LORD PRESIDENT—We have consulted the Judges of the Second Division upon this matter, so that the rule of practice may be uniform, and we are of opinion that the Act of Sederunt, in the passage where in certain events it limits the expenses chargeable by the pursuer, applies only to Court of Session expenses, and not to the expenses in the Sheriff Court.

The Court pronounced this interlocutor—

"The Lords apply the verdict found by the jury on the issue in this cause, and in respect thereof decern against the defenders for payment to the pursuer of the sum of £25: Find the pursuer entitled to his expenses in the Sheriff Court, and to one-half of the taxed amount of his expenses in this Court, and remit," &c.

Counsel for the Pursuer — Blackburn, K.C.—J. B. Young. Agent—E. Rolland M'Nab, S.S.C.

Counsel for the Defenders — M'Clure, K.C. — C. H. Brown. Agents — Alex. Morison & Company, W.S.

Thursday, June 11.

FIRST DIVISION.

[Lord Ardwall, Ordinary, officiating on the Bills.

GRIERSON AND ANOTHER *v.* OGILVY'S TRUSTEE.

Bankruptcy—Appeal—Competency—Election of Trustee—Adverse Interest—Ultra Vires—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 68 *and* 71.

At a meeting for the election of a trustee in a sequestration, objection was taken to a candidate on the ground that he had an interest adverse to the general body of creditors, his claim being founded upon documents as to which questions, as alleged, must necessarily arise. The Sheriff having repelled the objection and declared the candidate elected, an appeal was taken upon the ground that, the candidate being ineligible under section 68 of the Bankruptcy (Scotland) Act 1856, the Sheriff had acted *ultra vires*.

Held that the Sheriff had not acted *ultra vires*, and consequently that the appeal was, under section 71 of the Bankruptcy (Scotland) Act 1856, incompetent.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79) enacts—Section 68—"*Procedure at Meeting for Election of Trustee.*— . . . and it shall not be lawful to elect as trustee the bankrupt, or any person conjunct or confident with the bankrupt, or who holds an interest opposed to the general interest of the creditors, or whose residence is not within the jurisdiction of the Court of Session." Section 71—"*Judgment of Sheriff as to Trustee Final.*—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."

James Cullen Grierson, solicitor, Lerwick, and John Watson Macintosh, accountant, Glasgow, appealed against a deliverance of the Sheriff-Substitute at Lerwick (BROUN), declaring David Williamson, North of Scotland Bank, Limited, Lerwick, to have been duly elected trustee on the sequestrated estates of Thomas A. Ogilvy, farmer, Lerwick.

The appellants, *inter alia*, stated—"Mr Williamson was nominated for the office of trustee as was also the appellant Mr Macintosh, whom failing Mr Grierson. . . . Mr Grierson took personal exception to Mr Williamson acting as trustee in respect (1) that he was the nominee of and confident with the bankrupt's law agent, and (2) that he had interests conflicting with the general interest of the creditors in respect that his own claim was founded upon documents as to which questions must arise conflicting with the interests of the general creditors, and (3) that there was a claim by the North of Scotland Bank for £643, to which he took exception to the first item of £231, that it was not properly authenticated in terms of the Bankers Books Evidence Act, and the other items were open to objection and inquiry, and Mr Williamson was not the party to do so."

They also stated that the Sheriff refused to hear them on these objections; that he had declared Mr Williamson elected; and that in so doing he had acted contrary to the provisions of the Bankruptcy (Scotland) Act 1856.

On 14th April 1908 the Lord Ordinary officiating on the Bills (ARDWALL) refused the note.

The objectors reclaimed, and argued—Williamson had an adverse interest in respect (1) that his claim was founded on documents as to which questions might arise, and (2) that he was agent of a bank which was a creditor for a large amount. That was a sufficient disqualification—*Bisset* v. *Nicholson*, July 20, 1841, 3 D. 1283. A trustee held a judicial office and should be above all suspicion—*Robison* v. *Stuart*, November 23, 1827, 6 S. 104. In declaring Williamson elected, the Sheriff had acted *ultra vires*, and in such circumstances an appeal against his deliverance was competent—Goudy on Bankruptcy, p. 231; *Buchan* v. *Bowes*, June 13, 1863, 1 Macph. 922; *Foulis* v. *Downie*, October 27, 1871, 10 Macph. 20, 9 S.L.R. 18; *Farquharson* v. *Sutherland*, June 16, 1888, 15 R. 759, 25 S.L.R. 573; *Yeaman* v. *Little*, March 16, 1906, 8 F. 702, 43 S.L.R. 504. It was the function of the creditors to elect the trustee, the Sheriff's duty being to declare the result of that election—*Miller* v. *Duncan*, March 18, 1858, 20 D. 803.

