I agree with your Lordship that we should not be warranted in accepting that view of the facts of the case after the fuller discussion and exposition of these points that we have heard. I think it is natural in such cases to consider first what would be the professional usage or the natural course of the transaction as between man and man. When two persons are entering into a commercial agreement, or an agreement by which some benefit is exchanged against another, then the ordinary course of business is that the agent of the one party draws the deed and the agent of the other revises it, so that each person should have the benefit of professional assistance directed towards his own interest exclusively. But, on the contrary, if a person is going to make a gift to a relative or friend it is not in accordance with the ordinary practice, nor would it occur to one as a natural and reasonable measure, that there should be two agents employed, or that anyone should act at all as professional adviser of the recipient of the benefit. In such a case the person making the gift employs his agent to prepare the deed of gift, as in the case of a testator who employs his own agent to make his will, and never thinks of communicating with or intimating his intention to his legatees. If a father makes a settlement on his daughter in the event of her marriage, supposing that it is not to be put into her contract with her husband, but to benefit the daughter, her father would never think of asking her to name an agent in the preparation of a deed. Or supposing the father to give instructions to an agent, would the agent ever imagine that he had a claim against the daughter because the father had told her of his intentions?

I am putting here illustrations which of course admit of being only answered in one way, but they are really not very remote from the case in hand, because I see no evidence here of any communication between Paterson and his nephew on the subject of agency which would be different from what would take place between a father and his son or daughter when making a gift. Paterson told Tully of his intention, and mentioned that it would be necessary to have the titles revised by Mr Ingram, and Tully assented to this. But in order to make an agent responsible it is not enough that as between the donor and the donee there may be an assent to employment. It is necessary to show that he was employed on the authority of the donee. On that point I agree with your Lordship that the case has entirely failed, and I therefore am of opinion that the Lord Ordinary's interlocutor should be recalled and the defenders assoilzied from the conclusions of the action.

LORD KINNEAR—I agree with your Lordship, and I have nothing to add to what has been said.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for the Pursuer—C. S. Dickson—Wilson. Agents—Smith & Mason, S.S.C.

Counsel for the Defender Mackenzie—D.-F. Balfour, Q.C.—Chisholm. Agent—D. Milne, S.S.C.

Counsel for the Defender Mrs Ingram—H. Johnston—Sym. Agent—P. Adair, S.S.C.

Tuesday, November 3.

FIRST DIVISION.

[Sheriff of Stirling, Dumbarton, and Clackmannan.

HILLHOUSE *v.* WALKER.

Process — Appeal — Competency — Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40—*A. S., July* 11, 1828, *sec.* 5.

An appeal for jury trial from a Sheriff Court having been sent to the roll, the respondent, when the case came out for hearing, objected to the competency on the ground that the appeal had not been taken within fifteen days of the interlocutor allowing a proof.

Held (following *Shirra* v. *Robertson*, June 7, 1873, 11 Macph. 660) that the Court were bound to determine the question of competency although it had not been raised in the Single Bills, and the appeal *dismissed.*

Robert Hillhouse brought an action in the Sheriff Court at Dumbarton against William Walker, concluding (1) for interdict against the defender collecting from his (the pursuer's) customers or the general public any empty aerated water bottles bearing his name or registered trade-mark; (2) for payment of £200 as the estimated loss from the defender's actings.

The pursuer averred that the bottles which he made use of in his business were of a superior quality, specially manufactured for himself, moulded with a private registered trade-mark, and that they were not sold to customers but only lent to be returned empty. He further averred that the defender through his vanmen had collected and appropriated a large number of these bottles.

The defender admitted that in the course of his business he had uplifted bottles not supplied by himself, including bottles belonging to the pursuer, but he averred that it was the custom of trade to uplift in exchange for full bottles whatever empty ones were offered.

On 16th February 1891 the Sheriff-Substitute (GEBBIE) granted interim interdict.

"*Note.*—The pursuer and defender are manufacturers of aerated waters which they supply to the trade. The pursuer uses bottles of his own, impressed with his trade-mark, and holds a certificate of his trade-mark from the Patent Office, Trade-Marks Branch, dated 11th August 1889. In supplying the trade the pursuer lends his bottles so marked, which he afterwards collects from his customers, and the com-

plaint is, that the defender in prosecuting his business collects the pursuer's bottles and uses them in his trade. This, I think, the defender has no legal right to do, and the pursuer is entitled to be protected against it by interdict. It may be the customers have no right to give up the pursuer's bottles, but equally the defender is under no duty or obligation to receive them. A trade-mark in the sense of the Act is a right of property, and may be protected by interdict or action of damages for infringement. Fraud need not be averred in order to obtain protection for such trade-mark—*Singer Machine Manufacturers*, 1877, L.R., 3 App. Cas. 376."

