and declare accordingly, and decern: Find the first and third parties entitled to their expenses out of the residue of the estate of the deceased Mrs Scott Bell or Craw: Find the second party entitled to one-half of her expenses out of said residue, all as the same may be taxed by the Auditor."

Counsel for the First and Third Parties—Sym. Agents—Purves & Barbour, S.S.C.

Counsel for the Second Party—Craigie. Agents—W. & W. Saunders, S.S.C.

Thursday, February 16.

SECOND DIVISION.

[Sheriff of Lothians and Peebles.

BAIN *v.* GEORGE LAWSON & SON.

Process—Sheriff—Dismissal for Default—Reponing—Sheriff Courts (Scotland) Act 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 20—*Act of Sederunt, 4th December* 1878, *sec.* X.—*Act of Sederunt, 21st November* 1895, *sec.* 2.

The pursuer in an action having failed to appear at a diet appointed by the Sheriff-Substitute for the adjustment of the record, and having failed to pay the dues chargeable before the closing of the record under Act of Sederunt, 21st November 1895, Table A, Part XII. 4, the Sheriff-Substitute dismissed the action. Upon appeal to the Sheriff, the pursuer's agent stated that, the diet being just at the close of the summer session, when he was much occupied, the matter had escaped his attention. The Sheriff held this explanation to be insufficient, refused to repone the pursuer, and adhered. *Held* that the Sheriff had power at common law, apart from section 20 of the Sheriff Courts (Scotland) Act 1876, to dismiss an action for default; that the exercise of this power was a matter within the discretion of the sheriffs; that the Court ought not readily to interfere with what they had done in the exercise of their discretion; and that there was no sufficient reason for doing so here.

Opinion (*per* the Lord Justice-Clerk) that in the circumstances of this case the Sheriffs had acted rightly in dismissing the case, and refusing to repone the pursuer.

William Bain, accountant, Edinburgh, brought an action in the Sheriff Court at Edinburgh against George Lawson & Son, bakers, Edinburgh, and William Lawson, sole partner of that firm, in which he craved decree for payment of the sum of £50, 3s. 10d.

By interlocutor dated 19th July 1898 the Sheriff-Substitute (MACONOCHIE) appointed the case to be put to the roll on Tuesday, 26th July, with a view to adjust and close the record.

At this diet there was no appearance for the pursuer, and it was intimated by the Sheriff-Clerk that the dues payable by each party before the closing of the record had not been paid by him or on his behalf.

The Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. c. 70), sec. 20, enacts as follows:—"Where in any defended action one of the parties fails to appear by himself or his agent at a diet of proof, diet of debate, or other diet in the cause, it shall be in the power of the sheriff to proceed in his absence, and unless a sufficient reason appear to the contrary, he shall, whether a motion is made to that effect or not, pronounce decree as libelled or absolvitor (as the case may require) with expenses; or, if all parties fail to appear, he shall, unless a sufficient reason appear to the contrary, dismiss the action."

The Act of Sederunt, 4th December 1878, enacts as follows:—"X. Whenever a procurator on one side attends any meeting ordered by the sheriff for adjusting the record, or for any other purpose, and the other is absent, or not prepared to proceed, the sheriff shall have power to decern against the opposite party for payment of the fee for attendance to the procurator who is ready."

Under the table of fees annexed to the same Act of Sederunt the following fee is made chargeable:—Table I. 6 (21). "Attendance at calling in motion or compearance roll, or at diets for adjustment, or when the case is ordered to the roll for any purpose other than a debate, 5 shillings."

The Act of Sederunt, 21st November 1895, made in pursuance of the powers vested in the Lords of Council and Session by the Courts of Law Fees (Scotland) Act 1895 (58 Vict. c. 14), sec. 2, enacts as follows:—"The sheriff-clerk shall be responsible for the collection of all fees specified in the tables, and it shall be his duty to refuse to receive any paper chargeable with a fee, or transmit any service or petition for completion of title for extract, or allow any marking of an appeal, or other marking, to be made in respect of which a fee is payable unless the appropriate fee has been paid; and it shall further be his duty when a fee is declared payable prior to any particular step being taken in a process, and such fee has not been paid by either party, to call the attention of the sheriff to the matter, and the sheriff, unless the fee is thereupon paid, shall proceed with the case as if the party by whom the unpaid fee is payable were absent or in default." By the definition clause (sec. 7) "sheriff" includes "sheriff-substitute." Among the fees which are declared to be chargeable in terms of sec. 1 is the following:—Table A. Part XII. 4. "Each party before the closing of the record, 5 shillings."

