—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."

Sheriff—Process—Debts Recovery Act Procedure—When Necessary for Sheriff to Make Findings in Fact and Law—Debts Recovery (Scotland) Act 1867 (30 *and* 31 *Vict. c.* 96), *secs.* 9 *and* 10.

Held that in actions brought under the Debts Recovery (Scotland) Act 1867 the Sheriff is not bound to set forth in his interlocutor the findings of fact and law upon which he has proceeded, except in cases where he has taken a note of the evidence upon the requisition of one or both of the parties.

The Sheriff Courts (Scotland) Act 1876 provides—section 2—. . . "Unless where otherwise expressly provided this Act shall only apply to civil proceedings in the ordinary Sheriff Court."

Section 12, sub-section 2—"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."

The Debts Recovery (Scotland) Act 1867 provides—section 8—. . . "Where it shall appear to the Sheriff that the case is of such a nature that it cannot, with due regard to the ends of justice, be disposed of according to the summary procedure provided by this Act, he may remit the same to his ordinary roll."

Section 9—"Unless required by either party it shall not be necessary for the Sheriff to take any note of the evidence or of the facts admitted by the parties, but upon such requisition . . . he shall take a note . . . and where the evidence has been recorded as above provided for, the Sheriff shall pronounce and sign and date an interlocutor setting forth the separate findings in law and in fact upon which he has proceeded in giving judgment." . . .

Section 10—"Where neither party has in the manner above provided required the Sheriff to take a note of the evidence, it shall not be competent to appeal . . . in so far as the findings in fact pronounced by him are concerned." . . .

On 10th August 1904 John Hamilton brought an action under the Debts Recovery (Scotland) Act 1867 against Mrs Ann Thomson or Kerr and George Kerr, her husband, in the Sheriff Court of Fife and Kinross at Dunfermline for £29, 16s.

On 11th August the defenders were cited to appear at a Court to be held on the 16th of August, by service of a copy of the summons, with a citation thereto annexed, and a copy of the account sued for.

On 16th August they appeared and stated, *inter alia*, the following plea, which was duly noted—"(1) Under the provisions of section 3 of the Small Debt Act 1837, incorporated by section 5 of the Debts Recovery Act 1867, the summons is a sufficient warrant for citing the defenders to appear and answer at the time and place mentioned in the summons, 'not being sooner than the sixth day after such citation.' The citations given to the defenders were served by the officer on 11th August 1904, taken away again by him on same day, and re-served on 12th August 1904. Neither service complies with the statutory enactment as to the *inducice* of citation. The summons, not being a warrant for the citations given to the defenders to appear at a Court to be held on 16th August 1904, should be dismissed, with expenses to the defenders."

The case was set down for trial on 13th September, and upon that day the Sheriff-Substitute (HAY SHENNAN) granted the pursuer decree for the sum sued for in the form prescribed by section 8 of the Act of 1867. Neither party requested the Sheriff to take a note of the evidence, and no note was taken.

The defenders appealed to the Sheriff (KINCAID MACKENZIE), who on 5th October pronounced the following interlocutor—"Refuses the appeal and adheres to the judgment appealed against."

Note—"I think, on a reference to the minutes of procedure in this case, the defender is barred *personali exceptione* from objecting to the regularity of the citation.

"Further, I am of opinion that section 12 (2) of the Sheriff Courts Act 1876 does apply to cases brought under the Debts Recovery Act. The Sheriff does not, under that Act, exercise any new jurisdiction. He merely exercises his ordinary jurisdiction in the summary form provided by that Act—*Fraser* v. *Mackintosh*, December 19, 1867, 6 Macph. 170."

The defenders appealed, and argued—(1) The whole proceedings were vitiated by the admittedly faulty citation. The only question was, were the appellants barred from stating that objection by section 12, sub-section 2, of the Act of 1876? They were not, as that section did not apply to actions brought in the Debts Recovery Court under the Act of 1867. Section 2 of the Act of 1876 provided that the Act of 1876 was only to apply to civil proceedings in the "ordinary Sheriff Court," and the Debts Recovery Court was not the ordinary Sheriff Court. This was evident from section 8 of the Act of 1867, which specially provided for the remit of Debts Recovery cases to the ordinary roll, and from the differences in the language of the Acts, *e.g.*, summons in the Act of 1867, petition in the Act of 1876. That the Legislature did not mean to apply the provisions of the Act of 1876 to the Debts Recovery Court by inference might be deduced from the fact that in the case of the Small Debt Court there was an express provision in the Small Debt Amendment (Scotland) Act 1889, section 5, making certain sections of the Act of 1876 applicable to it. The only question in the case of *Fraser* v. *Mackintosh*, *supra*, founded on by the respondent, was whether it was a "contested" cause. (2) The Sheriff's decree was not in proper form as it contained no findings in fact and law. Even where no notes of the evidence were taken the decree should contain findings (Debts Recovery Act 1867, sections 8, 9, 10; Dove Wilson, Sheriff Court Practice, 4th edit. p 532); that was the fair inference from the sections, especially section 10.

