[13*th March*, 1848.]

THOMAS GRAHAM, residing at Kennoway, in the County of Fife, *Appellant.*

GEORGE MACKAY, residing in the County of Sutherland, *Respondent.*

Small Debt Act.—Jurisdiction.—Review of sentences of the Sheriff under the Small Debt Act, 1 Vict., cap. 41, even upon the ground of want of jurisdiction because of non-residence within the Sheriffdom, is excluded, unless by appeal to the next Circuit Court of Justiciary.

BY the 30th section of the the 1 Vict., cap. 41, it is enacted, "That no decree given by any Sheriff in any cause or "prosecution *decided under the authority of this Act*, shall be "subject to reduction, advocation, suspension, or appeal, or "any form of review or stay of execution, other than provided "by this Act, either on account of any omission, or irregula-"rity, or informality in the citation or proceedings, or on the "merits, or on any ground or reason whatever."

And by the 31st section it is also enacted, "That it "shall be competent to any person, conceiving himself aggrieved "by any decree given by any Sheriff, in any cause or pro-"secution *raised under the authority of this Act*, to bring the "case by appeal before the next Circuit Court of Justiciary: "Provided always that such appeal shall be competent only "when founded on the ground of corruption, or malice and "oppression on the part of the Sheriff; or on such deviation "in point of form from the statutory enactments as have pre-

" vented substantial justice, or on incompetency, including " defect of jurisdiction in the Sheriff."

In the year 1844 the Appellant brought an action of reduction, in the Court of Session, of a decree for payment pronounced against him by the Sheriff of Sutherlandshire under the above statute, and of a decree of forthcoming upon arrestments used upon the dependence of the action in which the decree for payment had been pronounced. The chief ground upon which this action of reduction was rested, was an allegation that the Appellant was not resident in the county of Sutherland, and therefore the Sheriff had no jurisdiction to pronounce the decrees.

The Respondent denied the allegation of non-residence, and averred that the Sheriff had pronounced the decrees after hearing evidence upon the subject; and pleaded that the action was incompetent, as review of decrees under the statute, by the form of reduction, was excluded by the statute, and that it was further excluded by the Appellant having appeared in the action of forthcoming, and pleaded the want of jurisdiction, whereby he had prorogated the jurisdiction.

The Lord Ordinary (Ivory) on the 22nd November, 1844, repelled the defences, " so far as they impugned the competency " of the action on alleged *personalis exceptio* against the pursuer, " in bar of his proceeding therein," and added to his interlocutor the following note:—

" The Lord Ordinary would have been disposed to report " this case to the Court, in order that a question of such general " concernment in the construction of the Sheriff's Small Debt " Act might at once have been settled by an authoritative judg- " ment. As both parties, however, concurred in asking a " deliverance on the case as it stands, he has not thought " himself entitled to refuse it.

" The question does not, as has generally been the case, turn " upon any point of mere nice technicality. It involves con-

" siderations of deep and substantial importance, and cannot be
" decided without materially affecting the whole scope and
" operation of the statute.

" Now, to the Lord Ordinary, it seems impossible to bring
" the proceedings which are here submitted to challenge within
" the protection of the statute. No doubt the words of its 30th
" and 31st sections are very broad. But the Lord Ordinary
" cannot think it was thereby meant to extend the powers which
" the Sheriff is entitled to exercise, to a case where the party
" has *no domicile within the county*, or to authorise the Sheriff,
" under any circumstances, to pronounce sentence, or at all
" exercise his judicial functions, in reference to persons '*without*
" *his territory*.' Unless it was so, however, this strikes at the
" root of the whole matter, *Ersk.* 1, 2, 16. For otherwise the
" cause was not one of which it can be said that it was either
" 'raised' or 'decided *under authority of this Act*.' In this
" view, after an anxious study of the whole anthorities, the Lord
" Ordinary cannot distinguish between the case now under
" consideration, and that of Scott, 2nd July, 1832.

" It is said that the pursuer is barred by having appeared
" before the Sheriff, from now maintaining that the latter had
" no jurisdiction. But the decree originally pronounced against
" the pursuer was a decree *in absence*. And unless *that* decree
" can be maintained on its own strength as a competent and
" valid proceeding, the whole superstructure subsequently
" reared upon it must fall to the ground. Besides, even after-
" wards, when the pursuer did appear, he did so, as seems to be
" admitted, only to plead the want of jurisdiction, and the
" offering of a declinature, is so far from importing an acquies-
" cence in the Judge's jurisdiction, that it is an express dis-
" owning of it.—*Ersk.*, 1, 2, 27.

