HAMILTON, ... APPELLANT.
ANDERSON, ... RESPONDENT.

1858.
June 18*th*.

A Sheriff Substitute ordered a passage in certain pleadings drawn by the Appellant (a practitioner in his Court) to be struck out. The Appellant refused. The Sheriff Substitute suspended him for a month. The Appellant's action for damages held by the House (concurring with the Court below) to be unsustainable.

To support an action under such circumstances against a Judge express malice must be alleged; not malice involved in the act, or to be inferred from it.

The dignity of the judicial office is not promoted by a too captious exercise of judicial power. Thus a Judge may well abstain from severity when a practitioner improperly avers in his pleading that an interdict has been granted "without hearing the other side." The Judge may order the pleading to be reformed under the 16th and 17th Vict. c. 80. s. 1; and if his order is not obeyed, the Judge may himself expunge the offensive passage; for he is authorized "to strike out of the record any matter which he may deem irrelevant or unnecessary."

But although the Judge possesses the power of rectifying pleadings by the use of his own pen, he is not in every case bound to do so. And if he orders the practitioner to make the required amendment, and such practitioner refuses to comply, the Judge has an authority essential to the judicial office to punish such disobedience.

Semble, every Court has an inherent power to prevent contempt of its proceedings.

The legal adviser is always responsible for the pleadings.

THE summons prayed that it should be "found and declared" by the Lords of Council and Session that a

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certain Interlocutor of the *Sheriff Substitute* of Ayr(*a*), bearing date 21st November 1855, suspending for a month the Pursuer (a practitioner of the law at Kilmarnock) from his functions of a procurator, was "uncalled for and unwarrantable;" that the Pursuer had "done nothing to justify such suspension;" and that the said Interlocutor was "irregular and illegal." Further, "in case it might be necessary for the Pursuer to get quit of the injurious effects of the said Interlocutor, and to obtain full and ample redress in the premises," the summons prayed that the said Interlocutor should be "reduced and set aside." Finally, there was a conclusion for 2,000*l.* damages.

The facts, shortly, were that on the 31st October 1855 the *Sheriff Substitute*, in a cause before him, had appointed the respective solicitors, of whom Hamilton was one, to attend him for the purpose of "adjusting the record." In the pleadings prepared by Hamilton there occurred a passage asserting that the *Sheriff Substitute* had granted an interdict "*without hearing the other side.*" The *Sheriff*, considering this passage disrespectful, ordered the Defenders to expunge it. Hamilton did not expunge it. He, in fact, expressly "declined to expunge it." On the 21st November 1855, the *Sheriff Substitute*, "in respect the Defenders' procurator (Hamilton) still refuses to obtemper (*b*) the Interlocutor of 31st October, suspends him from exercising his functions as a procurator before the Sheriff Court of Ayrshire for one month." This Interlocutor was the ground of complaint which formed the subject-matter of the litigation.

The following were the pleas in law of the Appellant as presented to the Court below:—

I. The Defender having, without cause, or even the colour or

(*a*) The Respondent. (*b*) Obey.

pretext of any adequate cause, suspended the Pursuer from the exercise of his functions as a procurator, the Pursuer is entitled to decree of declarator, and, if necessary, to reduction, as concluded for.

II. The said Defender's proceedings were null and inept, in respect that they took place in an incompetent proceeding without notice or warning, or an opportunity of explanation or defence being allowed.

III. The pretended ground of the Pursuer's suspension—viz., that of his alleged continued refusal to obtemper an order never pronounced against him (*a*)—being, on the face of the proceedings themselves, altogether unfounded and untrue, the proceeding must be held to have been wholly illegal and unwarrantable, and the Pursuer entitled to damages on account thereof.

IV. The Defender's said illegal and unjustifiable suspension of the Pursuer from his office as a procurator having occasioned severe suffering and injury to the Pursuer and his family, the Defender is bound to make reparation to the Pursuer.

