The Court recalled the interlocutor of the Sheriff-Substitute and assoilzied the defender.

Counsel for the Pursuers—Campbell, Q.C. — Steele — Purves Smith. Agent — T. C. Smith, S.S.C.

Counsel for the Defenders—C. N. Johnston—A. S. D. Thomson. Agent—J. B. M'Intosh, S.S.C.

Tuesday, November 29.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

GILLAN *v.* PARISH COUNCIL OF BARONY PARISH, GLASGOW.

Sheriff—Jurisdiction—Custody of Children —Custody of Children Act 1891 (54 *and* 55 *Vict. c.* 3), *secs.* 1, 2, *and* 3.

A sheriff has no jurisdiction to consider petitions for permanent custody of children, or petitions for the custody of children, where questions are raised under the provisions of the Custody of Children Act 1891, and the Court will not of consent, on appeal from the Sheriff Court, adopt such petitions and treat them as if they had originally been presented in the Court of Session.

This was an action brought in the Sheriff Court at Glasgow by Mary Ann M'Cann or Gillan, widow of William Patrick Gillan, formerly an ironwork labourer, and subsequently a carter in Glasgow, against the Parish Council of the Barony Parish of Glasgow.

The pursuer prayed the Court "To ordain the defenders to deliver to the pursuer each and all of her children, *videlicet*—George Gillan, Agnes Gillan, William Patrick Gillan, and James Gillan, presently in their custody or under their control, and failing their doing so within such period as the Court shall appoint, to grant warrant to officers of Court to search for each and all of the said children, and take possession of each and all of them, and deliver each and all of them to the pursuer; as also, on delivery of each and all of the said children having been made to the pursuer, to interdict the defenders from interfering in any way with the pursuer in her possession and custody of each and all of them; and to find the defenders liable in expenses."

The pursuer averred that she was married to William Patrick Gillan on 31st December 1886 according to the forms of the Roman Catholic Church, and that the four children referred to in the petition were born of this marriage—on 11th October 1887, 11th April 1889, 28th April 1891, and 25th January 1895 respectively; that her husband was admitted to Barnhill Poorhouse on 8th June 1895, and died there a few days later; that from that date till January 1896 the pursuer was paid sums varying from four to six shillings weekly on behalf of her children; that in May 1896 the pursuer consented to her three eldest children being sent to the Children's Refuge on condition that they were returned to her as soon as she got a suitable house; that these three children, notwithstanding this arrangement, were transferred without her knowledge or consent to the custody and keeping of the defenders; that shortly thereafter she and her youngest child were admitted to the defender's poorhouse, but that she only remained there a few days, and on leaving requested the defenders to allow her to get the custody of her children and to take them with her, but that the defenders refused to do this, and that since then she had frequently applied for delivery of her children, but that the defenders not only refused to accede to this request, but even refused to allow her to interview, or to afford her any information concerning any of them, except the youngest, whom she was allowed to see for three hours in one day in each month. She also averred as follows:—"The pursuer is both willing and well able to support each and all of her said children, and desires their custody and keeping, which the defenders refuse to give her, in consequence of which the present action has been rendered necessary."

The defenders averred that the pursuer's children were admitted in the ordinary way as proper objects of parochial relief in consequence of their mother's destitution; that she had left the poorhouse voluntarily, leaving all her children in the custody of the defenders, and that the three eldest children had been boarded out with respectable people in the country, and that their health and character were being carefully attended to. They also averred as follows:—(Ans. 7) "Admitted that the defenders have refused to deliver the said children to the pursuer. Explained that the pursuer is unable to house, feed, clothe, or educate her children, and is not a suitable person to have the care and upbringing of the young children whom she voluntarily left to the care and in the custody of the defenders."

The Guardianship of Infants Act 1886 (49 and 50 Vict. c. 27) enacts as follows:—Sec. 5—"The Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise as to costs as it may think just." Sec. 9—"In the construction of this Act the expression 'the Court' shall mean . . . In Scotland the Court of Session or the Sheriff Court within whose jurisdiction the respondent or respondents, or any of them, may reside."

