

LORD M'LAREN—I concur, and only wish to add a sentence to prevent this judgment from being regarded as a precedent in cases under another class of penal statutes. If a statute imposes a penalty, and then authorises, as an alternative, a warrant for imprisonment, it would be quite within the scope of precedent to separate the conviction into two parts—the sentence and the warrant of imprisonment for enforcing the sentence—and to sustain the sentence, even if the warrant was radically defective. Here the sentence is perfectly good; the only mistake is that the Magistrates ordain the prisoner to be kept in prison until he pays the penalty and expenses, when, as a matter of fact, no expenses had been found due. But in this case I agree with Lord Trayner that although the Prevention of Cruelty to Animals Act ordains no special course of procedure, yet the prosecution is under the Summary Procedure Act 1864, which contains a warrant for imprisonment as a necessary part of the conviction. The conviction would not be good without such a warrant, although if the fine is paid it may turn out to be merely a matter of form. The objection is certainly very critical, but it has been held, both here and in England, that where personal liberty is concerned form is substance, and I think this is a case for applying that principle.

LORD JUSTICE-CLERK—I concur. It is difficult to suspend a conviction upon a matter of form, but on the whole I agree with Lord Trayner that this warrant is illegal and that the conviction cannot stand.

The Court pronounced the following interlocutor:—

“Pass the bill: Suspend the conviction and sentence complained of *simpliciter*: Find the complainer entitled to expenses, which modify to ten guineas.”

Counsel for the Complainer—W. Thomson.
Agents—Whigham & MacLeod, S.S.C.

Counsel for the Respondent—Younger.
Agent—John Dobie, Solicitor.

COURT OF SESSION.

Thursday, November 7, 1895.

OUTER HOUSE.

[Court of Exchequer.]

ALSTON'S TRUSTEES v. THE LORD ADVOCATE.

Revenue—Inventory Duty—Repayment—Condictio indebiti—Compromise with Inland Revenue—Customs and Inland Revenue Act 1881 (44 Vict. c. 12), sec. 31—Stamp Duties Act 1842 (5 and 6 Vict. c. 79), sec. 23—Customs and Inland Revenue Act 1889 (52 Vict. c. 7), sec. 5, sub-sec. 6.

The trustees of a deceased merchant the value of whose interest in a firm could not be ascertained for some years, agreed, on the basis of certain valua-

tions accepted by the Inland Revenue Commissioners, to settle the inventory-duties, “taking their chance of the final realisation of the assets being less than that stated.” The estate was ultimately sequestrated, and the trustee, more than three years after the recording of the inventory, claimed repayment, on the ground (1) that the estate was over valued, and (2) that the debts exceeded the assets. The Commissioners refused to comply with this claim.

Held (by Lord Moncreiff, Lord Ordinary in Exchequer Causes) that the trustee was not entitled to succeed, in respect (1) that there is no statutory provision applicable to Scotland compelling the repayment of inventory duty on the ground of excess of valuation, section 31 of the Customs and Inland Revenue Act 1881 dealing only with probates and letters of administration, and consequently being inapplicable to Scotland; (2) that in this case the application not having been made within three years, and no proceedings at law or in equity having prevented the debts from being ascertained, the Act 5 and 6 Vict. c. 79, sec. 23, which deals with repayment in the event of debts proving greater than was anticipated, was not applicable; (3) that though there is a custom by which repayment of inventory duty is made on the Commissioners being satisfied that the valuation was excessive, yet as the matter was one for their determination, and they had refused repayment in this case, the Court had no power to interfere with their discretion; and (4) that at common law the principle of *condictio indebiti* was inapplicable, as the trustees had waived any claim they might have if the estate proved to be of less value than was stated.

Question—Whether the principle of *condictio indebiti* has any application to money paid as inventory duty.

Robert Findlay Alston, merchant in Glasgow, died on 1st March 1885, leaving a trust-disposition and settlement by which he appointed certain persons his trustees and executors. At the date of his death he was a partner in the firm of Campbell, Rivers, & Company, which was a partner of the firm of Alstons, Scott, & Company, Ceylon. The affairs of these firms were in course of being wound up. He was also a partner of a new firm of Campbell, Rivers, & Company, which was a partner of a new firm of Alstons, Scott, & Company, Ceylon. The executors gave up an inventory of the personal estate wheresoever situated of the said Robert Findlay Alston, which was recorded in the Sheriff Court Books of Lanarkshire on 25th May 1885. The amount of the personal estate so given up was £14,711, 13s. 5d., and the inventory duty corresponding thereto under the Customs and Inland Revenue Act 1881, amounting to £444, was paid by the executors. One of the supposed assets of the estate was his interest in the old firm of Campbell, Rivers, & Company. In the inventory which his exe-

