in under the deed of 1775, but he forfeited the composite estate. That is a very great change; and the investiture after 1775 was, as it appears to me, the only possible investiture under which Lord Breadalbane could hold. It was argued to us:—Suppose the two deeds had not been entails but had been mere destinations, and that the second deed was made by a person who could have altered the first deed but had retained the same destination in regard to the lands under the first deed and added the new lands,—the rule of not having recourse to technical rules would come in there. But if there was an entail, what was there to prevent the maker of the second deed from altering the first? Nothing but the rules of law to be found in applying the limitations of the first entail. If the first entail was bad altogether, the third Lord Breadalbane could have made what deed he liked in 1775. Why was he restricted to the same destination? Because of the limitations in the first entail. That is, because of the construction of the entail according to the rules of law with respect to them. And, therefore, you cannot exclude rules of law to all effects. We are not applying to this estate technical rules of construction; but in answering the question, What was the deed under which the Earl of Breadalbane held? it is impossibla to exclude this, that law—whether you derive it from the entail Act or from the recognised legal construction of the entail—prevents his holding under any other deed than that of 1775. And that is not applying a technical construction to the statute we are dealing with. It is only refusing to ignore an undoubted and settled rule of law, necessary to the ascertainment of what deed it was under which the Earl of Breadalbane held the estate.

Upon the whole matter, viewing Lord Breadalbane as holding under a disposition, and the true question being Which of the two deeds was the regulating deed under which he derived his title to this estate? I think it is impossible to come to any other conclusion than that the deed of 1775, executed by the third Earl of Breadalbane, was the true investiture of the estate. If so, then the maker of that deed (the third Earl), and not the maker of the deed of 1804 (the first Earl), is the predecessor of Lord Breadalbane within the meaning of the statute.

Lord President—The first part of the Lord Ordinary's interlocutor is not quite satisfactorily expressed I think, and it may be better to make a finding more in terms of the Act of Parliament. I would propose to recall the interlocutor, and to find that the pursuer and suspender has, from the death of the last Marquis of Breadalbane, become beneficially entitled to the whole lands and estate mentioned and described in the proceedings by way of substitutive limitation, by reason of the disposition executed by the third Earl of Breadalbane on the 5th May 1775, and therefore that the said third Earl of Breadalbane is, within the meaning of the 16 and 17 Vict., c. 51, the predecessor of the pursuer and suspender, from whom his rights as successor are derived.

Lord Kinloch absent.

Agents for Pursuer—Adam, Kirk & Robertson W.S.

Agent for Defenders—Angus Fletcher, Solicitor of Inland Revenue.

HOUSE OF LORDS.

Tuesday, May 24.

WATT *v.* THOMSON & OTHERS.

(*Ante*, vol. v, p. 329.)

Damages—Process Caption—Judicial Act—Privilege—Malice—Satisfying the Production. A Sheriff-Substitute having, in the usual way, signed a process caption on an application by the clerk—*Held*, affirming decision of Court of Session in an action of damages at the instance of an agent who was imprisoned under it, (1) that the Act havingb een taken in the course of proceedings which had been initiated before the Sheriff, it was judicial, and was therefore privileged; (2) that there was no relevant allegation of malice defeating the privilege.

In an action of damages at the instance of the same party against the Sheriff-clerk, who applied for the process caption, the Court of Session *held* that the plea of privilege was not, as in the case of the Sheriff, so obvious as to entitle him *in limine* to refuse to satisfy the production, and remitted the case to the Lord Ordinary to make up a record; and the House of Lords affirmed this decision.

These were appeals from judgments of the Second Division of the Court of Session. Mr Watt, advocate, Aberdeen, raised an action against Mr Thomson, Sheriff-Substitute, John Ligertwood, Sheriff-Clerk, and William Daniel, Sheriff-Clerk-Depute, to produce, for the purpose of being reduced, a certain warrant of imprisonment, a process caption, which they had issued and executed against him, and claiming £5000 as damages and *solatium*. Mr Watt, in his profession of advocate and procurator, in March 1867 prepared a petition to the Sheriff at the instance of a client named Mrs Mouat, praying for interdict against an intended sale of certain property belonging to her son. A caveat had been lodged previously with the Sheriff by Mr Duncan, advocate, who acted for another party. The parties met before the Sheriff-Substitute, who, on reading the papers, said he would not grant the interdict. Mr Watt thereupon stated that he would withdraw the petition, and conceived that, as no minute had been made upon it, he had a right to get back the petition, and took it up from the table and carried it away, though the Sheriff-Clerk asked him to return it for the purpose of having a warrant of service written upon it. Mr Watt alleged that the Sheriff-Substitute and Sheriff-Clerk thereafter maliciously and illegally issued a warrant of imprisonment for apprehending and detaining him until he should return this document, and he was accordingly imprisoned; but at the expiration of about twenty-four hours he was liberated on the authority of Mr Daniel. Mr Watt alleged that he had received no notice whatever of the application for a warrant to imprison him, and that the proceeding was illegal and malicious, and that his credit and reputation as a law-agent had suffered, and hence the damages which he claimed. Sheriff Thomson's defence was, that he had acted throughout the matter in his capacity of a Judge, and that the conclusions of the action were irrelevant as against him, and that as such Judge he had acted rightly, for Mr Watt had no right, by abstracting the peti-

tion, to prevent the judgment from being written out and signed. The other defenders, Mr Ligertwood and Mr Daniel, set up as their defence that they acted as officers of the Court; that the former was not present or a party in any sense, and that Mr Daniel did only what he was bound to do as custodier of the documents in process. The Lord Ordinary, on the preliminary defences, held that the action was not maintainable against any of the defenders. The Second Division adhered to that part of the judgment as regarded Sheriff Thomson, but recalled the other part as regarded the sheriff-clerks, and remitted to the Lord Ordinary to proceed in the action as against the latter defenders. Thereupon both Mr Watt and the sheriff-clerks appealed against the judgment.

