before procuring extract; and if he is right in that view there is a great deal to be said for the competency of this appeal. But it appears to me that that question was set at rest by section 32 of the Sheriff Court Act of 1876, which provides that "Notwithstanding anything contained in section 68 of the Court of Session Act 1868, extract of any judgment, decree, interlocutor, or order pronounced in the ordinary Sheriff Court may be issued at any time on the expiration of fourteen days from the date thereof, unless the same shall, if competent, have been sooner appealed against, and no extract of any such judgment, decree, interlocutor, or order shall be issued before the expiration of forteen days from the date thereof, unless the Sheriff or Sheriff-Substitute who pronounced the same shall allow the extract to be sooner issued." Now, this is a very unqualified provision; and if fourteen days have elapsed from the date of any judgment which is extractable, then I think extract of it must be competent. In the present case fourteen days had elapsed, because the extract was on 21st April, and the interlocutor of the Sheriff was on 31st March. I think, therefore, that under that section of the statute extract was competent and proper; and so it follows that this appeal cannot be taken, for there is no appeal against an extracted judgment.

The interlocutor on the merits being therefore not subject to appeal, the question comes to be whether there is any appeal here at all. To bring up a decerniture for expenses, to the effect of letting the appellant get into a review of the interlocutors on the merits, would be, I think, by a mere evasion to set at naught the provisions of the Acts of Parliament. I think, therefore, it is impossible to sustain the competency of this appeal to that effect. Then if there is only a decerniture for expenses, that is not an interlocutor subject to appeal. In *Cruickshank* v. *Smart* (5th Feb. 1870, 8 Macph. 512) Lord Deas expressed his opinion that a decree for expenses is not subject to appeal, and I concurred in that opinion, though not entering so fully into the question.

On both grounds I think this appeal must be dismissed as incompetent.

Lord Deas—I am of the same opinion. I think this extract was competent and proper; and I have always had the opinion that a decree for expenses is not subject to appeal.

Lord Mure—I concur. I think the provision of the Act of 1876, taken in connection with former practice, is conclusive. The Act of Sederunt of 10th July 1839 does not appear to me to affect the question at all.

Lord Shand—I am of the same opinion. By the statute which regulated these matters before the Act of 1876 an appellant had twenty days from the date of a final interlocutor within which no extract could be issued. The 1876 Act abridged this period, and parties may now obtain extract within fourteen days. The result is that if the successful party chooses to take extract he excludes appeal, and I think this case is important as pointing that out. Practitioners in the Sheriff Courts should take notice that if they desire to appeal they must do so within fourteen days from the date of a final interlocutor, though expenses have not been decerned for in the Court below.

The Lords refused the appeal as incompetent.

Counsel for Appellants—Rhind. Agents—Hagart & Burn Murdoch, W.S.
Counsel for Respondent—Baxter. Agent—W. Black, S.S.C.

Tuesday, June 22.

SECOND DIVISION.

[Lord Fraser, Ordinary.

CAMERON AND OTHERS (DEACONS OF THE INCORPORATED TRADES OF PERTH) *v.* HUNT AND OTHERS.

Trust—Administration—Application for Power to Sell—Trusts Act 1867, *sec.* 3.

A truster who died in 1810 directed that the residue of his estate should be invested in the public funds till a suitable investment in land in the neighbourhood of the town of Perth should be found, and that the rents and profits of such land when acquired should be applied in the promotion of education in Perth. There was no power of sale. A suitable investment was not found till 1851. In 1881 the trustees, on the representation that it was expedient that the land so purchased should be sold, applied to the Court for authority to carry out a contract of sale into which they had provisionally entered. They suggested no new purchase of land near Perth to which to apply the money, but proposed with part of it to pay off a heritable debt on the property they proposed to sell, and to invest the rest on heritable security. The petition was opposed by a dissenting trustee, but only on the ground that the debt had been illegally entered into, and that the other trustees were not entitled to pay it off out of the trust funds. *Held*, after a report by a man of business in favour of the application, (*rev.* Lord Fraser) that the sale fell to be granted as being expedient and not inconsistent with the purposes of the trust.

