[8*th June* 1841.]

THOMAS SCOTT of Abbottsmeadow, Appellant.[1] (No. 12.)

[*Sir W. Follett — James Anderson.*]

Messrs. CURLE and ERSKINE, Writers in Melrose, Respondents.

[*Lord Advocate (Rutherfurd) — Pemberton.*]

Process — Practice in Bill Chamber — Sheriff's Process — Caption — A. S. 17*th Jan.* 1797 — *A. S.* 14*th June* 1799 — *A. S.* 11*th July* 1828 — *A. S.* (*Sheriff Courts*) 11*th July* 1828, *c.* 19. *sect.* 4.—In an advocation from a Sheriff Court the bill was passed, but the advocator did not expede the letters till after the expiry of ten days. The opposite parties obtained a certificate of that fact from the Signet Office. The advocator, who had borrowed the process from the sheriff clerk on a receipt to return the same on demand, delayed returning it to the clerk, and thereafter expede letters of advocation, which he called in Court, and placed the process in the hands of the clerk to the advocation in the Court of Session. The Lord Ordinary, the Court adhering, dismissed the advocation. The advocator having been imprisoned under a sheriff's process-caption, obtained upon the application of the opposite parties, brought an action of damages against them: Held, assuming the said certificate to have been regular, (affirming the judgment of the Court of Session dismissing the action), (1.) That, in consequence of the letters of advocation not having been duly expede, there was no depending process in the Court of Session: (2.) That the party advocator was bound to have returned the inferior

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[1] Fac. Coll., 2 D., B., & M.

court process to the sheriff clerk, to be by him transmitted to the clerk of the bills; it being observed by the Lord Chancellor, that a party borrowing a process in a Sheriff Court, on a receipt to return the same on demand, and depositing it in the Court of Session, cannot be permitted to plead the possession of the Court of Session as a reason why he should not obey the order of the proper court.

Amendment of the Libel. — In a summons of damages for the alleged illegal and malicious use of a sheriff's process-caption, it was stated, narrativè, that the writ was "under "the hand of the sheriff clerk," and that the whole proceedings were illegal, &c. Held (affirming as aforesaid), that, although the record was not closed, an amendment of the summons ought not to be allowed, to the effect that the said "caption was not issued by the sheriff, nor was "it an extract of any warrant duly signed by him," except on payment of the previous expenses.

Practice in Bill Chamber — A. S. 14th June 1799. — Question as to the regularity of a certificate that letters of advocation had not been expede, the bill having been passed on the 13th August; the certificate bearing, that from the 22d August till the 3d September inclusive no such letters had passed the signet. (See p. 323.)

Costs. — The House of Lords will not allow an appeal in respect of costs. (See p. 324.)

2d Division.

Lord Ordinary Jeffrey.

Statement.

THE appellant, a procurator in Roxburghshire, presented an application to the sheriff of that county for the delivery of certain title deeds by the respondents. The application having been refused, the appellant advocated, and the bill was passed in common form on 13th August 1836. Letters of advocation were not expede within the ten days, in terms of the act of sederunt, 14th June 1799, sect. 5. The passing of the bill was held, as intimated by the respondents, on the 24th of August. The respondents thereafter

obtained a certificate by the substitute keeper of the signet, which bore the dates and was in the terms following:—"Searched the signet books from the "22d day of August last to the 3d day of September "current, both days inclusive, and found no letters of "advocation there entered as having passed the signet "during the above period, at the instance of Thomas "Scott, of Abbotsmeadow, against Messrs. Curle and "Erskine, writers in Melrose, and Mrs. Erskine, residing "there. Signet Office, 3d September 1836."

The respondents, on 7th September, wrote to the appellant to return the sheriff court process, which stood borrowed on his receipt to return the same when demanded; and this request not being attended to, caption was marked and issued in common form. The appellant admitted, in answer to the respondent's letter of the 7th September, that the process was in the hands of his Edinburgh agent, and that he would request that it might be lodged in the Bill Chamber; and he afterwards admitted that he had lodged the process in the Bill Chamber with the bill, and thereafter had it transmitted to the clerk of the process in the Court of Session, in whose hands it was at the date of his apprehension on a process caption, as after mentioned.

The appellant, on 26th September, expede letters of advocation, which, upon the meeting of the court, he called and enrolled in absence of the respondents; who, however, appeared at the bar when the cause was called by the Lord Ordinary (Corehouse), and objected to the competency, on the ground that the letters had not been duly expede, and which objection his Lordship, on 20th December 1836, sustained.

