pursuer a proof of his averment that the relation of employer and employed subsisted between himself and the defenders at the time of the accident, reserving thereafter to allow further proof that might seem necessary or advisable.

The pursuer appealed to the Court of Session for jury trial under the 40th section of the Judicature Act.

The defenders argued that the appeal was incompetent. The interlocutor of the Sheriff-Substitute did not allow a proof of all the averments on record, but only of one small preliminary question. The determination of that question might render inquiry into the circumstances of the accident unnecessary. It was unreasonable that the defenders should in this position of matters be put to the expense of a jury trial. In the case of *Shirra* v. *Robertson*, June 7, 1873, 11 Maeph. 660, the opinion was expressed that an interlocutor allowing proof before answer of certain averments by the writ or oath of the pursuer was not appealable under the 40th section of the Judicature Act. That opinion was in the respondents' favour.

Counsel for the appellant were not called upon.

At advising—

LORD PRESIDENT—Mr Watt's point upon the competency of this appeal is, I think, untenable. The 40th section of the Judicature Act allows an appeal to be taken as soon as an order allowing proof has been pronounced. The interlocutor here allows proof no doubt only of a part of the averments on record, but it is none the less an interlocutor allowing proof. The case referred to by Mr Watt was quite different; in it the opinion was expressed that an interlocutor restricting the mode of proof to writ or oath was not appealable under the 40th section of the Judicature Act. That opinion stands on an intelligible and distinct ground. In this case we have an allowance of proof at large albeit only of a part of the record.

I think therefore that the appeal is competent.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

Counsel for the Pursuer—G. Watt—Orr. Agents—George Inglis & Orr, S.S.C.

Counsel for the Defenders—Crabb Watt. Agents—Dove & Lockhart, S.S.C.

Tuesday, June 4.

SECOND DIVISION.

[Sheriff of Lanarkshire at Glasgow.

CAMPBELLS *v.* GLASGOW POLICE COMMISSIONERS.

Police — Police Commissioners — Gratuity to Children of Deceased Constable—Limit of Age—Rescission of Resolution Granting Gratuity—Police (Scotland) Act 1890 (53 *and* 54 *Vict. cap.* 67), *sec.* 2, *sub-secs.* 1 *and* 4, *First Schedule, sub-sec.* 8.

By sub-section 1 of section 2 of the Police (Scotland) Act 1890 it is provided that, if a constable dies from injuries received in the execution of his duty without his own default, the police authority "shall grant allowances" to his children. Sub-section 4 provides that, if a constable to whom a pension has been granted dies within twelve months after the grant of his pension, the police authorities may, if they think fit, grant "gratuities" to his children or any of them. Sub-section 8 of the first schedule provides that the "allowance" to a child shall not continue after the child attains the age of fifteen years.

Held that the provision of the schedule imposes no limit to the age of the children to whom gratuities may be granted under sub-section 4 of section 2; and that police commissioners, who had passed a resolution granting a gratuity to children of a deceased constable, were not entitled afterwards to cancel the resolution and to refuse payment on the ground that the grantees were over fifteen years of age.

By section 2 of the Police (Scotland) Act 1890 (53 and 54 Vict. cap. 67) it is enacted—"(1) If a constable dies whilst in a police force from the effect of an injury received in the execution of his duty without his own default, the police authority shall grant a pension to his widow and allowances to his children; (2) If a constable dies whilst in a police force from any other cause, the police authority may, if they think fit, grant gratuities to his widow and children or any of them . . .; (4) If a constable to whom a pension has been granted dies within twelve months after the grant of the pension, the police authority may, if they think fit, grant gratuities to his widow or children or any of them."

The first schedule, part 3 (8), of the said Act provides—"The allowance to a child shall not continue after the child attains the age of fifteen years."

Alexander Campbell, inspector in the Glasgow Police Force, retired on 1st October 1894 from the force under the provisions of the Police (Scotland) Act 1890, and in respect of his length of service was entitled to receive a pension of £56, 3s. 7d. per annum.

He died on 3rd November 1894.

After his death his two sons Lauchlan Campbell, a clerk, and Niel Campbell, a surgeon in Glasgow, who had both attained majority, applied to the Glasgow Police Commissioners for the grant of a gratuity under section 2, sub-section 4, of the Act, in respect of the death of their father within twelve months from the date of his retirement from the force.