Argued for respondent—The appeal was incompetent, for the Sheriff's decision was final—Bankruptcy Act 1856, sections 71, 170.

The question of the trustee's qualification was one of the things expressly remitted to the Sheriff—section 69. The minutes showed that the Sheriff had considered the objections and repelled them, and the minutes could not now be impugned as inaccurate—*Brown* v. *Lindsay*, March 2, 1869, 7 Macph. 595, 6 S.L.R. 400. The procedure prescribed by the Act for the election of a trustee was intended to be summary, and the Court would not readily entertain appeals such as the present—*Galt* v. *Macrae*, June 9, 1880, 7 R. 888 (Lord Young's opinion), 17 S.L.R. 635. The only case in which such appeals were allowed was where the Sheriff had failed to exercise his jurisdiction, and nothing of that kind had occurred here.

At advising—

LORD PRESIDENT—This is a reclaiming-note from a judgment of the Lord Ordinary officiating on the Bills, which deals with several points arising in a sequestration. But only one point was argued before your Lordships, which is not expressly dealt with by the Lord Ordinary, but which is covered by that portion of his opinion where he says—"All other objections to the Sheriff-Substitute's deliverance appear to me to be irrelevant in view of the provisions of section 71 of the Bankruptcy Act 1856." The objection stated is that the gentleman who was declared by the Sheriff to have been elected trustee was incapable of holding that office in respect that, as is alleged, he had an interest opposed to the general interest of the creditors. That is explained to mean that he himself had a claim founded upon documents as to which questions might arise, and that his interest to sustain his own claim thus conflicted with the interests of the general creditors. The argument which was seriously pressed upon us was this. Section 68 of the Bankruptcy Act 1856, which is headed "Procedure at Meeting for Election of Trustee," provides for the meeting of creditors, and for the election of a trustee, and concludes—"It shall not be lawful to elect as trustee the bankrupt, or any person conjunct or confident with the bankrupt, or who holds an interest opposed to the general interest of the creditors, or whose residence is not within the jurisdiction of the Court of Session." Section 69 makes the Sheriff the judge as to the person who has been elected, and section 71 provides that the judgment of the Sheriff declaring the person elected to be trustee "shall be final, and in no case subject to review in any Court or in any manner whatever." The case for the reclaimers was presented to us, not as an appeal against a judgment of the Sheriff, but as an appeal against an *ultra vires* act. It being impossible under the statute to appoint a person having an adverse interest, it was competent for this Court, as the reclaimers argued, to set aside such an appointment as an act done outwith the powers of the statute, and the familiar rule was appealed to that no finality clause can prevent an *ultra vires* act being set aside. I have come to the conclusion that the argument is not well founded. There is no doubt as to the policy of the statute. It was to get the trustee into the saddle as quickly as possible. I need not remind your Lordships of the remarks made in the case of *Yeaman* v. *Little*, March 16, 1906, 8 F. 702, by Lord Pearson, who has had a very large experience of this class of case, and by myself, where, with reference to the case of *Farquharson* v. *Sutherland*, June 16, 1888, 15 R. 759, it was said that it was not desirable to extend the doctrine of that case or to relax the stringent provisions of the statute as to appeals. I am confirmed in my opinion by the terms of section 69 of the Act. I consider that the objection with which we are now dealing falls within the category of "objections to the candidate" referred to in that section, with regard to which it is provided that they are to be decided on by the Sheriff. If this is so, it was not *ultra vires* of him to decide upon this objection, and the finality clause applies. It seems to me that you get in the sentence at the end of section 68 an example of two classes of objections. Suppose the bankrupt himself had been appointed trustee. There could be no doubt of the fact that he was the bankrupt, and if you can imagine such an extraordinary thing as the Sheriff declaring the bankrupt elected, no doubt that appointment could be set aside, not by way of reviewing the Sheriff's decision, but on the ground that the appointment was *ultra vires*. But when you consider the other objections stated in section 68, it is apparent that they are matters which admit of questions being raised and decided, as, for instance, whether a certain person is "conjunct and confident" with the bankrupt. The expression "conjunct and confident" is one which was used in the old Scots Acts, and there are many cases in the books dealing with its significance. I do not suppose that all the possibilities of doubt regarding it are yet exhausted, and there may still be cases where there is room for argument as to who is a "conjunct and confident" person. If such cases arose, it would be for the Sheriff to say whether the objection had been made out or not. Similarly in the present case it is for the Sheriff to decide whether the candidate has or has not an adverse interest, and when he has considered and decided that his judgment is final. In the practical working out of the statute I do not think that any harm can be done, because even supposing the Sheriff to have decided wrongly, and that the trustee has an adverse interest, the most he could do would be to rank his own debt, and as to that he is not final. So that even taking the matter at the worst I do not think that there is any serious *lacuna* in the scheme of the Act.

