SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

LACHLAN MACKINTOSH, Esq. of Raigmore ..... } *Appellant.*
ALEXANDER MACKENZIE, Writer in Inverness..... } *Respondent.*

BY the common law of Scotland, as declared by an Act of Sederunt of the Court of Session, dated the 6th of March, 1783, sheriffs and judges of inferior courts are prohibited, under the pains of law for malversation in office, from acting as procurators in any cause depending before them, in their respective courts. But it seems that a prosecution can only be instituted against the offender with the concurrence of the Advocate-General, as public prosecutor; or, *ex officio*, by the superior court; whether a private person, who has suffered injury by the violation of the law, may proceed as for a private remedy—Quæry.

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BY an order of the Court of Session, dated the 6th of March, 1783, and entitled "An Act of "Sederunt prohibiting *inferior judges* and their "clerks from *acting as procurators or agents* "*before their respective Courts;*" "The Lords of "Council and Session considering that it is "*contrary to law*, and subversive of the impartial "administration of justice, for any judge to act as "procurator or agent in any cause depending "before his court; and as it is a similar abuse "that any clerk of court, or his depute, having

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" trust and custody of processes and writs pro-
" duced therein, and being employed in extract-
" ing of acts and decreets, should be agents or
" procurators in these processes; and having
" observed in the course of certain processes
" depending in this court, that such illegal and
" improper practices have prevailed in some of the
" inferior courts, and may prevail in others; the
" Lords therefore, to prevent such abuse in time
" to come, do hereby strictly prohibit and dis-
" charge all *sheriff substitutes*, magistrates of
" burghs, and other judges whatever, and the
" sheriff clerks, clerks to baillie courts, and other
" clerks of court within Scotland, and their de-
" putes, not only from acting either directly by
" themselves, or *indirectly by mediation of any*
" *confident persons*, procurators or agents before
" their several courts, *in any action or cause de-*
" *pending or to depend before them*, but also from
" giving partial counsel or advice in any such
" action or causes; and that under *the pains of*
" *law for malversation in office, excepting always*
" herefrom petitions or applications for commit-
" ment. And they hereby appoint this act to be
" inserted in the books of Sederunt, and copies to
" be transmitted to each sheriff clerk, with in-
" junctions that he affix the same in the most
" patent place of his office, and transmit a copy
" thereof to the clerk of each baillie court and
" other court within his jurisdiction, with the like
" injunctions to affix the same upon the most
" patent place of their respective offices, that all

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"concerned may be certiorate thereof, and that "none may pretend ignorance."

The sheriff depute of Inverness having appointed a sheriff substitute, in May, 1814, issued a commission, which, after stating the appointment of the grantor as sheriff depute, proceeds in the following terms: "And whereas I am "sometimes necessarily absent, and that Thomas "Gilzean, Esquire, my *ordinary* substitute, may "happen to be necessarily *absent and indisposed*, "*or may be disqualified from his connection with* "*the parties*, or *otherwise*, from judging in some "causes that may be brought before him; and as "it is regular that a proper person should be "named to act in my absence, or during the "*absence or* indisposition of the said Thomas "Gilzean as my substitute, in case of any emer-"gency *or other business that may occur as afore-*"*said*; and I being well satisfied with the fidelity "and capacity of Alexander Mackenzie *, Esquire, "*banker in Inverness*, for exercising and discharg-"ing the trust, and that he is well affected to his "Majesty's person and government; therefore "witt ye me to have nominated, constituted, and "appointed likeas I hereby nominate, constitute, "and appoint the said Alexander Mackenzie to be "one of my sheriff substitutes in the foresaid shire "of Inverness, during my pleasure; and the "*absence, disqualification*, or *indisposition* of the "said Thomas Gilzean, with full power to him in "my absence to hold courts, &c."

* The Respondent, who was also a writer.

This *commission* was *dated the* 12*th May*, and produced in court by Mr. Mackenzie on *the* 19*th May*, 1814, who qualified himself by taking the requisite oaths.

On the 20*th and* 26*th of May*, 1814, *Mr. Mackenzie appeared* as procurator for Mr. Robertson of Inches, upon the execution of a commission granted by the sheriff to the clerk of his court, to take a proof in a cause in which the appellant was a party adverse to Mr. Robertson, the client of Mr. Mackenzie.

