Young junior acquiesced in this, and that the said £200 bill was renewed and retired for that object; but, Finds that James Young junior has not only deponed, when examined as a witness *in causa*, that he never gave any such assent, but has added that at the end of 1863 he sent the defender an account showing the state of his transactions with the firm, which state was made up on the footing that the defender was to be paid only 10s. in the pound of the father's debt, and that the defender made no objections to the state: Finds that this evidence is corroborated by other testimony, and there is no proof that the pursuers, as a firm, agreed that the old debt should be paid in full: Finds that, in these circumstances, it has been correctly found by the Sheriff-substitute that the defender is barred from pleading his own corrupt bargain with James Young senior as entitling him to throw the composition-contract overboard, and if he cannot do so, then he has been paid all he can claim in respect of James Young senior's debt, and he is still resting-owing, under the said two bills, the above-mentioned quantity of tallow, or its value: Finds that in the interlocutor appealed against the defender has been *per incuriam* ordained to give delivery of the whole quantity of tallow, said to have been originally contracted for, viz., 84 cwts. 1 qr. and 18 lbs., without crediting him with the 38 cwts. 3 qrs. and 17 lbs., receipt of which is acknowledged in the summons: Therefore, so far alters the said interlocutor, and ordains the defender to deliver to the pursuers, within three weeks, 45 cwts. 2 qrs. and 1 lb. tallow, with certification that, failing his doing so, decree will be given against him for the sum of £81, 18s., as the value of said tallow: *Quoad ultra* adheres to said interlocutor; dismisses the appeal," &c.

The defender advocated.

WATSON and MACLEAN for advocator.

SHAND and BRAND for respondents.

The Court adhered. They held that the defender, as founding on the illegal arrangement alleged on record, could not have effect given to his averments without proving that arrangement, even supposing that arrangement, if proved, to be a good defence to the action. But he had entirely failed to prove the arrangement, though he had been examined four or five times in the course of the proof; while, on the other hand, the pursuers gave evidence to the effect that there was no such illegal arrangement as the defender represented.

Agents for Advocator—Graham & Johnston, W.S.

Agent for Respondents—A. K. Mackie, S.S.C.

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## *Thursday, February* 18.

### FLEMING *v.* FOSTER.

*Expenses—Husband and Wife—Declarator of Marriage.* In a declaratorof marriage the pursuer founded on a written acknowledgment of marriage, the authenticity of which was denied by the defender. The Lord Ordinary found the marriage proved. The defender reclaimed. Before the reclaiming note was heard, the pursuer (respondent) moved for an interim award of expenses. The defender opposed. The Court awarded £10, 10s. to enable the pursuer to defend the judgment of the Lord Ordinary.

This was a declarator of marriage, in which the pursuer founded, *inter alia*, on a written acknowledgment of marriage subscribed by her and by the defender on the fly-leaf of a bible. The defender denied the authenticity of the writing. The Lord Ordinary, after a proof, found the marriage proved.

The defender reclaimed.

KEIR, for the pursuer, asked an interim award of expenses.

ASHER, for the defender, argued that such a motion was never granted, unless there was (1) a written acknowledgment, the authenticity of which was admitted, and (2) a recognition by the defender of the pursuer's status as his wife, neither of which, he contended, was found here; *Sassen* v. *Campbell*, 20th Jan. 1819, F. C.; *Brown* v. *Burns*, 5 D. 1288; and *Fleming* v. *Corbet*, 21 D. 179, were cited.

At advising—

LORD PRESIDENT—The cases of *Sassen* and *Brown* are not in point.

