

was intended to refer to the Christmas Circuit at Glasgow it was incompetent—if to the next Spring Circuit, the delay was unreasonable.

The pursuer Campbell sued the Caledonian Railway Company for damages sustained by him while travelling on their line at Pennilee, near Glasgow. He had given notice of trial for the next Circuit Court to be held in Glasgow, and now moved the Court to order the trial to proceed at the ensuing Winter Circuit, fixed, in terms of 9 Geo. IV. cap. 29, for the 27th December, or otherwise at the next Spring Circuit to be held in Glasgow.

The defenders resisted the motion.

Authorities—*Davidson v. Gray*, Jan. 6, 1844, 2 Brown 9; *Sinclair v. Hollis*, Nov. 9, 1881, ante, p. 71.

At advising—

LORD PRESIDENT—I see no reason why these cases should not be tried before the Lord Ordinary as in the Kirtlebridge cases. I think the notice of the pursuer is ambiguous, and may mean that he gives notice either for the Christmas Circuit or for the Spring Circuit; if it is for the Christmas Circuit it is incompetent, and if for the Spring Circuit it is very unreasonable, by postponing the case too long, and therefore, in one view or another, I am indisposed to give effect to the pursuer's motion. In these circumstances it is unnecessary to find whether this notice has caused the pursuer to lose the lead and pass it over to the defenders, and therefore I now appoint these cases to be tried here at the Christmas sittings.

LORD MURE—I am of the same opinion. If the notice is for the Spring Circuit it is too long to make the defenders wait, and I think, therefore, that the Court has power to appoint the cases to be tried earlier.

LORD SHAND—I read the notice of trial at the Circuit Court as for the Spring Circuit at Glasgow, and in that case I think when notice of trial is given for a distant date the other party may give notice to the Lord Ordinary or to us to have it tried earlier. The course of the later decisions leads me to think that rapidity in these cases is considered to be best, and looking at the length of time which has elapsed since the accident which gives rise to this action took place, I think it more necessary than ever in this case.

LORD DEAS was absent.

The Lords appointed the trial to take place at the sittings in Edinburgh.

Counsel for Pursuer—Murray. Agents—Smith & Mason, S.S.C.

Counsel for Defenders—Lord Advocate (Balfour, Q.C.)—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Tuesday, December 6.

FIRST DIVISION.

[Lord M'Laren, Bill Chamber.

WALKER v. BRYCE.

Personal Diligence—Imprisonment for Civil Debt—Act 43 and 44 Vict. cap. 34 (Debtors (Scotland) Act 1880), sections 4 and 5—“Sums decerned for Aliment”—Termly Payment of Aliment—Separate Debts.

The Debtors (Scotland) Act 1880, section 4, abolishes imprisonment for civil debt except as regards (1) taxes, and (2) “sums decerned for aliment, provided that in any of the excepted cases no person shall be imprisoned for a longer period than twelve months.” *Held* (rev. judgment of Lord M'Laren) that the various termly payments of an alimentary debt form separate debts, and may each be the subject of a separate warrant of imprisonment for a term not exceeding twelve months, though in the result the debtor may be imprisoned for a period of years.

The Debtors (Scotland) Act 1880, which came into operation on 1st January 1881, provides by section 4, with the exceptions hereinafter mentioned, that no person shall after the commencement of this Act be apprehended or imprisoned on account of any civil debt. There shall be excepted from the operation of the above enactment (1) Taxes, fines, penalties due to Her Majesty, and rates and assessments lawfully imposed and to be imposed; (2) sums decerned for aliment—Provided that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than twelve months.

On 21st August 1880 William Walker was incarcerated in the prison of Ayr under a decree for aliment of an illegitimate child of which he was the father. The incarcerating creditor was Anne Bryce, the mother of the child. The child was born in May 1880, and at the time of his incarceration Walker had not paid any sum under the decree which decerned him to pay aliment quarterly in advance. There were thus two quarters' aliment as well as a sum of inlying expenses due at the date of his incarceration. On 20th August 1881 a new warrant of imprisonment, following on a charge to pay aliment due on 3d November 1880, and 3d February, 3d May, and 3d August 1881, was served upon him in prison. Thereafter on 24th November 1881 he raised this process of suspension and liberation under the Debtors (Scotland) Act 1880, pleading, *inter alia*—“(2) The imprisonment of the complainer since 21st August 1881 being illegal in respect of the Debtors (Scotland) Act 1880, the complainer is entitled to liberation.”

The respondent lodged answers averring that the suspender had means amply sufficient to pay.

She pleaded, *inter alia*—“(1) The complainer's statements are irrelevant and insufficient to support the prayer of the note;” and “(3) The diligence of the respondent being formal and regular, is not liable to suspension.”

