

the arch of the bridge, to leave an opening in the parapet southward of the proposed end of the curve for any stairs to be made, and that any stairs to be made should be confined to the area in Mr Louttit's (the defender's) property;" that the stair to which the conclusions of the present action relate could not be erected by the defender in terms of the obligation contained in the fifth head of the articles of roup consistently with the terms of the report approved by the Council as above found; and that the defender had no power, and could not be compelled by the pursuer, to proceed in the construction of the said stair against the resolution of the Town Council aforesaid—and therefore dismissed the action.

Malcolm reclaimed.

SHAND and ORR PATERSON for reclamer.

GIFFORD and SPENS for respondent.

At Advising—

LORD PRESIDENT—My Lords, I must say that when this case was first argued to us I was not inclined to attach so much importance as the Lord Ordinary does to the proceedings of the Town Council, and now I am clearly of opinion that the interlocutor is wrong.

A person of the name of James Miller was proprietor of a piece of feuing ground which is laid down on the plan before us, and which has for two of its boundaries the river of Wick on the south, and Bridge Street and the New Bridge of Wick on the east. Miller proceeded to feu this property and to lay it out in the most convenient way, and having one of the public streets as his boundary on the east, it seems to me to be beyond dispute that he was entitled to access at every point at which his property touched. Now one part of his property being next the river on the south, he thought it would be convenient and proper to give an access between Kirk's land and Bridge Street, and accordingly his feuing plan is prepared on that principle. But to secure that there should be a thoroughfare, he laid an obligation on the parties feuing next the river, and along whose property this thoroughfare must pass, to make this thoroughfare. One part of the obligation was that a stair shall be built as set forth in the articles of roup, and the other part of the obligation was to lay and fence the pavement. Now this obligation was laid on Louttit, and the question comes to be whether the owner of this ground was entitled to lay this obligation on him, or whether the magistrates can interfere to prevent it.

As in a question between the pursuer and defender, the case is too plain for argument, and accordingly the Lord Ordinary intimates that but for the interference of the Town Council, he would have had no doubt. But it appears that the magistrates authorised Louttit to alter the parapet of the bridge so as to disable him from performing his obligation. I think the magistrates themselves could not have so altered the parapet as to interfere with Miller and his feuair having an access by that strip of ground eight feet six inches in breadth to the pavement in Bridge Street, and that is enough for the case. No doubt, if the magistrates had been of opinion that the public safety required that this obligation should not be performed, they might have come and prevented it from being done; and, there being some indication of a feeling of that kind, your Lordships thought proper to intimate to the magistrates so that they might come and let us know their opinion. They have declined

to appear, and therefore I am bound to assume that they are of opinion that no public interest is involved, and therefore that there is no necessity for their appearing. I cannot believe that the magistrates of any burgh in Scotland, if they thought the public interests were being compromised, would not instantly appear. That being so, it seems to me that the case is plain, and that the defender, whatever else the magistrates may have done, is in the position of a man refusing to fulfil an obligation in his common title, and therefore judgment must be pronounced against him.

LORD DEAS—I am of the same opinion.

The subjects belonging to Malcolm and Louttit were exposed for sale by articles of roup which contained a condition that Louttit should be bound to construct that stair for which Malcolm now contends. Louttit purchased the feu, and when the feu-disposition came to be granted it proceeded on the articles of roup. It is not disputed that Malcolm is *in titulo* to enforce this obligation which was laid on Louttit, nor that Louttit is bound to fulfil that obligation if he has the power to do so without consent of the Town Council. The feuing took place in 1856, and from that time to January 1863 it is not contended that this matter was in a state to cause any difficulty as to carrying that obligation into effect. If the stair had been formed in the way undertaken before January 1863, plainly it would not have interfered with the bridge at all. But in January 1863 a vague motion was brought before the Town Council, that it was necessary to give some instructions about this matter, and the Town Council authorised an alteration to be made by a sort of addition, that is, by continuing the parapet and turning it in towards the building, so that Louttit could not fulfil his obligation without breaking through that additional bit of wall. Now the person authorised to do that was Louttit himself—with his own consent if not on his own application. The whole question comes to be, whether Louttit, by getting the Town Council to give him that authority, gets free of the obligations to make that stair as a common access? That is quite extravagant on the part of Louttit and on the part of the Town Council, so far as they support him; and the construction I am inclined to put on their non-appearance is, that they cannot show face to support what was done.