To grant interim aliment to the pursuer of a declarator of marriage is always a very strong thing, for that is an interim recognition of her status as a married woman; but the motion here is for a sum to enable the pursuer to proceed with her action, and to defend the judgment of the Lord Ordinary. That is a much more favourable position than the other. I do not understand the pursuer's claim to be for a sum of money to cover the expenses already incurred. If that were the motion, I should not be prepared to entertain it; but I understand it to be a motion for a sum of money to be employed in defending the judgment of the Lord Ordinary, and that carries a good deal of appearance of equity with it. I don't think there is anything in the case of *Fleming* inconsistent with that. That was a case where the motion was made in a peculiar position of matters. The pursuer held a judgment of the Lord Ordinary in her favour, but when the case was heard on the reclaiming note, there being then no motion for expenses, the Court found that they could not pronounce judgment on the case as it stood, opened up the record and concluded proof, and remitted to the commissary for farther proof. It was after that that the pursuer made a motion for expenses, and in these circumstances the pursuer could not represent herself as being in possession of the judgment of the Lord Ordinary, for that judgment, though not formally recalled, was practically no longer a standing judgment. Besides, though the writing on which the pursuer founded was said to be dated in 1850, she made no claim for status until 1857, and in the meantime she had dealt with herself and her children as the mistress and the bastard children of the defender. But in the present case the circumstances are very different. All the length I am disposed to go, however, is to make such an award as will enable the pursuer to instruct her counsel and agent for opposing the reclaiming note, and I think £10, 10s. is sufficient for that purpose.

The other Judges concurred.

Agents for Pursuer—Macdonald & Roger, S.S.C.

Agents for Defender—Adam, Kirk, & Robertson, W.S.

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## *Friday, February* 19.

### MAGISTRATES OF KILMARNOCK *v.* MATHER.

*Title to Sue—Sheriff-court Act* 1853*—Burgh—Customs—Decree in Absence—Usage.* Magistrates of a burgh sued a tradesman for certain customs per account, &c., "which the pursuers

are entitled to exact and levy conform to decree of declarator of the Court of Session." No other title was set forth. The decree was in absence in an action directed against twelve tradesmen in the burgh, among whom the present defender was not included. Action dismissed, no good ground of action being set forth in the summons.

*Opinion*, that the decree of declarator might bind the defenders named therein until opened up.

The Magistrates and Town Council of Kilmarnock brought this action in the Sheriff-court of Ayrshire, against John Alexander Mather, cheese merchant, Kilmarnock, concluding for payment of £26, 10s., being the custom on cheese and butter brought by the defender within the said burgh of Kilmarnock for sale, per account, commencing the 22d day of November 1867, and ending the 18th day of May 1868 annexed hereto, and which the pursuers are entitled to exact and levy, conform to decree of declarator of the Court of Session dated the 16th day of November, and extracted the 21st day of December 1853, herewith produced and referred to, with interest of the said sum, at the rate of five per centum per annum, from the said 18th day of May 1868 till payment, and with expenses.

The decree of declarator was pronounced in absence, in an action at the instance of the Magistrates and Town Council of Kilmarnock, against James Dick, William Arbuckle, Robert M'Adam, and James Gray, all fleshers in Kilmarnock, John Fleming and David Pitt, both potatoe merchants there, John Templeton, David Reid, William Simpson, and Margaret Mather, all provision merchants there, and Andrew Hamilton and Alexander Scott, both fruiterers there; and found and declared that the pursuers and their successors and their tacksman were entitled to levy certain specified tolls and customs on certain specified articles when brought for sale within the burgh.

The defender pleaded, *inter alia*, that the pursuers had set forth no sufficient title warranting them to levy the customs claimed by them; that there had been no usage in support of the claim; and that the decree of declarator did not affect the defender.

The Sheriff-substitute (ANDERSON) pronounced this interlocutor:—"Finds that the pursuers have set forth no sufficient title to sue, nor stated any relevant ground for holding the defender liable in the customs claimed: Therefore assoilzies the defender from the conclusions of the action, and dismisses the same, except as to the claim of one halfpenny per stone on one hundred stones of butter, being four shillings and twopence, and which the defender all along expressed his willingness to pay: Finds the pursuers liable in expenses," &c.

