they seem to forget that that which they might have been called upon to do prior to the Statute of 1874 has been done for them by the statute, because the 4th section of the statute, in the second sub-section, provides that infeftment shall imply entry with the superior, and therefore when Mr Hay, on behalf of the Edinburgh Roperie Company, took infeftment in that part of the subject which he had bought from the Leith Roperie Company's trustees, he became thereby the entered vassal of the defenders. No doubt the effect of that entry was somewhat different from what would have been the effect of his taking an entry before the statute. He did not require to take an entry according to the old law when he bought this subject from the trustees of the Leith Roperie Company, because there was an entered vassal, viz., Mr Ritchie. But the statute implies the entry at once, and it provides also for what is to be the effect of that implied entry as regards the rights and obligations of superior and vassal. The third sub-section of the same section (fourth) provides that it is not to affect the rights of the superior as regards duties or casualties. In short, it provides that, as regards the casualties of superiority, they shall not be payable at any other time or on any other conditions than they would have been if this Act had not been passed. So that the effect is, that while Mr Hay was made the entered vassal as soon as he took infeftment by force of the statute, he did not require to pay a composition on that entry, his liability to pay the composition being postponed until the death of the last entered vassal, and the right of the superior to demand a casualty being in like manner postponed. The pursuers being the entered vassals of the defenders, and seeking to have the casualty redeemed under the terms of the 15th section of the statute, it appears to me quite unreasonable and beyond all intelligible construction of this statute to say that this party, who is entered with the superior and is now the superior's vassal in this particular part of the original feu as distinguished from the other, is to pay anything more by way of composition than one year's rent of that subject in which he is the vassal of the superior. I am therefore of opinion that the Lord Ordinary's interlocutor is well founded. There is no dispute as to the figures.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court adhered.

Counsel for Pursuers—Kinnear—Mackintosh. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defenders — M'Laren — Mackay. Agent—Wm. White Millar, S.S.C.

Saturday, July 14.

FIRST DIVISION.

[Sheriff of Lanarkshire.

M'GIBBON *v.* THOMSON.

Process—Appeal—Sheriff Courts Act 1876 (39 *and* 40 *Vic. cap.* 70), *sec.* 20—*Failure of Party to attend Diet.*

Sec. 20 of the Sheriff Courts Act 1876 provides—"Where in any defended action one of the parties fails to appear by himself or his agent at a diet . . . . it shall be in the power of the Sheriff to proceed in his absence, and unless a sufficient reason appears to the contrary, he shall, whether a motion to that effect is made or not, pronounce decree as libelled or of absolvitor . . . with expenses," &c. *Held* (1) that that section is imperative upon the Sheriff; (2) that where a party appeals against an interlocutor so pronounced, to entitle him to succeed the default must have been due to an innocent mistake not amounting to neglect; and (3) that the Court will not lightly decide against the view taken by the Sheriff where the appeal had in the first instance been to him from his Substitute.

Process—Appeal—Reponing.

Circumstances in which the Court *refused* to repone a pursuer who had failed to appear at a diet appointed by a Sheriff-Substitute.

This was an action in the Sheriff Court of Lanarkshire, in which the Sheriff-Substitute (Lees) on 2d May 1877 pronounced the following interlocutors:—"The Sheriff-Substitute having heard parties' procurators, and the defender having stated that he has no other witnesses in attendance, but that he intended to examine the pursuer, who he thought would be present, Discharges the diet of proof assigned for to-day, and in lieu thereof assigns Wednesday, the 23d day of May, at ten o'clock forenoon, as a diet for proof in the cause, at which diet allows the defender to examine himself as a witness, and the pursuer if duly cited for that diet." On 23d May—"In respect of no appearance by or for the pursuer at the diet of proof to-day, Holds him confessed as not insisting in the action; and, on defender's craving, sustains the defences: Assoilzies the defender from the conclusions of the libel, and decerns: Finds the defender entitled to expenses," &c.

The defender had not cited the pursuer as a witness for the proof on 23d May.

The pursuer appealed to the Sheriff (Clark) who on 15th June adhered to the interlocutor of 23d May. He added this note:—"In this case it was strongly urged for the pursuer that his non-attendance on 23d May 1877 arose from an innocent mistake, and it may be that something might be said in that respect. I do not, however, consider myself at liberty, unless some very strong ground indeed is made out, to recall an interlocutor such as that under review, pronounced by the Sheriff-Substitute after a full knowledge of the facts. Sec. 20 of the present Sheriff Court Act is very specific in its provisions, and if every excuse were to be taken as a ground

for recalling interlocutors pronounced in accordance with that section, it may as well be held *pro non scripto*. That is my reading of the Act, and if I have fallen into a mistake of undue strictness, I shall be glad to be directed by the Supreme Court as to the proper construction of the provision in question, and will endeavour to follow out such directions to the best of my ability."

