in question, and stated that they had given very careful consideration to the matter, and were satisfied that they had no claim against Mr Nicolson.

The Lord Ordinary (FRASER) on 22nd February 1888 allowed the parties a proof of their averments, the objector to lead in the proof.

The trustees reclaimed, and argued—Even assuming that the objector's averments were relevant, they could not be required to go to proof on a question of the kind with a third party when they were satisfied they had no good ground of action, and at the expense of the trust-estate. They were willing to give the objector their instance, and let her fight the matter out herself on her finding security for expenses—*Duke of Buckingham* v. *Breadalbane's Trustees*, January 17, 1844, 6 D. 403. Beyond that they could not be asked to go, especially as the objector's share in the residue was more than swallowed up by her debt, composed of advances and interest. The documents which had been produced were *prima facie* quite regular and complete. Further, she was the only one of the eight beneficiaries who had taken the objection.

The objector argued that she had set forth a relevant case as against the trustees, and that in any view she should not be obliged to pay the expenses of the proceedings.

At advising—

LORD PRESIDENT—The complaint here is that the trustees have failed to reduce into possession £600 which it is alleged is owing to the trust-estate. That is a perfectly relevant statement, but without going into detail I may say that, *ex facie* of the documents produced, it is plain that the debt was extinguished immediately after the death of Mr Brown. The trustees are therefore of opinion, and indeed say that they know they have no claim to this £600, and decline to sue Mr Nicolson for it. The objector is not satisfied with this answer, and of course if she wishes to try the question at her own expense she is entitled to do so. But then the trustees say that the state of the facts is that she is trying to have the question tried at the expense of the trust estate, that is, at the expense of the other beneficiaries. I think she is not entitled to do that, and whether the question is to be tried under this allowance of proof or not it ought not to be tried at the expense of the estate. The mode in which it is proposed here that the question should be tried is, to say the least, most inconvenient. I can imagine nothing calculated to put the case more out of shape than what is proposed. I do not say that it is absolutely incompetent, but it is certainly most inconvenient, and therefore if the question is to be tried at all it should be tried in an action in the name of the trustees against Nicolson. They cannot be asked to try it themselves at their own expense, but in these circumstances the trustees offer the use of their name upon the party wishing to raise the action finding security that they and the trust estate shall not be liable in any part of the expenses of an action which they know, or at least say, will end in favour of the defender. I think that we should recal the interlocutor, and if the objector does not accede to the trustees' offer there is no other footing upon which proof can be allowed.

LORD ADAM—If we should allow this interlocutor to stand, matters would be in the curious position that the objector would be pursuer in an action in which the trustees would be put to prove the non-liability of Nicolson to the trust for the sum of £600. There is no duty upon them to do that. The proposal is not incompetent, but when the trustees come forward and say that they are in possession of a discharge of the sum in question, and that they see no reason for thinking that the discharge is bad in any way, I cannot see why they should be compelled at the expense of the other beneficiaries under the trust to sue a claim which they think ill founded. If, then, the objector is not prepared to accept the trustees' offer I do not think that she can be allowed to put the trustees to this expense.

LORD KINNEAR—If the documents produced are valid then the debt alleged to subsist has been extinguished. I do not think it necessary to consider whether the averments on which it is proposed to set aside the discharge are relevant, for I think that if the beneficiary who desires proof wishes to proceed with the case she must take proceedings at her own expense and not at the expense of the other beneficiaries. I therefore concur.

LORD MURE and LORD SHAND were absent.

The Court repelled the objection, and reserved to the objector all questions as to the amount of her claim and any deduction which fell to be made from it.

Counsel for the Pursuers and Real Raisers—D.-F. Mackintosh—Patten. Agents—J. & A. F. Adam, W.S.

Counsel for the Objector and Respondent—Rhind—Hay. Agents—J. B. W. Lee, S.S.C.

Thursday, March 15.

FIRST DIVISION.

[Sheriff of Roxburgh, Berwick, and Selkirk.

WILSON *v.* BRAKENRIDGE AND OTHERS.

Process — Sheriff — Appeal — Competency — Sheriff Courts Act 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 24—*Judicature Act* 1825 (6 *Geo. IV. cap.* 120), *sec.* 40—*A.S., 11th July* 1828, *sec.* 5.

Held that an interlocutor of the Sheriff finding that the pursuer's proof must be limited to the writ or oath of the defenders was not appealable under the 24th section of the Sheriff Courts Act of 1853.

Shirra v. *Robertson*, 11 Macph. 660, *followed.*

This was an action raised in October 1887 in the Sheriff Court at Jedburgh in which John Wilson sued William Brakenridge and others, the executors of the deceased Charles Jardine, for payment of £51, 13s. 7d., being the price of various quantities of lime said to have been sold to Charles Jardine as per account annexed to the petition, the last item of which was under date June 1882.

The defenders, *inter alia*, pleaded "prescription."

