

[28th July 1840.]

(No. 9.) JOHN THOMSON, Clerk to, and on behalf of, and as representing the General Commissioners of Police, Edinburgh, Appellant.¹

[*Attorney General (Campbell) — Lord Advocate (Rutherford).*]

Ex parte.

JAMES MITCHELL, Respondent.

Public Officer — Edinburgh Police Acts. — Held (reversing the judgment of the Court of Session), that the commissioners of police, under the above acts, are not liable to be sued for damages for alleged acts of wilful oppression and cruelty by inferior officers, not done or ordered by the said commissioners.

1ST DIVISION.
 Lord Ordinary
 Fullerton.
 Statement.

BY 3 Geo. 3. c. 78., one of the police acts of the city of Edinburgh, it was enacted, as to the general commissioners of police, under section 23d., “ that it shall be
 “ their duty, &c. to assess, &c. the sums of money
 “ authorized for the purposes of this act; to appoint
 “ collectors, clerks, &c.; to fix the number of lieutenants, serjeants, watchmen, scavengers, and other
 “ inferior officers to be employed, and wages to be paid
 “ to them, and to increase or diminish their numbers
 “ from time to time as they shall see cause; to make
 “ orders and regulations relative to the lighting,
 “ cleansing, guarding, watching, and patrolling the
 “ streets, &c.,” by section 31. the commissioners “ are
 “ authorized and required to estimate and fix the

¹ 16 D., B., & M., 409; Fac. Coll., 1st Feb. 1838.

“ sums of money necessary to be levied for the current
 “ year for the purposes of this act, under the several
 “ heads of lighting, cleansing, watching, surveyors, col-
 “ lectors, and clerks salaries, and incidental expenses;”
 section 56. enacts, that “ the monies to be raised by
 “ virtue hereof shall be applied and laid out in defraying
 “ the expenses of the police establishment in its various
 “ branches, according to the annual estimates required
 “ as before specified, and for the other purposes con-
 “ tained in this act, and for no other purposes what-
 “ ever;” section 59., “ that it shall and may be lawful
 “ to the Lord Provost of the city of Edinburgh, and
 “ his Majesty’s sheriff depute of the county of Edin-
 “ burgh, and they are hereby empowered and required,
 “ to nominate and appoint a fit person to be super-
 “ intendent of police; and in the event of their differ-
 “ ing as to such appointment, his Majesty’s advocate
 “ for the time being shall decide, and the said lord pro-
 “ vost and sheriff depute shall have full power and
 “ authority at all times to remove such superintendent
 “ at their pleasure;” by section 60. power was given
 to five persons specified (not commissioners) on the
 requisition of the general commissioners, to dismiss
 the superintendent if they saw cause; by section 64.
 the general commissioners were appointed to fix the
 salary of the superintendent.

Section 65., regarding the appointment of watch-
 men, is as follows :—“ And whereas it is expedient that
 “ the superintendent of police so to be appointed shall,
 “ as far as possible, be made answerable for the conduct
 “ of the watchmen and other officers of the department
 “ acting under his orders, be it enacted, that as often
 “ as the said general commissioners shall fix the number

THOMSON
 v.
 MITCHELL.
 —
 28th July 1840.
 —
 Statement.
 —

THOMSON
 v.
 MITCHELL.
 28th July 1840.
 Statement.

“ of lieutenants, serjeants, watchmen, and other inferior
 “ officers of police they shall judge necessary for guard-
 “ ing, patrolling, and watching within the limits of this
 “ act, and to direct their distribution among the different
 “ wards, it shall and may be lawful to the said super-
 “ intendent, and he is hereby authorized and empow-
 “ ered, to appoint proper persons for the above duty,
 “ to direct their distribution within the different wards,
 “ and to remove them at pleasure; and the said super-
 “ intendent, lieutenants, serjeants, watchmen, and other
 “ inferior officers appointed by the said superintendent
 “ shall have and exercise all the powers belonging to
 “ constables by the law of Scotland;” section 66., “ it
 “ shall be the duty of the said superintendent of police,
 “ and of the officers of the watching department to be ap-
 “ pointed by him, to guard, patrol, and watch the
 “ streets, ways, and passages within the bounds of police
 “ herein-before described, according to regulations to
 “ be prescribed by the said superintendent of police
 “ under the control of the said general commissioners,
 “ and to apprehend and bring before the magistrates,
 “ &c., all persons who may be found within the said
 “ bounds, actually committing any criminal, riotous, or
 “ disorderly act, or accused or suspected of having com-
 “ mitted any such act,” &c. The superintendent was
 also enjoined to carry into effect the regulations laid
 down by the general commissioners “for the proper
 “ guarding, patrolling, and watching the streets,” &c.
 Section 107. provided that the sheriff depute or substitute
 or any of the magistrates of Edinburgh might punish or
 dismiss watchmen whenever it appeared proper to do so;
 section 134, “that no action shall be commenced against
 “ the judges, commissioners, superintendent, or any other

