There remains the further question whether a bare allegation of malice is sufficient without any allegation of facts and circumstances from which malice may be inferred. I think that where an arrest is made as in this case, and it is alleged that it was either made with unnecessary violence or accompanied by abusive language, and that the person arrested was perfectly respectable, these are facts and circumstances from which malice may be inferred, and therefore I am disposed to hold that there are sufficient averments on record to warrant the insertion of malice and want of probable cause.

LORD ADAM—I am of the same opinion. I think there is no case whatever against the Magistrates and Town Council. I think the police constables are the servants and act under the authority of the Committee of the Magistrates—who are a statutory body different from the Magistrates and Town Council. Along with the Sheriff they appoint the Chief Constable, and they are the authority who have the charge and control of the police. It is now proposed to make the Magistrates and Town Council responsible for the conduct of persons with whose appointment they have nothing to do. This would be a complete novelty, and I think we must dismiss the action as against the defenders.

Upon the other question in the case, I also agree with your Lordship. The circumstances attending the arrest, as set forth upon record, are in my view sufficient to suggest malice without any more specific averment.

LORD M'LAREN—Concurring as I do with your Lordships, I have only to add that I think the argument which has been addressed to us for the pursuers is founded on a mistaken analogy between cases like the present, and cases in which an employer of labour is held responsible for the negligent acts of persons in his employment on the principle *respondeat superior*. The relation between the Magistrates and the police is not a relation of employment, but is an official relation constituted by statute. The police of Glasgow are subject to the joint orders of the Magistrates' Committee and of the Sheriff, just as in the counties of Scotland the county constables are subject to the joint control of the Sheriff and the Police Committee (now the Standing Joint-Committee of the County Council, and of the Commissioners of Supply). The Town Council, who are the Police Commissioners of Glasgow, have no right to interfere with the police in the execution of their duties in relation to the apprehension and detention of prisoners, and therefore the Town Council cannot be responsible for the negligent performance of these duties.

I do not say that where the police are acting under the direct orders of the Sheriff or a Magistrate the official who gives the order may not be made responsible in an action containing proper substantive averments of malice towards the person aggrieved. According to the case of *Beaton* v. *Ivory*, a merely formal averment of malice would not be sufficient to take the case out of the region of the privilege which belongs to the higher executive officers in relation to their public duties.

With regard to the action as directed against the constables, without going so far as to say that a naked averment of malice would be sufficient to displace the officer's privilege, yet as it is here alleged that the arrest was carried out in an offensive and arbitrary manner, this, together with the constable's refusal to accept the pursuer's tender of her address and offer to attend the Police Court, constitutes a circumstantial case entitling the pursuer to an issue in the form proposed with the addition of the words "maliciously and without probable cause."

LORD KINNEAR was absent.

The pursuer having withdrawn the second issue proposed, the Court approved of the two following issues for trial of the cause:—"Whether on or about 5th November 1890 the said James M'Corriston and Malcolm M'Phee maliciously and without probable cause apprehended the pursuer at or near the house of her mother at 31 Willowbank Crescent in Glasgow, and conveyed her to the Cranstonhill Police Office in Glasgow, to the loss, injury, and damage of the pursuer? Whether on or about the date foresaid, at the said Cranstonhill Police Office, the said James M'Corriston and Malcolm M'Phee maliciously and without probable cause charged the pursuer with the offence of importuning, under section 149, sub-section 30, of the Glasgow Police Act 1866, to the loss, injury, and damage of the pursuer? Damages laid at £500."

Counsel for the Pursuer—M'Kechnie—Guy. Agents—James Drummond, W.S.

Counsel for the Defenders—Ure. Agents—Campbell & Smith, S.S.C.

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*Tuesday, May* 26.

## SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

## THE INTERNATIONAL EXHIBITION OF ELECTRICAL ENGINEERING AND INVENTIONS 1890, & ROBERTSON (LIQUIDATOR) *v.* LEE BAPTY.

*Jurisdiction—Domicile—Citation.*

An Englishman who had been appointed general manager of an Electrical Exhibition held in Edinburgh, by letter of guarantee subscribed to the guarantee fund for the sum of £500. The Exhibition resulted in a loss, the association which carried it on was wound up on 5th November 1890, and in terms of the articles of association the loss fell to be assessed first upon

the guarantors. Shortly thereafter the said manager was apprehended on a *fugæ* warrant and taken before the Sheriff. He was liberated on giving, along with a cautioner, a bond *de judicio sisti* in any action for payment of the said sum brought in any competent court within three months, and assigning the Sheriff-Clerk's office, Edinburgh, as a domicile at which any citation or intimation might be left. He left Edinburgh upon 8th November 1890, and on November 21st a summons concluding for payment of £500 was served upon him at the Sheriff-Clerk's office. He pleaded no jurisdiction, and averred that the bond was inept as his arrestment was illegal, and that he was in course of taking proceedings to have the warrant set aside.

