

pursuer had committed a fraud upon his customer. That was sufficient to entitle the pursuer to the issue asked—*Inglis v. Inglis*, Feb. 24, 1866, 4 Macph. 491; *Broomfield v. Greig*, March 7, 1868, 6 Macph. 563.

The respondent argued—There was no fraud alleged upon the part of anyone, but simply an accusation of fault made by the defender against the pursuer. The words which the defender was said to have uttered, and which were sought to be innuendoed, were not susceptible of the interpretation put upon them by the pursuer. The innuendo was unreasonable, and therefore the issue should be disallowed.

At advising—

LORD JUSTICE-CLERK—There is no doubt that any person who brings an action against another for alleged defamation of character which is contained in words not libellous in themselves, has the power to put upon these words as an innuendo the libellous meaning which he says they were intended to bear. And in general, if the words will fairly bear the innuendo, we do not weigh the words he complains of in very nice scales. But, on the other hand, the words themselves must be susceptible of bearing the libellous interpretation which the pursuer says they were intended to have.

In this case I think that the conclusion at which the Lord Ordinary has arrived is the right one. The words complained of here will not, I think, bear the interpretation which the pursuer desires to put upon them.

The pursuer is a grocer in Dunfermline, and among other things he deals in oil. He has two kinds of oil—an inferior and a superior kind. The Huttons were among his customers, and they gave him an order for oil. The order was given to the defender, who at that time was employed as traveller by the pursuer. He took the order, and entered it in his order book. The entry in the order book was for the inferior quality of oil known as No. 2. The No. 2 quality of oil was accordingly furnished to the Huttons, and was charged for as that quality. But the Huttons afterwards alleged that their order was for the superior, or No. 1 quality of oil, and that it was a mistake on the part of the defender to enter No. 2 quality in his order book as the quality of oil that had been ordered. Then the question arises as to how the mistake came about. The defender when asked about it says, "I took the order and put it in the order book." The pursuer when challenged says he obeyed the order as he found it entered, and in proof of the truth of his statement he produces an extract from his order book. Then there seems to have been some imputation on the defender, and he said that it was very mean of the pursuer to put it upon him when he had all the profit. That is the whole of the first statement. I do not think that the words complained of as being used by the defender can bear the construction that there was any fraud in the matter at all. Probably the defender thought that the accusation was one of carelessness in the business, and he resented that.

But then on another occasion it is said that he made the remark that if the worst came to the worst he would tell all. I do not think that these words are capable of the innuendo sought to be put upon them, unless it were averred that

these two men had for a long time been engaged in a course of fraud, and there is no such allegation here. I think that the conclusion of the Lord Ordinary is right.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK—I daresay that your Lordships are right, and I am sure that the conclusion at which you have arrived is the best for both parties, but I have had great doubts whether this case should not be sent to a jury, and I cannot say that these doubts have been altogether removed.

The Court adhered.

Counsel for the Reclaimer—Comrie Thomson—Craige. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for the Respondent—A. J. Young—Fleming. Agents—Wallace & Begg, W.S.

Friday, February 24.

## FIRST DIVISION.

[Sheriff of Ayrshire.]

HAMMEL AND BRAND *v.* SHAW AND OTHERS.

*Parent and Child—Illegitimate Child—Action for Delivery—Title to Sue—Tutor.*

The mother of an illegitimate child raised an action for its delivery against a person in whose custody she had placed it, and died while the action was in dependence, leaving a settlement by which she appointed a tutor to the child. *Held* that as the action was purely personal, the tutor was not entitled to sist himself as pursuer in the action.

This action was raised in August 1886, in the Sheriff Court at Ayr, by Ann Hammel against Mrs Shaw and her husband Charles George Shaw, for delivery of her illegitimate son, aged four years. A supplementary action was thereafter raised against Miss Shaw, daughter of Mr and Mrs Shaw, and the two actions were conjoined.

In March 1883 the pursuer and her illegitimate son, John Ingram Hammel, had been received as inmates of the Ochiltree Convalescent Home, of which the defender Mrs Shaw was an active supporter. Thereafter the pursuer was sent to a situation, and her child was, with her consent, placed in a home for boys in England. While the actions were pending the pursuer died leaving a settlement by which she left her whole estate to James Brand, contractor, Glasgow, in trust for her son. She also appointed James Brand to be his tutor, curator, and guardian.