LORD ARDMILLAN and LORD KINLOCH concurred.

Agents for Pursuer—J. & A. Peddie, W.S.

Agents for Defender—Graham & Johnston, W.S.

COURT OF JUSTICIARY.

Monday—Wednesday, November 23-25.

HIGH COURT.

(Before the Lord Justice-Clerk, Lord Neaves, and Lord Jerviswoode.)

H. M. ADVOCATE *v.* WATT AND KERR.

Cruel and Barbarous Usage — Assault — Culpable Homicide — Compelling persons to leave a ship — Relevancy. Charge of "cruel and barbarous usage by persons having authority on board a British ship" to persons on board the ship, held irrelevant. Charge of "compelling persons to leave a ship embedded in ice on the high seas, and travel towards the nearest land,

whereby they are bereaved of life, or put in danger of their lives, or injured in their persons," sustained as relevant.

Robert Watt and James Kerr were charged with "assault, to the injury of the person; cruel and barbarous usage by persons having authority on board a British ship to persons on board the ship: culpable homicide; and compelling persons to leave a ship embedded in ice on the high seas, and travel towards the nearest land, whereby they are bereaved of life, or put in danger of their lives, or injured in their persons." The indictment set forth that Watt and Kerr were master and mate of the *Arran*, which sailed from Greenock to Quebec on the 7th April 1868, and that on board were James Bryson, a boy of 16; David Brand, aged 16; John Paul, aged 11; Peter Currie, aged 12; Hugh M'Ewan, aged 11; Hugh M'Ginness, aged 12; and Bernard or Barney Reilly, who had stowed away or concealed themselves in the vessel before she left Greenock, and were taken to sea on board of her; and the prisoners were charged with having, between the 15th April and 20th May, while the vessel was on her voyage, attacked James Bryson, flogged him severely and repeatedly with a long line or rope's end, compelled him to strip off his clothes and lie down on deck, and while lying on deck caused several pails of water to be thrown over his naked body, and with a hard broom used for sweeping the deck scrubbed his naked person, and otherwise maltreated and abused him, whereby he was bruised and wounded to the injury of his person; further, on another day, during the period above libelled, they attacked Bryson, tied his hands together, took off his clothes, and flogged him severely and repeatedly with a lead line or piece of rope, and otherwise maltreated and abused him; further, during the period libelled, or the greater part thereof, they, wickedly and feloniously, cruelly and barbarously, used and maltreated James Bryson, David Brand, John Paul, Peter Currie, Hugh M'Ewan, Hugh M'Ginness, and Bernard O'Reilly; withheld from them necessary food and nourishment, which they were well able to supply, so that they were almost famished on various occasions during the said period; that they struck and beat the boys with their fists and with ropes, kicked them, and put them in irons, stripped or caused them to be stripped naked, when the weather was cold and frosty, and exposed them in that condition and in that state of the weather on the deck of the ship, and poured, or caused to be poured, snow and cold water on their naked bodies, and otherwise maltreated and abused them, whereby they were subjected to great pain and suffering; and further, on a day between the 11th and 20th days of May 1868, both inclusive, and while the ship was on the high seas, embedded in the ice off the island of Newfoundland, and in or near the Bay of St George, Newfoundland, at a distance of twelve miles, or thereby, from land, the prisoners wickedly and feloniously, culpably and recklessly, ordered James Bryson, David Brand jun., John Paul, Hugh M'Ewan, and Hugh M'Ginness, to leave the ship; seized hold of them and dragged them to its side; threatened to turn them out by force and withhold from them all food if they did not leave the ship, although they knew there was sufficient food on board the ship; struck John Paul on the arm with a belaying-pin while he was clinging to the bulwarks or rails of the said ship, and thus compelled the five persons named to leave the ship, they being, as the prisoners well knew, slenderly and insuffi-

