

1780. December 8. JOHN SYME *against* Captain CHARLES NAPIER.

IMPRESS SERVICE.

Impressing of Ship-carpenters' Apprentices.

[*Fac. Coll. VIII. 13; Dict. 6607.*]

HAILES. I am far from supposing Captain Napier acted *mala fide*. It is never to be presumed that a person of his rank and character would set himself in opposition to the laws of the land, especially when he knew that there existed a court at hand, ready to correct any wrong done; but, at the same time, I cannot admit that he was perfectly *in bona fide*: his instructions were plain; they could only relate to apprentices having protections, that is, to apprentices of sea-faring men, whom the law protected, unless in cases of extreme danger. Although he had granted protection to the apprentices, *that* would have been merely to save them from being taken up in the crowd by a press-gang. Such an apprentice was no more liable to be pressed, either by consuetudinary law or statute, than a writer's apprentice. To suppose that Mr Syme ought to have proved that the apprentices had never been at sea, was to lay on him the burden of proving a *very improbable negative*. Had there been any ambiguity in his instructions, Captain Napier ought to have detained the apprentices until the doubt was cleared, instead of hurrying them out of the jurisdiction of this Court. His supposed *bona fides* cannot secure him from indemnifying Syme: the question is not as to penalties, but only that Syme may be no sufferer through Captain Napier's error; for he certainly erred, be the cause what it will.

GARDENSTON. It was an arbitrary act thus to sweep away all the apprentices. The inferior officers disregarded and disobeyed the command of the Judge-admiral. The authority of their superior officers, on which they plead, is nothing in matters of civil right, although it might be an excuse in a matter of military discipline. If they could by that authority carry off thirty apprentices, they might have carried off fifteen judges; for I know not how the line is to be drawn. If apprentices of ship-carpenters may be pressed, so may sail-makers', rope-makers', &c. The orders of the Admiralty say no such thing: the words are plain, they respect men who are wont to navigate ships or boats. All these strange things are done to get favour from men in power; but I hope that such behaviour will not have that effect, for it essentially hurts the public service.

KAIMES. The inferior officers might be justified: had they disobeyed their commanding officer they might have been tried, and punished by a court-martial. Their case would be hard were they to be punished by a military court for disobeying, and by a civil court for obeying. If Captain Napier can allege *bona fides*, he will be safe. A public officer is presumed *in bona fide*: but it is

not in my power to hold Captain Napier to have been *in bona fide*; for he did not act according to the best of his judgment. The apprentices of carpenters were not the apprentices pointed out by his instructions. Was Syme to prove a negative, that his apprentices never were at sea? This is contrary to all principles.

COVINGTON. The subaltern officers were not the impressers. They could not refuse to obey their superior: had they done so, they would have subjected themselves to a trial by a court-martial. I think that Captain Napier also was excusable: he might misapprehend his instructions. Those very apprentices obtained protections formerly. This was an admission that they were liable to be impressed; and Syme himself claimed them, not as apprentices, but as persons having protections.

BRAXFIELD. Captain Napier has narrowed his own cause by acquiescing in the Ordinary's interlocutor, which finds that ship-carpenters may not be impressed. I distinguish between the case of a man acting in his own private affairs, and of an officer of the law: the former may act or not, as he pleases, and, therefore, he is justly liable for his actions; but the latter has no choice, he *must* act. If, with his eyes open, he acts against law, he must be punished: not when he acts *bona fide*. Damages are penal as to him who pays them; for he pays for what he received no value for. In the case of *Captain M'Donald* against *Buchanan*, the Court assoilyied Captain M'Donald, because he acted from mistake.

PRESIDENT. It was a bold stroke to impress thirty apprentices: this was complained of directly. Captain Napier ought to have consulted lawyers, instead of going out of town. It was no time to go out of town while matters of such importance were in agitation. There is no *bona fides* pleadable in this case. There is a judgment of the Ordinary, finding that the men ought not to be impressed. How could the lads be impressed lawfully? *Who* is to suffer for this wrong,—the private party, or the officer, who does not know his own duty? Admitting *bona fides* to be pleadable in every case of officers, the consequences would be dangerous. The case of Captain M'Donald was totally different. There was an *error facti* in mistaking one man for another; and, indeed, so dubious an error, that, if fame speaks true, there was no mistake at all. The indentures did protect the apprentices: the indorsing them was only for farther security. Indemnity must be given. Syme and his family must not suffer for Captain Napier's fault.

MONBODDO. It is not inconsistent with liberty to say, that every man who can be useful at sea ought to be obliged to serve the public at sea. I have a great doubt of my own interlocutor, exempting ship-carpenters; but, in the worst view of things, Captain Napier has only mistaken the law while acting in the duties of his office. Why might not the apprentices have been at sea, as well as the journeymen: the indentures were indorsed, which was an acknowledgment of the protection being necessary. Indentures by themselves gave not any protection. Captain Napier was *in optima fide* to suppose that the apprentices had no other protection than what arose from the indorsation of the indentures; for Syme himself thought so.

WESTHALL. The necessities of the state, at that period, required an uncommon exertion of the navy officers.

On the 8th December 1780, "The Lords found Captain Napier liable in damages and expenses;" altering Lord Monboddo's interlocutor.

Act. A. Crosbie. *Alt.* A. Murray.

Diss. Covington, Westhall, Monboddo, Stonefield, Braxfield.

N.B. Syme did not insist against the inferior officers: so they were assoilied, although an interlocutor of the Ordinary, in absence, stood against them.

1780. December 9. WILLIAM BISSET *against* DAVID BALLARDIE and OTHERS.

THIRLAGE.

[*Faculty Collection, VIII. 52; Dictionary, 16,063.*]

GARDENSTON. We must judge by principles, and not from expediency. The proprietor of the mill cannot alter the servitude originally constituted. The obligation is inherent and perpetual.

ALVA. This true in general; but acquiescence may vary the case. The mill was built *bona fide* for the benefit of the thirle; and Bisset did not object or interpel the proprietor.

COVINGTON. There is here a prædial servitude; and the mill is the dominant tenement. The mill is down; and unless it is rebuilt the thirlage is gone. Colliers, who are *ascripti glebæ*, have been obliged to work at another colliery equally commodious, when the master had no work to employ them in. The same is the case as to servitudes of roads: the roads may be varied for the general advantage; and he who is possessed of the servitude will not be heard to complain of the alteration.

PRESIDENT. I admit that the site of a mill cannot be changed in the general case. But if a mill falls, and is rebuilt at a more convenient place, although at a greater distance, can the servient tenement complain? It is said that the mill is placed on another tenement; but what then?—still the condition of the servient tenement is no worse than it was.

HAILES. There is no necessity for the mill of a barony being situated within the barony. *Here* the defender saw the mill built at a great expense by the proprietor, for the conveniency of the thirle, and he did not complain. What is he now aiming at?—To be exempted from in-town multures at that very mill to which, if he were exempted, he would repair and pay out-town multures; a plain proof that he has suffered nothing by the change of the site of the mill, and that he is grasping at an advantage.

MONBODDO. If a mill falls, the question is, Where ought it to be rebuilt? It may be rebuilt at some distance from the old one: here it is built, not on the lands of the same barony, but still on the lands of the same baron.

KENNET. The consent of the servient tenement ought to have been obtained previous to the erection of a new mill.