not a final judgment, but merely an interlocutor allowing a limited proof. Such an interlocutor was not appealable—*Shirra* v. *Robertson*, June 7, 1873, 11 Macph. 660; *Wilson* v. *Brakenridge*, March 15, 1888, 15 R. 587.

Argued for the defender—The appeal was competent under section 40 of the Judicature Act (Court of Session Act 1825), and section 73 of the Court of Session Act 1868. The cases quoted on the other side—*Shirra* v. *Robertson* (*supra*), and *Wilson* v. *Brakenridge* (*supra*), were decisions on the Sheriff Court Act 1853, section 24, and did not decide the competency of appeal under section 40 of the Judicature Act. The observations in *Shirra* as to the appeal being incompetent under the Judicature Act were entirely *obiter*. The case of the defender here was that the Sheriff was wrong in limiting the proof to writ, inasmuch as the defender was entitled to a proof *prout de jure* of his averments as to the pursuers being personally barred by their knowledge of the lease, and as to the ish of the lease having been rendered definite by oral agreement followed by *rei interventus*. That being so, the case came directly within the principle laid down and followed in *Robertson* v. *Earl of Dudley*, July 13, 1875, 2 R. 935, *per* Lord President Inglis at p. 937. If the defender acted on the allowance of proof granted by the Sheriff, it might be held that he had acquiesced in the restriction of the mode of proof, and on the principle laid down in *Robertson* (*supra*) it was the duty of this Court to decide whether the Sheriff was right in his limitation of the proof.

LORD JUSTICE-CLERK—I have no difficulty in holding that this appeal is incompetent. Mr Irvine frankly admitted that he had no case except under the provisions of section 40 of the Judicature Act. I think that this appeal is practically in the same position as the appeal in *Shirra* v. *Robertson*. The only difference is that in *Shirra* the proof was limited to writ or oath, while here, the pursuers being a limited company, the proof is limited to writ, but practically the two cases are identical. I can see no ground for holding that such an interlocutor is appealable for jury trial under section 40 of the Judicature Act. I agree with the Lord President in *Shirra's* case where he says that "all the authorities are against that view." I therefore move your Lordships to refuse this appeal as incompetent.

LORD YOUNG—It is not contended that this is a final interlocutor; the competency of the appeal is rested on this sentence in the interlocutor—"Allows the defender a proof by writ of the lease for three years averred in answer 10 of the defences." Now, I do not see why the defender appealed against that interlocutor, and I can see no competency in the appeal. If the defender has proof by writ, then he can produce it; if he has none, then he can say that he has none, and the Sheriff, if he thinks that no other mode of proof is competent, will decide the case on the footing that the defender has no proof—that is to say, he will decide the case finally, and that final decision can be appealed to this Court if the defender thinks fit to do so. I assume that the Sheriff is of opinion that the only competent proof is proof by writ, and that in the absence of such proof he will decide against the defender. By appealing against that decision the defender can raise the question whether the Sheriff was right in thus limiting the mode of proof, but I can see neither reason nor competency in raising that question now.

LORD TRAYNER—I agree in thinking that this appeal is incompetent. I think the question is ruled by authority. I appreciate the difficulty of the appellant. On 10th May 1901 the Sheriff-Substitute allowed the appellant a proof by writ of his averment of a lease for three years. Now, I quite see that the appellant if he proceeded to act on that allowance might be held to have acquiesced in that restriction of the mode of proof, but if he felt the danger of that, and doubted his ability to support his defence by writ, his proper course was to decline to proceed in terms of the Sheriff-Substitute's interlocutor, and the Sheriff-Substitute would then decide the case against him. That would be a final interlocutor, which if appealed to this Court would bring up all prior interlocutors, including, of course, the interlocutor against which this appeal is brought.

LORD MONCREIFF was absent.

The Court dismissed the appeal as incompetent.

Counsel for the Pursuers and Respondents—Graham Stewart—Lyon Mackenzie. Agents—M'Neill & Syme, S.S.C.

Counsel for the Defender and Appellant—Salvesen, K.C.—Irvine. Agents—Dove, Lockhart, & Smart, S.S.C.

Wednesday, July 10.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

BRICKMANN'S TRUSTEE *v.* COMMERCIAL BANK.

Bankruptcy — Sequestration — Valuation and Deduction of Securities—Security over Property Held on Joint-Account — Bill of Exchange—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 65 *and* 66.

Bills drawn by A and accepted by B were discounted by a bank, and delivery-orders for certain parcels of whisky, standing in the joint names of A and B, were assigned to the bank in security thereof. In a letter sent with the bills A stated that the whisky was held on joint-account by B and himself, and that it was to be held by the bank

in security of that specific transaction only. On the bankruptcy of A during the currency of the bills the bank claimed a ranking for the whole amount thereof without deducting the value of their security over the whisky. This claim the trustee disallowed. In an appeal, *held* that the bank were not bound to deduct the value of the security either at common law or under the provisions of section 65 of the Bankruptcy Act 1856; that the trustee was not entitled to value and deduct under section 66; and that the bank were consequently entitled to the ranking claimed.

