

ample jurisdiction to decide whatever questions arise in the course of the trustee's election. But it appears to me, farther, that the question which the Sheriff decided here was one perfectly within his competency to decide. I do not know how else the question could well have been disposed of. He could not proceed to declare the election of either party as trustee without deciding this question. The first point was to satisfy himself which were the true minutes of meeting. Where there is competition for the office of trustee, the first thing to be done to extricate his own jurisdiction is to examine the minutes of meeting and decide upon their validity. That being so, I am of opinion that the section of the Act of Parliament referred to renders his judgment on the whole matter final and conclusive.

It is a totally different thing when it can be alleged that the Sheriff is not deciding something within the competency of his own jurisdiction. It may be added that the present action of reduction comes in questionable shape and at a questionable time. For the matter is allowed to go beyond the mere election of the trustee; the Sheriff is allowed to go on and complete the title of the trustee, and set the sequestration going in full working order, and then this proceeding is brought, truly to reverse the original decision as to the trustee's election. I am quite satisfied therefore that the Lord Ordinary's interlocutor should be adhered to.

LORD DEAS—I entirely agree with your Lordship that the judgment of the Sheriff was quite competent, and therefore excluded from review in any way. But supposing that there were some question as to the competency of the Sheriff's decision, it would then come to be a question, whether the proper course would not have been to appeal within the ten days, instead of, as here, letting things run on, and after a lapse of time bringing a reduction. After the case of *Rankine*, I should be disposed to say it was. I am far from holding that a reduction would not in any case be competent, but I think only where something new emerges after the expiry of the time allowed for appeal.

LORDS ARDMILLAN and KINLOCH concurred.

Agent for the Pursuer—James Barton, S.S.C.
Agent for the Defender—John Auld, W.S.

Saturday, October 27.

SECOND DIVISION.

WATT v. LEGERTWOOD & DANIEL.

(*Ante*, vol. v, p. 329; vol. vii, p. 527.)

Process-Caption—Contempt of Court—Damage. A petition for interdict was presented in the Sheriff-Court. The Sheriff stated that he would refuse the petition, and the petitioner's agent thereupon carried off the petition against the wish of the Sheriff, who desired to write his deliverance upon it. On the motion of the Sheriff-Clerk, the Sheriff granted a caption for the recovery of the petition, without giving the agent any notice, and the agent was sent to jail on the caption. *Held* that a caption was not the proper mode of forcing back the process, as no receipt had been given for it and 24 hours' notice was required before issuing the caption; that the Sheriff should have issued a summary warrant

to bring the agent before him; and action of damages against the clerk dismissed, as no greater amount of damage had been sustained than if a summary warrant had been issued.

This was an action of reduction and damages for the wrongous issuing of a process caption. The facts of the case appear sufficiently from the former reports, and the following interlocutor of the Lord Ordinary (**MACKENZIE**):—

"*Edinburgh, 24th November 1870.*—The Lord Ordinary having heard counsel and considered the closed record, productions, and whole process, sustains the first plea in law stated for the defenders: dismisses the action, and decerns: Finds the pursuer liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the auditor to tax, and to report.

"*Note.*—The pursuer concludes in his summons for reduction of a process-caption, obtained and executed against him by the defender Mr Daniel, and for damages, on the ground that Mr Daniel wrongfully and illegally applied for and obtained that process-caption, and incarcerated the pursuer thereon; and that the defender Mr Ligertwood, the Sheriff-clerk, is liable for the acts of Mr Daniel, who is his Depute. The pursuer maintains that the process-caption was illegally and incompetently granted, because (1) The petition, for recovery of which the caption was issued, was not a process, but was withdrawn by him before any procedure took place upon it, and was thereupon the private property of the pursuer, or of his client, and not under the control of the Sheriff-clerk, who was in no way responsible for it; (2) The pursuer never borrowed or granted a borrowing receipt for the petition referred to; and (3) The process-caption was obtained without any notice having been given to the pursuer that a complaint craving the issue of such a writ had been or was to be presented.

