

[10th April, 1848.]

THOMAS BAILLIE, Solicitor in the Supreme Courts of Scotland,
Appellant.

DAVINIA and MARGARET MCGIBBON, Representatives of the
deceased MARY MCGIBBON and Others, *Respondents.*

Bankrupt.—Jurisdiction.—The Sheriff has power to award the professional expenses incurred during a contested election for the office of Trustee on a sequestrated estate, as well of the creditors as of the competitors for the office.

Reduction.—Jurisdiction.—The act of a Sheriff in awarding expenses upon a higher scale than allowed by statute, is not an excess of jurisdiction to be corrected by reduction, but of judgment to be corrected by appeal.

BY the 13th section of the 2 and 3 Victoriæ, cap. 41, it is enacted that the Lord Ordinary in the Court of Session, shall, upon a petition to that effect, award sequestration of the estates of a debtor, and appoint two successive meetings of the creditors, for the appointment of judicial factor and trustee, “and
“ he shall likewise remit to the Sheriff of the county where the
“ meeting is to be held, to proceed in manner hereinafter
“ mentioned.”

By the 27th section, it is enacted, “That, notwithstanding
“ the said remit to the Sheriff, the process of sequestration shall
“ be held to be in the Bill Chamber of the Court of Session,
“ and shall not fall asleep; and on the said remit being made, a
“ copy of the petition for sequestration, and of the first deliver-
“ ance, and also (where it is different) of the deliverance award-
“ ing sequestration, certified by one of the clerks of the Bill
“ Chamber, shall, with the productions, be transmitted by the

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“petitioner to the sheriff-clerk of the county or place where the
“meeting for election of interim factor is directed to be held;
“and the Sheriff shall have as full power and jurisdiction as
“hitherto possessed by the Court of Session (subject to review)
“in all questions in the sequestration, except in those cases
“where the power is otherwise specially conferred: And the
“Sheriff-clerk and Messengers-at-arms, and officers of the
“Sheriff Court, shall have power to act in their respective
“offices under this Act; and the sheriff-clerk shall keep a
“register of sequestrations transmitted to him in terms of the
“said schedule (A).”

By the 45th section, it is enacted, “That creditors, or their
“mandatories, qualified as aforesaid, shall assemble at the times
“and places fixed respectively for the election of interim factor,
“and for election of the trustee, with power to adjourn for such
“reasonable time as may seem fit, provided such adjournments
“do not postpone the meetings for the election of interim factor
“and trustee, beyond the limits of the periods within which
“these meetings are by this Act appointed to be held; and the
“Sheriff-clerk shall transmit, or cause to be transmitted, for
“exhibition to the meeting for the election of interim factor,
“the certified copy of the petition for sequestration and deliver-
“ances thereon; and if two or more creditors shall give notice
“to the Sheriff or Sheriff-substitute of the county, such Sheriff
“or Sheriff-substitute (or, in case of necessary absence, a
“Sheriff-substitute authorised by the Sheriff to act under the
“Act,) shall attend the meetings, and adjourned meetings, and
“preside; and the Sheriff-clerk or his depute shall also attend
“and mark the oaths and productions with his initials, and
“write the minutes in the presence of the meeting, and enter
“therein the names and designations of the creditors present,
“or the mandatories of creditors, and the amount for which
“they claim, and any other circumstances which the presiding
“Sheriff shall judge fit, which minutes the presiding Sheriff

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“ shall sign; and the clerk shall retain the oaths of the several
 “ claimants subject to exhibition thereof in his hands till the
 “ election shall be determined, when he shall deliver the same
 “ to the interim factor or trustee, (as the case may be); and
 “ where the Sheriff or Sheriff-substitute is not present, the cre-
 “ ditors shall elect a preses; and (if the Sheriff-clerk or a
 “ a depute be not present) a clerk; and the preses shall mark
 “ the oaths and productions with his initials, and sign the
 “ minutes, and the clerk shall, in the presence of the meeting,
 “ write the minutes, and enter therein the names and designa-
 “ tions of the creditors or mandatories, and the amount for
 “ which they claim, and any other circumstances relating to the
 “ said meeting.”