“ person or persons for any thing done in the execution
 “ of this act, in any case, unless wilful corruption or
 “ oppression or culpable negligence, out of which real
 “ injury has arisen, be charged, nor in any event shall
 “ such action be competent after three calendar months
 “ from the time the fact is committed.”

THOMSON
 v.
 MITCHELL.
 ———
 28th July 1840.
 ———
 Statement.
 ———

By subsequent statutes, particularly 7 Geo. 4. c. 115. and 2 Will. 4. c. 87., many of the provisions of the above statute were altered; but in other respects the above statute was re-enacted, and it was kept in force in reference to the provisions above cited. By 2 Will. 4. c. 87. s. 18. it was provided “ that the said general commis-
 “ sioners may sue or be sued for any thing done or
 “ ordered by them in virtue of this act, and for recovery
 “ of the penalties and forfeitures before mentioned, in
 “ the name of their clerk, collector, or treasurer for the
 “ time being.”

In 1836 Mr. John Thomson, the appellant, was clerk, and Mr. James Stuart superintendent, of the Edinburgh police.

James Mitchell raised a summons against the said John Thompson and James Stuart, libelling on the above statutes, and stating, that on the evening of 30th November 1836, as he was going peaceably homewards through the streets of Edinburgh along with his wife and John Henderson, herb distiller, Edinburgh, he fell, the streets being slippery from frost; that Erick Mackay, or some other of the night watchmen, came up to him, and falsely alleging that he had been fighting, insisted on taking him to the nearest watch-house; that the pursuer refused, and Mackay called up four other night watchmen, who seized the pursuer and his companions, two of them collaring the pursuer, who assured them that he was

THOMSON

v.

MITCHELL.

28th July 1840.

Statement.

merely going peaceably home, and refused to go to the watch-house ; that thereupon the said Erick Mackay, or one or other of the five police men in whose custody he now was, and whose name, as distinguished from the rest, is to the pursuer unknown, did with his baton strike the pursuer with all his might across his leg. The summons subsumed : — “ And although the pursuer has “ often desired and required the said Erick Mackay, as “ also the said James Stuart and John Thomson, de- “ fenders on behalf of and as representing the said “ commissioners of the Edinburgh police establishment, “ conjunctly and severally, or severally, to make repara- “ tion to the pursuer in the premises, yet they refuse, “ at least delay, so to do ;” and concluded, “ therefore “ the said defenders ought and should be decerned and “ ordained by decree conjunctly and severally to make “ payment to the pursuer of the sum of 1,000*l.* sterling “ in name of damages, and as a solatium to the pursuer “ for the injuries sustained, and still to be sustained by “ him through the illegal, oppressive, wilfully tyrannical, and cruel treatment, and the brutal outrage “ inflicted upon him in manner before specified.”

In defence, Stuart pleaded, *inter alia*, that the statutes did not authorize the commissioners to sue or be sued in name of the superintendent.

The appellant pleaded in defence, in the first instance, that the commissioners of police, as represented by him as their clerk, were not liable, in respect that no relevant or competent ground of action had been libelled against them officially, and that the wrong complained of was not, as required by statute, on which alone the action was laid, said to have been done or ordered by them.

The Lord Ordinary, 11th July 1837, pronounced the following interlocutor:—“ The Lord Ordinary, having heard parties procurators, and considered the summons and defences, sustains the first defence of the defender James Stuart, and also sustains the first defence for the commissioners of police: Finds that both of these defences are preliminary, and exclusive of the summons as now laid; and therefore, in regard to these parties, dismisses the action, and decerns: Finds them entitled to their expenses, and allows an account thereof to be given in, and to be taxed by the auditor; and in regard to the defender Mackay, appoints the cause to be enrolled, that parties may be heard on its farther preparation.”¹

THOMSON

v.

