William Brown was acting for himself or for the joint adventure in making the purchase? And the answer I give is that clearly William Brown was here acting for himself and not for the joint adventure. Having bought the nets they were put into his stock, and he sold them and made profit on them.

Lord Adam—I do not think that it is doubtful on the evidence that the terms of the joint adventure were that one of the brothers should supply boats and ironmongery, the other the nets and other necessaries to fit out the boats. It is not doubtful, I think, that the one being a dealer in ironmongery, the other in nets and ropes and such goods, the agreement was that the one should supply his goods, and the other his goods, at retail prices just as to other customers. The evidence of the brothers is clear, and is the only parole evidence we have. The accounts and books produced are in conformity with it, and they prove that these were truly the terms of the joint adventure. It appears to me, then, that the books prove that such of the nets as were supplied by N. & N. Lockhart, and passed to the joint adventure, passed in terms of the contract of sale between William Brown and the joint adventure, and not on any other terms. The price charged was the retail price and not the wholesale, which would have been charged had they been supplied direct to the joint adventure. They were in fact just sold to the joint adventure by William Brown. It appears to me on the facts of the case that the pursuers can have no claim for nets which they sold to William Brown, who again sold them to the joint adventure. As to the terms of the letter in which William Brown ordered the nets, and the meaning put on these terms by the counsel for the pursuers, I have to say that by the terms of the contract between them William Brown had no power to bind John Brown. It would have made no difference if he had said plainly that he was acting on behalf of his brother, as he had no authority to order nets in his brother's name and to bind his brother therefor.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for the Pursuers and Respondents—G. W. Burnet. Agents—Watt & Anderson, S.S.C.

Counsel for the Defender and Reclaimer—Gillespie—H. Johnston. Agents—Mackenzie & Kermack, W.S.

Saturday, June 16.

FIRST DIVISION.

[Sheriff-Substitute of Caithness, &c., at Wick.

FARQUHARSON *v.* SUTHERLAND.

Bankruptcy—Sequestration—Election of Trustee—Bankruptcy (Scotland) Act, 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 69 *and* 71—*Sheriff—Jurisdiction—Appeal.*

In a competition for the office of trustee in a sequestration an objection was stated to the oath of one of the creditors on the ground that it did not bear to have been taken before a magistrate or justice of the peace. The Sheriff-Substitute sustained this objection, and in the note appended to his deliverance stated that he considered this sufficient without dealing with any of the other objections, as one of the candidates was proposed by the creditor whose vote was thus objected to, and if the creditor was not entitled to vote he was not entitled to propose. The Sheriff-Substitute therefore declared the other candidate duly elected.

An appeal was taken against this deliverance, to the competency of which it was objected that the judgment of the Sheriff was final under sec. 71 of the Bankruptcy Act. *Held* that the Court could consider the reasons for the judgment given in the Sheriff-Substitute's note, and that as these disclosed that the Sheriff had exceeded the jurisdiction conferred on him by the statute, the appeal was *competent*, the *Lord President* being of opinion that the duty of the Sheriff was to determine which candidate had the majority of votes, which he had declined to do, *Lord Shand* and *Lord Adam* being of opinion that the Sheriff was only entitled under sec. 69 of the statute to entertain objections which were stated, and no others. The Court therefore *recalled* the judgment of the Sheriff-Substitute, and remitted to him to proceed with the election of the trustee.

The estates of Eric Sinclair Mackay, fishcurer, Pulteneytown, Wick, were sequestrated on 24th March 1888. There was a competition for the office of trustee in the sequestration, in which John Campbell proposed William Farquharson, bank agent, whom failing George Sinclair, accountant, and on the other hand Hector Sutherland proposed Alexander Sutherland, S.S.C., whom failing Symon Flett Sutherland, accountant. On the vote being taken creditors to the value of £15,856, 18s. 9½d. voted for Farquharson, whom failing Sinclair, and creditors to the value of £1641, 0s. 5d. for the Sutherlands.

Objections were stated to the validity of the votes tendered for Farquharson and Sinclair. In regard to the vote of John Campbell, the proposer of Farquharson and Sinclair, who produced an oath by himself to a debt of £16, 8s. 2½d., it was objected that the oath did not bear to have been taken in presence of a magistrate or justice of the peace, and that the name of the justice of the peace was omitted, and his oath therefore was null.

The Sheriff-Substitute (E. Erskine Harper) on 16th April 1888 pronounced the following interlocutor:—"The Sheriff-Substitute having heard parties upon the note of objections for Alexander Sutherland, S.S.C., Wick, and Symon Flett Sutherland, accountant, Wick, in the competition between them on the one hand, and William Farquharson, agent, North of Scotland Bank (Limited), Wick, and George Sinclair, accountant, Telford Street, Pulteneytown, on the other, for the office of trustee on the sequestrated estates of Eric Sinclair Mackay, fishcurer, Pulteneytown, in the parish of Wick and county of Caithness, for the reasons stated in the subjoined note hereby declares the said Alexander Sutherland and the said Symon Flett Sutherland to have

been duly elected trustee and trustee in succession on the sequestrated estates of the said Eric Sinclair Mackay in terms of the Bankruptcy Statutes: Finds the said William Farquharson and George Sinclair jointly and severally liable to the said Alexander Sutherland and Symon Flett Sutherland in expenses, which modifies to the sum of £3, 3s. sterling, and decerns.

