did not do so; and then there being thus, through his own reticence and failure to adduce available evidence, no means of testing his own evidence, the pursuer proceeds to say that after the operation he formed the opinion that the patient was suffering from syphilis, and gives various distinct reasons for his opinion.

Now, in those circumstances, I think the pursuer has not furnished evidence which should have been forthcoming in order to verify his story. It is his misfortune that he is precluded by professional etiquette from disclosing the name of the patient, but it does not follow that the defenders must suffer on account of that. But apart from that, he might and should have adduced his father as a witness. He has not done so, and he has given no explanation of his failure to do so. Therefore, however probable I may think the pursuer's story, I feel constrained to agree in the very carefully considered opinion of the Sheriff, and hold the case not proved.

The Court pronounced the following interlocutor:—

> "Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against: Therefore of new assoilzie the defenders from the conclusions of the action and decerned."

Counsel for the Pursuer and Appellant—Lees—King. Agents—Mitchell & Baxter, W.S.

Counsel for the Defenders and Respondents—Salvesen—J. J. Cook. Agents—Simpson & Marwick, W.S.

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*Friday, December* 11.

## SECOND DIVISION.

[Sheriff of Argyllshire.

## WILSON *v.* M'KELLAR.

*Poinding—Breach of Poinding—Personal Diligence Act* 1838 (1 *and* 2 *Vict. cap.* 114), *sec.* 30—*Concurrence of Procurator-Fiscal.*

*Held* that a petition to the Sheriff under sec. 30 of the Personal Diligence Act 1838 is a civil process, and does not require the concurrence of the procurator-fiscal.

*Opinions* that the term "summary complaint" in that section is not used in the sense in which it is employed in the Summary Jurisdiction Acts, but means a summary application *ad factum præstandum* as distinguished from an ordinary action.

By section 30 of the Personal Diligence Act 1838 (1 and 2 Vict. cap. 114) it is enacted "that if any person shall unlawfully intromit with or carry off the poinded effects, he shall be liable on summary complaint to the Sheriff of the county where the effects were poinded, or where he is domiciled, to be imprisoned until he restore the effects or pay double the appraised value."

David Wilson, grain merchant, Greenock, raised an action in the Sheriff Court of Argyllshire at Dunoon against Donald M'Kellar, baker, Kirn, and Sarah M'Kellar, his wife, in which he prayed the Court to ordain the defenders jointly and severally or severally to restore to the premises at Woodburn Place, Kirn, specified articles of the appraised value of £17 belonging to the defender Donald M'Kellar, and in the event of the defenders failing to restore the articles to the premises within such period as the Court should appoint, to grant warrant to officers of Court to apprehend the defenders and commit them to prison, therein to be detained until they restore the effects, or paid the sum of £34 to the pursuer.

The pursuer averred—On 12th November 1895 he obtained a decree against the male defender for £91, 10s. On 13th March 1896 the defender was charged on the decree to make payment of £91, 10s. less £19, 8s. 11d. paid to account. Following on this charge the articles mentioned in the summons were poinded at their appraised value in the defenders' house at Woodburn Place, Kirn. On 8th June 1896 the pursuer obtained a warrant of sale of the poinded effects, which was served personally on the defender on 13th June. On 20th June the auctioneer proceeded to Woodburn Place to sell the poinded effects, but on arriving there found that the articles had been removed, having been sold by the female defender, with consent of the male defender, to Alexander Morris, baker, Port-Glasgow.

The defender pleaded, *inter alia*—"(2) The action is incompetent, in respect that the concurrence of the Procurator-Fiscal has not been obtained."

On 7th August the Sheriff-Substitute (MARTIN) repelled the 2nd plea-in-law for the defenders, and allowed a proof.

The defender appealed to the Sheriff (WALLACE), who on 29th Septemer 1896 recalled the interlocutor of the Sheriff-Substitute, sustained the 2nd plea-in-law for the defenders, and dismissed the action as incompetent.

*Note.*—"As regards the second plea that the action is incompetent without the concurrence of the Procurator-Fiscal, I have delayed giving judgment until I had an opportunity of ascertaining the practice in other Sheriff Courts. The result of my inquiry is that I find it to be the practice in the Sheriff Courts of Edinburgh, Glasgow, and Aberdeen, to obtain the concurrence of the procurator-fiscal in petitions for breach of poinding, and I am not prepared to depart from this general practice. . . . Having regard to what appears to be the general practice and the penal nature of the conclusions of the petition, I am unable to see my way to sustain the competency of the proceedings without the concurrence of the public prosecutor."