Sir J. KARSLAKE, Q.C., and WILLS, Q.C., for the appellant Watt, argued—As this was not a depending process, there was no power in the Sheriff to issue a warrant of imprisonment at all; and as it was a criminal process, notice ought to have been given to Mr Watt, so that he might have had an opportunity of explanation. The action was therefore competent against the Judge, more especially as express malice was alleged against him. The Judges in the Court below had entirely overlooked the fact that the condescendence contained the very allegations which they stated that it did not contain. The proper course, therefore, was to give the appellant an opportunity of proving the malice which he said actuated the Judge in issuing the warrant of imprisonment. The fact of malice alleged by the appellant made all the difference in cases of this kind; and when Judges do actions which are judicial under the influence of malice, they are liable in damages as much as ordinary individuals. The privilege of exemption no longer exists when they act beyond the sphere of their office.

Sir R. PALMER, Q.C., and J. T. ANDERSON, for the respondent Thomson, replied—The Court below was right in dismissing the action against the Sheriff, who had acted solely as a Judge, and on proper grounds. The appellant could not escape the consequence of the rule which holds Judges irresponsible for judicial acts, merely by touching on any number of allegations of malice, which were obviously irrelevant. There could be no doubt that the Judge had power to issue the warrant of imprisonment, and that this was a depending process in the service used in the practice of Sheriff-courts.

LORD CHANCELLOR—I may say that we are satisfied that this was a depending process, seeing that both parties were present, and that the Sheriff had actually decided between them.

LORD ADVOCATE and J. T. ANDERSON, for the appellants Daniel and Ligertwood, argued—This action is incompetent. Apart from the mere fact that the sheriff-clerks acted as officers of the Court, they had no interest or responsibility whatever. No allegation of malice was made against the sheriff-clerks, though it had been alleged against the Sheriff. They were not properly made defenders in an action of reduction, and the Court below ought to have dismissed the action as against them.

Sir J. KARSLAKE, Q.C., and WILLS, Q.C., for the respondent Watt, replied—In cases of this kind there is a clear distinction between the Sheriff and the sheriff-clerk, the latter being only a ministerial officer. It is well settled that a notice is necessary before issuing a process-caption; and it is admitted that no notice was here given. It is of the essence of justice that specific notice should be given before so strong a step as imprisonment is resorted to. It is not necessary to allege malice against the sheriff-clerk. It is enough that the prisoner was illegally imprisoned. The interlocutor of the Court below was therefore right.

At advising—

LORD CHANCELLOR—My Lords, the appeal of *Watt* v. *Thomson and Others* is an appeal from an order of the Lord Ordinary, in so far as it affects the case of Mr Thomson, which order, in respect of Mr Thomson, has been affirmed by the Court of Session; and the complaint which the appellant makes is this, that he (the pursuer), in an action of reduction which he brought with reference to a course of procedure called a proceeding of process-caption, whereby he was arrested and imprisoned in consequence of such proceeding, has sought to reduce the order that was made upon this course of procedure, and he has also sought damages against Mr Thomson, the Sheriff-Substitute, in respect of his conduct in the course which led to the issuing of the process-caption, which was issued under his authority.

The narrative which he gives is a very singular one. That narrative is this, That he was proceeding as procurator on behalf of a Mrs Jane Mackie or Mowat to obtain an interim interdict to prevent one Alexander Edmond from advertising for sale certain property of hers, consisting of bathing houses and a bathing establishment on the sea beach at Aberdeen; and he tells us that Mr Edmond, the person who was about to sell this property, had taken the precaution, through the medium of a Mr Duncan, of entering a caveat against any such interim interdict being issued by the Sheriff. Then, he says, that finding this to be the case, he attended on the 19th March at the sheriff-clerk's office, and there he (the pursuer) met Mr Duncan in the office, and that Mr Duncan requested a sight of the petition, the petition being a petition for an interim interdict. Mr Duncan would have been entitled to have had notice given him of any such petition, and in the meantime to see any such petition, in order that he might resist any order being made thereon. Accordingly, he tells us in the second condescendence that the petition was handed to him, at his request, by the pursuer, and was read over by him; and then Mr Duncan and the pursuer (these are the two litigants—having become litigants by Mr Duncan resisting the interim interdict and the pursuer asking for it) went into an adjoining apartment, in which was the Sheriff-Substitute, and they were accompanied by the sheriff-clerk depute, Mr Daniel, who is one of the defenders also in the action. Then the condescendence proceeds to tell us that Mr Daniel immediately left the room, and did not return so long as the pursuer remained in it. However, the Court was certainly duly constituted, as the Judges of the Court of Session have determined, and the process was before them. There was an application on the part of the pursuer in the present action for an interim interdict. His opponent was then present, and had seen and perused the document in question in this case—namely, the petition for the interim interdict. And the Sheriff-Substitute had his clerk there, in his presence, though he does not seem to have remained all the time in the room while the matter was being discussed. That being so, it is said in the second condescendence that the defender, the Sheriff-

Substitute, perused the petition, and having heard the parties' procurators, stated that he would not grant the interim interdict. It appears, therefore, that he heard them and gave judgment.

One question, which has been argued at some length here, and also in the Court below, was this, whether or not this constitutes a process? I confess I cannot comprehend what a process is if it be not the hearing by the judge of the party who makes his application for an interim interdict, in the presence of any party who has a right to resist the application, and does resist it, and the decision of the judge when he has heard both the parties.

That being so, the pursuer proceeds to tell us in the third condescendence, "The pursuer thereupon intimated that he withdrew the petition, and would not further insist thereon, and he withdrew the same accordingly." I apprehend that that does not mean he withdrew this process because after he has been heard and been defeated he does what is called "withdraw" the petition. I take it that it was not competent to him so to withdraw it, at all events as to make it less of a process, or less of a matter which had been heard and had been determined, and as to which he would have a right, on any occasion when he thought fit, to say that the matter had been duly heard by a Court of competent jurisdiction. And although as regards this particular matter of the interim interdict, it was a matter no doubt only of passing interest to both parties, because it would have fulfilled its office in a very short time, still it was matter which (whatever may have been the amount of its importance) had been regularly heard and judicially determined.