V. The Defender having acted in violation of his duty, and caused severe injury to the Pursuer, is liable in reparation of the injury so occasioned.

VI. The Defender having acted maliciously and without probable cause, and injury having resulted from his said actings to the Pursuer, the Pursuer is entitled to reparation.

VII. Generally, the proceedings being inept, null, and reducible, and being further illegal and unwarrantable, the Pursuer is entitled to prevail in the conclusions of the present action.

The Respondent's pleas in law were these :—

I. There being no case stated by the Pursuer (Appellant) relevant to infer that the Defender (Respondent) acted in the matter complained of extrajudicially, beyond his power or competency as a judge, the action is not maintainable to any effect, and the Defender (Respondent) is not bound to satisfy the production.

II. The Defender (Respondent) having, in the matter complained of, acted regularly in the exercise of his judicial functions in good faith and with probable cause, and the contrary not being relevantly or competently averred, the action is untenable.

III. The Pursuer (Appellant) having taken and exhausted his remedy by appealing to the Sheriff against his sentence of suspension, and having it recalled, the present action is thereby excluded.

IV. Generally, the action as raised against a judicial functionary, in respect of matter occurring in the course of his judicial

(*a*) The order was against "*the Defenders.*"

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functions, and for alleged damage said in consequence to arise, is an incompetent action, and the statements thereof are not relevant to infer the conclusions.

On the 15th March 1856, the *Lord Ordinary* (*a*) found that "the Pursuer having been reponed and reinstated, and the declaratory and reductive conclusions of the action being subordinate and ancillary to the conclusions for damages, the same cannot under the circumstances be separately maintained;" and his Lordship further found "that the Interlocutor for which damages were claimed was a judicial act, not incompetent nor in excess of jurisdiction; and that an action of damages against the Defender (the Sheriff Substitute) for such an Interlocutor pronounced by him as a judge competently and within his jurisdiction, was not maintainable."

To the *Lord Ordinary's* Interlocutor, the Second Division of the Court adhered. Mr. Hamilton consequently appealed to the House.

The *Lord Advocate* (*b*) and the *Solicitor General* (*c*) were heard for the Appellant. They cited (besides the cases commented upon by the *Lord Chancellor*) the following authorities, namely:—*Rex* v. *Davison* (*d*) *Cave* v. *Mountain* (*e*), *Groenvelt* v. *Burwell* (*f*), *Garnett* v. *Ferrand* (*g*), *Dicas* v. *Lord Brougham* (*h*), and *Yates* v. *Lansing* (*i*); and they relied on the 16 & 17 Vict. c. 80. s. 4, which empowers the *Sheriff Substitute* to correct pleading with his own hand. It was his duty, they urged, to exercise this power. The mischief had arisen from his failure to do so. The order, moreover, pronounced by the

(*a*) Lord Ardmillan.
(*b*) Mr. Inglis.
(*c*) Sir Hugh Cairns.
(*d*) 4 Barn. & Ald. 329.
(*e*) 1 Man. & God. 257.
(*f*) 1 Salk. 395.
(*g*) 6 Barn. & Cress. 625.
(*h*) 6 Carr. & P. 249.
(*i*) 5 Joh. 282.

Sheriff requiring the Appellant to expunge the passage which had roused the judicial ire was directed, not against the Appellant, but against his clients, who alone were properly chargeable with a disobedience which the Interlocutors appealed from had erroneously charged against the Appellant.

Sir *Richard Bethell* and Mr. *Roundell Palmer* for the Respondent were not called upon.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

My Lords, this case appears to me so entirely clear from doubt that it is unnecessary to call for any argument on the part of the Respondent's Counsel.

The Appeal is against Interlocutors of the Court of the Second Division affirming the Interlocutor of the *Lord Ordinary*, by which he found "that the Interlocutor or sentence pronounced by the Defender, and for which damages are claimed, was a judicial act, not incompetent nor in excess of jurisdiction; and that an action of damages against the Defender for such an Interlocutor or sentence pronounced by him, as a judge competently and within his jurisdiction, is not maintainable. Therefore dismisses the action and decerns. Finds the Defender entitled to expenses."

