be no doubt or uncertainty as to the meeting at which the mandatory was to act. If that is so, if there is what Lord Bacon, I think, calls *præsentia corporis* as it were, the collateral error is immaterial; the certainty is gained by the description of the purpose for which the meeting was to be held. If that is so, I think your Lordships may well reject any error, if it be an error, in regard to the date, and hold that there is a certainty of the meeting, and that in point of fact the mandate was exercised at the meeting at which it was intended to be exercised.

My Lords, the other 33 mandates were subjected to an objection of a different kind. They were mandates in print, and the printer had in the first instance printed them with the date of, I think, the 15th of August 1870. That was an error of date; it ought to have been the 16th, and the figure 5 was erased by some process, and over and on the space where the 5 stood there was printed by type 6 in the place of 5. Now, my Lords, if it stood there without any evidence—that is to say, if your Lordships had had to deal with a case where there were a number of mandates all in print, and all with the same alterations made in this way upon them—I should myself have been clearly of opinion that the reasonable and natural presumption was that that alteration was made before the documents issued from the printer's hands, and before therefore they were used—before the person giving the mandate handed it to the mandatory. That, I think, would be the natural conclusion to be drawn under the circumstances. If you have got a document in print which has been altered afterwards in writing, inasmuch as writing may be placed upon it at any time, it may be doubtful at what time the writing was put there, and the presumption may perhaps be that it was put there after the document left the printer's hands. But it is quite different where you find that the alteration is a typical alteration, as to which the more natural presumption is that it was made in the place where alone types are to be found, namely at the printer's.

But your Lordships need not decide that question here, for your Lordships have the evidence of the printer, and the printer tells you that it was he who made the alteration, and that he made it as part of the business or job with which he was charged, and that after having made it he gave out the mandates to be used. Therefore your Lordships have nothing more than this, a printed document in which there has been an alteration in print made before the document has been used, or as we say, executed before the person putting it in circulation handed it to the mandatory. That being so, my Lords, I am at a loss to conceive what possible vice there is in the fact of an alteration having been made under these circumstances.

I therefore think that the Court below were perfectly right in the conclusion they arrived at, as well with regard to the 33 as to the 12 mandates, and that there is no ground whatever for this appeal, which I am bound to say is so minute in its nature, and proceeds upon a point of so little foundation, that one cannot but regret that such a case has been brought to your Lordships' House.

Lord Chelmsford—My Lords, the case is so very clear as to render it perfectly unnecessary for me to say more than that I entirely concur with my noble and learned friend.

Lord Hatherley—My Lords, I also fully concur. The object of the mandate was a simple one, namely, to authorise the mandatory to act for the person who gave the mandate at an election which was about to take place on some subsequent day, and which could take place only, as my noble and learned friend the Lord Chancellor has observed, at one meeting. It might be at the meeting adjourned, but that would be a continuance of the same meeting. And the meeting could be held only for one purpose, namely to fill up a given vacancy; for your Lordships will observe that the mandate says that the person was to be elected "in room of the late" so and so. There being that one object, and there being the certainty of the meeting being held for that purpose on a subsequent day, it appears to me that all this discussion about whether the exact date was correctly mentioned in the mandate, or whether there was an omission to put in the exact date in the instrument at the proper time, is wholly beside the question. The instrument is not vitiated in either case. This is different from the ordinary case in which instruments are treated as imperfect. This mandate is perfect for the purpose for which it was required, and I think therefore that these mistakes are of no importance.

Lord O'Hagan—My Lords, I quite agree with my noble and learned friends, and the case is in my opinion so perfectly clear that I do not desire to add anything to what they have said.

Appeal dismissed and judgment affirmed.

Counsel for Appellant—Robertson. Agents—W. Kelso Thwaites, S.S.C. — Andrew Gilman, Westminster.

Counsel for Respondent—Southgate, Q.C.—Shiress Will—Badenoch Nicolson. Agents—Gillespie & Paterson, W.S.—Connell & Hope, Westminster.

---

## *Thursday, March 9.*

### HUTTON *v.* HARPER.

(*Ante*, vol. xii. p. 586.)

