the trustees. But it does not prevent the testator disposing of the income of his estate in any manner he thinks fit, provided only that he does so in sufficiently clear and express language; and if he directs in express terms that dividends shall go wholly to a legatee and that no part of them shall be apportioned to the general estate, that is a perfectly effectual testamentary direction which will receive effect. In the case of *Tyrrel* (1854, 2 Drewry's Rep. 86), which was cited to us, it was held that the Apportionment Act was not to be excluded by any inference which might be drawn from the general terms of a will. But, on the other hand, in the case of *Lysaght* ([1898] 1 Ch. 115), and apparently from the report of a case which was not cited—*in re Meredith* (1898, 67 L.J. Ch. 409)—but which is referred to in the case of *Oppenheimer* (1907, 1 Ch. 399) quoted to us, it was decided with equal clearness that when a testator expressly directs that income which would be otherwise apportionable shall be given to a particular legatee, the Act will not apply. I think the present case falls under the latter rule. The truster says that the dividends accruing from the said shares "shall, as received, be paid over" to his wife. In saying so he gives his trustees a clear and express direction which they are bound to follow.

I entirely agree, however, with the observation which fell from your Lordship in the chair that although we think the direction clear enough it was nevertheless perfectly natural and proper on the part of the trustees to bring this question before the Court in order that they might have judicial authority for the course they might agree to follow.

LORD PEARSON—I am of the same opinion.

The LORD PRESIDENT was absent.

The Court answered the first question in the affirmative, found it unnecessary to answer the second question, and decerned.

Counsel for First Parties—D. P. Fleming. Agents—Webster, Will, & Company, S.S.C.

Counsel for Second Parties—R. S. Horne. Agents—P. Gardiner Gillespie & Gillespie, S.S.C.

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*Tuesday, July 9.*

## SECOND DIVISION.

[Lord Johnston, Ordinary.

## M'CREADIE *v.* THOMSON.

*Reparation—Administration of Justice—Wrongous Imprisonment—Magistrate—Immunity from Action of Magistrate—Malice—Jurisdiction—Sentence of Imprisonment without Option of Fine where Option Provided — Relevancy — Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 380 (10), 487, 501 (*b*).

A woman was brought before a magistrate in a police court of a burgh on a complaint charging her with using "indecent language to the annoyance of . . . police constable of said burgh on duty, contrary to the Act 55 and 56 Vict. cap. 55, sec. 380 (10), whereby the accused is liable to a penalty not exceeding 40s., and by sections 487 and 501 of that Act she may be sentenced to imprisonment until the same is paid for a period not exceeding one month." The complaint craved that she might be adjudged "to suffer the penalties provided by the said Act." The woman pleaded guilty, whereupon the Magistrate sentenced her to be imprisoned for fourteen days without imposing any pecuniary penalty, and by virtue of this sentence she suffered twelve days' imprisonment before being liberated under a process of suspension and liberation.

The woman having raised an action of damages against the Magistrate, *held* that the action was not incompetent or irrelevant, and that the wrong complained of being an entirely *ultra vires* act by the Magistrate, grossly illegal and irregular, it was not necessary for the pursuer to prove malice.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), secs. 380 (10), 487 and 501 (*b*), is quoted in the Lord Ordinary's opinion (*infra*).

Mrs Helen Folan, otherwise Tolan, or M'Creadie, brought an action of damages for wrongous imprisonment against William Brown Thomson, writer, Wishaw, Provost and one of the Magistrates of the burgh of Wishaw, who had pronounced sentence against her in a complaint in the Burgh Police Court.

The pursuer pleaded—"(1) The defender having, contrary to the terms of the Burgh Police (Scotland) Act 1892 and the terms of the complaint above narrated, maliciously and without any cause, or at all events without any reasonable or probable cause, sentenced the pursuer to be imprisoned for fourteen days, and the pursuer having in consequence suffered imprisonment for twelve days, decree should be granted as craved. (2) The defender having been guilty of wilful corruption, oppression, and culpable negligence in incompetently sending the pursuer to prison for fourteen days, whereby she was imprisoned for twelve days, he is liable in damages as concluded for. (3) The defender having granted a warrant for the imprisonment of pursuer that was grossly illegal and irregular, and the pursuer having suffered twelve days' imprisonment in virtue thereof, is entitled to damages as craved."