The Lord Ordinary on 2d December having heard counsel, passed the note and granted liberation, but on the motion of the respondent

prohibited the Clerk of the Bills from issuing any certificate of liberation till Tuesday the 6th, that the respondent might reclaim if so advised. He added this opinion :—

“*Opinion.*—In this case the complainer was imprisoned on 21st August 1880 for non-payment of two quarterly instalments of aliment due under a decree of the Sheriff of Ayrshire. Within a year after the commencement of the term of imprisonment a second warrant of imprisonment was lodged with the keeper of the prison for further arrears of aliment which had accrued during the period of the complainer's imprisonment, and on this warrant the complainer is at present detained in the prison of Ayr. He seeks liberation under the provisions of the Debtors Act 1880, limiting the use of personal diligence for alimentary debts to twelve months' imprisonment in each case. The natural and obvious reading of the statute is that which makes the word ‘case’ synonymous with decree, and this interpretation is supported, if support be necessary, by the antecedent part of the clause, in which the power of imprisonment is reserved in relation to ‘sums decreed for aliment.’

“The decerniture or decree is here referred to as the proceeding which is to be put in execution by means of personal diligence, and I think the meaning of the proviso is that a decerniture or decree may be followed by imprisonment not exceeding twelve months.

“It must be remembered that according to the theory of our law imprisonment for civil debt is awarded as a means of enforcing obedience to the decree which the debtor is charged to implement or perform. In the present case obedience to the decree means the regular payment of the instalments of aliment during the whole period to which the decree extends. There may, no doubt, be successive defaults in payment by the debtor, but there can only be one performance, namely, by complete implement of the whole obligations constituted by the decree. I am therefore of opinion that the two warrants of imprisonment issued against this complainer are truly warrants applicable to the same case within the meaning of the statute, and that the aggregate period of imprisonment under the two warrants must be limited to twelve months. Any other construction would enable the creditor by successive warrants to detain the debtor, if not possessed of independent means, for the whole period of ten years, and would defeat the plain intention of the statute. The judgment will be to pass the note and grant liberation.”

The respondent having reclaimed, the case was heard on 6th December.

The reclamer argued—There were here two questions—(1) Whether the respondent could be held to have detained the suspender a year in prison in the sense of the recent Debtors Act, which had come into operation after a considerable part of the year's imprisonment had been suffered. On that point it was clear that the Act did not apply to this case, as the suspender had not even yet been a year in prison since the passing of the Debtors Act. It required a special section (section 5) to allow the debtors incarcerated for ordinary civil debt to be liberated at the commencement of the Act, and there was no section applicable to this case. But (2) on the general question it could not be said

that by suffering one year's imprisonment a person in default of payment of an alimentary debt was free from that mode of compelling payment of sums which might become due under the decree long after the imprisonment had been suffered. The contention sustained by the Lord Ordinary came to this, that such a debtor could by suffering one year's imprisonment be freed from that mode of compelling payment for ever. Each term's payment was a new debt, and a good ground for the diligence of imprisonment. The analogy of the taxes clause was in reclamer's favour. Taxes were payable by certain statutes, and summarily recoverable without a new action, each new tax being a new debt, and the quarterly payments of aliment were in exactly the same position. The cases on the English Vaccination Statutes, where it had been held that a mere suffering of the penalty did not give the person in breach of the Act a licence to remain in breach of it, were in point—*Allen v. Worthly*, 9 Q.B. 163; *Knight v. Halliwell*, 9 Q.B. 412.

Argued for suspender—Imprisonment for debt is for disobedience to a decree, and when the Legislature has supplied a test of the debtor's willingness to pay by ordaining that it shall be competent to inflict one year's imprisonment, the Court will not suffer that period to be extended. The Act must, in accordance with the most elementary rule for the construction of statutes, be read in its plain grammatical meaning, which was that in the case of sums decreed for aliment imprisonment might not exceed one year. Now, the decree here, as in all such cases, decreed for the whole seven years' aliment at one time, and it was extracted. Further, the Act must be construed as an amending Act in favour of its object, the imprisonment for civil debt, and also must, as an Act in favour of liberty, assuming any ambiguity, be read in favour of liberty. The argument founded on from the preceding sub-section was unsound. With each new year there was a new tax due, but here the debt was constituted all at once. The speciality in the case was of no consequence, since the debtor would, assuming the reclamer's argument to be sound, be freed in a very few weeks, and the respondent had no interest to maintain the argument. The words “shall be imprisoned” were in suspender's favour here.

At advising—

LORD PRESIDENT—This is a question under the Act of 1880 for the Abolition of Debt in Scotland. That was the leading purpose of the Act, but there were exceptions to the general rule, and the debt under which this suspender is imprisoned is under one of these. The exceptions are—(1) “Taxes, fines, or penalties due to Her Majesty, rates and assessments lawfully imposed or to be imposed, and (2) sums decreed for aliment;” and then comes the proviso—“Provided that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than twelve months.” Now, in this case the pursuer holds a decree for the aliment of an illegitimate child. The suspender was imprisoned on the 21st August 1880 on a warrant for certain sums of money then due under the decree. Another warrant was afterwards brought to detain the suspender in prison for certain other

