

Counsel for the Second Parties—Cullen, K.C.—Hamilton. Agents—Sharpe & Young, W.S.

Counsel for the Third Parties—The Dean of Faculty (Campbell, K.C.)—Constable. Agent—Donald Smith, S.S.C.

Saturday, November 17.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

RUTHERFORD v. THYNE.

Administration of Justice—Law-Agent—Law-Agents and Notaries Public (Scotland) Act 1891 (54 and 55 Vict. cap. 30), sec. 2—Pretence of being Law-Agent—Relevancy.

Circumstances which were held not to involve a pretence of being a duly qualified law-agent.

The Law-Agents and Notaries Public (Scotland) Act 1891 (54 and 55 Vict. cap. 30), sec. 2, provides—“Any person, being neither a law-agent nor a notary-public, who, either by himself or in conjunction with others, wilfully and falsely pretends to be, or takes or uses any name, title, addition, or description implying that he is duly qualified to act either as a law-agent or as a notary-public, or that he is recognised by law as so qualified, shall be guilty of an offence under this Act. . . .”

Robert Sinclair Rutherford, solicitor, Edinburgh, Secretary and Fiscal of the Society of Procurators of Midlothian, brought a complaint under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, in the Sheriff Court at Edinburgh against David S. Thyne, Agent of the Union Bank of Scotland, Limited, at Murrayfield.

The complaint set forth:—

“That the respondent, being neither a law-agent nor a notary-public, has been guilty of an offence within the meaning of section 2 of the Law-Agents and Notaries Public (Scotland) Act 1891 (54 and 55 Vict. cap. 30), in so far as in or about the month of March 1906, having entered into a contract of copartnership with Forbes T. Wallace, solicitor, Edinburgh, for the purpose of carrying on a law-agent's business within the premises of the said branch bank and elsewhere to the prosecutor unknown, he did (*First*), on or about 12th March 1906, issue to the customers of the said bank dealing at said branch, to other members of the public whose names are to the prosecutor unknown, and in particular to James Smith, 8 Coltbridge Avenue, Edinburgh, and James Crowe, joiner, Murrayfield, Edinburgh, a printed circular in the following terms:—

‘The Union Bank of Scotland, Limited,
Murrayfield Branch,
Edinburgh, 12th March 1906.

‘Dear Sir.—I beg to inform you that Mr Forbes T. Wallace, solicitor, will, on and

after the 12th March 1906, he associated with me in business under the firm name of Thyne & Wallace. Mr Wallace has had upwards of seven years' legal experience in the offices of Messrs Wallace & Shepherd, solicitors, Leven, Fife, and Mr Thomas Henderson, W.S., Edinburgh, and while I shall continue to take entire charge of the bank business, Mr Wallace will attend to all law matters, and will, I am confident, at once commend himself as a man of business and legal adviser. I am, yours faithfully, DAVID S. THYNE.’

(2) That from and after the said 12th March he did affix to the door of said premises two brass plates, placed in juxtaposition, and bearing the following words—

‘THYNE & WALLACE.

‘F. T. WALLACE,

‘Solicitor.

‘Law Office Hours, 9.30 to 5.’

And (3) That he has, during the period subsequent to the 12th March 1906, carried on the business of a law-agent in copartnership or in conjunction with the said Forbes T. Wallace, whereby he, either by himself or in conjunction with the said Forbes T. Wallace, wilfully and falsely pretended to be duly qualified to act as a law-agent contrary to the said section of said Act, and whereby he is liable to a penalty not exceeding £10, together with the costs of prosecution and conviction. . . .”

On 12th October 1906 the Sheriff-Substitute (MILLAR) sustained objections taken to the relevancy of the complaint and dismissed it.

On the application of the complainer a case was stated by the Sheriff-Substitute for appeal to the Second Division of the Court of Session.

After narrating the complaint the Sheriff-Substitute continued—“Objections were taken to the relevancy of the complaint on the 8th day of October 1906, and after hearing counsel thereon, on said 12th October, I delivered judgment, in which I stated that it seemed to me clear that the circular merely intimated to the public that the respondent and Wallace had entered into partnership to carry on two businesses, one that of a bank agent, and the other that of a law agent in Edinburgh, and that the one partner would give his exclusive attention to the one business, and the other partner his attention to the other business. If the partners continued to act as set forth in the circular, in my view there would be no breach of the statute, as the representation was that the respondent would not do any of the law-agent's work. Under the second head of the complaint it was agreed by both counsel that as matter of fact there were two door-plates, one with ‘Thyne & Wallace’ upon it, and the other with the words ‘F. T. Wallace, Solicitor, Law Office Hours 9.30 to 5’ upon it. I held the separation of the two businesses was here continued and that there was here no relevant case. Under the third head of the complaint I asked the counsel for the prosecution whether he was prepared to aver and to prove that the respondent himself did, as a matter of fact, carry on business as a

law-agent, and he said he was not prepared to do so. Accordingly I held that the third head was a mere summing up of the previous heads and did not make the complaint relevant. In the whole circumstances I was of opinion that the whole complaint was not relevant, and therefore dismissed it with £2 of modified expenses. The question of law for the opinion of the Second Division of the Court of Session is—Was the complaint relevant?"