The defender, *inter alia*, pleaded—"(1) The action is incompetent in respect no action lies against the defender in consequence of his actings as magistrate sitting in the Police Court. (2) The pursuer's averments being irrelevant and insufficient to support the conclusion of the summons, the action should be dismissed. (4) The defender having in the matters complained of acted in his judicial capacity, he is not liable in reparation for the consequences

of his actings in that capacity. (5) The defender not having acted maliciously or corruptly in pronouncing the sentence complained of ought to be assoilzied."

The *facts* of the case are given in the opinion of the Lord Ordinary (JOHNSTON), who on 19th March 1907 pronounced this interlocutor—"Repels the first and second pleas-in-law for the defender: Finds that the cause is not one suitable for trial by a jury, and therefore dispenses with the adjustment of issues, and allows the parties a proof of their averments, to proceed on a day to be afterwards fixed."

*Opinion.*—"The pursuer Mrs Helen M'Creadie was apprehended and brought before the Burgh Magistrates of Wishaw on 12th November 1906 upon a complaint charging her with using 'indecent language to the annoyance of Robert M'Cullough, police constable of said burgh, on duty, contrary to the Act 55 and 56 Vict. cap. 55, section 380 (10), whereby the accused is liable to a penalty not exceeding 40s., and by sections 487 and 501 of that Act she may be sentenced to imprisonment until the same is paid for a period not exceeding one month,' and accordingly the complaint craved that she might be adjudged 'to suffer the penalties provided by the said Act.'

"Under the Burgh Police Act 1892 (55 and 56 Vict. cap. 55), section 380 (10), every person who 'commits a nuisance or uses any obscene, abusive, or indecent language to the annoyance of any person' is liable to a penalty of 40s. But it is provided—Sec. 487—'The Magistrates may sentence any person found liable in a pecuniary penalty to imprisonment until the same is paid, but in no case shall the period of imprisonment for non-payment exceed the respective periods hereinafter specified.' Sec. 501—'In all proceedings under the jurisdiction conferred by this Act—(*b*) where a warrant of imprisonment is granted, whether in default of payment of a penalty or sum specified in a forfeited bond, or for failure to find caution or security, where the amount adjudged to be paid or for which security is to be found . . . exceeds one pound but does not exceed five pounds, the period of imprisonment shall not exceed one month. . . .'

"There can be no doubt, therefore, that the primary penalty to which, if found guilty, Mrs M'Creadie was liable was a fine of 40s., and that imprisonment could only be ordered in default of payment of the pecuniary penalty, and not directly or separately.

"However, William Brown Thomson, solicitor, Provost of Wishaw, the defender, as presiding magistrate, on Mrs M'Creadie pleading guilty, sentenced her to be imprisoned for fourteen days, without imposing any pecuniary penalty, and by virtue of this sentence she suffered twelve days' imprisonment before being liberated under a process of suspension and liberation.

"Mrs M'Creadie has raised an action of damages against Mr Thomson. She sets forth (Cond. 5) that the said sentence was quite incompetent in terms of the section upon which the complaint was founded, 'and also in terms of the complaint itself, in which the penalty which might be imposed on conviction was clearly set forth. The sentence was also grossly oppressive. The pursuer believes and avers that John Burgess, the Clerk of Court, or one or other of the Court officials, pointed out to the defender that the sentence was incompetent, but he declined to alter it.' And Cond. 6—'The said sentence was pronounced by the said William Brown Thomson maliciously and without any cause, or at all events without any reasonable and probable cause, to the oppression of and in entire disregard of the rights and liberties of the pursuer. The defender had not the slightest occasion or excuse for the sentence he pronounced; he was quite aware from the complaint before him that he had no power to pronounce it, and that the proper penalty was a pecuniary mulct. His action in pronouncing said sentence was one of wilful corruption, oppression, and culpable negligence.'

"The defender's explanation of his action was 'that the said sentence was pronounced by the defender in the belief that the charge against the pursuer was one of breach of the peace at common law, on which a sentence of imprisonment without the option of a fine is competent.'

"The parties' averments differed as to the extent to which the complaint was read by the Clerk of Court in the defender's hearing. But it was not denied that the defender had never seen the pursuer before she appeared before him at the bar of the Police Court, and no suggestion of personal malice against her on the defender's part was made.

