

with which society in different ranks visits the erring wife, it is in accordance with what we know of human nature and with reasonable probability to believe that she only submits to such imputations and such treatment from a conviction that the facts founded on are true. I see no motive which should induce a married woman, as in the present case, to submit to church discipline as being the mother of a bastard if the child were really the child of her husband. It is not to be overlooked that some weight, though less in degree, ought to attach to the conduct of the father. By natural affection he ought to wish well to his child; and there is also an element of personal motive, because opinion in all times has to some extent made the husband who neglects his wife and exposes her to seduction a sharer in the reproach cast upon her. I see nothing to suggest that although Colquhoun was a peculiar man, his peculiarity took the form of courting the symbolical distinction which is given to the husband of an adulteress. Looking to the legal aspect of the case, I think it may be said that the general fact of non-access may be held proved by the separation and subsequent conduct of the spouses. It will then lie with the defender to prove the possibility of access on some particular occasion. In this case I see no satisfactory evidence of access at the time of conception or at any period so near it as to enable us to extend it by presumption to the date of conception.

I agree with your Lordship that the defender's evidence is of such a trivial and unsatisfactory description as disentitles it to any weight against the strong presumptions arising from the evidence on the other side and the admitted facts of the case. On the whole matter I am of opinion that the presumption in favour of legitimacy has been displaced, and that the pursuers are entitled to the declaratory decree which they seek.

LORD KINNEAR was absent.

The Court recalled the Lord Ordinary's interlocutor, and found and declared in terms of the conclusions of the summons.

Counsel for the Pursuers—Asher, Q.C.—Shaw. Agent—A. B. Cartwright Wood, W.S.

Counsel for the Defender—Jameson—A. S. D. Thomson. Agent—F. J. Martin, W.S.

Saturday, June 6.

FIRST DIVISION.

[Sheriff of Caithness, Orkney,  
and Zetland.

MOUAT v. LEE.

*Sheriff—Jurisdiction—Sheriff Court Act 1876 (39 and 40 Vict. cap. 70), sec. 46—Citation Amendment (Scotland) Act 1882 (45 and 46 Vict. cap. 77), sec. 3.*

*Held* (1) that a person resident at Fraserburgh was subject to the jurisdiction of the Sheriff of Zetland in an action for the rent of heritage situated within the sheriffdom; and (2) that service of the summons by the pursuer's agent by means of a registered letter, was a good citation of the defender.

Margaret Mouat, of Bressay, Zetland, raised an action in the Sheriff Court at Lerwick, under the Debts Recovery (Scotland) Act 1867, against William Lee, fish-curer, Baltasound, Unst, Zetland, residing at Fraserburgh, concluding for payment of £30.

The facts of the case are contained in the following minute of admissions for the parties—“(1) that the defender, who resides in Fraserburgh, holds a lease of the fish-curing station mentioned in the summons, for a term of five years from and after 1st June 1889, at the yearly rent of £30, payable at Martinmas, beginning the first payment at Martinmas 1889; (2) that the defender entered on the possession of the station as a fish-curer, and cured herrings thereon during the year 1889; (3) that the defender has not been removed from said station nor renounced his lease; (4) that the sum sued for is the rent due for the first year of the lease; (5) that since then the defender has not carried on active operations on the station, but has been in possession thereof, and has thereon fish-curing stock and plant; (6) that the summons was served by the pursuer's agent by registered letter.”

The defender pleaded—“(1) No jurisdiction in respect—1st, that the defender has no domicile in Zetland or place of business there; 2nd, that he has not carried on a trade or business within the said county since the month of August 1889; 3rd, that he has not been cited to appear in this action, either personally or at his place of business within said county; and 4th, citation by law-agent incompetent.”

On 4th February the Sheriff-Substitute (MACKENZIE) repelled the defender's 1st plea and fixed a diet of proof.

