chaser is entitled to assume, without inquiry, that the broker with whom he transacts is not agent for the seller; more especially where, as in this case, the broker comes to him to ask him to buy. A broker is, undoubtedly, held to act for both parties, but that is merely in making the contract; and he is not, as broker, under any duty to advise either of them in regard to it. It is a different question, whether, if he has information of a fact materially affecting the safety of one of the parties in entering into the bargain, he is not bound to divulge it? If, in the present case, the question were, whether the pursuer, acting *bona fide* as a broker for third parties, but happening to know of the alleged combination, was bound to inform the defenders of its existence, the Lord Ordinary would hold that he was under no such obligation. As the issue is framed, that seems to be the only question in regard to it, and the Lord Ordinary is therefore of opinion that the defenders are not entitled to such an issue.

"The difficulty with which the Lord Ordinary has been chiefly impressed in regard to the two first issues is, whether a combination of the facts which they separately contain would not afford a relevant defence against the action? These facts are the existence of a combination for the purpose, and having the effect alleged—the pursuer's agency for the parties to the combination, his representation that he acted as broker, and his inducing the defenders to enter into the contract, by the false representation that the price was a fair market price, and the fraudulent concealment of the existence of the combination. One material change resulting from this mode of putting the defenders' case would be, that the pursuer, while representing that he acted as broker, would be neither acting in that capacity nor as agent for an indifferent third party, but as agent for the parties to the alleged combination, the existence and effect of which are the facts which he is alleged to have concealed and misrepresented.

"The Lord Ordinary is the less disposed to express a decided opinion in regard to an issue which should embody all or most of these elements, as, from the way in which the issues are framed, this view of the defenders' case was not the subject of special argument. The great difficulty which he feels in taking a distinction between it and those views of the case with which he has already dealt in considering the issues as they stand is, that he does not think a buyer is entitled to trust that the broker with whom he transacts is not also agent for the seller, and that concealment of the existence of the combination by persons engaged in it, if he had bought direct from them, would not have afforded a good defence against this action. But he feels it to be a question deserving of serious consideration, whether persons in that situation are entitled to avail themselves of the apparently neutral character of a professed broker, through whom they sell, but who is truly their agent, to evade suspicion and inquiry, and thus conceal facts materially affecting the safety of the buyer in entering into the contract. But, while he thinks this the most serious form of the case stated by the defenders on record, he is inclined, for the reasons explained in considering the issues as framed, to hold that it is not relevant.

"3. He does not think that the defenders are entitled to the third issue. While there was no ground to complain that the contract, which, by its terms, was made with the pursuer himself, was not implemented, it does not appear that the defenders were entitled to cancel it merely because the pursuer refused to disclose his principal. It might have been otherwise if no bought and sold notes had passed, and the defenders, having bought through the pursuer as a broker, on the understanding that he represented other parties as sellers, had refused to recognise a contract with the pursuer on his own account. But that is a question on which it is unnecessary to enter in the circumstances of this case, and on which the Lord Ordinary expresses no opinion."

YOUNG and SHAND for pursuer.

CLARK and BRAND for defenders.

The Court heard argument on the relevancy, but no judgment was pronounced, the case, after being continued for farther argument, being settled out of Court.

Agent for Pursuer—John Ross, S.S.C.

Agent for Defenders—A. Kirk Mackie, S.S.C.

Friday, February 28.

SECOND DIVISION.

WATT *v.* THOMSON AND OTHERS.

Reparation—Process Caption—Judicial Act—Privilege — Malice — Satisfying the Production. A Sheriff-substitute having, in the usual way, signed a process caption on an application by the clerk,—*Held*, in an action of damages at the instance of an agent who was imprisoned under it, (1) that the Act having been taken in the course of proceedings which had been initiated before the Sheriff, it was judicial, and was therefore privileged; (2) that there was no relevant allegation of malice defeating the privilege.

In an action of damages at the instance of the same party against the Sheriff-clerk, who applied for the process caption,—*held* that the plea of privilege was not so obvious as in the case of the Sheriff to entitle him *in limine* to refuse to satisfy the production, and case remitted to the Lord Ordinary to make up a record.