The Watching and Lighting Committee of the Police Commissioners recommended that the treasurer should be authorised to pay to Lauchlan and Niel Campbell £275, 14s. 5d. as a gratuity under the Act, and this recommendation was approved by the Police Commissioners at a fortnightly statutory meeting.

On 20th November the clerk to the Commissioners wrote to Lauchlan and Niel Campbell intimating that the Commissioners had fixed the allowance at the above-mentioned sum, and that the treasurer had been authorised to pay it, and on the 21st the treasurer wrote in similar terms, saying that he would hand them a cheque for the amount on their calling either the next day or the day following to sign the formal receipt.

Lauchlan and Niel Campbell accordingly called on 22nd November, and after banking hours on that day were handed by the treasurer to the Police Commissioners a cheque for £275, 14s. 5d. For this sum they signed a receipt.

On the same day the treasurer wrote to the bank on whom the cheque was drawn, countermanding payment of the cheque, and when the cheque was presented on behalf of Lauchlan and Niel Campbell on the following day, payment was refused.

Lauchlan and Niel Campbell accordingly raised an action in the Sheriff Court at Glasgow against the Glasgow Police Commissioners for payment of the amount of the cheque, viz., £275, 14s. 5d.

The defenders made the following statements:—"(Stat. 9) Immediately after handing the cheque to the pursuer Niel Campbell, the defenders' treasurer questioned whether any gratuity under the Police (Scotland) Act 1890 could be competently granted to a child over the age of fifteen years, and consequently whether the pursuers were entitled to receive any gratuity under that Act. Thereupon he adjusted with the said Niel Campbell the terms of the following letter to the Under Secretary for Scotland . . . 'Sir,—Police (Scotland) Act 1890.—A question has arisen in connection with a claim under the above Act as to the meaning that is to be attached to the word "children" in section 2 (2 and 4). Kindly say whether there is any limitation as to the age beyond which you would disallow a gratuity granted under either of these sub-sections to the child of a deceased officer.' . . . (Stat. 10) Pending the determination of that question by the Under Secretary for Scotland, the defenders' treasuer suggested to the pursuer Niel Campbell that he should hand him back the cheque, which that pursuer declined to do. (Stat. 11) Although declining to hand back the cheque, the pursuer Niel Campbell undertook to said treasurer, on behalf of himself and the other pursuer, not to cash or attempt to cash the cheque in question until a reply had been received from the Under Secretary for Scotland to the above-quoted letter. (Stat. 12) To keep matters open the defenders' treasurer thereon wrote the Clydesdale Banking Company, on whom the cheque was drawn, countermanding payment of the cheque. (Stat. 13) In disregard of the undertaking before referred to, the pursuers, at the earliest possible moment, namely, at or about ten o'clock on the morning of the 23rd November 1894, caused the said cheque to be, on their behalf, presented for payment at the Clydesdale Bank, Limited, upon which bank the cheque was drawn, by a clerk or porter from another bank, believed to be a bank with which the pursuers, or one or other of them, dealt. Payment of the cheque was, however, in respect of the aforesaid countermand, refused. (Stat. 14) Thereafter the pursuers that day, about 10·30 o'clock a.m., called upon the defenders' clerk, and to him again undertook not to cash or attempt to cash the cheque, till the opinion of the Under Secretary for Scotland had been obtained on the question raised. (Stat. 15) On 28th November 1894 the Under Secretary for Scotland wrote the defenders' treasurer that, 'Although the terms of the Act are by no means clear, the Secretary for Scotland is of opinion, as advised, that a gratuity under the Police (Scotland) Act, 1890, should not be awarded to any child who exceeds the age of fifteen years.' (Stat. 16) The Sub-Committee on Police (Scotland) Act 1890, appointed by the defenders on 19th November 1894, thereafter, on 30th November 1894, having reconsidered the whole matter, and having regard to the fact, then made known to them for the first time, that the applicants for the gratuity in question were two men, one of whom was and is a medical practitioner in the city, and the other was and is in an apparently good mercantile position, and that, in view of the opinion of the Secretary for Scotland above referred to, they were beyond the scope of the said Act, resolved to recommend that the Commissioners, in the exercise of the discretion conferred upon them by section 2 (4) of the said Act, and of the whole circumstances of the case, decline to grant any gratuity, and that the minute of the previous meeting of 19th November 1894 granting the gratuity, be accordingly cancelled and recalled. (Stat. 17) On the same date (30th November 1894) the Watching and Lighting Committee approved of and adopted the minute of the Sub-Committee above referred to. (Stat. 18) On 3rd December 1894 the defenders, at their fortnightly statutory meeting, approved of and adopted the recommendation above referred to, and in the exercise of the discretion conferred upon them by said Police (Scotland) Act, 1890, declined to grant any gratuity to the pursuers, and cancelled and recalled the said minute of their meeting of 16th November 1894."