On 26th July (the day appointed for the adjustment and closing of the record) the Sheriff-Substitute issued the following interlocutor:—"The Sheriff-Substitute, in respect of the pursuer's failure to attend this diet of the cause, and also in respect that the Sheriff-Clerk calls the attention of the Sheriff to the fact that the dues of

'closing the record' under the table of fees, amounting to 5s., payable by the pursuer, have not been paid in terms of the Act of Sederunt, dated 21st November 1895, Dismisses the action: Finds the defenders entitled to expenses."

The pursuer appealed to the Sheriff (RUTHERFURD), who on 2nd November 1898 issued the following interlocutor:—"Adheres to the said interlocutor, and dismisses the appeal: Finds the pursuer liable to the defenders in £1, 1s. of additional expenses, and decerns for payment thereof: Further, remits the case to the Sheriff-Substitute."

Note.—"The only explanation on the part of the pursuer of his failure to appear on the 26th of July, at the diet fixed for the adjustment and closing of the record, was the statement made by his agent at the bar, to the effect that the diet in question being just at the close of the summer session, when he (the agent) was much occupied, the matter escaped his attention. This does not appear to the Sheriff a sufficient reason for reponing the pursuer, looking to the observations of the Judges in the First Division of the Court of Session in the cases of *Stephenson* v. *Hutcheson & Anderson* (1885), 12 R. 923, and *M'Gibbon* v. *Thomson* (1877), 4 R. 1085."

The pursuer appealed, and argued — (1) The provisions of the Sheriff Courts (Scotland) Act 1876, sec. 20, did not apply to a diet for adjustment. The penalty for non-attendance at such a diet was provided by the Act of Sederunt, 4th December 1878, sec. X. In the case of a proof or a debate the Sheriff could not proceed with the cause unless both parties were present or represented, and great inconvenience was caused by the failure of one party to appear. This was the reason for the highly penal provisions of sec. 20, and accordingly they were only intended to apply to diets for proof or debate or diets *ejusdem generis*. The attendance of parties was not necessary at a diet for adjustment. The Sheriff could proceed in absence. The Sheriff-Substitute ought not therefore to have dismissed the action here. There was no such default as was contemplated by the section. There was no case in which decree had been given for default in a defended action except for failure to attend at a diet of proof or debate. Further, decree of dismissal was not competent under sec. 20, which only warranted "decree as libelled" or "absolvitor." (2) Even if there was default here technically sufficient to warrant dismissal, the Sheriff ought to have reponed the pursuer upon terms—*M'Carthy* v. *Emery*, February 27, 1897, 24 R. 610. The terms should have been merely payment of the expense of the appearance for the defenders at the diet of adjustment.

Argued for the defenders—(1) The Sheriff-Substitute could not proceed with the adjustment here at the diet appointed, because the pursuer had not paid the dues chargeable under the Act of Sederunt, 21st November 1895, Table A, Part xii. 4, and under section 2 of that Act of Sederunt he was entitled in these circumstances to treat the pursuer as in default. (2) The Sheriff-Substitute had power to dismiss an action for default at common law apart from section 20. (3) The provisions of section 20 applied to diets for adjustment. (4) It was a question within the discretion of the Sheriff-Substitute whether the circumstances justified him in dismissing an action for default, and it was a question within the discretion of the Sheriff whether the default had been so excused as to make it just that the defaulting party should be reponed. The Court ought not readily to interfere with what the Sheriffs had done in the exercise of their discretion—*M'Gibbon* v. *Thomson*, July 14, 1877, 4 R. 1085; *Stevenson* v. *Hutcheson & Anderson*, May 12, 1885, 12 R. 923. (4) The Sheriff-Substitute was justified in dismissing the action here. If he had not done so he would just have had to continue the cause indefinitely until the pursuer saw fit to pay the dues chargeable before the record could be closed. The Sheriff was justified in refusing to repone the pursuer. The excuse stated by him was quite inadequate—*M'Gibbon, cit.*, and *Stevenson, cit.*

LORD JUSTICE-CLERK—I think the Sheriff-Substitute sitting in the Sheriff Court had power at common law, and independent of section 20 of the Sheriff Courts Act 1876, to consider, if one party did not appear at any time appointed by him for any step in the process to be taken, whether it was not just and reasonable in the circumstances that the action should be dismissed. In this case the Sheriff-Substitute, by the conduct of the pursuer's agent was put in such a position that he could not do anything further in the cause at that time except dismiss it. For not only was no one present to represent the pursuer, but the dues for the closing of the record were unpaid, so that the record could not be closed in absence. I think the Sheriff-Substitute was entitled to dismiss the action if he thought there had been unjustifiable default on the part of the pursuer. If the pursuer felt himself aggrieved he could go to the Sheriff and state to him any excuse which he had to offer for his absence. In this case the pursuer did so, but the Sheriff did not think that any sufficient excuse had been stated, and adhered to the interlocutor of the Sheriff-Substitute. I agree with the Sheriff that no reason for his absence was stated on behalf of the pursuer which any Court could give effect to. If such excuses were accepted it would be impossible to get dispatch of cases in the Sheriff Court at all. The explanation offered was just the kind of excuse which the Court refused to accept in the cases of *M'Gibbon* and *Stevenson*. In this case the Sheriff held that the excuse offered was insufficient. I think he was right. But apart from that it was a question for him to decide in the exercise of his discretion, and I do not think we should interfere with his decision.

