

Agents for the Trustees—Tait & Crichton, W.S.
Agent for Mrs Campbell (now Clarke)—Alexander Stevenson, W.S.

Agents for Captain Campbell—Hunter, Blair, & Cowan, W.S.

Agents for Mrs Hunter—A. & A. Campbell, W.S.

Saturday, December 16.

FORBES V. ADAIR.

Appeal—Competency—Civil or Criminal—Medical Act, 1858 (21 and 22 Vict. c. 90)—Summary Procedure Act, 1864 (27 and 28 Vict. c. 53, § 28). Held that the proceedings following upon a petition and complaint under sections 40 and 41 of the Medical Act, 1858, are of a criminal nature, as defined by section 28 of the Summary Procedure Act, 1864; and an appeal to the Court of Session from a judgment of the Sheriff thereon (in which he found the complaint not proven) dismissed as incompetent.

On the 27th October 1871 Forbes presented a petition and complaint against Adair to the Sheriff of Aberdeen, in which it was stated that the respondent falsely pretended to be a doctor of medicine, whereas he was not registered as such under the Medical Act, nor was recognised by law as such.

Section 40 of the Medical Act enacts, "that any person who shall wilfully and falsely pretend to be, or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title, addition, or description implying that he is registered under this Act, or that he is recognised by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding £20."

Section 41 provides that "Any such penalty may, in Scotland, be recovered by the procurator-fiscal of the county, or by any other person, before the Sheriff or two Justices, who may proceed in a summary way, and grant warrant for bringing the party complained against before him or them, or issue an order requiring such party to appear on a day and at a time and place to be named in such order; and every such order shall be served on the party by delivering to him in person, or by leaving at his usual place of abode, a copy of such order and of the complaint whereupon the same has proceeded; and upon the appearance, or default to appear, of the party, it shall be lawful for the Sheriff or Justices to proceed to the hearing of the complaint, and, upon proof on oath, or confession of the offence, the Sheriff or Justices shall, without any written pleadings or record of evidence, convict the offender, and decree him to pay the penalty named, as well as such expenses as the Sheriff or Justices shall think fit; and failing payment, shall grant warrant for recovery thereof by poinding and imprisonment, such imprisonment to be for such period as the discretion of the Sheriff or Justices may direct, not exceeding three calendar months, and to cease on payment of the penalty and expenses."

The prayer of the petition was precisely in terms of this section.

The Sheriff (GUTHRIE SMITH) found the complaint not proven, and dismissed the same.

The petitioner appealed to the Court of Session. SCOTT for him.

SOLICITOR-GENERAL and R. V. CAMPBELL, for Adair, objected to the competency of the appeal—in respect (1) that the Court of Session had no jurisdiction to entertain the appeal, the proceedings being of a criminal nature; (2) that the clause in the Medical Act dispensing with a record of the evidence virtually excluded review on the merits.

The first objection turned upon the application of the 28th section of the Summary Procedure Act, 1864 (27 and 28 Vict. c. 53):—"And whereas much inconvenience has resulted from the uncertainty which exists as to the nature of the jurisdiction conferred by various Acts of Parliament, authorising convictions for offences, and the recovery of penalties, and the enforcement of orders by imprisonment upon summary complaint before Sheriffs, Justices, and Magistrates in Scotland, and it is expedient to define the cases in which such jurisdiction shall be held of a criminal nature: In all proceedings by way of complaint instituted in Scotland, in virtue of any such statutes are hereinbefore mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment, 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, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation; and in all other proceedings instituted by way of complaint, under the authority of Act of Parliament, the jurisdiction shall be held to be civil."

Argued, for Forbes, that the adjection of poinding to the warrant of imprisonment showed that the penalty was contemplated as a civil debt, to be recovered by civil diligence. As the distinction drawn by section 28 of the Summary Procedure Act was purely artificial and for convenience, it would produce the opposite effect to that aimed at by the section if the line was not drawn in the exact mode in which it was drawn by the statute.

At advising—

LORD PRESIDENT—This is an appeal against a judgment of a Sheriff dismissing a petition and complaint under sections 40 and 41 of the Medical Act of 1858. That statute provides, in section 40—(*reads*). Section 41 provides the mode for recovery of the penalty—(*reads*). Now, we have not an opportunity of seeing in this case how the Sheriff would have followed out the provisions of this section. But, if he had convicted, I think he would have been bound to decree the respondent "to pay a penalty of , with of expenses;" and failing payment, he was bound to grant warrant for recovery thereof by poinding and imprisonment, under declaration that the imprisonment should in no case exceed three calendar months, and should cease on payment of such penalty and expenses. Such is the nature of the sentence which he is required to pronounce. The question is, Whether this is a criminal or a civil proceeding within the meaning of section 28 of the Summary Procedure Act? If it is criminal, we have no jurisdiction; if it is civil, we are bound to entertain the

