cited to us, and which seems to me to apply in terms to the circumstances of the case now before us.

LORD ARDWALL concurred.

The LORD JUSTICE-CLERK was absent.

The Court upheld the decision of the arbiter.

Counsel for the Appellant—Crabb Watt, K.C.—F. C. Thomson. Agents— Weir & Macgregor, S.S.C.

Counsel for the Respondent — D. P. Fleming. Agents — Mitchell & Baxter, W.S.

Saturday, July 4.

FIRST DIVISION.

[Lord Johnston, Ordinary.

LIDDALL *v.* BALLINGRY PARISH COUNCIL.

Expenses — Sheriff — Administrative or Judicial Capacity — Burial Grounds (Scotland) Act 1855 (18 *and* 19 *Vict. cap.* 68)*—Petition to Sheriff to Designate Land for Purposes of Burial Ground—Power of Sheriff to Award Expenses against an Objecting Conterminous Proprietor.*

A parish council presented a petition under the Burial Grounds (Scotland) Act 1855 praying the Sheriff to designate certain lands as a burial ground for the parish, and to find any person objecting liable in expenses. Intimation and advertisement having been made calling upon any person interested, who might desire to oppose the application, to enter appearance, objections were lodged by a conterminous proprietor, whose lands were separated from the proposed burying ground by a burn, on the ground, *inter alia*, that the burn would be polluted by the drainage of the cemetery. The Sheriff repelled the objections and found the objector liable in the expenses caused by his opposition. *Held* (*aff.* Lord Johnston), in a suspension of a charge for these expenses, that in the circumstances the objector ought not to have been found liable in expenses, and charge *suspended*.

Per Lord M'Laren—"I should like to consider it, if possible, an open question, whether the question of expenses is wholly a circumstantial question to be raised afresh in every case, or whether it is a general rule that parties appearing before the Sheriff in such proceedings (*i.e.*, administrative applications) are not liable in expenses. But in any case I am prepared to hold that in the absence of such special circumstances as justify the Court in coming to the conclusion that the party puts himself in the position of a contentious litigant, there is no ground or authority for awarding expenses against such a party merely because his application has been unsuccessful"—*County Council of Dumbarton* v. *Clydebank Commissioners*, November 14, 1901, 4 F. 111, 39 S.L.R. 57, *considered*.

The Burial Grounds (Scotland) Act 1855 (18 and 19 Vict. cap. 68), section 10, enacts—"Whenever any burial ground shall have been closed by Order in Council, the parochial board shall forthwith proceed to provide a suitable and convenient burial ground for the parish, and to make arrangements for facilitating interments therein; and in the event of a suitable burial ground not being provided by the parochial board within six months after such order or requisition as aforesaid, it shall be lawful for such board, or for any ten or more persons assessed for the relief of the poor in the parish, or any two or more members of the parochial board, to apply by summary petition to the Sheriff to have a suitable portion of land designated for the purpose of a burial ground; and the Sheriff shall examine such witnesses and make such inquiry as he shall think proper, and shall keep a note of such evidence as may be adduced, and if he thinks fit shall thereupon proceed to designate and set apart such portion as he may deem necessary of any lands in such parish suitable for the purpose, not being part of any policy, pleasure ground, or garden attached to any dwelling-house; provided always that due intimation shall have been given of not less than ten days to the owner of such lands that he may be heard for his interest before such designation is actually made, subject always to an appeal to any of the Lords Ordinary of the Court of Session, whose decision shall be final, such appeal always being presented within fourteen days of the date of the Sheriff's judgment. . . ."