The pursuers denied that they had ever undertaken not to cash the cheque.

The defenders pleaded—"(2) The said cheque having been a gratuitous and not an onerous cheque, the defenders were entitled to countermand payment thereof. (3) The defenders having effectually countermanded payment of the cheque in question, the action should be dismissed. (5) The defenders having, in the exercise of the discretion conferred upon them, declined to grant any gratuity to the pursuers, the action should be dismissed. (6) The decision of the defenders in declining to grant any gratuity to the pursuers being by the Police (Scotland) Act 1890 declared to be final, decree of absolvitor should be granted."

On 31st January 1895 the Sheriff-Substitute (SPENS) allowed a proof.

"*Note.*—I do not feel disposed to decide this case without inquiry into the facts, so far as not admitted. I can see that arguments may be raised, on the one hand, that the treasurer had no power to refuse to hand over the cheque, and that, having handed it over, he had no power to stop its payment. On the other hand, it may be argued, if the facts are, as averred by the defenders, that the cheque was handed over on a certain distinct footing, and the pursuers were in *mala fide* in attempting to cash it in violation of the arrangement come to, and that this being so the cheque was properly stopped. It may also be a question whether the Commissioners have power to rescind their previous resolution. In view, therefore, of the questions which I see may be raised, I would prefer to have an exact knowledge of the facts before deciding any of them."

The defenders appealed to the Sheriff (BERRY), who on 6th April 1895 recalled the interlocutor appealed against and assoilzied the defenders.

"*Note.*—. . . It seems to me that there is no serious dispute as to the facts which are material to the decision of the case.

"The defenders had on 19th November resolved to grant a gratuity to the pursuers, and as authorised by their minute to that effect, their treasurer had intimated the resolution to the pursuers, and on 22nd November handed to them a cheque for the amount. On seeing them to be grown men he seems to have entertained doubts whether they were persons to whom, as children of a deceased constable, the Act contemplated that a gratuity should be granted, and he took upon himself to stop payment of the cheque while he communicated with the Under-Secretary for Scotland on the subject. After the answer of the Under-Secretary was received, the Commissioners resolved to cancel and recal their previous resolution, and caused it to be intimated to the pursuers that they declined to grant to them any gratuity under the Act. All the minutes of the Commissioners or of their committees relating to the subject have, as was admitted at the bar, been produced in process.

"I do not think it likely that, if a proof were allowed, it would show that the treasurer when he stopped payment of the cheque had any authority to do so, and I am prepared to deal with the case on the footing that he had not any such authority. His countermand of payment, however, was subsequently ratified by the Commissioners when they recalled their previous resolution, and declined to grant a gratuity to the pursuers.

"The question may no doubt be raised as to whether the Commissioners had power to rescind their previous resolution, but that seems to me to be a question of law which a proof would not assist in solving.

"In my opinion the Commissioners had a right on further consideration to recal their original resolution. They are empowered by the Act to grant a gratuity 'if they think fit.' The grant, if given, is of a 'gratuity,' and it seems to me impossible to hold, as was argued before me, that the pursuers are in the position of onerous holders of the cheque on which they sue. No value for it was given by them, and the service of their father in the police force, while entitling him to a life pension, gave neither to him nor to any of his family a claim as of right to any payment from the Commissioners after the date of his death. Any such payment was of the nature of a gratuity or donation, which it rested in the defenders' discretion to give or to withhold. The sum represented by the cheque being therefore a pure donation the defenders had, as long as the cheque remained uncashed, a right, in my opinion, to countermand payment and revoke the donation, and their ratification of the treasurer's act operated as an effectual countermand. My conclusion is that the pursuers are not entitled to succeed in this action."