Then he says, "No deliverance had been written on the petition, and no proceeding of any kind had taken place thereon." That is not altogether consistent with his saying in the second condescendence, that it had been heard and decided. And then he says, "And the pursuer as agent for the petitioner had right to withdraw the petition at pleasure." Then he tell us what afterwards took place: "The pursuer then lifted the petition from the table on which it had been laid by the Sheriff after he had perused it." The Sheriff had made his order upon it, or rather he had refused to make an order upon it—and then the pursuer lifted it from the table—and on the Sheriff-Substitute, at the instigation of Mr Duncan (that is the opponent), "asking him to return the petition for the purpose of having a warrant of service written on it, the pursuer, as such a proceeding was useless to his client without an interim interdict, did not hand it to the clerk, but took it away, having thereupon left the room with it in his possession."

Now, in other words, it comes to this, if we take away the expression "instigation" (which, I suppose, is a word of evil import), it comes merely to this, that the person in whose favour the case had been decided, and who saw the petition in the hands of the Sheriff (who was the judge), was desirous that it should be in the proper custody—which, I apprehend, would be that of the sheriff-clerk in such a case—he was desirous that it should be in the custody of the sheriff-clerk, and he asked the Sheriff-Substitute to direct that the pursuer should deliver it to that proper custodier; and accordingly the Sheriff, at the request of the other litigant, did ask the pursuer to return the petition to the clerk, which request of the Sheriff the pursuer wholly disobeyed, and, in spite of the request, took it away, and left the room with it in his possession.

I can have no hesitation, my Lords, in saying that it appears to me that the Sheriff, in directing that document to be returned, was acting judicially, and in the course of the discharge of his proper functions; and that the pursuer, in so taking it away, after being directed to deliver it to the proper person, was guilty of a clear contempt of the Court.

I need not go in detail through all the other statements which are averred in these condescendences, with the exception of two or three which immediately follow, because a new case is alleged in what immediately follows—namely, in the fourth condescendence—that is, a case of malice against Mr Thomson, the Sheriff-Substitute, when he was, whether rightly or wrongly, exercising his jurisdiction in the matter. It states the matter thus:—The Sheriff-Substitute, Thomson, "took offence at the pursuer for not handing the petition to the clerk for the purpose foresaid, and, actuated by malice and ill-will towards the pursuer, and with the design of injuring the pursuer in his feelings, credit, and reputation, resolved illegally to effect his purpose, by having him apprehended on a process-caption. With this view the defender, the said John Comrie Thomson, actuated as aforesaid, wrongfully, illegally, maliciously, and without probable cause, instructed the said William Daniel, as sheriff-clerk-depute foresaid, to obtain and execute a process-caption against the pursuer for the recovery of the foresaid petition. The said William Daniel, in compliance with the instructions thus wrongfully given, wrongfully and illegally caused an application or complaint for a process-caption to be prepared, which he signed and handed to the said John Comrie Thomson. The said application or complaint is in the following terms:—"The clerk complains on John Watt junior, advocate in Aberdeen, for not returning the above process, and craves caption for recovery thereof in common form."

Then it is important to take the next condescendence in connection with this. The fifth condescendence says:—"The said complaint was so handed to the said John Comrie Thomson within a few minutes after the defender had left the room (as mentioned in article 3 hereof) with the petition in his possession; and the said John Comrie Thomson immediately, in the absence of the pursuer, who was ignorant of any such application having been made, or intended to be made, and in the knowledge that no intimation or notice of any kind had been given to the pursuer of an intention to present the said complaint, or of what was craved, and without directing any such intimation or notice to be given to the pursuer, subscribed a warrant of imprisonment, or process-caption, for the pursuer's apprehension and imprisonment in the following terms:—'*Eo die*—Grants warrant to officers of Court and their assistants to search for, seize, and apprehend the person of the said John Watt junior, and commit him prisoner to the gaol of Aberdeen, therein to be detained till he return the above process, or till he be otherwise liberated in due course of law.'"

Now, really, these fourth and fifth condescendences contain the substance of the whole matter; and the question is, whether or not in this case the matter is brought within the case of *Hamilton* v. *Anderson*, which very strongly resembles this case

in many particulars? and whether or not the learned Judges in the Court below are right in deciding that here the Sheriff was acting in the discharge of his judicial duty, and that there is not charged against him by way of misconduct in the course of his judicial duty any such malice as would authorise the Court to come to any conclusion against the Sheriff finding him, in case they should consider the process itself to be irregular, to have been guilty, although acting in his judicial capacity, of acting with malice in such a manner as to take him out of that protection which would otherwise be afforded him as a judge in the exercise of his judicial duty?