The pursuer then appealed to the Court of Session.

It was stated that it was owing to the illness of the pursuer's agent, and the neglect of the clerk in his master's absence, that there had been a failure to attend.

Section 19 of the Sheriff Courts Act 1876 enacts—"It shall not be competent of consent of parties to prorogate the time for complying with any statutory enactment or order of the Sheriff, whether with reference to the making up and closing of the record, appointing a diet of proof, diet of debate, or otherwise."

Section 20 enacts—"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 to that effect is made or not, pronounce decree as libelled, or of 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."

At advising—

Lord President—This is a very important point as regards practice in the Sheriff Court under the new Sheriff Court statute. The great object of the statute, and the mischief which it was intended to remedy, must not be left out of view. A portion of that mischief was the excessive delay which took place in allowing agents to consent to prorogations, and the object of the statute was to take away that power from agents, and to arm Sheriffs with the power to compel parties to proceed with causes when diets were fixed. For that purpose the 19th section of the statute provides—[*reads ut supra*]. That is an exceedingly important provision, and I hope the Sheriffs are carrying it out strictly. It is exactly in the same spirit and with the same end in view that the 20th section enacts—[*reads ut supra*]. The failure to appear at a diet of proof, or of debate, or at any other diet, is to be attended with the consequences that if both parties to the cause so fail, both are to go out of Court, and if one does, then judgment is to be given in favour of the other. This is imperative upon the Sheriff, unless sufficient reason is shewn to the contrary. That matter is, first, for the consideration of the Sheriff-Substitute, if it is before him that the diet is to take place. He must act because he is compelled by imperative words to do so, whatever his knowledge of the circumstances may be, if the party be absent. It was not intended that appeal under the 20th section should be prevented, and therefore the appeal was taken in this case. One can imagine circumstances where the absence of the party may be accounted for afterwards in such a way that it would be a strained construction of the section of the statute to which I have referred if he were not to be reponed. It is quite right that there should be this right of appeal to the Sheriff in order that the defaulting party may have an opportunity of explaining the reason of his non-appearance.

In the present case the Sheriff-Substitute upon 2d May, with both parties before him, assigned "Wednesday the 23d May, at ten o'clock forenoon, as a diet for proof in the cause, at which diet allows the defender to examine himself as a witness, and the pursuer if duly cited for that diet." On the 23d May the defender appeared. He had not cited the pursuer, and therefore it is evident he did not intend to examine him as a witness. He may not perhaps have chosen to lead any more evidence. But it makes no matter what course the defender intended to take; the pursuer was absent, and no one was there on his behalf. I do not see that the Sheriff-Substitute could have done anything else than he did. Then we have the Sheriff's view of the case in a very distinct note. He says—"Sec. 20 of the present Sheriff Court Act is very specific in its provisions, and if every excuse were to be taken as a ground for recalling interlocutors pronounced in accordance with that section, it may as well be held *pro non scripto*." There is a great deal of force in that observation. If there is anything which can possibly be represented as an innocent mistake, that might be a ground for getting rid of a Sheriff-Substitute's interlocutor. But there is great peril in what the Sheriff foresees. It is very easy to put forward what has the appearance of an innocent mistake. We know how explanations can be coloured so as to seem plausible and satisfactory. But it is negligence which these clauses are intended to prevent, and which is to be punished in the way they set forth. And it is that consideration which will justify the Sheriffs in dealing with cases in the way in which this has been dealt with.

It has been represented to us that the failure to attend here arose from the fact that the defender's procurator was confined by illness, and his clerk neglected to observe that the diet had been fixed for the 23d May. That is the same thing as if the procurator had himself been the guilty party. And does that not amount to negligence and fault? It is what was intended to be provided against by the introduction of these stringent clauses into this Act of Parliament.

Even if a more plausible case than the present were made out, I should have great hesitation in going against the views held by the Sheriff. He has the procurators for both parties before him, and if it is necessary to clear up the facts of a case he may institute inquiries and satisfy himself in that way. So that unless a party came here with some very distinct allegations, susceptible of being averred specifically and proved directly, it would be unsafe, I think, to interfere with the interlocutor of the Sheriff. I do not say there might not be circumstances which would entitle this Court to interfere, but there are none of that kind in the present case.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court adhered.

Counsel for Pursuer (Appellant)—Scott. Agent—A. Kelly Morison, S.S.C.

Counsel for Defender—J. P. B. Robertson. Agents—Macrae & Flett, W.S.

Tuesday, July 17.

SECOND DIVISION.

SPECIAL CASE—DUNCAN'S TRUSTEES AND OTHERS.

