Counsel for the Respondent — Salvesen, K.C.—Gunn. Agents—Mackay & Young, W.S.

Saturday, June 1.

FIRST DIVISION.

[Lord Pearson, Ordinary.

HENDERSON *v.* HENDERSON'S TRUSTEES.

Process — Expenses — Withdrawal of Reclaiming-Note — Respondent Printing after Communication with Reclaimer.

A reclaiming-note was sent to the Summar Roll on 16th May. On June 1, before the case had been put out for hearing, the reclaimers moved that the reclaiming-note be refused, and that they should be found liable in £2, 2s. of expenses. The respondents moved for full expenses, on the ground that after an interview on 27th May between the parties' agents, at which the reclaimers' agents had rejected a proposal for a joint print, and at which no indication had been given of any prospect of the reclaiming-note being withdrawn, the respondents had printed certain documents. The Court *allowed* £6, 6s. of expenses.

Alexander Henderson and others brought a petition for the sequestration of the trust estates administered under his marriage-contract trust. Answers were lodged for the trustees William John Menzies, W.S., and John Henry Robertson, stockbroker.

On 4th April 1901 the Lord Ordinary (PEARSON) pronounced an interlocutor, whereby he sequestrated the said estates.

Against this interlocutor the trustees reclaimed.

On 16th May 1901 the case was sent to the Summar Roll.

On June 1 the reclaimers enrolled the case in the Single Bills, and moved the Court to refuse the reclaiming-note, and to find them liable in £2, 2s. of modified expenses.

Counsel for the respondents moved for full expenses, and stated that, after an interview between the parties' agents on 27th May at which the reclaimers' agents had rejected a proposal for a joint print, and at which no indication had been given of any prospect of the reclaiming-note being withdrawn, the respondents had printed certain documents. He argued that the previous communication with the other side distinguished the case from *Gilchrist & Co.* v. *Smith*, Jan. 9, 1901, 38 S.L.R. 238, and brought it within the rule of *Little Orme's Head Limestone Company* v. *Hendry & Company*, November 25, 1897, 25 R. 124.

LORD PRESIDENT—We think that the circumstances here are such as to lead to somewhat more liberal treatment than in the ordinary case, because it cannot be said here, as it has been said in some other cases, that the respondent has been premature in printing. The respondent communicated with the other side and they offered no discouragement to printing. We therefore think that the expense of printing the documents referred to should be allowed, but we consider that instead of making a remit to the Auditor, an award of £6, 6s., instead of the customary £2, 2s., will meet the justice of the case.

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

The Court found the reclaimers liable in £6, 6s. of modified expenses.

Counsel for the Reclaimers — Macphail. Agents—Gadell & Wilson, W.S.

Counsel for the Respondents — Berry. Agents—Hagart & Burn Murdoch, W.S.

Tuesday, June 4.

FIRST DIVISION.

[Dean of Guild Court, Musselburgh.

DOWNIE *v.* FRASER.

Process—Civil or Criminal Jurisdiction—Dean of Guild Court Proceedings—Penalty—Appeal—Summary Procedure Act 1884 (*27 and 28 Vict. cap.* 53), *sec.* 28 *—Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 487.

Proceedings in the Dean of Guild Court, even when their purpose is the recovery of a penalty, are of a civil character, and may be appealed, when an appeal is competent, to the Court of Session.

Robert Fraser, Burgh Prosecutor of the Burgh of Musselburgh, presented a petition in the Dean of Guild Court Musselburgh against John Downie, contractor, Musselburgh, in which he prayed the Court to find the respondent liable in a penalty not exceeding £5 sterling, and additional penalties for each day that the contravention complained of continued.

In the petition it was averred that Downie was the owner of a new tenement in Musselburgh, and that he had failed to give notice to the clerk of the commissioners that the tenement in question was ready for inspection before permitting it to be occupied, contrary to section 180 of the Burgh Police (Scotland) Act 1892.

That section is in the following terms:—"Within one month after any new house or building, or any alteration on the structure of any existing house or building, has been completed, or before such house or building or any portion thereof has been occupied, the owner or the builder shall give notice to the clerk of the commissioners that the house or building, or any part thereof, is ready for inspection before being occupied; . . . and every owner or builder who shall fail to give such notice aforesaid, or shall permit such house or

building, or altered building, to be occupied before a certificate applicable thereto has been obtained, shall be liable to a penalty not exceeding five pounds sterling, with an additional penalty of forty shillings for every day during which such occupation shall continue."

