in saying that they support the inference that this man's incapacity resulting from the accident has ceased, and that he is now capable of earning his former wages. I think it is quite clear upon the Sheriff's own statement that that is a finding that cannot be supported. The Sheriff begins by finding as matter of fact that the appellant received an injury to his right eye, which injury (at least until an operation is performed) renders that eye of little use. Therefore he starts by saying that the man who had a good eye before his injury has now an eye so affected that it is of little use. That is a finding in the present tense. Then he goes on to say that the accident did not affect the left eye, which, however, had previously been affected by the disease called nystagmus, and that before the accident the man was able to work as a miner under ground. If he had gone on to find that the right eye was now perfectly restored, and that the left eye had on the contrary become so far deteriorated in consequence of some other cause than the accident, that he could no longer work under ground in consequence, not of the condition of his right eye, but of the condition of the left eye alone, that might have raised the question which the Sheriff seems to have considered and decided as to whether the present incapacity of the man was really owing to the accident or was owing to the disease which had no connection with the accident. But then he finds nothing of that kind.

He finds that the left eye is quite healthy and in such a condition as would permit of the appellant working as before the accident except for the nystagmus. He does not distinctly state whether the nystagmus is now so much worse that the man could not have worked as before even if the right eye had not been injured; but he finds it proved that the nystagmus was not caused nor even aggravated by the accident. Then he gives the present position, repeats the finding with which he started, and says that by the 25th of November 1907, when the respondents stopped his allowance, he had recovered from the immediate effects of the accident to his right eye so far as recovery (without an operation) is possible, and that then he might have resumed his former occupation if his left eye had not been affected by nystagmus to the extent to which it then was. That is a finding that the man has not completely recovered. He has recovered only in so far as it is possible to recover without an operation. We are not told whether it is probable that the operation would result in his complete recovery, or whether it is wise to submit to an operation. All that we know is that the man has not yet completely recovered, and that, according to the Sheriff-Substitute, there may be a possibility that he would recover more completely as the result of an operation which has not been performed. That seems to me a finding in fact that the man's eye has been injured by an accident, and that it has not yet recovered. I cannot reconcile that with a finding that the man has been restored to the same condition, with the same power of work as before the accident. On the Sheriff's statement, therefore, I am of opinion, with your Lordships, that it is impossible to accept a general finding that the man is now in such a condition that we can say he is not prevented by or through the accident from resuming his former employment, which the Sheriff says he is now unfit for. With reference to the form of the answer, I agree with Lord Mackenzie that we ought to make no finding which should preclude the Sheriff from entertaining and disposing of the question of the exact amount of compensation which in the present circumstances should be allowed to the man. That must be left to him.

The LORD PRESIDENT gave no opinion, not having heard the case.

LORD PEARSON was absent.

The Court pronounced this interlocutor—

"Find that the appellant is still prevented by the results of the injuries caused by the accident mentioned in the case from resuming his former employment: Recal the determination of the Sheriff-Substitute as arbitrator appealed against, and remit the cause to him to proceed as accords."

Counsel for the Pursuer (Appellant)—Scott Dickson, K.C.—Moncreiff. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders (Respondents)—Hunter, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Wednesday, June 10.

FIRST DIVISION.

(SINGLE BILLS.)

GEDDES *v.* A. & J. M'LELLAN.

Expenses—Modification—Jury Trial—Damages—Verdict in Court of Session Action for More than £5 and Less than £50—Act of Sederunt of 20th March 1907, *sec.* 8.

The Act of Sederunt of 20th March 1907, section 8, provides—"Where the pursuer in any action of damages in the Court of Session, not being an action for defamation or for libel, or an action which is competent only in the Court of Session, recovers by the verdict of a jury £5, or any sum above £5 but less than £50, he shall not be entitled to charge more than one-half of the taxed amount of his expenses, unless the judge before whom the verdict is obtained shall certify that he shall be entitled to recover any larger proportion of his expenses, not exceeding two-third parts thereof."

Held (by the Judges of the First Division, after consultation with the Judges of the Second Division) that in a case originating in the Sheriff Court the limitation of expenses applied only to Court of Session expenses and not to the expenses in the Sheriff Court.

Observed by the Lord President—"The certificate in such cases ought to be applied for either at the trial or within a short time, not exceeding eight days thereafter."