"1. The Lord Ordinary is of opinion that the petition was, at the time that the pursuer took it away, not the property of pursuer, or of his client, and not within their control. The petition prayed for an interdict against Mr Alexander Edmond, the respondent therein, and also that immediate interdict should be granted. It is stated by the pursuer that a caveat having been lodged for Mr Edmond, the pursuer and Mr Edmond's agent met in the Sheriff clerk's office, that they went with Mr Daniel, the Sheriff-clerk Depute, before the Sheriff-Substitute of Aberdeenshire, who perused the petition, heard him and Mr Edmond's agent thereon, and stated that he would not grant the interim-interdict. The Lord Ordinary considers that there was, according to the pursuer's own statement, a judicial application laid before and considered by the Judge Ordinary of the bounds—a competent judge, who heard the parties, and pronounced a judicial decision on the application for interim-interdict. Mr Edmond the respondent was entitled to have that decision refusing interim-interdict written out and signed by the Sheriff-Substitute; and if the pursuer declined to proceed farther with the application, Mr Edmond had right to move that an interlocutor should be pronounced, dismissing the application, and finding him entitled to the expenses to which he had been put in opposing it. It is said that by immemorial practice in Aberdeenshire such a petition was the property of the petitioner, and might be disposed of by him as he pleased. Even supposing this averment to be true, it cannot affect the disposal of the present case, because such a practice, if it

should exist, is, the Lord Ordinary thinks, contrary to law. The Lord Ordinary is therefore of opinion that the petition was a depending process when the pursuer, contrary to the order of the Sheriff-Substitute, given on the motion, or, as the pursuer calls it, the instigation of Mr Edmond's agent, carried it away; that the pursuer acted illegally and improperly in doing so; and that the Sheriff-clerk, who was the proper custodian of the petition, or his Depute, was entitled to apply to the Sheriff for caption in order to its recovery from the pursuer.

"2. The pursuer farther maintains that the process-caption was illegally and incompetently granted for recovery of the petition, because he had never borrowed it or granted a borrowing-receipt for it. It cannot surely be maintained that although a warrant or caption for the recovery of a process may be issued against an agent who has legally and in ordinary form borrowed it from the Sheriff-clerk, and granted the usual receipt for its return, and has failed to return it when required, yet that a warrant or caption cannot be issued against an agent for recovery of a process which he has illegally and improperly carried away. Such a proposition is, it is thought, wholly untenable. The ordinary warrant for recovery of a process is a caption, until the process be returned. If such a warrant can be issued for the recovery of a process from an agent who is in lawful possession of it, it can certainly be issued for the recovery of a process, or any step of or production in a process, from an agent, or any other person, who has not only illegally and improperly, but in contempt of Court, as was the case in the present instance, taken it from the table on which it had been laid by the judge, in presence of the parties, after he had perused it and heard them thereon, and pronounced his decision.

"3. The only other ground on which the illegality and incompetency of the process-caption are maintained is that no notice was given to the pursuer that a complaint craving the issue of such a writ had been or was to be presented. When an agent is lawfully in possession of a process by having borrowed it from, and granted a receipt for it to the clerk of the process, such agent is entitled to retain it until he shall receive notice for its return; and before a caption is issued intimation of the application for caption is, according to practice, given to the agent, in order that he may return the process within a specified time. Such practice depends not upon the provisions of any statute or act of sederunt, but solely upon the reasonableness and propriety of giving notice to an agent lawfully in possession of a process on a borrowing-receipt, that he must return it to the Clerk of Court, otherwise it will be recovered by the caption or warrant of the Court. But such a notice was, the Lord Ordinary thinks, not required in the case of the pursuer. He had no right to take or retain possession of the process. He was a wrongdoer who had not only illegally and improperly taken the petition out of the custody of the Court, but had, in contempt of Court, refused to return it when required by the Sheriff-Substitute to do so, and carried it away. He had, the Lord Ordinary is of opinion, got all the notice that he was entitled to when the Judge, as he himself avers, desired him to return the petition to the Clerk of Court. The process-caption was the legal and competent warrant for the recovery of the petition. In the ordinary case, practice, based upon

sense and reason, requires that before caption is issued that notice should be given to an agent who has legally and properly borrowed on a receipt such a petition from the clerk. But such practice cannot apply to the pursuer's case, seeing that he had illegally and improperly carried away the process, in contempt of the order of the Court.