The Appellant was a procurator practising in the Court of the *Sheriff Substitute* of Ayrshire, and the Respondent was the Sheriff Substitute; and this action arose out of certain proceedings in the Court of the *Sheriff Substitute*. It appears that certain persons of the name of Gilmour and Anderson were tenants to one Gilchrist; and that an interim interdict having been granted against them, there was an application made for the purpose of discharging that interdict; and a statement was made on their behalf by the

(*a*) Lord Chelmsford.

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Appellant in which there was a passage which was considered objectionable by the *Sheriff Substitute.* The passage was as follows:—

"This was followed by a petition for interdict against the Defenders, which your Lordship granted *before hearing the Defenders.*"

Now it appears that the *Sheriff Substitute* took umbrage at this passage in the Defender's statement; he seems to have considered that it was some imputation upon him that he had proceeded improperly, and in an *ex parte* manner. I certainly cannot help regretting that he should have viewed the statement in that light, but, at the same time, there might have been circumstances connected with these proceedings which might have led him to regard it much more seriously than the words themselves seem to justify. However, acting upon his impression, on the 31st of October 1855 he made an order for the Defenders to expunge this statement, which he describes as being "to the effect that a petition for interdict, at the Pursuer's instance against the Defenders, was granted before hearing them." It appears by a note which is appended to that Interlocutor, that there had not been any application made to the procurator to expunge this, which was considered to be an objectionable statement; because in that note it is said, "The procurator who signs the paper refuses to expunge the statement voluntarily, and the *Sheriff Substitute* has no alternative but to pronounce the above Interlocutor. He does so with extreme pain and reluctance." And it appears also by that note that the Interlocutor was pronounced because the *Sheriff Substitute* "felt that the statement was not only untrue in itself, but, from the tone of the Defenders at the discussion to-day, it was obviously intended as disrespectful to the Court."

Now it has been insisted, on the part of the Appellant, that the statement was in fact the statement of the Defenders (*a*), and that the Interlocutor was directed against *them;* that the procurator had nothing whatever to do with that statement, and therefore that any proceeding against him upon the refusal of the Defenders to expunge that statement, was wholly unwarranted. But there can be no doubt that the proceedings are, in fact, prepared by the procurator; he is an officer of the Court; he is answerable to the Court for the propriety of those proceedings; and it is obvious, from what took place on this occasion, that the procurator himself was satisfied that he was the person who was responsible, and that, in fact, the statement was his own act, because, although in the note itself it is said that "the tone of the Defenders at the discussion to-day was obviously intended as disrespectful to the Court," yet your Lordships must give a sensible meaning to the expressions which are used; and your Lordships must be perfectly aware that the person who would attend on behalf of the Defenders before the Court would be the procurator,—it would be he who would justify the statement in the proceedings; and therefore, if there were any disrespectful tone assumed to the Court, it would be he who would assume it, and not the Defenders. And it is quite clear that he, knowing the contents of this note which was appended to the Interlocutor, assumes, in the minute to which I am about to refer your Lordships, not that the Defenders themselves were the persons who would be answerable for anything objectionable, but that he himself was answerable, not only for the particulars of the statement, but for anything to which the *Sheriff Substitute* might object

(*a*) The Appellant's clients before the Sheriff Substitute.

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in the proceedings which had taken place in Court; because he proposes, in answer to this Interlocutor and the note which was appended to it, to present a minute to the Court in these terms:—"The Defenders respectfully decline to expunge the passage referred to in the foregoing Interlocutor, for the following reasons,—first, because they consider the statement to be relevant to their defence; second, because it is a true statement; and, third, because it is not in any degree disrespectful to the Court. The Defenders' Procurator takes this opportunity to disclaim any intention of offering disrespect to the Court in the passage complained of, and he submits that it does not bear such a construction."