" Perhaps the strongest consideration that can be offered in
" support of the defender's plea is, that the Sheriff must neces-
" sarily have jurisdiction to dispose of all such cases of *decli-*

GRAHAM *v.* MACKAY.—13th March, 1848.

" *nature*, and that his judgment on such a question ought
" therefore to be as conclusively final under the statute, as
" his judgment on the merits. But the Lord Ordinary
" cannot hold that the Sheriff could thus be supported in any
" undue and usurped extension of his jurisdiction, beyond his
" proper territory. It would lead to the most extraordinary
" conflict between the courts of different counties. And then,
" in such circumstances as here occur, just suppose that the
" summons before the Sheriff had, *on the face of it*, described the
" party *residing in Fifeshire*,—could it have been maintained for
" a moment that the proceeding was entitled to protection; on
" the contrary, the Sheriff could not have sustained his juris-
" diction in such a case, without doing violence not only to the
" spirit and intendment of the statute, but to every fundamental
" principle of the law of jurisdiction. But it comes to the same
" thing in principle if *the fact* truly was, and shall be established
" to have been, that the party had (as he alleges) possessed no
" actual residence or domicile within the county for a number
" of years. And the pursuer's allegation to this effect being
" relevant, it must meanwhile be held *pro veritate*, in the question
" of competency.

" The Lord Ordinary is not moved by the late case of
" Rankine, 7th December, 1843. The objection is not here to
" mere 'omission, or irregularity, or informality in the citation,'
" &c., or even to 'defect of jurisdiction,' as arising out of
" these or out of any other such like grounds. It rests
" on a total and absolute nullity out and out of everything
" that took place when put forward in the light of a proper
" judicial proceeding. The Sheriff, in truth, was not, in the
" sense of the statute, entitled to the character of Judge at
" all. His court was not *forum competens*. The cause was not
" a cause within 'the authority of the statute.' The whole
" proceedings' were *coram non judice*, and so were void *ab initio*,

" just as much as if they had occurred before a party not holding
" the judicial character.

" As to the remedy of appeal to the Court of Justiciary, the
" Lord Ordinary does not think that in such circumstances it
" was incumbent on the pursuer to resort to it. Sim, 24th
" February, 1831. And moreover, that remedy does not seem
" by the statute to be *exclusive* of the party's other common
" law remedies;—the case, in this respect, falling to be decided
" on the strength of section 30, which contains the only enact-
" ment to be found in the statute that is truly *exclusive of*
" *review*. Now, 1st, That section excludes review only where
" the decree has been given in a 'cause or prosecution decided
" '*under authority of this Act.*' 2nd, The words in which it so
" excludes review are nowise broader than those which formerly
" occurred in 10 Geo. IV., c. 51, sec. 18, unless in so far as (to
" meet such cases as Brown, 16th February, 1833; Wallace, 3rd
" July, 1835; Maclaren, 12th December, 1835; and M'Ewan,
" 9th March, 1838,) they include irregularity or informality 'in
" 'the *citation*,' as well as in the 'proceedings.' 3rd. Neither do
" they, any more than those of the corresponding enactments in
" 10 Geo. IV. (for words 'any ground or reason whatever'
" occur in both acts,) *exclude review* on '*incompetency or defect*
" '*of jurisdiction*,' at least not otherwise than as these grounds
" of review may have originated in mere omission, irregularity,
" or informality. And, 4th, Any implication to be drawn even
" from sec. 31, as regards the allowance of appeal to the Justi-
" ciary may reasonably be met, and the expression of the
" statute be satisfied rather by construing the 'incompetency
" 'and defect of jurisdiction' there mentioned as going no
" farther than those causes of incompetency, &c. pointed at in
" the precedent *excluding* clause, (or perhaps its reference to
" such jurisdiction as if created under sec. 26,) than by extend-
" ing them so as to violate all principle by letting in the Sheriff

Graham *v.* Mackay.—13th March, 1848.

