their deputes, act 84. Parl. 6. James VI.; albeit the former may have as great influence upon the latter, as a sheriff-clerk *qua* judge can have upon his clerk-depute. And there appears no greater danger to the lieges from the sheriff-clerk's judging as depute-sheriff, than from the sheriff-depute himself; yea, a greater presumption of partiality lies against the sheriff-depute, especially in decreets condemnatory, where he gets sentence-money; since the sheriff-clerk's dues are the same, whether the sentence condemn or assoilzie. No 371.

*Duplied* for the suspender, There being necessity for an act of Parliament to allow deputes to judge in the case of their constituents, it seems yet unlawful for a sheriff-clerk and his depute to officiate as a judge and clerk *in eodem judicio*. Yea, a depute's judging his constituent's cause is not so dangerous; seeing the clerk of court, who is altogether independent both of the sheriff and his depute, is a check to him; whereas here, Mr James Leslie had no check upon him, but what he might remove him at the next turn in case of a disobligation.

The Lords repelled the nullity objected against the decreet.

*Forbes, p.* 486.

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1752. *December* 14. Magistrates of Stirling *against* Sheriff-Depute.

No 372.

The Sheriff has no power of judging as to the erecting of buildings or encroachments on streets within burgh, this belonging alone to the Dean of Guild and Council.

*Fol. Dic. v.* 3. *p.* 360. *Fac. Col.*

*** This case is No 302. p. 7584.

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1772. *February* 22.

James Cathcart of Carbieston *against* James Rocheid of Inverleith.

No 373.
The Sheriff of the county where the lands are situated, is the only judge competent to a brief of division among heirs-portioners. Advocation from him, when *in cursu* of obtempering a brief at one party's instance, for

Mr Rocheid standing in the right of three-fourths of the lands of Inverleith, in the county of Edinburgh, and of Darnchester in the county of Berwick; which two estates, under a deed of entail executed by Sir James Rocheid, proprietor thereof, had devolved upon four heirs-portioners, and hitherto had been held *pro indiviso* by them, or those deriving right from them; in April 1771 took out a brief of division from the chancery, which was directed to the sheriff of Edinburgh, within whose jurisdiction the lands of Inverlieth are situated; and, after being published in common form, was, by virtue of letters of supplement, executed against James Cathcart, as the proper party to the division, being in the right of the remaining fourth, both of Inverleith and Darnchester.

No 373.
dividing so much of the common estate as lay within his territory, to the macers of the Court of Session, as sheriffs specially constituted for dividing the *universitas*, partly situated in another county, in virtue of brieves to that effect, issued upon the application of the other party interested in that division, refused.

Mr Cathcart, on the ground that this step tended only towards a partial division, whereas it would be more beneficial to the parties to have a total division expedited at once, which could not be attained upon Mr Rocheid's brief directed to the Sheriff of Edinburgh, did apply, by a bill, to the Court of Session, and obtained warrant for issuing brieves to the macers, as sheriffs specially constituded for dividing both parcels of land; and the brieves were accordingly issued.

Mr Cathcart, thereafter, compeared for his interest, in the process before the Sheriff of Edinburgh upon Mr Rocheid's brief, and opposed any further proceeding therein, in respect of the other brief of division at his instance, then pending before the macers, as sheriffs specially constituted by the Court of Session for the purpose and effect of one general division. But the Sheriff having over-ruled his plea, and proceeded to make a preparatory order respecting the division of Inverleith, Mr Cathcart complained, by a bill of advocation, craving to have this brief advocated to the macers.

*Pleaded* in support of the advocation, The powers of all the ancient Supreme Courts of civil jurisdiction came to be vested in the Court of Council and Session, as presently constituted; and this Court, after the example of the Courts they succeeded, continued to superintend, in a more eminent degree, the inferior judicatures of the kingdom, and to order and direct in all matters which they judge expedient for the administration of justice; and more particularly, this Court is in the constant usage of ordering brieves of mortancestry to be directed to the sheriffs specially constituted by them. It is a point equally clear and admitted, that the Court may likewise advocate the brief of mortancestry from the Sheriff, and remit, with an instruction, and appoint another Sheriff or Sheriffs, before whom the service shall proceed; and, as a consequence of these powers, and of the superintendent power of this Court, it is daily in use of ordering the brief of mortancestry to be directed to the macers, as sheriffs in that part specially constituted; and if so, what reason can there possibly be against the Court's exercising the same power with regard to the brieves of division? It possibly may be, as Mr Rocheid maintains, that no instance has occurred of this being done. Brieves of division are not frequent, and they generally go on by consent; so that the practice affords no argument to Mr Rocheid, unless he could show, that the question has been agitated, and it had been decided, that the division must proceed before the Judge-Ordinary of the county where the lands lie. As the case has not been brought in question, direct authorities are not to be expected; but, from the opinion of Stair, b. 4. tit. 3. § 15. and 18, as well as from the reason of the thing, it cannot, with justice, be controverted, that, in all brieves, retourable or not retourable, the Court may, upon causes shown, either order the brieves to be directed to the macers, as Sheriffs in that part, or may advocate the brieves from the Judge-Ordinary to the macers, or remit, with instructions; and, as this is the general position of the law, there can be

no good reason for making the brief of division an exception to the general rule. No 373.