"*Note*—This action is brought in name of the Magistrates of Kilmarnock, with consent of their tacksman of customs, and for his interest, and concludes against the defender, a cheese merchant in the town, for £26, 10s., being the custom on cheese and butter brought by the defender within the said burgh of Kilmarnock for sale, between Martinmas 1867 and Whitsunday 1868, and which the pursuers are entitled to levy, conform to decree of declarator of the Court of Session dated November 1853. There is no other title whatever set forth. It is not said that the Magistrates and their tacksman have right to levy a custom on cheese by virtue of an Act of Parliament, or by immemorial usage founded on a grant from the Crown; and yet there is no other way by which the right here claimed can be established. They have an Act of Parliament of old date in their favour; but, for obvious reasons, do not found upon it. They rest their case exclusively upon the Court of Session, decree No. 4. Now, no court whatever can confer a right to levy customs from the public. It may declare a right already existing, but nothing more. The decree in question was pronounced in absence, and the defender was no party in it. As regards the defenders actually called, and who did not think proper to enter appearance, the decree, though in absence, may be good while it stands unreduced, but cannot affect the present defender, who had nothing to do with it. The pursuers say, when they brought their action of declarator in 1853 they did everything in their power, by calling the most extensive and best known trades of Kilmarnock in the various branches of trade falling within their right of levying custom; and if those persons choose to let decree in absence go out against them, it binds not only themselves but every one else in the same, and their successors, in all time coming. Even if the case had been fully argued, and a deliberate decision on the merits given by the Court of Session, it might be doubted whether this would be so, as to which it is unnecessary to enlarge here; but when the Court never applied its mind at all to the subject, the plea of *res judicata* as against the public seems clearly out of the question. In the recent case of *Jenkins* (H. of L., 5th April 1867) in the House of Lords, with a reference to a right of way claimed on behalf of the public by two or three private individuals, Lord Romilly says, *res judicata*, "by its very words, means a matter on which the Court has exercised its judicial mind, and has come to the conclusion that one side is right, and has pronounced accordingly." Were it otherwise, it is easy to see how parties in the position of the present pursuers and others might rear up the most dangerous rights against the public. They would only require to call a few friendly defenders who were willing to allow decree in absence to go out against them, and then plead *res judicata* against the whole community.

Twelve years ago the Sheriff-substitute had occasion to decide a case in this Court against the tacksman of the Magistrates of Kilmarnock, who claimed custom on beans and barley meal under authority of an Act of the Scottish Parliament, dated in January 1701, in favour of Lord Kilmarnock, afterwards assigned by the Earl to the Magistrates of Kilmarnock, and in terms of which the decree of declarator by the Court of Session proceeds. In that action it was successfully pleaded that the dues claimed were not exigible, because, though included in the words of the Act, and the corresponding findings of the declarator, it had been the invariable practice never to charge them. In other words, that the right conferred must be limited and explained by usage. So, in the present case, the defender avers, and offers to prove, that custom never was exacted upon cheese brought for sale within the burgh, except where actually sold, and also weighed at the public weighhouse; while the pursuers claim from him custom on every stone of cheese he brings within the burgh for sale, whether sold or not, and where confessedly none of it was weighed at the public weighhouse. Though the decree of declarator was obtained fifteen years ago, it is believed this is the first occasion the Magistrates have ever attempted to levy the custom on cheese in the circumstances here set forth. It was so stated at the debate, and was not contradicted. Within the last few years a most extensive cheese

fair has been established in Kilmarnock, when, it is said, a larger quantity of cheese is annually exposed for sale than at any other place in the kingdom, and which is brought from all parts of Scotland, and even from England. According to the contention of the pursuers, as admitted by their agent, the whole of it would be liable in custom whether sold or not, and whether weighed at the public weighhouse or not. It would be but short-sighted policy thus to discourage and drive away a trade which is so rapidly attaining an almost national importance, and which is calculated to confer such immense advantage on the town and district generally."

The pursuers appealed.

Scott for appellants.

Gifford and Guthrie for respondent.

At advising—

Lord President—We must deal with this case as presented on record, for there is no proposal to amend. In that state of matters, I am clear that the Sheriff-substitute and Sheriff are right, though the action should have been dismissed without the farther finding of absolvitor.

