

Lordships have said as to the improbability of the Legislature intending to create a distinction between the law of Scotland and England as regards a matter vital to the interest of an accused person. But it is not necessary to go beyond the words of the statute. It would not, I think, have been possible to use words more clear and comprehensive than those used in the 10th section. It provides that in all prosecutions under the principal Act, that is, under the Food and Drugs Act of 1875, the summons shall not be made returnable in a less time than seven days from the day it is served upon the accused. This is a prosecution under the Act referred to, and the provisions of the section necessarily apply to the proceedings in the prosecution, whether it takes place in England or Scotland. I am not able to appreciate the difficulty which is said to arise from the section being expressed in technical language, which is foreign to the law of Scotland. If the language used is not the technical language of our law, it varies very slightly from it, and I see no difficulty in reading the words "returnable in seven days" as importing that there shall be seven days' *induciae*, that is, that the person charged shall have seven clear days between citation and trial. I share Lord Adam's doubt whether in dealing with the facts we ought to look at anything except the minutes of the proceedings—whether it is therefore necessary for us to consider what meaning is to be attached to the amendment of the case. But if the amendment is to be looked at, I also share Lord Adam's doubt as to what meaning is to be attached to it. The original case states that the three preliminary objections were repelled, and this is in accordance with the minutes of proceedings. The amendment says that the Sheriff repelled the first and second objections, but it does not say that he dealt with the third objection at all. He appears neither to have sustained or repelled it. If this be the case, then there is a direct contradiction between the case as originally stated and as amended. If, however, it is necessary to take these conflicting statements into consideration, and to assign a meaning to them, I agree with Lord M'Laren that they come to no more than this, that the Sheriff was ready to grant an adjournment, but that upon this being refused he repelled the third objection along with the others.

Now, it is perfectly clear that the defect in the procedure was not one which could be cured by an adjournment. The offer of an adjournment was therefore no answer to the appellant's objection. If it had been accepted there might be a question whether the acceptance would have barred the appellant from insisting on the plea. Had he accepted, it might still have been open to him to say that he had been induced to accept under a misunderstanding as to his legal rights. It might be a serious question whether an accused person could be barred in such circumstances, and by such an offer, from founding on an irregularity in the proceedings against him. The appellant did not, however,

accept the proposed adjournment; all that the amendment bears is, that he preferred to go on with the trial rather than that it should be adjourned, if the Sheriff refused to give effect to his plea.

On these grounds I am of opinion that the appeal must be sustained.

The Court accordingly sustained the appeal.

Counsel for the Appellant—A. J. Young.  
Agent—Robert Broatch, L.A.

Counsel for the Respondent—M'Lennan.  
Agent—Thomas Liddle, S.S.C.

Friday, June 28

(Before Lord Adam, Lord M'Laren, and  
Lord Kinnear.)

M'LEAN v. FALCONER.

*Justiciary Cases—Process—Diet—Adjournment of Diet—Unsigned Deliverance.*

In a trial upon a summary complaint the diet was adjourned by an unsigned deliverance to a subsequent day, when the accused appeared and after trial was convicted of the crime charged. The Court *suspended* the conviction on the ground that there had been no valid continuation of the diet.

*Lord Advocate v. Fraser*, 1 Irvine 1, followed.

John M'Lean was charged upon a summary complaint in the Sheriff Court of Kinross, with the crime of malicious mischief. A warrant for his apprehension was made out upon 15th January, but was not signed. On the same date the accused, who had been verbally informed of the charge against him, appeared in Court and pleaded not guilty to the complaint. The diet was then adjourned to the 29th January by an interlocutor signed by the Sheriff-Substitute.

On 29th January a second adjournment was made till 12th February, but the interlocutor by which this was done was not signed.

On 12th February the accused again appeared, and after trial was convicted of the offence charged.

Against this conviction the present suspension was brought, in which the complainer pleaded, *inter alia*—“(1) That no warrant to cite the complainer, or to apprehend him, or to cite witnesses or havers was ever granted. (3) That when the case was called on 29th January 1895 and not disposed of, no interlocutor or deliverance of any kind was pronounced adjourning the diet.”

Argued for the complainer—(1) There was no warrant to cite the accused, and therefore the proceedings were *ab initio* invalid—*Gallaehar v. Auld*, 1 White 130; *Parr v. Henderson*, 4 Coup. 252; *Stevenson v. Watson*, 2 Irv. 592. (2) It was essential there should be a continuation of the diet to a fixed day—*Lord Advocate v. Fraser*,

I Irv. 1. The interlocutor adjourning the diet not being signed, it must be held that there was no continuation of the diet, and the subsequent proceedings were therefore incompetent.