The 46th section enacts, “ That if the Sheriff or ordinary
 “ Sheriff-substitute be present at the election either of interim
 “ factor or trustee, and there be no competition for the office,
 “ or objections stated to the candidate or candidates, he shall,
 “ by a deliverance on the minutes, declare the person chosen by
 “ the creditors to be interim factor or trustee; and if there be
 “ competition or objections to the candidate or candidates, any
 “ objections shall be stated at the meeting to the votes or candi-
 “ dates, the Sheriff or ordinary Sheriff-substitute may either
 “ forthwith decide thereon, or make avizandum, and he shall, if
 “ necessary, make a short note of the objections, and of the
 “ answers, on which he shall, within four days after the meeting,
 “ hear parties *vivâ voce*, and declare the person to be interim
 “ factor, or (as the case may be) the person or persons, trustee
 “ or trustees in succession, whom he shall find to have been
 “ duly elected, and state the grounds of his decision in a note,
 “ and the same, as well as the said short note, shall form a part
 “ of the process.”

The 47th section enacts, “ That where the officiating Sheriff
 “ present at said meeting for the election is a Sheriff-substitute
 “ appointed to act in the absence of the Sheriff, or of the ordi-

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“ nary Sheriff-substitute of the county, or where the preses has
“ been elected by the creditors, such substitute or preses
“ (whether there be any competition or objection or not) shall
“ forthwith report the proceedings to the Sheriff or ordinary
“ Sheriff-substitute, and the oaths of the several claimants shall,
“ if the Sheriff-clerk or his depute be present, remain in his
“ possession, or, if he be not present, shall be transmitted to
“ the Sheriff-clerk by the preses, to be retained by him till the
“ interim factor or trustee (as the case may be) shall be finally
“ appointed,—when he shall deliver the same to such interim
“ factor or trustee ; and if there be no competition or objection,
“ the Sheriff, or ordinary Sheriff-substitute, shall declare the
“ person elected interim factor, or (as the case may be) trustee
“ or trustees in succession ; and if there be competition or
“ objection, the parties shall, within four days from the date of
“ the said meeting, lodge in the hands of the Sheriff-clerk short
“ notes of objections ; and the Sheriff or ordinary Sheriff-
“ substitute shall forthwith hear parties thereon *vivâ voce*, and
“ give his decision, and state the grounds thereof in a note,
“ which note, as well as the said short notes, shall form part
“ of the process, and the deliverance of the Sheriff or Sheriff-
“ substitute, declaring the person elected to be interim factor,
“ shall be final, and in no case shall be subject to review in any
“ court, or in any manner whatever.”

The 49th section enacts, “ That, on the bond for the interim
“ factor being lodged, the Sheriff shall confirm his election,
“ which confirmation shall be final, and not subject to review in
“ any court, or in any manner whatever ; and the Sheriff-clerk
“ shall issue an act and warrant, in the form of schedule (E)
“ herunto annexed, to the interim factor ; and in the event of
“ the said deliverance declaring the election of trustee becoming
“ final by no appeal being entered as hereinafter provided ;
“ and in case of any such appeal being entered, and the compe-
“ tition or objections being finally disposed of, and on a bond

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“ being duly lodged as aforesaid, the Sheriff shall confirm the
 “ election of the person elected or preferred as trustee, which
 “ confirmation shall be final, and not subject to review in any
 “ court, or in any manner whatever; and the Sheriff-clerk shall
 “ issue an act and warrant, in the form of schedule (F) hereunto
 “ annexed, to the trustee,” &c.