Now, in the case of *Hamilton* v. *Anderson* there was a charge of malice, as there is in this case a charge of malice, but what was thought by this House in the case of *Hamilton* v. *Anderson* was, that it is not sufficient to have simply malice charged without any averment or description whatever, to show what it is that is meant by the assertion of malice, or as far as anything appears upon the face of the proceedings to have only a certain malice charged by the averment of the fact that an order has been made, and that the party has suffered inconvenience and damage from that order. There must be something more definite than the mere circumstance that you have been caused to be arrested as you say illegally, that is to say irregularly, for that is all that it comes to. You have been arrested by an irregular course of process, and you assert nothing else in the shape of malice beyond the mere fact that you have been so arrested unduly and irregularly. These two condescendences contain in reality and in substance nothing more than this. The only suggestion of malice is, that Mr Thomson was offended with the pursuer for not handing the petition to the clerk as ordered. No doubt that might seem very wrong and improper, and I suppose he would desire to lead us by that assertion to this conclusion, that Mr Thomson the Sheriff-Substitute, without cause of any description, chose to take offence at the pursuer's conduct, and maliciously to revenge himself upon the pursuer for conduct which had offended him, without any other assignable cause or reason for his coming to such a conclusion as he came to, namely, that it was proper to issue a process-caption. But on the other hand, if you take this view, that the pursuer's conduct was as the Court below held, and as I myself must distinctly conclude, most unjustifiable, and that he was guilty of very gross contempt of Court in removing that which he was bound not to remove, and in subsequently walking away with the petition when he was ordered by the person who had authority to order him to return it, then the offence that the Judge takes at such conduct was a very just offence, and was simply such offence as every Judge in the discharge of his duty to the public ought to take at an irregularity committed in the face of the Court; and when the malice which is said to arise in the mind of the Judge is simply coupled with this allegation of offence at the conduct of the pursuer, the malice is simply reduced to this, that the Judge, acting judicially, —coming to the conclusion that a very gross contempt of Court had been committed in his presence, and being justly offended at that act,—took this mode of punishing the offence, which the pursuer avows to be an irregular mode.

Now, if this charge of malice is simply reduced to such a position as I have now endeavoured to describe, then the case comes distinctly within *Hamilton* v. *Anderson*, and the charge of malice so made will not at all affect the course which the Court ought to take with reference to the protection of a judge simply exercising his judicial functions. That the proceeding that he took, namely, as is averred, of instructing his clerk to make an application for the process-caption, is one that was done also in his judicial capacity, is quite clear, because it is stated that all this took place—the instruction was given, and the complaint itself was handed in to the Sheriff, who gave the instructions as is averred within a few minutes after the defender left the room. It was clearly therefore all part of one and the same judicial transaction. The Court had not risen, the Court was still sitting—the pursuer had left the room, but the Court was still sitting—and the Court conceived that the most proper way to repossess its officer of the document which had been abstracted was to take the course which was here suggested. Having had an application made to him for a process-caption, and that being handed to him, the Sheriff judicially signed that document; and accordingly, upon that application being made to him, and that document being so signed, it was placed in the hands of those who afterwards executed it; of which execution and arrest the pursuer complains. There seems, therefore, to be nothing whatever in this case distinguishing it from the case of *Hamilton* v. *Anderson*.

I do not read the subsequent passages from the condescendences, because I can state them so easily without reading them that it is not necessary to detain your Lordships by reading them verbatim. They only amount to this, that intimation ought to have been given before such a process as this, of process-caption, is resorted to; that the process-caption being a mode of obtaining possession of a record which has been improperly detained, the usual course seems to be this, according to the statements made in the condescendence, that any person desiring to have a record from the hand of the proper custodier—the sheriff-clerk—applies for this process, and hands in his receipt in return for it; and when he has handed in a receipt in return for it, if it is afterwards required again by the sheriff-clerk, the sheriff-clerk sends him an intimation or notice that he desires to have it, and if it has been wrongly or improperly detained he will probably send at the same time with the notice that he requires to have it a notice, either at the same time or afterwards, saying that if it is not delivered within such a time as he specifies in his notice a process-caption will be taken up, and that without such an intimation having been given a process-caption should not be taken up. That being the averment, it is further averred that the Sheriff-Substitute well knew that no such intimation had been given; and then we were referred, both by Sir John Karslake and by Mr Wills, who followed him, to a passage in Lord Cowan's judgment, upon which they very strongly relied, in which the learned Judge seems to have said that had it been made to appear that the Sheriff-Substitute was aware of the fact of an intimation not having been given, and therefore the application for the process not being regular, it might have made a difference in the case. It was said, and so far said with justice, that if the averments are very carefully looked into you do find an averment that an intimation was not given: and you do find an averment that the Sheriff-Substitute

was aware of the facts stated in the preceding condescendence, that being one of the facts so stated, and that therefore he was in the position in which Lord Cowan said that, if he had been placed, it might have made a difference in his opinion. I wish to assign every possible weight to that learned Judge's opinion; but whatever weight we may assign to it, it appears to me that there is nothing in this circumstance to make this case different in any way from *Hamilton* v. *Anderson*. If it be possible that the Sheriff-Substitute may be wrong (I do not wish to express an opinion upon that part of the case any more than the learned Judges did in the Court below) in directing this process to be served under the circumstances here stated, without this intimation having been given, it appears to me to make no difference in the case, provided he did what he did in his judicial capacity, as it seems plain to me that he did. Seeing before his own eyes a great wrong committed, he did not take the course that he might have taken, of immediately committing the pursuer on the spot—but within a few minutes of the person having unlawfully abstracted this document, he took judicial proceedings to have it recovered—he sitting there judicially, and before the judicial sitting was over. And whether the whole proceeding was right or wrong, I apprehend, makes no difference whatever to the position of the Sheriff. If it was right, of course he was fully justified; if it was wrong, the proper course was to appeal from the order and obtain a reversal of the order. Supposing the order had been reversed, would the Sheriff have been answerable? Clearly not. If the Sheriff was not answerable, you get this consequence following from it, namely, that whatever the result of the process of reduction, he is not the custodier of the document, and he has no interest in the document; it is a matter of entire indifference to him whether it stands or whether it is reduced. If it be reduced he will not be liable in the other part of the action which seeks damages. If it stand, of course there is an end of the case. Therefore, taking the case either the one way or the other, the Sheriff has no interest whatever in the proceeding that has taken place.

I think therefore, my Lords, as regards this case of *Watt* v. *Thomson*, the House will probably come to the conclusion that it will be right that the interlocutors complained of, so far as they are complained of (and both of them are complained of *in toto* in this proceeding), should be affirmed, and that the appeal should be dismissed, and dismissed with costs.