Now it has been suggested, on the part of the Appellant, that this minute contains two heads of answer, one referring to the Defenders, and the other to the procurator himself. But, my Lords, the minute was necessarily framed, first of all, upon the Interlocutor of the *Sheriff Substitute*, which is directed to the Defenders themselves as persons who are to reform the statement which had been made, and therefore he would in this minute necessarily introduce the name of the Defenders. But that the procurator himself considered that he was the person who was responsible, and that the statement was his own, appears clearly from the terms of the minute: "The Defenders' procurator takes this opportunity to disclaim any intention of offering disrespect to the Court in the passage complained of." Now, if the passage complained of, as has been alleged by the Appellant, must be considered to be the Defenders' statement and not the statement of the procurator, why should he assume to himself the authorship of that passage? And then he argues upon it, "And he submits that it does not bear such a construction. It is now within

a few months of forty years since he became a licensed procurator, and during that long period the present is the first time that any statement made by him in judicial procedure has been called untrue or disrespectful to the Judge. He cannot but feel sore at the charge imputed to him. He is anxious to believe that the Court has misapprehended the meaning of the statement of fact in question, and if so, he is hopeful that the Court will consider it proper to strike out the words in the note appended to the Interlocutor 'that the statement is untrue in itself,' which the procurator submits would only be an act of justice to him." Why "an act of justice" to him, if the statement is considered to be the statement of the Defenders, and not the statement of the Procurator?

Now, my Lords, I must express my very deep regret at the conduct of both parties in this matter. In the first place, I think it is to be regretted that the *Sheriff Substitute* took the view which he did of this statement, or, that taking that view, he did not act in a different manner. I think it would have been infinitely better if he had exercised the authority which was given to him, I think by the Act of the 16th and 17th of the Queen (*a*), by which the Sheriff, before the record is adjusted and closed is "to strike out of the record any matter which he may deem to be either irrelevant or unnecessary." I think it would have been a more dignified course of proceeding if he had adopted the mode that is pointed out by the Act of Parliament, and exercised the authority which is there given to him. But he was not bound to do so. He had his reasons, of course, for believing that the statement was intended as a deliberate insult to him; and under the circumstances he thought he was bound to

(*a*) Chap. 80, section 4.

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protect himself by requiring the procurator voluntarily to expunge that passage from the statement.

It is very much to be regretted that the procurator did not comply, because the statement, although perhaps it might not be irrelevant, was wholly unnecessary. There was not the least occasion that this should remain a portion of the narrative of the transactions which had taken place. Therefore a little yielding on both sides upon this occasion would have prevented a very disagreeable contest, and one which I cannot help feeling might easily have been obviated by a little forbearance on the one side and upon the other. But, however, the question here is not whether the *Sheriff Substitute* was justified in point of propriety or good feeling, or good taste, in adopting the course which he has done, but whether he had authority to do the act, and whether it is possible for the Appellant to contend successfully that under the circumstances he can maintain an action against him.

Now, the procurator having refused to expunge the statement, on the 7th of November 1855 the *Sheriff*, upon a motion for leave to lodge a minute in reference to the immediately preceding Interlocutor, (that is, the Interlocutor requiring the statement to be expunged,) "and also the process for interdict alluded to therein, refuses the motion as incompetent, the Defenders having failed to obtemper the said Interlocutor." Therefore, on the 7th of November 1855, the Defenders and the Appellant, who was acting for them, were aware that the *Sheriff Substitute* insisted upon obedience to the Interlocutor. Then there was ample time for them to obey, but they refused to do so. I think here there is some forbearance on the part of the *Sheriff Substitute*, because he does not act from the 7th of November

1855 until the 21st of November. On the 21st of November, there having been a refusal to obey an Interlocutor which it was competent for the *Sheriff Substitute* to pronounce, he then says, "In respect the Defenders' procurator still refuses to obtemper the Interlocutor of Court of 31st October, suspends him from exercising his functions as a procurator before the Sheriff Court of Ayr for one month from this date. And in order that the Pursuer may not be obstructed in issuing his cause, ordains the Clerk of Court instanter to withdraw from process the defences and relative productions."