*Note.*—The preliminary pleas in this case are ‘no jurisdiction,’ a question which, according to the judgment in *M'Leod v. Tancred, Arrol & Co.*, February 18, 1890, 27 S.L.R. 348, must be decided *ante omnia*; and ‘no valid citation.’ The jurisdiction which is claimed arises from the fact that although the defender resides in Fraserburgh he carries on business within this sheriffdom. From the statement of fact in the joint-minute, I think that there can be no doubt that although the defender's

business may not be in active operation at this moment, he has a place of business, and has the materials of business here, and is tenant of the premises in dispute for the purposes of his trade. I think this is sufficient to confer jurisdiction. A doubt, however, occurs as to whether the section which gives jurisdiction in this way, viz., the 46th section of the Sheriff Courts Act of 1876, is applicable to the Debts Recovery Court. There is another Act, however, the Statute 48 Geo. III. c. 110, sec. 60, which confers a wide jurisdiction over those carrying on the business of herring fishing within the sheriffdom, or within ten miles of the coast, and the defender undoubtedly comes under its provisions. Again, the principle of the thing in dispute being within the sheriffdom might fairly be applied here. For these two last reasons I hold that there is jurisdiction. A further objection is made against the form of citation in this case, but I am of opinion that that cannot be heard according to the rule that a defender who appears is barred by that fact from objecting to a citation. It is perhaps doubtful, in the absence of express enactment, if this rule which is contained in section 12, sub-section (2), of the Sheriff Court Act 1876, applies to the Debts Recovery Court, but as it is so specially enacted both for the Ordinary Sheriff Court and in the Act of 1868 regulating procedure in the Court of Session I think it is a reasonable analogy to hold it as applying to this Court also.

On 18th February 1891 the Sheriff-Substitute decerned for the sum sued for with £2, 6s. 4d. of expenses.

On 25th February 1891 the Sheriff (THOMS) on appeal affirmed the interlocutor appealed against.

The defender appealed to the Court of Session, and argued—(1) The Sheriff had jurisdiction over the tenant of heritable property only when the tenant actually resided in the county or carried on business there. Here the defender lived at Fraserburgh, and for some time no active operations had been carried on at the station. The case was quite different from that of the tenant of a dwelling-house or farm who was more or less continuously on the spot. To give the Sheriff jurisdiction in the present case it was necessary that the defender should have been cited either personally or at his place of business. This was not a proceeding in the Sheriff's ordinary court, nor was it an "action" in the sense of section 46 of the Sheriff Court Act 1876, and the rules of citation there laid down were not applicable—*M'Bey v. Knight*, November 22, 1879, 7 R. 255; *Ferguson v. Dyce*, February 25, 1882, 11 R. 671.

Argued for respondent—The action was for the rent of a heritable subject situated in the sheriffdom, and the Sheriff in such a case had jurisdiction. The provisions of section 46 of the Act of 1876 were wide enough to include proceedings in the Debts Recovery Court, for they dealt with the service of "writs" generally, not merely with petitions. As the defender here had

appeared, he was barred from taking any objection to the citation; besides, citation here was by registered letter in terms of the Citation Amendment of 1882.

At advising—

LORD PRESIDENT—I have a difficulty in seeing what valid objection could be taken to the jurisdiction of the Sheriff in this case. The action is for the recovery of a year's rent of a fish-curing station in Shetland, and the sum claimed is £30. The Sheriff undoubtedly has jurisdiction in actions for the recovery of the rent of heritable subjects situated in his county, and no good reason has been suggested why he should not have jurisdiction in the present case. The only question of any interest is, whether or not there has been a valid citation? and upon that matter I am prepared to adopt the view taken by the Sheriffs and hold the citation as good. The defender has a place of business in the county, and it appears from the minute of admissions that he cured herrings there in 1889; the premises are still in his possession, and he keeps there his fish-curing stock and plant. It is also admitted that the citation was by means of a registered letter which is recognised by statute as a valid and effectual mode of citation. I am therefore for adhering to the interlocutor appealed against.

LORD ADAM—I am of the same opinion. This is just an action for the rent of a heritable subject, and it is as competent as it would have been if it had related to the rent of a dwelling-house or farm in the county. It would be something entirely new to me if the Sheriff of the county had not jurisdiction to entertain such an action.

With regard to the objection which has been taken to the citation, I do not see that we can possibly entertain it.

The provisions of the Citation Amendment Act of 1882 apply to this case, and the language of the statute is very wide. It is provided by section 3 that "In any civil action . . . any summons or warrant of citation of a person . . . may be executed in Scotland by an officer of the Court from which such summons or warrant . . . was issued, . . . or by an enrolled law-agent, by sending to the known residence or place of business of the person upon whom the summons, &c., is to be served, . . . a registered letter by post containing the copy of the summons."

The objection which has been taken to the present citation is, that instead of being served by an officer of Court a copy of the summons was sent through the post office by an enrolled law-agent. But this is just what the statute allows, so the objection must necessarily fail.

LORD KINNEAR—I am of the same opinion, and upon the same grounds.