Gorman v. *Hughes*, 1907 S.C. 405, 44 S.L.R. 309, *commented on.*

Duncan Geddes, as tutor and administrator-in-law of his pupil son James Geddes, raised in the Sheriff Court at Glasgow an action against A. & J. M'Lellan, carting contractors, concluding for £500 as damages for personal injuries to his said son, occasioned by his being jammed between the wheels of a lorry belonging to the defenders and the kerb of a pavement. The case was appealed to the Court of Session for trial by jury, and was tried before Lord M'Laren and a jury, with the result that the jury on 20th March 1908 returned a verdict for the pursuer and assessed the damages at £25. No application for a certificate in terms of section 8 of the Act of Sederunt of 20th March 1907 (*v. sup. in rubric*) was then made.

On 21st May 1908 the pursuer moved the Court in Single Bills to apply the verdict, and at the same time applied to Lord M'Laren to grant a certificate that he was entitled to expenses, or at any rate to more than half of his expenses, in terms of section 8 of the Act of Sederunt of 20th March 1908.

Argued for the pursuer—1. This was a proper case for granting a certificate. The pursuer had reasonable grounds for believing he would recover more than £50, as his doctor had believed there would be permanent disfigurement. Accordingly there was no reason for modification of expenses—*Gorman* v. *Hughes*, 1907 S.C. 405, 44 S.L.R. 309. 2. In any case section 8 of the Act of Sederunt of 20th March 1907 referred only to modification of the expenses in the Court of Session.

Argued for the defenders—1. The pursuer could not reasonably have expected to get more than £50, and accordingly there was no reason for granting the application. In any case the application should have been made at the time of the trial. 2. Section 8 of the Act of Sederunt did not confine modification of expenses to those incurred in the Court of Session.

The LORD PRESIDENT intimated that they would dispose of the second point after consultation with the Judges of the Second Division.

LORD PRESIDENT—In this case a boy of the name of James Geddes was injured in Glasgow by a lorry, and an action was raised in the Sheriff Court by his father as his tutor and administrator-in-law — the boy being a pupil — concluding for £500 damages. The case was appealed to the Court of Session for trial by jury, and was tried before Lord M'Laren and a jury, with the result that the jury assessed the damages at £25. The motion before the Court now is to apply the verdict and to find the defender entitled to expenses. As to that there is no difficulty, but the question which arises is upon the motion of the defenders to have the expenses modified. We had cited to us the case of *Gorman* v. *Hughes*, 1907 S.C. 405, where certain remarks were made in this Division about the rules which would guide the Court in modifying the expenses when it was clear upon the evidence that the action was not appropriate for jury trial. I am bound to say in regard to these remarks that while there is nothing to take back from them, they have been necessarily displaced by the Act of Sederunt, dated 20th March 1907, which was not in force at the time when *Gorman* v. *Hughes* was decided. In section 8 the Act of Sederunt deals directly with this matter, and this particular Act of Sederunt has by Act of Parliament the force of an Act of Parliament. So here I think the only question for determination — the verdict being for less than £50—is whether the judge shall certify that the pursuer is entitled to recover any larger proportion of his expenses than one-half. Lord M'Laren informs us that he does not see his way to grant such a certificate. That ends the matter for me, and our finding will be accordingly. I think it right, however, for the guidance of the profession to say that the certificate in such cases ought to be applied for either at the trial or within a short time, not exceeding eight days thereafter, as is done in the case of an application for a certificate for the expenses of skilled witnesses. That enables the question to be gone into while the matter is fresh. We should not, of course, have visited the delay upon the parties in this case, but we wish to have it known that this is the rule which will be followed in the future.

LORD M'LAREN—I concur in the interlocutor proposed by your Lordship finding the pursuer entitled only to expenses modified to one-half the amount. In this case I had really no difficulty in refusing to grant a certificate for expenses, because I found that in a note written for my own guidance in charging the jury I had said that it was very unfortunate that the case had been brought into the Court of Session, and that the pursuer ought to have known that he could not recover any sum exceeding the £50 minimum limit laid down by the Act of Sederunt of 1907. While in this case no difficulty has been occasioned I agree that the proper time for applying for a certificate is at the close of the trial or within a few days thereafter, for there might be cases when the circumstances were not so clear, and in which the judge could deal more satisfactorily with the application while the facts were fresh in his mind than after such an interval as the spring vacation.

LORD KINNEAR—I agree with your Lordship as to the disposal of the present application. I also agree as to the general rule that a judge who is asked to grant a certificate should be asked to do so as a rule immediately after the trial.

Thereafter on 10th June 1908 the case was by order put out in the Single Bills.

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.