My Lords, the question here is whether it was competent to the Respondent, under the circumstances which have been brought to your Lordships' attention to issue this Interlocutor temporarily suspending the Appellant from his functions. Now it is clear that every Court must possess inherently in itself a power to prevent any contempt of its proceedings, and undoubtedly in general it must exercise a controlling and censorial power and authority over the officers practising in the Court. It is clear that this particular Interlocutor was within the competency of the *Sheriff Substitute*. He had authority given to him, not only by the Act of Parliament to which I have referred your Lordships, but also I should say at common law, to reform and to amend the pleadings and to correct any irrelevancy in them. Now, who is the person who is always considered in all Courts responsible for the pleadings? Why, the legal adviser. I remember, my Lords, having seen a case (*a*), which I think is reported in Cowper's Reports, where Lord

(*a*) *Price* v. *Fletcher*, Cowp. 727. The declaration had set out the whole lease verbatim. Lord Mansfield said :—"The next instance of the kind that came before the Court, he would inquire who drew the declaration."

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Mansfield, animadverting very strongly upon the prolixity of pleadings at that day, it having been the habit in actions for breach of covenant to set out upon the record the whole of the deed in which the covenant was contained, intimated that if anything of that kind came before him in future he would inquire who was the counsel who had prepared the pleadings. And so it must always be taken, that in all legal proceedings before the Court, the officer of the Court, the legal agent, the person who is entrusted with the preparation of those pleadings, is answerable for any irrelevancy or impertinency that may appear in them.

Then, my Lords, it being competent to the *Sheriff Substitute* to pronounce an Interlocutor which would have to be obeyed by the person who has prepared the proceedings, is it possible to say that in the absence of express malice on the part of the *Sheriff Substitute*, he can be responsible in an action for damages for punishing a person who has refused obedience to his lawful Interlocutor?

There is no allegation here of any express malice on the part of the *Sheriff Substitute*. The averment is merely that he did the act maliciously (*a*), and without reasonable and probable cause. But I apprehend, even supposing the *Sheriff Substitute* could have been made responsible under any circumstances for this judicial act which was within his competency, that at all events express malice, not malice involved in the act or to be inferred from it, but express malice, would be necessary in order to found an action of this description against him.

It is unnecessary for me here to consider whether if malice had been expressly alleged, still if the act itself was within the judicial competency of the

(*a*) See the Appellant's 6th plea, *suprà*, p. 365.

Judge, an action could have been founded against him. It is, perhaps, better upon the present occasion to confine ourselves strictly to the consideration of the case which is immediately before us.

Several cases have been cited on the part of the Appellant, none of which appear to me to have any application to the particular case before your Lordships. I allude to the cases of *Hagart's Trustees* v. *The Lord President* (*a*), *Robertson* v. *Barclay* (*b*), and *Gibb* v. *Scott* (*c*), and *Oliphant* v. *McNeill* (*d*). None of those cases were cases in which there had been judicial acts which had produced injury and damage to the party complaining. They were all of them cases in which defamatory words were spoken in the course of particular proceedings.

Within what limits Judges may be protected in expressions which are used by them in the course of delivering their opinions from the judgment seat, it is unnecessary for me here to consider. Those are cases which have no application to the present, which is a case not of any defamatory expressions, but of a judicial act within the competency of the Judge who has performed it, unaccompanied by any proof or any allegation of any express malice on his part; and, therefore, my Lords, it appears to me that it would be contrary to all principle, as well as contrary to all authority, to say that under circumstances like these a Judge could be made responsible in an action for damages to the party who has suffered in consequence of that judicial act.

There seems to have been no doubt entertained at all by the learned Judges in the Court below

(*a*) 2 Shaw's App. Ca. 125.
(*b*) 4 Wil. & Sh. 102.
(*c*) Lord Elchie's Dec. *voce* Public Officer, No. 9.
(*d*) 5 Bro. Supp. 573.