Argued for the respondent—(1) Informality in the citation will not invalidate the proceedings if the accused appears and pleads to the complaint, and if the informality has resulted in no injustice to the accused—*Armstrong and Another v. Stevenson*, 3 White 373; *Spouart v. Burr*, 32 S.L.R. 527. It was necessary to give the Court jurisdiction that there should be a properly authenticated complaint before it—*Stewart v. Lang & Sinclair*, 32 S.L.R. 67; but a warrant of apprehension or citation was merely executorial, and was not an essential part of the proceedings. (2) The interlocutor of adjournment was also executorial, and any informality in it was obviated if the accused appeared and stood his trial at the adjournment diet. In *Fraser's* case the trial was upon indictment, in which stricter adherence to form was required than in summary prosecutions. Here the adjournment was granted at the request of the accused.

At advising—

LORD ADAM—Two preliminary objections are urged in this case against the conviction which the complainer seeks to set aside. The first is that he was brought before the Court without a warrant, there being no signed warrant in existence when the first diet of his trial was called. It appears that the complaint charging the crime of malicious mischief was signed by the fiscal; a warrant for the apprehension of the accused was then made out in the usual terms, but was not signed. The accused was afterwards met by a policeman, who told him that a warrant for his arrest had been issued, and that he was required to appear in Court on a specified date. The complainer accordingly appeared on 14th January, and pleaded not guilty. On the same date the diet was adjourned until the 29th of January by an interlocutor signed by the Sheriff. On the 29th the diet was adjourned till the 12th of February by an interlocutor which was not signed. On 12th February the trial proceeded, and the complainer was convicted of the crime charged. His second objection to this conviction is that, there being no signed interlocutor adjourning the diet to 12th February, the proceedings on that date were incompetent and without warrant, and must therefore be set aside. It is argued that the case must be treated as if there had been no interlocutor, and that consequently the proceedings came to an end on the 29th January. It seems to me that this objection is well founded, and that consequently it is unnecessary for us to pronounce any opinion as to the merits of the first objection urged by the complainer. Ever since the case of *Fraser*, 1 Irvine 1, it has been settled that diets in criminal cases must be made peremptory, that is, must be fixed for days certain. In the case referred to, this

rule was laid down as regards a common law charge in the High Court, but there is no reason why the same rule should not apply in all cases truly criminal whether the proceedings are summary or not, or whether in the Sheriff Court or in the High Court. The charge in this case is one of malicious mischief, and that is a criminal charge. The rule, therefore, applies that every adjournment of the diet must be to a day fixed. If there is no adjournment, or if the adjournment is not to a day fixed, the whole proceedings come to a close. It was perfectly competent for the Court, assuming there was a warrant, or that the want of a warrant duly signed was got over, to go on with the trial on the 29th of January. But this was not done, and there being no adjournment of the diet the proceedings came to an end. If, therefore, we treat the unsigned interlocutor of 29th January, as we are clearly bound to treat it, as no interlocutor, the proceedings on the 12th February were clearly incompetent. The conviction must therefore be quashed.

LORD M'LAREN—There are two ways in which a defender may be made amenable to the jurisdiction of a criminal court. He may either be cited to appear by a warrant of citation, or he may be brought up under a warrant for his apprehension. It is equally true that no man can be brought before any civil court except either under a warrant issued in the name of the sovereign by the signet being affixed to the summons, or under a warrant of citation signed by the judge. The first objection to the proceedings is founded on the fact that the defender was not brought into Court on a warrant. The argument submitted to us is that the first objection, which is founded on the absence of a signed warrant, was waived by the accused pleading to the complaint. The second objection is that the case was continued from one diet to another by an interlocutor which was not signed. It is admitted that this was the case, and it thus appears that on the first of these diets the Court adjourned the diet without appointing another date, because, if an interlocutor is unsigned, it is equivalent to no interlocutor. Now, it is also a fundamental principle of the administration of criminal justice that an accused person is not bound to submit to indefinite delay. If the case cannot be finished upon the day appointed, it must be put off to a definite date.

