

I agree so entirely in what your Lordship has already said, that I really feel it unnecessary to add more.

The facts of the case are peculiarly clear, and especially unfavourable to the pursuer; and it does appear to me that to hold the sacred relation of marriage to be here constituted in this manner, and between these parties, would be to present a caricature of the Scottish law of marriage.

The other Judges concurred.

Counsel for Pursuer—Solicitor-General (Clark) and Rhind. Agents—Crawford & Guthrie, S.S.C.

Counsel for Defender—Lord Advocate (Young) and Lancaster. Agents—J. & R. D. Ross, W.S.

Saturday, February 8.

FIRST DIVISION.

[Sheriff of Renfrew and Bute.

MACBETH v. FRANCIS TROY AND GEORGE INNES.

Sheriff-Court—Process—Clerk of Process.

Held that where a Sheriff-clerk is pursuer of an action in his own Court, neither he nor his Depute is entitled to officiate as Sheriff-clerk in such action.

This was an appeal from the Sheriff Court of Renfrew and Bute, in a petition for sequestration for rent, presented by Daniel Macbeth, writer in Rothesay. The petitioner was Sheriff-clerk at Rothesay, and the Sheriff-clerk-depute was his partner in business.

The respondent, Innes, pleaded *inter alia*—“Where a Sheriff-clerk is pursuer of an action in his own court, neither he nor his partner is entitled to officiate as sheriff-clerk in such action, and all procedure in this action in which either of these parties have acted or may act in the capacity of sheriff-clerk, is illegal and invalid, as being against public policy.”

On 5th July 1872 the Sheriff-Substitute (ORR) pronounced an interlocutor, in which he repelled the preliminary plea for the respondent.

The respondent appealed, and, on 26th August 1872, the Sheriff (FRASER) pronounced the following interlocutor—“The Sheriff having considered the reclaiming petition and answers, sustains the appeal for the respondent, recalls the interlocutor appealed against; and, in respect that the petitioner Daniel Macbeth is sheriff-clerk of the county of Bute, finds that he is not entitled to institute or carry on an action in the Sheriff Court of that county: Therefore dismisses the petition, and decerns; Finds the respondent George Innes entitled to expenses against the petitioner Daniel Macbeth; allows an account thereof to be lodged, and remits the same to the Auditor to tax and report.

“Note.—In a series of cases it has been decided that a principal or depute clerk of a court cannot act as agent in it; and the Act of Sederunt of 6th March 1788 has been repeatedly found to be simply a declaration of the common law. The authorities to this effect will be found cited in the case of *Manson v. Smith*, 8th February 1871, 9 Macph. p. 492, and in *M'Glashan's Practice*, 4th ed., by Barclay, p. 77. After stating that a clerk of court cannot

act as agent in his own court, Dr Barclay lays down the law thus:—“The exclusion relates solely to clerks being agents for others, and does not preclude a clerk of court or his depute from conducting an action at his own instance in his own court, particularly if it cannot be competently raised before any other; but the libel when at the principal's instance should always be subscribed by his depute, and *vice versa*. Of course he is still more entitled to defend an action in his own court.”

“The Sheriff is unable to concur in this opinion, after considering the whole cases referred to by the learned author, and the other decisions mentioned by the Lord Justice-Clerk in the case of *Manson v. Smith*.