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as to this action not being maintainable. They one and all expressed a clear and decided opinion, in the first place, that this act was competent and within the jurisdiction of the *Sheriff Substitute*, and in the second place that the mere allegation generally of malice was not sufficient to found an action of this description.

I apprehend that this case is so perfectly clear, that it is highly important that your Lordships should express in the most clear and unequivocal manner the opinion which you entertain upon it, in order to prevent appeals of this description being brought to your Lordships' House, and to discourage persons from coming here with cases which really have no foundation either in principle or in authority. Under these circumstances, I feel bound to recommend to your Lordships, that this Interlocutor should be affirmed, and affirmed with costs.

Lord Brougham's opinion.

Lord BROUGHAM:

The *Sheriff Substitute* makes an order which he had an undoubted jurisdiction to make; an order which I take it to be clear, from the practice of the Court below, and the manner in which all the learned Judges dealt with that part of the case, he competently and regularly made upon the Defenders and their procurator, Mr. Hamilton, who were bound to obey that order. Your Lordships will find that the Judges, who well knew the practice both of the Sheriff's Court and their own, had no doubt whatever that a regular order was made, which the procurator, Mr. Hamilton, was bound to obey. He had a course of proceeding open to him if he chose to object to the order. He might have appealed from the *Sheriff Substitute* to his principal, the *Sheriff Depute*, and that would have brought the whole matter

before him upon that first stage of the proceeding. He might have contended (though I think he could hardly have done so under the circumstances), that the order was beyond the competency of the *Sheriff Substitute*. But he did not appeal; he refused to obey. Then comes the next stage of the proceedings. The Court, upon this refusal to obey, after a certain delay, which my noble and learned friend has well adverted to, pronounced his suspension for a month.

Now, as I have no doubt whatever that both the orders were within the jurisdiction of the *Sheriff Substitute*, that he had a right to make the order for expunging the allegation, and that, upon that order being disobeyed, he had a right to censure, and, if he chose to go beyond censure, as he appears to have thought it his duty to do in this case, to suspend for a month (that being also within his jurisdiction), it is perfectly clear to my mind, that in the circumstances of this case, an action against this Judge, the *Sheriff Substitute*, for an act which he did judicially and in a matter within his jurisdiction, does not lie. My Lords, it is unnecessary to give any opinion as to the conduct of the *Sheriff Substitute* in this case, because the question simply here is, Does the action lie or not? I might, perhaps, have agreed with my noble and learned friend in rather regretting that the *Sheriff Substitute* took the view of the allegation which he did; but nevertheless I have nothing to do with that. And I might, perhaps, also regret that he went so far as to suspend this gentleman, who had been, as it is stated, a practitioner in the Court for forty years without blame. It is possible that if I myself had been sitting in the position of the *Sheriff Substitute*, I might not have taken the same view. But that is perfectly immaterial to the question now before us. The question is, Had he a right to make that order,

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and was it a judicial proceeding? If so, if he had a right to make the order, and it was a judicial proceeding, the action does not lie.

My Lords, I cannot close the few observations which I have thought it right to add to those of my noble and learned friend in this case, without adverting to the full and elaborate, and, in my opinion, generally speaking a well-grounded judgment pronounced by the late *Lord Justice Clerk* (*a*), and in so doing I cannot, upon this first occasion of referring to the lamented event which has happened within the last three or four days, help expressing my deep sorrow for the great loss which the profession and the bench have sustained in losing that most able and learned, and most industrious and most conscientious Judge.

Lord Cranworth's opinion.

Lord CRANWORTH:

My Lords, this case raises what would be a most important question if it were involved in any sort of doubt. It is, so far as I am aware, a case of first impression. It is the case of an action by a practitioner in what I must call the Superior Courts against a Judge, not for something done extrajudicially, but because, according to the opinion of that practitioner the Judge had made an order which he thinks was not a correct order. Now, if your Lordships were for a moment to tolerate the notion that such actions could be maintained, there could hardly be a case in which such an action might not be brought upon similar grounds, and I need hardly say that the merely adding that it was done maliciously amounts to nothing at all. That would, in the opinion of the aggrieved party, be always true, or at all events it would be what he would be perfectly able to state.