*Church—Parish* quoad sacra—*Marriage—Proclamation of Banns.*

*Held* (aff. judgment of Court of Session) that the proclamation of banns is one of the functions and duties of the office of minister of a church erected into a parish church under the Act 7 and 8 Vict, c. 44, for the district attached thereto as a parish *quoad sacra*.

This was an action at the instance of the Rev. R. S. Hutton, the minister of the parish of Cambusnethan, and other members of the kirk-session of that parish and the session-clerk, "against the Rev. Alexander Harper, M.A., minister of the *quoad sacra* parish of Wishaw, and others, constituting, or claiming to constitute, the kirk-session of the said *quoad sacra* parish of Wishaw, and John Mackenzie, distiller at Wishaw, clerk to the kirk-session of the said *quoad sacra* parish of Wishaw," concluding for

declarator "that the defenders are not, and that none of them is, entitled to make proclamation of banns of marriages in the church of the *quoad sacra* parish of Wishaw, or to cause or permit proclamations of banns of marriages to be made in the said church, or to demand, exact, or receive dues or fees in respect of such proclamations made in the said church, and that proclamations of the banns of marriages made in the church of the said *quoad sacra* parish of Wishaw have not been and are not legal or valid, but are, on the contrary, illegal and invalid;" and to have the defenders interdicted from "making proclamations of banns of marriages in the church of the said *quoad sacra* parish of Wishaw, and from causing or permitting proclamations of the banns of marriages to be made in the said church; as also, from demanding, exacting, or receiving dues or fees in respect of proclamations of banns of marriages made or to be made in the said church."

The case having been argued before the Judges of the Second Division with three Judges of the First Division, judgment was pronounced assoilzieing the defenders from the conclusions of the summons.

The pursuers appealed.

At delivering judgment—

Lord Chancellor—My Lords, I cannot say that the very elaborate argument which your Lordships have heard at the bar has raised any doubt whatever in my mind as to the correctness of the decision of the Court of Session. I would remind your Lordships that we have here the unanimous opinion of the seven consulted Judges who met together to consider what should be the interlocutor of the Second Division of the Court of Session. No doubt the Lord Ordinary, for whom we entertain great respect, was of a different opinion, but I repeat that there was no dissension whatever between the seven consulted Judges.

Now, my Lords, the question is simply this. The district of Wishaw was disjoined from the parish of Cambusnethan, and was constituted under an Act of Parliament, to which I shall have to refer, "a parish" or "district" "*quoad sacra.*" I am using the words which are found in the Act of Parliament. The question is, Where are the banns of marriage to be published under those circumstances? If persons within the disjoined district are about to be married, and desire to have their banns published, are they to have them published in the kirk of the old parish, or in the kirk of the disjoined district? My Lords, that depends upon the exact meaning to be given to the word "parish" and the other terms used in the Act of Parliament; but of course your Lordships cannot overlook the strong *a priori* probability that if persons are about to treat marriage as a religious ceremony (of course in Scotland it is not necessary that it should be so treated), but if they are about so to treat it and comply with those regulations which prescribe publication of banns, any arrangement for the disjoining of a district would have carried with it the power and right to have banns under those circumstances published in the kirk where the persons who were about to be married were in the habit of attending, and the district where they resided.

But, my Lords, we must put aside the *a priori* probability, and look exactly to what the Act of Parliament has said. Now, the Act of Parliament has provided that where the necessary preliminaries which I will not refer to have taken place the Commissioners of Teinds are authorised to erect the new church "into a parish church in connection with the Church of Scotland, and to mark out and designate a district to be attached thereto *quoad sacra*, and to disjoin such district *quoad sacra* from the parish or parishes to which the same or any part thereof may have belonged or been attached, and to erect such district into a parish *quoad sacra* in connection with the Church of Scotland." My Lords, if the Act stopped here, of course we should have to inquire what is the proper meaning to be assigned to those words "parish *quoad sacra.*" But the Act does not stop there; it goes on to say, "and it shall and may be lawful for the ministers and elders of such parish to have and enjoy the status, and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland." Now, my Lords, the minister and the elders constitute together the kirk session of the parish, and it is admitted that the disjoined parish is to have a kirk-session. The kirk-session therefore is to have all the powers, rights, and privileges which a parish minister and elders of the Church of Scotland have. My Lords, these words of course must mean not with reference to the whole of Scotland but with reference to the disjoined parish, and therefore your Lordships have here an enactment that the disjoined parish shall have a kirk-session, and that that kirk-session shall have in the disjoined parish all the rights of any parish minister and elders of the Church of Scotland in any parish.

