randum should be applied exclusively to their purposes, they were willing to undertake that during the subsistence of the lease they would not call up any of the uncalled capital of the company or allow it to be applied to any purposes except the purposes of the tramway lease. If they are willing to give that undertaking, and make that a condition of their resolutions being confirmed, then I am of opinion that all their resolutions ought to be confirmed except the portion of the first resolution to which I have stated an objection which appeared to me, as at present advised, to be unanswerable.

LORD ADAM and LORD M'LAREN concurred.

LORD ADAM stated that the LORD PRESIDENT, who was absent, concurred in the judgment.

The Court pronounced the following interlocutor:—

"Confirm the proposed alteration of the petitioners' memorandum of association except in so far as regards the power to promote and dispose of tramways contained in the 10th article, and in so far as regards the 14th article thereof, but under the condition that the uncalled-up capital should be applied solely to the purposes of the existing lease."

Counsel for the Petitioners — Graham Murray—C. S. Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for the Respondents — Comrie Thomson—Ure. Agents — T. J. Gordon & Falconer, W.S.

Tuesday, March 17.

SECOND DIVISION.

[Sheriff of Argyllshire.

MACGILP *v.* SCHOOL BOARD OF KILCHOMAN.

Process — Appeal — Competency — Schoolmaster's Right to Compensation for Remission of Fees —Local Government (Scotland) Act 1889—(52 *and* 53 *Vict. cap.* 50), *sec.* 86.

The Local Government (Scotland Act 1889), sec. 86, enacts—"If under the provisions of this Act, or of anything made or done in pursuance thereof, any teacher appointed previously to the passing of the Education (Scotland) Act 1872 shall be prejudiced in any right to school fees possessed by him at the passing of this Act, he shall, after the passing of this Act, be entitled to receive from the school board compensation in respect of any loss so sustained by him, and such compensation, failing agreement, may be determined finally by the sheriff, and shall be payable out of the school fund."

A schoolmaster appointed before the date of the Education (Scotland) Act 1872 was entitled to the fees charged for the scholars attending the school. In August 1889 the school board resolved to remit these fees, and to pay a sum as compensation therefor. The schoolmaster repudiated the arrangement, and applied to the sheriff to fix the amount of compensation, and a record was made up between the parties. In the course of the proceedings the Sheriff-Substitute appointed the pursuer to lodge a claim stating details of certain alleged arrears of fees paid and payable to him, and the fees of children who paid in kind. On appeal the Sheriff ordered a proof. The defenders appealed to the Court of Session.

Held that the Court could not interfere with the mode taken by the Sheriff-Substitute to inform himself as to the amount of compensation due, and the appeal *dismissed* as incompetent.

Donald Macgilp was appointed schoolmaster of the parochial school of Kilchoman, Islay, on 27th October 1869. After the passing of the Education (Scotland) Act 1872 the school was under the authority of the school board of the parish. By virtue of his appointment the pursuer was entitled to receive, *inter alia*, payment of the fees exigible for the scholars taught in the school. In August 1890 the school board, in pursuance of the Local Government (Scotland) Act 1889, resolved to remit entirely as from 1st October 1889 the fees in use to be charged for the scholars attending the school. Upon 13th February 1890 the board fixed the compensation to which the teacher was entitled in lieu of school fees at £23, 15s. 8d. per annum.

Macgilp brought an action in the Sheriff Court to have it declared that the amount of compensation due to him should be fixed at £45 sterling per annum.

Upon 1st November 1890 the Sheriff-Substitute (SHAIRP) pronounced this interlocutor—"Appoints the pursuer to lodge in process, within fourteen days, a minute stating in detail the arrears referred to in article 6 of his answers to the defenders' statement of facts, and all arrears due for the five years ending Whitsunday 1889 received up to the date of lodging the minute, with the dates of payment, and the names of the parties from whom received, also the fees of the children who paid in kind."

The pursuer appealed, and upon 4th February 1891 the Sheriff (IRVINE) pronounced this interlocutor—"Having considered the appeal for the pursuer against the interlocutor of the Sheriff-Substitute, dated 1st November 1890, reclaiming petition for the pursuer, answers thereto for the defenders, and whole process, sustains the appeal, Recals the interlocutor appealed against: Allows to the pursuer a proof of his averments, and to the defenders a conjunct probation: Remits to the Sheriff-Substitute to take said proof; meantime reserves all questions of expenses.

"*Note.*—The Sheriff sees nothing either in

the Education (Scotland) Act 1872 (35 and 36 Vict. c. 62), or in the Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50), on both of which statutes the pursuer founds, to bar the competency of this appeal: and Mr Dove Wilson, under the head of appealable interlocutors (3d ed.), p. 318, lays it down that in any ordinary action appeals may be taken either against interlocutory judgments or against a final judgment.