2*dly*, The mode of division which has been adopted by Mr Cathcart of having Sheriffs specially constituted for dividing the whole estate at once, is not only proper, but necessary, for doing justice to the parties; and which decides the question, as there is not only a reasonable, but a necessary cause, for for the Court's exercising its superintendent jurisdiction, in ordering brieves to be directed to Sheriffs specially constituted. On the other hand, Mr Rocheid is here contending for what the Court cannot possibly grant him. It is clear, that, in this case, both brieves cannot be proceeded in; for the estate, nor no part of it, can be twice divided by different judges. Mr Rocheid purchased the first brief addressed to the Sheriff for dividing a part of the estate. Mr Cathcart purchased the second brief, directed by the special warrant of this Court, to the macers, for dividing the whole estate. The last is, therefore, a virtual repeal of the former; and Mr Rocheid cannot possibly be allowed to proceed in the first, while the last remains unresolved. Upon which ground, singly, the Sheriff was in the wrong, in not stopping proceeding upon the first brief, when he was informed, that this Court had ordered another brief to be issued to do the same business; and this is, of itself, a sufficient reason for giving the preference to that brief issued by authority of the Court. It is, indeed, true, that the order for issuing the brief may be recalled and determined by the Court. But this is not the mode of doing it; and, when Mr Rocheid shall take the proper step for that purpose, he will then meet with a sufficient answer.

*Answered*; The granting the warrant, and the taking out brieves directed to the macers, were things which happened of course, *sine causæ cognitione*. The brief to the Sheriff of Edinburgh was taken out and executed before the least mention was made of craving a warrant for brieves addressed to the macers. The subject in dispute, therefore, having been fairly tabled before the Sheriff, who was unquestionably a competent judge, it is clear, that the barely taking out a brief, which was in substance no more than raising a summons for having the same matter determined before the macers, or even before this Court, could not have the effect of removing the cause from the Sheriff's jurisdiction, or entitle him to sist proceedings, if either of the parties called upon him to go on.

Upon the merits of the question, Mr Rocheid maintained, 1*mo*, That the macers are not judges competent to a division of lands, either upon brieves originally directed to them, or upon advocation of a brief from another judge. The proper business of the macers is to attend upon this Court, and to execute its commands. They are not vested with any ordinary jurisdiction more than messengers at arms, or any other officers of the law. It is true, that, by immemorial usage in serving brieves of mortancestry, and other brieves not pleadable, the macers have sometimes a kind of jurisdiction delegated to them by

No 373. special warrant of the Court. But, as this juridiction, being *ex facie* contrary to the clearest principles of law, can be supported only upon the footing of immemorial usage, so the extent of it must be regulated by immemorial usage also. Mr Cathcart has accordingly been called upon to produce a single instance, from the very first existence of our law, where a brief of division ever was directed to macers, or where they ever were allowed to judge any question relative to the division of land-property. No such instance has been produced. As the supposed jurisdiction of macers, therefore, has no support here from immemorial practice, which is the only foundation for it in other cases, the Court can no more authorise them to determine with respect to the present division, than it could to them to discuss reasons of reduction, or to judge in a proving of the tenor, or any other of the most important questions which the law has entrusted to the decision of this Court.

The practice, on which the other party chiefly relies, of allowing the macers to sit as judges upon the brief of mortancestry, and other brieves, not pleadable, cannot avail him here. It is an admitted point, that the brief of division is one of those which are called pleadable; and a very little attention to the distinct nature of the two different species of brieves will satisfy the Court, that no argument can properly be drawn from the one to the other. See the distinction explained by Bankton, v. 2. p. 554. § 12.

The intention of a brief of mortancestry, and of the other brieves not pleadable, such as tutory, idiotry, &c. is to enquire into the facts particularly set forth in the brief, upon which the inquest are to make their report. No person, except the obtainer of the brief, is supposed to have any interest in the matter; of consequence, no particular persons are called as defenders; the brieves are only executed at the market-cross of the head burgh where the lands lie, against all and sundry, as it is not to be presumed that there will be any dispute or controversy; and, therefore, where the lands lie in different jurisdictions, it has been customary in order to avoid the multipying of proceedings before different judges, to have the brief remitted to the macers; whose office is purely ministerial, having nothing else to do, except to interpose their authority to the verdict of the inquest.

But the case of a brief of division is very different; it is precisely of the nature of an ordinary action respecting property, in which the proper parties interested are specially called as defenders; in which it is expected, that debates and disputes may arise, which must be determined by the judge to whom the brief is directed. In short, this and other brieves of the like nature are understood to stand in place of summonses before the Judge Ordinary, and which admit of pleadings and disputes, as much as any other action that may be brought before him. The macers are not understood to have any knowledge of the law; and, therefore, although, by practice, a jurisdiction was given them in matters that were not supposed to be the subject of litigation, it would have been most absurd to devolve upon them a jurisdiction for determining dis-

putes and controversies amongst the lieges, which the law has already put into so much abler hands. No 373.

