

Friday, November 6.

LOCALITY OF FORGAN.

Teind—Decree of Valuation—Surrender—Locality.

Held that a surrender of teinds by a heritor in a former locality does not exclude challenge by the minister of the validity of a decree of valuation, the said decree having been obtained in his absence.

The question in this case was one between the minister and the Earl of Zetland in the locality of the parish of Forgan, and it was in substance this:—Whether, when a heritor has in a former locality surrendered his teinds and had the surrender sustained, it is open to the minister in a subsequent locality to challenge the valuation upon which the surrender proceeded.

It was pleaded, for the Earl of Zetland that certain objections stated by the minister in this parish to a decree of valuation produced by his Lordship, dated in 1629, were excluded by a surrender sustained in the previous locality, proceeding upon the decree of valuation objected to, and were so excluded upon the principle of *res judicata*, or at “least that of *competent and omitted*.”

The Lord Ordinary (BARCAPLE) repelled this plea, adding the following interlocutor:—“The respondent’s plea of *res judicata* is founded on an interlocutor in the last process of locality sustaining a surrender by the respondent’s father of the teinds in question. But no question appears to have been raised in regard to the decree of valuation, and the parties did not in any way join issue on the point. In these circumstances the Lord Ordinary is of opinion that the plea cannot be sustained. There are no averments to support the plea of homologation and acquiescence.

“The ground on which the Lord Ordinary thinks that the decree founded on cannot be recognised as an effectual valuation in a question with the present incumbent is, that it appears on the face of the document that the minister was not called, and did not appear in the valuation. In this respect the case appears to him to be identical with that of *Kirkwood v. Grant*, 4 Macph. 4. He thinks that the judgment in that case established, in accordance with views expressed in *Stewart v. Brown*, 13 D. 556, that from the earliest period it was essential in a valuation before the High Commission that the minister should be called, in order to make it an effectual valuation against his successors in the cure.

“In the view which the Lord Ordinary takes of the case, it is unnecessary to dispose of the objections stated to the competency of the Court and to the form of the decree. The document is certainly of an unusual tenor, in so far as it refers to the appointment by the High Commission of a committee of their own number. But the Lord Ordinary is disposed to read it as setting forth a valuation by the High Commission itself, not by a committee. The objector also maintains that at its date, 16th December 1629, the High Commission could not itself carry through valuations, and that they could only be led before the sub-commissioners. The Lord Ordinary thinks that from the time when, after the submissions to the King, he authorised proper valuations of teinds to be led, that duty was committed both to the High Commission and the sub-commissioners. It appears to him that this objection is founded upon an erroneous view of the results of the investigation into the early proceedings

of the commissioners, which took place in the case of *Dunlop and Allan v. Commissioners of Woods and Forests*, 20 D. 1012. Neither does the Lord Ordinary think it a good objection to the valuation that no proof was led, the heritor being held as confessed.”

The Earl of Zetland reclaimed.

FRASER and LANCASTER for him.

MONRO and BALFOUR for minister.

At advising—

LORD COWAN—The only question is the effect of the surrender by the Earl or Zetland in a former locality—that is to say, the effect of the surrender upon the decree of valuation. I am prepared to hold the decree ineffectual as a decree of valuation, because, *ex facie* of the proceedings, it appears that the minister was not called, and I hold that to be a fatal objection. But, apart from that, it is said that the minister here is barred from taking this objection to the decree of valuation by force of the plea of *res judicata*, or of “competent and omitted,” or of homologation and acquiescence. On that matter I say, as regards the surrender, that that is a matter of personal right, and not of contract. An heritor is entitled to say, I surrender all my teinds, and that surrender will be final to this effect, that no objection can afterwards be taken to it in terms of the decree of valuation. But that does not touch the question—How far the decree of valuation is thereby fortified against all objection? The surrender may be good in terms of the decree of valuation, but that does not debar the minister from challenging the decree itself. There is no such doctrine as the claimer contends for, and the subject has been very deliberately considered. I hold that unless there has been a contest in regard to the decree of valuation there is no room for the plea of *res judicata*. *Ex facie* of the valuation, it appears that the minister was not called, and therefore it is liable to challenge at his instance. Cases of *Eddleston* and *Craik* referred to.