In July 1899 Messrs F. W. & O. Brickmann, distillers, Leith, applied to the Commercial Bank to discount certain bills of exchange amounting to £5347, 9s. 7d. drawn by them upon Mr Peter Dawson, distiller in Glasgow, and accepted by him payable in London or at six months' date. At the same time Messrs Brickmann wrote the following letter to the bank:—"Dear Sir,—We beg to enclose herewith bills drawn by us on Mr Peter Dawson, Glasgow, for £5347, 9s. 7d., and due 13th January 1900. These bills cover goods held by Mr Dawson and ourselves on joint-account. We wish these bills discounted, and we enclose herewith a note of the whiskies held with delivery-orders in the bank's favour against the discount. As we have said, the whisky is held on joint-account, and the delivery-orders will therefore be held by the bank as a security for this specific transaction only, and be transferred or returned to the party taking up the bills." The Commercial Bank discounted the bills, which were duly indorsed and handed to them by Messrs Brickmann.

The delivery-orders referred to in the above letter, which were signed by Messrs Brickmann & Dawson, and related to various parcels of whisky belonging to Messrs Brickmann & Dawson, and held by them on joint account, were duly sent, and were intimated by the bank to the custodiers of the whisky, and warrants therefor in the bank's name were obtained.

On 5th October 1899 the estates of Messrs Brickmann, and of the individual partners of that firm, were sequestrated and Mr J. A. Robertson Durham, C.A., was appointed trustee.

The Commercial Bank claimed to be ranked in the sequestration as holders of the bills above-mentioned for the sum of £5287, being the amount of the said bills after deduction of interest.

The trustee rejected this claim to the extent of £4535, 13s. 5d., being the value of the whisky for which the bank held delivery-orders. To his deliverance he appended the following note:—The three bills dated 10th July 1899 at six months' date, due 13th January 1900, drawn by the bankrupts upon and accepted by Peter Dawson, 82 Great Clyde Street, Glasgow, for £2000, £2000, and £1347, 9s. 7d., together £5347, 9s. 7d. are, as is well-known to the claimants, bills drawn in connection with a speculation in whisky which the bankrupts and Peter Dawson had purchased with the view of selling at a profit. The bank, in security of the bills which they discounted, insisted upon getting delivery of the whisky to which they relate, and at the date of Messrs Brickmann's sequestration the bank held the whisky in security of the bills. The whisky in question belonged to the estate of the bankrupts, being held by them on joint-account along with Peter Dawson, and the claimants were therefore bound to value and deduct. Alternatively, the joint-adventure was a partnership, and by the 66th section of the Bankruptcy Act, when a creditor claims upon the estate of a partner of a company in respect of a debt due by such company, the trustee on the estate of such partner shall, before ranking such creditor, put a valuation on the estate of the company, and deduct from the claim of such creditor such estimated value, and rank and pay to him a dividend only on the balance. Under that section the trustee puts the value of £4509, 6s. 11d. upon the whisky held in security, and rejects the claim to that extent."

Against this deliverance the Commercial Bank appealed.

They pleaded, *inter alia*—"(1) The appellants not having received any securities belonging to the said firm of F. W. & O. Brickmann, they are entitled to rank on the estates of the said firm and individual partners thereof in terms of their claim. (2) The securities held by the appellants againsts advance to the said firm of F. W. & O. Brickmann, not having been the property of the said firm at the date of sequestration, the appellants are entitled to rank for the full amount of those advances. (3) The appellants being creditors of the said firm of F. W. & O. Brickmann in the amount claimed for, and the whole amount thereof having been due at the date of sequestration, they are entitled to be ranked in terms of their claim. (4) In any event, the appellants are only bound to value one-half of the said securities, and to deduct the value thereof from their claim."

The trustee pleaded, *inter alia*—"(5) The appellants' claim being a claim on the estate of one partner of a joint-adventure in respect of a joint-adventure debt, the respondent is entitled to value and deduct the estate of the joint-adventure before ranking them, and the appeal should be dismissed with expenses. (6) Alternatively, the securities held by the appellants being securities over part of the estate of the bankrupts, the appellants were bound to value and deduct the same before ranking, and as they refused to do so their appeal should be dismissed with expenses."

