SUMMER SESSION, 1897.

COURT OF SESSION.

Wednesday, May 12, 1897.

FIRST DIVISION.

[Sheriff of Lanarkshire.

GORDON *v.* BRUCE & COMPANY.

Process — Appeal from Sheriff — Competency — Personal Diligence Act 1838 (1 *and* 2 *Vict. cap.* 114), *sec.* 21—*Error of Procedure.*

It is not a deviation from the statutory procedure, and forms no good objection to the competency of an appeal from the Sheriff under section 21 of the Personal Diligence Act 1838, that the defender in a petition for the recal of arrestments has not lodged answers though allowed by interlocutor of the Sheriff to do so.

Observed (*per* Lords Adam, M'Laren, and Kinnear) that a mere deviation from the usual course of procedure is not equivalent to withdrawing a cause from the ordinary jurisdiction of the judge unless it proceed upon an agreement by the parties to such a departure.

William Gordon, builder, Glasgow, presented a petition in the Sheriff Court of Lanarkshire for the recal of arrestments used by John W. Bruce & Company, accountants, Glasgow, on the dependence of an action raised by them against the pursuer.

By interlocutor dated 13th March 1897 the Sheriff-Substitute (STRACHAN) ordered service, appointed a diet for the hearing, and allowed the defenders to produce at said diet, if so advised, answers to the petition.

No answers were lodged.

On 16th March 1897 the Sheriff-Substitute (ERSKINE MURRAY) recalled the arrestments on the pursuer finding caution to the amount of £300.

The defenders appealed to the Court of Session.

The Personal Diligence Act 1838 (1 and 2 Vict. cap. 114), sec. 21, enacts that it shall be competent for any Sheriff from whose books a warrant of arrestment has been issued, on the petition of the debtor or defender, duly intimated to the creditor or pursuer, to recal or to restrict such arrestment on caution or without caution as to the Sheriff shall appear just, provided that the Sheriff shall allow answers to be given in to the said petition, and shall proceed with the further disposal of the cause in the same manner as in summary causes, and his judgment shall be subject to review in the Court of Session.

When the case appeared in the Single Bills the pursuer and respondent objected to the competency of the appeal, and argued—The defender had failed to comply with the requirement of the statute by not lodging answers. The result of such failure was to withdraw the case from the ordinary course of judicial procedure, and the parties must be held to have agreed to constitute the Sheriff an arbiter, in which case his award was final—*Dykes* v. *Merry & Cuninghame*, March 4, 1869, 7 Macph. 603.

Argued for the appellants—This was a summary proceeding. The lodging of answers was optional, not imperative, under the section of the statute; and the appeal was competent.

LORD PRESIDENT—The section provides that the Sheriff shall allow answers to be given in, and shall proceed with the further disposal of the action in the same manner as with summary cases, and that his judgment shall be subject to review in the Court of Session.

Now, Mr Salvesen has not made out that if this had been an ordinary summary case it was incompetent, or *extra cursum curiæ*, for the Sheriff, no answers having been given in, to proceed to hear parties and to dispose of the cause. That being so, and the statute pointing to summary procedure as the criterion of procedure, I am

not satisfied that there has been any irregularity, or that the parties have so acted as to withdraw the cause from the ordinary jurisdiction of the Sheriff.

LORD ADAM—I am of the same opinion. It is quite true that if parties deliberately agree to go out of the ordinary *cursus curiae* they may deprive themselves of the right of appeal. But then in many instances parties may go out of the ordinary *cursus curiæ* by mistake, and to say that an error in procedure of that nature makes the Sheriff an arbiter is to my mind altogether out of the question.

LORD M'LAREN—If it were necessary to consider the legal question which Mr Salvesen raised, I should be disposed to hold that in order to displace the right of review it is not enough to say that there had been a deviation from the course of procedure prescribed by statute. That might be the very thing complained of in the appeal or reclaiming-note. If deviation is shown to have been the act of the parties to the case, assented to by the Judge, then only do the proceedings become a proper arbitration.

In this case I do not think that there has been any deviation from the procedure prescribed by statute. The Act provides—[*quotes section.*]

I take that to mean that if the respondent moves the Sheriff for leave to lodge answers the Sheriff cannot refuse the motion. But then the application is to be dealt with in the same manner as summary causes, and it is a matter of ordinary practice that in summary causes a party to whom intimation has been made is entitled to be heard without the necessity of first lodging answers. If the question is merely as to the amount of caution, or again if it is merely as to the choice of a particular individual for the office, *e.g.*, of judicial factor, answers are not necessary. When, on the other hand, the party contends that the application is incompetent or ill-founded on the merits it is proper that answers should be ordered.

LORD KINNEAR—I agree. I am not satisfied that there has been any departure from the regular course of procedure, and indeed Mr Salvesen admitted, very properly, that if a respondent does not take advantage of the order of the Sheriff allowing him to lodge answers, that does not put him out of Court, but leaves the Sheriff to proceed upon the statement of such answers as may be given orally. The procedure in the Sheriff Court therefore was regular, but I agree also with what has been said by Lord M'Laren that a mere deviation from the ordinary course of procedure is not equivalent to a submission of the questions in dispute to a judge as an arbiter where it proceeds upon a mere error or slip in the conduct of a case, and not upon any agreement to make such a departure.

The Court sent the case to the Summar Roll.

Counsel for the Pursuer—Salvesen. Agents—Gill & Pringle, W.S.

Counsel for the Defenders—A. J. Young. Agent—L. M'Intosh, S.S.C.

Thursday, May 13.

FIRST DIVISION.

[Sheriff of the Lothians.

BELL *v.* BELL.

Process—Appeal from Sheriff—Competency—A.S. 10th March 1870, *sec.* 3—*Omission to Print.*

Where, in an appeal from the Sheriff, the appellant, though printing the note of appeal, record, and interlocutors, had omitted to print the proof, in compliance with the A.S. 10th March 1870, sec. 3, and where he admitted that the omission was not due to inadvertence, *held* that the appeal was incompetent.

This was an appeal from a judgment of the Sheriff-Substitute of the Lothians (HAMILTON), pronounced after a proof, dismissing an action of accounting and payment brought by Harold Fraser Bell against John Munro Bell.

The appeal was lodged with the Sheriff-Clerk on 22nd March 1897, and the process was transmitted to and received by the Clerk of Court on 24th March.

The appellant duly printed the appeal, record, and interlocutors, but did not print the proof.

In the Single Bills the respondent objected to the competency of the appeal, on the ground that the appellant, having failed to comply with the provisions of the A.S. 10th March 1870, sec. 3, must be held to have abandoned it.

The appellant explained at the bar that an action had been raised in the Court of Session covering the whole subject-matter of which the Sheriff Court action touched a part. He had accordingly intended when the appeal came up to move the Court to remit it *ob contingentiam* to the Lord Ordinary before whom the Court of Session action depended. He had therefore not printed the proof, but he had since been advised that such a motion would be incompetent, and he now proposed to proceed with the appeal in ordinary course.

The A.S. 10th March 1870, sec. 3, alters the course of proceeding prescribed by sec. 71 of the Court of Session Act 1868 to the following extent and effect:—"(2) The appellant shall during vacation, within fourteen days after the process has been received by the Clerk of Court, deposit with the said clerk a print of the note of appeal, record, interlocutors, and proof, if any, unless, within eight days after the process has been received by the clerk, he shall have obtained from the Lord Ordinary officiating on the bills an interlocutor dis-