

tion of their contract with the Railway Company, have invaded his right without leave from him, and without authority from anybody. If that is so, then they are simply trespassers, and the remedy of interdict is the proper remedy to apply against trespass, at least in the first instance. The answer of the defenders is, not that they got leave (for there is no averment whatever that they got leave from the pursuer), but that the Railway Company had authority under statute for using the road, which authority enured to the contractors, who were doing the Railway Company's work. Well, if the Railway Company had got authority for what the defenders have done, I think that would have been a successful defence. But when we come to inquire into the fact, it stands in this way:—under sections 25 and 26 of the Railways Clauses Act there is provision made for a railway company, in the pursuance of works authorised by their special Act, entering upon or taking over private roads. But it is not said in this record, and it was not stated at the bar, that the Railway Company here had taken any proceedings under sections 25 or 26. We must therefore take it that the Railway Company never had got authority, either under the Railway Clauses Acts or under their own special Act, to use this private road. If that is so, if the Railway Company had no authority to use the road, it is quite clear that the contractors had none. This brings us back to the position that the contractors were trespassers, and that, I think, was their real character. In these circumstances only one course can be taken, and that is that the defenders must be interdicted from continuing their trespass, and accordingly I think the interlocutors of the Sheriffs are wrong and should be recalled, and that interdict should be granted in terms of the prayer.

LORD MONCREIFF— I am of the same opinion. The defenders' counsel criticised the pursuers' averments. Probably they might have been made more precise, but I think we can gather from them that the defenders, without any legal authority, had entered upon and used this road. But the charge of irrelevancy being want of precision, the obvious retort is that it lay upon the defenders to justify the use they were making of this private road, and to state the part of the statute upon which they relied. But all they say is that they were using that road under statutory powers bestowed upon them by the Railways Clauses Act 1845 and the Lanarkshire and Ayrshire Railway Act of 1897. I think it was for them to state what part of the statute they founded upon. They have not done so, and what is more, when they were asked to state what section of the statute authorised them to use the road they were unable to do so. Now, I think the only part of the statute which gave them right to use that road is section 25 of the Act of 1845, and that only on condition of their giving notice to the landlord and tenant, and paying compensation.

The Sheriffs have dismissed the action, apparently sustaining the third plea-in-law for the defenders on the ground that the action is incompetent, being excluded by the statutory remedy provided by the Railways Clauses Act 1845. The section on which the Sheriffs rely does not, I think, justify their conclusions, and no notice having been given under section 25, the act of the contractors, I think, was illegal.

The Court recalled the interlocutor appealed against, granted interdict in terms of the prayer of the petition, and decerned.

Counsel for Pursuer—Dundas, Q.C.—Clyde. Agents—Smith & Watt, W.S.

Counsel for Defenders—Shaw, Q.C.—Grierson. Agents—Macpherson & Mackay, W.S.

Thursday November 30.

FIRST DIVISION.

[Lord Low, Ordinary.]

MILNE & COMPANY v. ABERDEEN DISTRICT COMMITTEE OF COUNTY COUNCIL.

Jurisdiction—Exclusion of Review—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), sec. 51—Extraordinary Expenses—Certificate of Surveyor—Allegation of Fraud—Reduction of Award of Sheriff—Competency.

By the 57th section of the Roads and Bridges Act 1878 it is provided that where "by the certificate of the surveyor" it appears to the local authority that extraordinary expenses have been incurred in repairing highways, "having regard to the average expense of repairing highways in the neighbourhood," owing to damage caused by "excessive weight . . . or by extraordinary traffic" passing over the highway, such authority may recover in a summary manner before the sheriff, "whose decision shall be final," the amount of such expenses "as may be proved to the satisfaction of the sheriff to have been incurred."