The 54th section enacts, “ That any creditor or competitor
 “ giving notice in writing to the Sheriff-clerk, within two days
 “ after the date of the Sheriff’s deliverance declaring the elec-
 “ tion of the trustee, of his intention to appeal against such
 “ deliverance, shall be entitled to appeal during Session, to the
 “ Inner House of the Court of Session, or in vacation to the
 “ Lord Ordinary, provided that, in the case of a competition, a
 “ bond of caution for the competitor, signed by a cautioner
 “ approved of at the said meeting for election of trustee, shall,
 “ along with such notice, be lodged with the Sheriff-clerk, and
 “ a certificate thereof by the Sheriff-clerk, with a note of appeal
 “ against such deliverance, be lodged with and marked by the
 “ clerk of the Bill Chamber, within fourteen days from the date
 “ of such deliverance; and on a copy of such note, certified by
 “ one of the Bill Chamber clerks, being delivered to the Sheriff-
 “ clerk, he shall forthwith transmit to the Bill Chamber the
 “ minutes of election, together with such of the proceedings as
 “ may be required; and the Inner House or the Lord Ordinary
 “ (as the case may be) shall thereupon hear parties *viva voce*,
 “ and pronounce judgment, and may order a new election, and
 “ appoint a time and place for that purpose; and if the appeal-
 “ ing competitor shall be preferred, a remit shall be made to the
 “ Sheriff to confirm him; and no part of the expense of such
 “ competition, either before the Sheriff Court or any other
 “ Court, shall be paid out of the estate, but the expenses shall
 “ be ordered to be paid by the unsuccessful party to the suc-
 “ cessful party.”

The 128th section enacts, “ That it shall be competent to

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“bring under review of the Inner House of the Court of Session any deliverance of the Sheriff, (except when the same is declared not to be subject to review,) provided a note of appeal shall be lodged with, and marked by one of the Bill Chamber clerks, within twenty-one days from the date of such deliverance, (except in the case of appeals against a deliverance declaring the election of a trustee, which shall be lodged as hereinbefore provided,) failing which the same shall be final.”

And the 132nd section enacts, “That it shall be lawful for all agents, duly qualified to practise before the Court of Session, to practise in all Sheriff Courts, in so far as relates to any of the proceedings authorized by this Act to be carried on before the Sheriff, provided that they shall not be entitled to payment of any higher fees than those legally exigible in such Courts.”

On the 23rd of December, 1841, the Lord Ordinary on the petition of the Appellants, awarded sequestration of the estates of Neil McGibbon, deceased, appointed meetings of the creditors to be held for the appointment of interim factor and trustee, and remitted to the Sheriff, “to proceed in manner mentioned in the said statute.”

On the 31st January, 1842, a meeting of the creditors was held at Inverary for the purpose of electing a trustee. This meeting was attended by the Appellant, as a creditor on his own account, assisted by counsel. It was also attended by the clerk of Mr. H. Graham, a Writer to the Signet, from Edinburgh, acting as mandatory for several creditors, and by mandatories for other creditors. The meeting was presided over by the Sheriff of the county of Argyle.

A variety of mutual objections to the claims of each other to vote, were taken by the Appellant, and by the other persons present. The Appellant tendered his vote for Traill as trustee, and the other persons voted for Lindsay. The 31st of January

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was occupied in hearing these objections, and likewise the 8th and 9th of February, to which days the meeting was adjourned. On the 9th, the Sheriff made avizandum with the objections, and appointed parties to be heard before him *vivá voce* on the 10th. Parties were accordingly heard upon that day. The Sheriff finally sustained the claim of the Appellant to vote, and of some of the creditors to whose claims the Appellant had objected; while he rejected the claims of the others, and declared Lindsay to have been chosen trustee.

Traill, the disappointed candidate, and the present Appellant, appealed from the Sheriff's decision to the Court of Session; but they afterwards withdrew their appeal, in consequence of an unfavourable decision of that Court upon another appeal taken by them, in regard to the claims of some of the creditors who had voted against them, and paid the expenses of the Respondents in the Court of Session, which were awarded to them by that Court. To the appeal so withdrawn, Lindsay, the successful candidate, was the sole Respondent.