In May 1906 the Parish Council of Ballingry, as coming in place of the old parochial board, presented a petition to the Sheriff of Fife and Kinross, under the Burial Grounds (Scotland) Act 1855, praying him to designate and set apart a certain portion of the glebe lands of the parish of Ballingry for the purposes of a burying ground for the parish, and to find any person offering objections liable in expenses. The land proposed to be designated was bounded on the north and north-west by the lands of W. J. N. Liddall of Navitie, along which it extended, following the centre line of a burn or ditch, 517 feet 6 inches. The Sheriff-Substitute (HAY SHENNAN) having considered the petition appointed intimation to be made by advertisement calling upon any party interested, who might desire to oppose the application, to lodge in the hands of the Clerk of Court at Kirkcaldy a notice of appearance within ten days. Liddall entered appearance and lodged objections on the ground, *inter alia*, that the whole drainage of the land proposed to be designated was into the burn flowing between the said land and his estate of Navitie; that the burn flowed

right through his estate, watering all the parks; and that the burn would be rendered unsuitable for the primary purposes for which it was used if the drainage of the burying ground were allowed to run into it. On 28th July 1906 the Sheriff-Substitute, having in terms of section 10 of the Burial Grounds (Scotland) Act 1855 examined witnesses and made inquiry, pronounced an interlocutor repelling the objections, designating the ground, and finding the objector (Liddall) liable in the expenses caused by his appearance and opposition. The expenses having thereafter been taxed at £48 and decerned for on 11th March 1907, a charge on the decree was given.

Liddall presented a note of suspension, in which he pleaded—"(1) The said decree for expenses having been *ultra vires* of the Sheriff-Substitute, the charge proceeding thereon ought to be suspended. (2) The Sheriff-Substitute having acted in the said inquiry in an administrative capacity, and having had no jurisdiction to pronounce the said decree for expenses, the complainer is entitled to suspension as craved."

On 31st October 1907 the Lord Ordinary (JOHNSTON) suspended the charge and whole grounds and warrants thereof *simpliciter*, with expenses.

Opinion.—"Mr Liddall of Navitie, under this suspension, complains that he has been charged, at the instance of the Parish Council of Ballingry, on an extract decree for expenses pronounced by the Sheriff-Substitute of Fife, which the latter had no power to grant.

"The circumstances are these:—The Parish Council of Ballingry, as coming in place of the old Parochial Board, in May 1906 presented a petition to the Sheriff of Fife, by virtue of the Burial Grounds (Scotland) Act 1855, praying him to designate 4½ acres of the glebe lands of Ballingry for the purposes of a burial ground for the parish. The prayer of this petition concluded by craving the Sheriff to find any person offering objections to the petition liable in expenses. I am of opinion that neither were the Parish Council warranted in concluding for expenses, nor had the Sheriff-Substitute power to award them, under said petition. That he should have even done so on the merits, had he the power, is unintelligible, his whole reasoning leading to an opposite conclusion, and proving that Mr Liddall's opposition was not only necessary but advantageous in the public interest as well as in his own, and amply justified by the result. But the question before me does not depend on the merits, but on the competency of the Sheriff's award.

"The Burial Grounds (Scotland) Act 1855 provides for the closing of burial grounds which have become dangerous to the public health or offensive to public decency, and for the provision of burial grounds, whether existing burial grounds have been so closed or not. In relation to this matter, certain authority is given to the Sheriff, subject to an appeal to a Lord Ordinary of the Court of Session; but I think that the very subject-matter of the authority committed to the Sheriff raises the *prima facie* presumption that his action will be ministerial, and not judicial. This is amply confirmed by the provisions of the statute when these are examined in detail.

"The Sheriff is first called in by section 3, when it is proposed to put the statute into operation, where a parish is partly burghal and partly landward, to determine whether, for the purposes of the Act, such parish is to be deemed burghal or landward. And where application is made to him for that purpose, he is to hear 'any parties having interest.'

"In the next place, by sections 4 to 8, the Sheriff may be applied to not merely by the parochial board, but by any ten persons assessed for relief of the poor, or any two householders residing within 100 yards of an existing or proposed burial ground, to determine whether such burial ground is or would be dangerous to public health or offensive to public decency. The provisions for the procedure on such application require the Sheriff 'to permit all parties whom he shall judge to have an interest, to appear and be heard in such manner as he shall deem fitting.' He is to make inquiry; and if satisfied of the truth of the allegations of the applicants, he is to pronounce an interlocutor to such effect, and transmit a copy to the Home Secretary, whereupon an Order in Council is to be pronounced, closing the existing or prohibiting the opening of the proposed burial ground. In this branch of the statute there is no provision for appeal, but there is a prohibition of the renewal of the application to the Sheriff, except with the concurrence of the procurator-fiscal, till after the lapse of five years. In both these provisions it is quite clear that the Sheriff is acting ministerially, and this is accentuated by the clause to which I have last referred; to enable him to deal properly with such application it is manifestly necessary and to the public advantage that all having interest should be heard.