The pursuer appealed, and argued—The concurrence of the Procurator-Fiscal was unnecessary. He had no concern in the matter, he being an officer of the Crown, with a duty to guard the fisc, and there

being in this case no fine to be collected by him. The imprisonment craved was not asked as a punishment but as a compulsitor to induce the defenders to restore the effects removed. The defenders could bring the imprisonment to an end at any moment —*Dickson* v. *Bryan*, May 14, 1889, 16 R. 673; *Kennedy* v. *Cadenhead*, December 1867, 5 Irv. 539. The statute in terms of which the complaint was brought did not require the consent of the procurator-fiscal to the proceedings. The argument that the procurator-fiscal's consent was required in all cases where imprisonment was craved was not well founded. In Schedule A of the Summary Procedure (Scotland) Act 1864 a form was given of a complaint praying for conviction in terms of the Act, and for imprisonment and forfeiture, which complaint could be made by a private party without the concurrence of the procurator-fiscal. At common law also the Court might ordain a defender by whom goods had been illegally removed to restore them, and if he disobeyed the order he might be imprisoned for contempt of court upon application by the pursuer without the concurrence of the procurator-fiscal.

Argued for the defenders—The defenders were here charged with an offence against a statute, and in the complaint against them there was a demand for imprisonment which rendered the action penal. In terms of section 3, sub-section (2), of the Summary Procedure (Scotland) Act 1864, the provisions of that Act applied, so that anything in the nature of a summary complaint must be brought in the form supplied by that Act. The consent of the procurator-fiscal was always required to complaints by private parties under the Summary Jurisdiction Acts. There was a strong analogy between the removal of goods poinded and a breach of interdict. In the latter case complaint by a private party was inept without the concurrence of the public prosecutor—*Duke of Northumberland* v. *Harris*, February 23, 1832, 10 S. 366; *Usher* v. *Magistrates of Edinburgh*, March 7, 1839, 1 D. 639.

At advising—

LORD JUSTICE-CLERK—The Sheriff states that he proceeded on what he has ascertained to be the practice in the Sheriff Courts of Edinburgh, Aberdeen, and Dundee. There may be such a practice, and if so, I suppose it has arisen from the fact that process involving imprisonment requires in certain events the concurrence of the procurator-fiscal, and it has probably been assumed that whenever imprisonment is concluded for, this concurrence is necessary. As regards the procurator-fiscal, it is probable that in these cases the concurrence of that official was given as a matter of course, without consideration being given to the question whether it was necessary or not.

Be that as it may, in this case it is necessary to look at the form of process, and it is clear that it is not presented to obtain the punishment of the defender for a past offence, but the whole object of the petition is to have the defender ordained to perform certain acts, and if he fails to obey, to have imprisonment ordered as a compulsitor to the order pronounced. But this prayer for imprisonment is only an invocation of the power inherent in every civil court to ordain performance of acts within its jurisdiction, and in default to commit the defaulter to prison. A criminal prosecution is of an entirely different nature. It relates to an offence which is past and proceeds *in modum pœnae* for the punishment of the offender, and "to deter others from committing the like crimes in all time coming," as it was formerly expressed in indictments. Here a private individual complains to the Sheriff that goods which had been poinded to answer for a debt due to him have been removed from his reach by the owner, and he calls upon the Court to ordain the defender to restore the goods, and in default to commit him to prison until he obeys the order or pays a sum equivalent to twice the value of the goods removed by him.

So far as we have heard, there appears to be no authority for the view that the concurrence of the procurator-fiscal is necessary. It is quite true that in the statute the words "summary complaint" are used, but there is no authority for the statement that these words are so appropriated to a criminal complaint for punishment of an offence that their use alone is sufficient to indicate a process of this character.

On the whole matter I am clear that the Sheriff has erred in sustaining the second plea-in-law for the defenders.

LORD YOUNG—I am of the same opinion. I do not think it necessary in this very clear case to say more than that the judgment of the Sheriff-Substitute is right and should be returned to.

LORD TRAYNER—I concur in the view that the plea-in-law for the defenders which has been sustained by the Sheriff should be repelled.

In one sense this complaint is based upon the Personal Diligence Act. It seeks to vindicate by a decree the right conferred upon the pursuer by statute of demanding the restoration of the goods which were poinded for the debt due to him, but which were removed by the defenders. The application of the creditor is to be made by way of "summary complaint," but there is nothing in the statute to indicate that the complaint is to proceed at the instance of anyone except the private individual who has been injured, and who applies to the Court to have his wrong redressed. The Procurator-Fiscal is not interested in the proceeding.

