

and hoarding in Dundee, of which stance and hoarding they (the pursuers) claimed to be respectively tenants and owners.

On 2nd December 1911 the Sheriff-Substitute granted interim interdict.

Against this interlocutor the defenders appealed to the Sheriff (FERGUSON), who on 8th December 1911 refused the appeal.

Thereafter on 7th March 1911 the Sheriff-Substitute (NEISH), after a proof, found that the pursuers' lease of the said premises expired on 28th December 1911, and that they (the pursuers) were entitled to remove the hoarding as a trade fixture. He accordingly recalled the interim interdict, and decerned against the defenders for £50 damages, in respect of their having illegally interfered with the pursuers' advertisements on the said hoarding.

The defenders appealed.

On the case appearing in the Single Bills, counsel for the pursuers objected to the competency of the appeal on the ground that the value of the cause was under £50, the only question left in the case being the amount of damages. He cited the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51), secs. 7 and 28.

Argued for defenders—The appeal was competent, for the action when raised contained conclusions for interdict. It was immaterial that the question of interdict was no longer before the Court. He cited *Thomson v. Barclay*, February 27, 1883, 10 R. 694, 20 S.L.R. 440. [LORD JOHNSTON referred to *Duke of Argyll v. Muir*, 1910 S.C. 96, 47 S.L.R. 67.]

LORD PRESIDENT—This case as it was originally presented in the Sheriff Court was an action of interdict and damages raised by a tenant of a hoarding against a tenant who succeeded him when his term of tenancy was over, upon an averment that this incoming tenant had, so to speak, assumed possession too soon, and had put his bills upon the hoarding and obliterated the bills of the prior occupant. The Sheriff-Substitute granted interim interdict. At the time that he came to pronounce judgment on the question of damages the period of the first lease had expired, and therefore there was no longer room for any pronouncement upon the matter of interdict. Accordingly the Sheriff-Substitute recalled the interim interdict previously granted, and found damages due and assessed them at £50. An appeal was taken to this Court, and the objection was raised upon the other side that it was incompetent because the action does not exceed £50.

I am of opinion that that is a good objection. No doubt the action as it was originally raised contained a conclusion for interdict, and if there were anything of that conclusion left in the action it might be competent for us to deal with the case on appeal. But the conclusion for interdict is now of purely historical interest, and there is nothing left in the case but the £50. Where there is any other consideration in a case—any consideration which cannot be measured in money—it would be out of the

question to disallow an appeal upon the ground of the pecuniary value of the cause, but as the value of this cause is entirely pecuniary, and also below the prescribed amount, I am of opinion that the appeal must be refused as incompetent.

LORD JOHNSTON—I agree.

LORD SKERRINGTON—I also agree.

LORD KINNEAR and LORD MACKENZIE were sitting with the Extra Division.

The Court sustained the objection and dismissed the appeal.

Counsel for Pursuers—Gentles. Agents—J. Ferguson Reekie, Solicitors.

Counsel for Defenders—J. D. Johnston. Agent—Arthur C. M'Laren, Solicitors.

Saturday, May 18.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

HARVEY v. STURGEON.

Reparation — Process — Issue — Malice — Want of Probable Cause — Wrongful Arrest—False Charge—Police Constable—Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), sec. 88.

In an action against two police constables for damages for wrongful arrest followed by a false charge, held that as the pursuer's averments did not disclose reasonable grounds for the defenders' actings it was unnecessary to put in issue malice and want of probable cause.

The Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), enacts—Section 88—“They (the chief-constable or any superintendent, lieutenant, or constable acting under or appointed by him) may search for, take into custody, and convey to the police office any person who is either accused or reasonably suspected of having committed, either within the city or at any place wheresoever beyond the city, a penal offence or any police offence not herein specially directed to be made the subject of a complaint, in respect of which imprisonment may be awarded without the alternative of a money penalty, or any police offence where the name and residence of such person are unknown to the constable and cannot be readily ascertained by him, or any person actually committing any riotous or disorderly conduct or act, or impeding any public thoroughfare.”

On 8th February 1911 Duncan Harvey, coppersmith and brassfounder, Glasgow, pursuer, brought an action of damages in the Sheriff Court at Glasgow against Alexander Sturgeon and Andrew Stirling, police constables, Glasgow, conjunctly and severally, defenders, in which he sued for

£500 in respect of defenders conjunctly and severally having, on 25th October 1910, maliciously and without probable or any cause and without a warrant arrested the pursuer and taken him through the public streets to the Southern Police Station, Glasgow, and there falsely charged him with having failed to give a satisfactory account of the contents of a parcel which he was carrying, and which on examination proved to be an alarm clock which was being taken by him to the watchmaker's for repair, in consequence of which the pursuer was detained for some time in custody at said police office and was subjected to the indignity of being searched.

