

£97, where £51 was judicially admitted, and where—without going into the question of whether there was an extra-judicial offer of even more—the pursuer has been held entitled to £73, there should be an appeal first of all to the Sheriff and then to this Court, with a print of 61 pages and two appendices, and no attempt to disturb the merits of the original judgment.

I think it has been quite settled—and, I have no doubt, rightly settled—that there is no actual defect in competency either in appealing from the Sheriff-Substitute to the Sheriff or from the Sheriff to this Court upon the ground of expenses alone; because, after all, competency in this matter of appeal would have to depend upon the provisions of the various statutes which regulate appeals, or, if it was something which was not actually touched by statute, then it would have to depend upon a well-settled common law practice, and admittedly there is no statutory provision and no rule of practice that would prevent an appeal in the circumstances. But, while that is so, I have no hesitation in saying that I think an appeal upon mere expenses, without touching the merits, ought to be severely discouraged, both in the Sheriff Court and in this Court, and that it is not too much to say that it should never be given effect to unless either there has been an obvious miscarriage of justice in the interlocutor reclaimed against, or in some of those cases where the expenses have become a great deal more valuable than the merits. But, as I say, when a person sues for £97, is offered £51 and gets £73, and the judge who decides the case and decides it in that way, gives neither party their expenses, I think the case is about as far removed from the two categories that I have indicated as any case can well be.

I therefore think that the Sheriff ought not to have gone into this matter at all, as soon as he found, as his interlocutor shows, that neither party quarrelled with the merits of the judgment before him. Of course, I have the same opinion with regard to the duty of this Court, and it was not without difficulty, therefore, that I considered it right to examine the Sheriff's judgment at all upon this matter. But, after all, I think I am bound to do so, because I think the Sheriff has, as I say, contravened the rule which I have ventured to lay down; and, secondly, I find this, that the Sheriff, in dealing with the expenses in which he has altered the judgment of the Sheriff-Substitute, goes upon what I have no hesitation in saying is a radically wrong principle—that is to say, he commences with a proposition which is radically unsound. . . . [*His Lordship then gave his reasons for preferring the judgment of the Sheriff-Substitute.*] . . . In these circumstances I think the justice of the case is best met, and the view is best enforced of the great repugnance that we have to entertaining appeals like this upon mere expenses, by recalling the interlocutor of the Sheriff-Principal, reverting to the interlocutor of the Sheriff-Substitute, and finding neither party entitled to expenses

since the date of the Sheriff-Substitute's interlocutor.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court pronounced an interlocutor recalling the interlocutor of the Sheriff, and reverting to and affirming the interlocutor of the Sheriff-Substitute, with no expenses to either party since its date.

Counsel for Pursuer and Respondent—C. H. Brown. Agent—F. J. Martin, W.S.

Counsel for Defender and Appellant—J. R. Christie—Fenton. Agents—R. & R. Denholm & Kerr, S.S.C.

Friday, May 25.

FIRST DIVISION.

[Justice of the Peace Court
for the County of the
City of Glasgow.]

ALEXANDER v. LITTLE & COMPANY.

Process—Appeal—Competency—Finality Clause—Compensation Claimed by Seaman under sec. 166, sub-sec. (2), of the Merchant Shipping Act 1894—Penalty or Civil Compensation—Merchant Shipping Act 1894 (56 and 57 Vict. c. 60), secs. 166, sub-sec. (2), and 709—Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. c. 53), secs. 3 and 28—Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. c. 62), secs. 2 and 3.

Section 709 of the Merchant Shipping Act 1894 provides that all orders, decrees, and sentences, pronounced by any sheriff or justice of the peace in Scotland under the authority of the Act shall be final and not subject to review.

The Summary Prosecutions Appeals (Scotland) Act 1875 provides that either party to a cause, *i.e.*, a proceeding under the Summary Procedure Act 1864 or for the recovery of a penalty before an inferior judge, may appeal notwithstanding any provision contained in the Act under which the cause shall have been brought excluding review.

