insolvency in one sense of the word, I should think the trustees would be guilty of a breach of trust if they were to pay over the money to the father. I think that, looking at the admission of which I give the appellant the advantage—that there was something more than pure poverty; that there was embarrassment of circumstances, that might have rendered something more necessary to be done than barely paying over the money to the father, and allowing him to dispose of it as he pleased—I think, upon the authority of *Govan* v. *Richardson*, and the other cases which have been referred to, that there would have been strong ground for contending, that it would have been unjustifiable, in this case, for the trustees, under the circumstances which the trustees acknowledge to have existed, to have simply paid the money over to the father. But instead of that they do what, if there had been an application to the Court, the Court would have directed. They obtained caution from cautioners who were substantial at that time, and their solvency was inquired into and established to be perfectly sufficient for this purpose. And it was under these circumstances that the payment was made. Now, whether it was made directly to the father, or to Waddell, the cautioner, and the father got the money afterwards, seems to me immaterial. Whether it was given to Waddell, or whether it was given to the father, I think that, after the caution had actually been given, the trustees had a right to make the payment as they did.

I think it would be a waste of your Lordships' time if I were to enter more into detail upon the facts of the case and the law which belongs to them, and I shall therefore only move your Lordships, that the interlocutor be affirmed, and the appeal dismissed; but, as the appellant is suing *in formâ pauperis*, of course there will be no costs.

Interlocutors affirmed.

For Appellant, Dodds and Greig, Solicitors, Westminster; David Manson, S.S.C., Edinburgh. —*For Respondents*, Deans and Rogers, Solicitors, Westminster; Wotherspoon and Mack, W.S., Edinburgh.

FEBRUARY 21, 1861.

ROBERT EVANS, *Appellant*, *v.* JOHN M'LOUGHLAN, *Respondent.*

Justice of Peace—Jurisdiction—Court of Session—Illegal Imprisonment—Excise—7 and 8 Geo. IV. c. 53—19 and 20 Vict. c. 56, § 17—Suspension and Liberation—Review—*M. was apprehended by excise officers for an offence against the Excise Acts, on 22d and detained without warrant till 24th, when he was taken before a Justice, and charged with the offence.*

HELD (reversing judgment), *That as the delay was caused by the difficulty in finding a Justice, there was nothing illegal in the detention.*

HELD *further, That as any review was taken away by the statute for mere irregularities in procedure, the suspension of the conviction was incompetent.*[1]

The suspender, a miner, residing near Airdrie, was apprehended near an illicit still for the manufacture of spirits, on 22d March 1858, by the respondent and Alfred Eyeres, both officers of excise. According to the suspender's statement he had, after quitting his work on the afternoon of the above day, "come accidentally near to a place where there was a still for the distillation of spirits. He had never seen a still before in his life, and he did not know, and had nothing whatever to do with, the parties to whom the still, referred to, belonged. When indulging his curiosity" "he was suddenly laid hold of by the respondent and Alfred Eyeres, another officer of excise, and certain police constables who had been concealed in the neighbourhood, on the allegation of being concerned in the illicit operations of the said still. The complainer told the respondent and his assistants who he was, from whence he had come, and that he had nothing whatever to do either with the parties to whom the still belonged, or with the operations they might have been carrying on; and referred the respondent to his neighbours for evidence of what he then stated. The respondent, disregarding these statements, forthwith handcuffed the complainer, and carried him off" to Airdrie, where he was lodged in prison on a writing, made out by the respondent, bearing that the suspender was "detained at the request of Robert Evans, excise officer, Clarkstone, and Alfred Eyeres, excise officer, Airdrie."

The suspender was detained in prison the rest of the 22d, the whole of the 23d, and until the forenoon of Wednesday the 24th March 1858, without any warrant having been obtained, and he was not brought before a magistrate till the forenoon of the 24th, when he was brought up

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[1] See previous report 31 Sc. Jur. 275. S. C. 4 Macq. Ap. 89: 33 Sc. Jur. 293.

before Mr. Torrance, a Justice of Peace in Airdrie. He was then orally charged by the respondent with a breach of the 33d section of 7 and 8 Geo. IV. c. 53. No written complaint or charge had been previously, or at any time, served upon him, nor was any charge presented to the Justice, and no clerk was present.

The respondent in the record stated, in explanation of the delay which had occurred in taking the suspender before a magistrate, that, on lodging him in prison, the respondent had immediately proceeded to endeavour to find a Justice of the Peace to hear the cause.

