The Court refused the appeal.

Counsel for Pursuer (Respondent) — D. P. Fleming. Agent—James G. Reid, Solicitor.

Counsel for Defenders (Appellants) — A. M. Hamilton. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, January 22.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

COUTTS *v.* DAVID MACBRAYNE LIMITED.

PARK *v.* DAVID MACBRAYNE LIMITED.

Reparation — Wrongous Apprehension — Ship — Issue — Malice and Want of Probable Cause—Merchant Shipping Act 1894 (57 *and* 58 *Vict. c.* 60), *sec.* 287.

Under section 287 of the Merchant Shipping Act 1894 it is lawful for the master or other officer of a passenger steamer to arrest without a warrant a passenger refusing to pay his fare.

In an action by a passenger against the owners of a steamer for alleged illegal arrest, the pursuer averred that he had been wrongously arrested by the officers of the ship on the ground that he had refused to pay his fare, and that in arresting and placing him in irons "the ship's officers acted in obedience to the orders of the captain, who was the defenders' servant in charge of said steamer." He proposed an issue whether the defenders had wrongfully and illegally arrested him.

Held that as the pursuer had averred that the ship's officers had, in arresting him, acted in obedience to the orders of the captain, their actings were privileged, and that accordingly malice and want of probable cause must be inserted in the issue.

On 25th October 1909 John Coutts, iron worker, Bellshill, brought an action against David MacBrayne, Limited, 119 Hope Street, Glasgow, in which he claimed £250 damages for illegal arrest.

[A similar action at the instance of George Park, steelworker, Mossend, against the same defenders, was disposed of at the same time.]

The pursuer averred, *inter alia*—"(Cond. 2) On the 27th August 1909 the pursuer travelled to Dunoon from Glasgow by the steamer "Isle of Arran." He paid the fare for the voyage to Dunoon and back to Glasgow, and obtained a return ticket. On the afternoon of the same day he, along with several other persons who held similar tickets, being under the impression that they were entitled to return to Glasgow by any steamer, went on board the defenders' steamer 'Columba' at Dunoon Pier to return to Glasgow. He showed his ticket when going on board, and its validity was not challenged. . . . (Cond. 3) While the said steamer was between Greenock and Dumbarton on its way to Glasgow, a purser in the defenders' employment named John Dobbie approached the pursuer, who was in the fore saloon, and asked for his ticket. When the pursuer produced the return half of the ticket he had obtained in the morning, the said John Dobbie stated that it was of no use and that the pursuer would require to pay the fare. The pursuer asked an explanation of his reason for refusing the ticket, but the purser declined to give any explanation and demanded the fare. The pursuer then offered to pay the fare demanded in exchange for a receipt therefor, which the purser refused to give. The pursuer then, at the purser's request, gave him his name and address, but the purser did not note or attempt to note the same. Immediately thereafter the said John Dobbie suddenly, and without warning, seized the pursuer, and, with the assistance of another purser, threw him on the deck and forcibly took the ticket which the pursuer had previously tendered and was quite willing to give. When the pursuer rose to his feet again the said John Dobbie had left the saloon. . . . . (Cond. 4) Thereafter the pursuer passed up to the fore deck and took a seat, believing that the incident was ended. About ten minutes afterwards, while he was sitting quietly smoking near a passenger, George Park, who had been similarly treated, the said purser approached with some other ship's officers and asked him and the said George Park to go down to the saloon. The pursuer immediately did so, but no sooner had he arrived there than he was seized by the defenders' employees, handcuffed, and fastened to a pillar in the said saloon, and in presence of all the passengers. He protested against this treatment, but without avail, and was retained in the ignominious position described in presence of all the passengers until the steamer reached the Broomielaw, Glasgow. . . . . (Cond. 5) The said arrest of the pursuer by the said purser and other officers of the said steamer and his detention in irons was wrongful, illegal, and oppressive, and was done maliciously and without probable or any cause. It was without justification or excuse. The pursuer reasonably believed that his ticket was available by the said steamer. In any event, he had tendered payment of the fare demanded, and his name and address were known to the defenders' servants. . . . . (Cond. 6) The pursuer is a man of good character and reputation, and in consequence of said wrongful, illegal, and oppressive act, he has suffered severely in his feelings and reputation. There was a large crowd on the steamer, among whom were several persons known to him, and he felt his position keenly. . . . (Cond. 7) In arresting and placing the pursuer in irons it is believed that the ship's officers acted in obedience to the orders of the captain, who was the defenders' servant in charge of said steamer. In any event they acted

within the scope of their authority. For the wrong which they did while so acting, the defenders have been called upon to make reparation to the pursuer, but they refuse to do so, and the present action has accordingly been rendered necessary."