The Sheriff-Substitute (ORR PATERSON), in respect of a minute lodged for James Brand, sisted him, on 2nd February 1887, as pursuer in the conjoined actions, "reserving all objections to his title." The defenders in an amendment to their record stated that "the settlement produced by James Brand (who has been sisted as pursuer, under reservation of all objections to his title to insist in this action) confers on him no title to insist therein. The original pursuer, as the mother of an illegitimate child,

had no legal power to appoint the said James Brand or any other person tutor to her child. The said James Brand has no legal status or right, through kinship or other right, to the custody of said child. The pursuer had no means or estate whatever at the time of her death. She was dependent on the charity of others. The said James Brand, if known to her at all, was only known to her by name, and his name, it is believed, was inserted in said document on the suggestion of those who surrounded the deceased during her last illness."

The pursuer pleaded—"(4) The defenders having no right or title to retain the custody of the child in question, and the pursuer Brand being duly appointed tutor, curator, and guardian to it by its mother, is entitled to an immediate order for delivery of the child as craved, with expenses."

The defenders pleaded—" (1) The action is incompetent in the Sheriff Court. (5) The pursuer Brand having no title or interest to insist in the present proceedings, and the document founded on by him having conferred no such title or interest, the defender should be assolized, or the action dismissed with expenses. (6) *Separatim*, the right to insist on the cravings of the petition not being transferable, the defender should be assolized, or the action dismissed with expenses."

The Sheriff (BRAND) on 16th April 1887 adhered to the interlocutor of the Sheriff-Substitute of 2nd February 1887, and remitted to him to proceed.

The Sheriff-Substitute on 24th May 1887 allowed a proof before answer.

The pursuer appealed to the Sheriff, who on 29th September 1887 recalled the interlocutor of the Sheriff-Substitute, found, under reference to the annexed note, that the action was incompetent, and dismissed the same; and found James Brand liable in expenses to the defenders.

"*Note.*—It appears that Ann Hammel, who died in or about November 1886, had in August of that year raised the present action in this Court against the defender Mrs Shaw, concluding for delivery to her of her child John Ingram Hammel, described as then in the custody or under the control of the said defender. In September thereafter a supplementary petition was brought by Ann Hammel against the other defender Miss Shaw, with a similar conclusion, and these actions were conjoined by the Sheriff-Substitute. Sometime after Hammel's death, Mr Brand craved by minute to be sisted as pursuer in room of the deceased. This motion was made in respect of a settlement by the deceased dated 31st August 1886, of which a copy has been produced. By that deed she bequeathed her whole means and estate in trust for her said son to Mr Brand, and appointed him her sole executor and tutor, curator, and guardian of her son. The motion to have Mr Brand sisted was opposed, but by interlocutor of the Sheriff-Substitute was granted, and this judgment was adhered to on appeal, under reservation, however, of all objections to Mr Brand's alleged title. Since then the Sheriff-Substitute has pronounced an interlocutor allowing a proof, and against that interlocutor the present appeal has been taken by Mr Brand, who in his reclaiming petition maintains that inquiry is unnecessary, and that, having regard to the settlement, there is

no room for any judgment save a decerniture in terms of the conclusions of the first petition. In their answers the defenders contend that as the action has been raised to determine the permanent custody of a pupil child it is incompetent in the Sheriff Court, which, it is said, can only deal with questions of interim custody arising on emergency. On the other hand, it is argued for Mr Brand that under the Guardianship of Infants Act 1886 (49 and 50 Vict. c. 45), and particularly section 3 (1), there is conferred on the Sheriff the jurisdiction requisite to deal with a case like the present. On the question whether apart from the Act the Sheriff has jurisdiction in this case to make an order for permanent custody there is no room for serious doubt. The suggestion that there is emergency is out of the question. The protection and guardianship of infants is, as Lord Fraser says (Parent and Child, p. 131), 'the peculiar province of the Court of Session as the Supreme court of equity, and to that Court must application be made in regard to all questions as to the custody of bastards. The Sheriff has power to decide as to their temporary custody where any sudden contingency prevents an application to the proper court.' See also page 222.