On 3rd April 1891 the Sheriff-Substitute pronounced the following interlocutor:—"Ordains the defender to deliver up to the pursuer within fourteen days from this date all bottles in the custody of the defender which are the property of the pursuer, which bear his registered trade-mark, or are impressed with his name or that of his firm: And *quoad ultra* allows the pursuer a proof of the damage sustained through the use and retention of the pursuer's property by the defender, and to the defender a conjunct probation, &c., and decerns.

"*Note.*—After discussion interim interdict was granted, and no appeal has been taken. If the view that was then adopted be a correct one, it would seem to follow that perpetual interdict must also be granted. It is said that usage of trade sanctioned and justified what the defender did. I cannot think so. The defender admits taking, using, and having in his possession a number of the pursuer's bottles bearing his trade-mark. Usage of trade must be consistent with law. No custom of trade can justify the appropriation of another man's property, and therefore it would be out of the question to allow a proof upon such a matter. Neither do I think that the order to deliver up the pursuer's bottles should be contingent or conditional upon the pursuer delivering an equal number of the defender's bottles, or bottles belonging to others. The pursuer does not admit he has any of the defender's bottles in his possession, and if the defender believes, and can prove he has, he must vindicate his right in an independent action. It may very well be that if there has been an inveterate practice in the trade, in which the pursuer has himself shared, of indiscriminately using bottles belonging to others than the users, an element may be introduced for consideration in dealing with the matter of damages; but whatever effect that may have, I am clearly of opinion the pursuer is quite within his right in seeking to protect his trade-mark and recover possession of property, and that usage of trade is an irrelevant defence in the circumstances here disclosed."

On 9th April the defender appealed to the Sheriff (BLAIR), who on 19th June 1891 dismissed the appeal, of new granted perpetual interdict, and remitted to the Sheriff-Substitute to proceed with the case.

"*Note.*—[*After stating the circumstances*]—The Sheriff thinks that in so acting the defender is violating the pursuer's rights as secured to him and protected to him by the Patents, Designs, and Trade-Marks Act 1883 (46 and 47 Vict. c. 57), and the Merchandise Marks Act 1887 (50 and 51 Vict. c. 28), and that the pursuer is therefore entitled to the verdict he craves. The defender pleads an alleged custom of trade; but in 1887 in a case—*Hillhouse* v. *Kettle & Company*—it was held in the Sheriff Court in Glasgow that no such custom existed, and the judgment was acquiesced in, and the now recent case of *Wood* v. *Burgess*, November 26, 1889, 24 L.B.D. 162, is also adverse to the defender."

On 23rd June the Sheriff-Substitute fixed Wednesday 15th July as a new diet for proceeding with the proof allowed by interlocutor of 3rd April.

The defender appealed to the Court of Session on 7th July 1891 for trial by jury under section 40 of the Judicature Act, in terms of section 5 of the Act of Sederunt 11th July 1828—"Section 5. Whereas it is enacted by section 40 (of the Judicature Act) that in all cases originating in the inferior courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof shall be pronounced . . . it shall be competent to advocate such cause to the Court of Session, it is enacted and declared . . . that if . . . neither party within fifteen days in the ordinary case, and in causes before the Courts of Orkney and Shetland within thirty days after the date of such interlocutor allowing a proof, shall intimate in the inferior court the passing of a bill of advocation, such proof may immediately thereafter effectually proceed in the inferior court; . . . and if within these periods respectively no intimation shall be made of any such bill of advocation, the proof shall then proceed, and the bill, if such have been presented, together with the passing thereof, shall be held to fall as if such bill had never been presented."

On the case appearing in the Single Bills no objection was stated to the competency of the appeal, and an order for issues was taken.

When the case was put out for hearing in the Summar Roll, the respondent objected to the competency of the appeal upon the ground that the defender had failed, in terms of section 5 of the Act of Sederunt, to appeal within fifteen days of the interlocutor allowing proof, whether the days were held to run from the date of the Sheriff-Substitute's interlocutor of 3rd April or of that of the Sheriff of 19th June—*Davidson* v. *Davidson's Executors*, July 7, 1891, 18 R. 1069; *Kinnes* v. *Fleming*, January 15, 1881, 8 R. 386; *Williams* v. *Watt & Wilson*, May 28, 1889, 16 R. 687. It was said that the objection came too late, as it ought to have been stated in the Single Bills. In *Ross* v. *Brims*, March 14, 1878, 15 S.L.R. 438, however, the Court *ex proprio motu* took up a similar objection at this stage—*Shirra* v. *Robertson*, June 7, 1873, 11 Macph. 660, 45 Scot. Jur. 412.

