

and is approached from the street by descending three steps.

The pursuer's case is that on 3rd May last, on the occasion of the opening of the Glasgow Exhibition by the Duke and Duchess of Fife, he and a number of the workpeople in his employment were standing on the pavement in front of his premises waiting to see the Duke and Duchess, who were to pass through the street on their return to St Enoch Station from the Exhibition; that the defender, who was there on duty, and the policemen under his command, proceeded to clear the pavement, and that when the pursuer interfered and insisted that his workpeople were entitled to occupy the pavement, he was pushed down the steps and roughly handled by the defender.

Now, it is often necessary that the members of the police establishment in the discharge of their duty should use force, it may be to protect individuals who are being wronged, or to keep order in the streets. The police are entitled to use force when necessary in the discharge of their duties, and he would be a very inefficient police officer who should confine himself to speaking to people and leaving them alone if they refused to obey orders. To make a relevant case of assault on the part of a police officer on duty, it appears to me that it is necessary to aver either (1) that the order which the officer was seeking to enforce was unlawful, that is, not within the scope of his duty; or (2) that the pursuer was willing to comply with the order, in which case the use of force would be unnecessary; or (3) that the force used was manifestly in excess of the requirements of the case.

As to the first exception, the pursuer states that he was entitled to be on the pavement with his workpeople, because the pavement is his property. Pavements usually are the property of the householder, but this right of property is subject to the public use of the pavement as a thoroughfare, and it was admitted at the Bar that North Drive is a public street on occasions when the arrival of persons of public station is expected to attract a crowd. The magistrates are entitled to make use of the police force to keep the streets clear, and it is for them in the exercise of their discretion to give such orders through the police as they think fit for ensuring safety and good order. On this occasion the police were keeping North Drive clear against the arrival of the Duke and Duchess, who had come to represent the King at the opening of the Exhibition, and in my opinion the pursuer had no higher right than any other member of the public to occupy the pavement on an occasion when the street was by lawful authority being kept clear.

The second exception does not arise, because the pursuer admits that he refused to leave the pavement, and claimed the right to occupy it by himself and his workwomen.

As to the third exception, the averments of the pursuer do not come up to a case of force manifestly in excess of what was

requisite. He does not say that a baton was used, or that he was even struck; still less that he was injured in his person. His statement is, "the pursuer along with his workpeople was hustled by the defender, and pushed down the steps in the direction of the glass door of his factory, and crushed and assaulted." I do not know how a street can be cleared except by "hustling" and "pushing" the people who refuse to move. When there is a crowd of persons present this must result in a certain amount of "crushing;" and as to the word "assaulted," this seems to be only the pursuer's view of what the pushing and hustling amounted to, because there is no averment of any separate or individual assault. It would, of course, be impossible for an officer on duty to measure the degree of the force which he uses so precisely as to know whether any individual in the crowd should be pushed down one, two, or three steps of the stair as the result of his effort, nor do I understand that the pursuer's case depends on any such minute criticism. His view is that the police had no right to interfere with him, and in this I think he is in error. In the result, I am of opinion that the defender is entitled to be assolized from the action.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary and assolized the defender.

Counsel for the Pursuer and Respondent—Shaw, K.C.—J. C. Watt. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defender and Reclaimer—The Lord Advocate, K.C.—Craigie. Agents—Campbell & Smith, S.S.C.

Thursday, November 28.

## FIRST DIVISION.

[Sheriff of Argyll.]

MACPHERSON v. JAMIESON.

*Prescription—Triennial—Interruption—Spirit Merchant's Account—Entries made Illegal by Statute—Pactum illicitum—Sale of Spirits Act 1750 (24 Geo. II. c. 40) (Tippling Act)—Act 1579, c. 83.*

Entries in an account which are struck out by the Sale of Spirits Act 1750 (Tippling Act) do not interrupt the triennial prescription.

The Sale of Spirits Act 1750 (24 Geo. II. c. 40) (Tippling Act), sec. 12, enacts—"That from and after 1st July 1751 no person or persons whatsoever shall be intitled unto or maintain any cause, action, or suit for, or recover either in law or equity any sum or sums of money, debt, or demand whatsoever, for or on account of any spirituous liquors, unless such debt shall have really been and *bona fide* contracted at one time, to the amount of twenty shillings or upwards."

