

—T. B. Morison—Dunbar. Agent—R. S. Rutherford, Solicitor.

Counsel for the Defenders and Reclaimers—The Solicitor-General (Dundas, K.C.)—Pitman. Agents—Inglis, Orr, & Bruce, W.S.

Wednesday, November 30.

FIRST DIVISION.

BUSBY v. CLARK.

Process—Parent and Child—Petition for Custody of Child—Respondent Obstructing the Execution of Service.

Where a petition by a father for the custody of his infant child was ordered to be served on the petitioner's father-in-law, in whose custody it was averred the child was, and where attempts to serve the petition on the respondent, both by registered letter and personally, proved unsuccessful owing to deliberate obstruction by the respondent, the Court granted the prayer of the petition.

James Busby, machinist, residing with Peter Buchanan, watchman, 2 Union Place, Dalmuir, Dumbartonshire, presented a petition for the custody of his infant child Thomas Clark Busby.

The petition set forth that on 2nd October 1904 the petitioner's wife Jane Mains Clark or Busby gave birth to a son, the child in question, and on 9th October 1904 she died at 9 Gladstone Place, Dalmuir; that after the death of the petitioner's wife the child was carried off by the petitioner's mother-in-law, and had since been in the custody of the petitioner's father-in-law James Clark, watchman, presently residing at 7 Gladstone Place, Dalmuir; that the petitioner was desirous of having the custody of his child, but the respondent Mr Clark, although he had been asked both by the petitioner and by his agent on four different occasions to hand over the child to the custody of the petitioner, refused to do so.

The petitioner further stated that since his wife's death he had resided in family with his mother and his stepfather, that his wages were 33s. per week, and that his mother and stepfather had intimated their willingness to receive the child into their house and do their best for its welfare.

In these circumstances the petitioner craved the Court to find that he was entitled to the custody of the child Thomas Clark Busby, and to ordain the said James Clark forthwith to deliver up the said child to the petitioner or to any other person having his authority.

On 24th November intimation and service of the petition on the respondent was ordered on eight days' induciæ.

On 30th November counsel for the petitioner, in the Single Bills, stated to the Court that an attempt had been made to serve the petition upon the respondent

James Clark by a registered letter, but the letter had been returned by the Post-Office to the clerk of the process marked "Absolutely refused." An attempt had then been made to serve the petition personally on the respondent James Clark through a messenger-at-arms. Counsel read a telegram which had been received from the messenger-at-arms in these terms:—"Have been unable to effect service to-night."

In these circumstances counsel for the petitioner, in respect that there was clearly a deliberate attempt on the part of the respondent to resist service, and that the matter was urgent, moved that the prayer of the petition should be granted at once.

LORD PRESIDENT—In this case the respondent has obstructed and prevented service, and as he has taken no steps to explain or justify his conduct I think that we should grant decree of custody as craved.

LORD ADAM concurred.

LORD M'LAREN—I agree. The obstruction here was directed not only against receiving a registered letter but also against allowing personal service. It seems to me therefore that the respondent was deliberately avoiding service and that decree of custody should therefore be granted.

LORD KINNEAR concurred.

The Court granted the prayer of the petition.

Counsel for the Petitioner—Morton. Agent—W. A. Farquharson, S.S.C.

Saturday, December 3.

SECOND DIVISION.

[Sheriff Court at Dunfermline.]

HAMILTON v. KERR.

Sheriff—Process—Debts Recovery Act Procedure—Citation—Competency of Objection to Regularity of Citation by Party Appearing—Relation of Debts Recovery to Ordinary Sheriff Court—Debts Recovery (Scotland) Act 1867 (30 and 31 Vict. cap. 96), sec. 8—Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. c. 70), secs. 2, 12 (2).

The Sheriff Courts (Scotland) Act 1876, which by section 2 applies only, unless otherwise expressly provided, to "civil proceedings in the ordinary Sheriff Court," enacts—section 12 (2)—that "a party who appears shall not be permitted to state any objection to the regularity of the execution or service as against himself of the petition by which he is convened."

Held (dub. Lord Moncreiff) that the section was applicable to an action raised under the Debts Recovery (Scotland) Act 1867, such action being "a civil proceeding in the ordinary Sheriff Court."