There is likewise another distinction between brieves pleadable and not pleadable, and which very clearly shows the impropriety of remitting the former to the cognizance of the macers. All the brieves not pleadable are, at the same time, retourable to the chancery; and, after being so retoured, are held to be decrees, not of the Judge before whom the brief was served, but of the chancery, (as expressly laid down by Stair, b. 4. tit. 3. § 8.), and are carried into execution accordingly. Pleadable brieves, on the contrary, such as a brief of division, are not retourable to the chancery; but the judge himself, to whom the brief is directed, pronounces a decree in terms of what the jury have found, and that decree will be enforced by the ordinary compulsitories of law, in the same manner as any of his other sentences. In the case, therefore, of brieves not pleadable, the jurisdiction of the macers is very easily explicated, because they have nothing more to do than to return the verdict of the jury to the chancery, which then becomes a decree of the chancery, and is carried into execution by certain forms established from time immemorial. But, supposing a pleadable brief should be remitted to the macers, who, of consequence, would be obliged to pronounce a decree themselves, without any interposition of the chancery, In what manner is that decree to be enforced, if either of the parties should refuse obedience to it? The macers, unquestionably, could issue no executorial; and none of the various acts empowering this Court to grant hornings upon the decrees of inferior judges, would apply to a decree proceeding from this new invented tribunal of the macers. The authority of Stair, b. 4. tit. 3. § 15, is not to the purpose, as, in this passage, he is not treating of what brieves are capable of being advocated and remitted to the macers, but only laying down what is the proper form of proceeding in such as are advocated; and the only cases which he mentions as being in use of being remitted to the macers, are those of mortancestsy and idiotry, both of which are not pleadable. On the other hand, the opinion of Bankton, b. 1. tit. 8. § 38, and also the authority of Spottiswood's Practics, p. 7, are with the respondent.

But, in the next place, supposing the mode of procedure contended for by Mr Cathcart, of remitting this cause to the macers, were competent, the doing so would clearly and unavoidably destroy the very intention of a brief of division.

The obvious purpose of leaving this matter to be determined by the verdict of a jury, was, that they might have an opportunity, from residing in the neighbourhood, of knowing and inspecting the lands which are the subject of division. Accordingly, Balfour, in his Practicks, when treating of a brief division, lays it down as essential part of the procedure, that the assize, after being elected and sworn, should pass and visit the 'hail lands whilk should be divided.' Upon the same principles it was, that, in judging upon a brief of perambulation, it was declared by act 1579, cap. 79, 'That na persons be received up-

No 373. ' on the inquest thereof, bot honest substantious men, having heritage of their ' awin, and wha best knawis the meithes of the saids lands, and dwells maist ' ewest to the samen, to wit, within the sheriffdome where the saids lands de- ' bateable lyes, gif they may be had within the samen; and four hafs about, ' or four next shires, gif they cannot conveniently be had within the shire itself.' And, with the like view, it was appointed, that actions of molestation should be remitted to the Judge Ordinary, to be decided by a jury of landed men, chosen from the parish where the grounds in dispute lay, or from the other parishes most adjacent; Parl. 1587. cap. 42. Accordingly, in the present case, the Sheriff had given a deliverance, appointing the jury to attend him at the house of Inverleith, in order that they might have all the assistance which an inspection of the grounds could give them, for making out a fair and accurate division; and the same method would, no doubt, be followed, with respect to the lands of Darnchester, upon a brief directed to the Sheriff of Berwick; but, if the division of both is to go on before the macers, this advantage, in which consists the very essence of a trial by jury, must infallibly be lost.

*Observed* on the Bench; No great stress is to be laid on the application to the Court by bill, and warrant granted *parte inaudita.*—It is an agreed fact, that there is no instance of advocations to macers, or of their being constituted Sheriffs for this purpose; nor has any lawyer said, that a brief of division can proceed before them.—The distinction between brieves retourable and not retourable, and brieves pleadable or not, is well founded. In a brief of division, the jury ought to be from the neighbourhood, and visit the grounds, which cannot take place before the macers; and each estate must be divided, and each party have his share of it; for each hath a right *pro indiviso;* therefore the advocation is not competent. And, 2*do*, There is no expediency to advocate, as the expense before the Sheriff will be less than before the macers, especially if the jury must visit the grounds accompanied by two assessors from this Court.

" The Lords remitted the cause to the Sheriff *simpliciter*, in common form."
And, upon a reclaiming petition and answers,
" The Court unanimously adhered."

Reporter, *Stonefield.* Act. *Advocatus et Dean of Faculty.* Alt. *Ro. M'Queen et Blair.*
Clerk, *Tait.*

*Fol. Dic. v.* 3. *p.* 361. *Fac. Col. No* 10. *p.* 21.