"*Note.*—The Sheriff-Substitute sustains the objection to the oath of John Campbell, viz., that it does not bear to have been taken before a magistrate or justice of the peace. The words of the Act of 1856 are very explicit (section 22) that the oath must be taken before a judge ordinary, magistrate, or justice of the peace; but in the present case, although the oath bears to be signed by a justice of the peace, it is not said, and it does not appear, that it was taken before him.

"This seems to be enough for the case without dealing with any of the other objections, because the appointment of Mr Farquharson, whom failing George Sinclair, as trustee, was proposed by the said John Campbell, who, if he was not entitled to vote, was not entitled to propose. It follows therefore that the other persons proposed for the trusteeship, viz., Alexander Sutherland, S.S.C., whom failing Symon Flett Sutherland, there being no objections to the votes of their supporters, and the meeting having declared itself satisfied with the sufficiency of the cautioners offered, fall to be declared elected."

Against this deliverance of the Sheriff-Substitute Farquharson and Sinclair appealed to the Court of Session.

Section 69 of the Bankruptcy Act provides, in cases where the Sheriff is present at the election, and there is a competition or objections, that "such objections to the votes or candidates shall be stated at the meeting, and the Sheriff 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 *viva voce*, and declare the person or persons trustee or trustees in succession whom he shall find to have been duly elected, and state the ground of his decision in a note, and the same, as well as such short note, shall form part of the process." Section 70 provides, in cases when the Sheriff is not present at the election, that "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 shall forthwith hear parties thereon *viva voce*, and give his decision, and state the grounds thereof in a note, which note, as well as such short notes, shall form part of the process." Section 71 provides that "the judgment of the Sheriff declaring the person or persons elected to be trustee or trustees in succession, shall be given with the least possible delay; and such judgment shall be final, and in no case subject to review in any court, or in any manner whatever." Section 101 provides that "all questions at any meeting of creditors shall be determined by the majority in value of those present and entitled to vote, unless in the cases herein otherwise provided for."

The respondents objected to the competency of the appeal, and argued that the decision of the Sheriff was final under section 71 of the Bankruptcy Act—*Buchan* v. *Bowes*, June 13, 1863, 1 Macph. 922; *Rankine* v. *Douglas*, July 19, 1871, 9 Macph. 1053. Further, the objection here sustained was a legal inference from the objection stated, and was thus in accordance with sec. 69 of the Act. The question the Sheriff had before him was whether there was any competition for the office of trustee, and it had been held that that was a proper question for the Sheriff to consider and decide—*Foulis* v. *Downie*, October 27, 1871, 10 Macph. 20.

The appellants argued—The Sheriff had exceeded his jurisdiction, and therefore appeal was competent, and was the proper mode of obtaining redress—*Buchan* v. *Bowes*, *per* Lord Kinloch; *Rankine* v. *Douglas*, *per* Lord Deas; *Foulis* v. *Downie*, *per* Lord President. An appeal had been sustained on the ground that the Sheriff had exceeded his jurisdiction under a similar section of the Sheriff Court Act (16 and 17 Vict. cap. 80) sec. 22—*Dick* v. *Great North of Scotland Railway Company*, October 8, 1860, 33 Jur., 3 Irv. 616. The Sheriff had exceeded his jurisdiction in two ways—(1) He had not declared the candidate who had received the majority of votes in value elected—Secs. 69, 70, and 101 of Bankruptcy Act; and (2) he had sustained an objection not stated, which was therefore not legally before him—Secs. 69 and 70 of the Act.

At advising—

Lord President—This is a question in regard to the competency of an appeal from the Sheriff-Substitute of Caithness, and in considering it I think we are entitled to look at the proceedings in the Court below. The question is one concerning the election of a trustee in a sequestration, and we have to examine whether the Sheriff has acted within the powers conferred on him by the Bankruptcy Act, and that cannot be decided without considering what is the jurisdiction which he has under that statute. The statute declares that the person elected as trustee in a sequestration is to be elected for certain reasons which are to be stated. The Sheriff has stated his reasons, according to the provision of the statute, which have decided him in the election in question, and therefore we are entitled to look at his note to see what were the reasons which guided him in declaring the trustee in question elected. Having explained in his note, in the first place, that the affidavit of John Campbell is bad, he goes on to say—"This seems to be enough for the case without dealing with any of the other objections, because the appointment of Mr Farquharson, whom failing George Sinclair, as trustee, was proposed by the said John Campbell, who, if he was not entitled to vote, was not entitled to propose." The Sheriff's opinion is that no one can be be elected who has not been nominated. In that reasoning I cannot concur. Looking at the Sheriff's note no one would suppose that the decision was to be reached according to the votes of the majority in value of the creditors present. Instead of going on to ascertain on whose side was the majority, he declined to proceed further, but said, because this person against whom he decided was not nominated, therefore he could not be elected In so doing, I am of opinion he has gone beyond the powers