As regards the position of the other two defenders, it appears to me I confess, my Lords, though I very much regret it, that we are under the necessity of holding our hands. And what is disclosed on the face of the condescendences entitles me to say that I regret it, because one would willingly have had the case brought to an early conclusion. The two other defenders are Mr Daniel, who is called the sheriff-clerk depute, and Mr Ligertwood, who is the sheriff-clerk. The case against them stands thus, according to the condescendence:—There is no malice averred against either Mr Ligertwood or Mr Daniel, and the course of the proceeding was this:—That the Sheriff-Substitute, Mr Thomson, instructed Mr Daniel, the sheriff-clerk depute, as the condescendences say, to make an application upon which this process-caption was issued. Then the process-caption itself is in dispute; and it cannot be said, as in the case of Mr Thomson, that it is a matter of indifference to these defenders whether or not it will be set aside or maintained, because I apprehend it is clear, that if it were to be set aside, they would not find themselves in the position in which Mr Thomson found himself, namely in the position of a judge exercising his judicial duty, and in the course of his judicial duty directing that which he thought right and just to be done, and which was to be dealt with on appeal, and as to which, as regarding him personally, he had no other interest in. I apprehend that when parties who apply for process and execute process which results in the arrest of the persons against whom the process was issued, are sued in respect of such process, their only defence is the order and direction under which they acted, and if that order and direction fail, that is to say, if that order be reversed on appeal, or if by action it be reduced—I use the expression "appeal" as being the more common phrase in this country (it seems that a similar order is obtained in Scotland, which is called by the name of reduction)—if that document be out of the way, then, the persons who have acted under that document have no longer anything upon which they can rely for their defence. Therefore it is all important that it should be established that that which has been done, has been regularly and properly done. It is not enough to say that it is done judicially, and that it is immaterial, so long as it is done judicially, whether it be regular or not, because if it fails under any circumstance, they may (it is unnecessary to say more than that they may) be made liable in damage.

Now in this case we are not in a position in which we can see as clearly as in the case of the action of reduction against Mr Thomson, that in no possible state of circumstances can the defenders be made answerable in a subsequent proceeding. They make out a very good case, and I am as far as the learned Judges in the Court below were from expressing any opinion adverse to the case of Messrs Daniel and Ligertwood. But, on the other hand, it is impossible, or at all events it is hardly right, at this stage of the cause, to say that the whole proceeding should be arrested on those grounds which led this House in the case of *Hamilton* v. *Anderson*, to arrest the proceeding in order to save useless litigation and expense. The case of *Hamilton* v. *Anderson*, at all events, furnishes no authority to the contrary; and I apprehend that in this case, where the result of the action may, in circumstances which may possibly arise according to the condescendences which are here set forth, and upon which alone you can proceed, be such as to create a liability on the part of the defenders, it is not now proper or right that we should take upon ourselves to decide upon the merits of the case at this stage of the inquiry, before the record has been closed, and before the parties have proceeded to the proof in the case; because the difficulty which will arise is this—if we so decide in this case, undoubtedly, it would be an important precedent, as *Hamilton* v. *Anderson* has furnished a very useful precedent in this case; but that would form a precedent for attempts being made, in almost every description of case, to raise prematurely an issue, and to have it, not finally determined in the cause, but to bring it to a hearing and obtain a determination upon it without a due investigation of the case, and a due administration of justice as between the parties. The courts of law in Scotland have thought it right that this

case has not come to the stage to which it should be conducted, before judgment can be arrived at upon the matter between the parties. I think, my Lords, the plain point of difference between this case of Ligertwood and Daniel and the case of Thomson is this:—those two defenders had no judicial functions to perform. Their functions, whatever they were, were simply ministerial. Those ministerial functions depended upon the validity of the authority under which they acted; and if the validity of that authority should fail them, they may be subject to the consequences of their actions, however well intentioned they may have been in their proceedings, and however free from the malice charged against them. It appears to me, therefore, my Lords, that we are under the necessity, though in many respects I regret it, of holding our hands and staying our judgment as to what may be the ultimate result of the proceedings against Mr Ligertwood and Mr Daniel, and we are compelled therefore to dismiss the appeal; and dismissing the appeal, it is right to dismiss it with costs.

Lord Colonsay—My Lords, the first case is that of Mr Thomson, and it appears to me that the judgment of the Court below in the case of Mr Thomson is well founded. I think it quite clear that in this matter Mr Thomson was acting judicially. I cannot entertain the opinion that there was no depending process, in the sense in which that term is intended to be understood, on the record. The parties were at issue as to whether there should or should not be an interim interdict granted. That issue was raised in this way. The appellant had presented a petition asking for an interdict. The solicitor for the other party, Mr Duncan, had lodged a *caveat*, which was a notice that, in the event of a petition being presented asking for an interdict, he desired to be heard before any such interdict was granted. The petition was presented. Mr Duncan got notice to attend, and he did attend for the purpose of opposing the prayer of the petition.