The other Judges concurred.

Agents for Objector—Dundas & Wilson, C.S.

Agents for Respondent—H. G. & S. Dickson, W.S.

Tuesday, November 10.

FIRST DIVISION.

PEGGIE V. CLARK.

Reparation—Wrongous Search and Apprehension—Police Constable—County Police Act. Circumstances in which *held* that a search of a person’s house and apprehension of the person himself by a Superintendent of Police were not illegal or oppressive, the Superintendent having reasonable ground for believing that the person had been guilty of a criminal offence. *Observations* on the duties and powers of police constables at common law and under the County Police Act 20 and 21 Vict., c. 72.

Peggie, sometime a carrier in Kinross, sued Clark, Superintendent of Police for the county of Kinross, for damages on account of alleged wrongous search of the pursuer’s house, and wrongous apprehension of the pursuer. The facts of the case are stated in the subjoined opinions of the Court. The Sheriff-substitute (SYME) decerned against the defender, assessing the damages at £6. The Sheriff (MONRO) reversed and assoilzied the defender. The pursuer Peggie advocated. The Lord

Ordinary (ORMSDALE) recalled the judgment of the Sheriff and returned to the judgment of the Sheriff-substitute.

The defender Clark reclaimed.

CLARK and KEIR for reclamer.

M'LEAN for respondent.

At advising—

LORD PRESIDENT—This is an action of damages against the Superintendent of Police for the county of Kinross, founded on allegations that the defender, on Sunday the 3d February 1867, illegally entered the pursuer's house in Kinross in search of the pursuer; and farther, that on Monday following he apprehended the pursuer, acting on both occasions without any warrant, and therefore illegally and oppressively.

The Sheriff-substitute found for the pursuer, and assessed the damages at £6. The Sheriff altered that interlocutor, and assoilzied the defender. The Lord Ordinary has returned to the interlocutor of the Sheriff, and the question between these competing judgments is one of some nicety.

The pursuer is a carrier, and at the time of these proceedings he had a dwelling-house in Kinross. He had a horse and cart, and he was employed by a person named Gordon, a fletcher in Milnathort, to deliver some meat in Burntisland, and receive the price, and bring it to his employer Gordon. He was to deliver the meat on Thursday and come back on Friday. He did not come back on Friday, but was at home all that day in Kinross until four o'clock in the afternoon. Kinross is only two miles from Milnathort. On the afternoon of Friday he went by train to Bridge of Earn. There he remained until Monday afternoon, and nothing in the meantime was heard of the money. In these circumstances Gordon was alarmed and put to inconvenience, and, under the impression that the man had absconded, he put himself in the hands of the Superintendent of Police. His wife went and stated the matter to him, and it was in these circumstances that the proceedings complained of were taken.

It appears to me that if the Superintendent of Police had reasonable ground for believing that this man intended to appropriate money, and in the execution of that intention had absconded, it was right in him, and within the scope of his duty, to take the most prompt and vigorous means to secure the culprit, and the case turns on the question whether there was reasonable ground. Now, the event certainly goes far to justify that belief; for, when the pursuer came back on the Monday and was apprehended, he had spent part of the money belonging to Gordon. Although the case is narrow, I am inclined to agree with the Sheriff. I think the Superintendent of Police had reasonable ground for suspecting that this man had committed a criminal breach of trust and intended to abscond. He went to search for the man on the Sunday at his own house. He could get no warrant on that day. I think he was justified in going to see if the man was at home. The man was not there. His wife gave no very definite answer where he was, and when the defender expressed some incredulity, she said, you may go and look for him. On the Monday he was apprehended and locked up in a police cell. It is part of the complaint of the pursuer that he was there for two hours. I think that was a good deal the pursuer's own doing, for as soon as the defender came to converse with him, he desired that Gordon might be sent for, and it was this sending for Gordon that caused the delay

in the Superintendent either bringing the pursuer before a magistrate or getting a warrant. In the end he was liberated, Gordon being satisfied about the money.