In the course of the proceeding under the commission, the Appellant's agent applied to the commissioner, who was clerk to the Respondent, to adjourn the proof, on account of the Appellant's absence. That application was refused, owing to the influence, which, it was alleged, the Respondent had over his clerk the commissioner, and to the injury and loss of the Appellant.

He therefore presented to the second division of the Court of Session *a petition and complaint* founded upon the Act of Sederunt, before stated, praying that the Respondent might be found incapable *of acting as sheriff substitute*, and *suspended from his office*, and also *that he should be found liable in such damages or other penalties* for malversation, as the Court might think just.

The Respondent, by his answer, to this petition and complaint, insisted on four objections, of which the two first only are material to be stated, as being the foundation of the judgment.

1. That the complaint was incompetent, as

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presented without the concurrence of the procurator fiscal, or other public prosecutor.

2. That the Appellant had no title, even as a private prosecutor, to insist on such a complaint, inasmuch as he, having received no particular injury by the breach of the Act of Sederunt, had no peculiar interest to enforce the infliction of the penalties for its violation.

In support of those objections, the Respondent cited the following authorities: *Hume on Crimes*, vol. iii. pp. 185 and 198; *Squire* v. *Steel*, Fac. Coll. 10th Aug. 1765; *Darby v. Love*, 10th Feb. 1796.*

In reply to the first objection the Appellant cited the cases of *Ritchie v. Sievewright*, 4th Feb.

* The two last were cases of prosecutions for fraudulent bankruptcies, at the instance of trustees for creditors. See Syme *v.* Murray, 19 January, 1810, where a complaint was instituted under the act 16 Geo. 2. c. 11. s. 26. which regulates the conduct of returning officers at elections in Scotland, and provides, that if the common clerk of a borough shall refuse to sign and seal a commission to the person elected a commissioner to serve in Parliament, by the majority of the magistrates, and town-council, or shall sign and seal a commission to any other person, he shall forfeit 500*l.* sterling to the commissioner elect, to be recovered (s. 43. by summary complaint before the Court of Session, upon thirty days notice to the person complained of, &c.); and shall also suffer imprisonment for six months, and be disabled to hold the office, &c.

The Court at first refused to sustain the complaint, as not having the concourse of the Advocate-General. The complaint was ultimately sustained, but only so far as related to the pecuniary penalty which was awarded to the complainer. See *Burnett's Treatise on Various Branches of the Criminal Law of Scotland*, p 506, *note*.

1786; *Murray v. Suter*, 9th July, 1793; * *Hawthorn v. Fraser*, 14th Dec. 1799; and *Seller and Thomson v. Duff and Bain*, 11th Feb. 1809; in all which cases the complainers were private parties, procurators, or litigants, in the courts in which the accused persons illegally united the characters of clerk and agent, and they prosecuted exclusively on their own title, without the concurrence of any public prosecutor.

With regard to the *second objection*, the absence of any *legal interest* to prosecute on the part of the appellant, the cases, *Ritchie v. Sievewright*, *Hawthorn v. Fraser*, *and Sellar v. Duff and Bain*, were again cited for the Appellant. In all *those cases* the complainers were merely *procurators* or practitioners in the courts where the illegal combination of offices had taken place, without any pretence of peculiar interest in the observance of the Act of Sederunt, or of peculiar injury by its violation. In the case of *Sellar and Thomson v. Duff and Bain*, where the title was contested, the objection was founded upon the very circumstance of the complainers *being procurators* and *not litigants*, under which last character it seems to have been admitted as indisputable, that any party had a title to complain. In that case the complainers do not seem to have had that secondary interest arising from a professional connection with the clients against whom the parties accused acted as agents, as it appears from the pleadings in that case, "that they (the

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" complainers) did not state directly, that they " were employed as agents in the causes in which, " as they alleged, the Respondents acted as " agents."

Yet, in that case, all objections to title were repelled.

The case of *Murray v. Suter*, decided on the 9th July, 1793,* was also cited. There the complainer, founding his application to the court on the Act of Sederunt, was a private *litigant without any concurrence of a public prosecutor.*

The Respondent in that case urged " that the " complainer had no interest in the matter, because " he was not a procurator." But the Court found the complainer entitled to *damages* and expences, and besides inflicted a fine on the Respondent.