"He first applied to Kidd, Esq., Justice of Peace in Airdrie, on said 22d March 1858, and requested him to hear the case. Mr. Kidd declined to do so, and referred the respondent to Mr. Watt, the Justice of Peace Clerk at Airdrie. The respondent applied to Mr. Watt to procure a Justice to hear the case, but that gentleman stated, that it could not be done on the evening of the 22d, and requested the respondent to attend next morning, when a Justice would be procured. In these circumstances the complainer was detained, along with the other persons apprehended, during the night of the 22d, in the county police office. The respondent attended next morning at Mr. Watt's office, and again requested that the case should be taken up. He was informed, that it would be so taken up during the course of the day, when a court, which was then being held by the Sheriff substitute, was over. The respondent waited till said court was over, and again applied for a hearing, but he was informed by the Procurator Fiscal, Mr. Steel, that none of the magistrates present would would hear the case, because the respondent had not exhibited informations and served summonses upon the prisoners; which things were not necessary. The respondent then proceeded to his superior officer, the supervisor at Hamilton, and informed him of the circumstances. The supervisor came in with the respondent from Hamilton to Airdie, on the morning of the 24th March, and having seen Mr. Thomas Torrance, Justice of the Peace, the supervisor induced him to hear the case on the 24th of March."

It appeared that proceedings before the Justice were conducted by the respondent, who gave evidence in support of the accusation, and he was the only witness examined in the case. The complainer admitted, that he was in the vicinity of the still at the time, but he denied any participation in the operations there carried on. After hearing the suspender, and the evidence of the respondent, the Justice considered the charge proved, and, upon the motion of the respondent, the penalty not having been paid, signed the warrant of commitment.

The suspender was immediately thereafter removed to the House of Correction and detained till 23d April following, when he was liberated in consequence of a note of suspension passed. And after a record was made up, the Court of Session sustained the reasons of suspension, and suspended the proceedings.

Evans appealed to the House of Lords, maintaining, in his case, that the judgment of the Court of Session should be reversed, because—1. The Court of Session had no jurisdiction in the matter. 6 Anne, c. 26, §§ 1, 6, 7; 33 Henry VIII. c. 39; 19 and 20 Vict. c. 56, § 1; 7 and 8 Geo. IV. c. 53, §§ 33, 58; *Brough* v. *Stewart*, 13 D. 408; *Young* v. *Townsend*, 2 Irvine, 525. 2. Because assuming jurisdiction, the judgment of the Court of Session was erroneous.

M'Loughlan in his *printed case* supported the judgment on the following grounds:—1. The appellant had no authority to detain the respondent in the Airdrie prison; and when brought before the Justice, he was not brought before him under any legal arrest, nor by summary procedure on arrest, nor under the circumstances set forth in the 33d section of the act; and, therefore, the Justice had no power or jurisdiction under that section, or otherwise, to try, convict, and imprison him. 2. The respondent was brought within the power of the Justice by means of an illegal detention and imprisonment. 3. According to the law of Scotland, the provisions of the statute founded on, and the orders of the Commissioners of Inland Revenue, no imprisonment for an offence under the statute could be legal, unless the party imprisoned had been brought before the Justice in the way provided in the act, and unless, prior to such imprisonment, there had been a written information or complaint, a written record of the evidence and whole proceedings at the trial, and a written conviction. In the present case, the respondent was not brought before the Justice in the way provided by the act, and there was no written information, record, or conviction. 4. The warrant of commitment was informally framed; it was illegally written by a revenue officer, concurrent in the arrest of the respondent, and was illegally addressed to the informer and prosecutor. It was, moreover, illegal and unwarranted by the 33d section to commit the respondent to the custody of the prosecutor and informer. 5. Because the whole procedure against the respondent was informal, illegal, oppressive, and unjust. 6. Because the whole proceedings were in neglect and violation of the common and statute law, and the Court of Session had power to determine that they were so to quash the conviction, and discharge the respondent. *Hay* v. *Linton*, 2 Irvine, 333; *Craig* v. *M'Colm*, Hume's Dec. 253; *Guthrie* v. *Cowan*, 10th Dec. 1807, F.C.; *Anderson*, 28th Feb. 1811, F.C.; *Mackenzie* v. *Maberly*, 31 Sc. Jur. 5; *M'Kenzie*, 2 Swinton, J.C. 152; *Christie*, 1 Irvine, 293: *Rodger*, Arkley, 393; *M'Donald and Gray*, 6 D. 1161; *Smith and Tasker* v. *Robertson*, 5 S. 848; *Coyle* v. *M'Kenna*, 32 Sc. Jur. 10.

Lord Advocate (Moncreiff), *Welsby*, and *F. Russell*, for the appellant.—The Court of Session

in this case was wrong in holding that this was a Court of Session case, and not an Exchequer case. This was properly an Exchequer case, and to be dealt with exclusively in the Court of Exchequer.

[LORD CHANCELLOR.—Assuming the conviction here to be bad, and consequently the imprisonment under it illegal, do you deny that the Court of Session could take cognizance of the matter and liberate the prisoner?]

Yes; where an inferior Court of Revenue miscarries, the only Court which has jurisdiction is the Court of Exchequer. This Court can liberate in that case by Habeas Corpus. The Court of Exchequer was founded in its recent form by the Act of Union, article 19, and had a revenue jurisdiction like the English Court of Exchequer, and the 6 Anne, c. 26, regulated its proceedings. The Court of Exchequer could stay proceedings in an action commenced in the Court of Session which touched the revenue, even though that action was one for damages.

[LORD CHANCELLOR.—The English Court of Exchequer also removes actions from the other Courts in like manner.]