It is not necessary to proceed on the same ground as the Sheriff does. He puts the justification of the Superintendent on the 12th section of the County Police Act. I am not satisfied that that section imports any new law, or extends the power of police constables to apprehend without a warrant. I think that, under special circumstances, a police constable is entitled to make an apprehension without a warrant, and it will always be a question for the Court whether the circumstances justify the proceeding. There is no doubt, in some cases—as where a man is suspected of murder or some such crime—there it would be a breach of duty not to apprehend him. This is a different case, and we must look for the justification of the constable to the special circumstances. I place his justification more on common law than on Statute. No doubt, his duties are defined in that section, but it is on common law that his right mainly depends, and on that ground I come to the conclusion that he did not act illegally and oppressively, although acting without a special warrant.

LORD DEAS—I come to the same conclusion as your Lordship has done.

This case involves questions of some delicacy as to the powers and duties of police constables, particularly with reference to the General Police Act. From the interlocutor and note of the Sheriff I should rather infer that the notion has got abroad that under this General Police Act police constables may apprehend any one they think proper on their own accusation or suspicion without any right warrant. The Sheriff quotes the Act, and then says:—"The powers and duties thus attached to the office of a county constable are much higher and more extensive than those of a constable under the common law, and are conferred in addition to those at common law (see § 11). Plainly, these powers are to be exercised without any warrant other than the Statute itself. The Sheriff understands that in the county of Edinburgh (and the same may be the practice in other counties), almost all those persons who are ultimately charged with crimes are, without any written warrant, apprehended by the constables and brought to the central police office, and there detained in custody until a petition is framed and presented to the Sheriff, and a warrant granted thereupon." I don't find any such powers as that conferred by this section. I have great doubt if it was intended materially to extend the power of police constables to apprehend without warrant. Section 12 is more directed to other things. It is mainly directed to give power or to declare a power to apprehend persons accused "or suspected of having committed crimes, delinquencies or offences of whatsoever description, and at what place soever the same may have been, or are suspected to have been, committed, whether the same be of such a kind as can competently be tried before such sheriff or justices, or be of a nature requiring to be remitted for trial before a higher tribunal, or which, from having been committed beyond the bounds of the county, fall to be tried in another jurisdiction." Any extension of power in the section is directed more to these things than to apprehension without a warrant. It is true that it speaks of apprehending persons accused or suspected of having committed crime, but

it does not say that they are not to be accused or suspected in the ordinary way, according to law. It would be a strange interpretation that this discretion was committed to these inferior officers to apprehend whomsoever they thought proper, without any written warrant, on some suspicion of their own, which may or may not be well founded. That is not the meaning of the Act. I agree with your Lordship that there are many cases in which a police constable may, and in which it is his duty, to apprehend without a written warrant. If he sees a crime committed, or finds a person in the act of committing a crime, there can be no doubt he has power to apprehend that individual. If there is reasonable ground for supposing that a man has taken the life of another, so as to found a charge of murder, there is no doubt there that it is the duty of the constable to apprehend the man, for the nature of the crime renders it probable that the criminal will not await the course of justice. So, if there is reasonable ground for supposing that a person is going to abscond, or is in hiding; or if he belongs to that class of the community which are reputed to live by thieving or crime, or to that peripatetic class which are in one place one day and in another the next, so that no one ever knows where to find them—in these and other cases it is the duty of the constable to apprehend without a warrant. But I agree in holding that there is a heavy responsibility on these officers not to overstep the necessary and reasonable requirements of the particular case. If a person, though regularly charged with a crime or offence, is a well known householder, or resident in a place and carrying on business; in short, if he is what we call a law-abiding individual, I find nothing in this Act more than at common law to authorise his apprehension without a warrant. Therefore I do not proceed on any such ground, but on the special circumstances of this case, and I agree entirely with what your Lordship has said. No doubt this person had a house in Kinross. He was acting as a carrier, but the only account we have of his trade is as to that particular day. He brought no money to any one, but admitted that he appropriated a considerable part to his own use. That is, he admits embezzlement, which the law holds to be theft. The officer goes, I think rightly, to his house; he does not appear till Monday, and then with only seventeen shillings, the rest being spent on his own purposes; there was a rumour that he meant to make a moonlight flitting. I think there is every probability in the circumstances that, though the money which he had taken was not very much, the position into which he had got was such as to lead him to believe that he could do no more good in that place, and that the sooner he was out of it the better. In the circumstances, I think there was enough to justify the officer in apprehending him. I see nothing wrong in the search or apprehension, and though he was detained for two hours, I cannot say that was an unreasonable detention. If a man is rightly apprehended and taken before a magistrate, the question how long he is kept before a warrant is obtained is always a question of circumstances. There was nothing unreasonable here. This judgment must not be misunderstood, but must be made to stand on its proper ground.

