appears to me from the recital of the canons of 1838, it was perfectly in their power to do Therefore, I entirely concur in the proposition which has been made, that this judgment should be affirmed.

Interlocutors affirmed, with costs.

Appellant's Agents, W. Peacock, S.S.C.; W. Robertson, Westminster.—*Respondents' Agents*, Ronald and Ritchie, S.S.C.; Connell and Hope, Westminster.

MAY 6, 1867.

JAMES PRINGLE, *Appellant*, *v.* JAMES FLEMING BREMNER and Another, *Respondents.*

Wrongous imprisonment—Issues—Warrant of search—Averment of malice in Constables—*P., in an action of damages against constables, alleged that they came to his house, saying they had a warrant, and entered and searched the house, and read and seized his papers, and conveyed him to prison and detained him there; whereas they had no warrant, and acted illegally and wrongously. Defendants in answer alleged they had a warrant, and pursuer replied, "reference is made to the warrant for its terms."*

HELD (reversing judgment), *That by this pleading the pursuer did not admit that a warrant existed, and having stated relevant matter, he was entitled to issues and a trial by a jury.*[1]

This was an appeal from interlocutors finding, that there was not on the record matter sufficient to support any of the issues proposed, and assoilzieing the defenders, with expenses.

The action was raised by the appellant, a millwright at Barley Mill, near Newburgh, in the county of Fife, and the respondents and defenders were the chief constable of the county of Fife and an officer of the constabulary force. On 31st October 1864 there was placed near to a window of the manse of Dunbog, the residence of Mr. Edgar, the iron bush of a cart wheel filled with explosive powder, plugged with plugs which had apparently been made and fitted for the purpose, and to this a long fusee was attached, which being set on fire caused an explosion of the machine, and shattered the windows of the house. Ultimately the defenders, on 24th December 1864, went and searched the pursuer's house, books, and papers in the circumstances set forth in the pleadings and in the judgment. The pursuer then raised this action of damages for the defenders' illegal, wrongous, and unwarrantable proceedings. The first plea in law for the defenders was, that "the pursuer's averments are irrelevant and insufficient in law." The record was closed, and the appellant lodged the following issues:—"1. Whether, on or about 24th December 1864, the defenders wrongfully and illegally searched the house at Barley Mill, occupied by the pursuer, or part thereof, and his repositories, and read or examined writings belonging to him or in his possession, and took possession of and carried away several writings belonging to the pursuer, to his loss, injury, and damage? 2. Whether, on or about 24th December 1864, the defenders wrongfully and illegally apprehended the pursuer and detained him in the police office at Cupar till the morning of the 25th December 1864, to the loss, injury, and damage of the pursuer? Damages laid at £500 sterling."

The Lord Ordinary reported these issues to the First Division; and the parties were allowed to amend the condescendence and answers, and amendments were made. On 30th January 1866 the First Division found, "that there is not on record matter sufficient to support any of the issues proposed, assoilzie the defenders from the conclusions of the action as laid, and decern; find the pursuer liable in the expenses of process."

The pursuer now appealed against this interlocutor, and in his *printed case* stated the following reasons for reversing the interlocutors:—1. Because the appellant's case was relevantly laid, set forth good grounds of action, and contained issuable matter. 2. Because the appellant should have been allowed the issues proposed by him, or such others as would have been suitable for the trial of the cause. 3. Because the judgments of the Court of Session, appealed against, proceeded on the footing, that the respondents' statements were true, although they were denied by the appellant, and had not been proved. 4. Because although the respondents' statements were true, they did not in law afford a justification of their actings, nor warrant a judgment of absolvitor in their favour. 5. Because the said judgments were erroneous and contrary to law and the justice of the case.

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[1] S. C. 5 Macph. H. L. 55; 39 Sc. Jur. 414.

The respondents in their *printed case* stated the following reasons for affirming the interlocutors :—1. There is no averment which necessarily infers any breach of duty or any error in the mode in which the duty entrusted to the respondents was discharged by them. 2. Even if an error on the part of the respondents in the discharge of their duty, could be inferred from the averments of the appellant, it would be necessary, in the circumstances of the case, to aver that it was committed maliciously and without probable cause.