So in the cases of *Duke of Queensberry*, M. App. Jurisdiction, No. 19; *Brough* v. *Stewart*, 13 D. 408; *Young* v. *Townsend*, 2 Irvine, 525.

[LORD CHELMSFORD.—I see that Lord Cowan reserves his opinion as to the power of the Court of Session to interfere, had the proceedings in the Court below been grossly irregular.]

[LORD CHANCELLOR.—Suppose there was a sentence of transportation against a man for illegal distillation, and he was imprisoned under that sentence, would not the Court of Justiciary have jurisdiction to release him?]

Perhaps it might. But at all events the Court of Exchequer was a Court of paramount authority, and could give redress in every form, in actions and proceedings touching revenue. The Court of Session had no higher power than the Court of Exchequer, in the way of revenue, at any time.

[LORD CHELMSFORD.—Supposing the proceedings before the committing magistrate are void *ab initio*, do you say, that that being a question arising out of revenue matters, no other Court than the Court of Exchequer could interfere in that case?]

Yes.

[LORD CHANCELLOR.—Although there was no jurisdiction on the part of the magistrate—though they were assuming a jurisdiction in matters of revenue which they did not possess by law?]

Yes; the Court of Session is merely the Court for deciding whether proceedings ostensibly taken under revenue statutes are regular. The Scotch Court of Exchequer was precisely on the same footing as the English Court of Exchequer.

[LORD CHANCELLOR.—*Primâ facie*, I think the question of the legality of the conviction would come to be considered rather in the Court of Queen's Bench than in the Court of Exchequer here.]

The Scotch Court of Exchequer was merged in the Court of Session by 19 and 20 Vict. c. 56, and the Judges of the Court of Session became the Judges of that Court, and the procedure was amended. Sections 17 and 21 regulate the right of suspension. The present is what is called an Exchequer cause, and even though the Justices had no jurisdiction, the Court of Session was not the proper tribunal to apply to; but here, the irregularities which took place do not appear *ex facie*, and, therefore, there is no ground for saying there was no jurisdiction. If it is an Exchequer cause, then all powers of review are excluded by the 79th section. This section might not apply if the proceeding was, on the face of them, not under the act of parliament. In such questions it is not enough to say, that there was an irregularity of procedure in order to enable the Court to interfere.

[LORD CHANCELLOR.—It was viewed differently in the Court of Queen's Bench; the test was, whether the magistrate was acting within his jurisdiction, or beyond his jurisdiction; and I must acknowledge, that the Court strained a little to take cognizance for the purpose of doing justice. Now, there is no temptation of that sort, because the magistrates have a right to state a case for the opinion of the superior Courts, under the statute 20 and 21 Vict. c. 43.]

The proceedings in this case could only have been challenged by the old writ of Habeas Corpus in the Court of Exchequer, and if the warrant of commitment had been valid *ex facie*, that Court would not have interfered. Here the warrant is regular *ex facie*. It is said the illegality was not in the warrant, but in the detention for a day in the police cell. It is admitted, that the statute gives a power to detain the prisoner for a certain time, and it is difficult to gather from the judgments of the Court below at what point of time that custody ceased to be legal.

[*Mr. Chambers*, for the respondent, said he would contend, that the legal custody ceased the moment the prisoner was put into the jail or into the police office, for then the officer was no longer within the statute.]

[LORD CHELMSFORD.—That could not always be so, for a Justice is not always to be found; there must be a reasonable time allowed.]

[LORD CHANCELLOR.—Whether it be a jail, or a cage as it is called, or a room at an inn, it cannot make any difference.]

If it were held, that the excise officer could not commit the prisoner to the custody of the police till a Justice was found, it would be impossible to carry out the statute in such districts as the Highlands, where the Justice might be 50 miles off. The statute says the excise officer may detain; that means, he may take all reasonable means for that purpose. If the prisoner is detained an unreasonable time, he would have an action for wrongous imprisonment. In *Van Boven's case*, 9 Q. B. 669, though a week had elapsed, it was held, that that did not prevent the jurisdiction of the magistrate attaching. Here it could make no difference, that the prisoner was put in a police cell, for if he had been put in the hands of two strong men, the character of the detention would have been quite the same. The prisoner was still under the authority of the excise officer, who could order the jailer to liberate him. It would have been the same if the officer had remained in jail with the prisoner, or had left him in the cell, and carried the key in his pocket. The prisoner was detained, as the detainer expressed it, at the request of the officer.
[LORD CHELMSFORD.—I think we must look to the thing itself, and not to the name applied to it. It may be called incarceration, or it may be called a detention. The question is whether it is a detainer or no.]
[LORD CHANCELLOR.—Stress seems to have been laid upon the circumstance, that M'Loughlan denied his delinquency, and that he was only proved to have been engaged in the distillation by one witness. Supposing that he had been caught *in delicto*, and that it was manifest that he should be convicted, would that make any difference?]