"In these circumstances the defender pleads (1) to the relevancy, and (2) to the competency 'in respect no action lies against the defender in consequence of his actings as magistrate sitting in the Police Court.'

"I think that I may put it thus—the defender maintains, in the first place absolute privilege, and in the second place, be it that his privilege is found not to be absolute, at any rate malice must be averred and put in issue, and of malice there is no relevant averment.

"First then as to privilege.

"It was sought to maintain this defence on the analogy of such cases as *Primrose* v. *Waterston*, 1902, 4 Fr. 783, where the absolute privilege of Judges—inferior as well as superior—was sustained. There is no doubt that in these cases, to which I need not particularly refer, expressions are used by the Court which, taken apart from their context, might infer absolute privilege to a Judge in everything said or done in the widest sense when sitting on the Bench. But these expressions must be read *secundum subjectam materiam*, and so read the doctrine of judicial privilege cannot be carried on their authority further than privilege for what is said or determined when acting in a judicial capacity.

"But these decisions have no application

to a case where a Judge acts in excess of his jurisdiction, and in consequence of his illegal act personal liberty is interfered with. I may refer to *Pollock* v. *Clark*, 8 S. 1, and other cases in Scotland, and with which may be compared *Groome* v. *Forrester*, 17 R.R. 333; and *Houlden* v. *Smith*, 1850, 19 L.J. (Q.B.) 17, in England, and see also Lord Jeffrey's note in *Orr* v. *Currie*, 1839, 1 D. 551, which though his Lordship's conclusion was disapproved is instructive as to the precedents.

"I cannot therefore sustain the plea of absolute privilege.

"Next as to whether an averment of malice is necessary. Where all that is alleged amounts only to irregularity in the proceedings, an averment of malice is necessary to support action even where the proceedings in which the irregularity is alleged to have occurred have resulted in imprisonment—*Malone* v. *Walker*, 1841, 3 D. 418. But I think that where, as here, there is not merely irregularity alleged but a wholly *ultra vires* act which has resulted in imprisonment, action lies without any averment of malice. I think that this results from the decisions above quoted and from those referred to by Lord Jeffrey in *Orr* v. *Currie*, *supra*.

"Had it been necessary to aver malice I confess I should have had some difficulty in holding that there was here any relevant averment of such. For I find it as difficult to conceive of legal malice as of legal fraud —*Peek* v. *Derry*, 1889, L.R., 14 App. Cases 337. And the circumstances preclude the idea of actual malice.

"I shall therefore repel the first and second pleas for the defender. The issues proposed do not appear to me to be proper for trial of the cause, and in any view would require reconsideration. But I am of opinion that this is a case which would be more appropriately tried before a Judge, and I shall so direct."

The defender reclaimed, and argued—(1) Where a judge or magistrate had, as here, jurisdiction to try a cause he was absolutely privileged and immune from actions of damages at the instance of parties aggrieved by what he in his judicial capacity had said or done, even though he had acted erroneously and in excess of his jurisdiction —*Haggart's Trustees* v. *Lord President Hope*, April 1, 1824, 2 Sh. Ap. 125, at 143; *Haggard* v. *Pélicier Frères*, [1892] A.C. 61; *Kemp* v. *Neville*, 1861, 31 L.J. C.L. 158; *Anderson* v. *Gorrie*, [1895] 1 Q.B. 668; Stair, iv, 1, 5; Ersk. Inst. i, 2, 32. The distinction in Lord Ivory's note to Erskine between supreme judges and inferior judges, in which he excepted the latter from this immunity, was not now recognised—*Harvey* v. *Dyce*, December 23, 1876, 4 R. 265, 14 S.L.R. 178: *Primrose* v. *Waterston*, March 20, 1902, 4 F. 783, 39 S.L.R. 475. The jurisdiction of magistrates was regulated by the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), section 454. That statute contained no immunity clause for magistrates, but treated them as being in the same position as a sheriff-substitute—*v.* secs. 454 and 455 (3). They admitted that an action would lie where a magistrate pronounced sentence in a cause in which he had no jurisdiction, and knew, or ought to have known, that he had none, in which class *Houlden* v. *Smith*, 1850, 19 L.J., Q.B. 170, relied on by the pursuer, should be regarded as falling—*vide* Beavan on Negligence, at pp. 279, 280—or where a magistrate in exercising some ministerial function acted maliciously or without probable cause, which was probably the *ratio* of *Pollock* v. *Clark and Others*, November 12, 1829, 8 S. 1, though the soundness of that case was doubtful. But the present case was to be distinguished from such cases, for here the magistrate was duly vested with jurisdiction and acted in a judicial and not in a ministerial capacity. (2) In any event the action was irrelevant, as there was here no sufficient averment of malice or want of probable cause. Reference was also made to Beavan on Negligence (p. 278) as to what constituted a Court of Record.

