MAY 24, 1870.

JOHN WATT, Junior, Advocate, Aberdeen, *Appellant*, *v.* JOHN COMRIE THOMSON, Esq., Sheriff substitute of Aberdeenshire, *Respondent*.

JOHN LIGERTWOOD, Sheriff Clerk of Aberdeenshire, and Others, *Appellants*, *v.* JOHN WATT, Junior, *Respondent*.

Judge—Privilege—Wrongous Imprisonment—Reduction of Caption—Sheriff—Sheriff Clerk—Malice—Preliminary Defence—*W., a procurator, presented a client's petition to the Sheriff for interdict, and a caveat having been entered, the opposing procurator attended with W. before the Sheriff, who decided not to grant the interdict. W. thereon took up the petition, which had not been marked by L., the Sheriff Clerk, and though asked by the Sheriff to leave it, carried it away. Thereafter the Sheriff directed a process caption to be issued against W., and L. caused it to be executed, of all which W. had no notice, and W. was imprisoned, but released next day, W. thereupon raised an action against the Sheriff and L., to reduce the caption and for damages.*—HELD (affirming judgment), 1. *That there was a depending process before the Sheriff;* 2. *That the Sheriff having jurisdiction, and having acted judicially, was entitled to have the action dismissed as against him without satisfying production;* 3. *That in the action against L., the defender was bound to satisfy production, and thereafter that the cause should proceed against him.*[1]

These were appeals from judgments of the Second Division. 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, or process caption, which they had issued and executed against him, and claiming £3000 as damages and *solatium*. It appeared from the condescendence, that Mr. Watt, in his profession of advocate and procurator, had 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, decided, that 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 substitute at the time 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. 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. The defenders severed in their defences. Sheriff Thomson set up as his defence, 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 petition, to prevent the judgment from being written out and signed. The other defenders, Mr. Ligertwood and Mr. Daniel, also 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 *J. S. Will*, for Mr. Watt.—1. The interlocutor in the case against

[1] See previous report 6 Macph. 1112: 40 Sc. Jur. 648. S. C. 8 Macph. H. L. 77; 42 Sc. Jur. 470.

the Sheriff substitute was wrong. The act of the Sheriff was without colour of jurisdiction. He knew that the petition had never been lodged with the Sheriff Clerk, and that it had never been borrowed. He also knew, that no notice had been given to the appellant, that a complaint craving the issue of a caption had been or would be presented. As malice is alleged, the issuing of the caption was a good cause of action. The act done was not a judicial act, because there was no process depending before the Sheriff. As there had been no borrowing receipt, there could not be, according to the practice of the Court, any caption properly issued. The Court below ought, therefore, not to have dismissed the action against the Sheriff at the present stage, but ought to have ordered him to satisfy production, and then, on the record being closed, to have dismissed the action as regards the conclusion for damage. But whether an action for damages is competent or not, the action of reduction was well founded. The practice of the Court, as shewn by the Act of Sederunt, proceeds on the assumption, that a caption can only be issued in a depending process and on a borrowing receipt—M'Glashan's Pract. 330; Bell's Dict., *voce* Caption Process; *Hunter* v. *Kerr*, 4 D. 1175. And here there had been no receipt. The Sheriff, moreover, acted not on the application of the opposite party, but on that of the Sheriff substitute, or his own mere motion. This of itself is strong evidence of malice, and that the Sheriff was not acting judicially. He is not exempt from liability in cases where he does not act as a Judge—Ersk. ii. 2, 32; Bankt. ii. 2, 480; *Stewart* v. *Sinclair*, 4 Br. Sup. 195; *Black* v. *M'Gill*, 4 Br. Sup. 653; 5 Br. Sup. 36: *Anderson* v. *Ormiston*, M. 13,949; *Mackay* v. *Sutherland*, 5 Br. Sup. 513. The protection of Judges for acts done in the course of their office is confined to Superior Courts—*Haggart's Trustees* v. *Hope*, 2 Sh. App. 125; *Hamilton* v. *Hope*, 5 S. 569. It is true that *Hamilton* v. *Anderson*, 18 D. 1003; *ante*, p. 800; 3 Macq. App. 363; extended the doctrine to Sheriffs, but in that case the act was one clearly within the jurisdiction of the Sheriff. Here the Sheriff has stepped out of his province, and is no more entitled to protection than any other person who does a malicious act without any cause. 2. As to the appeal of *Ligertwood* v. *Watt*, the interlocutor was right. The appellants were not judicial officers, but were acting ministerially, and are entitled to no privilege. They can be in no better position, and are not in so good a position as Justices of the Peace, and in actions against them it is not necessary to allege malice if they have granted an illegal warrant under which the pursuer has been imprisoned—*Milhollan* v. *Bertram*, 5 S. 170; *Strachan* v. *Stoddart*, 7 S. 4; *Landell* v. *Bell*, 3 D. 819. The cases already cited in the other appeal apply only to Judges, but not to officers of the Court. There being here an allegation of malice, and the process of caption being incompetent in the circumstances, the action could not be properly dismissed at this stage.

Sir R. Palmer Q.C., for the respondent (Sheriff Thomson).—The interlocutor, so far as relates to the Sheriff, was right. It is a well settled rule of law, both in Scotland and England, that a Judge, whether of a superior or inferior court, is not liable for acts done in his judicial capacity —*Haggart* v. *Hope*, 2 Sh. App. 125; *Garnett* v. *Ferrand*, 6 B. & C. 625; *Hamilton* v. *Anderson*, 3 Macq. App. 363; *Mackintosh* v. *Arkley*, *ante*, p. 1592; 39 Sc. Jur. 114. It is said, that there was no depending process in the present case, and that therefore the Sheriff had no jurisdiction. But where both the litigants appear before a Judge, in a matter over which he has jurisdiction, and the Judge decides the point submitted to him, it cannot be said that that is not a depending process. It was wholly immaterial, whether the petition had up to that point been actually marked or not by the clerk of the Court.

