

was instituted so far as regarded the feudal duties, and in the following year an inhibition was taken out to put an end to the lease so far as regarded the teinds; but it was admitted that this inhibition was invalid, and nothing more was done till 1871, when a fresh inhibition was executed, which put an end to the tacit relocation. In this case the defenders have no title corresponding to the lease followed by tacit relocation which was successfully put forward as the basis for the pleas of *bona fide* perception and consumption in the case of the *Lord Advocate v. Drysdale*. In *Watt's Trustees v. King*, 8 Macph. 132, the decision turned on the construction of a feu-contract by which the superior feued out the lands as possessed by a tenant, who presumably had possession of both stock and teind, and excepted from the warrandice clause, 'cess, teind, and public burdens.' After the feu had been granted the vassals were localised upon in several localities as proprietors of the teinds, and it appeared that the superior had never asserted any right to any surplus teinds, so that while the terms of the feu-contract were ambiguous, usage had interpreted it from the first in favour of the vassals' contention. In the present case the pursuer avers, and it is not denied, that the free teinds were paid to the pursuer's predecessors prior to 1864. Although no payments on account of free teinds have been made by the defenders or their predecessors since 1864, the Sheriff does not think that in the absence of any title in the defenders that this is any defence to the pursuer's claim—see *Lord Advocate v. Duke of Athole*, 1885, 12 R. 882, Lands of Pitdornie."

The defenders appealed to the First Division, and argued—(1) They had a title to the teinds which supported their plea-in-law. (2) The titular of the teinds had himself to blame for not claiming, and should not now get decree. The Court did not regard claims for arrears of teind with favour.

Argued for respondent—The argument upon title was irrelevant. There were no statements on record in support of it. The defenders' one plea was *bona fide* consumption, but that was only maintainable where there was a colourable but defective title. The judgments of the Sheriffs were right upon the grounds stated, and the authorities cited by them.

At advising—

LORD ADAM—It is admitted by the defenders that the pursuer is proprietor of the teinds in question, that they have intromitted with these teinds, and that they have not paid free teind since the date of their entry. These admissions are in my opinion sufficient to entitle the pursuer to decree, unless the defenders have set forth some relevant defence. The only defence is *bona fide* consumption. Now, that defence applies where a person not being the true owner of a subject, but being in the *bona fide* belief, under some colourable title, that he is the true owner, consumes

the fruits. But in this case the defender does not aver that he was in the *bona fide* belief that he was the owner of the teinds and in that belief consumed them. His defence is of quite a different kind, viz., that he thought the stipend exhausted the teind, and that there was no free teind. That is to say, merely, that he thought no debt was due. That does not appear to me to be a case for the application of the doctrine of *bona fide* consumption at all, and is not a relevant defence.

We had, however, a long argument on the construction and effect of the titles of the parties, for the purpose of showing not only that the defender had a colourable title to the teinds, but was in fact the true owner. Not only, however, are there no averments on record to support any such plea, but they are contradictory of the admissions and averments on record.

I am consequently of opinion that we cannot consider these pleas, and the defenders did not ask to be allowed to amend their record. I am therefore of opinion that the interlocutor appealed from is right, and that the appeal should be dismissed.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuer and Respondent—H. Johnston—Neil J. Kennedy. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Defenders and Appellants—W. Campbell—Cullen. Agent—J. Smith Clark, S.S.C.

Friday, July 20.

## FIRST DIVISION.

[Lord Stormonth Darling,  
Ordinary.]

### LUNDIE v. MACBRAYNE.

*Reparation—Wrongous Apprehension—Liability of Shipowner for Act of his Servant—Merchant Shipping Act Amendment Act 1862 (25 and 26 Vict. cap. 63), secs. 35 and 37—Form of Issue.*

A person brought an action of damages against the owner of a steamship on the ground that he had wrongously been given into custody by one of the defender's servants for travelling without a ticket. *Held* that the pursuer had stated a relevant case, and that the proper form of issue was "Whether on or about 10th August 1893, on board the defender's steamer, . . . at Fort-William, J. L., an officer in the service of the defender, acting within the scope of his authority, wrongfully and illegally caused the pursuer to be apprehended and taken in custody to the police office at Fort-William, to the loss, injury, and damage of the pursuer. Damages laid at £250."

*Reparation — Wrongous Prosecution —  
Limitation of Time for Raising Action  
of Damages—Summary Procedure Act  
1864 (27 and 28 Vict. cap. 53), sec. 35.*

The Summary Procedure Act 1864 by sec. 35 provides that "Every action against any . . . person on account of anything done in any case instituted under this Act shall be commenced within two months after the cause of action shall have arisen." . . . Held that an action of damages was brought too late when raised in January 1894 against a shipowner, on account of a summary conviction of the pursuer in August 1893 for travelling on the defender's steamship without a ticket.