Now I see it stated in the case of the appellant that Mr Duncan was heard on his *caveat*. I do not know exactly what that expression is intended to convey; but certainly he was not heard upon the question whether the *caveat* was right or not; but only as to whether the prayer of the petition should be granted. There might have been a question raised as to the *caveat* whether it had been duly lodged, and so forth; but the question that was raised was upon the petition; and accordingly Mr Duncan, the solicitor on one side, and Mr Watt on the other, in presence of the Sheriff and the sheriff-clerk who attended the Sheriff, both parties were heard.—Heard upon what? Not upon the right to maintain the *caveat*, but upon the merits of the petition, as far as the application for an interdict went. Surely that was a pending process as much as anything could be in the sense in which you have to consider it here. "Depending process" or "depending action" are phrases used in different senses with reference to different Courts and different proceedings. Mr Wills in his argument said that a process is not a depending process in the Court of Session till after certain steps have been taken in the Court of Session—but I do not so understand it. A summons executed without ever having been brought into Court at all is a depending process, on which diligence may proceed. It is dependent upon circumstances. Now, here when there is a great contention between the parties, each appearing by his procurator, debating the point, and the Sheriff ultimately deciding it, I cannot doubt that it is to be regarded as a depending process. Then in hearing and disposing of the case Mr Thomson was acting judicially, and in writing out a judgment upon the petition according to the proper and regular course. Having heard and disposed of the case, he was entitled to have laid before him the document on which he had pronounced his deliverance. The Clerk of the Court was the custodier of that document. He wished to have the document; but Watt insisted that he should not have it and he says, he withdrew himself with the document in his pocket. That was not a judicial proceeding. The Court was entitled to have the document brought back, the sheriff-clerk was the proper party to have it. Steps were taken to get it back—application was presented for what is called a process-caption, which is the usual mode of enforcing the return of a process—and the words "process-caption" are the very words used in an application to compel the return of a process. The process-caption itself gives authority to apprehend till the process is returned. Now in granting a process-caption I have no doubt the judge acts judicially; and therefore the whole question here is, whether there be ground laid for such malice as would be chargeable against the judge acting judicially? I see nothing stated in the nature of malice here except that which is alleged of the circumstances that occurred, as to his taking offence at Mr Watt's proceedings, which was exactly the thing we had a right to expect. He had offended against the procedure of the Court by carrying off the document against the direction of the Sheriff. I think there is here a want of statement of anything that could take the Sheriff out of the shield which protects him in his judicial capacity, and that there is therefore no ground for maintaining this action as against him.

There may be circumstances in the proceedings which in themselves are unusual, but I do not think they are matters which affect the position of the Sheriff, who was acting judicially. I therefore quite concur in the judgment which has been pronounced by the Court below with reference to the case of Mr Thomson—that judgment finding in terms that this pleading did not lay any ground on which he could be responsible, and therefore dismissed the action.

The case of the Sheriff-Clerk stands, in some respects, in a different position. I cannot hold that the sheriff-clerk is to be regarded as acting judicially. He was acting ministerially—acting, perhaps, under the direction of the Sheriff—but I cannot hold that he was under the protection of the Sheriff's judicial character. But still the question may be raised, whether there are alleged against him any grounds on which this action can be allowed to remain in force? Now, the position of the action is this:—It contains conclusions for reduction and also conclusions for damages. The object of the reduction is to take out of the way the warrant on which subsequent procedure may take place. But in all actions of reduction there is a demand made on the party to produce the document sought to be reduced. That demand ought to be directed against the proper custodier of the document. Now, the sheriff-clerk is the proper custodier of this document. He is called on to produce it. If no grounds are alleged by the

party who calls upon him to produce it, he may resist the production, and the action may be dismissed at that stage. But it is unusual at that stage, especially if the demand for the production of the document is followed up by conclusions of another kind, as in this case. The usual mode of procedure is this, that the custodier produces the document; he satisfies the production. That is merely a preliminary stage of the procedure; and then, after the production is satisfied, the parties have an opportunity of making their full statements of record, and having made those full statements of record, the Court will then judge whether there is such relevancy in the case stated as that they ought to send it to trial. The Court below seem to have been of opinion that it was not clear here that there may not arise such a question; and I do not wish to express any opinion on the allegations raised by Watt. I do not say that I do not entertain some opinion upon them, but I should like to have the statements of the parties more fully developed before I express any opinion. I therefore cannot think that the Court below were wrong in their desire to hear more about this, and to have the statements of the parties more fully developed before they dismissed the action. The allegation of want of notice is, perhaps, the most important of the allegations, and it seems to be coupled (not very clearly, but a further record may make it more clear) with an allegation of general practice and other circumstances which may go to make it more important perhaps than it appears at first sight to be. But if we were to deal with the case now, by dismissing this action as regards the sheriff-clerk, we should be shutting the door against any action of the kind without having the full light that may, perhaps, be shed upon the matter if a further record is made. I therefore concur in the course recommended, that this appeal also should be dismissed, with costs.

Lord Cairns—My Lords, in the first of these cases, which your Lordships have heard, the question which was presented to your Lordships for consideration, in the first instance, was, whether the petition for an interdict, which was the origin of the whole of this litigation, was really a part of a process depending in Court? My Lords, upon that point I entertain no doubt. The petition was an application to a judicial officer for the exercise of his judicial power. The party against whom that power was to be exercised had notice of the intention to present the petition. He in his turn presented a caveat praying to be heard, should the petition be offered to the Court. And so far as the petition and the statement upon it were concerned, the parties had actually joined issue upon the record, and had been heard upon these statements. The result, therefore, was this, that on the one hand the petitioner, whose petition had been dismissed, had a right of appeal from the order that had been made upon his petition, and on the other hand, the party against whom the petition was directed had the right of having it placed upon record that with regard to the statements in that petition he had been held to be right and the petitioner wrong. And it appears to me that the Court itself also had, as a matter of duty, the obligation of taking care that a judicial order of that kind, passing upon a petition of this sort, should in some way or other be recorded in the Court, and that the petition should therefore be detained in Court for that purpose.

My Lords, I do not stop to advert to what was said, that the petitioner himself wished to withdraw his petition. I think the time was too late to make any application of that kind. When the petition had been heard, and the order passed upon it, it was out of the power of the petitioner to withdraw his petition. I therefore think your Lordships will have no doubt or hesitation in holding that this was the case of a process in Court, which had become one of the documents of the Court, and ought to have been treated as such.

Then, if your Lordships take that view of it, let us observe for a moment what was done. The petitioner, as I said, claimed the right to withdraw his petition; he claimed the right, not only to withdraw it as a process, but to carry it away out of Court. That was objected to by the Judge. The Judge said,—I think very properly,—that it was one of the documents of the Court, and ought not to be taken away. Notwithstanding that remonstrance the petitioner, I might almost say forcibly, took the document out of Court, and left the Court with the document.

In that state of things, it appears to me, I might almost say beyond all doubt, that it was a case in which the Judge ought in his judicial capacity to have made some order or other upon the subject. It was a matter that could not possibly be allowed to rest as it then stood. It was the bounden duty of the Judge to take steps; and I think he would have failed in his duty if he had not in some way or other taken steps, by means of the exercise of his judicial power, to have that document, so improperly taken away, brought back to the Court.