This was an action of reduction and damages at the instance of Mr John Watt, advocate, Aberdeen, against Sheriff Thomson, substitute there, and the Sheriff-clerk and Sheriff-clerk-depute. In his condescendence the pursuer makes the following statements:—On or about the 19th day of March 1867, the pursuer, who is an advocate practising in Aberdeen, in his character of an advocate and procurator in the Sheriff-court of the county of Aberdeen, prepared a petition to the Sheriff of Aberdeenshire, at the instance of Mrs Jane Mackie or Mouat, residing in Aberdeen, relict of the deceased Alexander Mouat, china and rag merchant, Aberdeen, as representing Alexander Mouat, the eldest son of the said deceased Alexander Mouat, against Alexander Edmond, advocate in Aberdeen, trustee on the sequestrated estate of the said deceased Alexander Mouat. In the prayer of the petition interdict was sought to prohibit the said Alexander Edmond from advertising for sale the bathing-houses and others forming the bathing establishment on the sea-beach of Aberdeen. The pursuer and his client had been informed that such advertisement was intended to be inserted in the *Aberdeen Journal* of the following day; and as the pursuer's client claimed the property of the bathing-

houses and others on behalf of her son, interdict was necessary to prevent interference with her son's property.

At the time, a caveat had been lodged in the hands of the Sheriff-clerk of Aberdeenshire by Mr Charles Duncan, advocate in Aberdeen, agent of Mr Edmond, against any deliverance being pronounced granting interim interdict against the sale without his being heard. The pursuer and Mr Duncan met in the Sheriff-clerk's office on the said 19th day of March 1867, when Mr Duncan, having requested a sight of the petition, it was handed to him by the pursuer, and was read over by him. Mr Duncan and the pursuer thereafter went into an adjoining apartment in which was the defender, John Comrie Thomson, the Sheriff-substitute. They were accompanied by the defender William Daniel, one of the Sheriff-clerks-depute of the county of Aberdeen. The said William Daniel immediately left the room, and did not return so long as the pursuer remained in it. The defender John Comrie Thomson, Sheriff-substitute, perused the petition, and having heard the parties' procurators, stated that he would not grant the interim interdict.

The pursuer thereupon intimated that he withdrew the petition, and would not further insist thereon, and he withdrew the same accordingly. No deliverance had been written on the petition, and no proceeding of any kind had taken place thereon, and the pursuer, as agent for the petitioner, had right to withdraw the petition at pleasure. The pursuer then lifted the petition from the table on which it had been laid by the Sheriff after he had perused it; and on the Sheriff-substitute, at the instigation of the said Charles Duncan, asking him to return the petition to the clerk for the purpose of having a warrant of service written on it, the pursuer, as such a proceeding was useless to his client without an interim interdict, did not hand it to the clerk, but took it away, having thereupon left the room with it in his possession.

The defender, the said John Comrie Thomson, took offence at the pursuer for not handing the petition to the clerk for the purpose foresaid, and, actuated by malice and ill-will towards the pursuer, and with the design of injuring the pursuer in his feelings, credit, and reputation, resolved illegally to effect his purpose by having him apprehended on a process caption. With this view the defender, the said John Comrie Thomson, actuated as aforesaid, wrongfully, illegally, maliciously, and without probable cause, instructed the said William Daniel, as Sheriff-clerk-depute foresaid, to obtain and execute a process caption against the pursuer for the recovery of the foresaid petition. The said William Daniel, in compliance with the instructions thus wrongfully given, wrongfully and illegally caused an application or complaint for a process caption to be prepared, which he signed and handed to the said John Comrie Thomson. The said application or complaint is in the following terms:—"In the Sheriff-court of Aberdeenshire, *Mrs Mouat* v. *Alexander Mouat's Trustees*.—The clerk complains on John Watt junior, advocate, for not returning the above process, and craves caption for recovery thereof in common form. (Signed) Wm. Daniel, S.C.D., Aberdeen, 9th March 1867."

