

Thursday, March 7.

FIRST DIVISION.

[Lord Trayner, Ordinary.]

COOK v. WALLACE & WILSON.

Reparation—Damages for Illegal Apprehension—Alimentary Debt—Civil Imprisonment Act 1882 (45 and 46 Vict. cap. 42), sec. 4.

By section 4 of the Civil Imprisonment Act 1882 it is provided that the Sheriff on the application of the creditor may commit to prison "any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process, for which decree has been pronounced against him by any competent Court . . . but that a warrant of imprisonment shall not be granted if it is proved to the satisfaction of the Sheriff . . . that the debtor has not since the commencement of the action in which the decree was pronounced possessed or been able to earn the means of paying the sum . . . in respect of which he has made default, or such instalment . . . as the Sheriff shall consider reasonable."

The agents for a creditor holding a decree for a sum of aliment on which the days of charge had expired without payment, applied to the Sheriff for a warrant to commit the debtor to prison. The Sheriff granted a warrant to search for and apprehend the debtor, and bring him before the Sheriff for examination, and upon this warrant the creditor's agents caused the debtor to be apprehended.

In an action of damages by the debtor against the creditor's agents—held that the debtor must fail to satisfy the Sheriff that he is unable to pay the debt as a condition of imprisonment or apprehension under the statute; that apprehension before the condition was fulfilled was illegal; and issues ordered for the trial of the cause.

James Cook junior, medical student in Glasgow, brought this action against Messrs Wallace & Wilson, writers, Glasgow, to recover £500 as damages for alleged illegal apprehension.

The pursuer averred that in the end of the year 1887 an action had been brought by Miss Jessie Adam against him concluding for payment of certain sums in name of aliment and inlying charges attending the birth of an illegitimate child of which she had been delivered in the previous July, and of which she declared the present pursuer to be the father. Cook entered appearance, but did not defend the action, and on 8th December 1887 decree for certain sums in name of aliment, inlying charges, and expenses was pronounced against him. On 5th January 1888 he was charged on the decree, but the sums due were not paid as the pursuer had no funds to meet them. On 19th January the defenders, Wallace & Wilson, as agents of Miss Adam presented a petition signed by David Wilson of that firm, to the Sheriff at Paisley for a warrant to commit the pursuer to prison. Sheriff-Substitute (COWAN) on this application granted a warrant to search for and apprehend the pursuer, and to

bring him before the Sheriff for examination. On 24th January the pursuer was apprehended on this warrant in his father's house at Paisley, when the Sheriff-Substitute granted warrant to imprison him for six weeks. He was then removed from the Court in custody, but was shortly afterwards released on his mother paying a sum to account. He averred that the procuring and enforcing of said warrant to apprehend him, and under which he was apprehended, was wrongous and illegal. No notice was previously given to him that such a petition was to be presented, and it was only served upon him at the moment of his apprehension. The petition was a civil Sheriff Court proceeding, while the pursuer was treated worse than if he had been under a criminal charge. He was literally dragged from his bed, taken before a Judge without any opportunity of procuring legal advice, and summarily condemned to six weeks' imprisonment. The statute did not authorise apprehension before an order for imprisonment was pronounced, and the fact that imprisonment was the remedy craved did not imply that the pursuer was to be apprehended at the outset of the proceedings. In obtaining the said warrant to apprehend the pursuer, and giving instructions to enforce the same, and causing the pursuer's apprehension thereunder as aforesaid, the defenders acted wrongously and illegally, and were liable in damages and *solatium* to the pursuer. The pursuer, in consequence of said illegal and harsh proceedings, had suffered, and would continue to suffer, severely in his character, reputation, and feelings, and in view of the annoyance and grief thereby occasioned, the sum sued for was not excessive. The defenders had been called upon to make suitable reparation, but they refused, or at least delayed to do so.

The pursuer pleaded—“(1) The warrant to apprehend the pursuer, and his subsequent apprehension thereunder, as condescended on, being illegal and contrary to the statute, and having caused serious loss and damage to the pursuer, the defenders are liable in reparation as concluded for. (2) The defenders having acted maliciously and without probable cause, in procuring and proceeding under said illegal warrant, are liable to the pursuer in *solatium* and damages, in terms of the conclusions of the summons.”

The defender pleaded—“(2) No relevant case.”

By the 3rd section of the Civil Imprisonment (Scotland) Act 1882 (45 and 46 Vict. cap. 42) it is enacted that “from and after the commencement of this Act no person shall, except as hereinafter provided, be apprehended or imprisoned on account of his failure to pay any sum or sums decreed for aliment.” By the 4th section of the same Act it is, *inter alia*, provided as follows:—“Subject to the provisions hereinafter contained, any Sheriff or Sheriff-Substitute may commit to prison for a period not exceeding six weeks, or until payment of the sum or sums of aliment, and expenses of process decreed for, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute may appoint, or until the creditor is otherwise satisfied, any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process, for which

decree has been pronounced against him by any competent Court, provided—(1) That the warrant to commit to prison may be applied for by the creditor in the sum or sums decreed for without any concurrence; (2) That the application shall be disposed of summarily, and without any written pleadings; (3) That the failure to pay shall be presumed to have been wilful until the contrary is proved by the debtor; but that a warrant of imprisonment shall not be granted if it is proved to the satisfaction of the Sheriff or Sheriff-Substitute that the debtor has not since the commencement of the action in which the decree was pronounced, possessed or been able to earn the means of paying the sum or sums in respect of which he has made default, or such instalment or instalments thereof as the Sheriff or the Sheriff-Substitute shall consider reasonable."