My Lords, it is not denied, even if we stopped here, that one of the rights and one of the duties of a kirk-session is to require the publication of banns, and by the discipline of the Church to insist upon and enforce the publication of banns. Therefore your Lordships have to ask this question, in the face of the general words which I have read, and in the face of an Act of Parliament which says that the parish minister and elders of this disjoined parish shall have all the rights of the parish minister and elders of a parish in Scotland—What reason is there for taking out of those general words the right connected with the enforcing of the publication of banns, and for saying, whereas the Act of Parliament says that the kirk-session shall have all rights, your Lordships are to interpret that Act as meaning that the kirk-session shall have all rights, minus this important right of enforcing the publication of banns?

But, my Lords, let me go a step further and ask your Lordships whether the publication of banns does not come under the words *quoad sacra*, and is not one of the rights which in Scotland would be termed *inter sacra.* Now, your Lordships have not here to consider by any abstract standard what things should be called *sacra* and what things profane. What we have to inquire is, what has been considered in the Kirk of Scotland *inter sacra?* And my Lords, let us put aside altogether any question of civil enactment and turn to the law of the Kirk alone, commencing from the earliest times—commencing with the Book of Discipline as it is called,

although we might commence earlier. Commencing with the Book of Discipline of the year 1560, and going down from the Book of Discipline through the different Acts of Assembly, your Lordships have a regular course of Church legislation requiring publicity with regard to marriages, requiring the publication of banns through the medium of the kirk-session, and visiting with the discipline of the Church those persons, whether laity or ministers, who should disregard the discipline of the Church in that respect. My Lords, if that be so—if, putting aside all questions of civil enactment, your Lordships find the enactments of the Church consistent throughout the period to which I have referred in requiring the publication of banns—I ask, Is not the publication of banns part of the discipline of the Church? The Church went on also to require originally the marriage to be celebrated by a minister of the Established Kirk. That requirement, at all events as regards the effect of neglecting it, was afterwards modified by civil enactment, to which I shall afterwards refer; but, in the first instance, your Lordships have the consistent law of the Church requiring the publication of banns and the marriage by the minister. My Lords, it appears to me impossible to say after that that the publication of banns is not part of the discipline of the Church, and if it be part of the discipline of the Church, is it not a thing which comes under those words used in the language of the Church "*inter sacra*"? It appears to me that it is clearly to be considered as part of those things which have been called *inter sacra* by the Church.

Then, my Lords, it is said that the publication of banns has been regulated or in some way dealt with by civil enactments. But, my Lords, in what way has it been dealt with? The Act of 1661—the Act of Charles the Second—states by way of preamble that "Our Sovereign Lord and the Estates of this present Parliament, considering how necessary it is that no marriage be celebrated but according to the laudable order and constitution of this Kirk," that is to say, of the Kirk of the realm, and yet that persons "do procure themselves to be married and are married either in a clandestine way, contrary to the established order of the Kirk, or by jesuits, priests," "or any other not authorised by this Kirk," therefore His Majesty, upon the advice of the Estates, ordains that "whatsoever person or persons shall hereafter marry or procure themselves to be married in any clandestine and inorderly way, or by jesuits, priests, or any other not authorised by this Kirk, that they shall be imprisoned." Therefore your Lordships observe that the civil enactment refers to the order and the discipline of the Church, and brings to bear the weight of the civil authority, not in support of some independent enactment of its own, but of that which at that time is recognised and referred to as the law and the order of the Kirk.