Question (*per* Lord Young), Whether the trustees had not power, irrespective of the Trust Acts of 1867, to sell the lands without the necessity of applying to the Court?

William Stewart, of 8 William Street, in the parish of St Marylebone and county of Middlesex, who died in the year 1810, left a last will and settlement in favour of the eight deacons of the incorporated trades of the city or burgh of Perth, in which, after providing for payment of debts and for one special legacy, he directed that the residue and remainder of his estate, consisting for the most part of Irish five per cent. stock, "shall be invested"—"And as to all the rest, residue, and remainder of my estate and effects, I direct that the same shall be invested, or shall remain invested, in the public funds till a proper purchase or purchases in lands can be found in the neighbourhood of Perth, and that when such proper purchase or purchases can be found, the

same shall be laid out in such purchase or purchases, and the rights and title-deeds thereof shall be taken to the said deacons for the time being, as trustees under this my will, and I do direct that until such purchase or purchases be found the interest and profits of the said residue of my estate, and after such purchase or purchases is made the rents and profits thereof, be applied by my said trustees in payment of the expense of the education of such a number of boys of poor and honest parents, burgher tradesmen of Perth, as the said interest or rents and profits may suffice for." The testator then directed that sons of burghers of Perth of the name of Stewart should, if born in Perth and if their parents were deserving, be preferred in the first place; that the age of admission should be not less than seven years; and that the boys educated at the expense of the trust should have their education conducted at a separate school belonging to the trust. The testator also appointed the deacons of the incorporated trades, or any two of them, to be his sole executors.. No power of sale of the lands to be purchased under the provisions of the settlement was contained therein. The deacons of the eight incorporations accepted the office of trustees. Before a suitable investment in lands in the neighbourhood of Perth had been found, the trustees thought it expedient, in consequence of its being announced by the Government that interest on Irish five per cent. Stock was to be reduced to four per cent., to sell these stocks. Thereafter the funds of the trust were invested partly in City of Perth bonds and partly on heritable security, one subject of security being the estate of Glenfoot, near Perth. In 1851 a prior bondholder brought this property to sale, and the trustees purchased it at £655. Previously to this purchase the trustees had at a cost of £180 purchased a site for a school in Mill Street, Perth, on which, partly with the trust funds, but chiefly with funds contributed by the incorporated trades of Perth, they had erected a school building. At the date when this petition was presented, the property in the hands of the trustees consisted of this school site, the Perth bonds, and Glenfoot. The total annual income was less than £70. In 1874 the deceased Alexander Young left to the same body of trustees a sum of which the annual income amounted to £73, 10s. derived from Perth bonds, to be added to the salary of the teacher of Stewart's free school. Mr Young having expressed by his settlement a desire that girls should be admitted to the benefits of the charity, the trustees erected a new classroom for girls, in order to pay for which they borrowed £300 on security of the estate of Glenfoot. Glenfoot was from 1851 to Martinmas 1880 let at a rent of £35 per annum. During the last five years of that period the trustees found it necessary to allow an annual abatement of £5. At Martinmas 1880 Glenfoot was advertised as to be let, but the trustees failed to get any offer for a rent over £25 per annum, and offers at that rent stipulated for repairs on the fences and steading, which would have cost at least £100. In these circumstances the trustees determined to offer the property for sale subject to the approval of the Court, and received an offer to purchase it at £700, with £300 of which sum they proposed to pay off the bond, and the remainder to be invested on heritable security. As a result of this sale they stated that the revenue, which was too small for the necessary expenditure, and had all along required to be supplemented by voluntary contributions from the incorporated trades, would be increased by at least £12 a-year. The trustees therefore presented this application for leave to sell the trust-estate, founding on sec. 3 of the Act 30 and 31 Vict. c. 97, Trusts (Scotland) Act 1867. That section provides that "it shall be competent to the Court of Session on the petition of the trustees under any trust-deed to grant authority to the trustees to do any of the following acts on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof, . . . to sell the trust-estate or any part thereof." The prayer of the petition, after craving authority to sell, was as follows:—"and to give such directions as may seem to your Lordships necessary with respect to the investment by the petitioners of the said sum of £700, or the balance thereof after payment of debt and expenses; or to do further or otherwise in the premises as to your Lordships shall seem proper." To this petition answers were lodged for Colin Anderson Hunt and others, deacon and members of the Hammerman Incorporation, Anderson being as such deacon one of Stewart's trustees, and having dissented from the resolution to present this application to sell. These respondents maintained that Stewart's trustees had acted illegally and *ultra vires* in burdening Glenfoot with a sum borrowed, not for the benefit of Stewart's trust, which was for boys only, but of Young's, which was for girls. They also maintained that the sale of that property entered into provisionally was illegal. They therefore submitted that the property of Glenfoot should not be sold, or, at least, that the illegal loan of £300 should not be paid out of the price, but that the whole price should be re-invested without deductions.