LORD KINLOCH—I have had some difficulty in this case; chiefly from the fear lest any possible encouragement should be given to undue tampering with the liberty of the subject. But on the whole

matter, I have come to the same conclusion with your Lordships.

I think the conduct of the pursuer Peggie was such as to awake grave suspicions. He had got meat to deliver, and had received the price to bring back. He not only did not pay it, but spent part of it on his own purposes; and, by his absence for a couple of days, created serious apprehension that he meant to abscond. It was, *prima facie*, a fitting case to bring before the notice of the defender, the Superintendent of Police, and for him to inquire into. He properly went to the house of the pursuer; and I think nothing can be made of what is called the search of that house. He asked if the pursuer was at home, and, after being informed that he was not, was invited by the pursuer's wife to satisfy himself on the subject; which he appears to have done without any undue intermeddling. The pursuer's absence, as I have said, naturally confirmed the suspicions previously entertained; and, on his appearance in the afternoon of next day, he was apprehended under the directions of the defender. It is here that the true question in the case arises. I have no doubt that the defender was entitled in the circumstances to apprehend the pursuer without a warrant—but only to take him before a magistrate, or to apply for a warrant for his detention without any undue delay. If I thought that the defender kept him in the lock-up for the purpose of himself examining him, and thereafter detaining or liberating him as he himself might think fit, I would consider that he was acting beyond his competency, and had made himself liable in damages. But the view is fairly presented that in all that he did he was only in course of taking the pursuer before a magistrate, or of applying for a warrant for his detention; and that the liberation of the pursuer took place, not unreasonably, in consequence of his refunding the money to the party entitled to it. I am disposed to give to the defender the benefit of this favourable view, as fairly warranted by the evidence, and, on this account, to hold that he was acting within his duty, and is not liable to any claim proceeding on an opposite assumption. Whilst we take care that personal liberty is not unduly interfered with, we must be equally careful, on the other hand, that no undue discouragement is given to the detection and punishment of crime.

Agent for Pursuer—W. B. Glen, S.S.C.

Agents for Defender—H. & A. Inglis, W.S.

Tuesday, November 10.

**BUCCLEUCH v. DARLING (COMMON AGENT
IN INVERESK LOCALITY).**

Teinds—*Decimæ inclusæ*—*Res judicata*—*Common Agent*. Circumstances in which the Court sustained a plea of *res judicata* stated by a heritor in support of his claim of exemption from stipend in respect of a *decimæ inclusæ* right. In a question litigated with an individual heritor, the actings of the common agent bind the whole other heritors, if they do not appear and object.

In the locality of Inveresk the Duke of Buccleuch contended that his lands of Smeaton were exempt from the burden of stipend, alleging that he held these lands *cum decimis inclusis*, and pleading *res judicata* in respect of proceedings in a previous locality instituted in 1775, in which it was found