Now, let us consider, in the next place, what is the averment with reference to the question of the Judge being actuated by malice in what he appears afterwards to have done. It is said that the order which he made he made maliciously, because he was offended at the conduct of the petitioner in withdrawing the petition. My Lords, I treat these averments as perfectly idle and unmeaning. It is well settled that the mere introduction of the word "maliciously" will not be sufficient, unless you show facts from which you are entitled to conclude that there was malice in the mind of the Judge. And as to saying that in this case the Judge was offended at the misconduct of the petitioner, it is simply saying that grounds existed in the mind of the Judge leading him to make the order which he afterwards made.

But then it is said that in the order which was made there was irregularity, or, as it has been called in the argument, "illegality," a word which I think somewhat confuses the case, and is a word not so good as the word "irregularity." Now we start with this, that it was a case in which it was necessary and proper that a judicial order should be made, and that there is no malice properly averred to have existed in the mind of the judge. We have therefore to consider nothing but the question of irregularity.

Now the two points of irregularity which are relied upon are these. *First*, it is said, supposing this petition to be a process in Court, no receipt had been given when it was taken out of Court. My Lords, no receipt certainly had been given because it was taken away forcibly, and against the protestation of the Judge, and the idea of giving a receipt would have been at variance entirely with what actually occurred in Court. Although I do not think it necessary, for reasons which I will state hereafter, that we should decide

in this case on the question of irregularity as to the non-existence of a receipt, it seems to me that it would be absurd to treat it as a grave question. For my own part, I have no doubt at all in saying that I think the absence of a receipt in no way made the proceeding by process-caption an improper or irregular proceeding.

But then the next alleged irregularity is this. It is said that the petitioner had no notice that a process-caption was going to be applied for and issued against him. Now, on the one hand the argument is this:—it is said that whatever may have been the views of the petitioner as to his rights in withdrawing this process, whatever may have been the impropriety of his conduct in taking it away, if he had had notice served upon him that a process-caption, which is a proceeding that may result in imprisonment, was going to be applied for, he perhaps would have brought the petition back, and have saved himself the irksomeness and disgrace of being put in confinement. On the other hand, it is said that although it is quite proper in ordinary cases when a suitor has rightfully taken a process out of Court, giving a receipt for it promising to bring it back, that he should have notice that a process-caption is going to be applied for to make him bring it back, and to make that possession which originally was rightful a wrongful possession, the same reasons do not apply at all to the case where a man has, as it were, waived the necessity for notice, when he has insisted, not merely upon his right to borrow the document, but his right to carry it away without any consent or permission on the part of the Judge, or his clerk. When he has done this in the face of the Judge, and done it in spite of the protestation and order of the Judge, it is said that that is a case where the person so conducting himself has waived the necessity for notice, and that the case is ripe in point of time for issuing at once a process-caption in order to bring the matter to an issue with the person who has claimed to stand upon that view of his rights. My Lords, I do not think it is necessary that you should decide which of these two arguments is right, because, if your Lordships go along with me in saying that this was a case in which it was proper that the Sheriff should make an order, and in which the order made by him was a judicial act, it seems to me to follow of necessity that, the act of the Sheriff being a judicial act, we cannot hold the Sheriff liable, even if in point of regularity something was omitted to be done in making that order which ought to have been done. It would, of course, put an end to the position of all persons filling a judicial office of this kind if, in place of their orders being merely liable to be set right upon appeal, the judges themselves were to be held answerable for the regularity of their orders, —in other words, for the proper exercise of their judicial powers as regards the regularity of the orders that they might make.

It appears to me, therefore, that the case at the very most is a doubtful case, that there is an argument which might be a very proper argument if an appeal from this order was before your Lordships or before an Appellate Court, but that for the purpose of holding the Judge liable to a proceeding of this kind there is no illegality in what he has done sufficient to enforce that liability. I think, therefore, that the case which has been so often referred to, of *Hamilton* v. *Anderson*, is a perfect precedent for holding that at this stage of this suit the view should be taken that the Sheriff has no interest whatever in this order,—that the production of it, or the non-production of it, is a matter with which he has no concern,—because in no way can this action of reduction and for damages be made available against him for the consequences of the order he has made. I therefore entirely concur with what my noble and learned friend on the woolsack has proposed, that the first of these appeals should be dismissed, with costs.

I have only one word to say upon the second of these appeals. I regret very much that it has been brought here. I think it would have been much better if the two gentlemen who are the appellants in the second appeal had been content to allow the proceedings to go on in the way in which the Court of Session proposed that it should go on against them. I am afraid it must go on against them. It appears to me that their position is this, they clearly are not judicial officers; and if they justify themselves for the act of arresting and putting into confinement Mr Watt, they must do it upon the ground that they acted under a proper and regular order. As long as the order stands it is a perfect justification for what they did, but if the order is quashed, then they will no longer have it to appeal to as their justification. Now this is a proceeding for the purpose of quashing the order and for the purpose of obtaining damages supposing it should be quashed.