In January 1894 John Lundie, shoemaker and hawker, Maybole, formerly resident at Fort-William, brought an action of damages for £250 on account of wrongful apprehension, imprisonment, and prosecution, against David Macbrayne, shipowner, Glasgow.

He averred that "(Cond. 2) on 10th August 1893 the pursuer, who was taking a pony belonging to him from Oban to Fort-William, contracted with the defender's agent at Oban for the carriage of said pony and for a steerage passage for himself per the said steamer 'Chevalier.' The freight charge was fixed at 5s., which pursuer paid, and received a receipt therefor. By said contract, according to custom by which a person travelling in charge of a horse or pony or cattle received a steerage passage without payment of any sum beyond the freight, and according to specific agreement on this occasion with the defender's said agent, the pursuer was entitled to travel in charge of said pony without paying an additional fare, and he did so travel. He was not challenged by any of the defender's servants for a pass when going aboard said steamer as aforesaid, nor was any demand made upon him until the steamer was within twelve miles of Fort-William, when John James Lawson, the defender's purser, demanded his fare or a ticket. The pursuer in reply produced said receipt, explaining that that included his own fare. Lawson refused to accept this explanation, and without calling the captain or master, and making a demand for the fare through him on the arrival of the steamer at Fort-William, illegally, maliciously, and without probable cause, gave the pursuer in charge of a constable, and also forcibly and illegally took possession of the said pony. The above proceedings took place upon the open pier, and in presence of a large number of spectators. The pursuer was then publicly taken in custody to the police office at Fort-William, where he was detained for over half-an-hour and then liberated, without any formal charge having been made against him, or record made in the police books of the arrest or liberation. The defender's explanation in answer is denied. The pursuer had no choice but to go with the constable, as he was given in charge by Lawson. He was both arrested and detained." He also averred that he had been

subjected on 24th August to a summary prosecution under the 35th section of the Merchant Shipping Amendment Act 1862 at the instance of the defender, that he had been convicted and fined 5s., and that his pony had been sold under the Sheriff's warrant to pay said fine, although the conviction had since been quashed by the High Court of Justiciary.

The defender in answer 2 "Admitted that the pursuer contracted with the defender's agent at Oban for the carriage of a small Highland pony from Oban to Fort-William by the steamer 'Chevalier.' The usual freight charge of 7s. 6d. for a horse or pony was restricted to 5s., in respect of the pursuer's pony being a very small animal. The pursuer paid the 5s. and received a receipt. Denied that by said contract or by custom the pursuer was entitled to travel free. He was a passenger by the steamer in charge of the pony, and as such was liable for his fare in addition to the freight charge for the pony. He was asked for his fare by the pursuer, but he refused, and had no money to pay it. His name and address were unknown to the pursuer, and also to the constable on the pier at Fort-William, but he said he was known to the inspector of police, and he offered to go to the inspector to be identified. He was accompanied there. He was not arrested nor detained. In the circumstances he might have been lawfully detained till tried, in terms of section 37 of the Act 25 and 26 Vict. cap. 63. The pony was left by the pursuer on the pier, and the clerk to the steamboat agent put it in a stable, where it remained all night. It was offered to the pursuer in the morning, but he declined to take it, and it was thereafter placed at livery. *Quoad ultra denied.*" With regard to the prosecution he explained that the conviction had only been quashed on the technical ground that the complaint had been presented without the concurrence of the procurator-fiscal, and that although that concurrence had been added with leave of the Court at the trial, that did not validate the proceedings.

He pleaded—" (1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the action. (2) The pursuer's material averments being unfounded in fact, the defender is entitled to absolvitor, with expenses. (4) The proceedings referred to having been instituted under the Summary Procedure (Scotland) Act 1864, and the present action not having been brought within two months after the cause of action arose, it is excluded by section 35 of the said Act, in so far as based on anything done in the said proceedings."

