40, *and A. S.* 11*th July* 1828, *sec.* 5.

A Sheriff-Substitute on 2d September allowed a proof. He subsequently assigned three new diets successively, on the third occasion finding the defender liable in expenses of adjournment, and adding in a note that it was granted with difficulty, and no further indulgence would be given to him. The defender appealed to the Sheriff, who adhered. On the case coming back to the Sheriff-Substitute, he on 15th December assigned a new diet of proof. Against this interlocutor the defender appealed to the Court of Session. *Held* (1) that under the above enactments, and following the case of *Falconer* v. *Shiells & Co.* (July 10, 1827, 5 S. 853), the appeal was incompetent as not having been timeously presented; and (2) that the interlocutor of 15th December not being either an allowance of proof or a renewal of an allowance of proof was not appealable; and appeal *refused* accordingly.

Observations per Lord President (Inglis) distinguishing the case of *Murphy* v. *M'Keand* (Feb. 15, 1865, 4 Macph. 444) from the present case.

In an action raised in the Sheriff Court of Forfarshire by J. & W. Kinnes, house proprietors, Dundee, against A. G. Fleming, the following series of interlocutors was pronounced:—

On 2d September 1880 the Sheriff-Substitute (CHEYNE) allowed a proof to both parties, and assigned as a diet the 23d September.

On 23d September, "on the case being called, Husband tabled a joint-minute craving the Court to dismiss the action, finding no expenses due to or by either party, whereupon William Kinnes, one of the partners of the firm of J. & W. Kinnes, the pursuers in the action, appeared and stated that the joint-minute had been signed by his brother, the other partner in the firm, without his authority and against his wish, and that he was anxious that the action should proceed: In the above state of matters the Sheriff-Substitute discharges the proof of diet fixed for to-day, reserving the question of expenses; and appoints parties to be heard on the point raised at the Court of 1st prox."

On 6th October, on an *ex parte* motion not objected to, a new diet of proof was fixed, 20th October. On 15th October that diet was discharged and the 23d assigned in its place.

On 23d October "the Sheriff-Substitute, in respect it is stated by the defender that his former agent has ceased to act for him, and that he has not had time to instruct another agent, discharges the diet of proof fixed for to-day, and assigns as a new diet Monday the 1st day of November next, at half-past ten o'clock forenoon, within the Sheriff Court-House here: Finds the defender liable in the expenses consequent upon this adjournment; modifies these at the sum of 15s. sterling, and decerns *ad interim* against the defender for that sum accordingly, allowing immediate extract."

The defender appealed to the Sheriff (HERIOT), who on 30th November dismissed the appeal and adhered.

On 15th December the Sheriff-Substitute, on pursuer's motion, assigned as a new diet of proof the 20th December.

Against this interlocutor the defender appealed to the Court of Session.

The Act of Sederunt 11th July 1828 provides (sec. 5)—"Whereas it is enacted by section 40 [of the Judicature Act] that in all cases originating in the Inferior Courts in which the claim is in amount over £40, as soon as an order or interlocutor allowing proof shall be pronounced . . . it shall be competent to advocate such cause to the Court of Session, it is enacted and declared . . . that if . . . neither party within 15 days in the ordinary case, and in causes before the Courts of Orkney and Shetland within 30 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 . . . 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."

Authority—*Murphy* v. *M'Keand*, Feb. 15, 1864, 6 Macph. 444.

At advising—

LORD PRESIDENT — This appeal is presented under the authority of the 40th section of the Judicature Act of 1825.

The last interlocutor pronounced in the cause is dated 15th December 1880, and in it "the Sheriff-Substitute on pursuer's motion assigns as a new diet of proof Monday the 20th day of December current." That is not an appealable interlocutor on the face of it. But it is said that the proof which was directed to proceed by that interlocutor was allowed by a previous interlocutor dated 2d September, and that if it be competent to bring under review the interlocutor of 2d September, then this appeal may be sustained. But strangely enough the Judicature Act does not assign a time within which interlocutors may be appealed for jury trial. It therefore becomes necessary to see if there is any other limit in point of time. The Act of Sederunt of 12th November 1825, which immediately followed the Judicature Act, regulates a good many things which were not regulated by the Judicature Act itself, and the Act of Sederunt of 11th July 1828 repeals a great many of the regulations of the Act of Sederunt of 1825. It is not necessary to refer to the terms of the older Act of Sederunt. The fifth section of the Act of Sederunt of 1828 is thus expressed—[*reads clause as quoted supra*]. Now, this regulation does not in so many words say that the bill of advocation must be presented within fifteen days, but it implies it, because it says that failing such bill being presented the proof is to proceed in the Inferior Court, and after this no application to remove the case from the Inferior Court could be sustained.

All difficulty is set aside when we look at the cases which have been decided under the Act. In the case of *M'Farlane or Graham* v. *Duke of Montrose*, Nov. 24, 1826, 5 Shaw 38, new ed. 36, it was held "that fifteen days having elapsed from the date of an interlocutor in the Inferior Court allowing a proof before a bill of advocation was presented, the bill was incompetent, although it was prescribed within fifteen days from the time a commission was granted for taking the proof; and (2d) that the limitation in point of time prescribed by the Act of Sederunt 12th November 1855 is not *ultra vires* of the Court." That case was in the First Division of the Court. In the same volume there is another case in the Second Division of the Court, viz., *Falconer* v. *Shiells & Co.*, July 10, 1827, 5 S. 919, new ed. 853. There it was held "that an advocation under section 40 of the Judicature Act of a cause in which an interlocutor allowing a proof has been pronounced is incompetent, under the Act of Sederunt following on the Judicature Act, after the lapse of fifteen days from the date of the interlocutor; and (2) that it was not *ultra vires* of the Court to impose this limitation on the power of advocating, though given in the statute without limitation." That case occurred in the Second Division, and the Judges "entertaining great doubts of the judgment in the case of *M'Farlane*, ordered cases for the opinion of the whole Court. But the consulted Judges returned an unanimous opinion that not only from the terms of the Act of Sederunt 12th November 1825, but from the particular circumstances of this case, the said interlocutor is right, and ought

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