"This passage fully sets forth the rule of law as to jurisdiction, and the various cases on the matter which the Sheriff has examined do not modify or vary the rule as now stated. See the cases of *Buchan v. Cardross*, May 27, 1842, 4 D. 1268; *Lang*, June 30, 1849, 11 D. 1217; *Harvey v. Harvey and Others*, June 15, 1860, 22 D. 1209; *Muir v. Kerr*, July 18, 1863, 6 Macph. 1125; and *Hood v. Hood*, January 24, 1871, 9 Macph. 449. There may, it is true, be a question whether the Sheriff has power to interfere to enforce or protect the legal title of a parent of lawful children—*Dove-Wilson*, 3rd ed., p. 60—but no such question exists here. As an instance of procedure in the competent Court in reference to the custody of an illegitimate child, reference may be made to the case of *Macpherson v. Leishman*, June 4, 1887, 14 R. 180. Taking it accordingly as sound law that jurisdiction does not exist apart from statute, has it been conferred by the Guardianship of Infants Act? The result of an examination of its provisions has been to satisfy the Sheriff that it does not apply to illegitimate children. The preamble sets forth that it is expedient to amend the law relating to the guardianship and custody of infants, or as by the 8th section the word 'infants' is to be read in Scotland, of 'pupils.' This means infants or pupils lawfully begotten. The second section makes mothers the guardians of infants on the father's death, but it is trite law that an illegitimate child has no father, and to illegitimates therefore the second question cannot apply. Section 3 (1) contains the provision specially founded on by Mr Brand. It sets forth that 'the mother of any infant may by deed or will appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father of such infant (if such infant be then unmarried), and where guardians are appointed by both parents, they shall act jointly.' But it is clear from these words that the infant or pupil referred to is a person who has a father and mother, or, in other words, has been lawfully begotten. Further, by section 3, where

guardians are appointed by both parents, they are to act jointly, but a father has no right to appoint a tutor to an illegitimate child, and therefore the father of the child referred to in the Act must be the father of a child lawfully begotten. As Bell says (section 2071)—‘A natural child has no recognised father, and so his reputed father cannot appoint tutors,’ &c. A reference to the 7th section adds force to the view now stated. It provides for the case where there is a decree of judicial separation or a decree of divorce, and enacts that the Court pronouncing such decree may declare the guilty parent unfit to have the custody of the children, if any, of the marriage, &c. This section dealing with persons married, but afterwards judicially separated or divorced, must be taken as following on sections dealing also with persons who had entered into the marriage relation and had not been divorced or separated. It may be added that had it been intended that the Act should apply to illegitimate children it would have contained a provision to that effect. The view now taken renders it unnecessary to offer any opinion on various other questions raised, and in particular whether Mr Brand was validly appointed, and whether the action with its personal conclusion for delivery to the deceased when alive can be transferred into an action for delivery to Mr Brand. On the whole matter the Sheriff is of opinion that he has no jurisdiction in the present case.”

The pursuer appealed to the First Division of the Court of Session, and argued—At the date of the action the mother had the legal right to the custody of the child—*Macpherson v. Leishman*, June 4, 1887, 14 R. 780; *Sutherland*, Dec. 22, 1887, 25 S.L.R. 189; *Godeby*, July 7, 1815, F.C. The Sheriff had jurisdiction to determine the question of the custody of the child—*Herd*, Aug. 20, 1864, 3 Scot. Law Mag. 143. The settlement appointing Brand executor and guardian should receive effect—*Johnstone*, 1785, M. 16,374; *Whitson*, May 28, 1825, 4 S. 42. [LORD PRESIDENT—To bring yourself under the authority of these cases you must show that the mother left estate.] The Guardianship of Infants Act 1886 (49 and 50 Vict. c. 45), sec. 3, sub-sec. 1, and sec. 5 applied, and if so, the mother had a right to appoint Brand as guardian. The Statute 1555, c. 35, had been held to apply to bastard minors—*Wilson*, March 10, 1819, F.C.; *Kyle*, 23 D. 1104. The result contended for was supported by the Statute 1672, c. 2, and the statute 1696, c. 8. Hardships would ensue if such an application could not be made to the Judge Ordinary, because it could not be presented in the Bill Chamber during vacation.