By interlocutor dated 3rd May 1901 the Dean of Guild Court found that Downie had contravened the above-quoted section, and fined him in the sum of £5 of penalty. This interlocutor was signed by the Provost, by one of the magistrates of the burgh, and by two persons, members of the Dean of Guild Court, but not magistrates.

Downie appealed to the Court of Session.

On the case being called in the Single Bills, counsel for the burgh prosecutor objected to the competency of the appeal. The section of the Summary Procedure Act 1864, and the Burgh Police Act 1892, on which the question of competency turned, are quoted in the opinion of Lord Adam, *infra.*

Argued for the prosecutor—The case was criminal, not civil, and the proper Court of appeal was the High Court of Justiciary. The criterion of civil and criminal jurisdiction, under section 28 of the Summary Procedure Act 1864, was not what the magistrate had actually done, but what he was entitled to do. In this case he could have sentenced the respondent to imprisonment under section 487 of the Burgh Police Act if he failed to pay the penalty—*Paton* v. *Linton,* June 8, 1880, 4 Coup. 338. A similar appeal had been held to be criminal in *Lang* v. *Allan & Mann,* February 3, 1869, 7 Macph. 473, which was directly in point.

Argued for the appellant—This was a civil appeal relating to procedure in a civil matter. A similar appeal had been heard in the Court of Session without objection—*Somerville* v. *Macgregor,* November 7, 1889, 17 R. 46. The Dean of Guild was not a magistrate within the meaning of section 487 of the Burgh Police Act, and the court was not a court within the meaning of section 28 of the Summary Procedure Act.

At advising—

LORD ADAM—In this case a petition was presented to the Dean of Guild Court of the burgh of Musselburgh by Robert Fraser, burgh prosecutor of the burgh, and as such procurator of court for the public interest, against the appellant John Downie, craving the Court to find him liable in a penalty not exceeding £5 sterling for having failed to give notice as therein specified, or for having permitted certain houses to be occupied before a certificate applicable thereto had been obtained by him, with an additional penalty of 40s. for every day during which such occupation may have continued or should continue.

It appears that the appellant is the owner of certain houses in Musselburgh, and the petition is founded on the 180th section of the Burgh Police (Scotland) Act 1892, which enacts that one month after any new house or building has been completed, or before such house or building, or any portion thereof has been occupied, the owner shall give notice to the clerk of the commissioners that the house or building, or any part thereof, is ready for inspection before being occupied, and the said clerk shall thereupon transmit such notice to the surveyor of the burgh, who shall forthwith proceed to survey such house or building, and if he is satisfied that such house or building is fit for occupation, he shall grant a certificate to that effect; and that every owner who shall fail to give such notice, or shall permit such house or building to be occupied before a certificate applicable thereto has been obtained, shall be liable in a penalty not exceeding £5 sterling, with an additional penalty of 40s. for every day during which such occupation shall continue.

It is averred that the appellant failed to give notice that certain houses of which he was owner were ready for inspection before being occupied, and also failed, before permitting the same to be occupied, to obtain a certificate under the hand of the burgh surveyor to the effect that he was satisfied that the houses were fit for occupation, and had continued to permit the same to be occupied, and had so incurred the penalties claimed.

A record was made up and closed and a proof led, upon considering which, upon 3rd May 1901, the Dean of Guild Court pronounced an interlocutor by which the Court found that the appellant had contravened the 180th section of the said Act, as set forth in the petition, and fined him in the sum of £5 of penalty, and found him liable in expenses.

It is against this judgment that the appellant has appealed. The respondent, however, maintains that the appeal is incompetent in the Court of Session, and ought to have been brought before the Justiciary Court.

It is difficult to conceive a Court which deals with matters more exclusively civil than a Dean of Guild Court, and there is nothing whatever of a criminal nature in the present proceedings. But the respondent rests his contention on the combined effect of section 487 of the Police Act and section 28 of the Summary Procedure Act 1864.