None. The magistrate below had clearly jurisdiction. The statute says, when an excise officer finds a man aiding, etc., that is the offence. When that offence was proved, it was the duty of the justice to convict. The statute gave authority to the excise officer to detain him, and to all persons acting in his aid and assistance. Whether the prisoner was detained an unreasonable time, could have nothing to do with the jurisdiction of the justice, who has to deal with the offence alone. The prisoner must either have been put within stone walls, or chained to the officer during the intermediate time.
[LORD CHELMSFORD.—What the other side will say is, that, by reason of the detention, this was not a case of summary proceeding under the 33d section, but should have been taken under the 61st section.]

The immediate arrest mentioned in the 61st section, means immediate upon the detection in the act. Under the 33d section, the officer on taking the man *in flagrante delicto*, has authority to arrest him.
[LORD CHANCELLOR.—Could he say to the prisoner, "It is not convenient for me to go before a magistrate, will you go home, and this day week I will do so?"]

Montague Chambers Q.C., and *Neish*, for the respondent.—The justice had no jurisdiction in this case, or at least had exceeded it, and therefore the Court of Session had a right to liberate the prisoner. Wherever a subject of the realm is falsely imprisoned, it is a civil right which he has, to appeal to the Court of Session for liberation—*Craig* v. *M'Colm*, Hume, 253; *Wilkie* v. *Bouse*, *ibid.* 252. It is one thing to review the case on the merits, and another to release a person imprisoned by a Justice who has no jurisdiction. It is familiar knowledge in Westminster Hall, that a person may apply for a writ of habeas corpus at all the three Common Law Courts, and also the Court of Chancery in succession. There are no words in the Exchequer Acts in Scotland to take away the jurisdiction of the Court of Session; and, according to the rule in Ersk. 1, 2, 7, such jurisdiction remains. As to the recent act, 19 and 20 Vict. c. 56, the first 17 sections apply to the procedure of the Court of Exchequer proper, and do not touch the case of the respondent here. The 17th section gives a cumulative remedy by appeal, but does not exclude the ordinary right of applying to the Court of Session. Section 21 recognises the right of applying to the Court of Session. Assuming, therefore, the Court of Session could interfere, there was good ground, inasmuch as there was no jurisdiction in the Justice. No subordinate person is entitled to imprison another whom he is to take before a magistrate. When the excise officer here handed the prisoner over to the policeman, the prisoner ceased to be detained by the excise officer. This broke the continuity of the first arrest and detention. The excise officer had no right to give a warrant of detention to the policeman.
[LORD CRANWORTH.—Is it anything more than if he had said, verbally, "I want to go to the magistrate; you take charge of the prisoner"?]

The powers given to the excise officer are very limited. The ordinary proceeding was to get the authority of the Excise Commissioners, under the 61st section, and issue an information, and it was only in the case of an immediate arrest, that the power to detain was given; but in that case he had no power to authorize a third person to imprison the party arrested. If he could be detained a day, why not two, and why not a month?
[LORD CHELMSFORD.—When, according to your view, does the power of summary jurisdiction of the magistrate cease?]

It never began; at all events it ceased the moment the prisoner was handed over to another custody—that of the police.
[LORD CHELMSFORD.—Could not the officer have left the prisoner in a room, under the charge

of somebody, while he went in quest of a magistrate, and then returned and carried him before the magistrate?]

No; he could not leave the prisoner in a room, but must carry him about with him, for these are strict powers given to the officer. He could have no more power than an ordinary constable.

[LORD CHELMSFORD.—Surely if a man is apprehended in this country, so late, that he cannot be taken before a magistrate, he may be detained till the next morning; that is reasonable, and it has been decided.]

Yes; but, though the prisoner may be detained, he cannot be taken to an ordinary prison.

[LORD CHELMSFORD.—Call it a *lock up* house; it is, in fact, a jail.]

The prisoner might have been re-arrested under 4 and 5 Will. IV. c. 51, § 25, but could not be detained in a prison.

[LORD CHANCELLOR.—The whole question turns on this, whether the officer was not all the while *bonâ fide* pursuing the object of the act in bringing the party before the magistrate, and whether there was any unreasonable delay.]

The duty of the magistrate was to ask, if there had been any delay in bringing the prisoner up, and, if there was, to decline to proceed. In *Hay* v. *Linton*, 2 Irvine, 333, the Court of Justiciary held, that, under the Reformatory Schools Act, 17 and 18 Vict. c. 74, a child could not be detained in a police cell while inquiry was made under the act, even though the magistrate caused the detention. There are other objections to the conviction. There ought to have been an information in writing. 7 and 8 Geo. IV. c. 53, §§ 65, 82 contemplate that. It is conformable to practice in other cases, and is understood, unless specially dispensed with—*Law* v. *Steel*, Arkley, 109; *Mackenzie* v. *Maberley*, 32 Sc. Jur. 5.

[LORD CHANCELLOR.—Then you must admit there must be a detention for two seconds at least, till the information in writing is got ready.]

Perhaps the magistrate might detain, but not the officer. Then there ought to be a written record. The Justice ought to have taken notes, and drawn up the evidence in proper form—Paley on Convictions, 84 (ed. 1838); *Christie* v. *Adamson*, 1 Irvine, 293.