(*a*) The Right Hon. John Hope.

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My Lords, I have said that this Court (the Sheriff's Court) must be considered as one of the Superior Courts. What is meant exactly by "the Superior Courts," as the expression is applied in different countries, it is difficult to define; but I take it thus from the judgment of the very learned Judge, whose loss we all deeply deplore, the late *Lord Justice Clerk*, who gives this description of the Sheriff Courts:— "Their position is quite different" (he says) "from that of justices of the peace," alluding to a case of different circumstances, where an action had been brought against a justice of the peace, not for something that he had done, but for something that he had said extrajudicially in the opinion or judgment he had pronounced. "They" (that is, these Courts) "are not only, to use an English phrase, Courts of Record" (with great deference, I think that is a mistake; the term "Court of Record" has a definite meaning), "but Courts of very high authority Their jurisdiction in many branches of the law, and especially in regard to the ordinary transactions between man and man, is co-extensive with that of the Supreme Court. Their proceedings are conducted by regular pleadings in as formal a manner, their procedure is regulated by statute, and by the rules prescribed by the Supreme Court. Their Judges are permanent, not acting voluntarily on particular occasions, as suits their own convenience, or according to the taste they have for particular cases. Their functions are not limited, as that of the justices, to a particular class of cases; their jurisdiction is not summary, like that of the justices." Therefore, as the *Lord Justice Clerk* points out, the Sheriffs are Judges presiding in Courts of the very highest importance in that part of the United Kingdom.

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Then that being so, it appears that a case came before the Court in which the Judge of the Court thought—I do not go into the question whether he thought rightly or not—but he thought that a certain portion of the pleadings was not only, as we should say in the Court of Chancery, impertinent, but scandalous; that would be the true interpretation of what he meant to say, and he directed that it should be expunged. Now, if that was wrong, the remedy of the party was obvious,—to appeal against that direction. The parties do not appeal against that, but simply set themselves in defiance of the Judge, and say, We will not expunge it, you have ordered something which you ought not to have ordered, and we tell you that we do not mean to obey. And a long written minute is proposed, showing why it is that the Defenders said that they should not obey that order. In that minute, as was pointed out by my noble and learned friend on the woolsack, the professional person takes in truth the whole blame of that which had incurred the displeasure of the Judge upon himself, and I dare say very properly. He knew that he was the person who had prepared the pleadings, and he attempts to justify them, and says that he hopes that the order will not be persisted in, because he considers that it will be personally offensive and injurious to him. The Judge, however, takes a different view of the case, and refuses to admit any such minute, and says, You must obey the order.

Now that he was acting rightly, I think there is the high authority of the Court of Session for saying; because the *Lord Justice Clerk* says this, "I can view it" (he says) "in no other light than deliberate contempt of Court,"—he thinks that the *Sheriff* was perfectly right,—"and I cannot reconcile the procu-

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rator's conduct with any other state of feeling than the desire to bring the matter to this issue. I am to triumph in my refusal, or the *Sheriff* must take up the matter as contempt." If that was a correct view of the case, then the *Sheriff*, even if this first order was wrong, had no other course to pursue. He could not with propriety, in the due discharge of his judicial duties, leave an order on record, as I may call it, directing something to be done, and have that met by a direct refusal on the part of the person who had to obey it, saying, "We will not appeal against your order, but we tell you that we do not mean to obey it." It was impossible for him, with a due regard to his position as the Judge of one of those Superior Courts, to pass that over.

Interlocutors affirmed, and the Appeal dismissed with Costs.

GRAHAM, WEEMS, AND GRAHAM—RICHARDSON, LOCH, AND MCLAURIN.