On this second point was also quoted *Hume on Crimes*, vol. i. p. 188.

On the 9th of March, 1815, the following judgment was pronounced in the Court below:

" The Lords having advised this petition and " complaint, with the answers thereto, replies and " duplies, find, that the complainer has not shewn " any title to insist in this complaint, therefore they " dismiss the same."

The Appellant brought the question again under the view of the Court by a reclaiming-petition, upon considering which, with answers for the Respondent, the Court adhered to the interlocutor

* Not reported.

complained of, whereupon this Appeal was brought.

For the Appellants—*Mr. Wetherell* and *Mr. Bligh.* For the Respondents—*the Solicitor General* and *Mr. W. Murray.**

For the Appellant, upon the two first points, the argument was to this effect. The law, as declared by the Act of Sederunt, seems to contemplate a civil remedy as well as a penal infliction: for the word damages is used together with the word penalties.† For the public security, both by the common law, and by the declaration of the Court, judges are prohibited to act as agents in any cause depending in their courts. This prohibition must have arisen from a well grounded apprehension of the propensity which judges infected with the zeal of agents must naturally feel to favour their clients. The characters are wholly incompatible. Suppose that in this or any other case no injury to the party could be proved, should it depend upon the accident, whether the party in the cause suffered injury, to give a character of criminality to an act which the law has positively forbidden and noted as criminal. Such a construction is contrary to the analogy of all penal laws. The object of this law is

* The question was decided both in the inferior and Appellate Court, upon the ground that the Appellant had no title to pursue, and could not proceed without the concurrence of the public prosecutor. The facts, therefore, and arguments upon the other points of the case, became immaterial, and are omitted.

† See Syme *v.* Murray, *ante*, p. 276.

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to preserve purity in the administration of justice; the penalties, therefore, ought so to be directed and enforced as to deter a judge from placing himself in a situation in which he may be tempted to act partially, and violate the great duties of his office. When a judge becomes an agent in the cause, he must betray either his client or his oath. According to the construction now attempted, the law is supposed to be merely remedial, giving a private compensation to each individual suitor who might be injured, if he should, by good fortune, be able to prove the fact; and the reparation, upon this hypothesis, ought to be a payment to the party according to the amount of the injury. But here is a solemn regulation of law made to secure the impartial administration of justice: ought this to be reduced in practice to a mere private remedy, by which a party injured might seek a reparation in damages at his peril? That the public prosecutor is not a necessary party, appears by the cases cited in the Court below.* And although in some of these cases, procurators acting in the same court with the offender were the prosecutors, it is a libel on jurisprudence to imagine that such a law was made, not for the important and obvious purpose of preventing partiality and corruption in the seat of justice, but for the trifling or pernicious object of protecting agents and proctors against competition; that is, for the purpose of aiding a monopoly.

On the part of the Respondents it was argued—

* See *ante*, pp. 276, 277, and the note p. 276.

1. That the Appellant, having suffered no injury, could not have title to prosecute. 2. That if the Appellant had such title, the proceeding ought to have been in the name of the Advocate-General as public prosecutor: that the Act of Sederunt was only declaratory of a pre-existing law: that malversation was the offence contemplated by the Act of Sederunt. That in the case of Sievewright he was found guilty of malversation. Here was only one act charged of an equivocal nature, refusing to give time for the Appellant to appear at the proof under the commission. That might have been properly refused. The proceeding is of a criminal nature, and the party ought to have proceeded in the name of the Advocate-General.*

* In England, all criminal proceedings are in the name of the King, but at the suit and under the direction of a private party. In cases of oppression, or a double proceeding, application may be made to the Attorney-General, and he, if he thinks fit, may direct a *nolle prosequi* to be entered on the roll, by which the proceedings are suspended. How far this is a discretionary power in the Attorney-General, and how far in particular crimes the undue exercise of discretion is controlled by the right of appeal, or other checks, are questions of great interest, but too large to be discussed in a note.