The warrant of commitment, if taken as a conviction, was bad, because it does not appear, that the conviction was taken in view of the Justice, and, that the evidence was on oath; *Re Grey*, 2 Dowl. & L. 539; *R.* v. *Tordoft*, 5 Q.B. 933. Lastly, the officer with his own hand filled up the blank warrant of commitment.

[LORD CHELMSFORD.—But he did not sign it.]

[LORD CHANCELLOR.—All was vitiated by the officer filling up a blank *coram non judice!* If he had handed a piece of blotting paper to prevent the signature being blotted, or supplied a little sand to serve the same purpose, would that have been fatal?]

The principle is to keep the stream of justice pure.

[LORD CHELMSFORD.—You think it does not flow purely through the exciseman's still!]

The *Lord Advocate* in reply was not called upon.

LORD CHANCELLOR CAMPBELL.—My Lords, notwithstanding the able argument which we have heard at your Lordships' bar from the counsel for the respondent, I must say, that I entertain a clear opinion, that the decree appealed against ought to be reversed, but not at all on the ground, that the Court of Session has no jurisdiction over such matters. The Court of Session has jurisdiction over such matters, and no act of parliament has been passed to deprive that high tribunal of the jurisdiction which it once enjoyed. Although the Court of Exchequer may have co-ordinate jurisdiction in such a matter, it does not at all follow, that when the action was brought into the Court of Session, it would have been *coram non judice*.

If this proceeding could have been impeached on the ground, that the Justice had not jurisdiction over the offence with which the respondent was charged, I am of opinion, that in that case the Court of Session would have had jurisdiction, and would have been fully entitled to hear the objections that were raised; but upon looking at the act of parliament, it appears to me quite clear, that, in the circumstances of the case, the 79th section takes away jurisdiction from the Court of Session, and it lies upon the respondents to shew, that the suspension by which the proceedings were commenced before the Court of Session was regularly sued out.

By the 79th section of the 7 and 8 Geo. IV. cap. 53, it is enacted—"That no writ of *certiorari*," (that would apply to England,) "or other writ or process, shall be issued at the suit of any defendant out of any of His Majesty's Courts of Record in England, Scotland, or Ireland, nor shall any bill of suspension, advocation, or reduction be passed, nor shall any letter or letters of suspension, advocation, or reduction, or any other proceeding be issued out of the Court of Session or Court of Justiciary in Scotland, to supersede, sist, stay, remove, or in any wise affect any information or judicial proceeding before the Commissioners of Excise or Commissioners of Appeal in this act after mentioned, or before any Justice or Justices of the Peace in the United Kingdom in pursuance of this act." Therefore, if the Justice before whom Mr. M'Loughlan was brought was acting in pursuance of the act, he had jurisdiction in the matter, and therefore the suspension was incompetent, and the Court of Session had no jurisdiction.

It seems to me, that the counsel for the respondent have utterly failed in shewing, that the Justice had not jurisdiction, for it is enacted, by the 33d section of the same act which created the offence, that "it shall be lawful for any officer of excise, and all persons acting in his aid and assistance," (and in this case I know not whether the officer of police might not be considered as acting in aid and assistance of the officer of excise, if it were necessary to consider that,) "to arrest and detain every person so discovered, and to convey him or her before one or more Justice or Justices of the Peace for the county, shire, division, city, town, or place wherein such person shall be so discovered as aforesaid." Here there is power given to the excise officer, and to all who are acting in his aid, to arrest, detain, and convey the offender before a Justice. Then come the words which give jurisdiction to the Justice—"And it shall be lawful to and for such Justice or Justices of the Peace, on confession of the party, or by proof, on the oath of one or more credible witness or witnesses made, of such offence, to convict every such person so discovered as aforesaid."

Now, it is not at all disputed, that the magistrate who acted in this case would have had jurisdiction, if he had been the magistrate to whom the respondent was taken in the first instance, on the 22d March, in order to make the complaint before him. If the respondent had been immediately conveyed before that magistrate, and that magistrate had proceeded to hear and decide, no question could have been made about the jurisdiction; but it so happens that the arrest being on the 22d March, (I believe there is some doubt about the date,) it was, according to the statement in the case, not till the 24th March, that the hearing took place, and it is said, that during that interval the respondent could not be considered as having been detained under the authority of the act.

Now, it is allowed by the counsel for the respondent in this ably argued case, that all that is reasonable may be done by way of detention for the purpose of having the matter adjudicated; and it is not disputed, I presume, that if Mr. M'Loughlan had been taken to the house of a Justice, and the Justice had been at dinner, he might lawfully have been detained in the hall, or introduced into the drawing room, or into a picture gallery to amuse himself until the repast was over, and the matter heard. Indeed, it is admitted, that the excise officer might have taken him to his (the officer's) house, and detained him there, but the objection is, that instead of being in the officer's house, he was taken to a prison, and a police officer was asked to take care of him. Well, I say again, referring to these sections of the act of parliament, that the police officer in doing that must be considered as acting in aid of the excise officer, at all events he was acting for the excise officer, and the excise officer must be considered as the party who is detaining him. *Qui facit per alium facit per se.* He, for the excise officer, did detain him; and it is allowed, that there was no detention whatsoever beyond what was essentially necessary for the matter being adjudicated. There was no malice, no violence, no harsh treatment, and no time at all was wasted. The excise officer does his best to find a Justice to hear the case. He goes first to one man, and then to another, and then he consults the officer who represents the government at Airdrie, and he advises him, I think, to go to Hamilton. He goes to Hamilton. He does his best to find a Justice down to the 24th, when Mr. Torrance is found, and the proceedings are consummated.