An action was raised for the purpose of reducing a decree of a sheriff, which found that certain extraordinary expenses had been incurred by a local authority by reason of damage arising from excessive weight, and decerned against the pursuer for payment of that amount. There was also a conclusion for reduction of the certificates granted by the road surveyor. The pursuer's averments contained a general allegation that the certificates were granted falsely and fraudulently, but no specific grounds of fact were alleged by him in support thereof. It was further averred that the certificates were not in terms of the statute, because the surveyor in framing them had no regard to the average expense of

repairing the highways in the neighbourhood. The decree of the Sheriff was *ex facie* regular and in conformity with the terms of the statute, but the pursuer maintained that as the certificates were an essential preliminary to the action before the Sheriff, the whole proceedings were vitiated by their invalidity.

Held that the action was incompetent, the Sheriff having dealt with a matter within his jurisdiction and his judgment thereon being final.

Observed that the question of the validity of the certificates was one which ought to be raised before the Sheriff and decided by him.

Opinion that the certificates did not form an essential element in the process by which the Sheriff arrived at his decision.

By the 57th section of the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51) it is provided as follows—"Where, by the certificate of their surveyor or district surveyor, it appears to the authority which is liable to repair any highway that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or by extraordinary traffic thereon, such authority may recover in a summary manner before the sheriff (whose decision shall be final) from any person by whose order the excessive weight has been passed or the extraordinary traffic has been conducted, the amount of such extraordinary expenses as may be proved to the satisfaction of the sheriff to have been incurred by such authority by reason of the damage arising from such excessive weight or traffic as aforesaid."

An action was raised at the instance of Messrs John Milne & Company, manure merchants, Aberdeenshire, against the Aberdeen District Committee of the county of Aberdeen and Mr George Scott, District Road Surveyor, concluding for reduction of two certificates granted by the defender George Scott on 1st February 1897, and of a decree of the Sheriff of Aberdeenshire obtained by the defenders on 13th August 1898 in an action at their instance against the present pursuers.

The pursuers in the course of their business conveyed a large amount of traffic over two roads known as the Old Meldrum Road and the Dyce Road, and were in the habit of using traction engines with wagons.

On 1st February 1897 Mr Scott issued the following certificate with regard to the Old Meldrum Road—"I, George Scott, district surveyor of the Sixth or Aberdeen District of Roads of the County of Aberdeen, under the Local Government (Scotland) Act 1889, hereby certify, that having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by the Aberdeen District Committee of said county in repairing

the road or highway called the Old Meldrum Road (north of the river Don) in the parish of New Machar and county of Aberdeen, being number twenty-four in the list of roads in the said Aberdeen District, by reason of the damage caused by excessive weight passing along the said road by order of John Milne & Company, manure merchants, Dyce, or by extraordinary traffic conducted thereon by order of the said John Milne & Company. The extraordinary expenses incurred in repairing the said road for the period from Whitsunday 15th May 1894 to 15th January 1897, after allowing £435, 13s. 4d. sterling as the cost of repairing said road for said period, according to the average cost of repairing roads or highways of a similar description in the neighbourhood, amount to £603, 1s. 6d. sterling, and the proportion of the said extraordinary expenses payable by the said John Milne & Company in respect of their said traffic is £452, 6s. 1d. sterling. The length of said Old Meldrum Road is 7 miles 1 furlong and 197 yards, and the average cost of repairing roads of a similar description in the neighbourhood is at the rate of £20, 9s. 8d. per mile per annum. All which I certify to be correct. Given under my hand at Aberdeen the 1st day of February 1897 years.—GEORGE SCOTT, District Road Surveyor."

On the same day he granted a certificate with reference to the Dyce Road, which, *mutatis mutandis*, was in the same words as that quoted above, and in which he stated the amount due by John Milne & Company at £73, 12s. 9d.

An action was raised in the Sheriff Court by the District Committee against John Milne & Company for payment of the sums stated in these certificates, amounting together to £525, 18s. 10d.