It might have been said—it might be said at the present day—The State will recognise in Scotland no marriage but a marriage performed by a religious ceremony, and according to the order either of the Kirk of Scotland or of any religious denomination in Scotland. But, my Lords, if the State thought fit to say so, would that alter the nature of the marriage? Would it make it cease to be a religious ceremony? Clearly not. On the contrary, it would be the strongest affirmation by the State that it was a religious ceremony. And so here your Lordships have the Act of 1661 pointing to the religious ceremony and that which preceded it, the marriage according to what then was the order of the Kirk, and the publication of the banns, which was required, as that which was to be complied with and to be enforced through this Act of Parliament. My Lords, it appears to me that neither this Act nor any which followed it in the slightest degree alters the nature of the publication of the banns by merely enacting that the law of the Church shall be complied with.

My Lords, that really is the whole of this case. But for the elaborate argument which your Lordships have heard, I should have been well content to say that I concur with every word which has been expressed in the Court below, and I particularly refer to the very concise and pointed judgment of the Lord Justice-Clerk, which appears to me to exhaust entirely the whole of the case. I therefore submit to your Lordships that the interlocutor appealed against should be affirmed and the appeal dismissed with costs.

Lord Chelmsford—My Lords, the question upon this appeal is—Whether the parish of Wishaw, having been regularly erected as a *quoad sacra* parish, the minister and elders thereof are entitled to make proclamations of banns of marriages in the church, and to receive dues or fees in respect of such proclamations.

By the 7th and 8th Vict. c. 44, sec. 8, it is enacted that the minister and elders of a *quoad sacra* parish shall have and enjoy all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland. The House has therefore to determine what is the power of a minister and elders of a parish in Scotland in respect to the publications of banns of marriage. The duty of publishing banns is attached to the office of clerk of the kirk-session, and the due publication of the banns must be certified by him, his certificate not being traversable. The question is, whether all this is done by the sole authority of the clerk of the kirk-session, and without his requiring any sanction enabling him to perform these duties?

The Lord Ordinary, answering the argument of the defenders, is of opinion that they are mistaken in supposing that the power to proclaim banns is one of the rights and privileges of the minister and elders of a *quoad sacra* parish. I may observe that the question is not here quite accurately described, as the important word "powers" is omitted, and it is confined to the other words "rights and privileges." The Lord Ordinary thinks it is "no part of a parish minister or an elder's duty to make proclamation of banns. It is the duty of the session-clerk of the parish to do so, or to get this done by the precentor."

The Lord President expresses his surprise at this part of the note of the Lord Ordinary, and says—"It is quite true, so far, that a certificate by the clerk of the kirk-session is the proper legal evidence of the proclamation having been made, but that is because he is the servant of the kirk-session and acting under their authority

and direction, and particularly acting under the authority and direction of the moderator of the kirk-session, with whom this matter is left by the only existing law on the subject. The minister is the party who is to authorise the proclamation of banns to be made." "And therefore I am humbly of opinion that everything is under the control and direction of the minister as regards the proclamation of banns."

According to the view which I have taken of the case, it seems to me not essential to determine whether the publication of banns is *inter civilia* or *inter sacra*, because, whether it belongs to the one or other class, it is in my opinion equally within the power of the minister and the elders. But taking as I do the opinion of Lord Ardmillan as a correct description of the nature and character of the publication of the banns, it is clear that it must be regarded as a matter of ecclesiastical regulation. He says—"The proclamation of banns is a step of orderly procedure in the celebration of marriage by which religious sanction is given to the marriage." "It is not, I think, a step of civil procedure in the constitution of marriage, but a step of discipline in the orderly ecclesiastical procedure by which the Church gives sanction, seriousness, and solemnity to marriage as the most important and abiding of all human contracts."

But suppose it should be regarded as a mere civil proceeding, this would not advance the case of the appellants. At an early stage of the argument I put the question to the Lord Advocate, whether the clerk of the kirk-session could publish the banns by his own authority without the direction of the ministers and elders? and I received, as I expected, an answer in the negative, and this seemed to me at once to conclude the case against the appellants.

The correctness of the answer is proved by the Act of the General Assembly of 1784. By that Act the General Assembly resolved—"That no session-clerk in this Church proclaim any persons in order to marriage until he give intimation to the minister of the parish in a writing dated and subscribed by him, of the names, designations, and places of residence of the parties to be proclaimed, and obtain the said minister's leave to make the said proclamation." It follows that it is by the authority and direction of the minister, or of the minister and elders, that proclamation of banns can be made. Therefore this must be one of the powers possessed by the ministers and elders of the *quoad sacra* parish of Wishaw under the provisions of the Act of the 7th and 8th Vict. cap. 44.