Argued for the pursuer and respondent—(1) Though judges of the Supreme Courts were immune for acts done in their judicial capacity an inferior judge had no immunity where he exceeded his jurisdiction and imprisonment followed; nor was there any substance so far as liability was concerned in the attempted distinction between acts done by a judge in a cause in which he had no jurisdiction and acts grossly *ultra vires* done by him in a cause in which he had jurisdiction. The following authorities were referred to—*Taafe* v. *Downes*, 1812, 3 Moore P.C. 36, at 41; *Calder* v. *Halket* 1839, 3 Moore P.C. 28, at 75 (*Taafe* being reported as a note to *Calder*); *Pollock* v *Clark* (*cit. supra*); *Barton* v. *Brickwell* 1849, 13 Q.B. (A. & E.) 393; *Lawrenson* v. *Hill*, 1860, 10 Ir. C.L.R. 177; *Leary* v. *Patrick*, 1850, 15 Q.B. (A. & E.) 266; *Groome* v. *Forrester*, 1816, 5 M. & S. 314, 17 R.R. 333; *Corkery* v. *Hickson*, (1876) L.R. Ir. 10 C.L. 174; *Strachan* v. *Stoddart*, November 13 1828, 7 S. 4; *Orr* v. *Currie*, February 22, 1839, 1 D. 551, Lord Jeffrey's note; *Arbuckle* v. *Taylor*, May 1, 1815, 3 Dow's Ap. 160; *Laing* v. *Watson*, April 1791, 3 Pat. Ap. 219; *Carne* v. *Manuel*, June 28, 1851, 13 D. 1253; *Houlden* v. *Smith* (*cit. supra*); *Richardson* v. *Williamson*, June 1, 1832, 10 S. 607; Beavan on Negligence, pp. 278 and 283; Bell's Principles, sections 2034, 2036, 2038; Clerk and Lindsell on Torts, 4th ed., p. 737; Addison on Torts, 8th edition, pp. 922 and 941. Reference was also made to the Statute of 1803 (43 Geo. III, cap. 141), which limited the liability of justices of the peace to twopence unless malice and want of probable cause were averred, hence called the Twopenny Act; to 9 Geo. IV, cap. 29, sec. 26, which extended the operation of the Twopenny Act to Scotland; and to the Protection of Justices Act 1848 (11 and 12 Vict. cap. 44), secs. 1 and 2, the last-mentioned Act, though not applying to Scotland, being referred to as treating on an equality acts done in a matter in which there was no jurisdiction and acts done in excess of jurisdiction, and also as being the Act under construction in *Barton*, *Laurenson*, and *Leary* (*cit. supra*). The

cases of slander and verbal injury cited by the defender had no bearing on the question. (2) It was not necessary, the sentence being grossly and obviously irregular, and its irregularity having been pointed out, as they averred, by the clerk, to aver facts and circumstances inferring actual malice.

At advising—the opinion of the Court (the LORD JUSTICE-CLERK, LORD STORMONTH DARLING, LORD LOW, and LORD ARDWALL) was delivered by the

LORD JUSTICE-CLERK—This case raises a question of much importance. The pursuer asks for damages from a magistrate sitting in a summary court, on the ground that he sentenced her to imprisonment without the option of a fine, under a complaint based upon a clause of a statute which did not empower him to pronounce a sentence of imprisonment, except as an alternative to the non-payment of a pecuniary penalty, the prayer of the complaint being in terms of the statute. She alleges that although it was pointed out by the clerk, as the Court's assessor, that such a sentence could not be pronounced, he insisted on inflicting it on the view that he could deal with the matter, not as it was charged in the complaint, but as constituting an offence at common law, viz., a breach of the peace, for which he had by law the power to pronounce a sentence of imprisonment as a direct punishment. That he had erred in this cannot be doubted, and that consequently he acted outwith and in excess of his jurisdiction is equally plain. The question now before the Court is whether an action of damages can be competently and relevantly raised against him in these circumstances.