The Lord Ordinary (TRAYNER) on 7th February 1889 pronounced the following interlocutor:—"Repels the second plea-in-law for the defenders, and appoints the pursuer within eight days to lodge the issue or issues which he proposes for the trial of the cause: Finds the defenders liable in expenses since the date of closing the record," &c.

"*Opinion.*—In July 1887 the pursuer was decreed, by a decree of the Sheriff of Renfrew and Bute, to make payment to Jessie Adam of certain sums of money as aliment for the support of an illegitimate child of which the pursuer is the father. On 5th January 1888 the pursuer was charged to make payment of the sums contained in said decree; but having failed to implement the charge a petition was presented to the Sheriff under the Civil Imprisonment in Scotland Act 1882, craving the Sheriff to grant warrant to commit the pursuer to prison. On this petition the Sheriff granted a warrant to search for and apprehend the pursuer, and 'bring him before the Sheriff of Renfrew and Bute for examination.' The defenders (acting as law-agents for Miss Adam) put this warrant into the hands of a sheriff-officer for execution. The pursuer was accordingly apprehended by the sheriff-officer and taken before the Sheriff-Substitute at Paisley, who, after hearing the pursuer, committed him to prison for six weeks.

"The pursuer now avers that the warrant for his apprehension, and his apprehension following thereon, were illegal, and he sues the defenders for damages on the ground that they obtained the same, and gave instructions for the execution thereof. The defenders plead that the action is irrelevant. I am of opinion that plea should be repelled.

"By the Civil Imprisonment Act it is provided that a creditor in a decree for aliment which has not been implemented, may apply to the Sheriff for a warrant to commit the debtor to prison; and on such an application the Sheriff may commit the debtor to prison for a period not exceeding six weeks, unless it is proved to his satisfaction 'that the debtor has not, since the commencement of the action in which the decree was pronounced, possessed or been able to earn the means of paying the sum or sums in respect of which he has made default.' It is obvious therefore that before a warrant to commit the debtor can competently be granted the debtor must have an opportunity of satisfying the Sheriff that

he has not been possessed or been able to earn the means of paying his debt. To enable him to do this he must be brought before the Sheriff. But by what form of procedure is he to be brought before the Sheriff? In answering this question it has to be observed that the whole proceedings are taken under the civil and in no sense the criminal jurisdiction of the Sheriff. Now, the ordinary mode by which a debtor is brought by a creditor before the Sheriff to answer in a civil process for his debt or obligation is by citation. It is not material whether the Sheriff grants warrant for the debtor's citation in ordinary form, or ordains the debtor to appear before him at a certain time. These are but two different forms by which the debtor is called on to appear before the judge.

"In the present case, however, neither of these forms was adopted; the Sheriff granted at once a warrant to search for and apprehend the pursuer—a warrant which was not prayed for in the petition, and a warrant which, in my opinion, was illegal, and *ultra vires* of the Sheriff in the circumstances. The statute does not authorise the Sheriff to issue such a warrant; and I know of no authority anywhere in our law conferred upon a Sheriff in the exercise of his civil jurisdiction by which he is authorised *in limine* of the proceedings before him to grant warrant for the apprehension of any debtor or alleged debtor, unless it be in the exceptional case of a debtor said to be *in fuga*, and even there the warrant to apprehend does not proceed on the mere statement of the creditor, but on proof affording a *prima facie* case that the creditor's statements are true.

"If there is no authority in the law for granting such a warrant as that now under consideration, there is neither authority nor excuse for it in our practice. The statute, indeed, is of too recent date to have had any practice founded on it which could be regarded as in any sense authoritative. Such practice as has followed upon the statute has not been uniform, nor in all cases quite regular. I had occasion in the Bill Chamber to consider a case where the Sheriff, on an application under this statute to commit a debtor to prison, had without notice of any kind to the debtor, or affording him an opportunity of explaining his failure to pay the debt, *de plano* granted warrant for the debtor's committal to prison for six weeks, a procedure which was not only illegal because contrary to the statute, but obviously unfair to the debtor. I do not know what the practice has been in other counties, but in Forfarshire (with which I was officially connected) the practice was to order intimation of the petition to the debtor, and to appoint him to appear to answer to the same at a specified time. This, I think, is the right practice.