The said complaint was so handed to the said John Comrie Thomson within a few minutes after the defender had left the room, as mentioned above, with the petition in his possession; and the said John Comrie Thomson immediately, in the absence of the pursuer, who was ignorant of any such application having been made, or intended to be made, and in the knowledge that no intimation or notice of any kind had been given to the pursuer of an intention to present the said complaint, or of what was craved, and without directing any such intimation or notice to be given to the pursuer, subscribed a warrant of imprisonment or process caption for the pursuer's apprehension and imprisonment in the following terms:—"*Eo Die.*—Grants warrant to officers of court, and their assistants, to search for, seize, and apprehend the person of the said John Watt junior, and commit him prisoner to the jail of Aberdeen, therein to be detained till he return the above process, or till he be otherwise liberated in due course of law. (Signed) John Comrie Thomson."

The said warrant of imprisonment or process caption was illegally and incompetently granted, and it was *ultra vires* of the said John Comrie Thomson to grant it on the following grounds, viz.:—(1) The petition, which is therein termed a process, was simply a petition, and was not in any sense a depending process. It had never been entered in the books of the Sheriff-clerk, or been marked by him or any person in his office as lodged, and no fees were paid for it. It was withdrawn before any procedure took place upon it, and was thereupon the private property of the pursuer or his client, and was not under the control of the Sheriff-clerk, who was in no way responsible for it. Even had it been formally in the hands of the clerk of court, and a warrant of service been granted, it did not, and could not, become a depending process until the warrant had been executed and the petition returned to the clerk, with an execution of service, for the purpose of being proceeded with. (2) The pursuer never borrowed or granted a borrowing receipt for the petition referred to. (3) The warrant of imprisonment or process caption referred to was granted without any notice having been given to him that a complaint, craving the issue of such, had been or was to be presented.

The said John Comrie Thomson, in directing such an application to be made, and in granting the said warrant of imprisonment or process caption, acted wrongfully, recklessly, illegally, maliciously, and without probable cause, in the full knowledge of the circumstances set forth in the preceding paragraph; and it was illegal and *ultra vires* to grant such a warrant, and for the purpose of gratifying the malice and ill-will which actuated the said John Comrie Thomson as aforesaid and of injuring the pursuer in his feelings, credit, and reputation.

Damages claimed, £5000.

The Lord Ordinary (Barcaple) pronounced the following interlocutor and note:—

"The Lord Ordinary having heard counsel for the parties on the preliminary defences, and considered the process, Finds that the pursuer, having been liberated from imprisonment under the process caption which is sought to be reduced, the reductive conclusions of the action cannot, in the circumstances set forth by the pursuer, be maintained against the defenders separately from the conclusion for damages: Finds that the acts for which damages are claimed were, in so far as the defender John Comrie Thomson is concerned, judicial acts, not incompetent, nor in excess of jurisdiction, and, in so far as the defender William Daniel is concerned, were performed by him in the discharge of his duties as Sheriff-clerk-depute, and

are averred by the pursuer to have been performed by direction of the said John Comrie Thomson, as Sheriff-substitute and Sheriff-clerk-depute is not maintainable against any of the defenders: Therefore dismisses the action, and decerns: Finds the defenders entitled to expenses; allows accounts thereof to be given in, and, when lodged, remits the same to the auditor to tax and report.

"*Note.*—The first question which arises in this case, as it is pleaded by the defenders, is one of form of process, viz., whether it is competent at this stage, on advising the preliminary defences, to dispose of the whole cause, both as to the conclusions for reduction, and for damages? Any objection that can be taken to that course would seem to apply equally to disposing of the reductive conclusions alone, in respect of the legal objections to the action in so far as it concludes for damages. The Lord Ordinary feels that, in either view, it is substantially a question of relevancy that is disposed of—though one of a peculiar nature, involving consideration of the plea of privilege arising from the judicial nature of the acts complained of. The question is, whether the pursuer has stated such a case as to avoid that plea? Such a question might naturally have been reserved until defences should be lodged, and a record closed with reference to the damages as well as the reduction. But the defenders have asked for a judgment at present, in consequence of the opinions expressed in the recent case of *Mackintosh* v. *Arkley*, 22d December 1866; and it appears to the Lord Ordinary that the case of *Hamilton* v. *Anderson*, 18 D. 1003, and 3 Macq., 363, is a direct precedent, in point of form, for dealing with the whole case, and dismissing the action at this stage. That was also an action of reduction as well as damages. Only preliminary defences, as in a reduction, had been lodged, and no record was closed. The Lord Ordinary in his interlocutor, which was adhered to, and ultimately affirmed in the House of Lords, held that the reductive conclusions could not be separately maintained, and that the action of damages was not maintainable; and he therefore dismissed the action. His Lordship says in his note:—'The declaratory and reductive conclusions are subordinate and ancillary to the leading conclusion for damages, and accordingly the Lord Ordinary thinks that they cannot be legitimately separated, and that the whole case must turn on the relevancy and competency of the action of damages as laid.' The point of form was also adverted to by the Lord Justice-Clerk Hope, who said;—'In case this case is carried elsewhere, I have only to add, that it was not disputed that the defence stated was properly taken up and competently sustained at this stage of the cause, according to the view taken by the Lord Ordinary of the point.' With this precedent, the Lord Ordinary, having formed a view on the merits favourable to the defenders, does not think that he can refuse to give effect to it at this stage of the cause.