As regards the first of the objections now urged, I hold a strong opinion, which it is not, however, necessary to express, since I agree with your Lordship that the second objection is sufficient for the decision of the case. It is impossible to sustain a conviction pronounced upon a day subsequent to that originally fixed, and to which the original diet has not been adjourned, and on this ground I am of opinion that the conviction now under review should be set aside. Although in the particular case the error may have resulted in no tangible injustice to the accused, it is of essential

importance that we should enforce the strict observance of rules which are intended as securities for the liberty of the subject. One can easily see that if a dispensing power were permitted to be exercised by the judge, or if deviations from this proper and regular form of proceedings were allowed in one case, it might be that in other cases injustice or oppression might result. In consequence of the failure to observe them in this case, I think the bill of suspension must be sustained.

LORD KINNEAR concurred.

The Court suspended the conviction with expenses.

Counsel for the Complainer—Orr. Agents—George Inglis & Orr, S.S.C.

Counsel for the Respondent—Constable. Agent—N. Briggs Constable, W.S.

## COURT OF SESSION.

Wednesday, June 26.

### SECOND DIVISION.

[Lord Moncreiff, Ordinary.]

#### ELLIS v. ELLIS' TRUSTEES.

*Succession—Trust—Fee and Liferent—Manufactory carried on by Testamentary Trustees—Deduction from Profits for Depreciation of Plant.*

A testator provided the liferent of the residue of his estate to his widow, and authorised his trustees with her consent to carry on a manufacturing business belonging to him "in such way and manner as to my trustees shall seem in their discretion best for the interests of my trust-estate." After the testator's death the trustees carried on the business with the widow's consent. In doing so they expended large sums out of revenue in repairing the plant and buildings, and in addition they annually set aside a percentage of the profits as a depreciation fund. Part of the funds so set aside were employed in renewing the plant, but a considerable amount accumulated in the hands of the trustees.

In an action brought by the widow ten years after the testator's death it was proved that the buildings and plant were then in as good a condition as they had been at the testator's death.

*Held* (rev. judgment of Lord Moncreiff) that the trustees were only entitled to charge against revenue, for depreciation of plant or buildings, sums actually expended in the reasonable maintenance, repair, and renewal of buildings and plant, and that the surplus accumulated in the hands of the trustees fell to be paid to the widow.

Thomas Ellis, iron manufacturer, proprietor of the North British Ironworks, Coatbridge, died in July 1884, survived by a widow and children, and leaving a trust-disposition and settlement, whereby he conveyed his whole estate to trustees, of whom his wife was one. The trustees were directed to pay the whole free income of the residue of the estate to the testator's widow, and subject to this liferent to hold the residue for behoof of his children. The deed further provided—"I hereby authorise and empower my trustees to wind-up or carry on, or concur in winding-up or carrying on, any business or adventure in which I may be engaged either on my own account or in conjunction with partners at the time of my decease, and especially to wind-up or carry on, but during the lifetime of my said wife in the event of her surviving me only with her consent and concurrence and subject to her approval, the business presently carried on by me at the North British Iron works aforesaid, in such way and manner as to my trustees shall seem in their discretion best for the interest of my trust-estate, and to enter into such arrangements as may be most suitable in their opinion for that purpose."

After the testator's death the trustees, with the widow's consent, carried on the testator's business.

In October 1894 the widow brought an action of count and reckoning against the trustees, her surviving children, and the representatives or issue of deceased children. In the second place she concluded for declarator that "in the said accounting by the first-mentioned defenders, the said trustees, to the pursuer, and in ascertaining the whole free income or annual produce of the residue and remainder of the means and estate of the said deceased Thomas Ellis payable to her, or to which she is entitled as aforesaid, the first-mentioned defenders are not entitled to set-off against the pursuer, as charges against income, any sums by way of depreciation on buildings or plant other than sums actually expended by the said trustees in the reasonable maintenance, repair, and renewal of buildings and plant forming part of the residue of the said estate, and in particular it ought and should be found and declared by decree foresaid that the first-mentioned defenders, the said trustees, as in a question with the pursuer, are not entitled to charge against income the sums already written off by the defenders, the said trustees, in the books of the North British Iron Works, Coatbridge, on account of depreciation on buildings and plant in so far as these do not represent amounts actually expended by the said trustees in the reasonable maintenance, upkeep, and renewal of the buildings and plant under their charge."

The pursuer averred that the trustees had not only expended large sums out of revenue in repairing the plant and buildings, but had also annually deducted a percentage (amounting to 5 per cent down to 1888, and 7½ per cent. thereafter) from the profits of the business as a depreciation fund. "The total amount so written off and