A seaman brought a complaint against his employers in a Justice of the Peace Court for recovery of compensation alleged to be due to him under sec. 166 (2) of the Merchant Shipping Act 1894. The complaint bore to be under the Summary Jurisdiction (Scotland) Acts 1864 and 1881. The Justices having dismissed the complaint, the seaman appealed on a case stated under the Summary Prosecutions Appeals (Scotland) Act 1875. Held that as the complaint was not a proceeding under the Summary Procedure Act 1864 or for the recovery of a penalty or a sum of money in the nature of a penalty in the sense of the Summary Procedure Act 1864, the Prosecutions Appeals Act 1875 did not apply, and that therefore the appeal was incompetent.

The Merchant Shipping Act 1894 (57 and 58 Vict. c. 60) enacts, section 166—“(1) Where a seaman is engaged for a voyage or engagement which is to terminate in the United Kingdom, he shall not be entitled to sue in any court abroad for wages unless he is discharged with such sanction as is required by this Act, and with the written consent of the master. . . . (2) If a seaman on his return to the United Kingdom proves that the master or owner has been guilty of any conduct or default which but for this section would have entitled the seaman to sue for wages before the termination of the voyage or engagement, he shall be entitled to recover in addition to his wages such compensation, not exceeding twenty pounds, as the court hearing the case thinks reasonable.” Section 703—“In Scotland, all prosecutions, complaints, actions or proceedings under this Act, other than prosecutions for felonies or misdemeanours, may be brought in a summary form before the Sheriff of the county or before any two justices of the peace of the county or burgh where the cause of such prosecution or action arises, or where the offender or defender may be for the time, and when of a criminal nature or for fines or penalties, at the instance of the procurator-fiscal of court, or at the instance of any party aggrieved, with concurrence of the procurator-fiscal of court. . . .” Section 707—“Where on any summary proceedings in Scotland there is a decree for payment of any sum of money against a defender, the decree shall contain a warrant for arrestment, poinding, and imprisonment in default of payment.” Section 709—“No order, decree, or sentence pronounced by any sheriff or justice of the peace in Scotland under the authority of this Act shall be quashed or vacated for any misnomer, informality, or defect of form; and all orders, decrees, and sentences so pronounced shall be final and conclusive, and not subject to suspension, reduction, or to any form of review or stay of execution, except on the ground of corruption or malice on the part of the sheriff or justices. . . .”

The Summary Procedure Act 1864 (27 and 28 Vict. c. 53) enacts, section 3—“*Application of Act*—The provisions of this Act may be applied to. . . (3) All proceedings for the recovery of any penalty or sum of money in the nature of a penalty, which under the provisions of any Act of Parliament may be recovered by summary complaint or information, or by poinding or distress and sale, or other summary process or diligence of the like nature, before any sheriff, justices or justice, or magistrate.” Section 28—“*Limits of civil and criminal jurisdiction defined in respect to proceedings by way of summary complaint.* . . . In all proceedings by way of complaint instituted in Scotland in virtue of any such statutes as are hereinbefore mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature where in pursuance of a conviction or judgment upon such complaint, or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence

of imprisonment against the respondent, or shall be authorised or required in case of default of payment or recovery of a penalty or expenses. . . to grant warrant for the imprisonment of the respondent, . . . and in all other proceedings instituted by way of complaint under the authority of any Act of Parliament the jurisdiction shall be held to be civil. . . .”

The Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. c. 62) enacts—section 2—“*Interpretation of Terms*—In this Act the following terms have the meanings herein assigned to them. . . . ‘Cause’ means and includes every proceeding which may be brought under the Summary Procedure Act 1864, and every other summary proceeding for the prosecution of an offence or recovery of a penalty competent to be taken before an inferior judge.” Section 3—“*Inferior judge on application of party aggrieved to state a case for opinion of superior court*—On an inferior judge hearing and determining any cause, either party to the cause may, if dissatisfied with the judge’s determination as erroneous in point of law, appeal thereagainst, notwithstanding any provision contained in the Act under which such cause shall have been brought excluding appeals against or review in any manner of way of any determination, judgment, or conviction or complaint under such Act, by himself or his agent applying in writing. . . . to the inferior judge to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of a superior court of law as hereinafter provided. . . .”

On 20th September 1905 James Little & Company, steamship owners and brokers, 69 Buchanan Street, Glasgow, were charged in the Justice of the Peace Court for the county of the city of Glasgow on a summary complaint at the instance of Joseph Alexander, Miners Arms, Blyth, Northumberland

The complaint was as follows:—“Under the Summary Jurisdiction (Scotland) Acts 1864 and 1881. Unto the Honourable His Majesty’s Justices of the Peace for the county of the city of Glasgow, under the Summary Jurisdiction conferred on them by the Merchant Shipping Act 1894, the complaint of Joseph Alexander, Miners Arms, Blyth, Northumberland, a British subject, *Humbly sheweth*—That James Little & Company, steamship owners and brokers, 69 Buchanan Street, Glasgow, have been guilty of conduct or default within the meaning of sec. 166 (2) of the Merchant Shipping Act 1894, whereby the said Joseph Alexander is entitled to compensation, in so far as on or about 8th July 1904 the said Joseph Alexander having signed articles at North Shields to serve as donkeyman on board the said James Little & Company’s s.s. ‘Riverdale,’ on a voyage of not exceeding two years’ duration, to any ports or places within the limits of 75 degrees north and 60 degrees south latitude, commencing at the Tyne, proceeding thence to New York, thereafter trading to ports in any rotation, and to end at such

port in the United Kingdom or continent of Europe (within home trade limits) as may be required by the master, they did on or about 13th April 1905 at Bombay, while a state of war existed between Japan and Russia, with both of which nations Great Britain and Ireland was at peace, and raw cotton had been notified by Russia as contraband of war, charter or order said ship on a voyage to Kobe, a port in Japan, near Kare, where gun-cotton is manufactured for the Japanese Government, with a cargo of raw cotton, and on the said Joseph Alexander justifiably refusing to proceed on said voyage as in breach of said articles and the proclamation issued on 11th February 1904 by His Majesty King Edward Seventh, enjoining strict neutrality on the part of his subjects, falsely charge the said Joseph Alexander before a magistrate with wilful disobedience to lawful orders, and leave him at said port, in consequence of which the said Joseph Alexander had his agreement prematurely terminated, was compelled to return to the United Kingdom as a distressed seaman, and suffered much hardship and discomfort thereby, being compelled to sleep on deck during the greater part of the voyage, and put up with insufficient and inferior food, whereby he suffered in his health. May it therefore please your Honours to grant warrant to cite the said James Little & Company to appear before you to answer to this complaint, and thereafter to find them guilty of said conduct or default, and to adjudge them to pay to the said Joseph Alexander such compensation, not exceeding £20, as to your Honours seems reasonable, with expenses. According to Justice,

“JOSEPH ALEXANDER.”

At the hearing before the Justices the respondents objected to the relevancy of the complaint on the ground, *inter alia*, that a release in terms of section 136 of the Merchant Shipping Act had been signed by the complainer and attested. The Justices sustained this objection and dismissed the complaint.

The complainer appealed to the Court of Session on a case stated. The case bore to be under the Summary Prosecutions Appeals (Scotland) Act 1875, and contained a statement of the facts and certain questions in law for the opinion of the Court.