In Scotland, it seems to be held that no indictment can be sustained by a private party, without the concourse of the King's Advocate. But it is said to be understood that the concourse cannot be refused, and that the Advocate may be compelled to give it (how is not stated) in all cases where the complaint of the private party is founded on a known and relevant *point of dittay*, and as to which he has, *primâ facie*, a title to insist. It is allowed on the other hand, that the King's Advocate may refuse his concourse in cases of an opposite description. See Burnet's Treatise on, &c. p. 306. The King's Advocate, according to this

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The Court of Session has in some cases assumed a jurisdiction; * but the offence is of a public nature. The proof must be of malversation by acting at the same time, in the same cause, as judge and agent. In the commissions of oyer and terminer, &c. in England, practising barristers are included, and often try causes.

Reply. In such case they have nothing to do with the cause as counsel or agents.†

doctrine, must exercise a discretion. How it is to be controlled, or what appeal there may be against his decision, except by impeachment, quære. It is, however, more distinctly stated by the same author, that the King's Advocate cannot suspend the prosecution by a *nolumns prosequi.* To do so (and in proper cases to refuse his concurrence) is manifestly a denial of justice. See Burnet, p. 298.

* In the case of A. Ritchie, 29th June, 1798, upon a complaint against printers for giving a false account of proceedings in the court, concluding for damages to the complainer, and stating the offence as *derogatory to the dignity of the court;* it was said that the vindication of the Court belongs exclusively to the Advocate-General, or the Court itself; and the complaint was dismissed upon this among other grounds. See Burnett, p. 302.

† In the Court below, the case of Murray was cited on behalf of the defender; and on the part of the pursuer it was further argued, that the concourse of the Advocate-General was not necessary, because the purpose of the proceeding was merely to enforce an Act of Sederunt published by the Court; and although this act may be merely declaratory of the former law, still it is the duty of the Court to enforce it. The judges undermentioned delivered their opinions to the following effect.

Lord Glenlee.—The Act of Sederunt is applicable only to permanent judges; if it were otherwise, the inconveniency would be great. If it were applicable to occasional substitutions, what could be done in case of sudden emergencies, disqualifications of ordinary judges, &c.; for who else than a procurator so fit to be appointed? It must be a man of business; and a more proper person could not be chosen. And I believe this to be the uni-

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March 9. Motion for Judgment.

*Lord Redesdale.**—This is a question whether the Court of Session have done wrong in deciding versal practice. If he carried on business during the subsistence of such substitution, and in a process against the Complainer, then his title to complain would be undoubted; but this did not happen: and besides, I see no injury has been suffered; I am, therefore, inclined to dismiss the complaint.

Lord Robertson.—I agree, with regard to doubts on the title, with Lord Glenlee. The *law of Scotland* knows of no popular *action* against a judge. I agree also with his Lordship in thinking that the Complainer has no title; he must qualify an interest peculiar to himself: no such title, however, is alleged; he has no more than any other inhabitant of the county. And as to the case of Sellar, I have even very great doubts on the title of the Complainer, in that case. As to the merits, however, I differ from Lord Glenlee. There can be no doubt that substitution, granted merely for routine business, as signing warrants, &c. would not fall under the Act. But the substitution here complained of is of a very different nature; it is so broad, that if Mr. Gilzean were in any way incapacitated, the Defender may act; and it is *not at this moment recalled or resigned.* No man can act as judge and procurator in the same court; and, therefore, were the question to rest on the merits, I should be inclined to entertain the complaint; but only to the effect of giving the most lenient sentence, and should only go the length of the mere strict letter.

Lord Bannatyne.—The competency depends much on the fact. The Complainer has shown no action of his, wherein the defender acted both as judge and procurator; and there is nothing in the commission to prevent his also acting as procurator. The Court can take cognizance in the shape before us; they can do so at any time, *ex officio.* The Complainer has shown no title to complain; and I am, therefore, for dismissing the complaint.

Lord Justice Clerk.—On the title, I am clear that the Complainer has a good one. I am not in the least moved, as to the case of

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* The Lord Chancellor was absent on account of illness. The Chief Justice of the King's Bench sat in the House during the hearing of the Appeal.