Argued for the respondents—The Sheriff had no jurisdiction—*Fraser on Parent and Child*, p. 121. There was no authority for the view that actions for the custody of bastards could be brought in the Sheriff Court—*Lang v. Lang*, 11 D. 1217—the question was waived in that case. In *Hood v. Hood*, Jan. 24, 1871, 9 Macph. 449, the question was merely raised, not decided. There was no section in the Act in which the father was not mentioned. [LORD PRESIDENT—Supposing it did apply, what do you

make of “Court” including Sheriff Court?] The Sheriff had neither at common law nor under statute jurisdiction to entertain such an action. Brand must appear either as executor-nominate or as tutor-nominate. He could not sue in the former capacity, because there was no estate, and therefore he must plead the other. But there was no authority for the mother of a bastard nominating a tutor to it. An application similar to the present could be made in the Bill Chamber—*Earl of Buchan v. Lady*, May 27, 1842, 4 D. 1268.

At advising—

LORD PRESIDENT—The Sheriff in this case, recalling the interlocutor of the Sheriff-Substitute, who had allowed a proof, finds that the action is incompetent, and dismisses it. Now, if that means that the action as originally brought was incompetent I think that may be doubtful, because an application by the mother of an illegitimate child for delivery is *prima facie* a just and legal demand, and I am not disposed to throw any doubt on such an application where no special circumstances are pleaded against the legal title of the mother, and therefore I can hardly agree with the Sheriff. It is not necessary to consider whether a proper issue was originally raised between the pursuer and defender, because the issue has changed. The pursuer died about the beginning of November 1886, and in the February following Mr Brand came forward and proposed to sist himself in room of the deceased pursuer. That was assented to by the Sheriff-Substitute, under a reservation of all objections as to Mr Brand’s title; and the important question is whether Mr Brand in the capacity of executor of the deceased pursuer, or as tutor nominate to her child, is entitled to sist himself in this action? and I have come to be of opinion that he is not entitled to do so.

In the first place, the action as originally brought was purely personal. No one could have brought it except the mother of the child, because she alone had the legal title, the child being illegitimate. That is a title that can never pass to another. She cannot convey it by any deed, either *inter vivos* or *mortis causa*. Mr Brand has plainly no title as executor, because it is not an action to recover any of the deceased’s money. Therefore, without going further, I am of opinion that Mr Brand cannot put himself in the place of the pursuer, because so far as this petition is concerned nobody could carry it on except the original pursuer. I am for dismissing the action on the ground that Mr Brand has no title to continue it.

It is quite unnecessary to say anything about Mr Brand’s title otherwise, or whether the mother of an illegitimate child can nominate a guardian for it, or to decide whether the recent statute is applicable to the case of an illegitimate child.

LORD ADAM—I am of the same opinion. I think it is more than doubtful whether the Sheriff’s interlocutor of 29th September 1887 is well founded, because I am not satisfied that a petition by the mother of an illegitimate child, whose title is undisputable, for delivery of the child to herself is incompetent. But I agree

with your Lordship that as soon as the petitioner died the action could not be insisted in by Mr Brand. The ground of her claim was being the mother of the child. She could not transfer that character to Mr Brand or to anybody else. The action should have been then dismissed. It may well be that Mr Brand may have a title to apply for the delivery of the child in another process. It appears to me more than doubtful, however, if he can proceed in the Sheriff Court.

LORD KINNEAR concurred.

LORD MURE and LORD SHAND were absent from illness.

The Court pronounced this interlocutor—

“Recal the Sheriff’s interlocutor of date 29th September 1887: Find that the comparing pursuer Brand has no title to sue: Therefore dismiss the conjoined actions and decern: Find the said comparing pursuer Brand liable in expenses in both Courts,” &c.

Counsel for the Appellant—R. V. Campbell—W. Campbell. Agent—W. B. Glen, S.S.C.