The Custody of Children Act 1891 (54 and 55 Vict. c. 3) enacts as follows:—Sec. 1—"Where the parent of a child applies to the High Court or the Court of Session for a writ or order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may in its discretion decline to issue the writ or make the order. Sec. 2—"If at the time of the application for a writ or order for the production of the child, the child is being brought up by another person, or is boarded out by the guardians of a poor-law union, or by a parochial board in Scotland, the Court may, in its discretion, if it orders the child to be given up to the parent, further order that the parent shall pay to such person, or to the guardians of such poor-law union, or to such parochial board, the whole of the costs properly incurred in bringing up the child, or such portion thereof as shall seem to the Court to be just and reasonable, having regard to the circumstances of the case." Sec. 3—"Where a parent has (*a*) abandoned or deserted his child, or (*b*) allowed his child to be brought up by another person at that person's expense, or by the guardians of a poor-law union, for such a length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties, the Court shall not make an order for the delivery of the child to the parent, unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child."

The pursuer pleaded—"(1) The defenders, having by stealth and without legal sanction, deprived the pursuer of the custody of each of her said children, George Gillan, Agnes Gillan, and William Patrick Gillan, she is entitled to have each of them restored to her. (2) The defenders having been trusted with the pursuer's child, the said James Gillan, during the pursuer's pleasure only, and having no legal right to retain it in their custody against the pursuer's will, they should be ordained to restore it to the pursuer."

The defenders pleaded—"(1) No jurisdiction. (2) The pursuer having voluntarily left her children to the care and custody of the defenders, and having regard to the welfare of the children, she not being a fit person to have the custody of the children, the petition ought to be dismissed. *Separatim*—(3) If decree shall be pronounced as craved, it should be on condition only of the defenders being reimbursed by pursuer of the whole costs properly incurred in bringing up the said children."

On 24th May 1898 the Sheriff-Substitute (GUTHRIE) issued the following interlocutor:—"Finds that this Court has no jurisdiction in the cause; therefore dismisses the action, and decerns," &c.

The pursuer appealed to the Court of Session, and argued—At common law the Sheriff had jurisdiction to entertain this petition—*Goadby* v. *Maccandys*, July 7, 1815, F.C., where the jurisdiction of the Sheriff was assumed; *Brand* v. *Shaws*, February 24, 1888, 15 R. 449, *per* L.P. Inglis at p. 453 and Lord Adam at p. 454. The Legislature had given the Sheriff jurisdiction under the Guardianship of Infants Act 1886. This was an application made at common law, and not under the Custody of Children Act 1891. [LORD TRAYNER—Even if your petition is competent at common law, may not the defence raise questions under the Custody of Children Act 1891 which the Sheriff has no jurisdiction to decide?] There were here no averments relevant to found a defence under that Act. Nothing more was alleged than that the mother was not a "suitable person." That was not sufficient. It was not averred that the mother had abandoned or deserted the children. All that was alleged was that she had "voluntarily left them" with the defenders. Nor was anything said as to why the mother was not a "suitable person." There were no specific allegations of improper conduct on her part. The Court was not empowered under the Custody of Children Act 1891, section 2, to make the payment of the expense incurred in bringing up the child a condition of making the order as to custody. [LORD YOUNG referred to Dove Wilson on Sheriff Court Practice, p. 54.]

Argued for the defenders—The interlocutor of the Sheriff-Substitute was right. At common law the Sheriff had no jurisdiction to determine permanent questions of custody—Fraser on Parent and Child, 2nd ed., p. 81; Mackay's Manual, p. 537; Dove Wilson, *loc. cit.*; *Hood* v. *Hood*, January 24, 1871, 9 Macph. 449. Questions of permanent custody were dealt with by the Inner House in virtue of its *nobile officium*—Mackay's Manual, *loc. cit.*, and this was inconsistent with the Sheriff having jurisdiction to entertain such petitions. The fact that the Court of Session alone was mentioned in the Custody of Children Act 1891 showed that in the view of the Legislature that Court alone had jurisdiction in such questions. Under the last-mentioned Act it was plain that the Court of Session alone had jurisdiction, and questions under that Act were relevantly raised upon this record. The defenders, however, were willing that the course followed in *Mackenzie* v. *Keillor*, July 6, 1892, 19 R. 963 (see p. 965 of the report), should be adopted, and the case of consent remitted to the Sheriff-Substitute for inquiry, the petition being treated as if it had originally been brought in the Court of Session.

LORD TRAYNER—That may be, but I think that we should not continue to adopt applications which are incompetent *ab initio*.

LORD YOUNG—I am very much of the same opinion. I think that we should do nothing to encourage the idea that such applications are competent in the Sheriff Court. It is of course desirable not to increase expenses in cases of this sort, but

why should we not formally convert this into an application to this Court? A pen and ink and half an hour would do it.