After a proof the Sheriff (CRAWFORD) on 13th August 1898 pronounced the following interlocutor:—"Finds that extraordinary expenses have been incurred by the petitioners in repairing the highways libelled, and during the periods libelled, by reason of damage arising from excessive weight which passed, by order of the respondents, over the Old Meldrum Road to the amount of £150, and over the Dyce Road to the amount of £50: Therefore decerns against the respondents for payment to the petitioners of £200: Finds the respondents liable in expenses, modified to one-half: Allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report. In the list of skilled witnesses for the petitioners, disallows Nos. 1, 6, 7, 8, and of consent 11; certifies the remainder: Allows a debate fee of £5 to the agents on both sides in respect that the case required much special preparation."

The pursuers in the present action averred—" (Cond. 9) The said pretended certificates bore, as required by the Act, that the said George Scott in granting them had had regard to the average expense of repairing highways in the neighbourhood. As matter of fact the said George Scott in granting the said certificates and certifying that

extraordinary expenses had been incurred, had no regard to the average expense of repairing highways in the neighbourhood, but had regard only to the expense of repairing the two highways in question at a period anterior to the period when the extraordinary expenses sued for were alleged to have been incurred. It was absolutely essential for the purpose of ascertaining whether any such extraordinary expenses had been incurred, and if so, to what extent, that regard should be had to the average expense of repairing highways in the neighbourhood."

They averred that in point of fact the average cost of repairing similar roads was largely in excess of the sum stated in the certificates, the average cost of repairing those in the neighbourhood of the Old Meldrum Road being £57 per mile per annum instead of £20, 9s. 8d. as stated in that certificate.

The pursuers further averred—"(Cond. 12) The said pretended certificates were granted by the said George Scott falsely and fraudulently to enable the defenders, whose servant he is, and for whom they are responsible, to present a relevant case in terms of the Act to the Court for the recovery of the said sums from the pursuers. They were accepted and so used and founded on by the defenders themselves in the full knowledge that they were false, fictitious, and fraudulent, and that in granting them the said George Scott had not had regard to the average expense of repairing highways in the neighbourhood, and had not stated truly the average expense of repairing such highways. The terms of the said certificates were adjusted by the said George Scott with the assistance of the defenders' district clerk, who afterwards conducted the preliminary stages of the said litigation on behalf of the present defenders."

The defenders pleaded—"(2) The action is incompetent."

The Lord Ordinary (Low) on 18th July 1899 sustained the defenders' second plea and dismissed the action.

The pursuers reclaimed, and argued—The certificates were an essential requisite to the raising of the action before the Sheriff, and accordingly they must be accurate and in conformity with the statute, or the whole proceedings including the Sheriff's judgment would be null and void. The statute had given the users of the roads a threefold protection. The surveyor must consider the facts, and put his opinion in writing, the District Committee must be satisfied on that opinion that there was a case to go to the Sheriff, and finally the Sheriff must satisfy himself as to the extraordinary expenditure. But according to the Lord Ordinary it lay upon the Sheriff to decide whether the statutory requirements had been fulfilled, and he was final as to the antecedent procedure. The effect of that contention was to deprive the public of two-thirds of their remedy. All that was meant by the finality clause was, that the Sheriff's judgment was final upon the merits, but it was

quite open to reduce it in respect of the deviation from statutory requirements which had marked the antecedent proceedings—*Lord Advocate v. Police Commissioners, Perth*, December 7, 1899, 8 Macph. 244. The statute required that certain elements were to be considered, and both the surveyor and the Local Authority had neglected to consider them. The certificates contained wilful untruths as to the average cost of repair, and were therefore fraudulent. But even if granted honestly by the surveyor, he had put himself outside the Act by not taking into account relevant materials upon the question as to how he should have framed his certificate. The pursuers referred to the following cases—*Etherley Grange Coal Co. v. Auckland District Board* [1894], L.R., 1 Q.B. 37; *The Queen v. Ellis* [1882], L.R., 8 Q.B.D. 466; *Lord Aveland v. Lucas* [1879], L.R., 5 C.P.D. 211; *Hill v. Thomas* [1893], L.R., 2 Q.B. 333 at 342; *Whitebread v. Sevenoaks Highway Board* [1891], L.R., 1 Q.B. 8.

