competency of the action, and in my opinion their objection is well founded.

The debt due to the objectors has been ascertained in the most formal manner—viz., by the decree of this Court. The raiser has no defence against their claim, nor indeed does he offer any. His case is simply that he is not in safety to pay what the Court has ordered him to pay by reason of the arrestments and the furthcoming.

In my opinion nothing can be interposed between the objectors and implement of the decree save a claim made under the decree itself, as, for instance, under arrestments used by creditors of the objectors. To hold otherwise would be to set aside the decree; and to sustain this multiplepoinding is to hold that it is possible for the Sheriff to deprive the objectors of the benefit of their decree, and to assign the money due under the decree to a claimant who has no right under or through the persons holding it. Hence, in my opinion, the multiplepoinding is incompetent, because there is no double distress.

It is true that there are two claims on the same fund. But I have always understood that the mere fact that two persons make a claim on the same fund does not amount to double distress. Each claim must have a possible legal basis, and in my opinion this cannot be predicated of a claim by a stranger to a decree, who maintains that it shall not be implemented. It is no doubt hard on the raiser that he is harassed by diligence at the instance of the creditors of Meikle & Wilson. But he is in no worse position than any other person against whom unconsidered or reckless lawsuits are brought. His defence against the furthcoming simply is that he had no funds.

It has been said that the unsuccessful claimant may be made to pay the whole expenses of the multiplepoinding, and that in this way all interests will be served. But if the multiplepoinding is competent, the raiser is entitled, in accordance with what I believe to be the invariable practice of the Court, to have his expenses out of the fund *in medio*. This, in my opinion, is his right.

The Lords refused the appeal, with expenses.

Counsel for the Appellants—J. C. Smith—Strachan. Agent—R. Broatch, L.A.

Counsel for Respondent—Mackintosh--Guthrie. Agent—J. F. Mackay, W.S.

Tuesday, October 25.

FIRST DIVISION.

[Sheriff of Aberdeen and Kincardine.

DAVIDSON *v.* THE UNION BANK.

Trust—Trust-Deed for Behoof of Creditors—Accession.

Held that a demand for an interim dividend made by a bank on a trustee under a trust-deed for behoof of creditors, did not amount to accession, so as to bar subsequent action by the bank for recovery of their claim against the insolvent.

The Union Bank of Scotland sued William Davidson, plumber, Aberdeen, in the Sheriff Court of Aberdeen, for payment of £152, 3s. 10d., being the balance due to the bank on his account-current with them. The accuracy of the account was admitted, but the following facts were stated in defence:—The circumstances of the defender having become embarrassed, he granted a trust-deed for behoof of creditors on 3d June 1880, and a trustee was appointed to realise his estate. In the course of the negotiations which ensued, the agent for the Union Bank wrote to the trustee, asking that, as the bank was pressing for recovery of their debt, and as certain assets had been recovered by the trustee, he should pay an interim dividend.

On these facts the defender pleaded—"(1) The pursuers having acceded to the said trust-deed, they are, especially under the circumstances stated, barred from suing the present action except to the extent of obtaining a decree of constitution at their own expense, and they are barred from taking proceedings against the defender thereon."

The Sheriff-Substitute (Dove Wilson) decerned against the defender. He added this note:—"The debt is admitted, and no discharge is produced; but it is said in the defence (so far as relevant) that the pursuers have consented to a trust settlement of the defender's affairs, to the effect of preventing them from doing anything to recover their debt except await the action of the trustee.

"The proper evidence of such a consent is either actings or writings, and parole evidence is not admitted except for the purpose of making these intelligible. No writing of consent is produced; but it is said that the pursuers lodged a claim with the trustee, and there are produced certain letters showing that they were willing to accept a payment from him to account. But nothing has followed on these actings. The trustee has not paid anything, but prefers (it is said) using the trust-funds in a litigation, which (it is again said) is more for the benefit of the insolvent than of his creditors. The pursuers now prefer to recover their debt in the ordinary way, and it is difficult to see what has happened to prevent them. Merely being willing to accept payment from the trustee cannot be pleaded as an election to take him as their sole debtor in place of the insolvent."

On appeal, the Sheriff (Guthrie Smith) adhered.

The defender appealed to the Court of Session, and argued that, on the above facts, the bank must be held to have acceded to the trust-deed, and to be therefore barred *personali exceptione* from succeeding in this action.

Authorities — 2 Bell's Comm. (3d ed.) 499; *Marianski* v. *Wiseman* (*M'Lean's Trustee*), March 10, 1871, 9 Macph. 673; *Athya* v. *Clydesdale Bank*, Jan. 28, 1881, 18 Scot. Law Rep. 287.

The Lords, without calling upon counsel for the respondent, refused the appeal.