The Act 1579, c. 83, enacts—"That all actions of debt for . . . merchants comptes and uther the like debts that are not founded upon written obligationes be per-sewed within three zeires, urtherwise the creditour sall have na action, except he outhre preife be writ or be aith of his partie."

Mrs Margaret Macpherson or Mackay, carrying on business under the former name, grocer and spirit merchant, Oban, brought an action in the Debts Recovery Court there against James Jamieson, road-man, Kilninver, near Oban, concluding for payment of £48, 19s. 5½d., conform to account commencing 4th December 1895 and ending 8th May 1900. The summons in this action was dated June 13, 1901.

The defender pleaded—(1) Prescription. (2) Tippling Act.

Mrs Macpherson produced an account consisting of a large number of items partly for spirits and partly for provisions. The only entries in this account within three years of the date of the summons were three entries for spirits in 1899, amounting in all to 2s. 7d., and one entry in May 1900—"Spirits 6d."

On 21st July 1901, the Sheriff-Substitute (MACLACHLAN) granted decree for payment of £42, 3s. 1d.

On appeal the Sheriff (FERGUSON) affirmed.

The defender appealed to the Court of Session, and argued that the items in the account which fell under the provisions of the Tippling Act 1751 (quoted *supra*) were illegal, and could not be looked at judicially for any purpose—*Maitland v. Rattray*, November 14, 1848. 11 D. 71. If these entries could not be looked at, the account had prescribed.

The respondent argued that the Tippling Act, although it deprived the publican of the right to recover such items by action, did not affect them as an interruption of prescription.

At advising—

LORD ADAM—This is an action brought under the Debts Recovery Act by M. Macpherson, under which designation a Mrs Mackay carries on the business of a grocer and spirit merchant in Oban, against the defender for payment of an account for groceries and other furnishings, amounting to £48, 19s. 5½d.

In defence, the defender pleads prescription, the Tippling Act, and payment.

It appears to me that the first plea, which ought to have been considered and either sustained or repelled, was that of prescription. The Sheriffs, however, did not take that course, but held that the plea was barred by the defender's writ, and allowed a proof at large.

Now, on turning to the account libelled on, it appears that the four entries subsequent to April or May 1898 are all for small quantities of spirits under the amount of 20s., and the pursuer did not dispute that the Tippling Act (24 Geo. II. cap. 40), applied to these charges. Now, in the case of *Maitland v. Rattray*, 11 D. 71, it was decided that the Tippling Act did not

merely cut off the right of action for such furnishings, but rendered them positively illegal. On the authority of that case, accordingly, I think that these entries must be struck out of the account, and the account regarded as if the entries had never been in it. If that be so, then the last entry in the account falls beyond the three years of prescription, and the account is prescribed.

I am therefore of opinion that the plea of prescription ought to have been sustained.

[His Lordship then dealt with the question whether the constitution and resting-owing of the debt was proved by the writ of the defender].

I am of opinion, therefore, that we should recal the interlocutors appealed from, sustain the plea of prescription stated for the defender, and find that the constitution and resting-owing of the debt can only be proved by the writ or oath of the defender; find that the pursuer has failed to prove the constitution and resting-owing of the debt by such writ; and therefore assoilzie the defender.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court pronounced an interlocutor in accordance with the last paragraph of Lord Adam's opinion.

Counsel for the Pursuer and Respondent—D. Anderson, Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Defender and Appellant—W. Mitchell, Agent—James F. Mackay, W.S.

Thursday, November 28.

SECOND DIVISION.

[Sheriff Court at Glasgow.

HARDIE v. GREENOCK TOWING COMPANY.

*Shipping Law—Pilot—Compulsory Pilotage—Liability of Pilot—Pilot Deprived of Effective Control of Vessel—Duties of Pilot.*

When a licensed pilot is embarked on board a vessel to act as pilot in a place where pilotage is compulsory, so long as he continues to act as pilot he is responsible for any damage that is caused by the faulty performance of the duties incumbent on a pilot, and if he continues to act he will not escape responsibility by showing that he was ordered by the owner's representative to place himself in a disadvantageous position for controlling the navigation, and that he complied with that order instead of declining to continue to act as pilot on such conditions.