Argued for respondents—It was clear from the interlocutor of the Sheriff that he had fulfilled all the statutory requirements. He had made up his mind both as to the facts proved and as to the meaning of the section, which was clearly within his jurisdiction. The pursuers did not attempt to show that the Sheriff had gone outside the statute, and it was therefore clear that his decision was final and could not be reduced. It was incompetent for the pursuers to consider the meaning of section 57 as they had done by interpreting special words contained in it, and arguing therefrom that the antecedent procedure had been irregular. The duty of interpretation was the Sheriff's, and he was equally final upon it as upon the facts—*Gray v. Smart*, March 18, 1892, 19 R. 692; *Brand v. Police Commissioners of Arbroath*, May 23, 1890, 17 R. 790; *Robertson v. Pringle*, February 5, 1887, 14 R. 474; *Forbes v. Adair*, December 16, 1871, 10 Macph. 244. In England the jurisdiction of the Court was not excluded in the same way, and accordingly in English cases the meaning of the corresponding section had been considered. But in any view the certificates had nothing to do with the decree of the Sheriff, and in point of fact he had never seen them, but had come to his decision as the result of a seven days' proof. (The respondents further argued that the certificates were validly granted according to the right interpretation of section 57.)

LORD PRESIDENT—It may be convenient in the first place to consider the Sheriff's judgment, with the view of seeing whether it is in any respect disconform to the requirements of the Roads and Bridges Act, or whether, on the contrary, it satisfies these requirements. The Sheriff has found "that extraordinary expenses have been incurred by the petitioners in repairing the highways libelled and during the periods libelled by reason of damage arising from excessive weights which passed, by order of the respondents," over these highways. There is no question as

to "extraordinary traffic," an expression regarding the meaning of which there have been many decisions in the English Courts. The Sheriff's judgment relates solely to extraordinary expenses caused by excessive weight, a matter in regard to which he is invested with an exclusive jurisdiction.

It was, however, maintained by the pursuers that the Sheriff in arriving at the conclusion expressed in his judgment did not accept as a standard, or at all events did not take into account "the average expense of repairing highways in the neighbourhood." The direction in section 57 to have regard to that average expense is addressed, in the first instance at all events, to the road authority, and they are not enjoined to accept it as a final standard but only to consider it—possibly along with other evidence bearing upon the question whether the expenses incurred by them in repairing the highway in question are or are not extraordinary. It seems to me very doubtful whether the words in question are addressed to the Sheriff at all, but assuming that they are, they merely indicate considerations to which, it may be along with others, he should have regard. They do not bind the Sheriff, as they do not bind the road authority, to have regard to nothing else, and accordingly the allegation that the average expense of repairing the highways in the neighbourhood was disregarded does not appear to me to be relevant to assail the part of the Sheriff's judgment in which he deals with the question of extraordinary expenses. Even if it were competent for us to review the Sheriff's judgment, which I think it is not, it is to be observed that if the contention of the pursuers in regard to this matter was correct it would lead to a very startling result, and a result very much fitted to defeat the plain object of section 57. The object of that section is not, as has been suggested, to penalise heavy traffic, but merely to require the persons who use the highways either for extraordinary traffic, or with excessive weights, to pay for that use in so far as it is more injurious to the highways than ordinary traffic or ordinary weights would be. If the contention of the pursuers that the cost of repairing neighbouring roads must be taken as a standard was well founded, the result in a locality, where, as in the neighbourhood of Aberdeen, traction engines are greatly used, it might well be that the neighbouring highways which also suffer from excessive weights or extraordinary traffic would not be the best but the worst criterion by which to ascertain the normal cost of maintaining roads. Indeed the effect of the contention would or might be to defeat the purpose of section 57 altogether. But assuming that the Sheriff as well as the road authority is required to have regard to the cost of repairing neighbouring highways, even although they may be subjected to extraordinary traffic or excessive weight, he is not prohibited by the statute from considering what would be the average cost of keeping

such highways in repair for ordinary purposes. For these reasons it does not appear to me that the Sheriff is in any respect erroneous.