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that there was no title in the Appellant. That Court cannot make an act criminal which is not so by the common law of Scotland. The Act of Sederunt recognizes the common law as the foundation of their Act, which made the law more public; and it is again recognized more fully in

Murray, which related to statutory penalties. This Complainer only meant to enforce your Lordships' Act of Sederunt. There is no distinction *as to the party complaining, whether litigant or procurator*. The party here complaining has a positive interest, and is, undoubtedly, entitled to complain, and has fully more interest than a procurator. It gives me a good title to complain, if a judge shall act against me in any cause, in the same court, because of influence, &c.; and he has, therefore, as tangible a title as can be conceived. The case of Murray, alluded to, does not apply. On the merits, the question is, Has there been a violation of the Act of Sederunt? There is no doubt that the great object of the Act was to affect the existing and permanent judges. It would be an odious practice, in any process depending before a court, to permit the judge, in any case, to act *as agent*. The question here is, whether this substitution be within the scope of the act. Now I agree with Lord Robertson, that *this is not a limited substitution, but a general one*, enabling Mr. Mackenzie to act in every case, in certain circumstances, viz. absence, indisposition, or disqualification. Now this word; "disqualification," is very important in judging of the nature of the substitution; for the permanent substitute may even now be in that predicament, in a process at his own instance, or in behalf of the numerous constituents for whom Mr. Gilzean acts; so that Mr. Mackenzie will be entitled to judge in cases, even after Mr. Gilzean's return; and I am, therefore, clear that the substitution is neither sopite nor recalled; at least, of recall there is no evidence. Is this decent? I am not prepared to say that the Complainer is not entitled to have the substitution recalled; being clearly within the spirit of the act. If a special substitution be necessary, it should not be given to an agent.

However, I conceive, that if the complaint is to be entertained, the slightest possible judgment should be given.

one of the cases which have been cited. The Act of Sederunt prohibits inferior judges to act as procurators, or agents, before their respective courts; and considering it, as they by their act declare it to be, an abuse, "*contrary to law, and subversive* "*of the impartial administration of justice, for any* "*judge to act as procurator, or agent, in any cause* "*depending before his court*, and having observed "that such illegal and improper practices had "prevailed in some of the inferior courts, and "might prevail in others; to prevent such abuse "in time to come, they strictly prohibit all "sheriffs substitute from acting, directly or in- "directly, before their several courts, in any cause "depending before them."

Whether the act done by Mr. Mackenzie comes within the prohibition, is not now to be discussed here; because the Court below have only considered the question, whether the Appellant was intitled to sue. In the cases cited, the Court does seem to have acted on petition and complaint, without the concurrence of the public prosecutor. But in all those cases, the Court acted under circumstances which brought the matter before them *quasi ex officio*.

It is not customary, in proposing to affirm a judgment, to go, at large, into the reasons for affirmance; and, unless some Lord differs from me, I shall propose to find that the decision of the Court of Session is not wrong, finding, as I do, that the judges of the Court of Session, having the cases before them, have paid no regard to them. I agree that the appointment of a person, known

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to be acting as agent, to be sheriff's substitute, was highly improper. It is a practice which ought not to be continued. It may lead to great inconveniences, to speak of it in the mildest terms. But as all the judges agree that if the complaint had been entertained, they should have inflicted a slight punishment, it is not worth while to reverse the judgment.

There is, however, so much in the case, that I cannot recommend to the House to give costs for Mr. Mackenzie, although, by this judgment, he is absolved.*

* By the act 20 Geo. 2. c. 43. for abolishing heritable jurisdictions in Scotland, the appointment of sheriffs of counties and stewartries, heritable, or for life, and their jurisdictions, &c. was taken away from subjects, and resumed and annexed to the crown; and by sect. 29. it was enacted, that there should be but one sheriff or stewart depute, in each county, &c. in Scotland, to be appointed by the King, after seven years from the date of the Act, *ad vitam aut culpam;* and to every such sheriff depute is given power to appoint one or more sheriffs substitute to act during his pleasure.

The sheriffs depute and their substitutes have, by the law of Scotland, very large jurisdiction, both civil and criminal, including the trial of almost every species of crime, and of the most important civil causes. See *Ersk. Inst.* b. i. t. 4. ss. 3, 4, et seq.

The rule, therefore, which prohibits their acting as agents, is of much greater importance than in England, where the sheriff has a very limited jurisdiction. But even here the law has provided (1 Hen. 5. c. 4.), that no under-sheriff, sheriff's clerk, receiver, or bailiff, shall practise as an attorney, in the King's courts, during the time when he is in office with any sheriff.

This statute is evaded by practising in the name of other attorneys, or by putting in sham deputies as nominal under-sheriffs; a practice which excited the indignation of Dalton. See *Blac. Com.* i. 345.