Argued for the appellant—The public would think from the letter of 12th March and from the plates that a law business was to be carried on by Messrs Thyne & Wallace, and that Thyne as a partner of Wallace, a solicitor, had a mandate to act for him, and must be duly qualified. The Sheriff should have allowed a proof as to the effect of the circular on people's minds, for the question of pretence was a question of fact, whether the public gathered from the circular, &c., that Thyne was qualified.

Counsel for the respondent was not called upon to reply.

LORD KYLLACHY—I think that this case proceeds on an entire misconception of the scope of this *quasi*-criminal statute. I agree with the Sheriff. It appears to me that there is nothing set out in what have been called the counts of this complaint which in any reasonable sense involves a pretence by Mr Thyne that he is a duly qualified law-agent. I think that is enough for the decision of the case.

The LORD JUSTICE-CLERK and LORD STORMONTH DARLING concurred.

LORD LOW was absent.

The Court answered the question in the negative and dismissed the appeal.

Counsel for the Complainer (Appellant)—Clyde, K.C.—Morison, K.C.—Dunbar. Agent—Party.

Counsel for the Respondent—Murray. Agents—Beveridge, Sutherland, & Smith, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, November 19.

(Before the Lord Justice-Clerk, Lord Stormonth Darling, and Lord Low.)

BROWN AND ANOTHER v. NEILSON.

Justiciary Cases—Procedure—Irregularity—Fundamental Nullity—Police Court—Appointment by Magistrate of Assessor and Clerk of Court—Appointment not Signed until after Conclusion of Trial—Glasgow Police Acts.

In the absence of the Clerk of Court from a Police Court prosecution in Glasgow, the Magistrate appointed another person to act as Clerk of Court, whose advice he asked during the trial. The

appointment was minuted in the Books of Court, but the minute was not signed until after the conclusion of the trial. *Held*, on suspension, that no Clerk had been appointed at the time the case concluded, and the suspension *sustained* in respect of a fundamental nullity in the proceedings.

James Brown and Robert Bryson, dealers in Glasgow, were on 25th August 1906 convicted in the Western Police Court in Glasgow on a complaint charging them with intent to commit the crime of theft by pocket-picking, contrary to the Glasgow Police Acts, and particularly the Glasgow Police (Further Powers) Act 1892, section 25. They brought a bill of suspension, *inter alia*, on the ground of the alleged irregular constitution of the Court in which the said conviction was obtained.

The Glasgow Police Act 1866, section 67, empowers the Town Council to appoint, *inter alios*, "one or more Assessors to the Magistrate." It further empowers the Town Council by provisional appointments to fill vacancies which occur by death or resignation or removal of such officers. Mr William Gibson was duly appointed Assessor to the Magistrate and Clerk to the Police Courts of the City and Royal Burgh of Glasgow in terms of the section.

The circumstances of the conviction here in question and the contention of the complainers are set forth in the following statement of facts:—“IV. On 24th August 1906 the complainers . . . compared at the Western Police Court of the City and Royal Burgh of Glasgow. . . . At that diet William Forsyth, one of the Magistrates of said royal burgh, presided, and was accompanied by the said William Gibson as Assessor and Clerk of Court, and the Court was duly constituted. On the motion of the accused the diet was adjourned till the 25th day of August 1906 at nine o'clock forenoon. V. At said adjourned diet the complainers appeared before the said William Finlay, the presiding Magistrate, along with David Cook, writer, Glasgow, their agent. There was no Assessor or Clerk of Court present at said adjourned diet, but a Charles Brown, a clerk in the employment of the said William Gibson, sat on the bench along with the said William Finlay, the presiding Magistrate, advised the Magistrate as to the relevancy of the charge, and also on questions of law, ruled with regard to admissibility and rejection of evidence, examined the witnesses in the case, and advised the Magistrate on the merits of the case. The said David Cook at the commencement of the proceedings at said diet took objection to the constitution of the Court in respect that no Assessor was present; that the said Charles Brown had no authority or valid commission to officiate as Assessor to the Magistrate or Clerk to the Court, and was not qualified so to act. He also objected to the relevancy of the complaint. Notwithstanding said objections the said Magistrate proceeded with the trial of the complainers, and allowed himself to be guided and directed by the said Charles Brown as to what he