"On the merits of the cause it strongly appears to the Sheriff that the fairest course would be to allow a proof in which the whole facts of the case may be brought before the Court, so that a final decision may, it is hoped, be at once obtained."

The defenders appealed, and argued—The appeal to the Sheriff from the Sheriff-Substitute was incompetent; therefore the defenders had the right to appeal to the Court of Session in order to have the interlocutor pronounced upon an incompetent appeal recalled, under the Act 50 Geo. III. cap. 112. The Court of Session had always jurisdiction to correct a judgment pronounced by an inferior judge in a case where he has no jurisdiction. There was no appeal to the Sheriff on any part of the process, therefore his interlocutor ought to be recalled, and that of the Sheriff-Substitute reverted to. It had been decided that when an Act of Parliament enacted that the decision of the Sheriff of the county was final, an appeal from the Sheriff-Substitute to the Sheriff on a point of procedure was incompetent—*Bone* v. *School Board of Sorn*, March 16, 1886, 13 R. 768; *Fleming* v. *Dickson*, December 19, 1862, 1 Macph. 189; *Leitch* v. *Scottish Legal Burial Society*, October 21, 1870, 9 Macph. 40; *Harrington* v. *Richardson*, January 20, 1854, 16 D. 368.

The respondent argued—The Sheriff was the final judge of this matter under the statute, and this interlocutor was not appealable to the Court of Session. The case of *Bone* was really decisive of the question. There an interlocutor was appealed to the Sheriff which did not determine the merits of the case. The Sheriff, however, although the appeal was incompetent, disposed of the whole matter, and it was held there was therefore no appeal to the Court of Session, as the matter had been finally settled in the Inferior Court. It was not necessary for this case to argue that an appeal to the Sheriff on points of procedure was incompetent, but if he was able to dispose of the whole merits without an appeal to the Court of Session being competent, still more was he able to dispose of a point of procedure. There were *dicta* to the effect that if a case was to be decided in the Sheriff Court, the ordinary modes of procedure were all available to the parties—*Magistrates of Portobello* v. *Magistrates of Edinburgh*, November 9, 1882, 10 R. 130.

At advising—

LORD JUSTICE-CLERK—The arguments which were presented to us raised some difficulty in my mind, but in the view I take of the case, after consultation, these difficulties have disappeared. The Act of 1889, section 86, enacted—"If under the provisions of this Act or of anything made or done in pursuance thereof, any teacher appointed previously to the passing of the Educational (Scotland) Act 1872 shall be prejudiced in any right to school fees possessed by him at the passing of this Act, he shall, after the passing of this Act, be entitled to receive from the school board compensation in respect of any loss so sustained by him, and such compensation failing agreement may be determined finally by the sheriff, and shall be payable out of the school fund." That section appears to me to mean nothing more or less than this, that the sheriff after such procedure as he thinks proper shall determine the amount of compensation to be paid. I think it would be very proper that where any considerable sum is at stake he should make up a record and proceed to deal with the matter as if it was an ordinary Sheriff Court action, if the parties desire it. In my opinion, however, that is not a necessary proceeding; the Sheriff could, if he thought proper, call the parties before him and hear them, and then without any formal proceedings at all settle the question finally.

Therefore I think this appeal is incompetent, because while it was necessary for the Sheriff to acquire information to guide him in awarding compensation, this appeal arises out of something that he had done in the course of getting that information.

The facts are that the Sheriff-Substitute ordered the pursuer to put in a minute stating the particulars of his claim. On appeal the Sheriff recalled this interlocutor and ordered a proof. I do not think, however, that in that state of facts the matter is brought outside the position in which it was placed by the Act. It was not, as I said before, a regular case proceeding in the Sheriff Court, but was merely a convenient means of settling what was the compensation due to the pursuer.

After this question has been finally decided and the amount of compensation fixed by the Sheriff, a question may arise whether an appeal would not be competent to this court, not of course on the amount of compensation, but on the question whether the Sheriff in acting as arbiter to fix the amount of compensation had acted unfairly. On the question whether that would be competent or whether what the Sheriff did, could be interfered with, otherwise than by reduction, I give no decision at present; all that I do say just now is that in my judgment the proceedings cannot competently be reviewed by the present appeal.