“The Sheriff and the Sheriff-clerk, according to these decisions, must be regarded as coming under the same rule. Neither of them can be an agent for a suitor, and it would seem to follow necessarily that neither of them ought to be allowed to sue in the Sheriff court in which he is a judge or clerk. If the Sheriff had a debtor in the county of Bute, it is quite plain that a summons in his name against the debtor would be a nullity. Sometimes it has been tried to obviate this inconvenience by making the summons run, not in the name of the Sheriff, but in that of the Sheriff-substitute, which summons would also be a nullity, but upon another ground, viz., that the writ must run in the name of the officer who holds his commission under the sign manual. Now, whether rightly or wrongly, the Sheriff-clerk has been put in the same category in this respect with the Sheriff. Lord Neaves gave this explanation in the case of *Manson v. Smith* of the position and duties of a Sheriff-clerk:—“In the argument for the respondent the position of a clerk of court was completely ignored. It is a most important office. He is not the servant of the court, but an independent public officer, whose duty it is to record and to assist in carrying out the judgments of the court, and in whom must be placed the greatest confidence. He must be as impartial as the judge. In inferior courts he is the keeper of the signet of the court, for by his signature summonses are authorised, and rendered valid. He authenticates writs. It is to his satisfaction that caution must be found, and in his hands consignation must be made. He is the taxing officer in many courts, and is virtually the extractor of their decrees, which are only rendered the foundation of diligence by being authenticated by him. It is clear that a person in such a position should not attempt to be *actor in rem suam*. No man can rightly use his public functions or any trust he may hold so as to benefit himself. If a clerk of court were permitted to be the instrument of summoning his adversary, there would be an opening for great irregularities. His doing so in my opinion not only creates a nullity, but amounts to a delinquency.”

“Two conflicting judgments have been pronounced upon the point, the one by the First Division, and the other by the Second Division of the Court of Session. In *Heddie v. Garioch*, 1st March 1827, 5 Sh., p. 503, the Court held that the sheriff-clerk of Shetland could sue his tenant for payment of a rent amounting to £8 in the Sheriff Court of Shetland. On the other hand, in the case of *Campbell v. M'Gowan*, 10 July 1824, 3 Sh., p. 245, ‘the majority of the judges considered that it was illegal in a clerk of court to bring an action for his own debt before a court in which he him-

self must necessarily officiate as clerk; and that, although there were no grounds for suspending M'Cowan from his office, yet that his conduct had been irregular.

"The case of *Campbell* was pleaded to the Court in the case of *Hedde*, but was disregarded by the Second Division. At the same time (in this division of authority) the Sheriff is entitled to give effect to his own opinion, and he has come to the conclusion that it is more consistent with the spirit of all the decisions to declare the absolute incompetency of an action either at the instance of the Sheriff or the sheriff-clerk in his own Sheriff Court.

"It is no answer to say that the sum here sued for could not be sued for in an action in the Court of Session in ordinary circumstances. A sheriff-clerk is entitled to justice, and if (for reasons of public policy) he cannot sue in his own Sheriff Court, the Court of Session is open to him even for a debt under £25.

"Nor is it any answer to say that all the work devolving upon the clerk of court is done by his depute, as in the present case. The depute is just another name for his principal, and stands even in a worse position, so far as regards independent action, than a Sheriff-Substitute, seeing that the appointment of the sheriff-clerk-depute is during the pleasure of the principal. The Sheriff attaches no weight to the fact that the depute is the partner in business of his principal. He goes simply upon the general ground that it is for the interest of the public that a sheriff-clerk should not be allowed to carry on actions for his own behoof in his own Sheriff Court. This will no doubt cause some inconvenience to a very respectable class of officials; but it is an inconvenience that must be borne as one of the disadvantages of their office."

The petitioner appealed to the First Division of the Court of Session.

Argued for claimer that the authorities cited against him, as well as the Act of Sederunt 1783, only went the length of affirming that a Sheriff-clerk could not *act* as clerk in his own case. That the Sheriff was bound to extricate the difficulty in the way of the Sheriff-clerk getting and giving justice in his own Court. In this present case the depute-clerk might act.

Authorities relied on—*Wallace v. Colquhoun*, Jan. 24, 1823, F.C.; *Barclay's M'Glashan*, p. 15; *Hedde v. Garioch*, March 1, 1827, 5 Sh., p. 503.

The following authorities were cited for the respondent:—*Munson v. Smith*, 9 Macph. 492, and cases there cited; *Erskine Inst.* i. 2, 26; *Shand's Practice*, p. ; *Stair* iv. 39, 14; *A.S.*, Mar. 6, 1783.

At advising—

LORD PRESIDENT—In this case the Sheriff has pronounced an interlocutor in which he finds that, in respect the petitioner Daniel M'Beth is Sheriff-clerk of the county of Bute, he is not entitled to institute or carry on an action in the Sheriff-court of that county.