"Then there follow in sections 9 to 14 enactments for the provision of burial grounds for parishes, and I think also of additional ground to be added to an existing burial ground, and that whether the burial ground of the parish has been ordered to be closed or not. So far as I am concerned, the important sections are 10 and 13. Section 10 provides for the parochial board, any ten ratepayers, or any two members of the board, applying by summary petition to the Sheriff to have a suitable portion of land designated. And after examining witnesses, of whose evidence he shall keep a note, and making inquiry, the Sheriff is to proceed to designate and set apart such portion as he may deem necessary 'of any lands in such parish suitable for the purpose,' provided that due intimation is first given to the owner of such lands that he may be heard for his interest before such designation is actually made. Then section 13 incorporates the Lands Clauses Act 1845, which, in effect, makes the Sheriff's designation of a parcel of land for the purpose of a burial ground

the equivalent of a Private Act or Provisional Order, and confers compulsory powers on the parochial board, as promoters of the undertaking, to acquire the land designated by the Sheriff. It is somewhat strange that the 10th section should only provide expressly for the owner of such lands being heard for his interest, but I think that the Sheriff-Substitute, having regard to the provisions of the Lands Clauses Act, did right in giving a wide interpretation to the word 'owner,' and in holding it to include anyone who, as Mr Liddall, might be injuriously affected, in respect, for instance, that the land proposed to be taken marched with his estate, and was only separated therefrom by a burn, in the water of which he had the rights of a riparian proprietor, and which water was liable to be polluted by drainage from the proposed cemetery. I cannot understand the reasoning of the Sheriff-Substitute's note, in which he indicates that he was prepared to be satisfied of the suitability of the ground, chiefly because it was the only ground possible, without satisfying himself that either there would be no injurious affection of the burn by pollution, or that proper precautions were to be taken to prevent it, and which led him to proceed to designate the land, with a mere warning that 'having in view Mr Bennett's (that is, Mr Liddall's adviser's) cogent criticism of the tentative scheme, they (the Parochial Board) must see that an efficient scheme is provided.' It is manifest that but for Mr Liddall's appearance, whether statutorily entitled or not, the drainage question would never have been considered, and must have subsequently been raised between him and the Parochial Board in the form of an action for nuisance.

"In this third class of applications to the Sheriff an appeal is given to a Lord Ordinary of the Court of Session, but, notwithstanding, I cannot hold the proceeding, either before the Sheriff or before the Lord Ordinary, to be anything but ministerial. Of this I think it is sufficiently conclusive that by section 13 is committed to the Sheriff the functions of a parliamentary committee on a private bill, and to the Lord Ordinary the functions of the House on report.

"As the statute makes no provision as to expenses, except by saying (section 26) that the expenses incurred by the parochial board in carrying the Act into execution, so far as not covered by burial fees, are to be raised by assessment, the complainer here maintains that the Sheriff-Substitute in his final deliverance on the Board's application, had no power to award expenses against him; while the respondents maintain that he was entitled to do so by virtue of his common law powers. I am of opinion that he had no such common law powers, and that having no statutory power he was acting *ultra vires* in awarding expenses against Mr Liddall.

"That he was acting ministerially I think cannot be doubted, and I refer to *Binning* v. *Easton & Sons*, 8 Fr. 407, and to *Hughes* v. *Thistle Chemical Company*, 1907, S.C. 607.

"The Ecclesiastical Buildings and Glebes (Scotland) Act 1868 is an Act of somewhat similar character. Though it provides for appeal to the Sheriff, and ultimately to the Lord Ordinary in Teind Causes, from proceedings in the Church Courts, and there is therefore rather more to be said for such an appeal being of a judicial character than for one under the statute in question, yet by section 15 of the Ecclesiastical Buildings Act it was thought necessary to give express power to the Sheriff and Lord Ordinary to award expenses.