The pursuer averred, *inter alia*—“(Cond. 2) On an evening in or about the beginning of February 1910 the pursuer was proceeding about 5.30 p.m. from his business premises at Eglinton Lane to a metal refinery business which is carried on by his brothers at Salkeld Street. On his arrival there he was accosted by the defenders, who maliciously and without probable cause proceeded to search his clothing, and declared that he had something concealed under his overcoat. The pursuer remonstrated with the defenders as to their conduct and informed them of his identity. The defenders, for some reason unknown to the pursuer, had made up their minds to arrest him, and they were obviously disappointed when they discovered nothing of an incriminating nature upon him. After the defenders had got pursuer's name and address and had satisfied themselves that he had nothing to conceal they allowed him to go, but they intimated they would watch him in future. Said proceedings were wholly unjustifiable, and pursuer, who was a respectable and law-abiding citizen, was greatly annoyed at what had occurred and spoke pretty strongly to the defenders about their conduct. In consequence thereof pursuer believes and avers defenders conceived a feeling of ill-will towards him, which they determined to gratify by bringing another unfounded charge against him. (Cond. 3) On or about 25th October 1910 the pursuer left his premises before named about 5.35 p.m. and walked down Eglinton Street, his intention being to call at Salkeld Street to leave a message. At that time he was carrying a parcel containing an alarm clock which belonged to his mother, and which he was taking to a jeweller's for the purpose of being repaired. As he approached Salkeld Street he observed that the premises there were closed up. He thereupon retraced his steps along Bedford Street and proceeded along Apsley Place, when he was arrested by the defenders, who were in plain clothes. Defender Sturgeon crept up behind him and caught hold of the said parcel. The pursuer resented the defender Sturgeon's interference, with the result that pursuer was thrown heavily against some iron railings. Thereafter defender Sturgeon took him by the arm and the defenders marched him down through the public streets to the

Southern Police Station, the pursuer walking between the defenders and held by Sturgeon. On arrival there the defenders falsely, maliciously, and without probable cause stated to the official in charge that they had arrested the pursuer on the ground that he had refused to disclose the contents of his parcel and also to give his name and address. The parcel was taken by the defenders from the pursuer and handed to the lieutenant in charge, who examined the same and found it to contain an alarm clock as aforesaid. The pursuer objected to being searched, but notwithstanding his remonstrance the defenders searched his person, and the contents of the various pockets were laid upon the counter of the police station. Prior to that, however, he informed the lieutenant who he was and stated that the defenders were all along aware of his identity. Although he was well known to the defenders, they refused to concur in his identity. (Cond. 4) When the defenders were in the act of searching the pursuer, Detective M'Bride, who was attached to the Southern Division, came out of the detectives' room, and on realising what was taking place he informed the lieutenant that there must be some mistake, as the pursuer was a most respectable man. Notwithstanding this information the pursuer was detained in custody until said detective was sent by the lieutenant in charge to the pursuer's mother's house to verify the information both as to his identity and as to the proprietorship of the alarm clock in question. On said statements being verified he was thereupon liberated. (Cond. 5) . . . The arrest and charge against the pursuer was made maliciously and without probable or any cause, and was made for the purpose of injuring the pursuer in his reputation, feelings, and business. Since the incident in February 1910 the defenders have known perfectly well who the pursuer was. They have seen him frequently in the streets, and they knew he was a brother of Archibald Harvey, who is a partner in the Salkeld Street business.”

The defenders pleaded, *inter alia*—“(1) The action is irrelevant. (2) The defenders' whole actings towards pursuer being in the *bona fide* execution of their duty as police constables, without malice and with probable cause, are privileged.”

On 12th May 1911 the Sheriff-Substitute (BOYD) sustained the first plea-in-law for the defenders and dismissed the action.

Note.—“. . . The ground of action is that defenders (first) maliciously and without probable cause arrested the pursuer without a warrant. On consideration of the terms of the Glasgow Police Act 1866, sec. 88, I do not think that a warrant was necessary. Police officers are thereby empowered to arrest any person, either accused or reasonably suspected of having committed a penal offence for which imprisonment may be given without a fine.

