admitted that the hedge forms the boundary between the two properties; and that being so, the Sheriff will say whether it shall be repaired, or a new fence erected, or what else shall be done.

Interlocutor affirmed and appeal dismissed, with costs.

COURT OF SESSION.

Thursday, Feb. 15.

SECOND DIVISION.

DUKE OF BUCCLEUCH AND OTHERS *v.* COWAN AND OTHERS (*ante*, p. 141).

Nuisance—Pollution of Water—Issues. Form of issues in an action of nuisance caused by the pollution of water.

The following issues have been adjusted to try this case:—

"1. Whether between 1st January 1835 and 1st October 1853, the defenders, the first-mentioned firm of Alexander Cowan & Sons, did, by discharging refuse or impure matter at or near their mills of Bank Mill, Valleyfield Mill, and Low Mill, or any of them, pollute the water of the stream or river called the North Esk, to the nuisance of the pursuers or their authors as proprietors of their respective lands aforesaid, or of one or more of them?

"2. Whether, between 1st October 1853 and 20th May 1864, the defenders, Alexander Cowan & Sons, the present occupants of said mills, did, by discharging refuse or impure matter at or near their said mills, or any of them, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors as proprietors of their respective lands aforesaid, or of one or more of them?

"3. Whether, between 1st January 1835 and 15th May 1856, the defenders, the first-mentioned firm of William Somerville & Son, did, by discharging refuse or impure matter at or near their mill called Dalmore Mill, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors as proprietors of their respective lands aforesaid, or of one or more of them?

"4. Whether, between 15th May 1856 and 20th May 1864, the defenders William Somerville & Son, the present occupants of said Dalmore Mill, did, by discharging refuse or impure matter at or near their said mill, pollute the water of the said stream or river, to the nuisance of the pursuers or their authors as proprietors of their respective lands aforesaid, or of one or more of them.

"5. Whether, between 1st January 1835 and 1st July 1856, the defenders, the first-mentioned firm of Alexander Annandale & Son, did, by discharging refuse or impure matter at or near their mills called Polton Papermills, pollute the water of the said stream or river, to the nuisance of the pursuers, the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them?

"6. Whether, between 1st July 1856 and 20th May 1864, the defenders, Alexander Annandale & Son, the present occupants of said Polton Papermills, did, by discharging refuse or impure matter at or near the said mills, pollute the water of the said stream or river, to the nuisance of the pursuers, the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them?

"7. Whether, between 15th May 1856 and 20th May 1864, the defenders, James Brown & Company, did, by discharging refuse or impure matter at or near their mill, called Esk Mill, pollute the water of the said stream or river, to the nuisance of the pursuers, or their authors, as proprietors of their respective lands aforesaid, or of one or more of them?

"8. Whether, between 1st May 1848 and 20th May 1864, the defender, Archibald Fullerton Somerville, did, by discharging refuse or impure matter at or near his mill, called Kevock Mill, pollute the water of the said stream or river, to the nuisance of the pursuers, the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid, or of either of them?

"9. Whether, between 1st January 1843 and 20th May 1864, the defenders, William Tod & Son, did, by discharging refuse or impure matter at or near their mill, called St Leonard's Mill, pollute the water of the said stream or river, to the nuisance of the pursuers, the Duke of Buccleuch and Lord Melville, or their authors, as proprietors of their respective lands aforesaid or of either of them?"

The Court repelled the plea of acquiescence stated for the defenders, and held that there were no counter issues required.

MURPHY *v.* M'KEAND.

Process—Sheriff Court Act—Leading of Proof—Appeal to Sheriff. (1) A pursuer of an action having been allowed a proof, the diet of which was twice adjourned, and having failed to attend the adjourned diet, held that, under section 10 of the Sheriff Court Act, his action fell to be dismissed; and (2) a Sheriff-Substitute having fixed a new diet of proof after the original diet had fallen, held that this was an allowance of proof and that the interlocutor might be appealed to the Sheriff under section 19 of the Sheriff Court Act.

Counsel for the Advocator—Mr Mair. Agent—Mr W. Officer, S.S.C.

Counsel for the Respondent—Mr Pattison. Agent—Mr W. S. Stuart, S.S.C.

This is an advocation from the Sheriff Court of Galloway. The advocator had presented in that Court a petition against the respondent and another, in which he applied for interdict of an intended sale of some bark under a poinding. He alleged that the poinding had been carried out unwarrantably, because the bark was not the property of the poinder's debtor, but his. Interim interdict was granted, and a minute of defence was lodged to the effect (1) that the petition was vague and indefinite, and (2) that the bark was not the property of the petitioner. A variety of procedure occurred thereafter in the process, which is detailed in the annexed opinion of the Lord Justice-Clerk. The question before the Court arose out of a renewal of a diet of proof which the Sheriff-Substitute granted to the petitioner after a first diet had fallen. This interlocutor of the Sheriff-Substitute was appealed to the Sheriff (Hector), who recalled it. He also dismissed the petition, and found the petitioner liable in expenses. To-day the Court adhered to the judgment of the Sheriff.