[LORD CHANCELLOR.—You need not trouble yourself as to this being a depending process, as we are all satisfied that it was.]

Then, on the appellant's own statement, he was guilty of a contempt of Court. The Sheriff was bound to take cognizance of such contempt, and to issue a process caption as he had done, it being the proper mode of recovering the document—2 Shaw's Digest, Process Caption, p. 992; 3 *Ibid.* p. 354; 4 *Ibid.* 389. Whether the caption was rightly or wrongly granted is immaterial, for, as it was admittedly a judicial act, the Sheriff was not liable for the consequences. It is therefore quite irrelevant to allege malice in an action against a Judge for acting judicially. The Court was right in dismissing the action against the Sheriff at this stage.

The Lord Advocate (Young), and *J. T. Anderson*, for the appellants (the Sheriff Clerks).—The interlocutor of the Court as to the Sheriff Clerks was wrong, and the Court ought to have dismissed the action against them as irrelevant. There is no sound distinction between the case of the Sheriff and that of the Sheriff Clerks, and both are equally entitled to protection. There is in the condescendence no other averment of malice against the Sheriff Clerks than that they caused the process caption to be served. They acted in the course of their official duty, whether that duty was ministerial, or partly ministerial and partly judicial; and it was part of their duty to have the document in their own custody for the purpose of marking it—*Thomson* v. *Mags. of Montrose*, 3 S. 600. In what the Sheriff Clerks did they only fulfilled the instructions of the Judge, and there being no averment against them of malice, the action should have been dismissed as against them. Moreover, Mr. Ligertwood, one of the appellants, not having taken any part in the matter, the action against him should have been dismissed.

LORD CHANCELLOR HATHERLEY:—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 process caption, whereby he was arrested and imprisoned in consequence of such proceeding, has sought to reduce the order that was made in 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 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. Mouat 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. And then he says, that finding this to be the case, he attended on the 17th of 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 mean time to see any such petition in order that he might resist any order being thereon made. 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 so 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, viz. 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 not what is called "withdraw" the petition. I take it, that it was not competent to him so to withdraw it; at all events so 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 a 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 a right to withdraw the petition at pleasure." Then he tells 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 useful 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 the proper custodian, 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 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 some two or three which immediately follow, because a new case is alleged in what immediately follows, namely, in the 4th 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 aforesaid, 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 aforesaid, 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 of 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 connexion with this. The fifth condescendence says—"The said complaint was so handed to the said John Comrie Thomson, within a few minutes after 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 to be given to the pursuer of any 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, jun., and commit him prisoner to the gaol of Aberdeen, therein to be detained till the return of the above process, or till he be otherwise liberated in due course of law.'"

Now really these 4th and 5th 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 authorize 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, it is not sufficient to have simply malice charged without any averment or description whatever to shew 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 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 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. The 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 than what 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 a part of one and the same judicial transaction. The Court had not risen, 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 condescendence, 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 custodian, 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 out, and that without such an intimation having been given a process caption should not be taken out. 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. Will, 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 after the person 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, viz. 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, 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, 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 condescendence 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 proceedings 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 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. 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 circumstances, they may (it is unnecessary to say more than that they may) be made liable in damages.

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 proceedings 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 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 acts, however well intended they may have been in their proceedings, and however free from the malice charged against them. It appears to me, therefore, 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 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 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 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 proceedings. Mr. Will 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 for 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 away 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 is a 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 the 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 proceeding is this, that the custodier produces the document; he satisfies 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 opinions on the allegations made 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 more 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. 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.

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 the 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. 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 shew 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 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 that 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. 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 view 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 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 should 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. 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 it 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 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 be able to appeal to it 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 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. 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 that that appeal has been brought here, but as it has been brought here I think your Lordships can do nothing in it but dismiss it also with costs.

Watt, junior, v. *Thomson, et al.—Interlocutor appealed from, so far as complained of, affirmed, and appeal dismissed with costs.*

Ligertwood and Another v. *Watt, junior —Interlocutor appealed from, so far as complained of, affirmed, and appeal dismissed with costs.*

Appellant's (*Watt's*) *Agents*, A. K. Morrison, S.S.C.; W. M. Hacon, Fenchurch Street, London.—*Respondent's* (*Thomson's*) *Agents*, Millar, Allardyce, and Robson, W.S.; Simson and Wakeford, Westminster.—*Appellant's* (*Ligertwood's*) *Agents*, Tods, Murray, and Jamieson, W.S.; Burchells, Westminster.

JUNE 20, 1870.

HANS GEORGE LESLIE, Esq. of Dunlugas, *Appellant*, *v.* GORDON M'LEOD, Esq. of Lochbay, *Respondent.*

Et è contra.

Obligation—Marriage Contract — Provision for younger children—Liability of heir male—*L., the proprietor of an estate, by marriage contract bound himself to convey the estate to himself in liferent, and the heir male of the marriage in fee, also to secure to the younger children of the marriage a sum of* £16,000. *At L.'s death there was no free executry to pay the* £16,000, *and the estate was worth only* £28,000.

HELD (affirming judgment), *That the heir male was bound, as representing L., to pay the* £16,000 *in full to the younger children.*