ciently clothed, and without adequate food, which they were well able to supply, and John Paul and Hugh M'Ginness being barefooted, to proceed across the ice towards the coast on foot, to the manifest danger of their lives; and the five boys, being so compelled then and there, along with Reilly, left the ship, and proceeded across the ice, which was rough and broken, towards the coast, to the great peril of their lives. Hugh M'Ewan, at a place between the ship and the coast, in endeavouring to pass from one block of ice to another, slipped on the ice, and fell into the sea and was drowned. Hugh M'Ginness, at a part between the ship and the shore, became totally exhausted; and being, through fatigue and cold, unable to proceed further, lay down on the ice, and shortly thereafter died. And it was averred that both of these boys were thus culpably bereaved of life by the prisoners. Bryson, Brand, and Paul, proceeded across the ice at the great risk of their lives, and by means of a boat, which was sent to their rescue from the shore, reached the coast on the afternoon or evening of the day on which they left the ship; and through the effects of cold and fatigue and exposure, Bryson was greatly exhausted, and the toes of his right foot was frost-bitten, and his face was swollen and inflamed, and the feet of Paul were cut and bleeding.

Solicitor-General (MILLAR) and GLOAG, for the Crown.

YOUNG and SCOTT for Watt.

MONCREIFF, D-F., and MACLEAN for Kerr.

SCOTT objected to the relevancy of the second and fourth of the major propositions in the libel, and also to the fourth of the minor propositions. The second of the major propositions was the following:—"The cruel and barbarous usage, by a person or persons exercising command or authority in a British ship, of persons on board the said ship, especially of boys of the age of twelve or thereby, or other tender age." He contended that it set forth nothing which could be regarded as a criminal act. The "cruel and barbarous usage" might have been exercised on seamen requiring very severe discipline; it might have been exercised upon pirates taken upon the high seas. No doubt the usage was called "cruel and barbarous," but still there was nothing to describe a criminal act, and nothing to describe the motive by which that act was done. As to the fourth of the major propositions—viz., "the wickedly, and feloniously, and culpably, and recklessly compelling any person or persons on board a British ship to leave the said ship when embedded in ice on the high seas, and at a distance of twelve miles or thereby, or other great distance from land, slenderly and insufficiently clothed, and without adequate food, in order to proceed on foot across the ice towards the shore, to the manifest danger of their lives, whereby the said persons, or any of them, are bereaved of life, or are put in danger of their lives and injured in their persons, and especially when such persons are boys of the age of twelve years or thereby, or other tender age," he maintained that there was, in the first place, set forth no duty incumbent on the captain to supply food and clothing to the parties in question; second, it was not said that there was either food or clothing to give them; and, third, there were many cases in which such an act as here described was not criminal. With regard to the fourth and last of the minor propositions, he said that, on reading it, the jury must endeavour to get rid of the effects on their minds of

this very sensational description. He contended that the boy M'Ewan's slip on the ice might be caused by his own carelessness, as was done at Duddingston Loch many a day; and as regarded the other boy M'Ginnes, who was unable to proceed, he supposed that was to be connected with the insufficient clothing and want of food; but there, again, there was an entire absence of averment of duty on the prisoners of supplying the boys either with food or clothing.

SCOTT'S argument was adopted for the panel Kerr.

GLOAG A.-D. supported the indictment on the general principle that if a delinquency had been committed, the common law of the country was strong enough to punish for this crime. As to the first objection taken to the major charge of "cruel and barbarous usage," he said these words were general terms which, he thought, had been sustained in previous indictments to describe conduct directed against a person as criminal. Cruel and barbarous usage could not be alleged unless injury resulted from the conduct, and it was said in the minor charge that the treatment was such that the victims were subjected to great pain and suffering. The second objection was directed to the offence charged of compelling a person to leave a ship, and he had undertaken to prove that that was done wickedly and feloniously, and culpably and recklessly—done to the manifest danger of the lives of the persons.