The Merchant Shipping Act Amendment Act 1862 (25 and 26 Vict. cap. 63), sec. 35, provides that "The following offenders, that is to say . . . (9) Any person on board any such steamer who does not, when required by the master or other officer of such steamer, either pay his fare or exhibit such ticket or receipt (if any) showing the payment of his fare as is usually given to persons travelling by and paying their fare for such steamer, shall for every such

offence be liable to a penalty not exceeding 40s." . . . And section 37 provides that "It shall be lawful for the master or other officer of any duly surveyed passenger steamer, and for all persons called by him to his assistance, to detain any person who has committed any offence against any of the provisions of the two last preceding sections of this Act, and whose name and address are unknown to such officer, and to convey such offender with all convenient despatch before some justice without any warrant or other authority than this Act, and such justice shall have jurisdiction to try the case and shall proceed with all convenient despatch to the hearing and determining of the complaint against such offender."

The Summary Procedure Act 1864 (27 and 28 Vict. cap. 53) by sec. 35 provides that "Every action or prosecution against any sheriff, judge, or magistrate, or against any clerk of court, procurator-fiscal, or other person, on account of anything done in any case instituted under this Act, shall be commenced within two months after the cause of action shall have arisen." . . .

The following amended issues were proposed by the pursuer—"(1) Whether, on or about 10th August 1893, on board defender's steamer 'Chevalier,' at Fort-William, John James Lawson, an officer in the service of the defender, acting within the scope of his authority, wrongfully and oppressively caused the pursuer to be apprehended and taken in custody to the police office at Fort-William, to the loss, injury, and damage of the pursuer? (2) Whether, on or about 19th August 1893, the defender or some one in his employment, and for whom he is responsible, by presenting a complaint to the Sheriff-Substitute at Fort-William, wrongfully and illegally caused the pursuer to be brought before the Sheriff-Substitute at Fort-William on 24th August 1893, and tried on a charge at defender's instance of having refused to pay his fare from Oban to Fort-William, and convicted and fined five shillings, with instant execution by arrestment and poinding, to the loss, injury, and damage of the pursuer? (3) Whether, on or about 30th August 1893, the defender wrongfully and illegally caused the pursuer's pony to be poinded and sold by a sheriff-officer, to the loss, injury, and damage of the pursuer? Damages laid at £250."

Upon 5th June 1894 the Lord Ordinary (STORMONTH DARLING) allowed the first issue, but disallowed the second and third.

"*Opinion.*—With regard to the second and third issues proposed for the pursuer, the defender's plea, founded on the 35th section of the Summary Procedure Act, seems to me conclusive. Both issues relate to something done in a case instituted under that Act. No doubt it turned out that the case had been badly instituted for want of the concurrence of the procurator-fiscal. But it was a proceeding under the Act all the same, and therefore this action, so far as these issues are concerned, comes too late.

"If the wrong complained of in the first issue had been that the defender's officer gave the pursuer into custody for committing an ordinary crime, it is clear that the defender would not have been responsible, and the officer himself could only have been made liable by its being shown that he acted maliciously and without probable cause. But the apprehension of the pursuer took place in respect of an alleged offence against the 35th section of the Merchant Shipping Act of 1862, and by virtue of the powers conferred on the master and officers of a passenger steamer by section 37. Now, I cannot distinguish between an act of that kind done under statutory powers by the owner's representatives, and for his behoof, and the detention of a passenger by the servants of a railway company for an alleged contravention of the company's bye-laws. In the latter class of cases the company has been held responsible on the principle of implied authority, because the servant is appointed to do that among other things, and if he makes a mistake the company must answer. The officer's authority is not very distinctly averred on record, but I think any omission on that score is supplied by the defender's admitted adoption of his act. It seems to me therefore that the first issue must be allowed."

The defender reclaimed, and argued—(1) The Lord Ordinary should have disallowed the first issue on the same grounds as he had disallowed the other two. The whole proceedings complained of were taken under or in view of the Summary Procedure Act. (2) Even if the first issue were approved, the words "maliciously and without probable cause" should be inserted—*Rae v. Linton*, March 20, 1875, 2 R. 669; *Wilson v. Mackie*, October 22, 1875, 3 R. 18; *Craig v. Peebles*, February 16, 1876, 3 R. 441; *Wardrope v. Duke of Hamilton*, June 24, 1876, 3 R. 876; *J. & W. Kinnes v. Adam & Sons*, March 8, 1882, 9 R. 698. But if they were inserted the case fell, because there could be no malice on the part of the defender, who had nothing to do with the proceedings, and there could be no suggestion of want of probable cause looking to the pursuer's own statements and to the conviction by the Sheriff. That conviction had been quashed on a purely technical ground, *supra*, January 23, 1894, p. 337.