I am unable to concur in that interlocutor. It proceeds on the footing that it is absolutely incompetent for a Sheriff-clerk to carry on litigation in the Court of which he is clerk. Any such rule would occasion very serious inconvenience, not to Sheriff-clerks alone, but to all parties concerned; while so far as the Sheriff-clerk himself is con-

cerned, it would result in an entire *negatio justitie*, because there are some cases in which the Sheriff of a county has a privative jurisdiction, and if in such cases a Sheriff-clerk cannot institute proceedings in his own Court, he will not be able to do so in any court whatever,—a result which I cannot contemplate under our judicial system.

The Sheriff has gone far beyond anything pleaded by the respondent, because the only plea stated is, that "where a Sheriff-clerk is pursuer of an action in his own Court, neither he nor his partner is entitled to officiate as Sheriff-clerk in such action."

The Sheriff-Substitute repelled that plea, and the Sheriff recalled the Sheriff-Substitute's interlocutor, but went far beyond the plea to which he gave effect. I disagree with the Sheriff-Substitute on the one hand, but I cannot concur with the Sheriff in his judgment. If we substitute in the plea referred to the word "depute" for the word "partner," I think the plea would contain a sound expression of law.

Various authorities have been cited on both sides, but I think none of them are irreconcilable with the opinion I have expressed, which is quite in accordance with the latest decision in the case of *Munson v. Smith*. In that case the pursuer, a clerk of Court, signed a summons, and though that was in a small-debt case—(a class of cases with regard to which review is excluded by statute)—notwithstanding, the Second Division set aside the judgment.

In this case, *pari ratione*—nay, I am disposed to say *multo magis*—the conduct of the Sheriff-clerk in relation to the process was utterly incompetent. Mr M'Beth did not sign a summons—there was no summons to sign—this being a summary petition. But there must be a warrant of citation which initiates and sets in motion the whole action. This warrant of citation is signed by the Sheriff-clerk, or his depute; and if a Sheriff-clerk, in presenting his own petition to the Sheriff, signs the warrant, I think such an act vitiates the whole proceedings. If the Sheriff-clerk be clearly incompetent to act in his own case, equally so must be his depute, an official appointed by, and presumably entirely under the guidance of, his principal. But further, we cannot leave out of account that the interlocutor of citation in this case contains a great deal more than the warrant of citation, viz., a warrant of sequestration. It had the effect of sending an officer to inventory and seize the respondent's effects before the respondent had been heard at all. No occasion could be imagined where it is so necessary to protect the interests of defenders.

I apprehend that the remedy, where the Sheriff-clerk desires to sue in his own Court, is, that he should apply to the Sheriff to appoint a Sheriff-clerk to act in his stead in that process, a course which I consider would be perfectly competent, and quite consistent with a carefully considered judgment in the case of *Galbraith*, 3 D. 52. The same rule will apply in this case. If M'Beth had asked the Sheriff to appoint some one else, I have no doubt the Sheriff would have agreed, and that the Sheriff-clerk would have signed the interlocutor of citation, and he alone would have the custody of the process. And this is no small matter when it comes to be considered how important is the position of the Sheriff-clerk as clerk of process. For example, it might be necessary to find caution—

and the clerk to the process is the judge of the sufficiency of the caution. Now the impropriety of the Sheriff-clerk judging of the sufficiency of the caution which he himself must find is manifest. Or he may be called on to consign a sum of money in the hands of the clerk of Court—*i.e.* in his own hands.

All dangers would be avoided, the process would go on, and be conducted with perfect propriety, and with due regard to all requisite safeguards, by adopting the proposed remedy, *viz.*, where a Sheriff-clerk is a party to a cause in his own Court, another wholly independent should be appointed in his place.

In this view I am compelled to the conclusion that, while recalling the interlocutor of the Sheriff, we ought to recal all the interlocutors pronounced in the case, and dismiss the petition.

LORD DEAS—The ground of the Sheriff's judgment is—(*reads interlocutor*).