cutors at first gave up his interest was estimated at £10,000 'for confirmation purposes.' On the Commissioners of Inland Revenue thereafter asking for evidence of that valuation, the agents of the executors wrote on 16th December 1885 a letter explaining that the business of Campbell, Rivers, & Company was in process of liquidation at the time of Mr Alston's death, and that until the liquidation, which might extend over a period of several years, was completed, it would be impossible to say what the deceased's interest therein would be. The letter concluded thus—'If, however, the Inland Revenue Commissioners desire it, we would instruct our clients to instruct Alston, Scott, & Company to obtain valuations of the properties with the view of having the question of inventory and legacy duties settled at once if the Commissioners agree to accept such valuations as the basis for making up the balance-sheet of Campbell, Rivers, & Company.' The Deputy-Controller replied on 24th December 1885—'It is impossible to say whether the valuation of the properties will be accepted or not until such is actually before this office, but the course proposed would appear to be the speedier mode of settling the question.' Ultimately a valuation and statement was obtained showing Mr Alston's interest in the firm of Campbell, Rivers, & Company to be £11,696, 16s. The executor's agents transmitted that statement to the Inland Revenue, along with a letter dated 16th May 1886, in which they said—'Referring to our letter to you of 16th December last, and your reply thereto, we have now received from Messrs Campbell, Rivers, & Company a statement of the late Mr R. F. Alston's account with them showing his interest in that firm to be £11,696, 16s. We enclose that statement certified by them. We shall be glad to know if the Commissioners of Inland Revenue will accept that statement as the basis for a settlement now of the inventory and legacy duties. We would advise our clients to settle the duties on that basis so as to have the matter closed and done with instead of keeping it open for perhaps the next five years, and take their chance of the final realisation of the assets being less than stated in the account. We may remind you that the deceased's interest in Campbell, Rivers, & Company was estimated in the inventory of his personal estate at £10,000, so that if the statement of account now made out is accepted, an additional inventory will be given up at once, and the necessary residuary account made out and legacy duty paid.' On 4th June 1886 the Deputy Comptroller replied as follows:—'I duly received your letter of the 28th ulto. regarding the estate of the late Rob. F. Alston, and now return the statement which accompanied same, and have to inform you that the estimate of the deceased's interest in the firm of Campbell, Rivers, & Company will be accepted on the part of the Revenue, and you will therefore proceed with the payment of the duties without undue delay.' Accordingly an additional inventory was

given up and recorded on 11th June 1886, in which the whole nett personal estate was declared to be £16,937, 17s. 7d., of which his interest in the firm of Campbell, Rivers, & Company "as now ascertained" was stated to be £11,696, 16s. An additional inventory duty of £60 was paid thereon, which, with the sum of £444 paid on the original inventory, makes up the £504 now sued for.

The surviving partners of the old firms of Campbell, Rivers, & Company and Alstons, Scott & Company continued the winding-up of these firms till 10th July 1891, when the new firms of Campbell, Rivers, & Company and Alstons, Scott, & Company stopped payment. The new firm of Campbell, Rivers, & Company was sequestrated upon 31st August 1891. It appeared that the debts of the old firm of Alstons, Scott, & Company were greatly in excess of its assets, and that consequently as the only asset of the old firm of Campbell, Rivers, & Company was its interest in that firm, Robert Findlay Alston's interest in the old firm of Campbell, Rivers, & Company, estimated in the additional inventory at £11,696, 16s., was of no value at all. The trustees and executors and the survivors and survivor of them administered the trust estate till 12th January 1892, when on the petition of the last survivor a judicial factor was appointed. The estate was sequestrated on 17th April 1894, on the petition of a creditor of the old firm of Campbell, Rivers, & Company, and Mr James Muir, C.A., Glasgow, the pursuer in the present action, was appointed trustee. He admitted the creditors of the old firm of Campbell, Rivers, & Company to rank on the estate. The trust-estate, other than the deceased's interest in that firm, had been realised and paid away to beneficiaries, but these creditors' claims greatly exceeded the amount so realised and paid away, which was the whole of the deceased's estate, his interest in Campbell, Rivers, & Company having proved ultimately, as before explained, to be of no value.

In these circumstances the trustee claimed repayment from the Board of Inland Revenue of the inventory duty paid on Robert Findlay Alston's estate, on the ground that his debts exceeded his assets, and that he died bankrupt, or at any rate part of the inventory duty paid corresponding to the sum at which the deceased's interest in Campbell, Rivers, & Company was estimated in the inventory; but the Board of Inland Revenue refused to repay the inventory duty or any part of it. The trustee then brought the present action, in which he concluded for repayment of £504, being the amount of inventory duty paid upon the personal estate of Robert Findlay Alston.