"The defenders founded upon the case of *Mackintosh* v. *Arkley* as an authority for dismissing the action. But there is so much difference between the cases, in a variety of respects, that the Lord Ordinary is not prepared to hold that the decision, or the opinions there announced, are precisely applicable. The warrant, of which reduction is sought in the present case, was obtained by, and put in execution at the instance of, one of the defenders, in his capacity of depute-clerk under the other defender Mr Ligertwood, and it never was in any respect under the control of the private party to the proceedings, with reference to which it was obtained. It is also an important distinction, that in the present case the reduction is brought in aid of the conclusion for damages, while in the case of *Mackintosh* damages were not concluded for. If there appeared to be a well laid and maintainable action of damages, the Lord Ordinary does not think that he could, at this stage, have dismissed the action in so far as reductive, as regards the sheriff-clerks at least. Even as regards the Sheriff-substitute, if, by sufficient averments of malice, and otherwise, a relevant action of damages was laid against him, the Lord Ordinary would much doubt if the defences against satisfying the production should be sustained so as at once to throw out the reductive part of the action. A reduction so brought admits of a limited effect being given to its conclusions, in so far merely as necessary to remove any obstacle in the way of the pursuer succeeding in his action of damages, if it shall prove to be well founded.

"The Lord Ordinary thinks the case of *Hamilton* v. *Anderson* a more applicable authority, in the circumstances of this case, upon the merits of the questions raised by the preliminary defences. It was there held, and, as has been already noticed at this stage of the cause, that the action of damages could not be sustained; and for that reason, the whole action, both reductive and for reparation, was dismissed. The ground on which it was so held was, that the act complained of was properly judicial, and as such entitled to the protection attaching to the judicial act of a judge of a Superior Court; and that though malice was averred, the averment was merely general, and indicated nothing except what might be inferred from the act itself. As regards the Sheriff-substitute, the Lord Ordinary thinks that these grounds of decision directly apply to this case. The pursuer avers (condescendence 4), that 'the defender, the said John Comrie Thomson, took offence at the pursuer for not handing the petition to the clerks for the purpose foresaid; and, actuated by malice and ill-will towards the pursuer, and with the design of injuring the pursuer in his feelings, credit, and reputation, resolved illegally to effect his purpose, by having him apprehended on a process caption. With this view, the defender, the said John Comrie Thomson, actuated as aforesaid, wrongfully, illegally, maliciously, and without probable cause, instructed the said William Daniel, as sheriff-clerk-depute foresaid, to obtain and execute a process caption against the pursuer for recovery of the foresaid petition.' It is afterwards said that Mr Thomson signed the caption, and directed it to be enforced, and that he did so maliciously. But the only reference to malice, except in the passage just quoted, is merely by the repetition of the word. Whatever may be meant by the expression that Mr Thomson 'took offence at the pursuer,' it does not necessarily nor obviously import any charge of improper conduct or motive; and the Lord Ordinary does not think that it adds anything to the effect to which the rest of the averment is entitled as an averment of malice. So looked at, the passage just contains a statement that Mr Thomson maliciously, and with the design of injuring the pursuer, instructed the clerk of court to obtain and execute a process caption for recovery of the petition. That appears to the Lord Ordinary to be an averment of malice of the most vague and general kind, and to which no regard can be paid, if the act complained of is not in itself of such a kind as to import a

malicious intention. No doubt, it is said that Mr Thomson 'resolved *illegally* to effect his purpose' of injuring the pursuer. But the mere use of the word 'illegally' is of no importance, unless it shall appear that the act so resolved upon must have been known to the defender to be contrary to law, that is, unless he acted without probable cause. For the reasons to be immediately explained, the Lord Ordinary thinks that this essential element of the pursuer's case—want of probable cause—is excluded upon the face of his own statement.