Neish, for the appellant.—On the whole record there is abundance of issuable matter to support the issues : There is a substantial averment of trespass and false imprisonment, and the pursuer was entitled to have these issues of fact tried by a jury. The appellant, no doubt, admits, that the respondents stated they had a warrant, but he puts the fact of a sufficient warrant in issue. The issues proposed were substantially the same as those approved in *Bell* v. *Black*, 3 Macph. 1026.

Dean of Faculty (Moncrieff), and *Lee*, for the respondents.—There is no distinct allegation in the amended condescendence, that the defenders had not a warrant ; but rather an admission, that they had. Then, if so, unless the defenders acted maliciously, they cannot be liable for what they did in pursuance of the warrant.

[LORD CHANCELLOR.—What the pursuer seems to do in the record is this : He says, "I do not admit you had a warrant, but if you had, then I call on you to produce it." What more can he do than that ?]

We say, that he substantially admits there was a sufficient warrant, and therefore he ought to have alleged some excess in carrying out the warrant, which he has not done. There could be no doubt of the general proposition, that a warrant of the kind alleged by the respondents authorized the respondents to search the house and premises for the article, and if, in course of that search, they found other things which also bore on the evidence of the offence, they were entitled also to seize these things, and apprehend the pursuer. That is every day's practice in the execution of warrants. The warrant need not specify the things to be seized—*Crozier* v. *Cundey*, 6 B. & C. 232.

[LORD CHANCELLOR.—I take it, that the constable must at his peril seize things not mentioned in the warrant.]

That is not the practice in Scotland. If an officer in executing a warrant were, in the reasonable discharge of his duty, to seize what turned out to be not relevant to the offence, he would not incur any liability—*Arbuckle* v. *Taylor*, 3 Dow, 160 ; *Shepherd* v. *Fraser*, 11 D. 446 ; *Macpherson* v. *Cattanach*, 15 D. 287 ; and nothing of that kind is alleged here. What the appellant ought to have alleged was, that the warrant did not protect the constable in doing what he did.

LORD CHANCELLOR CHELMSFORD.—My Lords, I submit to your Lordships, that the interlocutors appealed from in this case cannot be maintained. The question depends entirely upon the first plea in law of the defenders, that the pursuer's averments are irrelevant and insufficient in law to support the action. This is in fact a demurrer which, admitting all the facts of the case, alleges, that they do not shew a sufficient ground of action.

In considering the question, we must confine ourselves entirely to the case on the part of the pursuer, taking into consideration not merely his condescendence, but any admission which he may have made in answer to the defenders' statements, and which must be considered to be imported into and to make part of the case. Looking, therefore, into the condescendence and to any admissions which are made on the part of the pursuer, is there or is there not a relevant case, that is, is there not a sufficient cause of action stated which entitles the pursuer to have a trial by jury ?

The condescendence seems to me very clearly to state not only a trespass in breaking and entering the house, called a wrongous entry in Scotland, but also the imprisonment of the pursuer. The second article of condescendence alleges, that "on or about 24th December 1864 the defenders came to the pursuer's house, stating to the pursuer, that they had a warrant to search the same. They accordingly searched the pursuer's house. They also searched his repositories, examined all his private books and papers, and seized upon and took a number of the same. The defenders had no warrant for said search or seizure, and in making the same they acted illegally and wrongously."

Now, if I had been called upon to put a construction upon this statement, I should have felt very little difficulty in coming to the conclusion, that there was what may be called a double allegation—the first being, that there was no warrant for the search or seizure, that is, no warrant for the act done originally, and the second being, that, in making the search, there was an excess of any authority which might have been legally exercised. But it appeared to the Court of Session, that there was an ambiguity in this statement, and therefore they allowed the pursuer to add another article of condescendence, and that must be taken into account in judging of the relevancy of the case.