But even if this had been otherwise, the defenders point to the declaration in section 57, that the Sheriff's judgment is final, and this they say means that it is final in questions of law as well as of fact, so that even if he had construed the statute erroneously, this Court could not have reviewed or set aside his judgment. It seems to me that this contention is well founded.

But the main contention upon which the Sheriff's judgment was assailed by the pursuers was that certain conditions which they describe as conditions-*precedent* to his judgment, were not fulfilled, and that consequently, assuming his judgment to be otherwise unassailable, it must fall to the ground. The requirement which is said to be a "condition-*precedent*" is contained in the earlier part of section 57, viz., "Where by the certificate of their surveyor or district surveyor it appears to the authority which is liable to repair any highway, that having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred;" and the pursuers maintained that the certificates—for these were two in number, one applicable to the Old Meldrum Road and the other to the Dyce Road—were granted fraudulently, *i.e.*, that the surveyor granted them knowing that their contents were not true, and that he had been induced to practise this fraud by his employers, the road authority. The Lord Ordinary says in his note—and I concur in the observation—that there are no facts set out by the pursuers to give colour or probability to that statement. Use of the word "fraudulently" with respect to an act which appears *ex facie* to be regular, without any such facts being alleged, does not make a relevant statement; and so I am disposed to agree with the Lord Ordinary in thinking that the averments of fraud directed against the surveyors and the road authority are not relevant as grounds for setting aside the certificate. But assuming that the certificates were reducible on that ground, what effect would this have upon the Sheriff's judgment? Would it annul all that the Sheriff did in hearing evidence and in pronouncing a decision which, *ex hypothesi* of the point I have now reached, was in itself sound? It seems to me it would be a very strained construction of the statute to hold that a vice in the certificates, which are quite extrinsic to the duty which the Sheriff had to perform, should lead to his judgment being set aside. I am not convinced by the pursuers' argument that this is such a defect in the execution of the act as to annul subsequent proceedings. It is true that certificates were required to set the statutory machinery in motion. The first, if not the sole purpose for requiring them, was to form a warrant for the action of the road authority, and they fulfilled this

purpose. But I do not think that, assuming the certificates to have been improperly granted or obtained, this would annul the judgment of the Sheriff, whose action was regular and proper throughout. It remains to consider what is the effect of the allegations of error (as distinguished from fraud) made against the surveyor, and, for the reasons already given, I consider that even if he erred in the mode in which he arrived at the expense of repairing the roads, this would not vitiate the subsequent action of the Sheriff.

The Lord Ordinary has sustained the second plea-in-law for the respondents, that is, the plea of incompetency, and for the reasons now given I consider that his judgment is sound.

LORD ADAM—I am of the same opinion. The jurisdiction conferred upon the Sheriff is conferred by the Roads and Bridges Act, and it appears to me that the judgment is entirely in accordance with the authority given in the 57th section. The action is raised upon the authority of the District Committee, and the judgment of the Sheriff, whose decision is to be final, is exactly in conformity with the section of the statute. But when the case comes up to us in this way, it is said, "That may be quite true, but in order to give jurisdiction to the Sheriff, that section must be put in motion in a particular way;" and it was argued to us that by the terms of that section there must be a certificate by the surveyor certifying to the district authority liable to repair the roads that certain extraordinary expenses have been incurred by excessive weight passing over the roads, but that unless that certificate is got in proper terms under the Act the Sheriff has no authority to proceed, and has no jurisdiction to pronounce that interlocutor. Now there was a certificate here, and upon the strength of that certificate the district authority raised the action. But then it is said that it was a false and fraudulent certificate; that that being so it is the same as if there were no certificate at all, and that the proper machinery was not put in motion. Of the allegations made against the certificate, and the grounds upon which it is sought to reduce it, there is no relevant averment. One ground is that the certificates were false and fraudulent, and that the District Committee and the surveyor combined between them to produce them as false. But that is all that is said, and I certainly decline to say that such averments made against a public authority without one fact being given in support of them are to be considered as relevant averments of fraud in such a matter; therefore, so far as fraud is concerned, I have no difficulty in saying that the certificates are not challengeable upon that ground. What, then, is said against this certificate? It is, that after considering this matter the surveyor and the District Committee put a certain construction upon the Act, but with your Lordship I think we do not require to decide that, although I think it was a proper construction of the Act. These are the grounds upon which this certificate has