The Lord Ordinary (Fraser) remitted to Mr W. G. Roy, S.S.C., to inquire into the circumstances and report. Mr Roy reported in favour of the prayer of the petition being granted. Thereafter the Lord Ordinary, on 1st June 1881, pronounced an interlocutor finding "that the proposed sale is not expedient for the execution of the trust, and is inconsistent with the intention thereof; therefore refused the petition and decerns."

He added this note:—"William Stewart by his trust-deed directed his trustees to invest the money he bequeathed 'in the public funds till a proper purchase or purchases in lands can be found in the neighbourhood of Perth, and that when such proper purchase or purchases can be found, the same shall be laid out in such purchase or purchases, and the rights and title-deeds thereof shall be taken to the said deacons for the time being as trustees under this my will.'

"It is unnecessary to review the administration of the trustees (as described in the report by Mr Roy) since the trust came into operation. If they were guilty of doing acts which were *ultra vires* (which that report shows they were), the purchase of the lands at Glenfoot of Abernethy certainly was not an act of this character. It was, on the contrary, one which carried out the direct order of the truster to purchase lands in the neighbourhood of Perth. Having purchased these lands the trustees have no power to sell, and

this application is made to the Court upon that footing under the Trusts Act, which requires that the sale shall be proved to the satisfaction of the Court to be 'expedient for the execution of the trust, and not inconsistent with the intention thereof.' The case of *Downie* (10th June 1879, 6 R. 1013) shows that the Court will, upon a case of expediency and when consistent with the main object of the trust, authorise a sale. That case had reference to a trust for the education of children similar to the present one. But the facts as to the expediency of the action and the consistency with the truster's will were very different from what they are in the present case.

"The whole advantage which it is said the trust will obtain by selling the heritable subjects in question—property of the character which the truster directed his money to be invested in—is an increased revenue of £12 a-year. This is calculating too sanguinely in reference to any investment in heritage that could be procured by the price of the subjects when sold, and the acquisition of such a small sum as this does not bring the case within the class making it expedient to authorise a sale.

"The respondents seem to have no objection to the sale provided that the whole £700 be applied for the purposes of the Stewart trust. But this consent on the part of the respondents, even though the condition should be assented to by the petitioners, does not remove from the Court the duty of considering the propriety of the transaction. If unconditional consent had been given by the respondents, the Lord Ordinary would still have been of opinion that the proposal was inexpedient and ought not to be granted. No doubt the land does not seem to be a very profitable source of revenue. But still it is the kind of investment which the truster appointed, and it is not shown that other land could be purchased that would make a better return. The funds of the Institution seem to be at a very low ebb. The land at Glenfoot requires to be fenced. The £300 borrowed over it must be paid for by some one or other, and funds must be raised for these purposes if the institution is to be kept up. The Incorporated Trades of Perth seem to be the natural parties to see that all this is done.

"The respondents are entitled to their expenses; and the Lord Ordinary in finding the petitioners liable, means, not that they shall take the expenses out of the trust-funds, but that they are personally responsible for this proceeding. The presentation of the petition was not an act in the execution of the trust; and the small trust-fund ought not to be diminished by the cost of this abortive proceeding."