Counsel for the Respondents—Sir C. Pearson—Maconochie. Agents—J. & F. Anderson, W.S.

Friday, February 24.

## FIRST DIVISION.

### THE MAGISTRATES OF GREENOCK *v.* THE EDUCATIONAL ENDOWMENTS COMMISSIONERS.

*Trust—Educational Endowment—Educational Endowments (Scotland) Act, 1882 (45 and 46 Vict. c. 59)—Whether Property irrevocably dedicated to Charitable Uses.*

A piece of ground was feued out in 1813 to the bailies, treasurer, and councillors of a burgh, and their successors in office, “for the sole and express purpose of building accommodations for charitable institutions.” The feuars were taken bound to pay a feu-duty of £2, 0s. 8d. so long as the ground and buildings should be used for charitable purposes, but if they used or disposed of the ground or buildings for any other purpose, then they and their successors in office were to pay a feu-duty of £18, 6s. Charity schools were built on the ground feued, the cost being paid out of the burgh funds. These schools were maintained partly out of the burgh funds, and partly by voluntary subscriptions, for a period of fifty-nine years. Subsequent to the passing of the Education Act of 1872, they were let to the school board at a rent sufficient to cover the feu-duty, taxes, and expenses of maintenance. In 1884 the subjects were acquired under the Lands Clauses Act by a railway company. In fixing the amount of the compensation, deduction was made of the capitalised value of the feu-duty of £18, 6s.

The amount of the compensation claimed by the Educational Endowments Commissioners having been claimed as an educational endowment within the meaning of the Educational Endowments Act of 1882—held, on a construction of the feu-contract, that as it was within the power of the magistrates to make use or dispose of the subjects for other than charitable purposes on paying the higher rate of feu-duty, the subjects were not vested in them as an irrevocable gift in favour of the public for charitable purposes, and therefore did not fall within the operation of the Educational Endowments Act.

For some years before 1813 two charity schools, one for boys and the other for girls, were carried on in Greenock, and were supported by subscriptions and the annual proceeds of certain bequests. The first of these was conducted in a building which was granted for this purpose by the Magistrates, and the latter in a building rented by the subscribers.

By feu-contract, dated 15th and 19th September 1813, between Sir Michael Shaw Stewart and the Bailies and Council of Greenock it was agreed—“That the said Sir Michael Shaw Stewart, in consideration of the feu-duties and others after specified, has sold and disposed, like as he hereby sells, disposes, and in feu farm and heritage for ever lets and demits, to and in favour of the said Hugh Crawford, Alan Ker, John Galt, Quintin Leitch, John Buchanan junior, Hugh Hamilton, David Hyde, Robert Bannatyne, and Robert Steele, Bailies, Treasurer, and Councillors foresaid, and to their successors in office, for the purposes after mentioned, heritably and irredeemably, all and whole that piece of ground lying on the west side of Anne Street and on the east side of Sir Michael’s Lane . . . But it is hereby expressly declared and agreed to between the said parties that the said piece of ground above disposed is given by the said Sir Michael Shaw Stewart to the said Bailies and Council and their successors in office for the sole and express purpose of building accommodations for charitable institutions. . . . For which causes, and of the other part, the said Bailies and Council bind and oblige themselves, and their successors in office, to pay to the said Sir Michael Shaw Stewart and his fore-saids, or to their factors and chamberlains, in name of feu-duty, the sum of £2, 0s. 8d. sterling yearly, at the term of Martinmas, beginning the first term’s payment at Martinmas 1813, and so forth yearly at the said term so long as the said piece of ground, with the erections made thereon, shall be used for charitable purposes: But in the event, at any future period, the said Bailies and Council shall make use of or dispose of the said ground or erections for any other purpose, then, and in that event, they oblige themselves, and their successors in office, in place of the feu-duty above mentioned, to pay the sum of £18, 6s. sterling of yearly feu-duty, and that at the first term of Martinmas after the said occupation, and so forth yearly thereafter in all time coming, with the due and ordinary annual rent thereof from and after the same becomes due, aye and until payment.”

The Town Council between 1814 and 1819 erected certain buildings on the ground feued,