LORD YOUNG—I am of the same opinion. The pursuer here is a schoolmaster who claims and indeed is entitled to compensation under the Local Government Act of 1889. The Act provides that the school board and the schoolmaster shall agree as to the amount, but if they do not agree then the Sheriff of the county shall determine what it is to be. When he does

determine the amount, then it is for the parties concerned to say whether it has been well determined or not. Now there is nothing in the case before us to indicate that when the Sheriff does decide the matter both parties will not be quite satisfied with the award. Before he has determined that matter I think it would be out of the question for us to inquire into the regularity of anything that the Sheriff-Substitute may have done in the process of informing himself as to the amount of compensation due. Even in the case of ordinary actions in the Sheriff Court there are some appeals which are competent and some which are not, but if an incompetent appeal has been taken from the Sheriff-Substitute to the Sheriff we do not deal with the matter at once, but wait till the end of the case, and if we think that anything has been done under the alleged incompetent appeal that has had an effect upon the decision, then we can alter it. Here the Sheriff-Substitute has adopted a particular form of process to obtain the information necessary. I do not think that any form of process is prescribed in the Act of Parliament. I think that the Sheriff might get the parties before him in his own room, and after hearing them he could determine the question of the amount of compensation finally. We have no jurisdiction until the matter has been determined by the Sheriff, and indeed only then if the parties complain of any irregularity.

LORD RUTHERFURD CLARK—I agree. I think the proceedings should be dismissed. I think it is an idle and useless appeal.

LORD TRAYNER—I agree with Lord Rutherfurd Clark. I think this is an idle and incompetent appeal. The Sheriff is the final judge in the matter, and to ask us to interfere with the way in which the Sheriff takes to get the information he requires for his decision is out of the question.

The Court dismissed the appeal.

Counsel for the Appellants—M'Kechnie—G. Burnet. Agents—D. Maclachlan, S.S.C.

Counsel for the Respondent—D. Robertson—G. Stewart. Agents M'Neill & Syme, W.S.

Tuesday, March 17.

SECOND DIVISION.

(WHOLE COURT.)

HALL AND OTHERS *v.* HALL.

Succession—Testament—Vesting—Conditio si sine liberis decesserit.

A testator, who was the only child of her mother's first marriage, conveyed her whole estate to her mother and stepfather in conjunct fee and liferent, for her or his liferent use allenarly, and to the children of their marriage in fee, with power to the liferenters or the survivor to divide the estate among the children. All the children of the marriage, six in number, were born at the date of the settlement.

The testator was predeceased by the liferenters and four of their children. In a question between the two survivors and the daughter of a predeceaser—*held* (*diss.* Lord Justice-Clerk and Lord Young) that the *conditio si sine liberis decesserit* did not apply, and that the daughter of the predeceaser was not entitled to one-third of the estate of the truster under the settlement.

Williamina Anne Scott of Campfield died at Aberdeen on 23rd October 1889, leaving a disposition and settlement dated 14th June 1844. Miss Scott was the only child of the first marriage of her mother, who at that time was married to Mr Harvey Hall, her second husband.

The settlement was in these terms—"I, . . . for the love, favour, and affection I have for my dear mother Mrs Anne Hall, now the wife of Mr Harvey Hall, do therefore, and for other good causes and considerations, give, grant, and dispone, to and in favour of the said Mrs Anne Hall, my mother, and the said Harvey Hall, my stepfather, in conjunct fee and liferent, and to the longest liver in liferent, but for her or his liferent use allenarly, and to the children of their marriage, equally between them in fee," certain specified lands; "and I do hereby nominate and appoint the said Mrs Anne Hall and Harvey Hall jointly, or the survivor of them, to be my sole executors or executor and intromitters with my moveable means and estate; but providing always and declaring, as it is hereby specially provided and declared, that, failing any more particular arrangement by myself, it shall be in the power of the said Mrs Anne Hall and Harvey Hall, or the survivor, by any writing under their hand, to transfer, divide, and apportion my lands and estate of Campfield above disponed amongst the children of their marriage, in such way and manner, and according to such proportions, as they or the survivor shall judge proper."

In 1844 Miss Scott was twenty-one years of age, and there were six children alive of her mother's second marriage, the eldest twelve and the youngest two years old; no other children were born of the marriage. Mr and Mrs Harvey Hall and four of the children predeceased the testator. One of the children, John Robert Hall, died 26th October 1885 and left one child, a daughter, Anne Margaret Hall. On Miss Scott's death this daughter claimed to take her father's share in his half-sister's succession. It was agreed that for the purposes of this case no notice should be taken of the fact that the testatrix survived John Robert Hall for four years without altering her settlement.

A special case was accordingly presented by (1) the two surviving children, Alexander Harvey Hall and Mrs Lancey, and