Argued for the defender—(1) The objec-

tion came too late. Like any other objection to a step of procedure as not being conform to Acts of Sederunt, it must be taken in the Single Bills, otherwise the party making it will be held to have waived it. But (2) the judgment of 19th June, in which the Sheriff declared the interdict perpetual, was really a judgment disposing "of the whole subject-matter of the cause" in the sense of section 53 of the Court of Session Act of 1868 (31 and 32 Vict. c. 100). By it the real question between the parties, viz., as to usage of trade, had been decided. Under section 68 of the Act the defender had six months to appeal. The subsequent interlocutor pronounced by the Sheriff-Substitute on 23rd June fell to be regarded *pro non scripto*. It merely referred back to the interlocutor of April 3rd allowing proof of the damage sustained by the pursuer.

At advising—

LORD PRESIDENT—The last point which was argued to us for the appellant is completely untenable. So long as there is a conclusion standing in the summons for £200 which is insisted in by the pursuer, and regarding which the parties have joined issue, it is impossible to say that the merits are exhausted by an interlocutor which so far from disposing of that pecuniary conclusion prescribes further procedure for its determination.

With regard to the appealability of the interlocutor allowing a proof, I think all the points raised are concluded by authority. Whether the fifteen days are to be computed from the 3rd of April, the date of the Sheriff-Substitute's interlocutor which allowed the proof, or from the 19th of June, the date of the interlocutor by which the allowance of proof was affirmed by the Sheriff-Principal, the appeal comes too late, and the case of *Davidson*, to which we were referred, is a decision in point.

It has been pointed out that this objection to the competency comes at an inappropriate stage. Here again I am bound to say that I cannot get over the case of *Shirra* v. *Robertson*, in which what turned out to be an incompetent appeal was sent by interlocutor to the roll, and only objected to when the case came out for hearing. The Court held that they were bound to determine the question of competency when that was raised, even when this was only done at the stage at which the merits were to be discussed.

I think that we have here to do with an appeal which arises *in pari casu* with that in the case of *Shirra*, and that we must follow its authority all the more, as I observe that the Lord President delivered the judgment of the Court after consultation with the Judges of the other Division.

I think, therefore, that we ought to sustain the objections to the competency of this appeal.

LORD ADAM concurred.

LORD M'LAREN—I agree with your Lordship that under the authority of the case of *Shirra* this appeal is incompetent. I should like, however, to add that I could not regard the circumstances of that case as constituting a precedent for extending the principle there applied to all other cases. There are undoubtedly conditions of procedure depending on the provisions of Acts of Sederunt which may be waived by parties, especially with reference to the time of lodging of papers, and according to our practice such conditions the Court will not seek to enforce if parties are agreed in dispensing with them.

As a general rule, when objection is to be taken to a step of procedure as not being taken within the time prescribed by an Act of Sederunt, the objection ought to be taken *in limine*. If it is not taken when the case appears in the Single Bills, the objection may be held to be waived, so that it cannot be revived after the case has been sent to the roll. That principle has not been applied to the case of appeals from Sheriff Courts, and it is desirable that we should not disturb the existing rule of practice.

If the point were open, I must say I cannot see why parties should not be allowed if they please to waive difficulties of the kind, or why if a respondent has not discovered that he is injured by such an informality, he should be treated as if he were injured by it when the case comes on for hearing on the merits.

LORD KINNEAR—I concur with your Lordship.

The Court sustained the objection to the competency of the appeal.

Counsel for Appellant — J. C. Watt. Agents—Mackenzie & Black, W.S.

Counsel for Respondent — M'Kechnie—Shaw. Agents—Carmichael & Millar, W.S.

Friday, November 13.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

WALKER (PATERSON'S TRUSTEE) *v.* COYLE AND OTHERS.

Bankruptcy—Lease — Illegal Preference — Act 1696, *c.* 5.

By agreements purporting to be "minutes of lease," entered into in 1879 and 1880, the trustees of J. P. "let" to J. S. P. certain premises, and the pawnbroking stock therein, J. S. P. being bound to pay a rent of a fixed amount for the premises, and 5 per cent. on the value of the stock handed over to him. It was provided that J. S. P. should keep books showing his intromissions with the business, and that in the event of the stock falling below the value at which it had been handed over to him, the trustees should have a right to enter into possession of the premises and stock, and