We had the advantage of a very able and full argument from the bar, the one party alleging that a judge sitting as the defender did, is immune from all actions at law for damages for anything done by him when sitting in his judicial capacity; the other party maintaining that while such immunity from attack in a court of law applies to judges of superior jurisdiction, there is no law to the effect that inferior magistrates may not be called upon to make reparation where they have gone outside their powers and inflicted a wrong.

Upon the question of immunity of the Judges of the Supreme Court there can be doubt. The principle is clear and the decisions are emphatic. The principle is that such Judges are the King's Judges directly, bound to administer the law between his subjects, and even between his subjects and himself. To make them amenable to actions of damages for things done in their judicial capacity, to be dealt with by judges only their equals in authority, by juries, would be to make them not responsible to the King, but subject to other considerations than their duty to him in giving their decisions, and to expose them to be dealt with as servants, not of him, but of the public. Accordingly, the remedy in their case, if they flagrantly offend against duty, is not by proceedings in any court, but only by address to the Crown from the Houses of Parliament. Between their position and that of judges appointed, not by the King, but by the community or some authority in the community not having the kingly prerogative, but only acting by a delegated authority for local administration, as in the case of Justices of the Peace appointed by the Lord Chancellor, there is no analogy. Therefore any claim for immunity for acts done in local summary courts cannot be based on the fact of the immunity of the Supreme Court Judges. That the highest courts of justice are designated "Supreme Courts," of itself indicates the distinction. The Supreme Courts have power to right wrongs done in the inferior courts, their jurisdiction being universal, and their duty being to see justice done throughout the land. The other courts have no jurisdiction beyond their own border, and cannot review the conduct of any other judge within their own border.

Is there, then, any immunity attaching to the judges of the inferior courts for their actings when sitting in judgment. Certainly there is. They cannot be made amenable for words used, however severely they may comment on the conduct of individuals, provided such words are uttered where acting in the exercise of their magisterial functions. Of this the case of *Waterston* is the latest and most emphatic instance. For in that case the magistrate, who was dealing with a charge of crime against a child, sent for the child's father, who was in no way a party to the proceedings, and was not a witness, and used words to him as regarded his conduct in relation to his child, which, while the Court considered them to be highly reprehensible, they held could not be made the ground of an action of damages, the magistrate having at the time been engaged in his official capacity. The principle of this is that the right to express himself freely in dealing with matters before him must not be hampered by apprehension that he may be sued in a civil court and subjected to damages, as if what he said had been uttered by him as an ordinary citizen not acting in a public judicial capacity, it being uttered for what presumably at the time seemed to him to be good and just cause.

But while this is so, it is a totally different question whether a magistrate who does official acts when sitting as such which he has no power to do under a statute in accordance with which he is bound to act, and which judicial acts have the effect of restraining the liberty of the subject, and subjecting him to penalty in his person, is immune from civil consequences for the wrong he has done. I do not think that this has ever been held, and the opposite has been held in many cases. Where a magistrate, professing to sit as such, and dealing with a case which he has no jurisdiction to deal with at all, commits what is an undoubted wrong upon a citizen, both by principle and practice he is held liable for the wrong done. If that is so, can it be said that a magistrate who has before him a case which he can competently try under

an Act of Parliament on which the complaint is founded, and who, instead of dealing with the case as it is before him, and on conviction awarding such punishment as the Act prescribes and allows, proceeds knowingly to pronounce a sentence which is not competent under the Act of Parliament, and thereby sends a person to prison contrary to the Act of Parliament—I say, can it be said that he is in any more favourable position than a magistrate trying a case in circumstances where he has no jurisdiction? In the one case his sentence is illegal, because he has no complaint before him on which he can pronounce a sentence at all. In the other he has a complaint before him, on which he cannot pronounce the sentence which he does pronounce. The wrong is as great in the latter as in the former. For as well might he have no jurisdiction at all as step outside the jurisdiction which he does possess to do something which he could not do if he held himself within the limits prescribed to him by the law under which he was called to exercise his jurisdiction. The case of *Groome* v. *Forrester*, decided in England, is a forcible illustration of the fact that there may be liability in a magistrate, not merely for acting without jurisdiction, but for doing an act in excess of the jurisdiction he was called upon to exercise. In that case, as here, the magistrate could have pronounced an effective judgment, under which incarceration might have taken place. The mistake made was that while the thing complained of was that an overseer had refused to obey an order of Court by delivering up a certain book, he was committed till he should have delivered up "all and every the books, &c." In that case the magistrates were held liable in damages for "a clear excess of jurisdiction."

