LORD JUSTICE-CLERK—I am of opinion that we should not interfere—indeed that we cannot interfere—with what the Sheriff-Substitute has done in this matter. This is a somewhat peculiar Act of Parliament. It is framed with the object of giving means for enforcing payment of alimentary decrees, and it gives facilities for having the debtor under such a decree imprisoned in any part of Scotland by the sheriff. Now, what may be necessary to entitle a sheriff to exercise his jurisdiction under this statute we need not at present determine. It would be natural to suppose that the person against whom the sheriff is asked to grant warrant of imprisonment should be subject to the jurisdiction of the sheriff—that is to say, his jurisdiction in ordinary matters. In the present case it is not disputed that the man here in question is resident in England, and that it was only when he happened casually to be in the county of Dumfries that an effort was made to have him apprehended. I am not surprised therefore at the doubt which the Sheriff-Substitute felt as to his jurisdiction. But he says that, conceding that he has jurisdiction, he is of opinion that the application is inexpedient, and accordingly he refuses the application. It appears to me therefore that the Sheriff-Substitute has exercised the discretion conferred on him by the statute, and with his exercise of that discretion this Court cannot interfere.

LORD YOUNG—I concur.

LORD TRAYNER—I am of that opinion too. The view presented to us by the appellant is that this appeal is competent, because it is a case in which the Sheriff-Substitute has refused to exercise his jurisdiction. I do not see anything in the Sheriff-Substitute's interlocutor to support that view. It is true that it appears from his note that he had some doubt as to his jurisdiction, and also as to whether there is a sufficiency of averment in the petition, but he does not say that these are the sole or the main grounds on which he proceeds in disposing of the application. I think we have here an exercise of his discretion by the Sheriff-Substitute, and that with that exercise of discretion we cannot interfere. I express no opinion on the question of jurisdiction.

LORD MONCREIFF was absent.

The Court dismissed the appeal, and of new dismissed the application.

Counsel for the Pursuer and Appellant—M'Lennan. Agent—Thomas Liddle, S.S.C.

Counsel for the Defender and Respondent—J. A. Christie. Agent—Alexander Wyllie, S.S.C.

Wednesday, July 2.

SECOND DIVISION.

[Sheriff-Substitute at Hamilton.

WILKIE *v.* HAMILTON LODGING-HOUSE COMPANY, LIMITED.

Contract — Building Contract — Schedule Rates or Lump Sum—Error Calculi.

A joiner, who had been supplied with a schedule for the erection of a house, filled in the rates at which he was prepared to execute the various items of work, adding a calculation of the total cost of each item and of the whole work, and offered to execute the work for the sum so brought out. In the schedule power was reserved to make alterations, and it was provided that the work should be measured and charged at the schedule rates. Thereafter an agreement was entered into, whereby, upon the narrative that the joiner had offered to execute the work, conform to plans and specifications, for the sum of £1333, 3s. 4d., and that this offer had been accepted, he agreed to execute the work, and the employers bound themselves to pay the sum of £1333, 3s. 4d. in certain instalments. One of the items in the schedule was 1100 square yards of pine lining at 3s. per yard. The joiner inadvertently calculated this at 3d. per yard instead of 3s., with the result that his offer was £152 lower than it ought to have been.

Held that the contract was a contract to execute work according to schedule rates and not for a lump sum, and that the joiner was not barred by his contract from claiming the full sum due to him on a correct calculation of the amount due at schedule rates.

Jamieson v. *M'Innes*, October 29, 1887, 15 R. 17, 25 S.L.R. 32, *followed*.

Seaton Brick and Tile Company, Limited, v. *Mitchell*, January 31, 1900, 2 F. 550, 37 S.L.R. 400, *distinguished*.

This was an action at the instance of Alexander Wilkie, joiner, Lamb Street, Hamilton, against the Hamilton Lodging-House Company, Limited, incorporated under the Companies Acts 1862-1898, and having its registered office at 47 Almada Street, Hamilton, in which he sued, *inter alia*, for a sum of £150, being part of a balance which he alleged to be due under a contract for joiner work done by him.

The facts in the case were as follows:—In 1900 the defenders resolved to build a lodging-house on a piece of ground belonging to them in Hamilton, and plans and schedules were prepared therefor by an architect in Hamilton and a firm of measurers in Glasgow. The pursuer amongst others was supplied with a schedule for the joiner, glazier, and ironmongery work. He filled in the rates at which he was prepared to execute the work, adding a calculation of the total cost of each item, and of the

whole work which he was prepared to do. He returned the specification and schedules filled in, along with an offer to execute the work for a certain sum named, being the total of the various items in the schedule. This offer being the lowest by about £100 was accepted by the defenders.