MITCHELL.

28th July 1840.

Statement.

¹ “ *Note.*—The Lord Ordinary gives no opinion on the question, how far it is incompetent in any circumstances, and under any form of action, to render the commissioners of police, as the administrators of the funds levied for the protection of the inhabitants, answerable for the misconduct of the watchmen, or other subordinate officers. The only point here, properly preliminary, is, whether or not the present summons can be sustained as legitimately raising the question of liability, and he is of opinion that it cannot. In so far as the commissioners are concerned, it is rested on the 18th section of the Police Act, authorizing the general commissioners ‘ to sue or to be sued in the name of their clerk, collector, or treasurer for the time being.’ And accordingly John Thomson, the present clerk of the police establishment, is called and concluded against, as representing the commissioners. But the clause in the statute referred to is expressly limited to the case of the commissioners suing or being sued for any thing ‘ done or ordered by them in virtue of this act.’ And the summons certainly sets forth nothing which falls under that description. Accordingly at the debate the case against the commissioners appeared to be rested not so much on the statute as on the responsibility at common law for the subordinate officers employed by and paid out of the funds of the police. It is evident that in an action on that head, it would be requisite to give some much more distinct intimation of the nature and ground of that liability, than is to be found in the present summons. But at all events, that ground of action is totally different from that of the acts libelled being ‘ done or ordered by them in virtue of the statute,’ which, as has been already mentioned, is the indispensable

THOMSON
v.
MITCHELL.
28th July 1840.
Judgment of
Court,
1st Feb. 1838.

Mitchell the pursuer reclaimed, when the Court pronounced the following judgment:—"1st February 1838. "The Lords having advised this reclaiming note, and "heard counsel for the parties, adhere to the interlocutor reclaimed against, in so far as it assoilzies James Stuart; and to that extent refuse the desire of the reclaiming note, and of new find the said James Stuart entitled to expenses, and remit the account thereof to the auditor to tax the same and report: "Recal the said interlocutor in so far as it sustains

"condition of the competency of any procedure against them through the medium of their clerk, collector, or treasurer.

"2dly. As to Stuart, the superintendent, the case is, if possible, clearer. He, it will be observed, is not called or concluded against personally in the summons. He is coupled with the commissioners of police of the city of Edinburgh, 'as answerable for the proceedings and conduct of their officers;' and 'the said James Stuart and John Thomson' are described as 'defenders on behalf of and as representing the said commissioners of the Edinburgh police establishment, conjunctly and severally, or severally,' &c. In short, it appears from the summons as laid, that Stuart is called, like the defender Thomson, only for the purpose of reaching the commissioners as administrators of the police funds. It is true, that at the debate the pursuer proposed to amend the summons by striking out the letter 's' at the end of the word 'defenders,' in the passage last quoted; by which amendment it seemed to be thought it might be converted into a summons, personally concluding against Stuart the superintendent; but the Lord Ordinary does not think that such an amendment can be received. It is clear from the whole structure of the summons, that it is not directed personally against Stuart. In that part of it which sets out his liability, he is joined with the commissioners of police of the city of Edinburgh, against whom no personal liability is alleged; and, besides, there is not a single fact or ground in law set forth for holding the defender, the superintendent of police, personally liable for the misconduct of the watchmen,—a responsibility so novel and so extensive in its operation as to require some very distinct statement indeed of the grounds on which it is rested; so that even if the summons could be construed as directed personally against the superintendent, it is defective in another essential particular, inasmuch as it does not, in compliance with the judicature act, set forth the grounds of the action in terms sufficiently positive and clear, so as relevantly and legally to deduce the conclusions against the defender."

“ the first defence for the commissioners of police, and
 “ find them entitled to expenses, dismissing the action:
 “ Find the action competent as laid against the said
 “ commissioners, and remit to the Lord Ordinary
 “ to proceed as shall be just; reserving all questions
 “ of expenses between the said commissioners and the
 “ pursuer. Quoad ultra, adhere to the interlocutor
 “ reclaimed against.”

THOMSON
 v.
 MITCHELL.
 ———
 28th July 1840
 ———
 Statement.
 ———

The appellant appealed. No case was delivered for the pursuer, and the cause was heard *ex parte*.