The Sheriff-Substitute (SPIERS) on 27th October 1887 repelled this plea, but the defender having appealed, the Sheriff (JAMESON), on 10th January 1888 pronounced the following interlocutor:—"Recals the Sheriff-Substitute's interlocutor of 27th October 1887: Sustains the first plea-in-law for the defenders: Finds that the pursuer's proof must be limited to writ or oath of the defenders: Finds the pursuer liable to the defenders in the expenses of this appeal, modifies the same to the sum of two pounds, ten shillings sterling: Decerns and ordains the pursuer to make payment of the said sum to the defenders: *Quoad ultra* reserves all questions of expenses: Remits the cause to the Sheriff-Substitute for further procedure, and decerns."

The pursuer appealed to the Court of Session.

On 15th March the case appeared in the Single Bills when the defenders objected to the competency of the appeal, on the ground that the interlocutor complained of was not appealable under either the Sheriff Courts Act of 1853 (16 and 17 Vict. cap. 80), or the Judicature Act 1825 (6 Geo. IV. cap. 120).

Argued for the respondents—I. The 24th section of the Sheriff Courts Act 1853 sets forth the only interlocutors which are appealable, viz., interlocutors (1) sisting process, (2) giving interim decree for payment, and (3) disposing of the whole merits of the cause. This interlocutor is not in any of these classes. Besides, there is no finding for expenses—*Miller* v. *Brown*, May 25, 1877, 4 R., 737. Compare the definition of a final judgment in the Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 53. [LORD PRESIDENT—The position of this case, however, is somewhat peculiar, for this interlocutor might come to have effect in a sense as a final judgment. The proof has been limited by the Sheriff to the writ or oath of the defender, who is also the respondent in the appeal, and if accordingly the pursuer—there being no writ—refers to the oath of the defender, then he is precluded absolutely from ever after submitting this interlocutor to review. Even when the final judgment in the case has been pronounced in the Sheriff Court, and an appeal has been quite competently brought against it, he could not do so. Did the Act mean to exclude an appeal in such circumstances?] Appeal from an interlocutor restricting the proof in exactly the same way was refused as incompetent in *Shirra* v. *Robertson*, June 7, 1873, 11 Macph. 660. [LORD PRESIDENT—The circumstances there were different. The appellant was the person to whose oath the reference was to be made.] But if appeal is incompetent to one party it could not be competent to the other. Besides the case of *Robertson* v. *Earl of Dudley*, July 13, 1875, 2 R. 935, is exactly in point, for there the Court refused to entertain an appeal at the defender's instance against that part of an interlocutor which restricted the proof to the writ or oath of the pursuer although it allowed it *quoad* the rest. [LORD PRESIDENT—Perhaps the pursuer here might keep the point open if he declined to refer, and when the Sheriff thereupon gave final judgment against him he might appeal and bring that final judgment, and all prior interlocutors as well under review.] II. The appellant is not entitled to found on the provisions of the Judicature Act anent appeal for jury trial, for he allowed more than fifteen days to elapse from the date of the interlocutor before taking his appeal, and it is conclusively decided that such an appeal must be taken within fifteen days—Judicature Act 1825 (6 Geo. IV. c. 120), sec. 40; A.S., 11th May 1828; *Duff* v. *Stewart*, October 20, 1881, 9 R. 17; *Kaimes* v. *Fleming*, January 15, 1881, 8 R. 386. Moreover, though it is not necessary to raise the point, as the appeal is too late, this is not such an interlocutor as can be appealed under the Judicature Act—*Primrose* v. *Mackenzie*, November 18, 1859, 22 D. 1; *Hamilton* v. *Henderson*, June 10, 1857, 15 S. 1105; *Shirra* v. *Robertson*, *supra*.

Argued for the appellant—The appeal was competent as the interlocutor was appealable under the Judicature Act. No doubt it was an appeal taken after fifteen days had expired, but the Judicature Act did not provide that appeals had to be taken within fifteen days, and in this case the Court should not stretch the application of the Act of Sederunt of 1828. If the present appeal was disallowed, it was the only chance the pursuer had to obtain a finding as to the mode of proof, because if the case was once referred to the defenders' oath the pursuer would be barred from appealing, as thus, after the reference to oath had once been made, it would be impossible for him to get the more enlarged proof. Besides, there was no writ in the present case, and the reference would be limited to the defenders' oath, and they being trustees had no personal knowledge of the matter. [LORD PRESIDENT—If this matter was referred to oath, you can always refuse to make a reference; judgment will then go against you on the merits, and the appeal that could be taken upon that interlocutor would raise the whole question between the parties.]

At advising—

LORD PRESIDENT—I think the case of *Shirra* v. *Robertson*, 11 Macph. 660, is conclusive against the competency of the present appeal. The only distinction between that case and the present is, that there the appellant was the party to whose oath the reference was to be made, while here it is to be made to the respondents', which is the common case. That circumstance does not, however, appear to me to make any real difference. The decision in the case of *Shirra* v. *Robertson* was pronounced after careful deliberation, and after consultation with the Judges of the other Division, and it is quite impossible that we can go back upon it.

LORD ADAM and LORD KINNEAR concurred.

LORD MURE and LORD SHAND were absent from illness.

The Court refused the appeal as incompetent.

Counsel for the Pursuer and Appellant—Watt. Agent—David Hunter, S.S.C.

Counsel for the Respondent—Macfarlane. Agent—Adam Shiell, S.S.C.