"The pursuer, as agent for the party applying for an interdict, had just been heard, along with the agent for the opposite party, who had lodged a caveat as to whether interim interdict should be granted, when the Sheriff-substitute, in presence of both agents, announced that he would not grant the interim interdict. Before any deliverance was written out, the pursuer intimated that he withdrew the petition. It was then lying on the table, where it had been laid by the Sheriff-substitute after perusing it. The pursuer, on intimating that he would not insist further in the application, lifted the petition to take it away, when the Sheriff-substitute, on the motion of the opposite agent, asked him to return it to the clerk for the purpose of having a warrant of service written upon it. The pursuer did not comply, but left the room, taking the petition away with him. The Lord Ordinary cannot read this, which is the pursuer's account of the matter, as importing anything else than that he determinedly refused to comply with the order of the judge, given while the parties were still before him, to replace the petition in the hands of the clerk. It seems to be of no consequence whether the Sheriff-substitute desired it to be returned to the clerk for the purpose of having a warrant of service written on it; or, whether in the circumstances such a warrant should have been granted. It would have been open to the pursuer, after returning the petition, to state that he did not wish a warrant for service, on which it is not to be supposed that any such warrant would have been issued. But, if the application was to be withdrawn, it is by no means apparent that the respondent was not entitled to an award of expenses. The pursuer founds upon the circumstance, that he had not paid any fee upon the petition, and that it was not entered in the books of the sheriff-clerk, or marked by him as lodged. The Lord Ordinary does not think that any irregularity in regard to those matters can be founded upon by the pursuer. He had presented the application, by lodging it with the sheriff-clerk, and had joined issue upon it with the opposite party before the Sheriff-substitute upon the question of interm interdict. In these circumstances, he was not entitled to treat it as never having been judicially before the Sheriff-substitute, and subject to his judicial authority.

"Upon the whole, the Lord Ordinary has no doubt that the pursuer was in the wrong, and guilty of a contempt of Court, by carring off and detaining the petition in defiance of the verbal order by the Sheriff to return it to the clerk, given while the parties were still before him, and that he was liable to be proceeded against in proper legal form, in order to compel him to return it to the clerk. The Lord Ordinary does not think it necessary to determine whether a process caption was the proper procedure for that purpose or not. That was a question of which it was Mr Thomson's duty to judge, in the exercise of his judicial functions, and he cannot be liable for having come to an erroneous judicial conclusion in the matter. But it may not be out of place to notice the practice which has been sanctioned in the Bill Chamber. By Act of Sederunt, 19th December 1778, it is provided, section ult., that 'where a bill of suspension or advocation is presented, the clerk of the bills is directed and required, as he shall be answerable, not to give out the bill, either to the ingiver, or any other person, but upon a receipt; and upon this receipt it shall be competent to apply for caption for re-delivery of the bill, in the same manner and form as is practised in the offices of the Clerks of Session.' And by section 11 of the Act of Sederunt, 11th July 1828, it is provided 'that the clerk of the bills shall not give up to the complainer the principal bill, either for carrying to the Lord Ordinary, or thereafter, for intimation, but that the clerk, or one of his deputes, shall in all cases attend the Lord Ordinary with the bill when it is to be advised.' The bill is thus as completely in the custody of the clerk before it is written upon as afterwards. The case of *Thomson* v. *Magistrates of Montrose*, 1st March 1825, 3 S. 423, may be referred to. In that case, the complainer alleged that he was entitled to carry off a bill of suspension and interdict which had been refused on his own motion. But the Court refused a suspension of a process caption used for the purpose of forcing it back.

"For the reasons now explained, the Lord Ordinary is of opinion that the allegation of want of probable cause is excluded by the whole circumstances of the case.