Argued for the respondent—(1) There was no suggestion that the apprehension complained of was in any way under the Summary Procedure Act, which could therefore have no bearing on the first issue. (2) The whole proceedings complained of had been under the Merchant Shipping Act. It contained no limitation of time; therefore the Lord Ordinary was wrong in disallowing the second and third issues. (3) It was not necessary to insert "maliciously," because there was here no case of privilege. The following cases were in point:—*Cann v. Clipperton*, 1839, 10 Adolph. & Ellis, 582; *Strachan v. Monro*, 1845, 7 D. 399; *Bayley v. Manchester, Sheffield, & Lincolnshire Railway Company*, 1873, L.R., 8 C.P. 148;

*Althorpe v. Edinburgh Street Tramways Company*, December 13, 1882, 10 R. 344; *Lowe v. Great Northern Railway Company*, 62 L.J. (Common Law, 1893) 524.

At advising—

LORD KINNEAR—The pursuer of this action complains of two distinct and separate wrongs, for both of which he maintains that the defender is responsible. In the first place, he alleges that he was illegally apprehended by the order of a clerk in the defender's employment, acting within the scope of his authority; and in the second place, that he was wrongfully subjected to an illegal prosecution at the defender's instance, under which he was sentenced to pay a fine of five shillings, and a pony belonging to him was illegally poided and sold for recovery of the fine. The Lord Ordinary has allowed an issue to try the question raised by the first complaint, but he has held that in so far as the action is based on the second ground it is barred by a provision in the Summary Procedure Act 1861 for the limitation of actions on account of anything done in any case instituted under the Act. I think his Lordship's judgment on both points is right. It is not disputed that the prosecution of which the pursuer complains was instituted under the Summary Procedure Act. It was not the less a proceeding under the Act, because of the defective instance in respect of which the conviction was quashed. But the action was not brought within two months after the cause of action had arisen, and is therefore excluded by the 35th section of the statute. It is said that this plea excludes the action on all its grounds, but this appears to me untenable. The pursuer's first ground of complaint is that the defender's clerk Lawson without warrant or legal justification gave him in charge of a constable, by whom he was accordingly taken into custody, and carried to the police office at Fort William, where he was detained for half-an-hour, and then liberated without a charge having been made against him. It seems to me very clear that that is not an averment of the institution of proceedings under the Summary Procedure Act, but a perfectly relevant averment of wrongful apprehension. The defence is twofold; it is said, in the first place, that the pursuer's averment is not true, and that what really happened was, that the pursuer having refused to pay his fare, and his name and address being unknown to the defender's pursuer, he voluntarily offered to go to the inspector of police at Fort William, to whom he said that he was known, in order to be identified; that he was accompanied to the inspector's office, but was not arrested or detained. But in the second place, it was argued that even if the pursuer's statement is correct in fact, his detention was justified by the 37th section of the Merchant Shipping Act of 1862, which prescribes the manner in which offenders against the 35th section may be apprehended. Now, that may be a perfectly good defence if the facts support it. But to give the defender the protection of

that enactment it must be shown, in the first place, either that the pursuer was travelling in his steamer without having previously paid his fare, and with intent to avoid payment thereof, or else that he had failed when required by an officer of the steamer either to pay his fare or to exhibit such ticket or other receipt as is usually given to persons travelling by the steamer, and paying their fare; secondly, that his name and address were unknown to the officer who gave him in charge; and thirdly, that being apprehended he was conveyed with all convenient despatch before a justice. But all of these propositions are contradicted by the pursuer, and therefore it appears to me that the defence on both grounds depends on matter of fact, which must be ascertained in the ordinary way before the law can be applied.

But then it is said that if the pursuer was wrongfully apprehended by the pursuer, that officer must be liable for his own wrong, and that the defender is not responsible. I agree with the Lord Ordinary that in this respect the case is undistinguishable from those in which it has been held that railway companies are responsible for wrongful arrests made by their inspectors for offences against the Railway Acts or against bye-laws authorised by these statutes. The case of *Moore v. The Metropolitan Railway Company* is an example. In that case a passenger travelling by the Metropolitan Railway from Moorgate Street to Notting Hill got out at Edgeware Road Station, which is a station short of Notting Hill. He was informed that he must pay an additional fare of twopence, which he refused to do unless a receipt were given him. He was thereupon given into custody by the inspector of the station on the charge of refusing to give up his ticket or pay his fare. The charge was dismissed, and the passenger brought an action of false imprisonment. It was held that as the railway company was empowered by the Railway Clauses Act to arrest persons committing frauds against the statute, and as the inspector was their representative at the station, it must be presumed in the absence of evidence to the contrary that he had authority from the company to arrest persons committing offences against the statute, and that if such an officer intending to exercise his authority makes a mistake and does an act which cannot be justified, the company are responsible, because he is their agent. The case establishes that two things must be proved in order to make a railway company or a shipping company liable for a wrongful apprehension by one of its officers. First, the offence must be one for which, if it had been committed, the company had power to arrest, because it is not to be presumed that the company have authorised one of their servants to apprehend a person whom they themselves had no power to apprehend; and secondly, that the officer was acting within the scope of his authority. As to the first point, there is very little