Argued for the respondent—It was too late to make any objection to the sufficiency of the citation. Section 12, sub-section 2, of

the Act of of 1876 was applicable, inasmuch as an action in the Debts Recovery Court was "a civil proceeding in the ordinary Sheriff Court," and the Sheriff in the Debts Recovery Court was merely exercising his ordinary jurisdiction in a summary manner —*Fraser* v. *Mackintosh*, *supra*. The fact that the general word "writ" was employed at the beginning of section 12 indicated that the section was not restricted to the ordinary Sheriff Court "petition."

(The respondent was not called upon to reply to the second point argued by the appellants.)

LORD JUSTICE-CLERK — There are two points raised in this case. The first arises on an objection taken by the appellants to the regularity of the citation. Now, whether that objection is one which could be stated and considered in the present case depends upon whether the Court of the Sheriff when sitting under the Debts Recovery Act of 1867 is or is not a court of his ordinary jurisdiction, and whether the rules which govern the latter apply. I have no doubt myself that they do, and I agree with the the late Lord President Inglis' opinion in the case of *Fraser* v. *Mackintosh*, 6 Macph. 170, where he says "that in disposing of a case brought before him under the recent Debts Recovery Act the Sheriff does not, properly speaking, exercise any new jurisdiction. What he does is to exercise his ordinary jurisdiction in the summary manner provided by that Act." I am therefore of opinion that section 12, sub-section 2, of the Sheriff Courts Act of 1876 applies here, viz.—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.

The second point taken by the appellants is that the proceedings were irregular because the Sheriff made no findings in fact or law. There appears to be a considerable amount of confusion in the provisions of section 8, 9, and 10 of the Act of 1867, but it is clear that the Sheriff is not to take a note of the evidence unless asked by either party to do so, and that it is in that case only that he is to make findings in fact and law. In the case where no record of the evidence is taken I can find no provision requiring him to make any findings, although of course there is nothing to prevent him doing so if he thinks fit. I am therefore of opinion that the appellants have failed upon both points.

LORD YOUNG concurred.

LORD TRAYNER—The Debts Recovery Act makes provision for the trial of actions in the Sheriff Court in a more summary fashion than is required by ordinary Sheriff Court procedure. The Sheriff if he thinks fit can remit to his ordinary roll any case which he thinks ought not to be tried in so summary a fashion, but that does not appear to me to imply that the Debts Recovery Act created a separate jurisdiction from the Sheriff's ordinary jurisdiction. I know of no civil jurisdiction which the Sheriff has except his ordinary jurisdiction and his small-debt jurisdiction. I am therefore of opinion that section 12, sub-section (2), of the Sheriff Court Act 1876 applies to the case of a party who appears in a case under the Debts Recovery Act, and prevents him from objecting to the regularity of the execution or service against himself.

On the second point it appears clear enough that the Sheriff-Substitute was under no obligation to take notes of the evidence, and no notes having been taken the form of interlocutor which he has adopted is correct, being that prescribed by section 8 of the Act.

LORD MONCREIFF—On the second point raised by the appellants—the form of the Sheriff's interlocutor—I agree with both your Lordships. There is some confusion between the terms of sections 9 and 10 of the Act of 1867, and the reference in section 10 to "findings in fact" is scarcely consistent with the provision in section 9 that it shall not be necessary for the Sheriff to take any note of the evidence or of the facts admitted unless required to do so by either party. But I am of opinion that when no note of evidence has been taken, the interlocutor is not incompetent merely because it contains no findings in fact.

On the other point—the competency of stating an objection to the citation after appearance has been entered—I have had some doubts. The question depends upon whether or not section 12 (2) of the Sheriff Court Act 1876 applies to an action raised under the Debts Recovery Act 1867, and that in turn upon whether or not such an action is "a civil proceeding in the ordinary Sheriff Court." By section 8 of the Act of 1867 the Sheriff has the power of remitting to his ordinary roll an action brought under the Debts Recovery Act, and in such a case I cannot doubt that the procedure would in all respects be ruled by the provisions of the Sheriff Court Act 1876. Further, section 12 of the Act of 1876 is by section 5 of the Small Debts Act 1889, made applicable to causes in the Small Debt Court, and it would be anomalous that the intermediate court should be in a different position. It may be that no corresponding provision was made in the case of the Debts Recovery Court, because in regard to such matters it was regarded as forming part of the ordinary Sheriff Court. Accordingly, although I do not consider the question as free from doubt, I am not prepared to differ from your Lordships on this point.

The Court dismissed the appeal.

Counsel for the Pursuer and Respondent —W. Thomson. Agents— Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Defenders and Appellants—Younger—Burt. Agents—Cunningham & Lawson, Solicitors.