"Two categories of cases were referred to as authorities on this subject. First, those in which summary complaints of a merely *quasi* criminal character were concerned, as in *Ledgerwood* v. *M'Kenna*, 7 Macph. 261, where opinions were expressed that Justices without any express power might competently award expenses in a complaint under that Act; but I think it is sufficient to say of that case that the Justices were assumed to be acting judicially. Then in the analogous case of *Nimmo* v. *Clark & Wilson*, 10 Macph. 477, being an appeal to the Court of Session from a conviction by the Sheriff for contravention of the Mines Regulation Act 1860, the question was raised whether the Court of Session, to whom the appeal was taken, could award expenses even in the appeal, there being no provision for an award of expenses in the original complaint. There was no suggestion that the Sheriff could have awarded expenses in the Court below; and the Court held that, on the analogy of the practice in the Justiciary Court in appeals from convictions of a criminal character, they were entitled to award expenses in similar appeals *from* convictions of a civil character.

"The other category of cases to which I was referred was that in which the Sheriff acts, as in the Burgh Police Act 1892, in the matter of extension of burgh boundaries, definition of drainage and water areas, &c., and it was pointed out that in *County Council of Dumbarton* v. *Commissioners of Clydebank*, 4 Fr. 111, the Court, on a statutory appeal from the Sheriff, had assumed the power of awarding expenses, both before them and in the Court below, of a successful opposition to the Magistrates' application, although the statute made no provision for expenses. I have some difficulty in understanding that decision; and looking to what Lord M'Laren says, I cannot regard it as a considered judgment upon the point, and can only explain it to my own mind by assuming that in the peculiar circumstances of the case, and to mark their sense of the improper and harassing conduct of the local commissioners, the Court used their *nobile officium* to do that which neither they nor the Sheriff had power under the statute or at common law to do. But this does not infer that the Sheriff had any power at his own hand to do the same; and in support of my view I refer to *White* v. *Magistrates of Rutherglen*, 24 R. 447.

"I therefore propose to suspend the charge, with expenses."

The respondents reclaimed, and argued—The Sheriff in deciding the question in which the expenses had been awarded was acting in a judicial and not in an administrative capacity. The best criterion in such a question was the existence of a right of appeal—*Binning* v. *Easton & Sons*, January 18, 1906, 8 F. 407, 43 S.L.R. 312; *Magistrates of Portobello* v. *Magistrates of Edinburgh*, November 9, 1882, 10 R. 130, 20 S.L.R. 92. There was a right of appeal here, and the limitation on it was merely in order to secure dispatch. Further, where a statute invoked the Sheriff for the purpose of carrying out its provisions without prescribing any special form of process, the presumption was that it was the ordinary jurisdiction of the Sheriff Court that was so invoked — *Magistrates of Portobello* v. *Magistrates of Edinburgh*, *cit. sup.*; *Leitch* v. *Scottish Legal Burial Society*, October 21, 1870, 9 Macph. 40, 8 S.L.R. 8; *Ledgerwood* v. *M'Kenna*, December 18, 1868, 7 Macph. 261, 6 S.L.R. 203. The procedure enjoined by the statute in this case was indistinguishable from the ordinary judicial procedure before the Sheriff, for the Sheriff was directed by section 10 to examine witnesses and to keep a note of the evidence, while the same section spoke of the Sheriff's "judgment." But even if the proceedings before the Sheriff contemplated by the Act were ministerial, they became judicial on the intervention and opposition of the complainer. If the Sheriff had acted in a purely ministerial capacity, the complainer would have had no right to appear, because the Act did not provide for the appearance of anyone in the proceedings under it except the owner of the lands proposed to be taken for the burial ground. Further, the complainer had appeared not in the public interest but for his own personal interests, which might have been protected by an action as proprietor of the burn. If the functions exercised by the Sheriff were judicial and not administrative, even though all the ordinary procedure of the Sheriff Court was not applicable, then an award of expenses was competent in virtue of the Sheriff's inherent power to deal with expenses. A justice of the peace had an inherent power to award expenses—*Ledgerwood* v. *M'Kenna*, *cit. sup.*—and an arbiter could competently dispose of expenses, even though no such power was conferred by the submission—*Robertson* v. *Brown*, December 6, 1836, 15 S. 199; *Ferrier* v. *Alison*, January 28, 1843, 5 D. 456. That inherent power of awarding expenses extended to all cases where the Sheriff was sitting in a judicial capacity, even though he were exercising a discretion in virtue of a statutory jurisdiction—*County Council of Dumbarton* v. *Clydebank Commissioners*, November 14, 1901, 4 F. 111, 39 S.L.R. 57; *White* v. *Magistrates of Rutherglen*, January 28, 1897, 24 R. 446, 34 S.L.R. 387; *County Council of Lanarkshire* v. *Corporation of Motherwell*, July 7, 1904, 6 F. 962, 41 S.L.R. 733; *Cunningham* v. *M'Gregor and Others*, July 7, 1904, 6 F. 955, 41 S.L.R. 727.