On 7th May 1901 the Sheriff-Substitute (HENDERSON) pronounced the following interlocutor:—"The Sheriff-Substitute having heard the agent for the appellants and counsel for the trustee, and having considered the note of appeal, the minutes for the parties respectively, productions, and whole proceedings, Sustains the appeal: Finds that the appellants are entitled to be ranked as creditors in terms of their claim without valuing and deducting the

price of the whisky in question: Ordains the trustee to rank them accordingly: Finds the appellants entitled to the expenses of the appeal," &c.

Note.—"I have come to be of opinion that the decisions in the cases of *British Linen Co.* v. *Gourlay*, March 13, 1877, 4 R. 651; and *Royal Bank* v. *Millar & Company's Trustee*, February 28, 1882, 9 R. 679, which were relied on by the agent for the appellants, rule this case, and that the price of the whisky, the delivery-orders for which are in favour of the appellants, is not held by them as a security over any part of the estate of the bankrupts.

"Looking to the terms of the decisions to which I have referred, it seems to me that the fact that the bankrupts may have a possible interest in whatever surplus might arise out of the transactions does not make the adventure on joint-account with a wholly independent third party (Mr Dawson) a part of their estates as provided by section 65 of the Bankruptcy Act 1856.

"It cannot on the face even of the trustee's own statement be maintained that the whisky was in the actual possession or under the undivided control of the bankrupts, and therefore it is much in the position of the goods and securities dealt with in the cited cases."

The Bankruptcy (Scotland) Act 1856 enacts, section 65—"To entitle any creditor who holds a security over any part of the estate of the bankrupt to be ranked in order to draw a dividend, he shall on oath put a specified value on such security, and deduct such value from his debt and specify the balance." Section 66—"When a creditor claims on the estate of the partner of a company in respect of a debt due by such company, the trustee on the estate of such partner shall, before ranking such creditor, put a valuation on the estate of the company, and deduct from the claim of such creditor such estimated value, and rank and pay to him a dividend on the balance."

Brickmanns' trustee appealed to the Court of Session.

Argued for the appellant — Admitting that the Sheriff-Substitute was right in so far as he held that the whisky was not part of the estate of the bankrupt, and therefore that the bank was not bound to value and deduct their security under the provisions of section 65 of the Bankruptcy Act 1856 (*quoted supra*), the trustee's deliverance was justified under the provisions of section 66 (*quoted supra*). The whisky was the property of a joint adventure, and the obligation on the bill was a debt for which that joint adventure was liable, and the bank was therefore in the position of a creditor claiming on the estate of the partner of a company for a company debt. The trustee was therefore entitled to deduct the value of the estate of the joint adventure before ranking the creditor on the estate of one of the partners to it. There was no valid distinction between a partnership and a joint adventure in such questions—Bell Comm. (M'L. ed.) ii. 539; *British Linen Company* v. *Gourlay*, March 13, 1877, 4 R. 651. Alternatively, at common law the trustee in bankruptcy, as coming in place of the bankrupt, was entitled to offer to the bank only the balance of the debt under deduction of the value of the security. There could be no doubt that Brickmanns would have been entitled to insist on the security being realised and the transaction closed on payment of any balance that might remain, and the trustee had the same right.

Argued for the respondent—If there was a joint adventure in this case it was not a "company" within the meaning of section 66 of the Bankruptcy Act. The sections relating to valuation and deduction of securities were strictly construed—*British Linen Company* v. *Gourlay, ut supra*; *University of Glasgow* v. *Yuill's Trustees*, February 10, 1882, 9 R. 643; *Royal Bank* v. *Purdom*, October 26, 1877, 15 S.L.R. 13; *Royal Bank* v. *Millar & Company's Trustee*, February 28. 1882, 9 R. 679. But this was not a case of a joint adventure, but the ordinary case of the joint liability of the drawer and acceptor to the holder of a bill. To such a case section 66 of the Bankruptcy Act had no application, and the holder was entitled to rank for the full amount of the bill on the estate of either or both obligants, subject to the limitation that he could not obtain by any ranking more than 20s. in the £. The argument on common law was based on a fallacy. It was not disputed that Brickmanns could have satisfied the bank's claim by arranging for the realisation of the whisky and payment of any balance. So could the trustee. But the trustee did not propose to do so, he only offered a dividend on the balance, which was a very different matter.