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The process not having been returned to the sheriff clerk, a caption was enforced, and the appellant was imprisoned in Jedburgh Castle upon the 23d December. He presented a bill of suspension and liberation on the 24th December, and produced a certificate of the same date by the "clerk of process," bearing, that the process was then in his (the clerk's) custody, "being at present "in dependence in the Court of Session;" and the Lord Ordinary (Cockburn) forthwith granted warrant for the appellant's liberation. A reclaiming note was thereafter lodged by the appellant against Lord Corehouse's interlocutor of the 20th December, which the Court, on 26th May 1837, refused.

The appellant (13th May 1837) brought an action of damages for wrongous imprisonment against the respondents, stating in his summons that the process was, at the time of his apprehension, subject to the order of the Court of Session, and not of the sheriff; and that he had been apprehended "in virtue of a pro-"cess-caption under the hand of the sheriff clerk of Rox-"burghshire;"—proceedings which he subsumed were illegal, malicious, and injurious. The respondents in defence pleaded, that, the advocation never having been a depending process, it was competent to proceed in the sheriff court as if the bill had been refused, and illegality and malice were denied. The record having been prepared, but not closed, and the cause remitted for the preparation of issues, it was re-transmitted, upon the motion of the respondents, to the Court of Session roll, to have the question of law, raised by the defences, disposed of previous to trial.

The Lord Ordinary (26th November 1838) ordered minutes of debate on the points of law or relevancy,

and by a subsequent interlocutor (7th December 1838) allowed the appellant to give in a minute stating an addition to the record, to the effect that the "caption "was not signed by the sheriff, nor was it an extract of "any warrant duly signed by him," and a relative plea in law. When the minutes of debate were given in, the Lord Ordinary (9th November 1839) made avisandum therewith to the Court, expressing the inclination of his opinion in a note, that "the new plea "cannot be entertained under this summons."

Statement.

The Court (18th January 1840) pronounced the following interlocutor:—"The Lords, having advised "this process and minutes of debate, and heard counsel, "remit the cause to the Lord Ordinary, to close the "record and sustain the defences, and to decide as to "expenses of process as to his Lordship shall seem fit, "and decern, reserving to the pursuer to institute a "new action, if he shall be so advised."

Judgment of Court, 18th Jan. 1840.

Mr. Scott appealed.

Appellant.—1. There is raised on the record a bonâ fide case of malice and oppression, in the use of a process-caption served irregularly by a sheriff clerk, while the proceedings were actually part of a depending suit in the Court of Session. The effect of the passing the bill and of the subsequent procedure was, to bring the inferior court proceedings under the control and jurisdiction of the superior court, so as no longer to be subject to the order of the sheriff; and as the process was in the hands, first, of the Bill Chamber clerk, where the respondents might have borrowed it, and thereafter of the clerk to the advocation in the Court of Session, this was not a case where the proviso of

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the A. S., 17th January 1797, and more recent sheriff court A. S., 1828, c. 19, sect. 4, were imperative, as to the process being returned by the party borrowing it to the sheriff clerk, to be transmitted by him to the clerk of the bills.

Although, strictly, the letters of advocation must, by A. S., 14th June 1799, be expede within ten days, yet, in practice, the period from which the time runs[1] is not precisely understood or acted on; and as the respondents held the passing of the bill as intimated after the lapse of the ten days, and withheld from the appellant all knowledge of the obtaining of a certificate, they acted in malâ fide. At any rate the appellant was clearly entitled to discuss the question of the competency of the advocation, which, from the informality of the certificate and otherwise, might have been sustained; but till it was disposed of by the Lord Ordinary and the Court, it was as much a depending process as any other advocation then in Court; and so the Lord Ordinary must have held, as by his interlocutor he "dismissed" the process, thus showing that there had been a process before him.

2. The summons, which sets forth the signing of the process-caption by the sheriff clerk and the illegality of the proceedings, is broad enough to let in a claim for damages, on the ground that the caption was not signed by the sheriff. The relevancy of a claim to damages on this ground will not be disputed after the case of Landell v. Brodie or Landell.[2] At any rate, the record not being closed, an amendment of the libel

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[1] Beveridge on Bill Chamber, pp. 90—94.

[2] 26th Jan. 1838, Fac. Coll. See also Stair, 4. 47. 23; Bell, Dict. & Dig. p. 127; Maclaurin, Form of Process, p. 55; M'Leod v. Hill, 16th Nov. 1826, 5 S. & D. 1; Horne v. Steele, 18th Feb. 1825, 3 S. & D.

ought to have been allowed, reserving all the question of expenses.[1]

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Respondents Argument.