Argued for the complainer (respondent)—The Sheriff was not given any express power by the statute to award expenses, and he had no common law power to award them if he was acting in an administrative capacity. A sheriff in any statutory procedure was acting in an administrative and not in a judicial capacity, unless it could be shown that the statute "intended to invoke the jurisdiction of the Sheriff Court with all its ordinary methods of procedure, including the right of review by the Court of Session"—*per* Lord Adam in *Main* v. *Lanarkshire and Dumbartonshire Railway Co.*, December 19, 1893, 21 R. 323, 31 S.L.R. 239. The Burial Grounds Act 1855 could not be said to invoke the Sheriff Court "with all its ordinary procedure," &c., because the procedure and the mode of appeal were specially prescribed. The Sheriff by section 10 could inform his mind in any way he chose, and an appeal from his decision was to a Lord Ordinary. In applications under this Act the Sheriff was really exercising legislative functions, because the question he was called on to decide was whether public expediency would justify an encroachment on private rights. He was exercising delegated powers from Parliament, and could not award expenses unless the power to do so was expressly delegated. In other Acts providing for the delegation by Parliament of the exercise of its functions express provision was made for expenses, *e.g.*, the Private Legislation Procedure (Scotland) Act 1899 (62 and 63 Vict. c. 47), the Public Health (Scotland) Act 1897 (60 and 61 Vict. c. 38), the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51), the Ecclesiastical Buildings and Glebes (Scotland) Act 1868 (31 and 32 Vict. c. 96), Burgh Voters (Scotland) Act 1856 (19 and 20 Vict. c. 58). If no power to award expenses was expressly given the presumption was that it did not exist. In the cases relied on by the reclaimers there was nothing to support the view that the Sheriff here had power to award expenses except a suggestion in *Ledgerwood* v. *M'Kenna*, *cit. sup.*, which was merely *obiter*. In the case of *White* v. *Magistrates of Rutherglen*, *cit sup.*, Lord Young rested the refusal to award expenses on the ground that the proceedings were not a litigation, while in *Cunningham* v. *M'Gregor and Others* and the *County Council of Lanark* v. *Corporation of Motherwell*, *cit. sup.*, the Court awarded no expenses in the Sheriff Court. In the *County Council of Dumbarton* v. *Clydebank Commissioners*, *cit. sup.*, expenses in the Sheriff Court were awarded on the ground of oppression. In any event, though the Court of Session had power to award expenses under the Burgh Police Acts that was no authority for holding that the Sheriff could at his own hand deal with the expenses in statutory proceedings before him.