Counsel for Appellant—Trayner—J. M. Gibson. Agent—William Officer, S.S.C.

Counsel for Respondents—Wallace—Maconochie. Agents—J. & F. Anderson, W.S.

Tuesday, October 25.

FIRST DIVISION.

[Sheriff of Banff.

STEUART *v.* DUFF.

*Process—Appeal—Competency—*6 *Geo. IV. c.* 120—*Judicature Act, sec.* 40—*A.S.* 11*th July* 1828, *sec.* 5.

Under the 40th section of the Judicature Act appeals for jury trial must be taken within fifteen days from the date of the interlocutor allowing proof; and this provision applies even in cases where it is necessary before taking an appeal to present an application to the Sheriff under the 5th section of the A.S. 11th July 1828, in respect the value of the cause does not appear on the face of the record.

In an action raised in the Sheriff Court of Banffshire by Major Lachlan Duff Gordon Duff of Drummuir against Andrew Steuart, Esq. of Auchlunkart, to have the defender ordained to forthwith concur with and join the pursuer in clearing out a certain ditch and march drain, the Sheriff-Substitute (SCOTT MONCRIEFF) on 22d January 1881 allowed the defender a proof of certain averments and to the pursuer a conjunct probation. The pursuer appealed, and the Sheriff (BELL), after ordering a reclaiming petition and answers, adhered, by interlocutor dated 9th and promulgated 18th April.

Thereafter, on 3d May, the defender lodged a petition in terms of section 5 of the A.S. 11th July 1828, in respect the value of the cause was not disclosed on record, and the Sheriff-Substitute having on the same day ordered intimation, on 9th May ordained the defender to make his declaration as to the value of the cause. That deposition was lodged on 10th May. No further proceedings occurred until 6th July 1881, when the Sheriff-Substitute pronounced an interlocutor granting leave to the petitioner (defender) to remove the action in question to the Court of Session. In the note which he appended he said— . . . "I have delayed giving judgment in this case for some time because I understood that parties were about to refer the whole matter in dispute to arbitration. It is deeply to be regretted that this has not been done, and that such a case is to be prolonged in any Court. It appears to me to be one quite unsuited for trial by jury, but I do not think that the statute gives me power to refuse the petition on that ground."

On 19th July the defender appealed to the Court of Session.

The Act of Sederunt of 11th July 1828 provides (section 5)—"Whereas it is enacted by section 40th" (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 (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers) it shall be competent to advocate such cause to the Court of Session—it is enacted and declared that if in such causes the claim shall not be simply pecuniary, so that it cannot appear on the face of the bill that it is above £40 in amount, the party intending to advocate shall previously apply by petition to the Judge in the Inferior Court for leave to that effect, which application shall be intimated to the opposite party or his agent, and the petitioner shall be bound, if required by the Judge, to give his solemn declaration that the claim is of the true value of £40 and upwards; and on such petition being presented, and on such declaration, if required, being made to the satisfaction of the Judge, leave shall be granted to advocate, and the Clerk of the Inferior Court shall certify the same; and it is further enacted and declared that if, in either class of causes, 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, unless reasonable evidence shall be produced to the inferior Judge that a bill of advocation has been presented, or the Judge be satisfied that effectual measures have been taken for presenting it, in which case the inferior Judge shall prorogate the time for taking the proof for a reasonable time, not less than seven days after that fixed for the diet of proof in the ordinary case, and not less than twenty days in cases from Orkney and Shetland, 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 Single Bills counsel for the respondent moved the Court to dismiss the appeal as being incompetent in point of time, more than fifteen days having elapsed between 18th April, the latest date at which the allowance of proof could be held to have been made, and 19th July, when the defender's appeal to the Court of Session was taken.

Replied for the appellant—The defender's petition to the Sheriff on 3d May was within fifteen days from the allowance of proof on 18th April. That petition, and what followed on it, constituted "effectual measures" for the presentation of an appeal. In any case, the delay which occurred was through no fault of the defender.

Authorities—*Falconer* v. *Sheills & Co.*, July 10, 1827, 5 S. 919; *Ritchie* v. *Ritchie*, Oct. 22, 1870, 9 Macph. 43; *Rain* v. *Gibb*, May 19, 1877, 4 R. 732; *Fleming* v. *Kinnes*, Jan. 15, 1881, 18 Scot. Law Rep. 245.

At advising—

LORD PRESIDENT—An objection has been taken to the competency of this appeal, to the effect that being an appeal under the 40th section of the Judicature Act it comes too late. That question depends on the construction which is to be put upon the 5th section of the Act of Sederunt of 1828. The interlocutor allowing proof was pronounced by the Sheriff-Substitute on 22d January 1881. It was appealed to the Sheriff, and the Sheriff's interlocutor, adhering