Now, if the law were so, I think the disadvantage arising from such a state of the law would be quite as much or more injurious to the public than to the Sheriff-clerks themselves. There is no better instance of that than the present case. I agree with your Lordship, however, that that is not the law. A Sheriff-clerk may undoubtedly bring an action in his own Court. The whole question is, In what way should the process be conducted? I agree in thinking that the best way is that proposed by your Lordship. That is not the only way, however. For we have the high authority of Stair to the effect that the Sheriff-clerk depute might act in such a case. A man does not cease to be a responsible public officer because he has been appointed to the public office he holds by his principal, and if the depute in this case had not been the partner in business of his principal, I don't see why he should not have acted.

I have some difficulty, however, in nullifying the proceedings *ab initio*. There is a great deal to be said for the view that there was a necessity for having the interlocutor of citation to set the process going. I do not mean necessity, in the absolute sense that nothing else could have been done, but I am not surprised that it did not occur to the Sheriff on the moment that he ought to appoint another clerk. There might in such a case have been that amount of necessity which would justify the course adopted. With these explanations and qualifications, however, I am not prepared to differ from your Lordship in the conclusion you have arrived at.

LORD ARDMILLAN—I cannot say that I quite agree with the view taken of this case by the Sheriff. I am not prepared to decide that the Sheriff-clerk is not entitled to institute an action in the Sheriff-court of the county, or that he cannot defend himself in the Sheriff-court. I think that would be a penalty on the office, and, as your Lordship says, a denial of justice to the Sheriff-clerk which the law does not sanction. Justice—and accessible justice—the prompt, available, and cheaply attained justice of the Sheriff-court—cannot be refused to the Sheriff-clerk. It is not in that aspect that the question is here presented to my mind. The Sheriff-clerk cannot act as agent in the Sheriff-court. He does not do so here: an agent, or procurator of Court, appears for him.

To me the true question appears to be—whether

the duties of Sheriff-clerk in this cause, where the Sheriff-clerk was a party, have been competently and legally discharged? The office and duties of Sheriff-clerk are certainly important, and he must be neutral, and independent of both parties. I think that he himself cannot competently and legally act as Sheriff-clerk in his own cause. But another clerk may be appointed by the Sheriff: the occasions on which, on account of the Sheriff-clerk being a litigant, another clerk requires to be appointed, cannot be numerous. When they occur the Sheriff must provide the remedy. It is in his power to do so, and he should be asked to do so. Such an occasion is an emergency—and the appointment by the Sheriff of a Sheriff-clerk for the temporary purpose of meeting that emergency, seems to be a reasonable and competent proceeding; and it was so considered by the Court in the case of *Galbraith*. But the remedy must be provided by the interposition of the Sheriff. The Sheriff-clerk, who in his own case cannot personally act, cannot himself appoint his substitute to act for him. It was his part, as a litigant in the Court where he was clerk, to apply to the Sheriff, and crave from him the appointment of a person to act as clerk in the emergency. I rather think a motion might have been sufficient.

Not having done so—but having devolved the duties of clerk on his own depute, representing himself—his *alter ego*—I cannot think that the procedure was correct: one of the protections by which law guards the neutrality and independence of judicial procedure is weakened.

In expressing this opinion I do not rely on the fact of the Sheriff-clerk depute being partner in business of the Sheriff-clerk, though that is a complication of the matter. My opinion rests on the more general ground, and is in accordance with that which your Lordship has stated.

LORD JERVISWOODE concurred.

The Court accordingly, regarding the whole proceedings in the petition as incompetent, recalled all the interlocutors pronounced in the case, and dismissed the petition.

Counsel for Petitioner—Orr Paterson. Agents—J. & A. Peddie, W.S.

Counsel for Respondent—R. Maclean. Agents—J. & R. Macandrew, W.S.

Saturday, February 8.

FIRST DIVISION.

FERRIER v. KENNEDY.

Poor—Minor—Settlement.

Held that a minor is emancipated by the death of his father, and has no claim against the parish of his father's residential settlement.

This was a Special Case for Andrew Ferrier, Inspector of Poor for the parish of New Monkland, and for D. M. Kennedy, Inspector of Poor for the parish of Auchinleck.

The facts of the case were as follows:—John Syme, the pauper whose settlement was the matter in dispute in this case, was born on 2d August 1841, at Clarkston, in the parish of New Monk-