"It is further averred by the pursuer that he was not informed by the sheriff-officer who executed the warrant that he was in possession of a process-caption against him. He does not say that the officer was not in possession of the warrant which gave him authority to act, or that the pursuer asked to see it and was refused. There was nothing illegal, so far as the pursuer avers, done by the officer in the execution of the warrant—*Erskine*, iv, 4, 33.

"The Lord Ordinary, after careful consideration of the pursuer's statements, is of opinion that these statements are not relevant or sufficient in law to support the conclusions of the summons. These averments do not set forth any grounds on which it can be held that the proceedings complained of were incompetent or illegal and wrongful, or on which the process-caption can be reduced, and the defenders be found liable in damages. On the contrary, the application for and execution of the process-caption were fully justified by the circumstances disclosed in the pursuer's condescence."

The pursuer reclaimed.

SCOTT for the reclainer.

The Solicitor-General (CLARK) and SHAND for the respondents.

At advising—

LORD BENHOLME and LORD NEAVES (LORD COWAN, who was absent, intimated that he concurred) held that it was clear that Mr Watt in carrying away the document had been guilty of contempt of Court, and his offence was aggravated by his afterwards burning it. The Sheriff would have been quite justified in issuing a summary warrant to bring Mr Watt before him, and in committing him to prison. But a process caption was not the proper mode of proceeding. Caption was the mode of enforcing the obligation which an agent when he borrowed a paper undertook to return it. Before issuing a caption it was necessary to give twenty-four hours' notice. But the irregularity of the procedure was not such as to entitle the pursuer to damages, as he had brought upon himself, by his own conduct, any damage which he had sustained, and that damage was no greater than he would have suffered if the regular procedure had been adopted. The error was in form, and not in substance.

The LORD JUSTICE-CLERK held that the procedure had been quite regular. Watt did not require notice, as he carried off the petition in defiance of the order of the Sheriff. The right of the Clerk to force back the process does not depend upon the agent's receipt. The receipt only enables the Judge to issue caption without any proof. His Lordship, however, agreed with the result at which the other Judges had arrived.

The Court pronounced the following interlocutor:—

"*Edinburgh*, 28th October 1871.—The Lords having resumed consideration of the cause, with the proof allowed by interlocutor of 28th February last, and heard counsel, find that on the occasion in question, upon a petition praying for interdict and interim interdict at the instance of Mrs Jane Mouatt, presented to the Sheriff of Aberdeenshire

by the pursuer as agent for the said petitioner, and upon a caveat presented for the respondent in that petition, the Sheriff-Substitute, after hearing parties' procurators, pronounced his judgment that the prayer for interim interdict should be refused; find that, when the Sheriff was proceeding to have his judgment to that effect written out, the pursuer, at his own hand, took possession of the petition, then in *manibus curiæ*; and notwithstanding the intimation of the Sheriff-Substitute that he desired the petition to remain with the clerk in order that the interlocutor might be written upon it, carried off the petition, and prevented the interlocutor from being written thereon; and thereafter, as it appeared, destroyed the said petition in his own place of business: Find that the conduct of the pursuer in so acting was illegal and culpable, and amounted to a contempt of the Sheriff's jurisdiction and authority: Find that, in these circumstances, when the said petition had been so carried away, it was competent to the Sheriff, within whose cognisance and in whose presence the pursuer's proceedings took place, to have issued a summary order or warrant ordering the pursuer to restore the petition of which he so took possession, and failing his immediately restoring the same, for his immediate imprisonment till that order was implemented; but find that the conduct of the Sheriff-clerk-depute, in obtaining and carrying into execution a warrant in form of an ordinary process caption, without any notice or special warning to the pursuer that such was to be issued or executed, was an inappropriate and irregular proceeding: Find, at the same time, that as no further action can be taken on the said process caption or warrant, it is unnecessary to reduce or set aside the same: And further, find that, as it was the pursuer's own illegal and culpable conduct and contempt of the Sheriff's authority which led to the necessity of a proceeding or warrant against him, and as he was in any view liable to be proceeded against in a summary manner, the pursuer is not entitled to damages as against either the principal Sheriff-clerk or against the Sheriff-clerk-depute, for the error in point of form committed by the Sheriff-clerk-depute in the discharge of his official duty: Therefore, in the whole circumstances, dismiss the action, and decern, and to that extent adhere to the interlocutor of the Lord Ordinary; but find no expenses due to either party."