The defenders pleaded, *inter alia*—"(3) The defenders' servants having acted in the matters complained of in the discharge of their duty, *et separatim*, in the due exercise of the powers conferred on them by section 287 of the Merchant Shipping Act 1894, and without malice and with probable cause, the defenders should be assoilzied."

On 11th January 1910 the Lord Ordinary (SALVESEN) approved of the following issue:—"Whether, on or about 27th August 1909, on board the defenders' steamer 'Columba,' during the voyage between Greenock and Glasgow, the pursuer was wrongfully, maliciously, and without probable cause arrested and placed in irons by the defenders' servants acting within the scope of their employment, to the loss, injury, and damage of the pursuer? Damages laid at £250."

Opinion.—". . . [*After narrating the nature of the action and of the pursuer's averments*] . . . The pursuer proposes to take an issue only with regard to the alleged illegal arrest. The defence on the merits is that the pursuer and other two passengers created a great disturbance, in the course of which the pursuer assaulted Dobbie, and that it was necessary for the protection of the other passengers that the pursuer should be restrained from further acts of violence.

"The only point raised at the discussion on the issues was as to whether the words 'maliciously and without probable cause' should go into the issue. The defenders founded on section 287 of the Merchant Shipping Act 1894, and on the powers at common law of the master and officers of a ship when at sea to restrain persons on board from assaulting the passengers or crew, and he founded especially on the case of *Buchanan*, 7 F. 1001. In that case it was held that two tramway inspectors who had mistakenly given a person in charge for the offence of spitting in the car were privileged in what they did. I do not think there is any substantial distinction between that case and the present. The master of a ship and his officers have a duty to maintain order on board a ship while at sea; and if they act in pursuance of their duty without malice and with probable cause they are protected from an action of damages even if it turn out that they made a mistake. The pursuer founded on the case of *Lundie*, 21 R. 1085, where the Court refused to insert malice and want of probable cause in the issue. The ground of judgment was that before the defender could plead the protection of the statute it must first be shown that the pursuer was travelling in the steamer without having previously paid his fare and with intent to avoid payment of it; that his name and address were unknown to the officer who gave him in charge; and that being apprehended he was conveyed with all convenient dispatch before a justice. All these propositions were, however, contradicted by the pursuer, and accordingly a simple issue of wrongfully and illegally causing the pursuer to be apprehended was sent to the jury. Here no doubt the pursuer denies that he personally did anything which would justify his being put in irons, but he does admit that there was an altercation between one of the other persons who was so dealt with and the purser, and I cannot see how he can make the defenders answerable at all if their purser made an unprovoked assault upon him for no purpose that could be said to be in the employers' interests. I shall therefore allow an issue in the terms proposed, but with the words 'maliciously and without probable cause' inserted in the proper place."

On 22nd January 1910 the pursuer moved the Court to vary the issue by deleting therefrom the words "maliciously and without probable cause," and inserting in place thereof after the word "wrongfully" the words "and illegally."

[A similar motion was made in the action at the instance of Park.]

Argued for pursuer—The facts which justified the insertion of the words "maliciously and without probable cause" were denied. That being so the question of privilege could only arise at the trial if and when these facts were established—*Lundie* v. *MacBrayne*, July 20, 1894, 21 R. 1081, 31 S.L.R. 872; *Wood* v. *North British Railway Company*, February 14, 1899, 1 F. 562, 36 S.L.R. 407; *Beaton* v. *Ivory*, July 19, 1887, 14 R. 1087, 24 S.L.R. 744. Reference was also made to the Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 287.

Argued for defenders—The pursuer's averments disclosed that the occasion was privileged, for he averred that the defenders' servants acted in obedience to the orders of the captain. As to the powers of the master of a ship at sea, reference was made to Abbott on Merchant Shipping (14th ed.), p. 900, and to sec. 287 of the Merchant Shipping Act 1894 (*cit. sup.*).