LORD KINNEAR—I think the judgment of the Sheriff-Substitute is right, and I do not understand that it is disputed that it is right if the only question is that which he has in terms disposed of; that is to say, whether the respondents are bound under section 65 of the Bankruptcy Act to value and deduct their security as a security over the estate of the bankrupts. The appellant's counsel have explicitly conceded that this whisky did not form part of the bankrupts' estate, and therefore the trustee does not claim that it should be valued and deducted under section 65, but puts forward the alternative claim that it should be deducted under section 66 as a security on the estate of a company of which the bankrupt was a partner. Now, section 66 is in the following terms—"When the creditor claims on the estate of a partner of a company in respect of a debt due by such company, the trustee on the estate of such partner shall, before ranking such creditor, put a valuation on the estate of the company, and deduct from the claim of such creditor such estimated value, and rank and pay to him a dividend only on the balance." I cannot think it doubtful that the case the Legislature intended to meet by that section was that of an insolvent and sequestrated partner of an insolvent and sequestrated company, because if the company were solvent

it would be able to pay the claim in full, and the creditor would have neither title nor interest to ask for a ranking on the estate of an individual partner. The sole purpose of the section was to give effect to a general rule which was established long before the Bankruptcy Act of 1856, namely, that in bankruptcy no claim could be made on the separate estate of a partner of a company for a company debt except for the balance which remained after deduction of all that could be drawn from the company's estate. The question therefore is, whether there are any grounds for holding that this case falls within the provisions of section 66, and I confess I can see none, and cannot see here any claim on the estate of the partner of a company for a company debt. It is said that the facts indicate a joint adventure, to which the bankrupt and another person who is not said to be insolvent were parties. But I cannot see any evidence of a joint adventure. In the first place, it is to be observed that this claim of the bank is not a claim upon a joint adventure, or upon one of two joint adventurers, but it is a claim to enforce the direct liability of the indorser of a bill, who having discounted the bill and received the proceeds, has pledged certain property in security to the indorsee. The claim is clearly on the bill, and is one which could undoubtedly be enforced against the drawer or the indorser of the bill. I cannot see that it has been established that the subjects pledged for the bill were the property of any co-partnery or of any joint-adventure. It may be that they were the common property of the acceptor and the indorser of the bill, but that is a totally different matter, and does not impose any necessity to constitute the debt against a company or co-partnery. For these reasons I am of opinion that the respondent has failed to show that section 66 of the Bankruptcy Act is in any way applicable to the case.

There remains the argument founded on the nature of the transaction between the drawer and indorser of the bill on the one hand and the Commercial Bank on the other. By that transaction the bank was to hold the whisky for that specific transaction only, and was to restore it on the bills being taken up. Then it is said that the trustee in bankruptcy, standing in the place of the bankrupt, is entitled to come in and maintain his right to delivery of the whisky on payment of the bills. I think it is not doubtful that he has that right, and that if he pays the bills the bank must deliver the whisky pledged for them. If there is anything clear in the law of pledge it is that the pledger is entitled on payment of the debt to recover the subjects pledged. But the trustee does not propose to pay the debt, only to pay a dividend on it, and the obligation to restore the pledge only arises on payment of the debt and not on payment of part of it. If it were otherwise, a lender would have very little interest to take a security. The notion that a trustee in bankruptcy is entitled to delivery of a pledge on payment of a dividend which would not have enabled the borrower, in whose shoes he stands, to obtain such delivery, is entirely inconsistent both with law and good sense.

I should only add that it is clear that the creditor cannot by any means of ranking obtain more than full payment of his debt. If it were shown that the bank in the present case proposed to obtain more than full payment, that might be a reason for rejecting their claim. But there is no ground stated in the papers before us for such a supposition, and of course if they did ultimately receive more than their full debt they would be bound to account for the surplus.

LORD ADAM and LORD KINCAIRNEY concurred.

LORD PRESIDENT and LORD M'LAREN were absent.

The Court pronounced this interlocutor:—

"Refuse the Appeal; Find in terms of the findings contained in the interlocutor of the Sheriff-Substitute, dated 7th May 1901, Affirm the same, and of new decern in terms thereof: Find the respondents entitled to the expenses of the appeal," &c.

Counsel for the Appellant — Jameson, K.C. — T. B. Morison. Agents — Millar, Robson, & M'Lean, W.S.

Counsel for the Respondents—Younger—Graham Stewart, Agent—W. Kinniburgh Morton, S.S.C.

Wednesday, July 10.

FIRST DIVISION.

[Dean of Guild Court, Musselburgh.

DOWNIE *v.* FRASER.

(*Ante*, p. 639.)

Police — Burgh — Dean of Guild—Fitness of House for Occupation—Certificate of Burgh Surveyor—Occupation of House—Permission to Occupy — Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 180.

By section 180 of the Burgh Police (Scotland) Act 1892 it is provided, *inter alia*, that every owner of a house or building who shall "permit such house or building or altered building to be occupied" before he has obtained a certificate from the Burgh Surveyor, shall be liable to a penalty.

An owner of certain houses in a tenement, before he had obtained the certificate required by the Act, gave the keys of the houses to his tenants and allowed them to put in their furniture with a view to their occupying the houses, but told them that they must not live in them until the certificate had been obtained. *Held* (1) that it was a question of circumstances in each case whether the mode of use allowed to a