Such being the facts of the case, it seems to me quite clear, that it must be considered, that there was a continuity of detention, and, that it was always either by the excise officer, or by some person acting in aid of the excise officer; and there is no doubt, that, if a Justice could have been found sooner, the detention would have been abridged.

It was said by the counsel for the respondent, that this was not in the heart of the Highlands; that Airdrie is a very populous place, and, that there are a great number of magistrates there. But if it be admitted, that in the heart of the Highlands, where magistrates are rare, the respondent might have been detained till a magistrate could be found, then if in any other part of the country, there are twenty magistrates applied to, and each of them improperly refuses to hear the case, it is clear, that the man must be detained till a magistrate could be found to administer the law. Under these circumstances, it appears to me, that Mr. Torrance had jurisdiction, just as much as if he had been present at the time when the unlawful distillation was discovered, and had sat at the outset of the proceedings to hear and adjudicate.

Van Boven's case is, I think, in point, because it shews, that even although the detention be for an unreasonable time, that does not affect the case. I do not think, that the detention in the present case was for an unreasonable time; and if a jury had had to try that question, I think any jury would have said, that there was no detention for an unreasonable time. One noble and learned Lord has intimated his opinion, in commenting on *Van Boven's case*, that that would not have interfered with the jurisdiction of the Justice when the hearing actually took place. In that case the act of parliament gave power to detain for a reasonable time, and the jury expressly found, that he had been held in custody for an unreasonable time, but still the determination was, that that did not interfere with the jurisdiction of the magistrate.

That being so, all the other questions disappear. The Court of Session having no jurisdiction to suspend the proceedings before the Justice, because the Justice had jurisdiction in the matter,

and the suspension being incompetent, the other questions, that have been discussed at the bar do not arise.

I am almost ashamed to refer to some of the objections that have been made, such as, that there was only one witness examined, for the act of parliament says, that the proof of one witness shall be sufficient, and again, that the officer filled up a blank warrant. Although these objections received a certain countenance from the Lord Ordinary, I must say, that they seem to me to be wholly frivolous, and I am sorry, that they should have received countenance in that quarter.

The only further objection, that I think it right to take notice of is, that there was no written information, and, that consequently there was not any jurisdiction in the Justice. If this had been a proceeding under a different clause of the act of parliament, not where there has been an arrest, but an immediate procedure for obtaining an adjudication, and the infliction of a penalty, I think there might have been good reason for such an objection; but it is quite clear, that the legislature meant, and this *festinum remedium* of arresting parties taken *in flagrante delicto*, and having an immediate conviction, contemplated, that it should be done without the formality of a written information, and without the formality of a regular conviction. Those steps may be necessary and proper when there is a regular proceeding, which is supposed to take place before a magistrate, but this is a special proceeding to be adopted for the purpose of putting down an offence which it is very difficult to meet, namely, the offence of unlawful distillation, and it seems to me, that if parties were allowed to raise such objections as these, the very object of the act would be defeated. All that it appears to me judicially necessary for us to decide is, whether this suspension was competent or not, and I say, that it was incompetent. I have therefore to advise your Lordships, that the interlocutors of the Court of Session should be reversed.

LORD CRANWORTH.—My Lords, I entirely concur with my noble and learned friend. The 33d section of the statute in question makes it the duty of any officer of excise, upon finding a person *in flagrante delicto* engaged in illicit distillation, to arrest and detain him, and bring him before one or more Justice or Justices of the Peace, in order, that he may there be dealt with, and the duty then imposed upon the Justice is to hear and determine the case, and to fine the party £30 if he is convicted either upon his own confession or by the evidence of one witness, and in default of his payment, then to commit him for a certain time to prison.

Now what happened here was this: The officer of excise, Evans, did find M'Loughlan engaged in illicit distillation, did arrest him, did detain him, and did bring him before a Justice of the Peace, and the first point, that was argued was, that it was the duty of the Justice of the Peace to inquire, whether he had been brought up *quam primum* before him. Now, in my opinion, the Justice of the Peace not only had no obligation to make such an inquiry, but he would have been doing that which he would not have been justified in doing, had he stopped to make such an inquiry. He might just as well have inquired whether the arrest had been unnecessarily harsh, as to have inquired whether the detention had been unnecessarily long. The Justice of the Peace had no duty to perform except to proceed upon the case as the case of a person taken *flagrante delicto*, having been arrested, and detained by the officer and brought before him. That, therefore, I think, disposes altogether of the question about unreasonable detention.