The additional condescendence which was allowed is this :—"On the occasion when the defenders came to the pursuer's house as aforesaid, the pursuer, who had been from home,

arrived at his house just as the defenders had driven up. The pursuer's dwelling-house was situated on the side of a public road, and his workshop is separate and at a short distance from it. The defenders informed the pursuer immediately on his arrival, that they had a warrant against him, but they did not at this or at any other time explain the nature of said warrant to the pursuer. At the time when the defenders informed the pursuer that they had a warrant against him, they were all outside the house, and it was so dark that the pursuer could not have read the warrant. The pursuer did not, after this, demand exhibition of the warrant, because he did not doubt the statement of the defenders, that they had a warrant of some kind, and he assumed, that they would not exceed the limits of the warrant. After this the pursuer opened his dwelling house, which the defenders entered, and a light was then procured. The defenders thereafter proceeded at once and without further ado to search the pursuer's writing desk and the drawers which it contained. The defenders spent between one and two hours in ransacking the said writing desk and drawers, and in reading the said manuscripts, books, letters, and papers which they found therein. The whole search made by them in the pursuer's dwelling house consisted of the reading and examination of the pursuer's said books, letters, and papers. The pursuer is not aware whether the defenders ever made a search in his workshop." Then in addition to that which must be taken as part of the condescendence, the original condescendence alleges, that "thereafter and upon the said day the defenders apprehended the pursuer and took him to the lock-up or police cells at Cupar. The pursuer was lodged there, and detained therein till the following day by the defenders. The defenders had no warrant for these proceedings, which were wrongous, illegal, and oppressive."

In addition to this condescendence, in answer to one of the statements on the part of the defenders, the defenders having alleged, that "on 24th December 1864 a warrant was obtained at the instance of Alexander Black and William Morrison, joint procurators fiscal for the county of Fife, from Mr. Robert Sutherland Taylor, Sheriff substitute of the county, to search the premises at Barley Mill occupied by the pursuer, for pieces of the wood of which the plugs used in plugging the bush had been made, and of the fusee by means of which the bush had been exploded, and this warrant was the same day placed in the hands of the defenders by the said procurators fiscal, with instructions to execute the same. Accordingly, the defenders, James Sterling and James Fleming Bremner, in the discharge of their duty, proceeded to the premises of the pursuer the same afternoon." In answer to this the pursuer says: "Reference is made to the alleged petition and warrant for their terms."

Now, it was said by the Dean of Faculty, that this is an admission, that there was a warrant in the terms of the one produced in process. I can only say, that if that is so, it appears to me it would be a very unjust conclusion to apply to an answer of this kind. The warrant is the justification of the defenders for the act which they are alleged to have done. That warrant, if a trial took place, must be produced by them, and this statement of "reference to the alleged petition and warrant for their terms," cannot amount to more than this, that the pursuer, having heard that the defenders, at the time that they committed what he alleges to be a trespass in his house, asserted that they had a warrant, does not deny that there was a warrant, nor does he admit that there was a warrant, but he puts it on the defenders to produce the warrant at the trial, by referring to the petition and warrant for their terms.

Now, that being the state of the case, looking only at the pursuer's condescendence, and any admission which he may have made in answer to the defenders' statements, can it be said, that there was not a *primâ facie* case, because that is what I understand to be the meaning of a relevant case, on the part of the pursuer, which entitled him to call on the defenders for an answer to it? That, I apprehend, is the real question which has to be considered, and we are not to look beyond that to anything that may have been alleged on the part of the defenders by way of defence, except so far, as I have already said, as it may have been admitted by the pursuer.

Now, it may be said, (and as the argument has been urged, it may be as well to observe upon it,) that the constable, having a warrant to search merely for pieces of wood and pieces of a fusee, had no right whatever to go beyond that, to ransack the house, if I may use the expression, and to endeavour to find something which might implicate the pursuer in the charge which was preferred against him; but supposing, that in a search which might have been improper originally, there were matters discovered which shewed the complicity of the pursuer in a crime, then I think the officers—I can hardly say, would have been justified, but—would have been excused by the result of their search. Then again, with regard to the arrest and imprisonment of the pursuer, as to that it is not alleged that there was any warrant at all; but then it is said, that the constable, having discovered matters which, in his judgment, brought home to the pursuer complicity in the alleged crime, was justified in exercising his discretion upon the subject, and in apprehending the pursuer and lodging him in prison. Again I say, answering him in the same way as I answered with regard to the searching for papers, the result will either justify him, or will not justify him; if the papers he seized really proved, or gave a fair or reasonable ground to believe, that the pursuer was implicated in the grave crime which was charged, then, although the officer

had no warrant for his apprehension, and he had no warrant upon this occasion, yet the event would justify him, and he would protect himself by the circumstances afterwards discovered.