"It was said on behalf of the defenders that to give notice of the petition to the debtor would only enable him to abscond. The same thing might be said of the service of a summons, for it gives notice to the debtor of the claim made against him, and enables him to quit the jurisdiction or dispose of his property before any decree can be obtained. Or take the case of an application for breach of interdict. The citation there would enable the respondent to quit the jurisdiction and avoid the penalty due to his offence, yet even in such a case (which is *quasi*

criminal) the respondent is not apprehended, but cited to appear and answer to the complaint. But the proper answer to the objection stated is, that there is no presumption that a law-abiding citizen will fail to render obedience to the citation of a competent Court. The assumption of the power, either by a Sheriff or any other authority, to order the apprehension of any citizen, which is not directly authorised by the law, is not to be allowed; and I think the Sheriff in granting the warrant in question assumed a power which he did not possess.

“If the warrant was illegal there can be no doubt the defenders are liable for instructing it to be executed.”

The defenders reclaimed, and argued—It was not intended that the debtor should be cited in applications under section 4 of the Civil Imprisonment Act. If it had been, there would have been a provision to that effect as there was in section 6 with regard to applications for law burrows. The procedure to be followed was regulated by the 6th section of the Personal Diligence Act (1 and 2 Vict. cap. 114). The charge said that if the debtor did not settle within the days fixed he was liable to pouncing or imprisonment. He could within these days lodge a *caveat* if he wished to be heard, but the Act certainly did not contemplate any formal citation. The debtor being in default, why should he get any further notice of threatened imprisonment? The Sheriff was a fitting judge of whether a warrant should be granted or not—*Strain v. Strain*, June 26, 1886, 13 R. 1029.

The pursuer was not called on.

At advising—

LORD PRESIDENT—I think the view of the Lord Ordinary in this case is unimpeachable. Under the Act 45 and 46 Vict. cap. 42, imprisonment is a competent means of enforcing a decree for aliment. This statute says in section 3 that “no person shall, except as hereinafter provided, be apprehended or imprisoned on account of his failure to pay any sum or sums decreed for aliment.” Now, the provisions there referred to occur in the next section, which is divided into several sub-sections. Imprisonment is only competent in the case of a wilful failure to obey a decree for aliment, and in order to obtain a warrant the creditor must apply to the Sheriff. That infers the institution of a sort of summary process, and in that process it is open to the debtor to satisfy the Sheriff, if he can, that he is not able to pay the debt or to earn the means of paying it. It seems to be a condition of obtaining a warrant for imprisonment that the debtor in a decree for an alimentary debt should fail to satisfy the Sheriff that he is unable to pay or to earn the means of paying it. If that be so, imprisonment without fulfilling that condition, and apprehension in the same way, must be illegal, and I am therefore for adhering to the Lord Ordinary’s interlocutor.

LORD RUTHERFURD CLARK and LORD ADAM concurred.

LORD MURE and LORD SHAND were absent.

The Court adhered, and ordered issues to be lodged for the trial of the cause.

Counsel for the Defenders—Wilson. Agents—Macpherson & Mackay, W.S.

Counsel for the Pursuer—Salvesen. Agents—Sturrock & Graham, W.S.

Thursday, March 7.

SECOND DIVISION.

MACPHERSON AND OTHERS (ANDERSON BURSARY TRUSTEES) v. SUTHERLAND AND OTHERS.

Testament—Construction—Uncertainty—Bursary—Persons Benefited.

A testator by his trust-disposition and settlement directed certain sums of money to be invested, and the interest paid in bursaries to deserving young men “either residents in the parish of Alves, or in the parish and burgh of Elgin.” Parts of the latter parish lay beyond the burgh, and parts of the burgh extended beyond the parish. Held that residents in any part of the parish of Elgin, or in any part of the burgh, might be benefited.

The late William Anderson, Lossiewynd, Elgin, who died 10th May 1884, by his trust-disposition and settlement directed certain sums of money to be paid “to the ministers of the Established and Free Churches of Scotland in the parish of Alves, the three Free Church ministers and senior Established Church minister in the parish of Elgin, and to Robert Young, solicitor, to be held by the said ministers and their respective successors in office, and by the said Robert Young and his nearest heir-male for the time, who shall be resident in the county of Elgin, in trust to invest the same and to pay the yearly interest thereof for bursaries to . . . young men to be of good character and fair talents, either residents in the parish of Alves or in the parish and burgh of Elgin, whose parents are respectable and in narrow circumstances (residents in the parish of Alves to be preferred on equal terms).” A difficulty arose as to the meaning and construction of the words “in the parish and burgh of Elgin.” The landward part of the parish of Elgin, which was of large extent and populous, was without the burgh, and on the other hand the burgh of Elgin extended in certain directions beyond the parish of Elgin into the adjoining parishes of New Spynie and St Andrew’s. The parish was eleven miles or thereby in length, by an average breadth of about three and one-half miles. At the date of the will the population of the burgh within the parish was returned at 8600, of the burgh outwith the parish about 1100, and of the parish outwith the burgh about 1260. There were in the parish of Elgin in all three Free Churches and ministers, two in the burgh of Elgin, and the third in the landward part of the parish at Pluscarden, six miles or thereby distant from the burgh.

A special case was submitted by the Bursary Trustees of the first part, and by two intending candidates for the bursaries, who resided, the