given him by the statute. The duty of the Sheriff in the circumstances was to go on to examine the votes tendered, and the objections stated to them, and to determine which candidate had the majority of votes. He declined to exercise that jurisdiction, and therefore he must be considered to have acted in excess of the jurisdiction and authority given him by the statute, because the law holds that a refusal to exercise a lawful jurisdiction is an excess of jurisdiction. He refused to examine the votes and objections, and thus, I think, he has gone beyond the power given him by the statute. I am therefore of opinion that we should recal the interlocutor appealed against.

Lord Shand—I reach the same opinion as your Lordship, but on different grounds. My view also is that the Sheriff has proceeded outwith the statute. If the Sheriff, in dealing with a question of this kind, keeps within the statute there is no doubt that we have no jurisdiction to review any decision to which he may come, however erroneous in point of law. His judgment is final, and not subject to review here or anywhere. But the question here is whether the Sheriff has gone and exceeded the provisions of the statute in having taken up and sustained an objection stated by himself, and not by the party for whom he has decided. Now, the 69th section of the Bankruptcy Act of 1856 enacts in cases where the Sheriff is present, and there is a competition or objection to the candidate or candidates, that "such objections to the votes or candidates shall be stated at the meeting, and the Sheriff may 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 *viva voce*, and declare the person or persons trustee or trustees in succession whom he shall find to have been duly elected." That section provides that a note of the objections shall be taken, and the objections to be dealt with are the objections stated at the meeting. The 70th section further provides in cases where the Sheriff is not present, and there is competition or objection—"The parties shall . . . lodge in the hands of the sheriff-clerk short notes of objections, and the Sheriff shall forthwith hear parties thereon *viva voce*, and give his decision, and state the ground thereof in a note." Now, it is a question whether the provisions in these two sections about the giving in a careful note of objections, and that the Sheriff is to deal with the objections so given in and noted, do not seem to have been made with the view of enabling the Court to say whether the Sheriff has gone outside the statute. Now, the objections which were stated were within the statute. Parties gave in objections in conformity with the statute. The Sheriff, however, in sustaining an objection to one of the votes has not considered the other objections at all. What he has done is this—Although the objections stated by the parties were merely to each particular vote, he has sustained one objection to the whole of the votes. If parties had stated the objection that these votes were bad because the parties voting were not proposers, as far as I can see, in sustaining that objection, however wrong he might have been in point of law, the Sheriff's judgment would have been final. But he had no objection of that class before him, and he has practically sustained an objection which was not before him for consideration. Where he has gone beyond the statute is in having sustained an objection which was not stated. The statute authorises him to deal with the objections stated, and no others. I agree with your Lordship that we are entitled to look at the proceedings to see if the Sheriff has disregarded the provisions of the statute. In the present case he has, in having taken up and sustained an objection which was never stated, and on that ground I think that the Sheriff has gone beyond the jurisdiction which the statute gives him.

I am not prepared to say that he has refused to exercise the jurisdiction given him by the statute, and so has exceeded his jurisdiction, for he did consider the question of these votes, and decided that they were not to be taken into consideration in deciding which candidate had the majority. I do not accordingly think that he was out of the statute otherwise than by taking up and sustaining an objection which had never been stated to him. In so doing I think he went beyond the powers given him by the statute.

Lord Adam—I am of opinion with your Lordships that the Sheriff has gone beyond the powers given him by the statute. I also agree in thinking that we are entitled to look at the proceedings to find out the grounds upon which the Sheriff has based his judgment. It appears to me that the only objection, so far as dealt with by the Sheriff, was the objection to the vote of John Campbell. That was the only objection stated, and the only objection the Sheriff had to deal with. We must assume that all the other votes were good and unobjectionable. The result if, as your Lordship says, the Sheriff had gone on to examine the other votes might have been different. The Sheriff only examined the vote of John Campbell, and decided that it was bad. His judgment therefore should only have gone so far. The 101st section of the statute is very clear to the effect that all questions are to be decided by the majority in value of the creditors present and entitled to vote. The Sheriff could not do otherwise than declare that candidate duly elected who was supported by the majority in value without going beyond the statute. His duty was to declare the candidate supported by the majority in value elected, and he has gone outwith the statute by declaring the party who had not the majority of good votes to be trustee. Saving objections to the votes of those who supported the other candidate their votes were good, but the Sheriff has held that because that candidate was not nominated these votes could not be used. I agree with Lord Shand on the grounds stated by him that clearly under the statute the Sheriff is only entitled to entertain objections which have been stated.

The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute, and remitted to him to proceed with the election of the trustee, and found the appellants entitled to expenses.

Counsel for the Appellant—Low. Agent—Alex. Morison, S.S.C.

Counsel for the Respondent—Sir C. Pearson Agent—James Purves, S.S.C.