The pursuers appealed, and argued—The Sheriff's judgment was wrong. He had been misled by the eighth sub-section of part 3 of Schedule I. That only applied to allowances to children granted in terms of sub-section (1) of section 2, which were quite distinct from gratuities granted under sub-section (2). It was reasonable that in some cases a gratuity should be granted to children of a deceased constable, although their age might be over fifteen. The gratuity was destined to be a sort of compensation for a pension which had not been enjoyed. In this case the constable had died within a month of his receiving the pension, and it was reasonable that his children should receive some compensation. The magistrates having resolved to grant the gratuity, the matter was disposed of and the cheque must be paid.

Argued for the defenders—It was *ultra vires* of the Police Commissioners to grant this pension. The Police Commissioners were in the position of trustees, and the Government or any member of the public or of the police force was entitled to object to their acting beyond their powers under the Act. The limitation in the schedule in regard to allowances must be held to apply to gratuities. The Police Commissioners

were unable under the Act to grant allowances to children over fifteen years of age of constables dying from injuries received in the execution of their duties, and it was impossible that the Legislature could intend to allow the Commissioners to give gratuities to grown-up children of a retired constable who had died a natural death.

At advising—

LORD JUSTICE-CLERK—This Act of Parliament by which pensions and gifts to widows and children of police officers are given for the first time in this country, makes, I think, on the face of it a very distinct separation between what are called allowances and gratuities to children. The words seem to be carefully chosen to be always applied as suitable to the particular case. In one case the widow and children of the police constable are entitled, as a matter of right, to receive, the widow a pension and the children allowances. And that case is the case of a constable being killed in the execution of his duty, and in the schedule we find that the allowances to children are to cease on the children attaining the age of fifteen. There is another case in which there is a pension to be granted to the widow which does not need to be referred to, because here we are dealing with children alone. But there are two cases provided for in which discretion is given to the police authority, if they shall see fit, to grant a gratuity to the children or to any of them. The one is the case of a constable dying from any cause while he is in the force, and the other is the case of his having done such service as has caused his retirement and receiving of a pension, and his dying within twelve months after the grant of the pension. In these two cases the police authority, if they see fit, may grant a gratuity to the children or any of them. The police authority in this case, having considered the matter, came to the conclusion that this was a suitable occasion for granting a gratuity to the children, and having come to that conclusion, the children of the deceased constable who was receiving the pension were invited to come and receive payment of the gratuity which the police authority had on consideration resolved was a suitable gratuity to give. A cheque was given for the amount, but that cheque having been given and a receipt taken for the gratuity, a question seems to have arisen in the mind of some official as to whether or not the restriction in the schedule of the Act to fifteen years, as applicable to allowances to children, might not make it illegal to give a gratuity to children older than fifteen. Accordingly the cheque was stopped. Now the question we have to consider is whether there is any ground in this Act of Parliament for holding, that the restriction to fifteen years applies to prevent the police authority, when it considers that a gratuity might suitably be given to children, from doing so in respect that the children happen to be over the age of fifteen. I am unable so to decide. I think the restriction to fifteen applies on the face of the Act to the stoppage of running allowances under sub-section 1 of section 2—such allowances as were a matter of right, and which it was declared by the schedule should cease when the children attain the age of fifteen. I therefore see no ground for holding that the police authority were not within their legal powers in granting such gratuities to these children. I accordingly am in favour of the Sheriff's judgment being recalled, and decerning as craved.

LORD YOUNG—I quite agree with the Sheriff that the Sheriff-Substitute's judgment was properly recalled. There was no case for inquiry at all. I think the question, as has been pointed out several times, is whether the Police Commissioners here in giving this gratuity were acting within their legal powers. If they were, then there is no case for interference. If they were not, then I think there is a case for interference, and that the money ought not to be paid on their cheque, the stopping of which *in transitu* as soon as they discovered they were exceeding their legal powers may be upheld. But I think it is proper to say that I must in my judgment deal with the case upon the footing that the Police Commissioners did not act hastily and rashly or without due exercise of their judgment in the case. They hint, and indeed rather more than hint, say rather frankly, that they did act hastily and without due inquiry, and that, if they had known what they came subsequently to know, the age of the children to whom they gave this gratuity, they would not have acted as they did. I do not think we may inquire into that. That is apparently what the Sheriff-Substitute thought might be a proper subject of inquiry to show that the Police Commissioners had acted hastily and without due inquiry, and as they came to think, rashly. I am surprised that in an individual case they should have chosen to bring that forward and parade it somewhat publicly. I assume that they did exercise their judgment. I think the party to whom they gave the money is entitled to be treated on the footing that the police authority acted in the due discharge of their duty to inquire into the circumstances of a particular case and determine whether it was proper or not. The only question for us to determine is whether it was in their power or not. Now, I am of opinion that it was within their power. The statute says it shall be in their power, if they see fit, to give the gratuity to the widow and children of an officer who has died within twelve months of retiring upon a pension, the purpose of the statute plainly being to put it in the power of the Commissioners, after due inquiry and exercise of due discretion, to make up to the widow and children for the sad calamity in a pecuniary point of view of their father dying within twelve months of having retired upon a pension. Here I should not have thought *prima facie* of there having been any want of due discretion on the