On the 26th March, 1842, the Sheriff, upon the motion of the Respondents, pronounced the following interlocutor, “ Having
“ heard the agent for Mrs. Mary McGibbon, and for the other
“ creditors who supported the successful candidates for the
“ offices of trustee and commissioners, and whose claims have
“ been specially sustained by the Sheriff, on the motion made
“ first for the expenses occasioned to them in the proceedings
“ before the Sheriff by the opposition of Mr. Thomas Baillie
“ and Duncan Bell, or his mandatory, and secondly, for the
“ confirmation of Mr. Donald Lindsay as trustee in terms of
“ the statute ;—In respect of the bond of caution lodged with the
“ Sheriff-clerk, and of the interlocutor of the Court of Session,
“ dated 10th March current, the said Thomas Baillie and Dun-
“ can Bell, although notice was sent to their agents of the motion
“ for expenses, having failed to appear before answer, makes
“ avizandum with the cause.” And on the 29th of March, the

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Sheriff pronounced two separate interlocutors. By the first he found the Appellant and Bell, the only creditor who had voted with him, liable to the Respondents “in the expenses occasioned “to the said claimants by the opposition offered on the part of “the said Thomas Baillie and Duncan Bell, at and subsequent “to the meeting for electing a trustee and commissioners, to “the election of the successful candidates for the said offices of “trustee and commissioners.” By the other interlocutor the Sheriff confirmed Lindsay’s election, and allowed an extract of the confirmation to go out “without prejudice to the inter- “locutor of this date, finding Thomas Baillie and Duncan Bell “liable in the expenses occasioned by their opposition to the “election of the said trustee and commissioners, incurred “before the Sheriff, as to which continues and reserves the “proceedings until the expenses shall come to be modified and “decerned for; but allows the act and warrant of confirmation “in favour of the trustee to go out and be extracted ad interim.”

Under the first of these interlocutors the expenses to which the Appellant was found liable were taxed at 99*l.* 0*s.* 10*d.*, subsequently modified to 92*l.* 4*s.* 4*d.* by interlocutor of 26th September, 1842. This taxation took place upon an account which embraced the proceedings at the meetings of 31st January, and 8 and 9 February, and was composed of charges made after the scale allowed to that branch of the profession which practises in the Court of Session, amounting in the whole to 83*l.*; the rest of the account was made up of charges by a practitioner before the Sheriff Court, after the scale allowed in that Court.

On the 18th of October, 1842, the Sheriff allowed decree for the taxed expenses to be extracted within twenty-one days from the 14th October. On the 4th November the Appellant lodged an appeal against the interlocutor of 26th September, modifying the expenses. The Respondents objected that this appeal was too late, under the 128th section of the statute.

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The Appellant acquiesced in the force of this objection and withdrew the appeal; but immediately presented a note of suspension, and brought an action for reducing the Sheriff's interlocutors of 29th March and 26th September.

In the action of reduction the Lord Ordinary, upon the 20th of March, 1845, repelled the reasons of reduction, and assoilzied the defenders from the conclusions of the action. And on the 15th November, 1845, the Court adhered to the Lord Ordinary's interlocutor.

Mr. Rolt and *Mr. Crawford* for Appellant.—I. The Sheriff had no jurisdiction to award expenses to the Respondents. During the proceedings at the meeting of creditors held on the 31st January and the 8th and 9th of February, nothing of a judicial nature occurred. The Sheriff presided over the meeting, and signed the minutes as "Preses," because the statute gave a preference to him when present; but in doing so he exercised no judicial function any more than any private creditor who might have been appointed Preses in his absence could have done. The first judicial step taken by the Sheriff was his interlocutor making avizandum at the close of the meeting on the 9th. Up to this point the Appellant had not assumed the character of a litigant before the Sheriff; all he had done was to exercise the right which the statute gave him as creditor to vote for his own candidates and object to the admission of improper votes for other parties. Up to this time there was not only no litigation but no suit or judicial record; all that existed to show what had passed was the minutes of the creditors' meetings.

Unless, therefore, the statute expressly gave the Sheriff jurisdiction, he could have no power to award the expense which had been incurred by any of the parties prior to the 9th February, for nothing had occurred to justify the award as made in exercise of his ordinary jurisdiction. Such jurisdic-

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tion as the statute gives to the Sheriff takes its foundation from the 13th section, which directs a remit to be made to him, “to proceed in manner hereinafter mentioned.” By the 45th section the creditors are to assemble for the purposes of election, and the Sheriff is to preside over them; but the power to adjourn is not given to him, whether present or absent, but to the creditors themselves.