appeal. Section 28 of the Summary Procedure Act proceeds on a recital of the inconvenience arising from uncertainty as to whether a proceeding is of a criminal or a civil nature. It then enacts, that "in all proceedings by way of complaint instituted in Scotland, in virtue of any such statutes as are hereinbefore mentioned." Now, the first question which arises is, Whether this is a proceeding by way of complaint "in virtue of any such statutes?" I think that the reference is to the preamble of this particular section, which sets forth that inconvenience has arisen from the uncertainty which exists as to the nature of the jurisdiction conferred by various Acts of Parliament, &c. And I think that this is one of such statutes. The next question is, Whether this case falls within the definition of section 28 of a criminal proceeding? It is certainly not a case where the Sheriff is required or authorised to pronounce a sentence of imprisonment. Does it fall within the alternative, "where, in default of payment or recovery of a penalty or expenses," the Sheriff is authorised and required "to grant a warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation?" What the Sheriff is required to do by the Medical Act is, failing payment of the penalty and expenses, to grant warrant for recovery thereof by poinding and imprisonment for a certain period. This is not quite the same as the clause in the Summary Procedure Act. The Sheriff is authorised to grant warrant for recovery by imprisonment, and something more. The only doubt is whether the conjunction of the two means of recovery—one by means of a proper civil diligence, and the other by imprisonment for a definite period—is sufficient to prevent this case falling under the definition of criminal. No doubt some curious consequences might follow from this conjunction, about which it is needless to speculate, as they must be held to have been in the view of the Legislature. The question is, whether this ceases to be a case where the Sheriff grants warrant for imprisonment, &c., because he grants a more extensive warrant? I think the distinction is too narrow to take the case out of the definition. I am therefore of opinion that this is a criminal proceeding, and that we have no jurisdiction to entertain this appeal.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—I am of opinion that, under the provisions of the Summary Procedure Act, 1864, the present must be held a criminal process, and the appeal to this Court incompetent.

The intention of the Summary Procedure Act was to supply, what was much wanted, an easily applied test by which it should be known whether review should be sought from the Court of Justiciary or the Supreme Civil Court. Hence it declared, by section 28, that a case should be held criminal "where, in pursuance of a conviction or judgment, 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, or in case of disobedience to their order—to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation."

By the Medical Act, 1858, § 40, any person improperly assuming the title of Doctor of Medicine is liable to a penalty of £20; and by section 41 it is provided, that the court awarding this penalty shall, "failing payment, grant warrant for recovery thereof, by poinding and imprisonment, such imprisonment to be for such period as the discretion of the Sheriff or Justices may direct, not exceeding three calendar months, and to cease on payment of the penalty and expenses." It appears to me that this is, *in terminis*, the case contemplated by the Summary Procedure Act, in which, in default of payment, a warrant of imprisonment for a limited period is authorised.

It is true that recovery may be also enforced by poinding; and, irrespectively of the Summary Procedure Act, this circumstance might have made it difficult to decide whether the case was criminal or civil. Questions may still arise as to the precise course of procedure by poinding or imprisonment respectively, which questions may not be easy of solution. But all these considerations are irrelevant in the present inquiry. The sole question at present is, Whether a part of the sentence, or of the procedure for recovery, is not imprisonment for a limited period? And this being clear in the affirmative, the review lies with the Court of Justiciary, not the Supreme Civil Court.

The Court, in respect that the complaint was, within the meaning of section 28 of the Summary Procedure Act, of a criminal nature, dismissed the appeal, and found the respondent entitled to expenses.

Agents for Forbes—Pearson & Robertson, W.S.
Agents for Adair—Lindsay, Paterson, & Hall, W.S.

Wednesday, December 20.

THOMAS HOULDEN v. PETER COUPER.

Reparation—Damages—Process—Jury Trial—Motion for a New Trial—Excess of Damages.

Where the trustee on the bankrupt estate of the pursuer's sons had caused the pursuer's dwelling-house to be entered, and an inventory made of the furniture and effects belonging to him contained therein, without legal warrant—*held*, in an action of damages against the trustee, that it was not sufficient defence for the defender to establish that the actings of the pursuer, in conjunction with the bankrupts, his sons, had induced the belief on his part that the house and furniture belonged to the bankrupts, and that he had reasonable ground for believing that they might make away with the said furniture.

Motion for a new trial, on the ground of excessive damages, *refused*, because the damages given were under £100 in amount, and the case one of minor importance, though the Court intimated that in their opinion the damages were excessive.

This action of damages was raised by Mr Thomas Houlden against Peter Couper, the trustee on the sequestrated estates of Mr Houlden's sons, who had carried on business under the firm of Houlden Brothers as fancy stationers, and had become bankrupt in June 1871. Mr Houlden claimed damages against the trustee for having, without judicial warrant, caused Mr George Smith,