Counsel for the pursuer, in view of the opinions expressed from the Bench, did not press for a decision on the question of jurisdiction, but asked for a continuation to allow the pursuer an opportunity of presenting a new application to the Court of Session for the custody of her children.

Thereafter the agent for the pursuer having intimated that she did not propose to present any such new application, the defenders presented a note to the Lord Justice-Clerk asking his Lordship to move the Court to refuse the appeal and adhere to the interlocutor appealed against, with expenses.

The Court dismissed the appeal, and affirmed the interlocutor appealed against.

Counsel for the Pursuer — Younger — Peddie. Agent—James M'William, S.S.C.

Counsel for the Defenders—D.-F. Asher, Q.C.—W. Thomson. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, November 30.

SECOND DIVISION.

[Sheriff-Substitute of Aberdeen.

MACKIE *v.* MACMILLAN.

Reparation—Negligence—Injury by Falling into Cellar in Public-House—Contributory Negligence.

A man who intended to go into the lavatory of a public-house, by mistake went through a door situated near the bar, and near the door of the lavatory, and sustained injuries by falling down a stair to which this door gave access. This door led first of all to a landing, 5 feet 5 inches by 3 feet 10 inches, from the right side of which the stair descended. There was no marking on this door, but the lavatory door had the word "lavatory" upon it, and opened from the stair side of the landing. In an action by the injured man against the keeper of the public-house for not having a door in such a position either locked or guarded in some way, *held* that the defender was not liable, on the ground that this door could not be a source of danger to anyone taking reasonable care of his own safety, and that consequently no fault was established on the part of the defender.

This was an action brought in the Sheriff Court at Aberdeen by John Mackie, mason, Aberdeen, against Mrs Elizabeth Macmillan, spirit dealer there, in which the pursuer craved decree for the sum of £100 as damages for injuries sustained by him through falling down a stair in the defender's public-house, his fall, as he alleged, having been caused by the fault of the defender.

A proof was allowed. The facts established sufficiently appear from the following interlocutor and note of the Sheriff-Substitute (ROBERTSON) dated 13th June 1898:—"Finds (1) that on the occasion libelled pursuer was in defender's bar, and desired to go to the lavatory; (2) that pursuer had not been in the bar before, and was not aware of the position of the lavatory; (3) that seeing a door open at the end of the bar, pursuer assumed it led to the lavatory, while in point of fact it opened on to a small landing, from which the stair down to the cellars led; (4) that pursuer, in going through said door, failed to observe the stair, and fell down and broke a bone in his leg; (5) that the door in question was not marked in any way, but that the lavatory door, which was through a glass swing door, and was 6 feet beyond the door into which the pursuer went, was plainly marked with the word "lavatory," which was visible from a considerable portion of the bar; (6) that the landing at the top of the cellar stair was well lighted from the bar, and that the stair, which was not a steep one, was in addition lighted by a gas-jet opposite the bottom of it; (7) that at the time when pursuer entered no one was stationed at the door in question to prevent the public entering; but finds (8) that the said landing and stair was not, on the occasion in question, a dangerous place to anyone using the most ordinary precaution, and that pursuer must be held to be himself to blame for the accident: Therefore assoilzies defender from the conclusions of the action, and decerns," &c.

Note.—"The facts of this case are as follows:—Defender is proprietor of a bar in Bridge Street of Aberdeen. This bar is at a corner, and is a large and well-lighted one. There are large windows on two sides, two on each side 8 feet wide, and extending to the roof; as pursuer's witness Winchester put it, 'There is no question but that it is a very well lighted bar.' The entrance to the bar is in Bridge Place, and on entering the serving bar faces you; at the right-hand end of the bar there is a passage at right angles leading through a double swing door into the smoking-room. This swing door is of clear glass, and has clear glass panels on each side of it. On the right hand side of this passage, just opposite the end of the bar, and just before you come to the swing door, there is another door of obscure, or rather rolled glass in its top and larger half. Through the swing door, and about 6 feet from the door just mentioned, is the lavatory door. The door first mentioned opens on to a landing 5 feet 5 inches by 3 feet 10 inches. On the right-hand side of this landing a stair goes down to the cellars. The near corner of the stair is about 2 feet from the door, a substantial stair-rail commences at the cheek of the door and continues down the stair. The stair is not a steep one. The ceiling of the passage opposite to the door is sloped corresponding to the stair, and the door opens away from the stair side. There is no marking on this door.