That really is the whole of the case. I wish to confine myself entirely to that which alone ought to be considered upon the question of relevancy of the pursuer's statement, viz. whether taking the whole of the pursuer's, not only what he alleges originally, but also what he states in answer to the defenders' statement, there is or is not such a *primâ facie* case established as calls on the defenders for answer and justification. I leave entirely out of consideration, although it has been brought into the argument, anything that may have been alleged on the part of the defenders by way of justification, and confining myself, as I have said, to the statement of the plaintiff's case, I can have no doubt whatever, that he has stated a relevant case, and was entitled to have that case submitted to a jury.

Now, it is said, that it would be better for us not to touch the question of the issues that have been framed, but to leave them for consideration by the Court of Session. But I think it possible it might save a little expense and trouble in Scotland, if we were to express an opinion on the subject. And it seems to me, that the issues are properly framed for the purpose of raising every question that can be raised between these parties. I do not think it could have been at all necessary, as was contended on the part of the defenders, that the words should be introduced, that the acts complained of were done without any warrant. I think, that is covered by the words of the proposed issue, that the defenders "wrongfully and illegally searched the house at Barley Mill." That necessarily involves in it, that they had no legal warrant or authority to do the act. There is no necessity to specify any justification that they may have. The pursuer alleges this, and he puts it on the defenders to shew, that they have a legal answer to their complaint.

Under these circumstances, it appears to me, that the interlocutors appealed from must be reversed, and that the case must be remitted to the Court of Session.

LORD CRANWORTH.—My lords, I entirely concur with my noble and learned friend, and should hardly think it necessary to add a single word, except that the Dean of Faculty seemed to suppose, that in deciding that there was a relevant case here stated, we should bring into doubt the propositions, that a constable or police officer has authority to take a person into custody, if he has probable ground to suppose that he is a party who had committed a felony. Nothing of the sort follows from our holding that a relevant case is here stated. All that we decide, in holding that there is a relevant case here stated, is, that *primâ facie* a wrong was done, which entitles the pursuer to have his case tried by a jury, although it is possible that the wrong complained of may be justified by shewing, that the person who is alleged to have committed it was a police officer, and either, that he had a warrant which authorized him to do what he did, or, that a felony having been committed, he had reasonable ground for the course he pursued in taking possession of certain documents, and also imprisoning the person alleged to have committed the felony. It seems to me, that the whole question is left entirely open, and that, unless it were left to be tried by an issue or issues, wrong would be done to the pursuer.

LORD COLONSAY.—My Lords, this case, in any view of it, resolves itself into a very narrow question, and chiefly one of pleading. I apprehend the statement of the pursuer here is, not that his premises were searched without the existence of any warrant at all, but that the true reading of his statement is, that there was no warrant for doing that which they did in the course of the search. As to the reference which is made to the petition and warrant for their terms, I interpret that as saving the party from admitting, that the terms of the petition and warrant are such as are set forth by the pursuer in the article to which that is an answer.

Now the case being one of excess of authority by reason of having done things which the warrant did not authorize to be done, though the parties were lawfully in the house and lawfully searching, the question comes to be, what was it that the constable might have been held justified in doing? If the constable is to be held under such circumstances as justified in taking possession of papers which he finds implying complicity in the offence which is under investigation, then I think, that the constable here would have a good defence in stating and in proving at the trial, that he had taken possession of papers which gave them reasonable ground to suppose, that this party was implicated in the offence. We have not the terms of those documents set forth. I do not know that that was necessary, and I do not think that the non-production of the particular documents themselves is a sufficient ground for the defenders' not alleging, that they were not of such a character as is described, because they were the pursuer's own documents in his own possession formally, and must be presumed to have been within his own knowledge.