I think the citation here was good, and that no valid objection could be taken to the citation as such under the Act of 1882. I may add, for myself, that if the question of jurisdiction had depended on section 46 of the Sheriff Court Act of 1876, I should

have considered that the citation here was sufficient to satisfy the provisions of that statute also.

LORD M'LAREN was absent.

The Court refused the appeal.

Counsel for the Appellant—M'Kechnie.  
Agent—J. D. Macaulay, S.S.C.

Counsel for the Respondent—C. S. Dickson. Agents—Torry & Sym, W.S.

Wednesday, June 10.

## SECOND DIVISION.

[Sheriff of Lanarkshire.

### COCHRANE v. RUSSELL.

*Process—Amendment by Stating New Defence—Expenses—I O U Sued on without Specification of Debt.*

In an action in the Sheriff Court for the amount of an I O U without specification of the debt for which it was granted, the defender pleaded that the document was not that granted by him, as the pursuer had torn off a note to the effect that interest at 5 per cent. was to be charged. There was no plea to the relevancy. In an appeal from the decree of both Sheriffs, the defender proposed to amend his record by alleging that the I O U had been granted for a gambling debt, and could not be founded on. The pursuer refused to amend his record by setting out the debt for which the I O U was granted.

The Court allowed the defender to amend on paying £15, 15s. of expenses—*diss.* Lord Young, who was of opinion that the pursuer should amend his record by specifying the debt for which the I O U was granted, leaving the defender to amend if he considered this necessary.

William Cochrane, residing in Govan, sued John Russell, commission agent, Airdrie, for payment of a sum of £54 sterling, with interest. He averred—"The pursuer is the holder of an I O U, dated 25th October 1887, for £50, granted by the defender on that date in favour of the pursuer."

The defender answered—"Denied. The pursuer is called upon to produce the alleged document. Explained that the document now produced is not that granted by the defender, in so far as a part of it has been torn away."

The pursuer alleged that the defender on 4th March 1890 paid £5 to account.

The defender pleaded—" (1) The defender not being due the pursuer the sum sued for, he is entitled to absolvitor, with expenses. (2) The document produced not being that granted by the defender, the action should be dismissed, with expenses."

At a proof before the Sheriff-Substitute

(MAIR) the defender deponed that he granted the I O U; that he had paid £5 to account; that he owed the pursuer no other sum of £50 than that for which he had granted the I O U; but that the document as originally granted by him contained a note to the effect that interest was to be charged at the rate of 5 per cent., which the pursuer had since torn off.

The Sheriff-Substitute held that even assuming the defence to be proved, which he did not believe, the I O U was not affected as a document of debt.

On appeal the Sheriff-Principal (BERRY) adhered.

The defender appealed to the Court of Session, and when the case was called the defender's counsel proposed to amend the record by averring that the I O U was granted for differences in stocks, delivery of which was never contemplated or enforceable, and no action in law could be founded on it.

Argued for the pursuer—The expenses previously incurred must be the condition of stating a new ground of defence by amendment—*Arnott v. Burt*, 11 Macph. 62. [LORD YOUNG—The pursuer should amend his record; he should sue upon the debt and not upon the I O U, which is only evidence of the debt.] The pursuer was prepared to stand on his record. There was sufficient authority for his view that he was entitled to sue on the I O U—*per* the Lord President in *Haldane v. Spiers*, March 7, 1872, 11 Macph. 541. Besides, the defender did not plead that the action was irrelevant.

At advising—

LORD JUSTICE-CLERK—The pursuer does not propose to amend his record. The defender does propose to make an amendment, and the question is, what share of the expense previously incurred he is to pay to the pursuer as a condition of making that amendment? I do not think it quite clear that some part of the previous expense may not be made available for future use. I therefore think that the amendment may be allowed on condition that the defender pays the pursuer fifteen guineas.

LORD YOUNG—In my opinion an I O U is not a bond; it is not a document of debt constituting a debt *per se*. I think it is settled in England (and we borrowed them from England) that an I O U is not a document of debt, but serves only as evidence of the amount of the debt agreed on between the parties on an antecedent contract. But if the money is not paid, then the debt must be sued on and proved. The I O U is a most important and, it may be, a very conclusive piece of evidence, but the debt itself must be sued on. That is the way in which the law is put by Mr Justice Byles in his work, and if the law is otherwise, then an I O U would be tantamount to a bond which would stand by itself as a document of debt without reference to any antecedent contract, and one consideration in support of these views is that otherwise