Here I think it is necessary to draw a distinction. It is where the error committed by the inferior magistrate takes effect that his liability to answer for the wrong done arises. It is not for what he has ordered, but for what he has caused another to suffer, that he is amenable to the law. That he has pronounced an illegal sentence is not sufficient to subject him in damages if nothing has been done upon it. But where it has been carried out so that the wrong has been made effective, then he may be answerable. This is illustrated by the English case where an illegal sentence ordering confinement in the stocks was pronounced, but was not carried out, so that the wrong was not suffered. Accordingly it was held that no claim for damages could be sustained.

The principle which I have stated as governing the matter seems to be well established by the authorities. Erskine in his Institutes says—"Where a sentence is glaringly illegal, *lata culpa equiparatur dolo*, the law, from the grossness of the error, presumes a perverse will." The magistrate so acting is presumed to have been led astray by evil motive, or by such rashness and disregard of the citizen's rights as will be held equivalent to direct dole. It would be difficult to state the matter more concisely and clearly, and it appears to me that the decisions of the Courts are entirely in accordance with the idea that, whatever may be the privileges attaching to a Judge of the Higher Courts, it has never been held to extend to such Courts as are called Courts of Summary Jurisdiction, which was the nature of the Court in this case.

Reference was made in the course of the debate to the Act of George the Third, commonly called the Twopenny Act, by which Justices of the Peace were protected from any award of substantial damages unless it was averred that the acts were done "maliciously and without any reasonable and probable cause." It also enacted that no damages or costs could be recovered by the plaintiff if the justice could prove his guilt, and that he had not undergone greater punishment than was assigned by law to the offence. I refer to the Act for the purpose of indicating what I think is a plain inference to be drawn from it, viz., that these inferior judges must have been subject to actions of damages by the law as it then existed, otherwise it would have been unnecessary to pass a law limiting their liability. And it is to be noticed that the exemption is a limited exemption It refers only to a conviction "had or made under any Act or Acts of Parliament," and so had no reference to acts done in administering the common law, as to which it left the liability of justices as it was before. And further, I remark that although that Act was extended to Scotland by the Act 9 Geo. IV, cap. 29, it could never apply to this case, seeing that the pursuer here did suffer a greater punishment than was assigned by law to her offence, and seeing that the Act under which she was tried gave no power to commit to prison without the option of a fine. I notice in passing, with reference to England, that new rules as regards liability of justices were established by the Act 11 and 12 Vict. cap. 44, and the Twopenny Act, in so far as inconsistent with it, was repealed. But that does not affect what I have already said—that the passing of such Acts proceeded and could only proceed upon the footing that such inferior judges as the Act deals with did not possess the general immunity which attaches to the Supreme Court Judges. But I think there is a further and necessary inference to be drawn from it, viz., that the doctrine sometimes stated in English cases, that judges of what are called there "Courts of Record" are immune from actions of damages, did not apply to some courts. The phrase "Court of Record" is not one which conveys any clear idea to the mind of one not versed in English law and practice. But whatever a Court of Record may mean, and to whatever courts it might apply, the Twopenny Act plainly indicates that courts of inferior magistrates were never included in the phrase. Accordingly, such actions have been repeatedly sustained. The most notable case is that of *Pollock*.

It only remains to be seen whether, under the legal decisions which have been pronounced, it can be held that in such a case as the present, in which a magistrate sitting in a Police Court has pronounced a sentence of imprisonment for a term, without the option of a fine, where he had no jurisdiction to do so, he is free from any action. I am unable to find, after an examination of the cases quoted in the debate, that they lead to any such conclusion. The case of *Haggart* was a case similar to *Waterston's* case, being based on remarks made by Lord President Hope about the conduct of an advocate. *Harvey* v. *Dyce* was a case of slanderous words used by a sheriff. The only other case founded on in opening by the reclaimer was the case of *Haggard* in Appeal Cases 1892. That case has no bearing on the present, as the question there turned upon the right of a judge to dismiss a civil case as vexatious. One other case was referred to in reply by the reclaimer—that of *Anderson* v. *Gorrie*, 1895, 1 Q.B. 668. That case also has no bearing, being the case of a Supreme Court judge of a colony, and it was held that his position was analogous to that of a Supreme Court judge in this country, and that he could not be sued for an act done in his capacity as judge, whether he acted rightly or wrongly.