LORD TRAYNER—I agree. I think both the interlocutors appealed against were within the competency of the judges who pronounced them, and as it was more or less a question within the discretion of these judges I think we should not interfere with their decision.

LORD MONCREIFF—I am of the same opinion. I think that the course adopted by the Sheriffs was competent, and as it was a question of discretion I should not like to interfere with what they have done.

LORD YOUNG was absent.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the pursuer's appeal, Dismiss the same: Of new dismiss the action, and decern: Find the pursuer liable in expenses in this Court, and remit the same and the expenses found due in the inferior court to the Auditor to tax and to report: Of new decern against the pursuer for payment of the sum of £1, 1s. found due by the interlocutor of 2nd November.

Counsel for the Pursuer—Hunter. Agent—J. B. W. Lee, S.S.C.

Counsel for the Defenders—W. L. Mackenzie. Agent—Thos. B. Tweedie, Solicitor.

Thursday, February 16.

SECOND DIVISION.

[Lord Kincairney Ordinary.

SHEARER *v.* MALCOLM.

(*Ante*, July 19, 1898, vol. xxxv, p. 924.)

Expenses—Modification—Smallness of Sum Recovered.

In an action of damages for personal injuries brought originally in the Court of Session the pursuer obtained a verdict for £25. The Court, in respect of the smallness of the sum recovered, *modified* the expenses from £139, 5s., the amount as taxed, to the sum of £100.

This case, which is reported *ut supra*, was tried before the Lord Justice-Clerk and a jury, when a verdict was returned for the pursuer, damages £25.

On 17th December 1898 the pursuer moved the Court to apply the verdict, and for expenses.

Counsel for the defender moved the Court to allow only expenses on the Sheriff-Court scale, in respect of the smallness of the sum recovered, which showed that the action should not have been brought in the Court of Session, and referred to the case of *Jamieson* v. *Hartil*, February 5, 1898, 25 R. 551.

Counsel for the pursuer maintained that he was entitled to full expenses. This was not an appeal for jury trial as in *Jamieson, cit.* The pursuer had recovered a sum for which she was entitled to sue in the Court of Session.

The Court pronounced this interlocutor:—

"Apply the verdict: Decern against the defender for payment to the pursuer of the sum of £25 sterling: Find the pursuer entitled to expenses subject to modification, and remit to the Auditor to tax the same and to report, reserving the amount of modification."

The amount of the account as taxed was £139, 5s.

Counsel for the pursuer maintained that the modification should be slight, otherwise the pursuer, who had succeeded in an action which she was entitled to bring in the Court of Session, would be out of pocket as the result of her success. It was to be observed that in this case the defender had never offered to pay anything by way of compensation to the pursuer for the injuries which she had sustained through his fault. He referred to *Lumsden* v. *Great North of Scotland Railway Company*, May 24, 1870, 8 Macph. 791.

Counsel for the defender asked for a substantial modification.

The Court pronounced this interlocutor:—

"Approve of the Auditor's report on the pursuer's account of expenses: Modify the said expenses to the sum of £100 sterling, for which decern against the defender, and allow this decree to go out and be extracted in name of Messrs Sibbald & Mackenzie, agents-disbursers."

Counsel for the Pursuer—Munro. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Defender — Graham Stewart. Agents — Mylne & Campbell, W.S.

Thursday, February 16.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

WALLACE *v.* BRAID.

Process — Reclaiming-Note — Reclaiming-Note Boxed without Record—Competency —Court of Session Act 1825 (6 *Geo. IV. c.* 120), *sec.* 18—*Act of Sederunt*, 11*th July* 1828, *sec.* 77.

A reclaiming-note boxed without prints of the record in the action is incompetent and cannot be received even of consent. *M'Evoy* v. *Braes' Trustees*, January 16, 1891, 18 R. 417, *followed.*

In this case a reclaiming-note was presented against an interlocutor pronounced by the Lord Ordinary (Kincairney), but no prints of the record were boxed. When the case was called the Judges intimated that no copies of the record had been boxed to them. Counsel for the respondent stated that he did not desire to object to the