“The defenders say the pursuer approached this refinery in the dark with a

parcel. It is well known that such premises are often visited by thieves for disposal of stolen metal and they are constantly watched by detectives. I do not think they were unreasonable in supposing he might be about to dispose of stolen property. I think it was a reasonable wish on their part to see the contents of the parcel, and I think also it would have been reasonable for the pursuer to disclose the contents at once, and had he done so it is likely the matter would have ended there. He did not take this course, however, and his refusal was calculated to increase the defenders' suspicion, and the defenders had to take him to the police station before they ascertained what the parcel contained.

"The pursuer further says that the defenders falsely charged him with refusing to give a satisfactory account of the parcel, and I think it is plain from his own statement that he had refused to account for it, that he did resist the defenders' intention to examine the parcel, and that the defenders took him to the police station in consequence.

"I think it is clear that the defenders were privileged, and the question is whether facts and circumstances are averred from which malice can be inferred (see *Buchanan v. Glasgow Corporation*, July 19, 1905, 7 Fraser 1001, 42 S.L.R. 801). From the facts stated by the pursuer I do not think I can infer malice. The defenders were mistaken in supposing the pursuer was carrying a suspicious article, but that does not imply malice. The mistake would have been apparent if the pursuer had displayed the contents when challenged, but as he refused, the only way of allaying suspicion and discovering the mistake, if there was one, was to take him to the station. I do not think that the facts stated by the pursuer lead inevitably to the conclusion that the defenders had conceived ill-will to the pursuer, and in order to gratify this had wilfully magnified the innocent incident of October into a false charge of resisting the police in the execution of their duty."

The pursuer appealed to the Sheriff (GARDNER MILLAR), who on 12th February 1912 recalled the interlocutor of the Sheriff-Substitute of 12th May 1911 and allowed a proof before answer.

Note.—". . . In the case of *Pringle v. Bremner & Stirling*, May 6, 1867, 5 Macph. (H.L.) 55, 4 S.L.R. 18, the rule is laid down that the Court is not entitled to look at anything but the averments of the pursuer, together with any admissions he may have made in answer to averments by the defender. . . . The defenders' counsel laid great stress upon the possession of the parcel, at the time the defenders accosted the pursuer, as being a suspicious circumstance, and he referred to the averment by the defenders in their statement of facts that the defender Sturgeon asked the pursuer what he had there, pointing to the parcel, and that the pursuer persisted in his refusal to say what was in the parcel

and would not give the defenders his name. This averment is met by a general denial by the pursuer, upon which the pursuer's counsel relied when asked if he would give a specific denial of this averment. According to the rule in the case above referred to I do not see how the Court can look at this averment.

"The question therefore is upon these averments, has the pursuer stated a relevant case? The first question that was raised by the pursuer was as to his apprehension without a warrant. I think it is clear from the Glasgow Police Act 1866, sec. 88, and the authorities, that a police constable has the power in Glasgow to arrest without a warrant anyone whom he has reasonable ground for believing has committed a crime, but if he does proceed without a warrant then he must justify that by the circumstances. In the present case if the defenders had reasonable ground for believing that the pursuer was in possession of stolen property, then they were acting in the course of their duty in apprehending him. If that is proved, then the defenders are in a privileged position, and the question may arise thereafter whether the pursuer has stated circumstances inferring malice. He says the constables knew who he was, after the incident of February, and that he was a respectable citizen. They further knew that he was a brother of a partner of the business in Salkeld Street, and notwithstanding that they stopped him on the street, and without due inquiry as to the nature of his parcel took him down to the police office. These circumstances if proved may amount to malice, and accordingly I think the pursuer is entitled to inquiry, but in the whole circumstances I think it should be by a proof before answer."

The pursuer required the cause to be remitted to the Second Division of the Court of Session for jury trial and proposed the following issue—"Whether, on or about 25th October 1910, the defenders wrongfully and illegally apprehended the pursuer in Apsley Place, Glasgow, and conveyed him to the Southern Police Office in Glasgow, to the loss, injury, and damage of the pursuer?"

The defenders objected to the form of the proposed issue, and argued—The pursuer's averments disclosed a case of privilege, and malice and want of probable cause should be put into the issue. The Glasgow Police Act 1866 (29 and 30 Vict., cap. cclxxiii), sec. 88, conferred special powers on police constables. Moreover, the actings of officials were always presumed to be *bona fide* until proved to be otherwise—*Hill v. Campbell*, December 9, 1905, 43 S.L.R. 226, *per* Lord Kinnear 229; *Young v. Magistrates of Glasgow*, May 16, 1891, 18 R. 825, 28 S.L.R. 645.

Counsel for the pursuer were not called on.

LORD SALVESEN— I am of the same opinion as the Sheriff. The only point

where I differ from him is when he says that this is a difficult case. I think it is a very plain case.