"He does not think it materially affects the case as against Mr Thomson, that it is averred that he not only signed the process caption, but also instructed the sheriff-clerk-depute to present it, and cause it to be executed. That was a proceeding taken in the conduct of a cause judicially before him. He was acting strictly within his judicial office in giving all necessary and proper instructions to the clerk of the Court in such a matter, as to which it cannot be alleged that he was entitled to throw aside all responsibility. The petition was carried off in presence of Mr Thomson, and, according to the pursuer, outwith the presence of the clerks; and in these circumstances it was eminently natural and proper that he should himself deal with the matter, by instructing the clerk what it was his duty to do.

"The Lord Ordinary has hitherto considered the case solely as against the Sheriff-substitute. As regards an action against the clerk of Court, the question of privilege may be in some respects materially different. The duties of the clerk being administrative, are not judicial in the same sense as those of a judge, and that may considerably affect the relative extent to which, on grounds both of strict justice and public policy, the official acts of the one or the other are held to be privileged. But still, in a sense fully recognised in law, the duties of a clerk of a court of justice are judicial and are protected as such. They are duties affecting the interests of suitors which he cannot avoid performing, and which he is bound to perform to the best of his judgment, impartially between the parties. The Lord Ordinary does not think that the distinction now adverted to between the position of the clerk and the judge, is material in the present case. There is no question here in regard to any technical irregularity or omission. It was a question of judicial discretion even with the clerk, if it was left to him whether it was proper to take steps by process caption to recover the petition, or to allow

the pursuer to retain it. If the Lord Ordinary's views of the case are correct, the clerk did not act without probable cause in adopting the former course. The pursuer's allegation is not that he acted maliciously, but that he did so recklessly, unwarrantably, and without probable cause. There is nothing, however, stated to support this general charge of recklessness. The clerk only applied to the competent judge for the warrant, which, when obtained, he put in force in the ordinary way. The Lord Ordinary thinks it would require averments going greatly beyond anything in this summons to ground an action for reparation in respect of proceedings so taken. But further, it appears to him that the whole case against Mr Daniel, the depute-clerk, is negatived by the pursuer's statement, that he acted in the matter by the directions of the Sheriff-substitute. In that case, it could not matter what his own opinion might be as the legality of the proceeding. Of course, if there is not a good case against Mr Daniel, there can be none against the principal clerk."

The pursuer reclaimed.

FRASER for him.

CLARK and GIFFORD for Thomson.

SHAND for Sheriff-clerk.