LORD PRESIDENT—The whole question here is whether malice and want of probable cause ought to be put in the issue, as the Lord Ordinary has done. The actions are two actions of damages brought by two individuals who were travelling upon a Clyde steamer belonging to a private company, the defenders David MacBrayne, Limited. The averments of the pursuers are, that having gone on board the Clyde steamer with a return ticket which they had no reason to suppose was not perfectly good for the steamer upon which they went, viz., the "Columba," they were accosted by the purser, and upon showing the ticket were told that that ticket would not do, that a fare was demanded from them, that all explanations of any sort were taken no notice of by the purser, that they were then assaulted by the purser, and that thereafter, by the captain's orders, they

were seized and put in irons. The gravamen of their charge I take from Conds. 6 and 7, which, after the circumstances I have narrated, sum up the thing of which the pursuers complain. The pursuer says he "is a man of good character and reputation, and in consequence of said wrongful, illegal, and oppressive act"—that is to say, the putting in irons—"he has suffered severely in his feelings and reputation. There was a large crowd on the steamer, among whom were several persons known to him, and he felt his position keenly. In arresting and placing the pursuer in irons, it is believed that the ship's officers acted in obedience to the orders of the captain, who was the defenders' servant in charge of said steamer."

I read those two paragraphs particularly because I think that the complaint made might have been of a different character. There might have been a complaint made of a simple assault by the purser himself, which to my mind would have put the case in a different complexion as regards the issue. Here it is perfectly clear, on the pursuer's own showing, that the act complained of, for which he seeks damages, was an act done in pursuance of the orders of the captain.

I need scarcely say that the explanation given by the defenders is very different indeed, and one which, if true, entirely justifies the whole proceeding. But of course I do not take that into account at all upon this question of the form of the issue.

Now, that being so, should "maliciously and without probable cause" be in the issue? I think it should. And I think it should because of the peculiar position of the captain of a ship. The captain of the ship is the person who, for very obvious reasons, has been, according to common law, always considered to be invested with supreme authority over the persons in the ship, not, of course, entirely without being liable to be called to account for the exercise of that authority, but still endowed with the authority for the time being; and if he thinks it necessary for the security of the other persons in the ship to arrest certain members of the crew or passengers upon the ship, he has *prima facie* the right to do so. At any rate he is privileged in doing so, or, in other words, it must be shown that he has exercised his powers in abuse of his privilege—that is to say, as it is expressed in the form of the issue, maliciously and without probable cause.

No doubt there are cases of arrest where there may be no privilege. But I think the matter is really quite well put in a text-book from which I am reading, in which the learned writer, after setting forth the old doctrine that an arrest may be made by a police constable without a warrant or even by a private individual where persons are seen in the act of committing the crime, goes on to say that circumstances may instruct absolute privilege, qualified privilege, or no privilege. I think that is quite right, and that really the only question before us at all is whether malice and want of probable cause should go at once into the issue because privilege was disclosed, or whether it should be left over to the trial, leaving it to the judge to direct the jury that they could not find for the pursuer without finding also malice and want of probable cause upon the circumstances that arose at the trial.

I am clearly of opinion, inasmuch as the action is founded upon those sentences that I have read, and inasmuch as these sentences show that it is the action of the captain that is complained of—the captain being, as I have said, in the position of a person who has a privilege in his actings in regard to the persons upon the ship—that the Lord Ordinary is right and that the issue should be approved as it stands.

LORD KINNEAR—I concur.

LORD SKERRINGTON—I also concur.

LORD M'LAREN and LORD JOHNSTON were absent.

The Court refused the motion.

[A similar judgment was pronounced in *Park's* case.]

Counsel for Pursuer—J. A. T. Robertson. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for Defenders — Watt, K.C. — Macmillan. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Tuesday, January 25.

FIRST DIVISION.

[Sheriff Court at Glasgow.

BISHOP *v.* BRYCE.

Loan — I O U — Discharge — Proof — Parole Evidence.

An I O U "is an acknowledgment of indebtedness, and that acknowledgment of indebtedness, if you have nothing more, certainly carries with it a legal obligation to repay the sum which is thereby said to be a debt . . . Where you have an obligation to pay money constituted by writ, you cannot ordinarily prove by parole that that obligation has been discharged. But, on the other hand, you can and may prove by parole that facts and circumstances have arisen which really show that the party putting forward the I O U has no proper right to have the document of debt with him."

In an action by the holder of an I O U for payment of the sum contained therein, the defender averred that the document had been granted as a temporary receipt for shares; that the shares had been subsequently allotted to the pursuer; and that as the obligation for which the I O U had been granted had been duly discharged, he was no longer liable thereunder.

Circumstances in which *held* that the defender had proved that the obligation had been discharged.