*Held* that the jurisdiction of the Scottish Courts did not depend on the possibility of the defender showing that his apprehension was illegal, and that he had been well cited at the domicile chosen by himself.

The International Exhibition Association of Electrical Engineering and Inventions 1890 was in December 1889 formed and registered under the Companies Acts 1862 to 1886. The objects of the association were, as declared by the memorandum of association thereof, *inter alia,* to open and carry on during the year 1890 an Exhibition in or near Edinburgh in the county of Mid-Lothian, and to construct, maintain, and alter any buildings or works necessary or convenient for the purposes of the association. By the articles of the said association it was provided, *inter alia,* as follows—"37. In the event of a loss or deficiency arising, the same shall be assessed upon the members who have subscribed to the guarantee fund, and upon the subscribers to the guarantee fund (if any) who shall not have become members of the association, in proportion to the amount of the respective subscriptions to the guarantee fund of such members and other subscribers to the guarantee fund; and when the guarantee fund has been exhausted, then upon the members in respect of their liability under clause 7 of the memorandum of association."

Upon 31st October 1889 Samuel Lee Bapty, who had been appointed general manager of the Exhibition, and was then living in Edinburgh, wrote to Mr Watson, therein designed as the "secretary of the International Exhibition Association of Electrical Engineering and Inventions," in these terms—"I agree to become a member of the International Exhibition Association of Electrical Engineering and Inventions, and authorise you to place my name on the list of subscribers to the guarantee fund thereof for the sum of £500, to which amount my liability is limited."

Bapty, who was an Englishman, lived for about six months within the Exhibition buildings. The Exhibition was continued during the summer of 1890, and was closed upon 1st November of that year. At a general meeting of the association upon 5th November 1890 it was resolved that the association should be wound up voluntarily, and J. A. Robertson, C.A., was appointed liquidator. Thereafter, by interlocutor of the Second Division of the Court of 13th November 1890, the winding-up was directed to be continued under the supervision of the Court, and the appointment of the liquidator was confirmed.

Upon 8th November 1890 Bapty was about to leave Edinburgh on his way to England when he was arrested on a *fugæ* warrant obtained on petition of the Exhibition Association and the liquidator Mr Robertson, and having been taken before the Sheriff-Substitute he was liberated on a bond being granted by him and a cautioner, Alexander Mackenzie Ross. Ross judicially enacted, bound and obliged himself, his heirs, executors, and successors, as cautioner and surety, acted in the Sheriff Court books of Edinburghshire, for the said defender *de judicio sisti* in any action for payment of the debt of £500 to be brought against him at the pursuers' instance in any competent court within three months from the date of said bond; and further, he and the defender assigned the Sheriff-Clerk's office, Edinburgh, as a domicile at which any citation or intimation might be left in connection with the bond. Bapty left Scotland the same day.

On 21st November 1890 a summons concluding for the sum of £500 was served upon him, both at the Sheriff-Clerk's office and at the residence in the Exhibition he had occupied during its existence, at the instance of the Exhibition Association and the liquidator.

The defender averred—"The defender is domiciled in England. . . . The defender was upon 8th November 1890 illegally and unwarrantably apprehended as *in meditatione fugæ,* and without an opportunity of obtaining legal assistance he entered into the bond referred to. The said bond is null and void, as the said apprehension was illegal. The defender is presently in communication with the pursuers as to the effect of the warrant for his apprehension, and he is in course of taking proceedings to have the said warrant set aside as being illegal."

He pleaded—"(1) No jurisdiction."

Upon 7th February 1891 the Lord Ordinary repelled the defender's first plea-in-law, and put the case to the roll for further procedure.

"*Opinion.*—It is admitted that the defender, who is an Englishman, resided for six months or thereby within the Exhibition buildings in Edinburgh, that he left Edinburgh on 8th November 1890, and that the summons in the present action was served upon him at his residence in the Exhibition on the 21st day of the same month. In these circumstances he pleads no jurisdiction. I am of opinion that the plea is bad.