Now, I think at this stage, all that your Lordships have to ask yourselves, upon this part of the case, is—Is there a question to be tried? If the allegations are so perfectly idle and absurd that you can say that there is no question whatever to be tried as to the irregularity of this order, then I should not be at all unwilling to say that, even at this stage of the case we might interpose and say that it was an idle thing to reduce an order upon which no proceedings for reduction could really be founded. But, my Lords, I am not prepared to say that there is no case to be tried. I think it better to abstain from expressing any view as to which of the two arguments upon the question of notice (which really is the only question to be tried) is the right one; whether there ought or ought not to be notice in this case. The case must go further; and, therefore, I think it is better to abstain from expressing an opinion, though I have an opinion upon this point. It is sufficient now to say that it appears to me that the question is not altogether so vain and so idle as that we should say that there is nothing whatever to be tried upon that point. My Lords, I am the more led to that by this reason, that if we were to decide now, one way or the other, either that there ought or that there ought not to have been notice before the process-caption was issued, we should be virtually settling the law, not only for this case, but for the practice of Sheriff-Courts in the future. Now, I think that it would be a very inexpedient, and a very improper thing to do that at this stage of the case, without any closed record, and without any power of making any declaration in the order which we should pronounce. We have not now at this stage any power to assoilzie the defenders from the conclusions of the summons. I think therefore, however one may regret that further litigation should ensue, there is sufficient allegation here to prevent our saying that there is not a case to be tried, and that the Court of Session are right in saying that the action must go on against the appellants in the second appeal.

My Lords, I regret, I repeat, that that appeal

has been brought here, but as it has been brought here, I think your Lordships can do nothing with it but dismiss it also, with costs.

Agents for Watt—William Officer, S.S.C., and William M. Hacon, London.

Agents for Sheriff Thomson—Millar, Allardice, & Robson, W.S., and Simson & Wakeford, Westminster.

Agents for Sheriff-Clerks—Tods, Murray, & Jamieson, W.S., and Burchells, Westminster.

COURT OF SESSION.

Thursday, June 9.

SECOND DIVISION.

RULE *v.* BAXTER.

Poors-Roll—Remit. Circumstances in which *held* that application for remit to poors-roll ought to be refused.

The litigation in this case began in 1861 by an action at the instance of Baxter against Rule in the Sheriff-Court of Lanark, for payment of the sum of £175, 3s. 3d., decerned for in a reference between the parties as to the sale and purchase of certain quantities of wood. The Sheriff decided against Rule in 1863. During that year Rule advocated, but failed to proceed, whereupon, on 2d June 1863, Baxter obtained decree of protestation. Thereafter, on 15th May 1865, Rule raised an action of reduction of the adverse award in the reference, and of the judgments in the Sheriff-Court. In this action, after a proof had been led on commission, the Lord Ordinary pronounced judgment, giving effect to certain of the reductive conclusions. No interlocutor was subsequently pronounced except one of wakening on 20th November 1868. In July 1869 a remit was made to the reporters on *probabilis causa*, but no steps therein taken till March 1870, when, on the case coming before the reporters, it was found to be asleep under the remit, and accordingly dismissed. A new certificate having been obtained, the motion for a remit was now renewed, whereupon

BRAND, for Baxter, opposed the remit, on the ground (1) that in the circumstances the applicant ought not to be indulged in further litigation; (2) that the certificate was disconform to the A. S.; and (3) that as the applicant was in receipt of 13s. per week, he was not entitled to the benefit of the poors-roll. The following authorities were referred to on the last point; *Duncan* v. *Morrison*, Jan. 16, 1863; *Inglis* v. *M'Phun*, Feb. 10, 1863; *Williamson* v. *Irvine*, Nov. 21, 1863; and *Sutherland*, Jan. 28, 1864.

SPEIRS in answer.

The Court held that in the whole circumstances they must refuse the application.

Agent for Pursuer—J. Barclay, S.S.C.

Agent for Defender—R. Denholm, S.S.C.

Saturday, June 11.

FIRST DIVISION.

BRODIE *v.* BRODIE.

Husband and Wife—Divorce—Process—Adultery—Recrimination—Sisting. In an action at the instance of the husband decree of divorce on the ground of adultery was pronounced; and against this, judgment the wife reclaimed. Previous to the decree by the Lord Ordinary being pronounced she brought an action on the same ground against her husband; but the Lord Ordinary sisted the process in it *hoc statu* because of the reclaiming note against his interlocutor in the first action, but gave leave to the wife to reclaim against this latter interlocutor. *Held*, the proper course was to have sisted the process furthest advanced, so as to let both actions be considered at the same time.

Observed, it is settled law that recrimination is no bar to divorce; and (*dub.* Lord Ardmillan) decree of divorce might be pronounced against both parties.

On 22d October 1869 the pursuer raised an action of divorce against his wife on the ground of adultery; and on 13th January 1870 she raised an action of divorce against him on the ground of acts of adultery, which she said were committed anterior to those that he alleged she had committed. On 5th February the Lord Ordinary (ORMIDALE) pronounced decree of divorce in the action at the husband's instance. The wife reclaimed, and the note was boxed to the Court on the 26th February. The record in the action at the wife's instance was closed on the 19th February; and when the wife asked a proof of her averments, the husband replied the action was incompetent in respect of the dissolution of the marriage by the decree of the 5th February. On 25th May the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, in respect of the dependence of a reclaiming note against the Lord Ordinary's judgment of divorce in the action at the instance of the defender against the pursuer, sists the present process *hoc statu;* and, on the motion of the pursuer, grants leave to her to reclaim against this interlocutor.

"*Note.*—The Lord Ordinary was moved by the pursuer to allow her a proof in the present case, and to proceed as if the marriage in question had not been already dissolved. The Lord Ordinary did not think that this would be a correct course; but he has, in the meantime, sisted the present process, and the pursuer may again move in it in the event of the judgment in the other case being recalled. The Lord Ordinary has also granted leave to the pursuer to reclaim against the present interlocutor, in order that she may, if so advised, have both cases before the Inner-House at the same time."

Mrs Brodie reclaimed.

SCOTT for her.

FRASER in answer.

At advising—

LORD PRESIDENT—Sisting is a question for the discretion of the Court. Recrimination is not a good defence for a wife to plead in an action against her. That was first expressly decided by the case of *Lockhart* in 1799. But that case also decided that she may raise a counter action. I cannot therefore consent to put the wife out of Court as the Lord Ordinary has done. What I think he should have done was to sist the action that was in advance of the other. And as we have the power, I think we should sist the process in the husband's action, so as to have both suits ripe for decision at the same time, and then we shall have it in our power to grant decrees against