The summons is laid under the Sheriff-court Act 1853, and contains a statement of the ground of action in the conclusion. The conclusion is as follows—(*reads ut supra*). If I understand the pursuer's counsel, he contends that that is a sufficient reference under the above Act, but I cannot agree in that. I think the Act requires the pursuer to set out the ground of action, and that cannot be done without libelling the title of the pursuers to recover. The form provided for the conclusions of petitory actions is set out in Schedule (A), and is as follows —(*reads from schedule*). Now, in all these instances, the pursuers' title to sue appears from the schedule; and it is out of the question to say that the ground of action can be properly libelled unless the pursuers' title is set out. But in this case, suppose the summons concluded with the word "hereto," then there would clearly be no setting forth of title, and equally clearly the summons would have been bad. All that follows the word "hereto" is, "and which the pursuers are entitled to exact and levy, conform to decree of declarator of the Court of Session, dated the 16th day of November, and extracted the 21st day of December 1853, herewith produced and referred to, with interest of the said sum, at the rate of five per centum per annum, from the said 18th day of May 1868 till payment, and with expenses." The title is laid on the decree of declarator. Now, when this alone is referred to, I would certainly have expected that in the extract decree produced the title on which the decree was obtained would have been set out. But there is no such statement in the decree, and in this summons there is no mention of charter or usage,—nothing but the decree of declarator. The argument of the pursuers is that the decree is binding on the defender until set aside. The ground on which that is maintained is, that it is a declarator of a right vested in the Magistrates of a burgh to levy customs on the inhabitants of the burgh. And it is maintained—and I think rightly—that such a declarator, directed against that part of the community chiefly interested, or against a considerable number of that part, and decree pronounced in that declarator, *causa cognita*, will bind the community, and will finally establish the right of the Magistrates. I think that is sound. But what shall be said of a decree in absence directed against three or four of the persons interested? Now, I can understand that if this summons had been directed against persons actually called as defenders in that action, and against whom the decree was pronounced, it might perhaps have been necessary for them to open up the decree before they could be heard in defence. But can it be said that a party who was not called in the action, and against whom no decree was pronounced, yet requires to open up the decree, as a matter of form, to enable him to maintain his pleas? There is neither authority nor reason for that. It would be carrying the effect of a decree in absence in such a declarator a great deal too far. I think the defender is not bound by that decree at all. I do not think even the defenders in the declarator are bound beyond this, that they may require to open up the decree, but I do not think the others are bound at all. If that be so, the summons is plainly a badly libelled summons by the Sheriff-court Act of 1853, for it does not set forth any ground of action against the defender.

Lord Deas—I do not wish to give any opinion on how this case might have stood if the pursuers had set forth that ever since the decree of declarator in 1853 they had been levying these customs without objection; but I am clearly of opinion that, without any averment of that kind, a mere decree of declarator in absence cannot entitle them to succeed in this action. It is not a mere objection to title. The case is this, that the pursuers stand on that decree of declarator as that which alone is necessary to entitle them to decree in this action, and they undertake nothing more. We must take it on the supposition that there has been no possession, even if there had not been that admission in the Sheriff-court that there was not. There is no reason why we should not take that *pro veritate*; and we are not to suppose that the Sheriff-substitute would state in his interlocutor what he did not think was plain. But I do not think that admission was necessary, for the same would result from the want of averment of possession.

Lord Ardmillan and Lord Kinloch concurred.

Agents for Appellant—Wotherspoon & Mack, S.S.C.

Agent for Respondent—T. Dowie, S.S.C.

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## *Friday, February* 19.

### KENNETH *v.* DE CAEN.

*Ship—Freight—Short-shipment—Carrying Capacity —Proof.* Circumstances in which *held* that a charterer had failed to prove an alleged short-shipment, in respect of which he claimed a deduction from the stipulated freight.

De Caen, owner of the ship "Prince of the Seas," chartered her, in December 1864, to Kenneth, a ship broker in Glasgow, for a voyage from Glasgow to Buenos Ayres, guaranteeing the ship to carry 550 tons dead weight. The voyage having been completed, the owner claimed the stipulated freight, and certain extra payments on account of demurrage and otherwise. The freighter claimed, *inter alia*, a deduction on account of an alleged short-shipment of 70 tons.

After a proof, the Sheriff-substitute (Dickson) pronounced this interlocutor:—"Finds—(1) with regard to the first item in the account appended to the summons, that the pursuers chartered to the defender the ship 'Prince of the Seas' to perform a voyage from Glasgow to Buenos Ayres, in January 1865, for a slump sum of £1050, the pursuer