

[20th May, 1847.]

H. M. and A. M., *Appellants*.

ARCHIBALD SCOTT, Procurator-Fiscal of the Shire of Edinburgh, *Respondent*.

Jurisdiction.—The Court of Session has no jurisdiction to review proceedings taken by the Procurator-Fiscal before the Sheriff for the security of the public against a party alleged to be insane.

ON the 7th of March, 1835, the Respondent presented a petition to the Sheriff of Edinburgh, stating that he had received information that the Appellant A. M. was in a state of mental derangement, and had not only written improper letters to different persons, but had also attacked, insulted, and annoyed them in the streets of Edinburgh, whereby he had put them in fear and alarm, and praying that a warrant might be granted for his apprehension and examination, and that in case these statements should be proved, a warrant might be granted for his imprisonment until further order, or until sufficient caution should be found that he would be kept under such confinement or restraint as would prevent him doing injury to or conducting himself so as to injure, annoy, or alarm any person.

The Sheriff granted warrant of apprehension according to the prayer of the petition, but before it had been served upon the party, the other Appellant, H. M., appeared and signed an undertaking, which was endorsed upon the petition, whereby he “judicially bound and obliged himself, under a penalty of
“ one hundred pounds sterling, that the said A. M. will be put
“ under restraint and kept in proper custody, and not allowed
“ to go at large until it is certified by a proper medical person
“ that he is in such a state that he may be allowed to go at
“ large with safety to himself and others.”

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In the month of November, 1844, the Appellants brought an action in the Court of Session concluding for reduction of the above undertaking.

The Respondent pleaded, as a preliminary defence, that the action was incompetent and inadmissible, and that the parties must seek their remedy in another form and place.

The Lord Ordinary sustained the defence and assoilzied from the conclusions of the action. But this interlocutor being applicable to the merits which had not been tried, the Court altered it in so far as it assoilzied, and of new sustained the defence and dismissed the action.

The appeal was against both interlocutors.

The *Hon. Mr. Wortley* and *Mr. Anderson* were heard for the Appellants, and

The *Solicitor-General* and *Mr. J. Moncrieff* for the Respondents.

LORD CHANCELLOR.—My Lords, it appears to me that this judgment must be affirmed.

The public officer, the Procurator-Fiscal, whose duty it was to see to the safety of the public, and to bring before the proper Court any person whose conduct might lead to a breach of the public safety, being satisfied of the truth of the statements made to him, and having reason to suppose that the party might do an injury, makes an arrangement with a relation of the party accused, who undertakes in the terms stated in the papers.

Now it was competent for this public officer to interpose, and either to take on himself to bring the party accused before the Sheriff, or to enter into any arrangement for the security of the public. I do not find any authority before your Lordships which at all shows this transaction which has taken place

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between the Procurator-Fiscal and the relations of the party accused, to be a transaction which might not properly be made the subject of investigation before those who had the revision of the criminal jurisdiction.

As to the jurisdiction, the question is, whether the Court of Session had jurisdiction to examine into the transaction? It appears to me where the nature of the examination was into the act of the criminal prosecutor, the Procurator-Fiscal, and where the Court of Justiciary have the power of revision, this action cannot be sustained. It is not disputed that the exercise of that right, whether rightly or wrongly carried into effect, which the Procurator-Fiscal held, might be made the subject of investigation in the Justiciary Court. The question is, whether the Court of Session has the jurisdiction which is here sought to be conferred on it? If they have, then they might, in the exercise of their civil jurisdiction, take upon themselves to determine whether the transaction had taken place rightly or wrongly in a Criminal Court. Can that be so? The jurisdictions are separate. The only question here is, whether they had that jurisdiction. I think not—and, therefore, that the judgment below should be affirmed.

LORD CAMPBELL.—My Lords, I was at first startled with the argument that the Court of Session could be ousted of its jurisdiction. I could not understand the difference between a contract with the Procurator-Fiscal, and an obligation or contract by which a civil debt is created—that which is called in these proceedings a “bond,” but which is called in England a “recognizance,” as the noble and learned Lord has just stated. There is, however, this difference in principle. Here, proceedings are entered into by which the party says, I owe to our Lady the Queen the sum of 100*l.*, on condition that A. M. be kept under restraint upon the petition of the Procurator-Fiscal, and that he be kept in proper custody, and be not

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allowed to go at large until it shall have been certified by a proper medical person that he is in such a state as that he may be allowed to go at large with safety to himself and to others. Now that is what I call a recognizance—the conditions are named in it—and whether those conditions be broken or not is to be determined by the Court in which the recognizance is entered into.

It is admitted by Mr. Wortley that if this is a criminal proceeding, and recognizance be taken by the procedure in Scotland, the remedy would be before the Sheriff, and in the Court of Justiciary, and that the Court of Session has no jurisdiction. It would appear to me to be a most anomalous state of things, that one Court should have jurisdiction over another in the manner contended for in the argument. It is clear that the exercise of those powers which are conferred on the Procurator-Fiscal may be examined into before the Sheriff, or it may be examined into by the Superior Court, the Court of Justiciary. Therefore it may be considered that, as far as the Court of Justiciary is concerned, there is a power to inquire into the validity of proceedings in criminal suits. And consequently, it would be very inconvenient, and clearly contrary to all the course of proceedings in that part of the country, if the Court of Session were to interfere.

I quite agree with the Judges, who were unanimous on the subject, that the proper remedy, if there were any remedy, would be before the Sheriff, and afterwards before the Court of Justiciary.

I cannot suppose that there has been any irregularity throughout the whole of this case—not the slightest irregularity. I find my Lord Ordinary, who is very well acquainted with the mode of proceedings in Scotland in these cases, says, it does not appear that there has been anything done in this case different from what is done in similar cases. And a very wholesome proceeding it is, that when a person is in this precarious state,

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God Almighty only knowing whether he will ever be liable to criminal procedure, or whether he is only under the visitation of Heaven—that when he has done that which is the subject of punishment, and when process has been taken out, and judgment pronounced against him—it is a most wholesome proceeding that recognizance should be entered into for him by some friend to keep him under restraint, and that he should not be allowed to go at liberty until he has recovered his reason. A most salutary proceeding it is, and one most perfectly in accordance with the law; and the requiring that that recognizance should be given, was a proceeding wholly unexceptionable.

There is no doubt, my Lords, in my mind, that the proper tribunal in which this ought to have been brought was the Court of Justiciary, and not the Court of Session. I therefore am of opinion that this judgment should be affirmed.

In these opinions Lord Brougham concurred.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed with costs.

LAW, ANTON, and TURNBULL—RICHARDSON, CONNELL,
and LOCH, Agents.