Respondents.—1. The terms of the A.S., 14th June 1799, sect. 5, as renewed by the Supreme Court, A.S. 11th July 1828, sect. 17 and 18, show that, ten days having elapsed before the letters were expede, the advocation fell to the ground, and that the respondents, upon obtaining the certificate after the lapse of that time, were at liberty to go on with their diligence or other proceedings, as if the bill had been refused.

[*Lord Chancellor.*—How does it happen that this certificate does not bear, that the letters were not expede within ten days from the passing of the bill, that is to say, from the 13th to the 23d of August, but only certifies the fact after the 23d of August?]

The certificate may in that respect be defective, but the fact of letters not having been expede within the prior period is admitted; and if otherwise, no certificate would have been issued. Besides, this has been disposed of by the Court, by a judgment not appealed from.

There being no depending process, therefore, the appellant was not entitled at his own hand to keep up the inferior court proceedings, which were more properly lodged by him in the Bill Chamber, as the A.S. 11th July 1828, sect. 9 and 10, require.

2. The summons was not so libelled as to let in the claim for damages on the ground of the objection to the process-caption, and the Court exercised a wise discre-

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550; Livingstone v. Beveridge, 24th Nov. 1831, 10 S. & D. 52; Dunlop v. Hay, 14th Nov. 1822, 2 S. & D. 11; Pagan, 14th Feb. 1835, 13 S., D., & B. 471.

[1] Inglis & Company, 9 S. & D. 199; Anderson v. Main, 20th May 1835, 13 S., D., & B. 807.

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tion, and acted consistently with its approved practice, under the judicature act, in not allowing the proposed amendment of the libel.[1]

LORD CHANCELLOR. — My Lords, in this case, at the time of the hearing, I felt no doubt, except on one point, that of the form of the certificate mentioned. With respect to the rest of the case which has been brought before your Lordships by the appellant, it did not create one moment's doubt. The interlocutor of the Court of Session remitted to the Lord Ordinary to dismiss the action, with power to decide as to expenses, the Court being of opinion that the pursuer (appellant) was not entitled to the relief he prayed. The only other judgment the Court could have pronounced would have been to allow the amendment under the penalty of previous expenses. But the Court, at the same time, while it dismissed the action, gave him the liberty of commencing a new action, if he should be so advised. This really, therefore, is a case that resolves itself into a question of costs, though it does not assume that shape. Your Lordships do not allow an appeal in respect of costs[2]; but where the same question is presented in another shape, your Lordships are under the necessity of hearing a discussion on a question as unimportant between the parties as if it had been presented as a mere question of costs.

The contest between the parties arose out of a summary application in the Sheriff Court, from which the appellant presented to the Court of Session a bill of advocation. There is no doubt that that bill of advo-

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[1] Shaw's Digest voce Process, p. 371. nos. 27. 41. 54. 58. 65. 92.

[2] Clyne's Trustees v. Dunnett, M'L. & Rob. App. p. 28; Earl of Strathmore v. Paul and others, 1 Rob. App. 217.

cation fell to the ground, unless a certain step was taken by the appellant within ten days; that is to say, at the expiration of ten days, according to the construction which has been put on the act of sederunt, it was competent for the opposite party to put an end to the proceeding, if that process had not taken place. More than ten days did elapse. The respondents then applied for a certificate, which certificate was in these words. [His Lordship read it.] There is no doubt that upon ten days having elapsed, and the proper certificate being obtained, according to the act of sederunt, the advocation was actually gone,—it no longer existed. The terms of the act of sederunt[1] are, "that the other party "may go on with his diligence or other proceedings as "if the bill had been refused."

After that, however, the appellant proceeded as if no such step had been taken to put an end to the bill of advocation. He expede the letters, and brought the advocation first before the Lord Ordinary; and after the Lord Ordinary had decided, on this very ground, that the certificate of lapse of time put an end to the suit, he thought proper, not being satisfied with the Lord Ordinary's decision, to bring the case before the Court; and the Court, of course, adjudged in the same way as the Lord Ordinary had done. It is said, however, the appellant having possessed himself of the Sheriff Court process, and placed it in the hands of the clerk to the advocation process, that the advocation was still a depending process, and that the pendency of the advocation prevented the respondents taking any proceeding in the Sheriff Court. That would be a very strange view to be taken of the case, if the act of sederunt put

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[1] A. S. 14th June 1799, sect. 5.