At advising—

LORD M'LAREN—This is a reclaiming note against an interlocutor of the Lord Ordinary disposing of an application for suspension of a decree for expenses and of a charge following thereon. The case arose out of an application made to the Sheriff under the Burial Grounds Act by the Parish Council of Ballingry to have a certain piece of ground set apart as a burial ground. In the proceedings which followed, Mr Liddall appeared as an objector. The Sheriff repelled his objections, and found the petitioners entitled as against him to such expenses as had been caused by his appearance and opposition. Mr Liddall has been charged for payment under this decree, and has brought this suspension, in which he prays the Court to suspend the charge and the whole grounds and warrants thereof. Opposition was offered, I believe, by Mr Liddall upon the ground that the opening of a burial ground in this place would pollute a stream which flows through the parish, and in which Mr Liddall has an interest as a conterminous proprietor. I do not know that we are much concerned with the grounds of opposition except to see that they are not factious or vexatious. The Sheriff, in the exercise of what he considered to be his jurisdiction, made an award of expenses. The question is, had the Sheriff power to make such an award? The argument of the suspender is that the Sheriff was exercising an administrative jurisdiction to which the rules that regulate the awarding of expenses in ordinary actions do not apply. There are different ways in which this principle, which I think is a sound principle within certain limits, may be considered.

In the first place, this is an administrative proceeding under which the Sheriff is asked to sanction the compulsory acquisition of land, and it is necessary that evidence should be produced to satisfy the Sheriff, and even if the proprietor is willing to sell, and every other necessary consent is obtained, the Sheriff must investigate the whole circumstances and be satisfied that it is in the interests of the parish that the burial ground should be acquired. The cost of finding the evidence and of laying it before the Sheriff must be borne by the parish, even where there is no opposition. Theoretically, the expense of the promoters is just the same whether the application is opposed or unopposed. As a matter of fact, the case of the promoters will be got up in a more careful, and therefore in a more expensive way when opposition is expected than it would otherwise be. But it is difficult to distinguish between the cost of laying before the Sheriff evidence which is necessary to establish the case of the promoters and that which is required to meet adverse evidence, and this difficulty is an argument against treating the expenses of opposition as litigious expenses.

Next we have to consider that opposition is not necessarily of a litigious character. Where land has to be taken for the formation of a burying ground, a proprietor whose land is to be taken, but who objects to parting with it, may, if he wishes to be troublesome, insist that the value of his land be assessed by a jury, or he may, in any case, ask for an arbitration under the conditions of the Lands Clauses Consolidation Act. The same consideration applies to anyone who considers that his land will be injuriously affected. Mr Liddall made no pecuniary claim. He came in the interest of the parish to complain of the pollution of a stream in which all the parish was interested. Mr Liddall was not appearing for himself; he had a right to appear under the conditions of the statute. A person who appears to lay considerations before the Sheriff which the promoters might not be expected to put before him is really coming forward in the public interest, and such a person should not be treated as a contentious litigant. I see nothing to show that Mr Liddall appeared except to see that an object laudable in itself should not be made injurious to the public in other ways.

Again, in an ordinary action expenses are awarded on the ground that the party is entitled to be indemnified for the expense to which he has been put in defending his rights or enforcing his claim, but this ground of judgment is not available where the proceedings are administrative. I say nothing as to cases in which the right to appear is abused, and as to whether expenses should be awarded in such cases.

The power of expropriating lands for purposes of public utility is an element of the sovereign right of the State, and can only be exercised by Parliament. According to the common law of Parliament, expenses are not given to or against parties promoting private bills, but by the standing orders expenses may be awarded in cases of vexatious opposition. Where Parliament delegates its powers to a local authority without making provision as to expenses, the natural conclusion is that these powers are given under the same conditions which regulate the practice of Parliament. Where the opposition to the power sought is confined within reasonable limits, I am unable to see that there is any authority for treating it as hostile litigation to be followed by an award of expenses to the successful party. But where opposition is vexatious I should not be disposed to doubt that the local authority—in this case the Sheriff—would have authority to deal with the opposition in the same way as Parliament would deal with such a case. But it is not necessary to consider that question for the purposes of the present case, except in so far as it touches upon the points raised in the case of the *County Council of Dumbarton* v. *Clydebank Burgh Commissioners* (1901, 4 F. 111), which has been cited to your Lordships as an authority for allowing expenses in an administrative proceeding. This was the case of a second application by the Burgh of Clydebank asking for an extension of its boundaries at the expense of the county. It was keenly contested, and large expenses were incurred. The second application, like the first, was refused, and the Lord President in giving judgment said—"It