Agent for Pursuer—William Officer, S.S.C.

Agents for Defenders—Tods, Murray & Jamieson, W.S.

Saturday, October 28.

TAYLOR v. TAYLOR, ETC.

Conjugal Rights Act, 1861, § 16—Provision to Wife.

Held that the above section applies to property acquired by a wife before the passing of the Act. Circumstances in which £50 held a reasonable provision.

This was an action by "Agnes Monro or Taylor, wife of Robert Taylor, farmer, residing at Wholeflats, near Polmont, against the said Robert Taylor, and against Adam Smith and John Gair, both writers in Falkirk, trustees under a disposition granted in their favour by the said Robert Taylor, on or about the 31st December 1869, for behoof of his creditors," concluding for declarator that the

rents of certain properties did not exceed a reasonable provision for her, under section 16 of the Conjugal Rights (Scotland) Amendment Act, 1861, or for the Court to fix a reasonable amount.

The defenders stated, *inter alia*, the following plea:—"The provisions of the Conjugal Rights Act have no application to the present case, in respect that—1st, The pursuer succeeded to the liferent of the subjects in question before the statute came into operation. 2d, The right to the rent of said subjects during their joint lives had vested *jure mariti* in the husband of the pursuer, and was in his lawful possession, within the meaning of the statute, before the present claim was made by the pursuer."

The Lord Ordinary (MURK) ordered a proof before answer, and added the following note to his interlocutor:—"The claim made by the pursuer in this case appears to the Lord Ordinary to fall within the general policy and spirit of the provisions of the Conjugal Rights Amendment Act, and assuming the allegations relative to the manner in which the pursuer has been allowed to draw and administer the rents of the property in question, from 1842 to 1869, to be established, the Lord Ordinary, as at present advised, would entertain great doubts whether her claim to a reasonable provision under the 16th section of the statute can be repelled simply because the deed under which the property was acquired came into operation before the passing of the Act.

"The main ground on which it appears to be laid down in Dwaris on Statutes, and other authorities relied on by the defenders, that Acts of Parliament are not to be construed as having any retroactive effect, is the apprehension that such a construction might operate unjustly as between parties who have contracted with reference to a different law from that enacted by the statute. But that difficulty appears to have been disregarded in the case of *Fowler*, 10th November 1829, 6 Bingham, p. 258; and in the case of *Reid*, 3d March 1863, the judgment in this Court seems to have proceeded upon the ground that as the Act was an amending and remedial one, it must be construed so as to carry out the main object intended, even if the effect be to some extent retrospective, unless the words of the statute necessarily exclude that construction. Now, one leading object of the Conjugal Rights Act was to amend the law relative to the administration and disposal of property belonging to married women in the lifetime of their husbands. But if, in a case like the present, where it is alleged that the rents of a property belonging to a married woman have for a series of years, and for eight years after the date of the Conjugal Rights Act, been drawn and expended by her without any interference on the part of her husband, he or his creditors were now to be held entitled to claim the whole rents as falling under the *jus mariti*, the remedial operation of the 16th section of the Act would in all such cases be defeated; and this is a result which ought, in the opinion of the Lord Ordinary, to be avoided, unless there is some very clear and imperative provision of the statute to that effect.

"But the operation of the 16th section of the Act is not, in express terms, limited to the case of married women succeeding to property 'after the passing of the Act,' as the remedy provided by the 12th section is, in the case of the widows of parties dying infert in property held burgage. There is a marked distinction between the sections in this re-