I agree that the interlocutor appealed from should be affirmed.

Lord Hatherley concurred.

Lord O'Hagan — My Lords, in my opinion the decision of the Court of Session ought to be affirmed.

Under the statute a parish *quoad sacra* has been erected, and the first question is, Whether the publication of banns is to be considered as *inter sacra*, so as to put it under the direction of the ecclesiastical authorities of the parish so erected? I have no doubt that it is. The institution of banns was purely of ecclesiastical origin at an early period of the history of the Christian Church, and at that time, at all events, there could have been no question that it was to be held *inter sacra*. The civil state had nothing to do either with the creation or with the regulation of it. It has continued throughout Christendom always under Church control; and in Scotland we have it clearly shown that it has remained so till the present hour. The obligation to publish was not cast upon the contracting parties by any statute of the realm, and its enforcement is effected by ecclesiastical censures, assisted to some extent by the civil power. The publication does not concern the constitution of the marriage, but it is made by ecclesiastical authority a proper preliminary to it for the avoidance of clandestinity and the prevention of fraud, and those who disobey it are properly described in a book of much authority as "transgressors of a very comely and rational Church order." All this being so, it seems to me plain that the usage so established and so kept in action is a part of the ecclesiastical discipline of the Scottish Kirk and must be numbered *inter sacra*, and that the parishioners of Wishaw must therefore publish their banns in their own parish church and not in any other.

On this view alone the judgment we are considering is sufficiently sustainable. But even if that view were doubtful, the terms of the Act of the 7th and 8th Vict. c. 44, seem to me decisive of the question. When a parish *quoad sacra* is erected under that statute, the provision of the 8th section is—that "it shall and may be lawful for the minister and elders of such parish to have and enjoy the status and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland." Surely it is amongst the "powers, rights, and privileges" of the ministers and elders of a Scottish parish to require and compel the parishioners to publish the banns of marriage according to the law of their Church. It is also amongst their duties and liabilities which their ecclesiastical superiors will oblige them to fulfil. The words of the section are general, and have no limitation either in any other portion of the Act or in the provisions of any code of discipline, or in the reason of the thing. And on this second ground, even if I doubted, as I do not, with reference to the first, I think the appellant's contention cannot be supported.

The argument from inconvenience is not to be lightly entertained, and never for the purpose of construing a statute which is clear in its terms, and indicates unmistakeably the purpose of the Legislature. When the terms are obscure, and the purpose therefore more or less doubtful, it may help to a right understanding of them; and in the present case the respondents might fairly pray it in aid if, on the points to which I have already adverted, their case was not impregnable. It is difficult to conceive that the object of the publication of banns being, in the words of Mr Erskine (Principles, i. 6), "to prevent bigamy and incestuous marriages," and to prevent them by inviting objections, which may prevent or defeat fraud and misrepresentation, it could have been intended to direct it in a parish other than that in which the contracting parties are resident, and where evidence might most easily be found of their actual status and relations with their neighbours. To require it to be made in a

strange parish would be to antagonise the very object of the institution, and nullify altogether its beneficial operation. To the parties it would be a hardship to be obliged to resort to a church other than that in which the marriage is to be celebrated; and to the public it would be a mischief, by depriving the subsequent celebration of the security and lawfulness which it would have derived from full local notice of the proposed contract, such as has been wisely contemplated by various denominations of the Christian Church.

My Lords, on these grounds I am clearly of opinion that the appeal should be dismissed.

Appeal dismissed and judgment affirmed.

Counsel for Appellants — Lord Advocate (Gordon)—Cotton, Q.C. Agents—Grahames & Wardlaw, Westminster—Ronald, Ritchie, & Ellis, W.S.

Counsel for Respondents—Fitzjames Stephen, Q.C. — Gloag. Agents — William Robertson, Westminster—W. & J. Burness, W.S.

---

*Thursday, March* 16.