I quite appreciate the argument of Mr M'Lennan based upon the Summary Procedure Act, and if this were a proceeding *in modum pœnae* it might require the concurrence of the Procurator-Fiscal. But this is not a proceeding *in modum pœnae*, but only an application to the Sheriff which asks that if the defender does not return the goods he shall be imprisoned. Imprisonment in such circumstances is not inflicted

as a punishment, but is only the usual means adopted of enforcing an order *ad factum præstandum*. That such imprisonment is not punishment is clear from the consideration that the defender may at once put an end to it by restoring the goods. Indeed, he may prevent it altogether by restoration of the poinded goods before imprisonment has taken place. Accordingly it appears to me that this is a civil complaint before a civil court with which the Procurator-Fiscal has nothing to do.

I think it is a mistake to suppose that this statute necessarily uses the term "summary complaint" in the sense in which it is employed in the Summary Jurisdiction Acts. A summary complaint such as this means rather a complaint before the Sheriff which, requiring despatch, is not required to submit to the delays which attend a case going through the ordinary roll. I think that is the sense in which it is used here.

LORD MONCREIFF—The only question submitted to us is whether the concourse of the Procurator-Fiscal to such an application is essential. In the Court below the defender raised no objection to the form of the application; and although in this Court he was given an opportunity of amending the record he declined to avail himself of it.

I agree with Lord Trayner that the words "summary complaint," as used in the 30th section of the Personal Diligence Act 1838, simply mean a summary application *ad factum præstandum* as distinguished from an ordinary action. They are used in the same sense in regard to removings in the 8th section of the Sheriff Court Act of 1838; and in the schedule of the Small Debt Act 1837 the initial event in a civil cause is described as a "summons of complaint." The process is a civil and not a criminal process, the imprisonment concluded for being not *in modum pœnæ*, but in order to compel restoration.

Even if such an application could be competently brought under the Summary Jurisdiction Acts, which may be doubted, it would still be a civil and not a criminal process, and might be sued by a private person without the concurrence of the procurator-fiscal.

I agree with all your Lordships that the concourse of the Procurator-Fiscal is not essential, and that the judgment of the Sheriff should be recalled.

The Court pronounced the following interlocutor:—

"Sustain the appeal and recal the interlocutor appealed against: Affirm the interlocutor of the Sheriff-Substitute dated 7th August last; and remit the cause back to the Sheriff to proceed therein as accords."

Counsel for the Pursuer—Watt—Horn. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders—M'Lennan. Agents—Miller & Murray, S.S.C.

*Friday, December* 11.

## SECOND DIVISION.

[Lord Kincairney, Ordinary.

## MELVILLE *v.* NOBLE'S TRUSTEES.

*Process—Count, Reckoning, and Payment—Liability of Trustees for Additional Interest on Trust Funds.*

In an action of count, reckoning, and payment brought against trustees in their character as such, where they produced vouchers accounting for the whole sums of principal and interest that had passed through their hands—*held* that their liability for additional interest on the ground that the trust funds had not been properly invested might be inquired into and determined.

*Trust—Liability of Trustees—Investment—Trust Funds Placed on Deposit-Receipt—Interest—Neglect to Invest—Scope of Indemnity Clause.*

A trust-deed provided that the trustees were not to be liable for omissions of management, or for the omissions or neglect of their factors. The trustees never met to consider the question of investing the trust funds, but left the entire management in the hands of one of their number, who was a bank agent. He placed the trust funds under his charge on deposit-receipt in a Scottish bank. There they remained for nineteen years, the average interest yielded during the period being 2⅜ per cent.

*Held* (*diss.* Lord Young) (1) that to place money in bank on deposit-receipt is not a proper permanent investment of trust funds; (2) that the trustees were liable to pay interest upon the trust funds at 3 per cent.; and (3) that the clause of indemnity in the trust-deed did not protect the trustees against liability.

William Noble, a butcher in Aberdeen, died on 23rd April 1875, leaving a trust-disposition and settlement dated 9th April 1875, by which he appointed James Noble, master mariner, Aberdeen, Thomas Park, merchant, Fraserburgh, Alexander Watson, bank agent, first at Fraserburgh and then at Invergordon, and Andrew Ritchie, fisherman, Inverallochie, his trustees for the purposes therein mentioned. The whole of the trustees accepted office, and entered into possession of the trust-estate. Under the trust-deed Mrs Noble, the widow of the truster, was to get the whole income of the residue of the trust-estate on certain conditions, and for five years after the death of the truster this was paid to her. In 1880 Mrs Noble claimed her legal rights and these were paid.

In December 1894 two beneficiaries under the trust-deed, viz., Alexander Melville and William Noble Melville, whose shares, though vested in them prior to 1880, had remained unpaid and uncalled for in the hands of the trustees, raised an action of count, reckoning, and payment against