The schedule supplied to the pursuer contained the following stipulation:—"Full power is reserved to make alterations, and to increase, lessen, omit, or relet such parts of the work as may from time to time be thought fit. The work will be measured and charged at the schedule rates, and for alteration by others strictly in conformity therewith, and all subject to revision and correction by measurers, and to any addition or deduction which may be made by contractor in filling up his offer."

The pursuer's offer was in the following terms:— "*July* 1900.

"THE HAMILTON LODGING-HOUSE CO. LD.

"Gentlemen,—I hereby offer to execute the wright work, &c., at the model lodging-house you propose to erect in Hamilton, agreeably to plans by Gavin Paterson, Esq., I.A., now shown in conformity with and to the extent of the foregoing estimate for the sum up: Thirteen hundred and thirty pounds sterling, and will enter into a stamped minute of agreement to have the whole work complete within a time to be determined and entered in said agreement.—Your acceptance of this offer will be binding on, Gentlemen, your obedient servant, "*pro* ALEXR. WILKIE.

"£1330, 0s. 0d. ALF. E. WILKIE."

A minute of agreement was thereafter entered into between the pursuer and defenders. This agreement proceeded on the narrative that "Whereas the company are about to erect a model lodging-house in Church Street, Hamilton, conform to plans and specifications prepared by Gavin Paterson, architect, Hamilton, and the second party has offered to execute the carpenter, joiner, glazier, and ironmongery work thereof conform to the plans and specifications thereof for the sum of One thousand three hundred and thirty-three pounds three shillings and fourpence sterling, which offer has been accepted by the company: Therefore" . . .

The agreement provided, *inter alia*, as follows:—"*First*, The second party further obliges himself to carry on and complete the work in a tradesmanlike manner in conformity with the said plans and specifications. . . . *Third*, The company bind and oblige themselves to pay to the second party the said sum of One thousand three hundred and thirty three pounds three shillings and fourpence, and that in the following instalments, viz.—Four hundred pounds on the completion of the roof, Three hundred and fifty when the floors and windows are put in, and Four hundred pounds when the work is completed, and the balance when it is measured."

One of the items in the specification was to supply 1100 square yards of pitch pine dressed and jointed lining. This item was thus entered in the estimate—"240. *Fittings in Dormitories*—1⅛ Pitch pine dressed and jointed, tongued and grooved lining, enclosing berths, sq. yds. 1100, 3s. £13, 15s. 0d." The pursuer thus inadvertently calculated this item at 3d. per yard instead of 3s., bringing out £13, 15s. as the price instead of £165. The result was that his offer was £152 lower than it ought to have been.

In these circumstances the pursuer brought the present action in the Sheriff Court of Lanarkshire at Hamilton, in which he claimed, *inter alia*, this sum of £152 as part of the balance due to him.

He averred that the rate was correctly entered in the specification, and that the defenders and their measurers should have noticed the error if they had used ordinary care, and that the working copy of the specification, with which he was provided, and which he used while executing the work, did not contain either the rates or prices; and that he had no opportunity of noticing the error, and was not aware of it until it was brought to his notice by the architect after the work had been completed.

The defenders averred that the first notice of the error they got was in a letter from the architect after the work was finished; that if this mistake had been discovered in time the pursuer's offer would not have been the lowest, and consequently would not have been accepted; and that if the work had been executed by the next lowest offerer a saving of £100 would have been effected; but that as they did not wish to take advantage of the pursuer's mistake, they had offered, and again thereby offered, to pay to him the price at which that piece of work would have been done by that offerer—without prejudice, however, to the written contract.

The defenders pleaded, *inter alia*—"(2) The contract between the parties being for a lump sum, the pursuer is not entitled to resile from it and claim detailed prices."

On 24th May 1902 the Sheriff-Substitute (DAVIDSON) pronounced this interlocutor—"Finds that the pursuer undertook to do the work specified in the schedule for the slump sum of £1333, 3s. 4d.; that he is entitled to be paid for any extra work at the rates named in the aforesaid schedule; *quoad ultra* allows to both parties a proof of their averments, and sends the case to the roll of 3rd June next to fix a diet."

Note.—"I have found this case attended with some difficulty. The history of the dispute commences with an offer by the pursuer to do certain work according to specification and at schedule prices. This offer the defenders accepted. The specification was passed by their architect, and the work practically finished, when the pursuer discovered that by an error in the transcription of a single item his offer was £152 lower than it ought to have been. Had there been nothing further I should not have been able to distinguish this case from that of *Jamieson* (15 R. 17). But subsequent to the offer and acceptance the parties entered into a new and separate contract, to which I can attach no other meaning than this, that all the work described in the specification was to be

done for a slump sum. In the third article of that agreement there is a reference to measurement, which I take to mean that anything over and above the work specified will be charged for as provided in the specification."