sums of money which have become due since he has been in prison. He contends that having suffered the imprisonment to which he was rendered liable by statute, he is not liable to be incarcerated again for the same cause, and on the mere words of the statute there at first appears to be good ground for his argument. But there is another aspect of the case, and that is, if a person who is liable to pay aliment for seven or ten years is to be imprisoned for the first term, and after that is to be free from all claims upon him for aliment, the effect would be that the section about imprisonment for aliment would become nugatory altogether. And this view becomes strengthened when we see that the other exception from the general rule that the statute allows is in allowing imprisonment for not paying the taxes due to Her Majesty. It cannot be contended that because a man was imprisoned for not paying his taxes one year, he cannot be imprisoned for not paying his taxes due for another year, and aliment, like a tax, is a constantly recurring obligation. I cannot help thinking that the Legislature in making these exceptions intended that the prisoner should be liable to be imprisoned for twelve months for each term of aliment as it fell due, for if it were otherwise it would have been undoubtedly a serious matter, and would nullify the continuing decree for aliment. It is said, on the other hand, that if a man can be imprisoned in this manner, that it amounts to perpetual imprisonment, but in that case the remedy for the prisoner, if he is an honest debtor, is to sue out a *cessio*. I therefore think we should refuse the note of suspension.

LORD MURE—I think the Lord Ordinary made a mistake in holding that when the pursuer holds a decree for aliment for seven or ten years in the common form, the defender cannot be imprisoned for more than twelve months altogether upon it. I cannot think this is a case that comes under the statute. The second warrant is issued for the second year's debt, whereas what the defender was imprisoned for before was the first year's debt; these are not the same thing, and therefore I think the note ought to be refused.

LORD SHAND—While the Legislature provided by a recent statute that imprisonment for debt should be abolished in Scotland, it reserved to certain creditors their rights of arrestment and imprisonment for "taxes, fines, or penalties due to Her Majesty, and sums decerned for aliment." In making this provision they were really following an example set them ten years before in the statute for the limitation of the arrestment of wages. Under the concluding words of section 4 it is contended that if a person is imprisoned for one year's aliment, and has undergone imprisonment, he cannot undergo any more; but the answer to that is that each year's aliment is a different debt; to read it otherwise would lead to very grave results, especially in cases where the Court has granted decrees of separation and aliment, where the husband has to pay aliment for the whole term of his wife's life; each term forms a new debt, and on each term he is liable to be imprisoned for the new debt.

LORD DEAS was absent.

The Lords recalled the Lord Ordinary's inter-

locutor, and remitted to his Lordship to refuse the bill.

Counsel for Suspender—Sym. Agent—J. H. Jameson, W.S.

Counsel for Respondent—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Saturday, December 10.

SECOND DIVISION.

[Sheriff of Forfar.]

GRANT v. FLEMING.

Sheriff—Debts Recovery (Scotland) Act 1867 (30 and 31 Vict. cap. 96)—"Merchants' Accounts"—Triennial Prescription Act 1579, cap. 83.

In an action brought under the Debts Recovery Act for the amount of disbursements made more than three years previously by the pursuer in discharging a cargo on the defender's mandate, the Court *repelled* pleas (1) to the effect that the debt fell under the expression "*Merchants' Accounts*" as used in the Triennial Prescription Act of 1579, and was therefore prescribed; and (2)—*dub.* Lord Young—that if the Act of 1579 did not apply, then neither did the Debts Recovery Act.

David Grant, potato merchant, Dundee, presented a petition in the Sheriff Court of Forfar against Alexander Gilruth Fleming, Manager of the Scottish Banking Company, Dundee, for the purpose of having him ordained to make payment of the sum of £46, 8s. 8d. sterling, as the amount of disbursements made by the pursuer on his account in discharging a cargo of potatoes.

The defender pleaded—“(1) Prescription. (2) If it was held that triennial prescription did not apply, action was incompetent in the Debts Recovery Court. (3) On the merits, no employment—the pursuer's brother John Grant, now deceased, being the party employed with the work, and he having been settled with.”

After a proof the Sheriff-Substitute (*CHEYNE*) found in fact—“(1) That in the end of the year 1877 the defender, who was then a bank-agent in Dundee, imported a cargo of potatoes, consisting of 148 tons or thereby, in a ship called the '*Olympus*;' (2) that at the defender's request, the pursuer, who was a potato merchant in Dundee, and a customer of defender's bank, and to whom the defender had rendered some friendly services, agreed to see to the discharging, storing, and dressing of said cargo; (3) that in carrying out said agreement, and in connection with said cargo, the pursuer made disbursements amounting to £40, 8s. 8d., which sum included no charge for personal trouble; and (4) that no part of said disbursements had been repaid to the pursuer by the defender: Found in law, on these facts, that the defender was liable in the amount of said disbursements, and three years' interest (amounting to £6) thereon: Therefore decerned against the defender for payment to the pursuer of the sum sued for, being £46, 8s. 8d. sterling, and for the further sum of £6, 8s. 1d. sterling of expenses," &c.

He added this note:—"The case of *Saidler v. M'Lean*, 1794, M. 11,119, and other cases cited