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an end to it completely, and enabled the party who had got the certificate to go on with the proceedings in the Sheriff Court. There is no question about the construction of this act of sederunt. If, then, an advocation is actually out of Court by the lapse of the ten days, there being no farther opportunity of preventing the opposite party going on in the Sheriff Court, an advocator thinks proper to institute so useless a proceeding as to apply to the Lord Ordinary in the first instance, and the Court afterwards, that cannot be considered as a pendency of the process in favour of the party who has gone on prosecuting the advocation, assuming the proceedings to be regular, after the expiration of ten days, and after a certificate granted to the opposing party, which, by the terms of the act of sederunt, put an end to the cause. It may be assimilated, according to our course of practice, to the case of the Court of Chancery dismissing a bill; the plaintiff is actually out of Court, and if he thinks proper to give notice of a motion in that cause, if he comes before the Master of the Rolls or the Vice Chancellor, who must necessarily give judgment against him on the motion, on the ground that the suit is no longer in existence, and if the party, notwithstanding that, brings the matter by appeal before the Lord Chancellor, who must necessarily decide that that suit is ended, can such person say that the suit was pending? Certainly not, nor can the appellant be heard to contend that this advocation was pending, because he has chosen to take these proceedings, contrary to the act of sederunt. It is impossible to contend that that is a pendency of a process, for the purpose of preventing the party who, by the act of sederunt, had a right, on the certificate being granted, to take the course he did.

The respondents having armed themselves, as I have stated, with the certificate, in terms of the act of sederunt, proceeded in the Sheriff Court; and having found that the proceedings, which ought to have been in the hands of the sheriff clerk, were somehow in the possession of the appellant, having been procured by him from the Sheriff Court, they applied to have them restored. They were not properly in his possession, and ought not to have remained in his possession; and it is quite clear he had no right to use the possession he so obtained from the Sheriff Court for the purpose of expeding letters of advocation. The mode of proceeding is very clearly pointed out; he ought to have restored them to the Sheriff Court, having borrowed them for a particular purpose. He did not deny that he was bound to deposit them in the Sheriff Court, but, contrary to the purpose for which the documents had been entrusted to him, and contrary to the act of sederunt, he brought these proceedings into the Court of Session; at least so he states, and that may be assumed, for the present purpose, to be a correct representation. But there is another fact which he does not dispute, for it appears from his own minute of debate, namely, that on the 7th of September, those documents were in the possession of his agent in Edinburgh.

He is then called upon, by proceeding in the Sheriff Court, to bring in these documents; he does not do so; he states no reason for not doing so, but afterwards deposits them in the Court of Session. Now, if a party is entrusted with documents in the Sheriff Court, under an obligation to return them to the clerk of the Sheriff Court when called upon to do so, and he afterwards thinks proper to deposit them in the Court of Session or elsewhere, he cannot be permitted to plead the pos-

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session of the Court of Session as a reason why he should not obey the order of the proper Court. That, however, was the course taken. After repeated applications, having deprived himself of the means of obeying the order of the Sheriff Court, by having deposited the document elsewhere, (at least so he alleges,) he is arrested under process of the Sheriff Court for not obeying the order of that Court; and then he gets liberated, and for that arrest he brings his action of damages; and these facts are stated by himself. He also states, not as the statement of a grievance, but in the course of the narrative, that he was apprehended, on the 23d Dec. 1836, by a process-caption "under the hand of the she-"riff clerk of Roxburghshire;"—not, I say, stating that as a grievance, but narrating it as part of the transaction. Now, that process-caption is said not to have been regular, in respect it was signed by the clerk, and not by the sheriff. That objection the Court of Session, on the case being brought before them, did not dispose of. They did not think the summons stated that as a ground of action, which it clearly did not, but as a part of the narrative, and they held, that if the party meant to state that as a specific ground of action for his arrest, he ought to have distinctly libelled it as such, and therefore the Court adopted a course which preserved to the party complaining of the arrest all the benefit he might be entitled to in consequence of any defect in the process-caption, by giving him liberty to bring another action on that ground, if he thought proper; but it refused him an opportunity to amend his pleadings, by introducing a new grievance as a ground of action. Now, the action proceeded on a totally different ground. His alleged error in the process-caption not having been brought forward, and stated as a ground of com-