The pursuer appealed to the Court of Session.

Any question as to the competency of the appeal, which was brought under the Judicature Act, was waived by the defenders, and on that footing the Court allowed the case to proceed.

Argued for the pursuer—This was not a contract for a lump sum, but a "specification contract." The minute of agreement proceeded on the narrative of the specification, which it incorporated. The case fell within the rule of law laid down in the case of *Jamieson* v. *M'Innes*, October 19, 1887, 15 R. 17, 25 S.L.R. 32.

Argued for the defenders—The Sheriff-Substitute was right in holding that this was a contract for a lump sum. The case was distinguishable from the case of *Jamieson* v. *M'Innes*, October 29, 1887, 15 R. 17, relied on by the pursuer, and was governed by the case of *Seaton Brick and Tile Company, Limited* v. *Mitchell*, January 31, 1900, 2 F. 550, 37 S.L.R. 400.

LORD JUSTICE-CLERK—I think that this is a clear case. Supposing there had been no such case as *Jamieson* (1887, 15 R. 17), I should have held that this is a case where, there having been a specification with prices, there was not an acceptance of an offer for a contract to be performed for a lump sum. Here, most undoubtedly, if the figures put down had been a true summation, the figures brought out would have been very different, 1100 square yards having been carried out at 3d. per square yard in place of 3s. I think that that is a very clear case where the person who has done the work cannot be made to suffer and get only one-twelfth of the actual price he was entitled to get.

But apart from that the matter is made absolutely clear by the case of *Jamieson*. In that case there was a specification with prices, and an offer for a sum named at the end of the specification; there also an *error calculi* had been made, and it was distinctly held by the Court that it was not a contract for a lump sum. The only difficulty which has been suggested is that in this case there was a formal agreement, but that proceeds on the narrative that an offer had been made to execute the work conform to plans and specifications already prepared, and that that offer had been accepted. Upon the whole matter I have no doubt whatever, and as regards the other case before this Division (*Seaton Brick and Tile Company* v. *Mitchell*, 1900, 2 F. 550), it seems totally different from the present case and from *Jamieson*. In the case of *Seaton Brick and Tile Company* an offer was made without any prices at all being placed before the person to whom the offer was made. It turned out that in his private calculations the party making the offer had made serious mistakes, nevertheless he made the offer and was bound by it. That was a case absolutely distinguishable from the present. I am of opinion that the Sheriff-Substitute was wrong, and that his judgment should be recalled.

LORD YOUNG—That is my opinion also. I think this is a case of a manifest and serious error which ought to be corrected.

LORD TRAYNER—I come to the same conclusion. Had I been of opinion that the contract here was for a lump sum I would have hesitated before giving any effect to a statement that the lump sum had been by error stated at a smaller amount than the offerer intended. But I think the contract here was for specified and scheduled work, subject to be increased or diminished as the respondents might order, at scheduled rates. The amount for which the appellant offered to do the work is no doubt stated precisely, but that is just repeating the summation of the different items of the schedule. I think this case is substantially the same as the case of *Jamieson* cited to us.

LORD MONCREIFF was absent.

The Court recalled the interlocutor of the Sheriff-Substitute, repelled the second plea-in-law for the defenders, and remitted the case to the Sheriff-Substitute to proceed.

Counsel for the Pursuer and Appellant—C. N. Johnston, K.C.—Deas. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders and Respondents—W. Thomson. Agents—Alexander Morison & Co., W.S.

Thursday, July 3.

SECOND DIVISION.

MACDONALD'S TRUSTEES *v.* CORPORATION OF ABERDEEN.

Succession—Legacy—Legacy Duty—Free of Legacy Duty—Pictures—Residue.

A testator, *inter alia*, directed his trustees to "make offer to the Town Council of Aberdeen, on behalf of the community of that city, free of legacy duty, of my collection of oil paintings, . . . together with one-third of the residue of my estate for the purpose after mentioned." . . . *Held* that the words "free of legacy duty" applied to the bequest of paintings only.

Observations on the competency of a bequest of residue free of legacy duty.

By his trust-disposition and settlement, dated 11th December 1882, the late Alexander Macdonald of Kepplestone directed, *inter alia*, as follows:—"(*Fifth*) On the death of my said wife my said trustees shall make offer to the Town Council of Aberdeen, on behalf of the community of