At advising—

LORD JUSTICE-CLERK—In this case the interlocutor reclaimed against is objected to on two grounds. The first is, that the judgment of the Lord Ordinary has been pronounced prematurely at a wrong stage of the cause; and the second ground is, that the judgment is erroneous upen the merits. The action is directed against Mr Thomson, Sheriff-substitute of Aberdeenshire, and against the Sheriff-clerk-depute and his principal. I think it necessary to consider the case as regards these parties respectively. In so far as the Sheriff-substitute is concerned, he pleads that, according to the statement of the pursuer, his actings were judicial. He finds no statement of any special ground of malice set out, and he pleads the privilege of his position as judge in order to evade the responsibility sought to be attached to him in the action. I am of opinion that the plea of the Sheriff-substitute is properly taken at this stage of the proceedings. If he has proof that the acts which he has described are acts of a judicial character, the objection goes to the competency of the whole case; and I think we are relieved from any difficulty upon that subject, in the first place, by the express precedent of the case of *Hamilton* v. *Anderson*, and, in the next place, by the opinions expressed by the Court in the decision in the case of *Mackintosh* v. *Arkley*. The serious question which we have to determine is, whether or not the interlocutor is well founded. Apart from the objection made that, in the special circumstances of this case, the mere signing of the warrant upon which a man is committed to prison could never form a legitimate subject for an action of damages, a judge is unquestionably entitled, upon a report regularly made to him by the clerk of his court, to act at once upon such an application. I think he is entitled to rely implicitly upon the statement made by the clerk in such a matter. It would, I think, be entirely anomalous for him to proceed to institute any inquiry as to the truth of the statement so made by the clerk. I think it would be quite out of the question to say that a judge to whom such an application is made was compellable to institute an inquiry into the circumstances under which it was presented, and to have evidence of a receipt being granted in connection with circumstances in which a clerk approaching him states that a part of a process has been withdrawn, and asks a warrant in order to proceed by the ordinary form of process caption. I think the very nature of the remedy—which is one of the most summary known in our law, which is a well-known remedy in our law—excludes the notion of any preliminary inquiry into such circumstances upon the part of the Sheriff who has got a regular application made to him, and an attestation of the facts by his clerk. The very summary nature of the remedy requires that it shall be immediately acted upon; and accordingly it appears to me that in ordinary circumstances—and without reference to the special allegations of the case, which I shall proceed to examine—there can be no case founded upon the mere subscription of a warrant in a question of this nature, where a person who is in the position of a judge is called upon to give such a warrant, and gives it under the usual circumstances, and on the usual attestation on which it is founded. Now, if it is incompetent to proceed against a party whose proper province it is to take cognisance of such an application, and to proceed upon it, it becomes essential for us to be satisfied that there are averments contained in this record which shall fix special liability upon Mr Thomson in respect of his particular position in this case. One allegation is that he granted this warrant maliciously, having taken offence at the pursuer. The cause of offence is stated. He had, it is said, asked the pursuer to return a petition for interdict to the clerk, which the pursuer refused to do, and not only refused to do, but took the petition away with him in presence of the Sheriff and of the clerk. It is said that the Sheriff took offence at the pursuer for not handing the petition to the clerk. The cause of the offence as stated, according to the pursuer's own version of it, originated in the course of judicial proceedings before the Sheriff, and he had, and could have, no other element of personal feeling in the matter than that which was naturally incident to his position as a judge, and to a matter arising in the course of judicial procedure before him. If the Sheriff took offence in such circumstances, I think that the complaint that he did take offence under the circumstances so alleged contains nothing which can be the foundation, upon a legitimate view of it, of a matter turning upon the gratification of private malice, or any other feeling than that which occurred in the considering of a judicial petition. There is no special malice relevantly alleged in the case, and in the absence of any statement other than the mere facts which are disclosed before you, I must hold, conformably with the views expressed in previous cases by the Court, that in this case we can have no regard to alleged malice on the part of the judge, because there was no special or intelligible ground of malice. The pursuer says that, when the Sheriff gave up the petition, he, the pursuer, had a right to withdraw the petition at his pleasure; and that he had failed to do what the Sheriff required him to do because he had that right. That is the position in which he asks us to consider the question. Now, that is not matter of fact, but matter of law. The relevancy, therefore, cannot be affected by the mere allegation of right. We must consider whether the party in such circumstances did possess any such right, and was entitled, under the circumstances he himself set out, to withdraw that petition—to remove it, and to take it away in the face of the demand of the Sheriff that it should be put in the hands of the clerk.