part of the Commissioners, because the constable retired in October with a pension of £50 or £60 a-year, and he died within a few days—died in November—and they awarded a pension to the children. Now, the statute applies no limitation except as to the amount; they may give it if they see fit to the widow or children or any of them. Now, the two young men here, although over fifteen, came within the meaning of the word children in this particular case. If we could hold that the limitation as to the stoppage of allowances when children attain the age of fifteen applies to this case, then I should arrive at the conclusion with the Sheriff that this was beyond the legal power of the Commissioners, and that therefore the money ought to be restored. But for the reasons which I have indicated I am of opinion that it was within their powers, and that the limitation does not apply. As I pointed out in the course of the argument I think every reasonable consideration and every desire on the part of the Commissioners ought to be in that direction. If they really, as I hope they will always in future, ascertain the facts, and, after applying their minds to them and exercising their discretion, think it reasonable and proper and fit that an allowance should be made in a particular case, it must be their desire that it should be in their power—for everybody must desire it should be in his power — to do what after due consideration is right, and reasonable, and proper. I am therefore of opinion that the judgment of the Sheriff is wrong, and that the pursuers are entitled to decree.

LORD RUTHERFURD CLARK — I am of opinion that the Commissioners were entitled to make the gratuity, and that further having made it by granting a cheque they were not entitled to stop payment of the cheque.

LORD TRAYNER—I agree.

The Court recalled the interlocutor of the Sheriff, and decerned in favour of the pursuers.

Counsel for the Pursuers—Asher, Q.C.—A. S. D. Thomson. Agent—John Veitch, Solicitor.

Counsel for the Defenders—Lees—Deas. Agents—Campbell & Smith, S.S.C.

Thursday, June 6.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

RAINIE *v.* FULLARTON AND OTHERS.

Burgh—Church—Minister—Stipend—Obligation to Provide "a Competent and Legal Stipend not under" a Certain Sum.

In 1779 the only surviving bailie and the treasurer of a burgh of barony, for themselves and as representing the council, freemen, and community of the burgh, raised a summons of disjunction and erection in the Teind Court, wherein they set forth that a new church had been erected within the burgh for the accommodation of the inhabitants, and concluded for decree disjoining the burgh from the parish with which it had theretofore been united, and erecting the same into a separate parish; providing always that the magistrates, council, and freemen of the burgh, and their successors in office, should be bound to provide the minister serving the cure of the said new kirk, and his successors in office, in all time coming, with a competent and legal stipend not under £60 sterling yearly at the usual terms.

Thereafter the Court pronounced a decree separating and disjoining the burgh, and erecting the same into a separate parish, and finding "that a committee of thirteen freemen annually to be chosen by a community meeting to be held for that purpose shall have the only right of modeling and disposing of the said church and haill seats thereof and bounds within the same and of letting and uplifting the rents for the said seats and if thought proper to sell and dispose of the seats and uplift the prices thereof. . . . Providing always that the magistrates council and freemen of the said burgh and their successors in office shall be bound and obliged to provide the minister serving the cure of the said new kirk and his successors in office in all time coming with a competent and legal stipend not under the sum of sixty pounds sterling yearly at the usual terms of payment with power to said committee of thirteen whereof nine to be unanimous if the funds shall admit of it to make such augmentation of said stipend as shall be just and reasonable the same being no burden on the funds of the community but upon the contingent funds under their management."

Held (following the case of *Peters* v. *Magistrates of Greenock*, March 16, 1892, 19 R. 643, *aff.* May 18, 1893, 20 R. (H.L) 42) that the obligation on the magistrates, council, and freemen of the burgh with regard to payment of stipend was not limited to £60, but was