"It was not disputed by the defender's counsel that residence in Scotland for forty

days is sufficient to found jurisdiction, but he contended vigorously that there is no warrant for holding that the jurisdiction so constituted endures for forty days after the actual termination of the residence. Mr Mackay in his book on Practice states the rule thus:—'The Court has also jurisdiction over persons who have resided in Scotland for forty days prior to the action, or who, having resided during that period, have not since been absent for forty days.' He cites as his authority for this statement the case of *Calder* v. *Wood*, 1798, M. 2250, which does not, according to the defender's counsel, bear out the latter part of the statement. What the case of *Calder* decided was that the Court had jurisdiction over a man who had resided for the requisite time in Glasgow, and on whom service had been made by leaving a citation at his lodging there two or three days after he had quitted it, and was on his way to England. This at all events recognises that the jurisdiction survives the actual termination of the residence. But the rule does not rest merely on the authority of *Calder's* case. I should be slow to believe that on an important point of practice the principal writers on the subject had concurred in mis-stating the law, for Mr Dove Wilson (Sheriff-Court Practice, pp. 72-3), and Professor Rankine (in his edition of Erskine's Principles, i. 2, 9), state the law exactly as Mr Mackay does. This rule is customary, and for customary rules it is sometimes difficult to cite decisions. There is, however, a very distinct recognition of it in the opinion of the Lord President (then L.J.-C.) in the case of *Joel* v. *Gill*, 21 D., at p. 939 of the report.

"The Judicature Act (6 Geo. IV. c. 120, p. 53) provides that 'Where a person not having a dwelling-house in Scotland occupied by his family or servants shall have left his usual place of residence, and have been therefrom absent during the space of forty days without having left notice where he is to be found within Scotland, he shall be held to be absent from Scotland, and be charged or cited according to the forms herein prescribed accordingly,' *i.e.*, by edictal citation. This provision does not directly enact how such a person is to be cited during the interval of forty days, but it very plainly implies that he is not to be held to have left Scotland till the end of that period, and consequently that citation at his former residence would be good. A direct enactment to that effect is to be found in the A.S., 14th December 1805 (quoted in Lord Ivory's note to Ersk. Inst. i. 2, 16). There is some doubt whether that Act did not expire with the statute to which it related, but Lord Ivory quotes (apparently with approval) Mr More's opinion to the effect that it might be considered as a declaration of the common law upon the subject. When read along with the Judicature Act it seems to put the matter on the intelligible footing that for a certain short time after the termination of actual residence of the required duration, a man shall be presumed to be still within Scotland, and if so, he is still in the eye of the law just as liable to the jurisdiction of the Scottish Court as when he was physically within the kingdom. It may be said that the rule is arbitrary, but so are all fixed periods and presumptions, and in such matters it is better that the law should be arbitrary than that it should be uncertain. At all events, I think the rule is well established by custom."

Upon 19th March 1891 the Lord Ordinary repelled the remaining pleas-in-law for the defender, and decerned against him conform to the conclusions of the summons.

The defender appealed, and argued—(1) There was no jurisdiction. It was admitted that Bapty had come under the jurisdiction of the Scottish Courts by his residence in the house provided for him in the Exhibition buildings for forty days, and if a summons had been served upon him after that date while he was still in Scotland he could not have disputed the jurisdiction. But that jurisdiction lasted only as long as Bapty remained in Scotland, and fell whenever he crossed the border. Now, the Exhibition closed on 1st November, Bapty left Scotland on the 8th, and the summons was not served till the 21st at the earliest. The citation was quite good, but it had no effect upon a person over whom the Scottish Courts had no jurisdiction—*Johnston* v. *Strachan*, March 19, 1861, 23 D. 758 (Lord Kinloch's opinion). The case of *Calder* v. *Wood* to which the Lord Ordinary referred, and which was taken as the basis of Mr Mackay's statement of the law did not bear out that statement, as could be seen from the much fuller report of the case *Calder* v. *Wood*, January 19, 1798, F.C. As was shown in that report, the summons was either served upon the defender or was known to him while he was still in Scotland; that was not the case here. The only other case which the Lord Ordinary referred to was a *dictum* by the Lord President in *Joel* v. *Gill*, June 10, 1859, 21 D. 929. In that case the Lord President was considering the case of a person over whom the Scottish Court had jurisdiction, while here there was no such case. The Act of Sederunt referred to could not extend the jurisdiction of the Court if it did not otherwise exist—*Brown* v. *Blaikie*, February 1, 1849, 11 D. 474. On the question of the agreement, the citation at the Sheriff Clerk's office must be held to be bad because it was when arrested under a *fugæ* warrant that the defender had agreed to it. That arrestment was illegal as had been decided a short time ago—*Hart* v. *Anderson's Trustees*, November 28, 1890, 18 R. 169. The defender was endeavouring to get the proceedings quashed as illegal, and it could not be said that if this arrestment was illegal any agreement made under that pressure could be legal.