Section 87 of the Police Act enacts that the magistrate may sentence any person found liable in a pecuniary penalty to imprisonment until the same is paid, but in no case should the period of imprisonment exceed the respective periods thereinafter specified. The respondent maintains that under this section the Dean of Guild Court might competently have sentenced the appellant to imprisonment.

He then refers to the enacting part of the 28th section of the Summary Procedure Act, which provides that in all proceedings by way of complaint instituted in Scotland, in virtue of any such statutes as are thereinbefore 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, . . . "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."

It is accordingly argued that as, in this case, the Court was authorised to sentence, and might, if it had chosen, have sentenced the appellant to imprisonment, the case falls under the 28th section of the Summary Procedure Act, although no such sentence was in fact pronounced.

It does not appear to me that the power conferred upon "the magistrate" by the 487th section of the Police Act of sentencing the appellant to imprisonment extends to a Dean of Guild Court. The section is one of a bundle of sections which form Part VI. into which the Act is by section 3 divided, and which is titled "Jurisdiction and Recovery of Penalties." The part commences with section 454, and confers the jurisdiction and powers set forth in the Act, on "the magistrates of police of a burgh under this Act or any one or more of such magistrates, except where otherwise provided in this Act, including stipendiary magistrates and sheriffs acting in the Police Court. The power contained in section 487 is one of the powers so conferred, and I do not see how we can hold that it applies to the Dean of Guild Court, or how that Court is to be brought under the category of "the magistrates of police of a burgh," or any of the magistrates or justices specified in the Act.

If that be so, then the objections to the competency of the appeal must fail.

But I think further, that even were it otherwise the 28th section of the Summary Procedure Act would have no application to the case. That section proceeds upon the preamble that "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 convictions before sheriffs, justices, and magistrates in Scotland, and it is expedient to define the cases in which such jurisdiction shall be held to be of a criminal nature."

The Act therefore concerns itself with jurisdiction in cases of summary conviction before sheriffs, justices, and magistrates in Scotland.

Magistrate in that Act means "any magistrate of any burgh in Scotland having jurisdiction."

It certainly appears to me that the conviction under the petition to the Dean of Guild Court in this case is not a summary conviction before any sheriff, justice, or magistrate in Scotland.

Coming then to the enacting part of the clause, we find that, in accordance with the preamble, it enacts that in all proceedings by way of complaint the jurisdiction shall be deemed 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. And turning to the interpretation clause to see what "the court" here means, we find that it means, a "Sheriff Court or Burgh Court or any Court of Justices of the Peace for any county or city in Scotland, any Police Court having jurisdiction, or any sheriff, magistrate of any burgh, or justice or justices of the peace for any county or city in Scotland exercising jurisdiction . . . in any matter which may be lawfully brought before him or them in the manner provided by this Act."

It appears to me that a Dean of Guild Court falls within none of the definitions or descriptions of a court here specified. The one to which it has most analogy is, perhaps, a "Burgh Court." But although it is a court held in a burgh, it is certainly not "the Burgh Court," a court before which all sorts of crimes and offences of a limited kind may be brought.

In my opinion the Summary Procedure Act has no application to a Dean of Guild Court.

With regard to the case of *Lang* v. *Allan*, 7 Macph. 473, that was a case under the Glasgow Police Act 1866. It was presented to the Dean of Guild and craved that the respondents should be found liable in respect of a certain guild offence, in certain penalties, and failing payment within fourteen days, warrant was craved to imprison the respondents for any period not exceeding twenty days. The Dean of Guild found that the respondents had incurred the penalties specified in the petition, and granted warrant of imprisonment failing payment within fourteen days. It was held in an advocation that the Summary Procedure Act applied to the case, and that the advocation was not competent in the Court of Session.

The Lord Justice-Clerk (Patton) is the only judge who indicates the grounds on which the Summary Procedure Act was held to apply to the case. He says—"The Lord Dean of Guild is clearly 'a magistrate of a burgh exercising jurisdiction,' and the offence libelled was, according to the terms of the Summary Procedure Act, a criminal offence," by which he means, no doubt, an offence a conviction for which gave jurisdiction to the Justiciary Court. That may or may not be so, but I fail to see how a Dean of Guild Court, as in this case, can be held to be a magistrate of a burgh exercising jurisdiction.