" to proceed against parties not subjected to his jurisdiction at " all under the statute, and wholly beyond his territory. Indeed, " it might very well so happen that a party resident beyond the " Sheriff's jurisdiction,—perhaps in a foreign country,—should " never hear of the decree taken out against him until long " after all power either of obtaining a rehearing before the " Sheriff, or of submitting the Sheriff's judgment to review by " way of appeal, had been lost by lapse of the statutory period " allowed for the purpose."

The Court, upon a reclaiming note for the Respondent, (on the 22nd February, 1845,) "altered the interlocutor of the " Lord Ordinary, found that the only competent Court of " appeal in the case was the Circuit Court of Justiciary, and " dismissed the action."

The appeal was heard *ex parte*, the Respondent having neither lodged a printed case nor appeared by counsel.

Mr. Anderson for the Appellant enlarged upon the grounds for the appeal which appear in the note of the Lord Ordinary, and cited in support of his argument, Scott *v.* Anderson, 4 *Bell's Ap. Ca.* 197; Wallace *v.* Hume, 13 *S. & D.* 1034; Campbell *v.* Young, 13 *S. & D.* 535; Brown *v.* Richmond and Co., 11 *S. & D.* 407; and Campbell *v.* Brown, 3 *Wil. & Sh.* 441.

Lord Chancellor.—My Lords, it appears to me that there is nothing at all in this question. It turns entirely upon the construction of the 30th and 31st sections of the statute, and no cases which have been decided under other Acts, not containing those provisions, or provisions in terms very similar, have any application or afford any ground for the proceeding on the present occasion.

The question is, whether the Sheriff's decree, the party being out of the jurisdiction of his Court, was a subject for reduction in the Court of Session. It seems to me that these

two clauses have been framed expressly for the purpose of excluding reduction, it having before been found to be inconvenient. The preamble of the Act recites that "experience has "pointed out certain alterations which ought to be made." There was in the former Act a clause similar to the 30th, but none similar to the 31st, and parties were held entitled to come to the Court of Session.

Now the Legislature, in the 31st clause, says, "That it shall "be competent to any person conceiving himself aggrieved by "any decree given by any Sheriff in any cause or prosecution "raised under the authority of this Act, to bring the case, by "appeal, before the next Circuit Court of Justiciary, or where "there are no Circuit Courts to the High Court of Justiciary." Then certain grounds of appeal are enumerated, and, amongst others, is "incompetency, including defect of jurisdiction of the "Sheriff." So that if the objection be that the Sheriff has exceeded his jurisdiction (which is not controverted here and is beyond all question), the Court of Justiciary has the jurisdiction by way of appeal, and in this section that is called a proceeding "under the authority of this Act," that is, the Sheriff having no jurisdiction but assuming jurisdiction, if he err in the question brought before him the appeal is to the Court of Justiciary. Upon that there is no question.

Then the 30th clause says, "That no decree given by any "Sheriff in any cause or prosecution decided under the authority "of this Act shall be subject to reduction," and so on, "other "than provided by this Act, either on account of any omission "or irregularity, or informality in the citation or proceeding, or "on the merits, or on any ground or reason whatever."

The words "under the authority of this Act," which are the words used in the 31st section, have a clear and ascertained meaning, about which no doubt can be entertained. If they have the same meaning in the 30th section the Court of Session is deprived of the jurisdiction, and it is given to the Court of

Justiciary. That is the whole question to be decided. The Court of Session have decided, by a majority, that they have lost their jurisdiction in this case by this provision, and I am clearly of opinion that they were right in that conclusion.

LORD CAMPBELL.—My Lords, with very great and sincere respect for the Lord Ordinary and Lord Mackenzie, I must say I think this is the clearest case I have ever seen, and I do not apprehend that any reasonable doubt can be entertained.

What is the meaning of the words "under the authority of "this Act" in the 30th section? Why that is explained by the 31st section. It seems to me to be quite clear that, under the 31st section, this would be matter of appeal to the Court of Justiciary. The jurisdiction of the Court of Session is taken away in the most express terms, because, it is said, that the only mode of questioning what shall be done is by the appeal which is given under the 31st section. Then, under the 31st section, although the objection may be want of jurisdiction, it is considered a proceeding "under the Act." That reflects clearly the meaning that the Legislature intended to fix to the 30th section; and that meaning being fixed to the 30th section, the jurisdiction of the Court of Session is taken away in the most express terms.

My Lords, it appears to me that the decision in this case ought to be affirmed.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed.

DEANS, DUNLOP, and HOPE, Agents.