I accordingly move your Lordships to adhere to the judgment of the Lord Ordinary.

LORD M'LAREN—I take the same view as your Lordship. The argument submitted to us was that while the statute deter-

mined by exclusion who was eligible for the office of trustee, if the Sheriff confirmed the election his decision was final, provided, of course, that he had exercised his jurisdiction. I agree that there may be cases in which the Sheriff's decision would not be final, as, for example, where he had appointed as trustee the bankrupt's brother or the bankrupt's son. In such a case I should hold that the Sheriff's attention had not been called to the relationship, and that, accordingly, he had not applied his mind to the true question and so had failed to exercise his jurisdiction. On the other hand, if the objection to the trustee was based on agency—that he was the agent of someone who had a claim against the bankrupt's estate—I should not take the same view, because the question of agency is one of degree, and I should assume that the Sheriff had considered the matter and come to a different opinion from the appellant, and whenever it is ascertained that the Sheriff has exercised his jurisdiction the statute declares his decision to be final.

Similarly, where the person elected trustee has an interest which is manifestly opposed to that of the general body of creditors—as, for instance, where he claims a preference—I should be of opinion that this was a case where the election could not be sustained, and I should assume in such a case that the Sheriff's attention had not been called to the matter, and that, accordingly, he had not given a decision on the point.

But if all that is said against the trustee's election is that he, in his capacity as an individual, has a claim against the bankrupt estate, you get at once into a question of degree, for the objection taken might be so trifling that no sensible judge would pay any attention to it, and, on the other hand, it might be so serious as to require very careful consideration. These seem to me to be just the kind of questions which the statute has left to the determination of the Sheriff, and nothing has been shown to convince me that in the present instance the Sheriff had not fully considered the matter.

I therefore think the objection fails.

Lord Kinnear — I am of the same opinion. I think on the construction of the statute that the question which it is proposed to raise for our consideration is exactly one of those questions which are by the statute to be decided by the Sheriff finally. The statute says that the creditors are to meet and elect a fit person as trustee. Then it says it shall not be lawful to elect as trustee the bankrupt, or any person conjunct or confident with the bankrupt, or who has an interest opposed to the general interest of the creditors or whose residence is not within the jurisdiction of the Court of Session. Now, all these objections are objections to the election by the creditors of a particular person, and so must be considered in the first instance by the creditors. Then the statute says that if there is no competition for the office the Sheriff shall declare the person chosen by the creditors to be trustee. If there is competition he has to find who has been duly elected, and his decision is not subject to review in any Court or in any manner whatever. But the question whether it is a good objection to the trustee that he is a conjunct or confident person, or has an interest opposed to the general interest of the creditors, is a question which must be decided before the Sheriff can decide whether the trustee is duly elected or not, and when he has applied his mind to that question and settled it one way or other it appears to me that the express terms of the statute make his decision final. I agree with your Lordship's observation as to the true purpose and effect of this provision. For the books show that under previous statutes the proceedings were apt to be delayed by protracted litigation between persons competing for the office of trustee, and it is clear enough, as Lord Adam points out in one of the previous cases, that such litigations could be of no advantage whatever to the creditors or to the estate. This is the evil which the section was intended to meet. But such a question as that which it is proposed to raise in this case is just one of those which might probably lead to protracted litigation, because the decisions rest on fine distinctions and a defeated candidate was not very likely to be satisfied with a single judgment against him. I think that this is just the kind of question which it was intended to exclude from appeal. In any case I think that the terms of the statute clearly make the Sheriff's decision final. I agree also that this Court is not prevented by the finality clause from setting aside judgments which are not pronounced in the true and honest exercise of jurisdiction conferred by the statute; but I think that the question whether a decision has been pronounced in the exercise of such jurisdiction cannot depend upon the greater or less materiality of the question or upon the amount of attention which may be supposed to have been given to it. I suppose such a judgment might be set aside on the same grounds as any other final judgment, as, for example, if it had been obtained by fraud. But it is not necessary to consider what would be a sufficient ground. It is enough to say that there is no ground for reduction alleged in the present case. Whether the Sheriff was right or wrong in declaring this man elected is not material, because his deliverance is final.

Lord Pearson was absent.

The Court adhered.

Counsel for Reclaimers—Scott Dickson, K.C.—MacRobert. Agents—Clark & Macdonald, S.S.C.

Counsel for Respondent—Spens—Macmillan. Agents—Carmichael & Miller, W.S.