The Customs and Inland Revenue Act 1881 (44 Vict. cap. 12, section 31) provides as follows:—'If at any time after the grant of probate or letters of administration, and during the administration of the estate, the value mentioned in the certificate of the officer of the court shall be found to

exceed the true value of the personal estate and effects of the deceased, or if at any time within three years after the grant, or within such further period as the Commissioners of Inland Revenue may allow, it shall appear that no amount or an insufficient amount was deducted on account of debts and funeral expenses, it shall be lawful for the said Commissioners, upon proof of the facts to their satisfaction, to return the amount of stamp duty which shall have been overpaid, and to cause a certificate to be written by an authorised officer on the probate or letters of administration setting forth such true value, or as the case may be, the amount or corrected amount of deduction, and such certificate shall be substituted for and have the same force and effect as the certificate of the officer of the court."

The Stamp Duties Act 1842 (5 and 6 Vict. cap. 79, sec. 23) enacts as follows—"When it shall be proved by oath and proper vouchers to the satisfaction of the said Commissioners of Stamps and Taxes that an executor or administrator hath paid debts due and owing from the deceased and payable by law out of his or her personal or moveable estate to such an amount as being deducted from the amount or value of the estate and effects of the deceased . . . which shall be included in any inventory duly exhibited and recorded . . . in a Commissary Court in Scotland, shall reduce the same to a sum which if it had been the whole gross amount or value of such estate or effects would have occasioned a less stamp duty to be paid on such . . . inventory than shall have been actually paid thereon, it shall be lawful for the said Commissioners of Stamps and Taxes, and they are hereby required, to return the difference, provided the same shall be claimed within three years after the date of such probate or letters of administration, or the recording of such inventory as aforesaid; but where by reason of any proceeding at law or in equity the debts due from the deceased shall not have been ascertained and paid, or the effects of the deceased shall not have been recovered and made available, and in consequence thereof the executor or administrator shall be prevented from claiming such return of duty as aforesaid within the said term of three years, it shall be lawful for the said Commissioners of Stamps and Taxes to allow such further time for making the claim as may appear to them to be reasonable under the circumstances of the case."

The Customs and Inland Revenue Act 1889 (52 Vict. cap. 7, sec. 5, sub-sec. 6) provides as follows:—"The provisions contained in section 31 of the Customs and Inland Revenue Act 1881 for the return of stamp duty overpaid shall apply to the return of duty overpaid on any statement delivered under this section, and in Scotland a return of duty overpaid on any statement so delivered shall be made in like manner as a return is now made of stamp duty overpaid on an additional inventory."

The pursuer averred that Robert Findlay Alston died insolvent, and pleaded:—

"(1) The debts of the late Robert Findlay Alston having now been ascertained to exceed his assets, the pursuer is entitled under the Inland Revenue statutes, and particularly the Customs and Inland Revenue Act, 1881, section 31, to recover for the benefit of his creditors the inventory duty provisionally paid by his executors, on the footing that a surplus for the beneficiaries would be realised. (2) In any view, the pursuer is entitled under the said statutes as administered in Scotland to a return of the inventory duty corresponding to the sum of £11,696, 16s. condoned on, in respect that the item of the late Robert Findlay Alston's estate represented by that sum is ascertained to be of less than no value. (3) The estate of Robert Findlay Alston having at and since his death been insolvent, no inventory duty was due, and the pursuer as representing his creditors is entitled to recover the duty provisionally paid. (4) The alleged compromise and settlement having been entered into with the trustees and executors of the deceased while his estate was insolvent, it is not binding on the pursuer as representing creditors."

The defender pleaded, *inter alia*—" (2) The pursuer's claim under section 31 of the Inland Revenue Act 1881 is untenable, because the provision founded on does not apply to inventory duty. (3) As the deceased's executors were not prevented by any legal proceedings from claiming a return of duty within the statutory term of three years, the Commissioners have no power to make such a return, and the pursuer's claim cannot be sustained. (4) The pursuer's claim is barred by the compromise and settlement agreed to when the additional inventory was given up, and a further payment of duty was accepted."

On 7th November, after a discussion in the Procedure Roll, the Lord Ordinary (MONCREIFF) assolized the defender.

Opinion.—"The object of this action is to obtain a return of £504, being the amount of inventory duty paid to the Inland Revenue in 1886 upon the personal estate of Robert Findlay Alston, who died on 1st March 1885. The return is demanded partly on the ground that certain assets were over-estimated, and partly on the ground that the deceased's debts exhausted the remainder of his estate.

"The first matter to be ascertained is whether there is any statutory authority which entitles the pursuer to a return of duty.