## BRAND'S TRS. *v.* BRAND'S TRS.

(*Ante*, vol. xii, p. 124.)

*Heritable and Moveable—Lease—Heir and Executor—Fixtures.*

*Held* (*rev.* judgment of Second Division, and *rest.* judgment of Lord Shand) that when the tenant of minerals, under a lease of ordinary duration, erected upon the land fixed machinery for the purpose of working the minerals, and died during the currency of the lease, the machinery was heritable in a question as to the tenant's succession.

Robert Brand senior was the lessee during his life of a colliery in Cambusnethan, which he held on a lease for nineteen years from 1867. He died in January 1873, leaving a trust-disposition under which all his heritable and moveable property went to Robert Brand the younger, his son. Robert Brand the younger died in July 1873, unmarried, and without having attained majority. He also left a trust-disposition, disposing of his whole means and estate to trustees. The heir-at-law of Robert Brand junior was his uncle Alexander Brand, who died in November 1873, also leaving a trust-disposition of his whole estate in favour of trustees.

The trustees of Robert Brand senior raised this action of multiplepoinding, to have the questions relating to the succession of Robert Brand senior settled, and the trustees of Robert Brand junior and of Alexander Brand lodged claims.

While the action was still pending the three sets of trustees entered into an agreement whereby it was contracted and agreed (1) that the whole heritable property, including the mineral lease, should be made over to Alexander Brand's trustees; (2) That the residue of the moveable estate should be made over to Robert Brand junior's trustees; . . . (5) That the whole plant and machinery of the colliery be made over to Alexander Brand's trustees, on condition that if it should be found in the multiplepoinding that any portion thereof was moveable, and as such belonged to Robert Brand junior's trustees, the value thereof should be paid to them by Alexander Brand's trustees, according to a valuation by certain valuators therein appointed.

The machinery here referred to was of a description necessary for working the colliery, and was of the class ordinarily termed trade fixtures.

On 4th August 1874 the Lord Ordinary (Shand) pronounced an interlocutor containing the following finding:—"In regard to the machinery and plant, including rails, which belonged to the deceased Robert Brand senior, and were used by him at or in connection with the colliery held on lease by him from Mr Houldsworth, finds that the machinery and plant, and those parts thereof, are heritable and belong to the trustees of the late Alexander Brand, which were attached either directly or indirectly, by being joined to what is attached to the ground for use in connection with the working and carrying away of the minerals, though they may have been fixed only in such a manner as to be capable of being removed, either in their entire state or after being taken to pieces, without material injury, including those loose articles which, though not physically attached to the fixed machinery and plant, are yet necessary for the working thereof, provided they be constructed and fitted so as to form parts of the particular machinery, and not to be equally capable of being applied in their existing state to other machinery of the kind."

On a reclaiming note the Second Division, on 19th December 1874, recalled the above finding, and in lieu thereof found "that all the machinery therein referred to is to be considered as moveable in a question as to the tenant's succession."

Alexander Brand's trustees appealed.

On delivering judgment—

Lord Chancellor—My Lords, your Lordships have now to dispose of this appeal, which was argued before your Lordships a few days since with very great ability; and I will in the first instance take the liberty of reminding your Lordships exactly how the question which has to be considered arises.

Robert Brand the elder was the lessee during his life of a colliery in Cambusnethan; he held it on a lease for nineteen years, beginning in 1867. When I say it was a lease of a colliery, it was in point of fact a lease of certain seams of coal, with a right of the ordinary description to occupy such portions of the surface as from time to time he might find necessary for the purpose of working the colliery; and then as he occupied portions of the surface, they were to be taken into account and rent paid for them at so much an acre. My Lords, Robert Brand, the lessee, died in 1873, and he made a trust-disposition under which all his heritable and moveable property went to Robert Brand the younger, his son, and the lease being, as your Lordships are aware, by the law of Scotland a heritable subject, would pass under the category of property which was heritable. Now, this Robert Brand the younger in his turn died, and he died under the age of twenty-one years. He made a disposition which, according to the law of Scotland, it has been assumed would carry his moveable property, but would not carry the heritable subjects. The appellants represent the heir of this Robert Brand