The pursuer here avers that he is a law-abiding citizen of Glasgow and a partner of a firm of brassfounders; that on a certain day he was carrying a parcel containing a clock belonging to his mother, which he was taking to be repaired, and that he was suddenly pounced upon by two police officers in plain clothes and carried off to the police office.

Now it is quite true that under section 88 of the Glasgow Police Act of 1866, even such an apparently unjustifiable proceeding may be justified if the police officers are able to show that they acted with reasonable cause, having reasonable grounds of suspicion against the person whom they treated in that way. But *prima facie* what they did, on the pursuer's statement, which is the only one we can consider just now, was a wrongful thing; and, accordingly, it appears to me that the pursuer is entitled to an issue in the form which has been proposed by his counsel.

If at the trial the defenders are able to persuade the jury that they acted reasonably and within the powers conferred upon them by the Glasgow Police Act, then a case of privilege will arise, and it will be the duty of the presiding judge to tell the jury that if they take that view they must find for the defenders unless they are of opinion that the defenders acted maliciously. But that will arise at the trial. In the meantime I see no ground for putting malice into the issue or assuming, in the face of the pursuer's averments to the contrary, that the defenders acted reasonably in taking him to the police office.

LORD GUTHRIE—The Sheriffs have differed in this case, but I rather think the difference has arisen from the fact that the Sheriff-Substitute has not only looked at the defenders' averments, which the Court may be entitled to do, but has substantially assumed that they were correct.

It is quite clear that whatever view may be taken of the opinions of the House of Lords in *Pringle v. Bremner & Stirling* (May 6, 1867, 5 Macph. (H.L.) 55, 4 S.L.R. 18) any such proceeding is quite unwarranted. In that case, as the Sheriff brings out, there appears to have been a difference of opinion as to whether the defenders' averments could be even looked at; but I take it that Lord Colonsay when he expressed the opinion—which the Sheriff seems to read as differing from those of the other judges—that "in judging of cases of this kind we are accustomed to examine the whole record, consisting of the statements of the pursuer, the statements of the defender, and the answer of the pursuer," certainly never intended that the Court should do what the Sheriff-Substitute has here done, namely, not merely examine the whole record and look at the averments, but also assume, without any evidence, that the defenders'

averments are correct. I think the Sheriff has taken the right view, and I agree with him.

LORD JUSTICE-CLERK—I am entirely of the same opinion. In recent times, when there is so much publicity, very large discretionary powers have been given to police officers which would not have been tolerated in former times. That makes it all the more necessary that while they are allowed a certain margin as regards dealing with persons upon suspicion, their powers should not be stretched beyond what is reasonable, and that when they are powers conferred by statute they should not be stretched beyond what the statute provides or what may be reasonably inferred from its terms.

I find it difficult to imagine anything more unreasonable and more wrong on the part of police constables than that when a person is going along the street with a parcel under his arm, because they think that he may be going to some place on suspicious errand, they should seize his parcel and insist upon him going to the police office with them to answer to some charge or other which they are going to make. As a matter of fact they made no charge against him, but they tried to make out that he was arrested in what they call the execution of their duty. I cannot conceive that it should be held to be reasonable by any magistrate or judge that it is within the powers of the police to arrest a private citizen going along a street with a parcel under his arm, having done nothing, not even having gone into a shop, but simply carrying the parcel under his arm.

If the police had had a warrant to arrest the pursuer, it would have been a different thing altogether, and they would have had a good excuse for arresting a law-abiding citizen in such circumstances. If they were entitled to do this to him without a warrant, they were entitled to do it to everybody who went along the street with a parcel under his arm, under the idea that he was going to some shop for an illegal purpose. I think it would be very bad practice indeed to insist in such circumstances that the general privilege which a police constable has that he is presumed to be acting honestly in the execution of his duty should preclude the pursuer from taking an issue that the police constables wrongfully and illegally made this arrest.

I must say I think it is a great pity that the Sheriff-Substitute has stated the case as he has done in his note. He says—"I think it was a reasonable wish" on the part of the police officers "to see the contents of the parcel, and I think also it would have been reasonable for the pursuer to disclose the contents at once, and had he done so it is likely the matter would have ended there." That is all upon the assumption that the defenders' statements are true, which is not an assumption that ought to be made in considering relevancy. It is also upon the assumption that if he chose not to show them the contents of his parcel they were entitled then to arrest him. A law-abiding citizen is not to be called

upon to allow himself on the public street to be subjected to police search of the parcel he is carrying, and his refusal to do so would never justify arrest. It does not give just ground for any suspicion, and cannot give reasonable ground for taking into custody. Such an idea seems most extraordinary, and it is one which can have no countenance from this Court. I must say I think this a most unfortunate case.