plaint, but merely incidentally stated as one among other circumstances, it would certainly have been a very inconsiderate exercise of discretion for the Court to have permitted the amendment to have been made. It was for the Court to determine the question of relevancy or competency, and the Court being of opinion, in which it appears to me clearly that they were right, that that was not a complaint stated or relied upon in the summons, the permitting a party to amend the record, for the purpose of bringing forward some new case, would have been an act of injustice towards the other party. The Judges felt that they could not permit a record framed for one purpose to be turned to another, and therefore they dismissed the action of damages, but at the same time, while they dismissed the action, they left him at liberty to bring another, if he thought proper. Now, the expenses must have been paid at all events; if the amendment had been permitted, the expenses must have been paid up to the point when the action was allowed to proceed on a new ground; so that, regarding it, simply, as a question of expenses, the effect of the action being dismissed (with expenses), with liberty to bring a new action, would be precisely the same in every respect, except that in the one case the party would have to pay expenses up to the period of the amendment, and in the other to pay the expenses of the action so dismissed.

The only point, on which I yesterday entertained any difficulty, was as to the form of the certificate. I did not receive any explanation, why, the bill of advocation having passed on the 13th of August, the search is stated to have been from the 22d day of August, and finds that there was no bill of advocation at that period.

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Why it was that the information was not required for the period previous to the 22d, the day stated in the certificate, I do not understand; but there is in the appellant's case (p. 4.) a passage cited from Mr. Beveridge[1]: "It may be noticed, that in practice the ten days have "been reckoned heretofore, not from the date of the "interlocutor passing the bill, but from the date that "the bill so passed is issued, or in a state to be issued, "by the clerk to the bills." Whether that is the period to which the date refers or not, there has no satisfactory explanation been given, but in the same page of the appellant's case there is a passage, which appears to me to remove the difficulty arising from the doubt as to the period to which the certificate refers, for it is there stated, "that if the letters should be expede before the "certificate is issued, although beyond the ten days, "the proceeding is quite effectual; in fact the keeper of "the signet would not issue a certificate if, before such "certificate was applied for, the letters were actually "expede, although after ten days." The only difficulty that arises upon the terms of the certificate is the possibility that in the interval between the 13th of August and the 22d of August letters of advocation might have been signeted. But that is entirely excluded by the statement of the appellant himself, that, on the application to the officer for the certificate, though more than the ten days had elapsed, he would not have granted the certificate applied for, if, even after the expiration of the ten days, letters of advocation had been expede before the certificate was applied for. Now, that appears to remove the possibility of there having been such

[1] Treatise on Bill Chamber, p. 90.

letters expede at the time the certificate was granted, and in point of fact there is no statement that there were such letters expede at any time between the 13th of August and the 22d.

This, however, was a question for the parties before the Lord Ordinary in the original suit, because, when that cause came before the Lord Ordinary, if this bill of advocation was gone, if there had been no duly expede letters of advocation, of course it was competent, to the party contending that the bill of advocation was gone, to raise that as an objection, and to apply for the dismissal of the process; and it was competent for the other party to insist on the irregularity of the certificate, if any such objection could be made; and then it would have become the duty of the Lord Ordinary or the Court to decide on the regularity of the proceeding; and if there was no certificate, in consequence of which the suit was necessarily ended, it would be matter of discretion for the Lord Ordinary or the Court to determine what course should be pursued. But neither on the one occasion nor the other do we find any question raised on the ground of a supposed irregularity of the certificate. It is, therefore, a case in which the whole effect of the certificate remains, and this certificate must be assumed to be a regular certificate in the absence of any authority to show that it is irregular. The case having been four times before the Court of Session, twice before the Lord Ordinary, and twice before the Inner House, and that objection not having been made, it would be too much for your Lordships to assume, in a question of practice, that there is any thing, in substance, in that which appears, certainly, not perfectly explained.

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If then that is a valid certificate, the proceeding in the former action was gone at the time the letters of advocation issued, and all further proceedings were null and void, and so the Court said whenever the question came before them. Whether the respondents were correct in their proceedings in the Sheriff Court, or whether there was any defect in the process-caption, is a question which may be tried, if another action is brought. It is quite sufficient that this action of damages has failed on all the grounds on which it was brought, and therefore the interlocutor of the Court of Session was perfectly correct in dismissing that action, and directing the pursuer to pay the expenses, leaving him at liberty to bring another action, if he thought fit. Under these circumstances, my Lords, I submit that the interlocutor appealed from should be affirmed, with costs.

Judgment.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor, therein complained of, be and the same is hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the said costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

J. W. NICHOLSON — SPOTTISWOODE and ROBERTSON, Solicitors.