So soon as the election is over the character of the Sheriff's interference changes. By the 46th, 47th, and 49th sections it then assumes a judicial nature, and so, in truth, do the proceedings of the creditors. But even after the Sheriff's functions have assumed a judicial character, there is no power given him by the statute to award costs. Neither in the direction to hear the parties *vivá voce* upon their objections, and give his decision as to their election, nor in the direction to confirm the election, is there any authority given, express, or implied, to award costs. The interlocutor of the 29th March, 1842, therefore, which awarded costs was without any warrant from the statute, and so was the latter part of the other interlocutor of the same date, which, after confirming the election of Lindsay, kept the proceedings open in order to work out the finding for expenses. This was necessary for that purpose but was without authority, for, with the confirmation of the trustee, the jurisdiction of the Sheriff was at an end. No doubt the 27th section says the Sheriff shall have “as full power and jurisdiction as hitherto possessed by the Court of Session;” but that is qualified thus, “except where the power is otherwise specially conferred;” and the 13th section says, he is to proceed “in manner hereinafter mentioned.” The Sheriff is not, therefore, to have the general jurisdiction of the Court of Session. All that is meant is that, having delegated to him the jurisdiction of that Court, what he does in conformity with the statute, shall have the same force as if done by the Court of Session. Thus the confirmation of the trustee, if not appealed against, is to be as bind-

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ing as if it had been made by the Court of Session. But if, by the words quoted, the Sheriff were to have the general jurisdiction of that Court he might order a new election; a power which, both under the 54th section of the present statute, and by the prior statutes, is given to the Court of Session. If, then, the Sheriff has jurisdiction to award costs, it must be found elsewhere than in these words of the 27th section. In the close of the 54th section there is a negative provision, implying power to award costs, but the whole of that clause has reference to an appeal to the Court of Session, and is confined to the case of a competition where there is a contest between the candidates themselves, and cannot be so stretched as to apply to the proceedings of the creditors in their meetings; besides, the words are “the expenses either before the Sheriff Court or any other Court;” but the Sheriff, while sitting as preses of the creditors, was not in any Court; and the expenses are to be paid “by the unsuccessful party to the successful party,” but each creditor exercising his right to vote, and doing no more, cannot be called “a successful,” or “unsuccessful,” party, in the sense in which these words are used in this clause,” and the power, such as it is, is not given to the Sheriff, but the Court of Session.

II. Although the Sheriff should be held to have power to award expenses he cannot have any to award them against one set of creditors in favour of another. Till after the actual vote of the creditors appointing the trustee there is nothing judicial, either in the character of their proceedings, or in the Sheriff's duties. And neither justice, reason, nor propriety will suggest that a creditor, appearing to take part in an election, which is to be one of free will, should do so under the penalty of paying the expenses of his fellow creditors, who may outvote him, incurred merely in their attendance upon the meeting. And so far as regards the 54th section, as has been already shown, that has reference to the case of competitors for the office appealing

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to the Court of Session. Even if it were held to embrace an appeal by the creditors themselves, its operation must be limited to that part of the proceedings which is of a judicial character. The words are “before the Sheriff Court or any other Court,” but the Sheriff, while acting as preses of the meeting, was not sitting in any Court, and the limitation of the power to the judicial part of the proceeding is quite consistent with reason; for it is one thing for a creditor to exercise his right of election in such way as he may think will make it effective, and quite another for him after he has done so, to try to disturb what has been done by an appeal to a judge. He is then following the course of any other litigant.

IV. But, assuming the Sheriff had power to award costs, and costs from one creditor to another, he had no power, when the agent was a practitioner before the Superior Courts, to award costs upon the scale of fees allowed in these Courts. The 132nd section of the statute is express, that agents qualified to practise before the Court of Session shall have power to practise before the Sheriff Court, but that they shall not be entitled to payment of “higher fees than those legally exigible in such Courts.” In the taxation of Graham’s expenses, therefore, the charges should have been cut down to the scale of the Sheriff Court fees, and in awarding expenses upon a higher scale, the Sheriff proceeded *ultra vires* and in disregard of this enactment.