Succession—Vesting.

A testator directed his trustees to hold the sum of £5000 "for behoof of such of the children of E. as shall at her death be then surviving, and shall have attained or shall afterwards attain the age of twenty-five years complete." *Held* that the attainment of the age of twenty-five years was a condition essential to any of E.'s children as individuals taking a vested interest in the fund.

Succession—Vesting—Annual proceeds.

Circumstances in which *held* that beneficiaries were entitled to have the income of provisions which had not vested in them applied for their behoof.

This was a Special Case presented by Macfie and others, trustees of the late James Duncan, of Rothesay, formerly merchant in Valparaiso, parties of the first part; John Abbey Ellison and others, children of the deceased Mrs Maria Lyall or Ellison, wife of John Ellison, Liverpool, and the said John Ellison, as curator and administrator for some of his children, parties of the second part; and Janet Duncan M'Callum and others, the whole persons, other than the second parties, interested in the residue of the trust-estate, two of them being the sole surviving next-of-kin of the truster, parties of the third part.

Mr Duncan died on 21st October 1874, leaving a trust-disposition and settlement dated 28th November 1867, and a codicil dated 19th October 1874, under which he appointed the first parties trustees and executors.

The important clauses of the trust-disposition were as follows:—"*In the Seventh place,* . . . . (*Third*) I direct and appoint my trustees, at the first term of Whitsunday or Martinmas happening six months after my decease, to set aside and hold, and when opportunity offers to invest, in their own names, as trustees foresaid, the sum of £5000 sterling, and, in the event of my sister the said Mary Duncan being then in life, to pay and make over the annual income or produce thereof, as and when the same shall arise, to my said sister during all the days of her lifetime, for her alimentary use allenarly; and, failing my said sister, whether before or after me, survived by the said Maria Lyall or Ellison, I direct and appoint my trustees to make payment of the said annual income or produce, as and when the same shall arise, to the said Maria Lyall or Ellison for her separate alimentary use allenarly; and upon the decease of the longest liver of the said Mary Duncan and Maria Lyall or Ellison, or in the event of their both predeceasing the said last-mentioned term of Whitsunday or Martinmas happening as aforesaid, then at said term my trustees shall hold the fee of the said sum of £5000 for behoof of such of the children of the said Maria Lyall or Ellison, whether by her present or any future marriage, as shall be then surviving, and shall have attained or shall afterwards attain the age of twenty-five years complete, and for behoof of the issue of any child or children who may have predeceased the cessation of said liferents, or if there be no liferenter who may have predeceased said last-mentioned term, or who may die before attaining the foresaid age leaving issue; and I direct and appoint my trustees to pay and divide said sum to and among said children and issue upon their respectively attaining the foresaid age of twenty-five years complete, the division being *per stirpes* . . . and I direct and appoint my trustees, until they shall invest the five sums of £5000 last hereinbefore mentioned, to pay to the person or persons entitled to the liferent of said sums, or, should there be no liferenter, to add to the capital of said sums, and dispose of the same along therewith and as a part thereof, the interest of the said sums respectively, at the rate of 4 per centum per annum, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas happening six months after my decease, for the whole period between my decease and said term, and the next payment at the first of these terms thereafter, and so forth half-yearly and termly, until the foresaid sums respectively be invested; but upon the said sums being once invested, no further payments of interest shall be made from my estate, although the various investments made may yield a less rate of interest than 4 per cent. or be afterwards paid up or realised, my trustees being the only judges as to the making and the continuance of the foresaid investments." . . . .

"*In the Ninth place,* I direct and appoint my trustees, after implementing and fulfilling, or providing for the due implement or fulfilment of, the preceding purposes of this trust, to divide the residue and remainder of my means and estate into five equal shares, and to hold, retain, and invest in their own names, as trustees foresaid, one of the said shares for behoof of my brother the said Colin Duncan in liferent, and another of the said shares for behoof of my niece the said Janet Duncan M'Callum in liferent, and to pay over the annual income or produce of each of said shares as and when the same shall arise to my said brother and niece respectively during all the days of their respective lives, for his and her alimentary use allenarly; and with reference to the disposal of the fee of the said two shares, I direct and appoint my trustees upon the decease of the said liferenters respectively to divide the shares liferented by them respectively into three equal proportions, and to hold, apply, and dispose of the same according to the destination, and in the same way and manner in all respects (subject always to the provision as to vesting hereinafter written), as is hereinafter appointed with reference to the three remaining shares of said residue and remainder: But, notwithstanding what is before written, I provide and declare that none of the proportions of said two shares, or any part thereof, shall become vested interests in the persons who may become entitled thereto until the same shall be paid over to them respectively." . . . .

"With reference to the disposal of the three