On the question whether in this case it is necessary to aver specific malice, and to put malice in issue, I concur with the Lord Ordinary that the case being one in which the wrong complained of was an entirely *ultra vires* act by the magistrate, it is not necessary for the pursuer to prove malice. I adopt the words of Lord Pitmilly, who said in a similar case—"It is no matter whether it was from error or malice, if . . . grossly illegal and irregular, the party is entitled to claim damages alike from the private party and the judge."

But I guard myself, as he did, from its being supposed that any *culpa levissima* would warrant damages against a judge.

This doctrine is emphatically confirmed by Bell in his Principles, where too he says—"He (the magistrate) will also be liable if there be gross irregularity in imprisonment, though no malice be shown."

I would therefore move your Lordships to adhere to the Lord Ordinary's interlocutor. His Lordship has held that the case is not suitable for trial by jury. In accordance with practice, the discretion of the Lord Ordinary will not be interfered with except in very special circumstances. But in the present case I am satisfied that the Lord Ordinary has exercised his discretion wisely.

The Court refused the reclaiming note, adhered to the interlocutor reclaimed against, and remitted the cause to the Lord Ordinary to proceed.

Counsel for the Pursuer (Respondent)—George Watt, K.C.—Ingram. Agent—Henry Robertson, S.S.C.

Counsel for the Reclaimer—Morison, K.C.—Murray. Agents—Macpherson & Mackay, S.S.C.

*Thursday, May* 30.

## FIRST DIVISION.

## GOODWINS, JARDINE, & COMPANY, LIMITED, *v.* CHARLES BRAND & SON.

(Reported *ante* July 19, 1905, 7 F. 995, 42 S.L.R. 806, and March 15, 1907, 44 S.L.R. 553.)

*Expenses—Taxation—Fees to Counsel—Proof and Hearing in Outer House—Hearing in Inner House—Cause of Value and Complexity.*

In a cause dealing with the supply of material for a large railway contract there was in the Outer House a proof lasting four days, followed by a hearing on evidence lasting two days, and in the Inner House a hearing lasting four days. The pursuers having been successful, and having been awarded expenses, charged the following fees for senior and junior counsel respectively, viz., thirty and twenty guineas for each day of the proof, fifteen and ten guineas for each day of the hearing on evidence, twenty and fifteen guineas for each of the first three days of the hearing in the Inner House, fifteen and ten guineas for the fourth day. The Auditor allowed for the first day of the proof twenty and fifteen guineas, and for the remaining days fifteen and twelve guineas, for the hearing on evidence twelve and four guineas, and for the hearing in the Inner House for the first day fifteen and twelve guineas, and for the remaining days twelve and ten guineas.

On a note of objections, *held* that the Auditor should have considered the largeness of the amount at stake in the cause and its complexity, involving much preparation, and fees *allowed* for the proof of twenty-five and eighteen guineas for the first day and twenty and fifteen guineas for the remaining days, and for the hearing on evidence fifteen and ten guineas for each day, the fees in the Inner House remaining as taxed.

*Shaw & Shaw* v. *J. & T. Boyd*, March 7, 1907, 44 S.L.R. 460, *approved*.

This case is reported *ante ut supra*.

On March 26, 1906, the Lord Ordinary (DUNDAS) after a four days' proof (March 5 to 8), and a two days' hearing (March 14 and 15), had pronounced an interlocutor making findings. The defenders reclaimed, but the First Division after a four days' hearing (February 18 to 21, 1907), on March 15, 1907, pronounced this interlocutor—"Adhere to the said interlocutor except *quoad* the second and eighth findings in lieu of which findings find (second) that the pursuers are entitled to charge in respect of the girder work in dispute at the rate of 13s. 3d. per hundredweight, and (eighth) that the pursuers are entitled to interest upon the sums for which decree falls to be pronounced in their favour at the rate of 4 per centum per annum from