V. The objection to the interlocutor upon all these grounds is the proper subject of an action of reduction. Relief could not have been obtained by an appeal to the Court of Session under the 128th section of the statute, for, if that mode of remedy had been adopted, the right to relief could only have been supported by showing objections to the interlocutors upon their merits; whereas the objection is, in truth, that they were pronounced upon matter *coram non iudice*, which applies equally to the allowance of expenses, upon an improper scale of charge, as to

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the general finding of expenses, for if the general finding fails for want of jurisdiction, so must the allowance of the particular scale.

Mr. Bethel and *Mr. Anderson* for the Respondents.

LORD CHANCELLOR.—My Lords, this is one of those cases in which one cannot but regret that the parties have thought proper to indulge themselves in coming to this House, on a matter in which, if they entirely succeeded, they could not by possibility have done so without an expenditure far exceeding the value of the subject matter in contest. However, the parties have a right to come here, and they have done so, and we must dispose of the matter on the principles of law applicable to the case.

My Lords, the case turns entirely on the question, whether the matter, being brought before the Court of Session for reduction, that Court could dispose of it in that form or not; and it arises on a question of sequestration, which, under the Act of Parliament, was referred to the Sheriff; proceedings took place before the Sheriff, and a contest arising as to the office of trustee, some parties preferring one person, and other parties preferring another, some expenses were incurred, and the result was, that the Sheriff decided in favour of one of the parties, and the party disappointed who was not successful, might, under the express provisions of the Act, have applied to the Court of Session to raise again the question which the Sheriff had decided. He might have done so under the 28th section, which provides, “That it shall be
 “ competent to bring under review of the Inner House of the
 “ Court of Session, any deliverance of the Sheriff (except where
 “ the same is declared not to be subject to review), provided a
 “ note of appeal shall be lodged with and marked by one of the Bill
 “ Chamber Clerks within twenty-one days from the date of such
 “ deliverance (except in the case of appeals against a deliverance

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“ declaring the election of a trustee, which shall be lodged as “ hereinafter provided), failing which the same shall be final.” But the parties permitted the time to elapse, they found they were too late in the appeal, and they determined to bring an action of reduction, and the ground of reduction attempted to be supported was, not that the Sheriff had done anything within his jurisdiction which ought to be corrected, (for that, it is admitted, cannot be the subject of reduction), but that the Sheriff had exceeded his jurisdiction, and the grounds on which he was supposed to have exceeded his jurisdiction were, first of all, because it was contended the Sheriff had no jurisdiction to give costs at all; that if he had any jurisdiction in the matter, he had no jurisdiction to award costs as between competing creditors, each being anxious for the appointment of a particular trustee; and further, that he had no jurisdiction over costs in proceedings before himself, or in some other stage of the proceedings which it is not material in the view I take of the case to particularize. Thirdly, it was said he had exceeded his jurisdiction, because he had not adhered to the rules laid down in the 132nd section, by which it is provided that parties practising in the Court of Session, may practise in proceedings before the Sheriff, but that in coming in before the Sheriff, they should have no other costs allowed them than what are allowable in that Court.

This being a new subject matter for the jurisdiction of the Sheriff, it might be well supposed there were a great many proceedings under the Act of Parliament before the Sheriff, as to which there would be no rule to be found in the Sheriff’s Court as to costs. The scale of fees there would be applicable to matters theretofore under the jurisdiction of the Court, but as new matter was introduced, it would be difficult to find a new scale of fees. The opinion I have formed, however, does not turn on that, I only mention it because the learned Judges below seem to have found great fault with the Sheriff for having

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departed from the rule laid down by the statute. The purpose I have in referring to that section is to show that the Judges might have complied with the provisions of that statute in respect of the allowance of costs.

With regard to the first question, my Lords, that the Sheriff had no jurisdiction, it seems to me the clauses referred to, the 54th and 132nd, put it beyond the possibility of doubt, for it is first of all declared that the Sheriff should have the same power as the Court of Session had; and the Court of Session no doubt had the power and jurisdiction to give costs. If there is any doubt about that the 54th section provides for costs, not only before the Court of Session, but for costs before the Sheriff; then comes the very clause in question, which directs the scale and mode in which the costs are to be paid, a scale and mode for paying costs, which on the arguments used, the Sheriff had no right to look at. On these various clauses, I myself think that the first point cannot be maintained, namely, that the Sheriff had no jurisdiction over costs.