It appears from the interlocutor appealed against that the court in this case consisted of four persons, two of whom happened to be magistrates of the burgh, and two were not. I do not see how a judgment pronounced by a court so constituted can be considered as the judgment of a magistrate exercising jurisdiction in the burgh. I therefore think that the case of *Lang* v. *Allan* is no authority against repelling the objections to the competency of the appeal,

which I propose your Lordships should do.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The case was sent to the roll.

Counsel for the Petitioner and Respondent—Cooper. Agents—Buik & Henderson, W.S.

Counsel for the Respondent and Appellant — Younger. Agents — Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, June 4.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

FARQUHAR *v.* MURRAY.

Reparation — Negligence — Medical Man — Gross Negligence—Issue.

In an action of damages brought by a patient against his regular medical adviser, the pursuer averred that on 9th April he scratched his finger on a nail; that the wound caused him no pain or inconvenience at first, but that on 14th April, the finger having gradually become more and more painful, he called on the defender, who pronounced it to be affected by erysipelas, and prescribed a medicine to be taken internally, and an ointment to be used externally, and instructed the pursuer to poultice the finger; that the defender called on 16th April and directed the pursuer to go on poulticing and using the medicines prescribed till he called again; that the defender did not call again, and that the pursuer continued the treatment prescribed, but being surprised at the defender's protracted absence, asked his wife to write and request the defender to come immediately; that in response another doctor called and stated that the defender was on holiday, and that he was looking after the defender's practice, and stated, as was the fact, that the defender had left no instructions regarding the pursuer's case; that the substitute examined the finger, and pronounced that it had been too long poulticed; that the continuance of the treatment prescribed by the defender had, through his failure to perform his professional duty to the pursuer, become prejudicial instead of remedial, and proved hurtful and injurious; that the substitute continued to attend the pursuer, and to use various remedies, but that ultimately, after consultation with the defender, who had returned, it was decided that amputation was necessary, and that after examination by two independent medical men at the Infirmary the finger was amputated there on 18th May; that the defender had carelessly and grossly neglected his duty to the pursuer as his patient, that the facts averred showed there had been on the part of the defender culpable want of attention and care, and a gross neglect of his professional duty, and that as the result the pursuer had suffered loss and damage.

Held (*rev.* judgment of Lord Kincairney, Ordinary — *diss.* Lord Young) that the action was relevant.

Form of issue *approved*.

John Farquhar, 13 Hillside Crescent, Edinburgh, raised an action of damages for £500 against Donald R. Murray, M.B., C.M., Leith.

The pursuer averred as follows:—"(Cond. 2) On or about 9th April 1900, up to which time the pursuer had been in good health, the pursuer, whilst serving a customer in the course of his business (as a provision merchant), got the second finger of his right hand scratched with a nail on the top of a haddock box. Beyond a slight effusion of blood at the time the wound caused him no pain or inconvenience for a day or two, until on Saturday, 14th April, the finger having gradually become more and more painful, the pursuer called upon the defender, who was his regular medical attendant. The defender having examined the pursuer's finger, pronounced it to be affected with erysipelas, and wrote out a prescription for a medicine to be used internally, and an ointment to be applied externally. He instructed the pursuer to follow the prescription and also carefully to poultice the finger with linseed and oatmeal, and undertook to call on Monday, the 16th inst. The defender accordingly called on that day about 7 p.m., and having examined the finger, directed the pursuer to continue poulticing it, and to use the medicines prescribed until he called again, which he promised to do without fail on an early day. The defender did not call next day as he had undertaken, and the pursuer waited on in daily expectation of a visit from him, relying upon the defender's promise to return, continuing all the time to carry out carefully the defender's instructions. The defender, however, never again visited the pursuer. (Cond. 3) On or about 25th April 1900, the pursuer being surprised at, and much inconvenienced by the defender's protracted absence and unaccountable silence, and having all along been suffering considerable pain and anxiety, asked his wife to write and request the defender to come immediately to see his finger. She accordingly wrote that day to the defender. The defender did not call that evening, but Dr Colin Mackenzie called next morning and stated that the defender was at present on holiday, and that he was looking after defender's practice while he was away from home. Dr Mackenzie further particularly stated, and it was the fact, that defender had not left any message or instructions whatever regarding pursuer's case, and that he knew nothing about it until he had got pursuer's wife's letter. The pursuer told Dr Mackenzie what the defender's instructions to him were, and stated