LORD NEAVES—What do you mean by compelling? Do you mean by bodily violence?

GLOAG A.-D.—I do not mean necessarily bodily violence.

LORD NEAVES—By moral suasion? There is "compelling" to come in in the sense of the gospel.

GLOAG, A.-D.—Compelling them to come in may be different from compelling them to go out. If you compel a man by moral suasion he goes in or out with his own will.

LORD NEAVES—By putting a higher motive before them?

GLOAG, A.-D. said it was used in the sense of making people go where they did not want to go. If they were to put in the libel, "compelling by force," they would only be adding words without in any way strengthening the language. As to the fourth objection, he thought it was covered by the major proposition of culpable homicide.

Solicitor-General (MILLAR) supported the libel.

MONCREIFF D.-F. replied, and stated, with reference to the mate, in whom he was more particularly interested, and who was an inferior officer, that it was not alleged he had anything to do with the boys being insufficiently clothed or without adequate food.

LORD NEAVES said he was of opinion that the second charge was not relevant. The words "cruel and barbarous usage" were much too vague to be descriptive of a criminal act; and unless it could be affirmed that the usage was indictable, he did not see how they could sustain this charge. He also thought that this charge was defective, as it wanted a statement of the mutual relations of the parties concerned. He therefore could not sustain it. As to the objection to the fourth major charge, while he saw it to be defective, he was unable to say that it was not relevant. The nature of the offence was that they were compelled to leave the ship, and had no resource but to proceed to land, or remain and starve on the ice; and believing

that to be the offence, the question came to be, whether it was so stated that the charge could be held to be irrelevant. Though he hoped such a charge as that would not be copied or imitated in future, he could not say it was irrelevant. The objection to the fourth minor proposition was not, he thought, well founded.

LORD JERVISWOODE and the LORD JUSTICE-CLERK concurred.

The Court thus sustained the libel, with the exception of the portion of it which specified as a charge, "cruel and barbarous usage."

The panels pleaded Not Guilty, and the trial was appointed for 23d November.

At the trial,

Evidence was led for the Crown. Kerr withdrew his plea, and offered a plea of guilty of assault, which plea was accepted by the prosecutor.

Evidence was led for Watt in exculpation.

The jury found Kerr guilty, by his own confession; and found Watt not guilty of assault, but guilty *quoad ultra*, adding a recommendation to leniency on the ground of previous good character.

Watt was sentenced to eighteen months' imprisonment, and Kerr to four months' imprisonment.

Agent for the Crown—T. G. Murray, W.S.

Agent for Watt—Mr Sheill, S.S.C.

Agent for Kerr—W. Millar, S.S.C.

COURT OF SESSION.

Wednesday, November 25.

SECOND DIVISION.

FOSTER AND OTHERS *v.* SCOTT'S TRUSTEES.

Expenses—Settlement of Action. Certain parties brought an action to enforce the objects of a destination for charitable purposes. The trustees defended, on the ground *inter alia* that the executors of the trustor had not accounted to them. An action at the instance of the trustees was in dependence for that purpose. During the dependence of the present action the executors were assozied, and the defenders lodged a scheme for the working out of the charity. The pursuers having obtained the object of their action, acquiesced. *Held* that they were entitled to expenses.

Mr William Scott, of St Andrews, New Brunswick, died there in 1838, leaving a will by which he bequeathed his whole property, under burden of some small legacies, "to the Provost and Magistrates for the time being, as also the two clergymen of the east and west parishes of his father's native town, Greenock, to be by the said trustees applied to the endowment of a school for the maintenance and education of as many indigent orphan children as the proceeds of said property may be able to support and educate; said children to be instructed in English, reading, and grammar, together with writing, arithmetic, and a few of the plain branches of mathematics; no children to be continued in the said institution over the age of fifteen years, when said trustees shall endeavour to put said children in a way of providing for themselves in this world." By the will and a codicil, there were also appointed three executors, two of whom resided in New Brunswick, and one in Greenock. Five years were allowed by the will for