The respondents objected to the competency of the appeal, and argued—The decision of the Justices was final—Merchant Shipping Act 1894, section 709. The procedure contemplated by section 703 of that Act was the ordinary common law procedure of the Justice of the Peace Court and not that of the Summary Jurisdiction Acts of 1864 and 1881. If the latter had been meant the Act of 1894 would have said so. The fact that the proceedings contemplated were to be summary did not mean that the ordinary common law jurisdiction of the Justice of the Peace Court was to be excluded. This was not a prosecution for a penalty but for a civil debt (*i.e.*, compensation) recoverable by civil procedure. The concurrence of the procurator-fiscal would

have been necessary had the proceeding been for recovery of a penalty (section 703). The fact that under section 707 the decree might contain warrant for imprisonment did not make the complaint a proceeding for the recovery of a penalty in the sense of the Summary Procedure Act of 1864, but merely abrogated the effect of the Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34), which abolished imprisonment for civil debt. Under the Merchant Shipping Act of 1854 (17 and 18 Vict. c. 104), section 538, imprisonment was also competent. The Summary Prosecutions Appeals Act 1875 dealt merely with summary proceedings in the sense of the 1864 Act and prosecutions for offences or recovery of penalties (section 2). This proceeding fell within neither category, and therefore it was not entitled to the benefit of the appeal provided for by section 3 of the 1875 Act—*Lee v. Lasswade Local Authority*, November 2, 1883, 11 R. (J.C.) 1, 21 S.L.R. 51. The common law jurisdiction of the Justices (6 Geo. IV, c. 48, section 2) had not been exceeded, and therefore the finality clause in the Merchant Shipping Act was conclusive—*Bone v. School Board of Sorn*, March 16, 1886, 13 R. 768, 23 S.L.R. 537.

Argued for appellant—The appeal was competent. The objection now taken that this was not a proceeding under the Summary Jurisdiction Acts had not been taken in the Court below. [Counsel for the respondents stated that it had, and that his plea of “no jurisdiction” covered that objection.] The fact that under section 707 of the Act imprisonment was competent brought this proceeding within the scope of the Act of 1864. Section 28 of that Act provided that the jurisdiction was to be regarded as criminal if a sentence of imprisonment could be pronounced in default of payment. That was so here. This proceeding was therefore competently brought under the Act of 1864, and that being so this appeal was competent. The finality clause in the Merchant Shipping Act (*viz.*, section 709) was met by section 3 of the Summary Prosecutions Appeals Act 1875. It was sufficient if the compensation could be assimilated to a penalty. The fact that it was limited to £20 did so assimilate it.

At advising—

LORD PRESIDENT—By the Merchant Shipping Act of 1894, and section 166 thereof, provision is made by which a seaman engaged in a voyage which is to terminate in the United Kingdom, shall not be entitled to sue in any Court abroad for wages unless under certain exceptions therein specified. By the second sub-section of that section it is provided that if a seaman on his return to the United Kingdom proves that the master or owner has been guilty of any conduct or default which but for this section would have entitled the seaman to sue in a Court abroad, he shall be entitled to recover in addition to his wages such compensation, not exceeding £20, as the Court hearing the case thinks reasonable.

Now the present appellant Joseph Alexander was a seaman, and he was engaged in the employment of James Little & Company, the respondents, on a vessel which was about to make a voyage from Bombay to Japan. The ship was ordered by the owners to take a cargo of cotton to Japan. At that time cotton had been declared by the Russian Government to be contraband of war, and accordingly this appellant refused to go further on the voyage.

Under this section he was not able to sue for his wages in Bombay; but a case was taken in Bombay in which it was held—and I shall assume rightly without giving any opinion upon the matter—that he was entitled to refuse as he did to serve. On his return home he now brings an action. He has been paid his wages under circumstances I do not think it necessary to go into; and this action which we have before us is admittedly rested on the second sub-section alone. It is, of course, quite clear in reading the second sub-section that the idea of the sub-section is that the extra payment is to be recovered at the same time as the wages are recovered. All the same I do not think that that prevents him suing for it itself, if the wages have been recovered by voluntary payment. There is nothing in the section which makes it absolutely necessary, although in most cases it might be desirable, to recover the two sums at one time. Accordingly, I think the case was competently brought in the Justice of Peace Court, because section 703 of the Merchant Shipping Act allows for summary proceedings, *inter alios*, before the Justices. It accordingly was so brought, and the Justices pronounced a decree assolving the defenders in respect that it was proved that a discharge had been given for this claim. Against that pronouncement of the Justices an appeal has been taken upon a case stated under the Summary Procedure Act of 1864 and the Summary Prosecutions Appeals Act of 1875, and on the case arriving here the objection of incompetency has been taken, and that is the matter which your Lordships have now to determine.