"As regards the claim for return of duty on the ground that the value of assets was over-estimated, the reply is simple. Strange as it may appear, there is, as regards Scotland, no statutory authority or direction for a return of inventory duty on that ground. Section 31 of 44 Vict. cap. 12, the Customs and Inland Revenue Act 1881, which is appealed to by the pursuer, is as follows—[*His Lordship quoted the section*]. "But unfortunately this provision does not apply to Scotland. An examination of sections 29, 30, 31, and 32 of that Act makes it quite plain that the provisions of section

31 apply only to probates and letters of administration in England or Ireland; and I may say in a word that there is no earlier statute which allows or enjoins such a return. For instance, section 40 of 55 Geo. III. cap. 184 (which is now repealed), is also confined to probates or letters of administration.

"Again, as to the return claimed in respect of debts, section 31 of the Act of 1881, as I have said, does not apply to Scotland. The statutory provision which applies in this matter, viz., section 23 of 5 and 6 Vict. cap. 79 (which applies to inventories as well as probates and letters of administration), contains this provision—[His Lordship quoted the proviso].

"This provision, however, does not avail the pursuer, because his claim was not made within the three years, and the delay was not caused by reason of any proceeding at law or in equity within the meaning of the Act.

"But whatever may have been the reason for drawing a distinction in the statutes between probates and letters of administration in England, and inventories in Scotland, as regards return of duty on the ground that the value was over-estimated there is a practice of old standing in Scotland, according to which the Board of Inland Revenue are in use to return duty overpaid, substantially upon the same lines as the statutory rules which regulate in England and Ireland. This is done upon a corrected inventory being lodged. I find this practice referred to and recognised in 52 Vict. cap. 7, sec. 5, sub-sec. 6, which deals with 'estate duty,' and is as follows—[His Lordship quoted the sub-section].

"But this practice, taken at its highest, merely amounts to this, that the Commissioners of Inland Revenue in their discretion allow a return of inventory duty if it is established to their satisfaction that the value stated in the original inventory exceeds the true value of the estate. If they declare that they are not satisfied of this, I apprehend that this Court has no power to interfere with their discretion.

"There remains only to consider the pursuer's argument at common law. He maintains that in the absence of any statutory provision he is entitled to recover on the ground of *condictio indebiti*.

"It may be doubted whether *condictio indebiti* applies to and is available in such a case. The values put upon items of personal estate for Revenue purposes being often necessarily conjectural, it is right that there should be some remedy in the event of them proving to be erroneous,—either too high or too low. But the fact that in the Revenue Statutes, whether relating to probate or inventory duty or income tax, power to return duty overpaid is generally conferred in express terms and under conditions, seems to indicate that the common law as to payments made in error is inapplicable. I may refer to my observations in *The National Bank of Scotland v. Lord Advocate*, 30 S.L.R. 579.

"But passing from that, there are no ter-

mini habiles for the claim—[His Lordship stated the facts above set forth].

"In order to recover on the ground of *condictio indebiti* it must be shown that inquiry was not waived, and that the money was paid in excusable error. In the present case it will be seen from the correspondence there was no mistake. The value put upon the assets was known to be conjectural; and the money was paid, not in the expectation that a return would be made should the value of the asset ultimately prove to have been over-estimated, but in order that there might be a settlement once for all, and that the matter should not be hung up for several years pending the liquidation of Campbell, Rivers, & Co. The duty was paid and accepted on that footing, and therefore, to state the case at its lowest against the pursuer, he waived all inquiry as to the ultimate and real value of the asset.

"This is sufficient apart from the Crown's defence on the ground of compromise or transaction. In the general case there is no transaction. The Inland Revenue accepts the duty but grants no discharge. But it has not, so far as I know, been decided that the Crown can be barred in no case by a deliberate transaction entered into in the full knowledge of the circumstances, and in the absence of neglect or omission on the part of its officers. Had the Crown not been one of the parties, I should have had no hesitation in holding that on the correspondence there was a concluded transaction. But it is settled law that the Crown is not barred by the neglect or omission of its officers, and it is difficult to define the limits of this exemption. The cases of *The Lord Advocate v. Meikleham's Trustees*, 22 D. 1427; *The Lord Advocate v. Pringle*, 5 R. 912; *The Lord Advocate v. Miller*, 11 R. 1046; *The Lord Advocate v. The Duke of Hamilton*, 1891, 29 S.L.R. 213, sufficiently illustrate the difficulty.

"Whether it be called a compromise or not, it remains that the executors of Robert Finlay Alston, who paid the duty, were under no mistake as to what they were doing. They deliberately waived further inquiry for the sake of an immediate settlement which they intended and believed to be final. The result, therefore, is that the defender must be assoilzied."

Counsel for the Pursuer—Lorimer—Clyde. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the Defender—The Lord Advocate—Young. Agent—Solicitor of Inland Revenue.