The petitioners reclaimed, and argued—The proposed sale was expedient, for it would increase the revenue of the trust. It was not inconsistent with the intention of the trust, but would enable that intention to be better carried out.

At the bar the petitioners obtained leave to delete from the prayer of the petition the words —"and to give such directions as may seem to your Lordships necessary with respect to the investment by the petitioners of the said sum of £700 or the balance thereof after payment of debt and expenses."

The respondents maintained that it was incompetent to pay off the £300 borrowed for the purposes of Young's trust with the price derived from the sale of Glenfoot, which belonged exclusively to the funds of Stewart's trust.

At advising—

Lord Justice-Clerk—I must say I have no sympathy with the attempt here made to make a number of hard working trustees, who are acting gratuitously to the best of their ability for the benefit of the trust, personally responsible. These two trusts are conducted by the incorporated trades of Perth, and it is not stated that any of the funds have been used except for the benefit of the trust. There may have been, indeed, some irregularities committed, but it is out of the question to say it was not within the power of the trustees to purchase Glenfoot. Then a legacy yielding about £75 per annum is left, the object of which is to give to girls as well as boys the benefit of the school. A classroom for girls was built, and to pay for this a sum of £300 was borrowed on the security of Glenfoot. It is now desirable to sell Glenfoot, and a purchaser has been found for it at £700, to be paid on condition of the trustees clearing the record of the £300 bond. I know no reason why we should not sanction the sale. The trust will get a benefit thereby, and I am not disposed to scan very critically the actings of the trustees in such a matter. I propose that we should approve of the sale, and grant the prayer of the petition as now amended.

Lord Young—I am of the same opinion. This is a trust of seventy years' duration now, and it has, so far as we can judge, been discreetly administered. The trustees are the deacons of the incorporated trades of Perth, and the funds have been invested in various ways—part being at one time lent over Glenfoot, and part being invested on City of Perth bonds. In 1851 Glenfoot was sold by a prior bondholder, and the trustees thought the best thing to do was to buy it, and they did so, and have since borrowed £300 on it, which it was almost necessary to do. Now in 1881, thirty years after the purchase, they come here and say it is expedient to sell it. The Lord Ordinary remitted to a man of business to consider the matter, and he agreed with them in their opinion, but one deacon and his incorporation object to the £300 being paid out of the price, because for that they think the trustees are personally responsible, and it is stated to us that they consider that if the trustees are so found liable their fellow corporators will probably not let them be losers but will reimburse them. That is the only objection. I cannot assent to it. But I should further say, that while I think this application is competent under the Trusts Act of 1867, I am also of opinion, as at present advised, that it is a matter for the trustees' own discretion without our authority. I am not prepared to assent to the proposition that the trustees having in 1851 bought the subject of security are thereafter prohibited from selling it. The Lord Ordinary holds that having once got into the hands of charity trustees the property must for ever remain so, and that there is no relief under the Trust Act. I think it is not so, and that in the exercise of the same power as made them purchasers they can turn it back again into money. I think the trustees have acted sensibly and in the interests of the trust

in making this application, and though I am doubtful if our authority is required, I think that the prayer of the petition as amended ought to be granted.

Lord Craighill concurred.

The Lords recalled the Lord Ordinary's interlocutor and granted the prayer of the petition as amended.

Counsel for Petitioner—Trayner—W. C. Smith. Agent—A. Morison, S.S.C.

Counsel for Respondents — Scott. Agents—J. & J. Galletly, S.S.C.

Wednesday, June 22.

SECOND DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

STIRLING CRAWFURD *v.* THE CLYDE NAVIGATION TRUSTEES.

Property—Ferry—Powers of Statutory Trustees—Interdict—Trespass.