The LORD JUSTICE-CLERK said—This is a small case, but it belongs to a class of cases of great importance, because there is no way in which more mischief can be done than by applications for interdict, and especially for interim interdict. The petitioner's application was presented on the 24th of January, interim interdict was granted of that date, and all I will say upon that point is that if the application had been made to me I would have refused it. The defender appeared, and stated his defence to be an objection to the vagueness of the petition, and a denial that the bark in question was the property of the petitioner. Upon that the Sheriff-Substitute allowed the petitioner a proof of his averments. I shall not say whether the proof ought to have been

allowed or not. But assuming that to have been well done, the Sheriff-Substitute further appointed a diet for taking the proof, and that was fixed for the 13th of February. His own judicial engagements prevented him taking the proof then, and accordingly there was an adjournment for two days in order that he might be present, and in the minute of adjournment the cause of it is properly set forth. On the 14th a motion was made for the petitioner's agent to adjourn the diet again, and the ground advanced for that motion was the absence of the petitioner's agent in Edinburgh. I doubt whether that was a sufficient cause. Any other agent would have been very glad to do that piece of work for him. But the Sheriff-Substitute took an indulgent view, and adjourned the diet till the 16th. And what is the result? That on the 16th there was no appearance for the petitioner. The effect of that, under the tenth section of the Sheriff Court Act, was that the allowance of proof fell to the ground; that the petitioner was no longer entitled to lead proof, or, in other words, had failed to avail himself of the allowance. On that failure, the Sheriff-Substitute should have dismissed the petition. But nine days were allowed to elapse, and nothing was heard of the petitioner or his agent, although the interim interdict was standing; and at last, on the 25th of February, the petitioner comes and asks a new diet of proof, and the Sheriff-Substitute grants it very indulgently, I think, but on grounds that were quite inadequate. I think that the Sheriff-Substitute should have come to an opposite conclusion. Then comes the question whether the respondent did not competently bring that before the Sheriff. I have no doubt he did. The original diet of proof had fallen; any interlocutor of the Sheriff-Substitute reviving the allowance of proof was just an allowance of proof, and under the 19th section of the statute that might be appealed to the Sheriff. I think that the Sheriff is right, and that we should adhere to his interlocutor.

The other judges concurred.

Friday Feb. 16.

FIRST DIVISION.

MAXWELL'S TRUSTEES *v.* GLASGOW AND SOUTH-WESTERN RAILWAY CO.

Sheriff — Jurisdiction — Competency. A summary application to a Sheriff for the removal of certain structures erected on a person's property by another, and which had remained unchallenged for thirteen years, held (diss. Lord Curriehill) incompetent.

Counsel for Petitioners—Mr Patton and Mr Duncan. Agent—Mr John Walker, W.S.

Counsel for Respondents—The Solicitor-General, Mr Clark, and Mr Johnstone. Agents—Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

This is an advocation from the Sheriff Court of Dumfries. The Sheriff (Napier) found that the question raised by the petitioners was substantially a question of heritable right upon which it was not competent for the Sheriff of a county to adjudicate. He therefore dismissed the action, and the petitioners advocated.

The petitioners complained of certain works for damming and draining executed by the defenders upon their property, which they said were injurious to their property, and they called upon the Sheriff to ordain the defenders to remove these works from their lands. The defenders alleged that the works complained of were upon their own property. They also alleged that they had been in existence for many years, while the petitioners did not aver any recent operation by the defenders.

The Court to-day found that the application to the Sheriff was incompetent.

The LORD PRESIDENT said—The petitioners here complain of certain injury done by the defenders' operations on the *solum* of the river Nith and a piece of ground on the bank thereof which they say belong to them. The Sheriff sustained the defender's third plea-in-law, and found that the application raised a question of heritable right. It appeared or the Court that, whatever might be the merits to demerits of that judgment, the case could not be disposed of on the ground on which the Sheriff had disposed of it. We therefore, after the debate, ordered the questions raised to be specially argued. I could not adopt the view confidently pleaded by the railway company, when they contended that the moment a defender in the Sheriff Court alleged that he had a competing title the Sheriff was to stop short without even considering the titles. I think that altogether unsound. It was even contended that a simple averment without producing any title was sufficient to stop the machinery; so that if a party was assailed, all he had to do in order to shut his adversary's mouth was to draw an old sasine out of his charter-chest which had no bearing on the question, and say—That is my title. The question was afterwards argued upon other grounds, and it is necessary to keep in view the position of parties. The company having obtained statutory powers to make their railway and to build a bridge over the river, proceeded to do so. These works have been in existence for many years. The petitioners now say that the company has made a weir below the bridge which impedes the current, and so destroys the banks of the river. They also say that this structure is erected on their property, and injures it. They farther complain that a pipe of large dimensions has been laid in their ground and projected into the river, whereby their property is sometimes flooded. The railway company alleged that the lands belonged to them. The writings produced show that this cannot be so. The petitioners pray for removal of the work, and also of a deposit which has been made in the river in consequence of them, and for the repair of the damaged banks The petition does not say how long these works have existed; but both parties are agreed that they have been there for many years—the petitioners say for thirteen years and the defenders for sixteen years. The questions which arise are — Can the Sheriff entertain an application for the removal of the structures in these circumstances? and if so, can he do so under a petition, or is a summons required? I have no doubt that if the Sheriff has the power a petition is the proper form of addressing him. I don't recollect of any case in which a Sheriff was approached by an ordinary summons to compel the performance of operations. The question remains as to the power of the Sheriff. The company say they had authority from Parliament to make the railway and bridge, and that the operations complained of were executed long ago, and were necessary to protect the bridge. They found upon section 16 of the Railway Clauses Act, which they say authorised them to do what they have done, and they say that, as the structures have existed so long, without some other proceeding to establish the petitioners' right the Sheriff has no power to remove them. There are some matters, I think, in this petition which the Sheriff might have dealt with had they stood alone. But I doubt his power to remove the structures. The application was not for a curative remedy, but to remove the structures which had stood so long, and which had been erected under the ostensible authority of an Act of Parliament. It is said some stones have been recently added, but that is not the substantial matter of complaint. There is a demand to repair the banks and to remove the deposit. If the petition had been limited to this I think the Sheriff would have been the proper person to deal with it. But the possession of the *solum* of the river although for a limited purpose, has been with the company, and so has that of the ground, and I think that a declarator is necessary as to the structures. In regard to the minor matters, they are so much linked with the