Now I have already referred to the section upon which the claim depends, and I have referred to the section which allows summary proceedings, but there is another section in the Merchant Shipping Act which is very much to the point, and that is section 709—[*His Lordship read the section*]. No one says that the present case is within the exception there defined, and therefore, *prima facie*, that is a finality clause which would prevent any appeal; and so it would but for one thing, and that is that by the provisions of the two Acts which I have already cited—viz., the Summary Procedure Act and the Summary Prosecutions Appeals Act—it is familiar to your Lordships that these Acts read into every other Act of Parliament a provision for appeal according to the provisions enacted in them—that is, notwithstanding there may be a finality clause in a General Act of Parliament which allows of prosecution, yet if that prosecution is brought under the forms of the

Summary Procedure Act and the Summary Prosecutions Appeals Act, then *ipso facto* there is an appeal given there by way of a case stated.

Therefore, that being so, the question necessarily comes to be narrowed to this—the finality clause will obviously apply to summary proceedings in general, but it will be overridden by the provisions of the two Acts I have cited, if the prosecution is a prosecution which can be brought under the Summary Procedure Act and the Summary Prosecutions Appeals Act. No doubt this complaint, on the face of it, bears to be so. When I look at the complaint I see it is headed—“Under the Summary Jurisdiction (Scotland) Acts 1864 and 1881.” But of course it is clear that you cannot make a thing rightly fall under a certain Act of Parliament by simply putting the title of the Act at the top, and therefore the question comes to be whether this is truly a proceeding under these Acts or not. Now that depends on the terms of these Acts, and the provisions of these Acts applicable to this matter are, first of all, the third section of the Act of 1864, which by sub-section 3 says that the provisions of the Act are to apply to “All proceedings for the recovery of any penalty, or sum of money in the nature of a penalty, which under the provisions of any Act of Parliament may be recovered by summary complaint . . . before any sheriff, justices or justice, or magistrate.” And then that definition, such as it is, is perhaps extended—for I do not think the extension practically comes to much—by the second section of the Summary Prosecutions Appeals Act of 1875, which says—“Cause means and includes every proceeding which may be brought under the Summary Procedure Act 1864, and every other summary proceeding for the prosecution of an offence, or recovery of a penalty, competent to be taken before an inferior judge.” Therefore the question comes to be simply this—Is the prosecution for this sum of money, due under sub-section 2 of section 166 of the Merchant Shipping Act, either a proceeding for the recovery of a penalty, or a sum of money in the nature of a penalty, or is it a summary proceeding for the prosecution of an offence, or the recovery of a penalty? I am quite unable to see that it is; because I think it is not, in the ordinary sense of the word, a penalty at all. It is not a penalty in the sense in which the word penalty is used in the Summary Procedure Acts. It is referred to as compensation, and the scheme of the section, I think, is not far to seek. By the first part of the section the seaman is prohibited from exercising what would otherwise be his right of suing the owner abroad for breach of contract—the obvious reason being that it is very inexpedient that ships should possibly be delayed by the existence of legal proceedings at ports of call where they would be reduced to this dilemma, either that they would be delayed, or, if they were not delayed, that the proceedings would have to go on in the absence of material witnesses. But then,