It may turn out when the case comes to trial that the statements of the pursuer are not substantiated as he states them, and that the statements which the defenders make are substantiated. In that case the question of malice may arise at the trial, but I see no ground whatever for interfering with the issue proposed, and I am for approving of the issue as it stands.

LORD DUNDAS was absent.

The Court approved of the proposed issue.

Counsel for Pursuer and Appellant—Watt, K.C.—Paton. Agents—Reid & Milne, W.S.

Counsel for Defenders and Respondents—Morison, K.C.—Duffes. Agent—W. Carter Rutherford, S.S.C.

Tuesday, May 21.

FIRST DIVISION.

[Sheriff Court at Duns.

GORDON v. HOGG.

Lease—Termination—Management—Rotation of Crop—Five-Shift Rotation—Duty of Waygoing Tenant to Sow, or Permit to be Sown, Grass Seeds with Waygoing White Crop.

The tenant of a farm was bound under his lease to observe the rules of good husbandry and to follow a regular rotation of crops known as the five-shift rotation, defined in the lease as follows:—First year, old grass; second year, white crop after grass; third year, green crop or bare fallow; fourth year, white crop after green crop or fallow; and fifth year, young grass.

Held that he was bound when sowing out his last grain crop at the end of the lease to sow out grass seeds with the waygoing crop—he receiving the cost of the seeds and sowing from the incoming tenant—or otherwise to permit them to be sown by the landlord or incoming tenant.

On 9th May 1911 A. D. Forbes Gordon of Langlee and Greenknowe, liferent proprietor of the farm of Gordon East Mains, Berwickshire, *pursuer*, brought an action against Alexander Hogg, farmer, the outgoing tenant of the farm, *defender*, in which he craved the Court “to find and declare that the defender, as outgoing tenant fore-said, . . . is bound either (*First*) to sow down and harrow and roll in, in so far as not already done, with his waygoing crop upon

said farm and others upon that break which in the year 1910 was in fallow or turnips, the usual kind and quantities of grass and clover seeds either supplied by himself or by the pursuer or the incoming tenants as the defender may elect, and upon payment by the pursuer or incoming tenants after mentioned of fair and reasonable remuneration for all additional work and all expenses occasioned thereby; or alternatively, (*Second*) To grant all necessary facilities and access for the pursuer or James Haliburton and Ralph Haliburton, both farmers, Raecleuch, near Lauder, incoming tenants of said farm and others, and his or their servants, to sow, harrow, and roll in the same upon said break in so far as not already done.”

The lease, *inter alia*, provided—“With respect to the management and cropping of said lands, the said Alexander Hogg binds and obliges himself and his foresaids to labour, cultivate, and manure the same in all respects agreeably to the rules of good husbandry, and particularly without prejudice to said generality to farm and manage these parts of said lands that are arable by at least the five-shift rotation thus to have in each year not less than one-fifth thereof in old grass, and not more than one-fifth in each of the following crops, *videlicet*:—Young grass, turnips or bare fallow, white crop after grass and white crop after turnips or fallow, declaring that no two white crops shall succeed each other.”

The pursuer pleaded, *inter alia*—“(1) The defender being bound to labour and cultivate said farm in accordance with the rules of good husbandry, and *separatim* to preserve and maintain the rotation of cropping thereupon, and having failed to implement said obligations or either of them as stated, decree should be granted as craved. (2) The defender being bound in accordance with the common law and the custom of the said farm and surrounding district to adopt one or other of the alternatives concluded for, and having refused to implement same, decree should be granted as craved.”

The defender, *inter alia*, pleaded—“(1) The defender not having failed to implement any of the obligations incumbent upon him as tenant of the said farm either under his lease or at common law, decree of absolvitor should be pronounced, with expenses.”

On 15th July 1911 the Sheriff-Substitute (MACAULAY SMITH) pronounced the following interlocutor:—“*Finds in fact* (1) that the defender under a lease of fifteen years was tenant of the farm of Gordon East Mains down to Whitsunday 1911 as to houses and grass; (2) that about one-fifth part of these subjects, now under white crop, is not to be vacated by him till the separation of said crop; (3) that in or about the month of April 1911 the defender was requested by pursuer either himself to sow, or to grant facilities for his successor the incoming tenant to sow, grass seeds along with said crop of corn in order to provide young grass for said incoming tenant, and