appears to me that the case of *Whyte* v. *The Magistrates of Rutherglen* is not an authority for the proposition that under no circumstances can or should expenses be awarded to the persons who have successfully resisted an application of this kind. A similar application was made by the Burgh of Clydebank in 1890, and it was successfully resisted, the petition having been refused by Sheriff Blair in 1891, and the persons (or the interests) who were then successful have had to defend themselves again. I think it not doubtful that the Court has power to award expenses, and that this is a clear case for awarding them. Serious oppression might result if suburban owners or administrative bodies might be called upon to defend themselves again and again from such applications by a wealthy burgh. Whether this is a litigious or an administrative proceeding, the unsuccessful applicants should in the circumstances of the present case pay the expenses of the parties whom they convened, and who successfully defended themselves." In that case I am reported to have said—"My only doubt is whether, seeing that this is a statutory proceeding, our jurisdiction extends to the awarding of expenses incurred in the inferior court. That is a question on the terms of the statute, and it is never safe to express an opinion on the construction of a statute without having it read and hearing argument upon it. As this point was not taken, I do not need to consider it for the purposes of the case." I do not refer to my opinion as bearing on the merits of the question, but only because it is there pointed out that the distinction between the expenses of the local inquiry and the expenses of the appeal had not been argued, and because I do not think the Court intended to lay down a rule of general application which had not been tabled in discussion. But whatever was the ground of the decision, it appears to me that the general question as to expenses following the event in such applications was not raised and argued at the bar. I have every reason to believe that the judgment in the circumstances of that case was sound, and that it is an authority for the proposition that in a case of vexatious opposition expenses may be awarded in an administrative proceeding. The ground upon which the Lord President's judgment proceeds is that the application was vexatious, being the second application upon grounds quite insufficient to support the proposed extension. I should like to consider it, if possible, an open question, whether the question of expenses is wholly a circumstantial question to be raised afresh in every case, or whether it is a general rule that parties appearing before the Sheriff in such proceedings are not liable in expenses. But in any case I am prepared to hold that in the absence of such special circumstances as justify the Court in coming to the conclusion that the party puts himself in the position of a contentious litigant, there is no ground or authority for awarding expenses against such a party merely because his application has been unsuccessful. I therefore think that the Lord Ordinary is right, and that his judgment should be upheld.

LORD KINNEAR concurred.

LORD DUNDAS—I agree generally with the Lord Ordinary and with what has been said by your Lordship in the chair. I think the Sheriff-Substitute was sitting in a purely administrative and not in his judicial capacity, and that he was not in the circumstances entitled to award expenses against Mr Liddall.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court adhered.

Counsel for the Complainer (Respondent) —Johnston, K.C. —Macmillan. Agents— Somerville & Watson, S.S.C.

Counsel for the Respondents (Reclaimers) — Constable — Mercer. Agents — Tait & Crichton, W.S.

Tuesday, July 7.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

WATSON AND OTHERS (OWNERS OF "HEBE" AND "THAMES") *v.* GIBSON & COMPANY (OWNERS OF "EILDON.")

Ship — Collision — Compulsory Pilotage— "Carrying Passengers between any Place in the British Islands and any Other Place so Situate" — Merchant Shipping Act 1894 (57 *and* 58 *Vict. c.* 60), *sec.* 604 (1).

The Merchant Shipping Act 1894, section 604 (1) enacts—"The master of every ship carrying passengers between any place in the British Islands and any other place so situate, shall, while navigating within the limits of any district for which pilots are licensed under this or any other Act, employ a qualified pilot. . . ."

The s.s. "Eildon" on a voyage from Leith to Dunkirk, carrying passengers all of whom were booked to Dunkirk, put into the Tees, and having taken up cargo at Cochrane's Wharf, Middlesborough, proceeded up the river towards Dent's Wharf, also in Middlesborough, for the purpose of loading additional cargo. *In itinere* she collided with a tug and its tow. The place where the collision took place was within the limits of a district for which pilots are licensed within the meaning of the Merchant Shipping Act 1894, sec. 604, and at the time she was in charge of a licensed pilot.

Held, in an action of damages brought against the owners of the "Eildon" on account of the collision (*rev.* judgment of Lord Salvesen), (1) that