as a *quid pro quo* for that taking away of the common law right of the sailor, subsection 2 comes in and says that if the sailor shows that he would have had a perfectly good cause of action, the right to sue which the first part of this section deprived him of, then he is to be entitled, in addition to his contract wages, to such compensation, not exceeding £20, as the Court thinks reasonable. The compensation is not measured by the offence of the owner, for the owner has committed no offence. All that the owner has done is that he has availed himself of the Act of Parliament, which says that he is not to be sued in a foreign court. It is measured by the extra expense and trouble that the seaman has been put to in not being allowed to recover what, *ex hypothesi*, is his just debt at the time, but, instead of that, having to come home and sue, months or almost a year after. All that seems to me to be of the essence of civil compensation, and not penalty, and therefore I do not think it falls in any sense within the definition of either the one statute or the other. If that is so, then the matter is ended, because we are bound to give effect to the finality clause, which is a plain provision of the Merchant Shipping Act. I think, accordingly, that the objection to the competency is well taken, and that your Lordships cannot entertain this appeal.

LORD M'LAREN—I should have been glad if we could have given a decision on the questions submitted to us in this case, because the questions are well suited to the determination of a superior court, and are not such as can be satisfactorily solved by two justices of the peace on their own knowledge of the law. But after listening to your Lordship's exposition of the case, I am not satisfied that these questions can be brought within the scope of the Summary Prosecutions Appeals Act 1875. Appeal under that Act is limited to representations against penalties and sentences of imprisonment for offences, and awards in the nature of penalties. It is impossible to read that Act and the correlative provisions from other Acts without seeing that the penalties there dealt with are fines imposed by the Court for something done which the party is not entitled to do, with the effect of causing injury to others. Now it has been pointed out that the provisions for compensation under the Merchant Shipping Act of 1894 are not of the nature of a punishment or penalty for a wrong, because the shipowner is within his statutory right in delaying payment until the ship comes home and the case can be tried in the courts of his own country. The shipowner is absolved from the obligation of submitting to the jurisdiction of a Small Debt Court in the place where the debt first becomes due, but in consideration of this privilege the Merchant Shipping Act awards the seaman compensation limited to £20, to compensate him for the inconvenience to which he is put in not getting his wages until the termination of the voyage. It has been argued that this limi-

tation to £20 brings the award within the nature of a penalty. If it were a question between liquidate damages and penalty, no doubt this would be a penalty because it is restrictable. But this does not solve the question before us, and I am not satisfied that it is a penalty in the sense of the Summary Prosecutions Appeals Act which deals with penalties which are either within the region of criminal jurisdiction or are of the nature of penal awards imposed on offenders in consequence of a wrong. I think that indemnity rather than penalty is the motive of this provision of the Merchant Shipping Act.

LORD KINNEAR—I concur.

LORD PEARSON—I agree in holding that the appeal is incompetent for the reasons assigned by your Lordship. The strength of the appellant's case lies in the expression "guilty of any conduct or default" occurring in section 166 of the statute, and in the provision of section 707 that the decree shall contain a warrant for arrestment, poinding, and imprisonment, in default of payment. The question must be solved by considering the precise nature of the seaman's claim in this case and of the remedy given him by the statute. It is clearly a civil claim for money compensation in respect of a wrongful act, and in imposing the liability to imprisonment in default of payment the statute means imprisonment until payment. The imprisonment takes its place, along with the poinding and the arrestment with which it is joined, as a mode of recovering the money, and is not imposed *in modum pœnæ*. The punishment of the master would do no good to the dismissed seaman. What he wants and what the statute provides for him is the prompt payment of the money due to him. Having regard both to the nature of the pecuniary claim itself and to the general policy of the statute, which is really a code standing by itself, I hold the Summary Procedure Acts do not apply. I think it clear that the case falls within section 709 of the Merchant Shipping Act, which enacts that the order shall be final and conclusive and not subject to review except on the ground of corruption or malice on the part of the Justices, which is not alleged.

The Court dismissed the appeal.

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