Then, my Lords, comes the question whether, if he had jurisdiction over costs, he had any jurisdiction over costs as between creditors. The 45th and 46th sections show that the competition may be raised by a creditor; it could only be raised by a creditor. Who is to elect? The creditors; one creditor proposes one individual, another creditor proposes another individual; they are all in competition; an individual has no right to come and say, "Appoint me;" he has no right to come before the Court and say, "My position here is that of a trustee;" it is the act of the creditors; the sections treat the competition as raised by the creditors; at the close of the section—in order, if there should be any doubt, to remove it—it drops the word "creditor," and says, "the expenses shall be ordered to be paid by the unsuccessful party." Here, my Lords, we have then a provision that creditors

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shall enter into a competition, and that the party successful shall have the costs against the party who is unsuccessful. Can it be contended that a creditor is not a person entitled to costs within the provisions of that section? The 45th and 46th recognise the competition, and the 54th shows how it shall be dealt with.

Then, my Lords, with regard to the costs incurred before the Sheriff, that very provision referring to costs before the Sheriff, as well as before the Court, clearly shows that the costs to be given were costs, as well in the one case as the other. The competition arises from the first moment—the beginning—it arises when there is a difference of opinion between the creditors, one proposing one party, and the other another party.

The next question is one which has been the subject of much discussion, and according to the opinions of the Judges below, was the subject of most doubt, viz., whether there was such an erroneous proceeding on the part of the Sheriff as brought the case within the rule as to excess of power; and, supposing the rule to apply, whether a reduction could be maintained if it was a matter beyond his jurisdiction, notwithstanding the decision of the Sheriff is to be considered as final. I will assume that if it is beyond the jurisdiction, it is a proper subject for reduction; and then we will see what the act is. The Sheriff, I will assume, now has to deal with the costs; he is, by section 132, to adopt a particular scale, that is to say, he is to apply the scale existing in his Court to this new state of things; they say, “You have not done that; you have adopted a scale which is “in use in the Court of Session, a higher scale,” therefore, giving the party a higher remuneration than he would have under the scale adopted in the Sheriff’s Court; and therefore they say he is doing that which is not within his jurisdiction; his jurisdiction is to do right, and he is doing wrong; but that is not the sense in which the term is used. Is the subject-matter within

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his jurisdiction? Has he erred in deciding that which he was by law compelled to decide upon? If there be an error in dealing with that which is within his jurisdiction, it is not a subject for reduction, though it would be a subject for an appeal. It is true a scale was laid down; but is this a matter so clearly not within his jurisdiction, as that it should be treated as a nullity? and is the party not to apply to the proper authority by appeal, to set aside what he has done, but to apply to the Court of Session for reduction? Suppose the Act of Parliament contained a scale, and the Sheriff had not adhered to that scale, but in taxing the bill of costs he had in some instances allowed more than that scale had allowed, and more than the Act itself prescribed, that is not to be corrected in this way; the answer would be, as the subject-matter was within your jurisdiction, you have erred in the exercise of your jurisdiction.

That, my Lords, disposes of all the grounds which have been the subject of this unfortunate appeal. My opinion is, that the majority of the Court of Session were right in the decision to which they came, and that the interlocutor appealed from must be affirmed with costs.

LORD CAMPBELL.—My Lords, I fully agree with my noble and learned friend, and I do not think it necessary to add anything to his very lucid exposition of the case. I never had the smallest doubt, since the commencement of this case, that the Sheriff had jurisdiction over the costs in this case. As to that conundrum about excessive jurisdiction, it can only be supported by saying that there is an excess of jurisdiction whenever the Judge has made a mistake. For these reasons I concur in the motion, and I think that the judgment below must be affirmed with costs.

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Ordered and adjudged, That the petition and appeal be dismissed this House, and the interlocutors therein complained of be and the same are hereby affirmed, &c.

A. H. SMITH—SPOTTISWOODE, and ROBERTSON, Agents.