been challenged. Of course if it were a false and fraudulent certificate objection ought to have been taken to it before the Sheriff, and if objection had been taken and the Sheriff had pronounced a judgment, I agree that that is one of the matters which falls within his jurisdiction, and with regard to which the statute says he shall be final. If the pursuers did not take the objection they ought to have taken it, and they cannot now come forward and take it. Upon these short grounds it appears to me that this judgment, which the 57th section of the Act declares to be final, decides nothing but a question of fact, and it is incompetent for us to touch that finding in fact. The jurisdiction in that matter is entirely with the Sheriff. A question of law would be equally within his jurisdiction.

LORD M'LAREN—This is an action of reduction of a judgment in which the Sheriff of Aberdeenshire, in a matter under the 57th section of the Road Act, has given his final decision, and therefore, *prima facie*, the grounds upon which we could interfere with such a judgment in a process of reduction are very limited indeed. It is perfectly clear that we could not review the judgment of the Sheriff on the merits of the question committed to him, because the finality of the Sheriff's judgment under the statute is, I think, independent of the particular form of process which may be chosen for the purpose of obtaining a review. My view of such a declaration of finality is that it does to a large extent cover error of law as well as alleged error of fact. I think the Court would be disposed to give a liberal construction to a declaration of finality in a local statute intended summarily to regulate the incidence of local taxation. At the same time there might be cases where reduction would be an appropriate remedy for an excess of power, and if it could be clearly shown that the Sheriff had awarded damages for some use of the road which was not within the 57th section, and which could not in any view be regarded as either excessive weight or extraordinary traffic, or again if the Sheriff, taking a wrong view of the statute, had refused to exercise his jurisdiction in a matter plainly committed to him, I should not say that relief might not be had in a reduction. One thing is clear, that in such a case reduction must be supported by grounds that are plain upon the face of the interlocutor. But if the interlocutor is in the form required by the statute—if the grounds of judgment as disclosed in the interlocutor are such as to show that all the points arising in the case have been fairly considered and dealt with, then it is not a good ground of reduction that the Sheriff has not taken the view of the application of the statute which we might possibly be disposed to take. Now, let me state how I should apply this principle to the consideration of the present case. In the first place, I discard altogether the argument founded upon the certificate. It appears to me that it is a condition of the right of the District Committee of the Council to raise an action of