So also I concur in the observation that has been made, that if, in the course of executing such a warrant, the constable finds elements for implicating the party in the offence which is under investigation at the instance of the public prosecutor, it is his right and his duty to take that party into custody if the offence is a serious one, and to bring him before a magistrate. No doubt, if he has not reasonable grounds for doing so, he is responsible for his act; and then the question comes to be, whether the want of reasonable grounds for doing so is an element of

liability. Then the question arises, whether it is for the pursuer to allege, that there were no reasonable grounds, or whether it is for the defender to set forth, that there was a reasonable ground.

In judging of cases of this kind, we are accustomed to examine the whole record, consisting of the statements of the pursuer and defender, and the answers of the pursuer and the statements of the defenders may throw material light upon the relevancy of the pursuer's case, and still more, it may come in in explanation of any ambiguous part of the pursuer's case; and where there is ambiguity on the part of the pursuer which he declines to clear up, I apprehend that he is in error in pleading in such terms.

The view taken in the Court below appears to have been, that the pursuer had not set forth, in sufficiently explicit terms, all the elements that were necessary to make a case of liability in damages. The view taken by your Lordships is, that he has set forth enough to make it the duty of the defenders to set forth, that they had reasonable grounds for what they did. That is a very narrow question upon a matter of pleading. I have been of opinion, and I cannot say that I am entirely shaken in that opinion, that the statements of the pursuer were evasive, and avoided that which was the main point in the reasonableness or non-reasonableness of the conduct of the constable. However, as I have said, that is a very narrow question of pleading, and as it is held, that nothing that is done in this case interferes with the proposition which was contested in the Court below, that a constable, in executing a search warrant for certain articles, and finding other articles that tend to implicate the party, and taking those articles and the party himself also into custody, is only acting in the performance of what may be his duty, I think there is the less reason to regret, that there should be any difference of opinion in regard to this case. I therefore do not enter further into this case beyond expressing my opinion as I have shortly done.

Interlocutors reversed, and cause remitted.

Appellant's Agents, W. Miller, S.S.C.; Adam Burn, Doctors' Commons, London.—*Respondents' Agents*, Murray, Beith, and Murray, W.S.; Loch and Maclaurin, Westminster.

MAY 14, 1867.

JAMES DYCE NICOL, Esq. of Ballogie, and Others, *Appellants*, *v.* REV. W. PAUL, D.D., Minister of the Parish of Banchory-Devenick, *Respondent*.

Teinds—Old Decreets of Valuation—Subjects omitted—Augmentation of Stipend—*A minister of a parish, in seeking augmentation of stipend, alleged, that a valuation of the barony of F., dated* 1682, *omitted to value the teinds of parts of the lands of B., C., and D., in such barony; also, that a valuation of the barony of P., dated* 1709, *omitted certain lands therein.*

HELD (affirming judgment), *That as the decrees did not in terms purport to contain a valuation of all the lands in such baronies, it was open to the minister to lead a proof of his averments.*

The Commissioners of Teinds had no authority to declare lands prospectively not to be liable to teinds—per LORD CRANWORTH.[1]

This was an appeal against the interlocutor of the Second Division, which found, that, "according to the construction and effect of the decree of valuation of 1682, the teinds of those portions of the barony of Findone, if any, which are not embraced within the special subjects enumerated in the rental produced by the pursuer, and adopted as the basis and limits of the decree of valuation, are unvalued, and that the teinds of the lands of Barclayhill, Calsayend, and Meddens, mentioned in the said decree, are not valued by the said decree; that according to the true construction and effect of the decree of valuation of 1709, the teinds of those portions of the barony of Portlethen, if any, which are not embraced within the special subjects enumerated in the prepared state of the proof which forms the basis and limit of the decree of valuation, are unvalued," etc.

The defenders having appealed against this interlocutor, in their *printed case* gave the following reasons for reversing the interlocutor:—1. Because the teinds of the whole lands and barony of Findone, and of the whole other lands mentioned in and embraced by the decreet of valuation of

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[1] See previous report 1 Macph. 1014: 3 Macph. 482: 37 Sc. Jur. 228. S.C. L. R. 1 Sc. Ap. 127: 5 Macph. H. L. 62: 39 Sc. Jur. 417.