question in this case, because the defender claims the right under the statute to apprehend a person in the position of this pursuer. One averment in the pursuer's condescence might throw some doubt upon the second point, for he says the pursuer gave him in charge without having first appealed to the captain. If this means that the right to apprehend offenders rested with the captain, and not with the pursuer, it might be difficult for the pursuer to show that the pursuer acted within the scope of his authority. But I think that this is not a fair construction of the averments, and that fairly read they disclose a *prima facie* case to go to a jury.

The only remaining question is as to the terms of the issue. I do not think it necessary that the pursuer should take an issue of malice and want of probable cause. The defender and his servants have no privilege to give persons into custody except that conferred by the statute, and he cannot plead the statute unless he has observed its conditions. He may have a good defence on the merits. But if he has not, it is no answer to the pursuer's complaint that his officer was not acting maliciously. On the other hand, I do not think the word "oppressively" which has been inserted in the issue is apposite. In *Mackay v. Grant*, June 14, 1865, 3 Macph. 944, where an issue in these terms was allowed, the Lord Justice-Clerk said—"Where wrongfully is combined with oppressively, I think it is open to the pursuer to proceed either upon want of legal warrant or upon the oppressive use of a warrant in itself legal." In the present case I cannot see that the pursuer has alleged any case of oppression in addition to or distinct from the illegality of the arrest of which he complains. If he committed an offence against the statute for which the defender's officer was entitled to apprehend him, and if in making the apprehension the officer acted in accordance with the provisions of the statute and not otherwise, I see no case of oppression. I do not know what is meant by that word as used in this issue, and I think there would be a risk of its misleading the jury if it were allowed to remain.

I think the more appropriate form of issue is that approved in the case of *Bringloe v. Stirling*, and I see no reason for departing from a style which has received the approval of the House of Lords.

I am of opinion therefore that we should affirm the judgment of the Lord Ordinary, but make this variation in the form of the issue.

LORD M'LAREN—Judging from the narrative in this case, it would appear that some people imagine whenever they have been wronged they are entitled to hand over the person who has wronged them to a police officer without a warrant.

I need hardly say that the constitution of this country confers no such right. It is a fundamental principle that no one can be deprived of his liberty or subjected to

restraint without the warrant of a judge or magistrate. An exception is admitted where the injured party has seen the crime committed, or has such evidence as is equivalent to personal observation. In that case he may detain the wrongdoer on condition of taking the person apprehended before a magistrate without delay, and he may if necessary call to his aid constables or officers of law.

This is not a case of a crime at common law, but an alleged contravention of a statute, and we must look at the statute to see the right of the person against whom the contravention has been committed. It is only where the address of the person alleged to have contravened the statute is unknown that his apprehension is authorised, and I think the pursuer is entitled to an issue of wrongful apprehension, because he avers that he, being a law-abiding citizen whose address was known to the officers of the steamer, was given into the custody of a police officer by the defender's servant.

I agree with Lord Kinnear in his discussion of the authorities on this point, and also as to the form of issue which should be adopted.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court appointed the following to be the issue in the cause, viz.—"Whether on or about 10th August 1893, on board defender's steamer 'Chevalier,' at Fort-William, John James Lawson, an officer in the service of the defender, acting within the scope of his authority, wrongfully and illegally caused the pursuer to be apprehended and taken in custody to the police office at Fort-William, to the loss, injury, and damage of the pursuer. Damages laid at £250."

Counsel for the Pursuer and Respondent—N. J. D. Kennedy—Macaulay Smith. Agent—James Ross Smith, S.S.C.

Counsel for the Defender and Reclaimer—Abel. Agents—Gill & Pringle, W.S.

Friday, July 20.

## FIRST DIVISION.

[Lord Low, Ordinary.]

DAVIES AND ANOTHER v. BLACK.

*Patent—Infringement—Bicycle Tyres.*

A person obtained letters-patent under a specification which claimed "in a wheel tyre the combination, with a 'jacket,' of wires held at the edges of such jacket, but adapted to move within it, the said wires forming a completed circle or section of a circle, and having overlapping ends, substantially as set forth and for the purposes specified." The ends of the wires after overlapping were left free, thus en-