this kind that they shall be satisfied upon the certificate of their surveyor that in the words of the statute extraordinary expenses have been incurred. I attach no importance to the argument relating to this certificate. It is not a formal legal document at all. It was not intended that the Committee of the County Council should scrutinise the certificate or institute a public inquiry into the subject. But for the information of the District Committee, and perhaps also as a protection to the ratepayer, who is to be charged with more than his rateable proportion of the cost of maintaining the road, it is required that in any resolution to which the Committee may come they must be supported by a certificate under the hand of their surveyor, which, when taken along with the known facts of the case, would raise a probable cause of action. The notion of the falsity of such a certificate would probably not have entered the contemplation of anyone but for the exigencies of the case. There can be nothing false or fallacious in what is essentially a statement of opinion by the surveyor. But even if we admit the supposition, I do not think that it would be of the slightest consequence if the District Committee proceeded upon the certificate and brought their action before the Sheriff. The hypothesis of the statute when we come to the action is that extraordinary expenses have been incurred and damage has been caused by excessive weight or extraordinary traffic, and if the Sheriff affirms this hypothesis, he has then to proceed to assess the damage caused by the individual user of the road. When I compare the interlocutor (which is precisely in terms of the statute) with the relative note, I find that the Sheriff has in fact affirmed that extraordinary expenses have been incurred; he has affirmed that these have resulted to a certain extent from damage caused by excessive weight, and he did not need to consider the case of extraordinary traffic, which, as your Lordship observed, gave rise to a good deal of difficulty in the cases before the English courts. Having affirmed the hypothesis of the statute the Sheriff proceeds to determine the damage, and in all respects his judgment seems to have been entirely in accordance with the statute. Whether he has come to a right or a wrong conclusion on the facts is a matter with which we have no concern, and I am of opinion with your Lordships that the interlocutor of the Lord Ordinary ought to be affirmed.

LORD KINNEAR—I agree with your Lordships. I think, in the first place, there is no relevant averment of fraud in the condescendence, and I confess to thinking that that is an averment which ought not to be introduced into pleadings for the purpose of setting aside any kind of instrument, unless the pursuer really means it, and has specific grounds of fact, which he is prepared to aver and to undertake to prove in support of so grave a charge. Now, there are no specific grounds of fact alleged on this record which it would be possible to send to proof, and indeed we are told by

counsel for the pursuer that it was not possible to imagine specific grounds of fact in support of the allegation. Facts which cannot be specifically alleged cannot be proved, and I am therefore of opinion that the case of fraud is altogether out of the question. If that be so, I agree with your Lordships that the other ground of challenging the certificate and the judgment of the Sheriff which was ultimately given are irrelevant. It appears to me that the surveyor's certificate is only necessary to set the local authority in motion. They are to be informed by their surveyor of the facts that render it proper or necessary to raise a process in the Sheriff Court, and they cannot raise such a process before the Sheriff unless it appears to them through their own surveyor's certificate that extraordinary expenses have been incurred. The purpose of the certificate therefore is to make it appear to the local authority that extraordinary expenses have been incurred; it has, so far as I can see, no other function to perform; and when the jurisdiction of the Sheriff has been invoked by a process instituted by the local authority on having received their surveyor's certificate, he must determine any question of fact or law which is necessary to enable him to dispose finally of the application that has been brought before him. If there be any ground for holding that the process before the Sheriff is incompetent, inasmuch as the local authority which instituted it had received no certificate or no valid certificate from its own surveyor, that appears to me to be a question that must be raised before the Sheriff, and must be decided by him. I cannot see any ground for doubting that when the judgment of the Sheriff is declared by statute to be final, it must be within his competency to determine every question which it is absolutely necessary to determine in order to explicate his jurisdiction. And I should therefore hold that the declaration of finality in this clause is applicable to the judgment of the Sheriff, to determine in the first place that there is an action competently submitted to his judgment, and finally to determine that there are grounds for issuing a decree. In the present case I agree with your Lordship in the chair that this point was either raised before the Sheriff and repelled by him, or else it ought to have been raised before the Sheriff if it were intended to raise it anywhere. The judgment of the Sheriff, when we come to consider it upon its own terms, is exactly in conformity with the power conferred and very clearly expressed in the statute. I am therefore of opinion that the Lord Ordinary was quite right in sustaining the plea of incompetency, and that his Lordship's judgment should be affirmed.

The Court adhered.

Counsel for the Pursuers—W. Campbell, Q.C.—Brown. Agents—Henry & Scott, W.S.

Counsel for Defenders—D.F. Asher, Q.C.—Dove Wilson. Agents—J. K. & W. P. Lindsay, W.S.