Statutory harbour trustees having obtained from a riparian proprietor a strip of ground on the bank of the river under their care for the purposes of their Act, and having thereafter obtained a right of ferry at and near the place at which that ground was situated, established a ferry and landed and embarked passengers at a part of the bank so acquired, between which and any public place the lands of the said proprietor intervened. The proprietor having brought an interdict to have the trustees prevented from landing and embarking passengers at the point in question—*held* that the interdict was wrongly directed against the trustees, and that his true remedy was an interdict against persons found crossing his lands—*diss.* Lord Justice-Clerk, who held (1) that the trustees by their actings were violating the conditions under which they had acquired the complainer's ground; and (2) that they had no right to establish a ferry unless where they could communicate directly with some public place.

By the Act of Parliament 9 and 10 Vict. c. 23 (18th June 1816) and preceding Acts, the Parliamentary Trustees on the river Clyde and Harbour of Glasgow, afterwards called the Clyde Navigation Trustees, were empowered, *inter alia*, to purchase lands for the extension of the harbour of Glasgow and the erection of a new wet-dock at Stobcross. In 1857 William Stuart Stirling Crawfurd of Milton, under the powers contained in a Private Act of Parliament, and on the narrative of that Act and of the Act 9 and 10 Vict. c. 23, entered into a feu-contract with the trustees whereby he sold to them two portions, ascertained by specific measurement and by reference to a plan, of the lands known as Merklands, part of the entailed estate of Milton. These two pieces of land thus sold to the trustees together formed a narrow strip of land running along the north bank of the Clyde, and the feu-disposition was granted "always with and under the following provisions, declarations, and others, viz., that the said second parties and their foresaids shall be bound to appropriate the said two pieces of ground wholly and exclusively to the widening and straighting of the river Clyde, and also shall be bound to erect a substantial embanking or retaining wall along the new brink of the river as delineated on said plan, and uphold and maintain the same at their expense, and shall form and maintain two watering-places, one at the east and another at the west end of said ground disponed in the second place, besides steps at convenient distances in said embanking wall for access to the river, and shall also plant a thorn hedge in lieu of the one partly taken away by the second parties' operations and partly still remaining, and that at such a distance from and parallel with the said retaining wall as may be pointed out by the said first party or his managers, and shall protect said hedge by stob and rail in the usual manner; also declaring that the foresaid ground is hereby disponed to the said second parties for the sole purposes contained in the foresaid Act, 9th Victoria, chapter 23d, and the Acts therein recited, and that no buildings shall be erected thereon of the nature of public works, stores, warehouses, or dwelling-houses."

By the Clyde Navigation Consolidation Act 1858 (9 and 10 Vict. c. 23), whereby the Act of 8 and 9 Vict. c. 23, was, along with other Acts relating to the Clyde navigation dated previously to 1858, repealed, the undertaking of the Trustees of the Clyde Navigation is defined (section 76) to consist of, *inter alia*, "the forming and erecting on both sides of the river of such jetties, banks, walls, sluices, and works, and such fences for making, securing, confining, and maintaining the channel of the river within proper bounds as the trustees shall think necessary . . . the erection, construction, and mooring of such beacons and buoys as may be necessary or expedient for the use and guidance of vessels in the harbour and in the river." By section 114 of the same Act it is provided that the "trustees" (the respondents) "shall be entitled to provide one or more ferry-boats for the convenience of persons passing from one side of the river to another to the east of Marlinford, and to levy such reasonable rates for the use of such boats, and the tear and wear of the works of the trustees, as they shall consider reasonable, not exceeding one halfpenny for each passenger." Merklands lies to the east of Marlinford.

In 1881 Mr Stirling Crawfurd presented a note of suspension and interdict against the Clyde Trustees, in which he craved the Court to "interdict, prohibit, and discharge the said respondents, and all others acting under their orders or authority, from ferrying passengers on the river Clyde to and from the complainer's lands of Merklands, on the north bank of the said river, and landing passengers thereon, or embarking them therefrom, and from establishing or using a ferry on the said river at any point *ex adverso* of the said lands, and from erecting any landing stage, ferry steps, or other accessories for the above purposes upon or *ex adverso* of said lands; and to ordain the said respondents to remove any such landing stage or others which they may have already erected on or *ex adverso* of the said lands." He averred that the respondents had recently without his knowledge or consent erected