But I must say, that, looking at it as a question of fact, if I had to decide it only as a juryman, I should say, that there was no unnecessary detention at all. The man was taken, and, for aught that appears, would have been immediately brought before the Justice that same evening, if a Justice could have been found; but for some reason not explained the officer of excise goes first to one Justice of the Peace, and then to another, and none of the Justices chooses to entertain the case, till at last, forty-eight hours after the man had been taken, the excise officer does find a gentleman of the name of Torrance who hears the case and convicts. It appears to me, therefore, that this question of unreasonable detention, which seems to have been the only ground on which the Court of Session proceeded, entirely falls to the ground. It was not a question, that could come into contest before the Justice, even if the facts had warranted it, and in truth, the facts would not warrant it, if it had come before the Justice.

That may be considered as a question of substance; all the other questions are questions really and entirely of form. I had at one time a doubt whether the conviction was drawn up in the proper form, but I think, that what was pointed out by my noble and learned friend is unanswerable on that subject, namely, that, the substance being right, the authority of the Court of Session to inquire into the form is taken away by the 79th section of the statute. That the Court had jurisdiction to inquire into such a matter, if it had appeared on the face of the proceedings, that the Justice was acting without jurisdiction, I can entertain no doubt. I do not think, that the statute meant to give exclusive jurisdiction to any Justice of the Peace, or to any tribunal, to imprison one of Her Majesty's subjects, without its being distinctly shewn on what ground he was imprisoned, and that he was lawfully imprisoned, but all the rest being entirely matter of form, the right of suspension is taken entirely away.

Upon the whole, therefore, I think, that the Court of Session have certainly come to an erroneous conclusion, and that the interlocutor must be reversed.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friend upon the

woolsack, that the general jurisdiction of the Court of Session is not taken away by any of the provisions of the acts to which reference has been made. If, therefore, the magistrate had been acting without any jurisdiction, I apprehend, that it would have been competent to the Court of Session to have entertained these proceedings; but, supposing the magistrate has jurisdiction, then, according to the opinion of my noble and learned friend upon the woolsack, in which I entirely agree, the 79th section of the 7 and 8 Geo. IV. c. 53, took away from the Court of Session the power of granting a note of suspension. Therefore, in this case, the real substantial question is, whether the magistrate had or had not jurisdiction under the circumstances over the particular case.

I confess, that upon the question of the magistrate's jurisdiction, I am unable to agree either with the conclusion at which the Court of Session arrived, or with the reasons which they have given for that conclusion. They thought, that the proceeding under the 33d section of the 7 and 8 Geo. IV. c. 53 was incompetent, in consequence of what they regarded to be an illegal detention of the respondent, because he was not brought before the Justice in the manner prescribed and authorized by the statute—that it ceased to be a proceeding on immediate arrest under the act from the nature of the detention, the respondent not being conveyed before the Justice by the excise officer, but being brought up as a prisoner in the hands of the jailer.

It is to be observed, that, upon this single point, upon which the Court of Session decided, the Lord Ordinary seemed rather to be of opinion, that the detention or imprisonment, or whatever it is to be called, was not sufficient in itself to make the conviction bad, and I think it is perfectly clear, that it could not have that effect. Let us look to the object, and to the words of the 33d section of the act upon which the question turns. The object of that section of the act was to provide for the immediate apprehension of offenders who were likely to escape from justice; and, accordingly, it empowers the officer, where any person is discovered assisting in the illegal manufacture, that is, the illicit distillation of spirits, "to arrest and detain every person so discovered, and to convey him or her before one or more Justice or Justices," etc., so that the officer is empowered to arrest and detain. Arrest and detention are here in a certain sense synonymous terms, but inasmuch as the officer is to convey the offender before a magistrate, there must necessarily be some detention following the arrest in order to enable him to perform his duty in that respect. Now, detention is of various kinds. It may be by the officer keeping hold of the person, that he has so arrested, and detaining him in that manner. It may be by locking him up in a room under the charge of some persons who are intrusted to watch over him, while the officer goes for the purpose of finding some Justice of the Peace; and it is admitted, on the part of the respondent, that such detention would be lawful in every case where the room, or the parties who were watching that room, were under the control of the officer. But it is said, that in this particular case the man having been lodged in a jail, from that moment the detention ended in the sense of the act of parliament, and that a new species of custody, in the nature of an imprisonment, changed the character of the detention, and made the party no longer under the control of the officer. It appears to me, however, that you cannot, by using the term "incarceration" or "imprisonment," alter the nature of the thing. It may still be detention, although the detention is in a jail, or lock-up house, and not in a private house, in which it is admitted, that the detention would be lawful under the act of parliament; because, after all, the persons who have the control over, and the custody of the offender, are aiding and assisting the officer in the detention of the offender. It is not a change of custody as long as they are holding him upon the authority of the officer, and for the purpose of detaining him under the act of parliament.