Counsel for the respondent were not called on.

At advising—

LORD YOUNG—I do not think it necessary to call for any answer here. I am myself

of opinion that the ground of action in the case arose in Scotland. It is a letter of guarantee by the manager of an exhibition established in Scotland with a view to its existence and being carried on for a considerable period against any loss consequent upon it. The obligant, the defender in the action, was appointed manager with an agreed-on remuneration, and he granted this obligation. The Exhibition did not result in profit but in loss, and accordingly the guarantors — there were many beside the present defender — were called upon under their obligations of guarantee to make it good. This action is therefore to enforce a ground of action arising in Scotland, and I think the Scottish Court had jurisdiction against the obligant in the obligation provided he was well cited to appear before the Scottish Court.

Now, it appears on the face of the record that after the Exhibition was closed and resulted unsatisfactorily as I have expressed, that he (the defender) proceeded to depart, and in such a way as to induce—I do not say whether they ought to have been induced or not—those having claims upon him, including the present pursuers, to seize hold of him as in the act of flight. We are told that there are objections to their proceedings in seizing him and apprehending him as in the act of flight or meditating flight, but of course I do not enter upon that matter at all but only refer to the fact that he was seized upon the allegation that he was meditating flight from the country. Of course the object of such apprehension is only that he may answer for his liabilities in the Courts of the country from which he is meditating flight. And when he is so seized, regularly or irregularly, he enters into a covenant with his adversary who seized him, and says, "Let me go and I will find caution to answer in a Scottish Court to any action which may be brought against me, and a summons in which may be served in the Sheriff-Clerk's office, which I fix upon as my domicile of citation." Upon that condition he is let go, and this action, the summons of which is served at the domicile of citation then agreed upon, is the condition of his being left at liberty to depart.

Now, joining these two things together, I think the defender was here well cited in the action raised upon a Scottish ground of action, that is, a ground of action arising in Scotland, and that he must answer accordingly, and I do not think his liability to answer in a Scottish Court depends at all upon the result of any proceedings by him to recover damages in respect of any irregularity in his apprehension. If he had been apprehended here, however irregularly, and so as to render the party liable in damages, and if a summons in an action upon a Scottish ground of action arising in Scotland had been then put into his hands, I do not think he would have been permitted just to throw it away and say, "You ought not to have stopped me in the street so as to put that into my hands." I think he is in the position of having the summons in an action upon a ground arising in Scotland put into his hands, and that his liability to answer for it will not depend upon whether he was regularly or irregularly stopped in the streets and ordered to take it. And so in respect of the jurisdiction of the Court in such an action I do not think he can object to it upon the ground that he may be possibly successful in showing that there were irregularities in connection with his apprehension upon which he granted the bond.

I think that is sufficient for the judgment, and I would rather myself abstain from expressing any definite opinion upon the ground upon which the Lord Ordinary has proceeded, although it is not to be understood that I dissent from it or express any opinion adverse to it. It is this, that the only jurisdiction here is that which is acquired by forty days' residence in the country, and that a jurisdiction acquired over any person resident for forty days in a country endures for forty days after he has left it. There are certain authorities *dicta* upon that question, I do not say all on one side, but I should rather abstain from putting my judgment in this case upon it in respect there exists another ground which to my mind is satisfactory. I would refuse the reclaiming-note and adhere to the interlocutor of the Lord Ordinary, but so far as my opinion goes upon the ground I have expressed, and without entering upon or expressing any opinion for or against the ground upon which the Lord Ordinary has proceeded.

LORD TRAYNER and LORD LOW concurred.

The Court dismissed the reclaiming-note and affirmed the Lord Ordinary's interlocutor.

Counsel for the Reclaimer—Strachan—Hay. Agent—William Officer, S.S.C.

Counsel for the Respondents—Murray—A. S. D. Thomson. Agents—Davidson & Syme, W.S.

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*Wednesday, May 27.*

## SECOND DIVISION.

[Lord Kincairney, Ordinary.

## TROTTER *v.* TORRANCE.

*Landlord and Tenant—Lease of Farm—Reserved Power to Resume Specified Ground—Exercise of Reserved Power although Ground Partially Built upon.*

In a lease of a farm the landlord reserved power to resume and take off an outlying part of the lands adjoining the municipal boundary of a city on giving twelve months' notice and allowing for the ground so taken a deduction from the rent at the rate of £6 per acre, besides the value of the unexhausted manure. The lease excluded sub-tenants. The landlord, and the tenant with the landlord's consent,