Now, if it appears that the pursuer in this respect was in default, and that his acts made him amenable to censure or other proceedings on the part of the judge, it appears to me that we are then reduced to the question as to the mode in which that matter has been specially disposed of in the subsequent stages of the case. Now, I have no doubt whatever that the pursuer had no right to withdraw that petition against the remonstrances of the Sheriff, and that he was bound to have left it in the custody of the clerk. I am not concerned by any allegation of practice to the contrary effect. I would just be as little moved by the allegation of any irregularities committed in the ordinary course of procedure. If in this case the party had a right to withdraw the petition, that is one thing; but that right can certainly not be founded upon a custom which I do not consider to be, and which I do not believe to be, a universal or a general custom, and which, if it prevails at all, prevails only to a limited extent. The petition had been presented with a view to obtain interim interdict; a caveat had been entered in order to secure that the parties should be heard by the Sheriff upon the application for interdict which it was anticipated would be made; and parties were heard, and the Sheriff's judgment was intimated to the parties. The proceeding was taken upon this petition, and the petition having been read and presented for the purpose of obtaining an interim interdict, the party who acted as the agent for the petitioner was heard in support of his application. I think that the opposite party, who were successful in showing to the satisfaction of the Sheriff that no interdict should be granted, were unquestionably entitled to have that petition there for the purpose of the interlocutor being written upon it refusing the application for interim interdict. The pursuer says that the petition was not marked by the clerk, and he does not appear to have paid the usual fees which are paid upon the presentation of such a petition; but I hold that, when the parties proceeded to debate the question as upon that petition, the pursuer here is not in a position to object that he had failed to make payment of these fees, or that he could legitimately or properly refuse to have paid these fees so soon as the discussion was over. I think the proceedings before the Sheriff, in the hearing of parties upon the question of interim interdict, must have proceeded upon the footing that, if there was anything omitted by the non-payment of the ordinary fee, that matter would be put right. I am of opinion that, by the caveat which had been lodged, and by the hearing on that petition, a step had been taken which put that petition out of the control of one of the parties to the exclusion of the other, and that the clerk had a proper right to ask the custody of that document, and the judge to direct that it should be given to the clerk. It is said, no doubt, that the Sheriff asked the pursuer to return the process for the purpose of having a warrant of service written out, and that he did not desire it upon other grounds. It is enough to say that the right cannot be affected by the alleged statement of the special purpose when the retention was unjustifiable. The question then is, Whether the Sheriff had such a case before him as takes the matter out of the ordinary rule, in which a party is not entitled to take from the custody of the clerk a petition or incidental part of the process to withdraw it and to keep it? I apprehend that upon that part of the case the contention of the Sheriff is correct. But then it is said—and there the only difficulty of the case arises in my mind—that, having the matter before him, he proceeded to suggest to or instruct the Sheriff-clerk to make a particular application in the particular form in which it was actually made; and it was said that that, under the circumstances, was illegal. Now, it appears to me that it could be no more than a suggestion; and I do not think that the averments, fairly construed, amount to more; because, according to the position of the pursuer himself, the Sheriff and the Sheriff-clerk had special independent duties to perform; and an instruction given in reference to the application for a warrant, whether legal or illegal, certainly cannot be held to have been binding upon the Sheriff-clerk under these circumstances. It seems to me that the Sheriff was entitled to make a suggestion as to the mode by which a great irregularity could be corrected; and if he failed to come to the right conclusion as to the particular course to follow, it appears to me that the Sheriff was in that case still in the exercise of judicial functions, and did nothing by which he was deprived of the privileged character in which he made that suggestion to the clerk. The suggestion to the clerk is acted upon by the application for this process caption. I am far from throwing any suspicion upon the regularity of that proceeding; but I do not pretend to say—and I do not think it is necessary for us to determine at this stage of the matter, and in reference to the position of Mr Thomson—whether this process caption was rightly taken or not. It is enough for the purpose of establishing privilege in the judge that, in a matter of judicial procedure, he considers and judges the course which is proper to be taken, and grants the warrant accordingly. Now, then, that being the view of the case which I take as applicable to Mr Thomson, and viewing the proceedings of the pursuer himself as wrong in themselves, and warranting the procedure which, in the other form of contempt of Court, would have subjected him to similar consequences, I do not apprehend that there was any case put before us upon which it could be said or maintained that the Sheriff is in a different situation from a judge proceeding in the ordinary course, supposing the matter had been judicially before him. So far as the Sheriff-clerk is concerned, it appears to me that different questions arise, and that different questions arise with reference to the position of the two clerks; and that in their case there is not so clear a privilege—there is not so clear an objection to the production being satisfied—as that we should proceed at this stage of the case to determine that matter. I propose, therefore, that we should, without expressing any opinion, or throwing out any view as to the ultimate disposal of the matter which arises upon the position of the Sheriff-clerk, follow the ordinary procedure in the case of the Sheriff-clerks of getting the record closed in order to get the question deliberately considered and tried on the matter between the Sheriff-clerk and the pursuer. I propose, therefore, in these circstances, that we should adhere to the interlocutor of the Lord Ordinary so far as regards Mr Comrie Thomson; but that, so far as regards the other parties, we should recal the interlocutor, and remit to the Lord Ordinary to proceed to prepare the record in the ordinary way.

The other judges concurred.

Agent for Pursuer—John Thomson, S.S.C.

Agents for Defenders—White-Millar & Robson, S.S.C.; and Tods, Murray, & Jamieson, W.S.