Now, when the party under these circumstances is brought before the magistrate, I quite concur with my noble and learned friend (LORD CRANWORTH), that the magistrate has nothing to do with the mode in which the party has been dealt with after he has been arrested. When he is discovered, and is immediately arrested by the officer, then the jurisdiction of the magistrate would attach, and it would be no part of the duty of the magistrate to inquire, when he found, that there had been a delay, as in this instance of two days, why it was that the party arrested *flagrante delicto* was not immediately brought before him. The whole of his duty is to ascertain whether the offence has been committed, whether the party was discovered assisting in the illegal distillation. And if he were so discovered, and immediately arrested, that is quite sufficient to give the magistrate jurisdiction; and the magistrate has no duty to inquire further, or to ascertain whether, since his arrest, he has been actually in the immediate keeping of the officer, or whether he has been in some other custody, but still under the charge of the officer, and under his control.

The case was likened by the Lord Justice Clerk to the case of *Hay* v. *Linton*, and yet it is impossible to conceive any one thing more distinguishable from another than the case of *Hay* v. *Linton* from the present case. What was the case of *Hay* v. *Linton?* It was a proceeding under an act of parliament, which authorized constables to bring before a magistrate any child under 14 years of age found wandering in the streets, without any home, proper guardianship, or visible means of subsistence; and the magistrate was authorized, if no person appeared after

intimation being given to provide for the child, and find security to that effect, to order such young person forthwith to be transmitted to and received at any reformatory school. Now, when a destitute child is brought before a magistrate under the provisions of that act, it is quite clear, that when intimation has been made, the child is to be taken care of in the mean time, until it can be ascertained whether any person will appear and give the requisite security. But in that case, instead of taking care of the child in that manner, the magistrate granted a warrant to detain the child in the cells of the police office. Therefore when the child was brought up after the period of intimation had expired, it was insisted, or rather it was afterwards insisted, when the child had been sent to the reformatory, that the jurisdiction of the magistrate had ceased, because the character and condition of the child had altogether changed. And so the Lord Justice Clerk puts it very clearly when the order was afterwards pronounced, the child was no longer before the magistrate in the position contemplated by the statute, that is, brought before him immediately upon being found in the streets in a state of destitution, but, on the contrary, was brought up as a prisoner from the cells of the police office. Now, what possible analogy can there be between that case and the present? The character of the immediate arrest changed in this case by reason of the subsequent detention? Is there anything in the evidence to prove, that the party was discovered in the act of illicit distillation? It is clear, that the analogy between the two cases altogether fails, and that there was nothing whatever in the circumstances of this detention, even supposing it had been an illegal detention, which would take away from the magistrate that jurisdiction which attached to him under the act, by reason of the discovery which was made of the party, and the immediate arrest upon that discovery.

I wish, that it may be understood, that I do not intend to express any opinion which might countenance the delay which took place upon the present occasion in carrying the offender before a magistrate. My noble and learned friend (LORD CRANWORTH) thinks that there was no unnecessary delay, and he may be right in that respect. But I am bound to say, that, even if there was an improper delay, the officer was placed in a situation of great difficulty and embarrassment in consequence of the refusal of one or more of the magistrates to hear the case. However, I am so perfectly clear with regard to the question as to the jurisdiction of the magistrate not being taken away, that I could not have entertained any doubt whatever upon the subject, if it had not been for the very high respect which I entertain for the judgment of the learned Judges of the Court of Session who have decided this question.

With regard to the other objections which have been raised, in my opinion they are really very frivolous. I entirely concur with the opinions which have been expressed by my noble and learned friends, and I think, that upon the present occasion the interlocutors ought to be reversed.

LORD CHANCELLOR.—Lord Advocate, What adjudication do you pray?

Lord Advocate.—I think the judgment should run—reverse the second, third, and fourth interlocutors complained of, and remit to the Court of Session to refuse the note of suspension.

LORD CHANCELLOR.—Be it so.

Interlocutors reversed, and cause remitted with a declaration.

For Appellant, J. Timm, Solicitor, London.—*For Respondent*, Holmes, Anton, Turnbull, and Sharkey, Solicitors, Westminster; John Leishman, W.S., Edinburgh.

MARCH 12, 1861.

JOHN ROBERTSON AIKMAN, *Appellant, v.* GEORGE ROBERTSON AIKMAN, and HUGH HENRY ROBERTSON AIKMAN, *Respondents.*

Domicile—Marriage—Legitimacy—Succession—Scotsman in English Sea Service.

HELD (affirming judgment), *That a native born Scotsman, who had left Scotland at the age of 13, and had been connected for thirty years with the East India Company's mercantile marine service, and who, thereafter, on an average, spent about seven or eight months every year in London, and the remainder in Scotland, had not lost his domicile of origin; and that children born to him in England of a mistress, whom he subsequently married in Scotland, were legitimate, and were to be preferred to issue born subsequent to the marriage, in a question of succession to his heritage in Scotland.*[1]

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[1] See previous reports 21 D. 757: 31 Sc. Jur. 404, 755. S. C. 3 Macq. Ap. 854: 33 Sc. Jur. 363.