Appellant.—The judgment of the Court altering the interlocutor of the Lord Ordinary was erroneous, inasmuch as it overlooked the express provisions of the statutes, by which the commissioners could only be sued for any delict done or ordered by them. Their ground of exemption from liability has been clearly stated by Lord Moncreiff, as Ordinary, in his interlocutor (12th January 1836) in a previous case of *Smith v. the Police Commissioners*, and the appellant now avails himself of his Lordship’s opinion¹ in that case, as the

Appellant’s
 Argument.
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¹ “ *Note.*—The Lord Ordinary is very clearly of opinion that the
 “ action cannot be maintained against the commissioners. The 18th sec-
 “ tion of the statute, quoted in the summons, page 6, provides that the
 “ commissioners may sue or be sued by their clerk ‘ for any thing done
 “ ‘ or ordered by them in virtue of this act, and for the recovery of the
 “ ‘ penalties,’ &c. Is there any thing set forth in the summons, as
 “ having been done or ordered by the commissioners, which is founded
 “ on as the ground of action? Certainly nothing. Therefore, sup-
 “ posing that the commissioners could be otherwise liable for the things
 “ complained of, it must be by personal action and citation. They
 “ cannot be sued by their clerk for acts or orders which, by the showing
 “ of the summons, were not their acts or orders, but the acts or orders
 “ of others. Yet the pursuer disclaimed in the debate any plea of per-
 “ sonal liability. This is one short view of the incompetency. But,
 “ secondly, the Lord Ordinary is clear, that the commissioners are not
 “ liable for any acts of the superintendent, in matters with which they
 “ have no interference. The statute affords no countenance to this.
 “ Their duties are financial and fiscal. They have not the power of

THOMSON
v.
MITCHELL.

28th July 1840.

Appellant's
Argument.

best argument for a reversal. The question has also more recently been settled in the analogous case of *Duncan v. Findlater*, in the House of Lords. (M'Lean and Robinson, 911.)

The *Lord Chancellor*.—I do not see how this judgment can be supported, but I shall take till to-morrow to look into the papers, and the report of *Duncan v. Findlater*.

Judgment deferred.

Ld. Chancellor's
Speech.

THE LORD CHANCELLOR.—My Lords, in this cause, which was heard before your Lordships yesterday, I have taken an opportunity of looking into the case, and also of referring to the report of the decision of this House in the case of *Duncan v. Findlater*, and it certainly does appear that the principle established by that decision applies in all respects to this. But there are in this case circumstances, arising out of the provisions of the police acts, which make it still more clear that the judgment of the Court below ought to be reversed.

It appears, in the first place, that the watchman who actually committed the alleged injury was not appointed by the commissioners against whose clerk the action is brought. Their duty certainly is to provide funds; but

“ appointing the superintendent, (see sec. 59), and no interference with
 “ the criminal department, except to fix the number of officers. Neither
 “ can they be liable at common law. They are not in the situation of
 “ masters, not having the power of appointment, and the duties being of
 “ a public nature, for which the party himself can alone be responsible.
 “ The procurator fiscal in the Sheriff Court is named by the sheriff, yet
 “ it would be somewhat extravagant to make the sheriff answerable for
 “ the wilful wrongs of a procurator fiscal. 3dly, Either Stuart acted in
 “ conformity to the statute, in which case, by section 134, the action will
 “ not lie against him, or he violated his duty, and did something not
 “ warranted by the statute, in which case it is a personal act for which
 “ the commissioners cannot be liable. Lastly, the Lord Ordinary is
 “ strongly inclined to think that the commissioners have no funds which
 “ can be made liable for the acts of the officers.”

the individual who committed the injury was not in any sense their agent. There is also a difficulty arising from the 18th section of the act, which provides that they shall only be sued in name of their clerk in respect of some act done or ordered by them. These are the circumstances which distinguish this case, even if the judgment below were not met by the judgment in *Duncan v. Findlater*.

THOMSON
v.
MITCHELL.
28th July 1840.
Ld. Chancellor's
Speech.

I find that the circumstance of this case having been heard *ex parte* is not attributable, as was stated from the bar, to that judgment of this House last session. For I find, in the observations I made to the House on that occasion¹, that I had my attention drawn to the dependence of the present case, and being informed that this case would raise the same question, I enquired how that matter stood, thinking it probable that the House might feel it right to have this case heard before deciding *Duncan v. Findlater*; but I then found that the present case had been set down *ex parte*, and therefore it was not to be expected the House would derive much information from the discussion of it. It was set down *ex parte*, therefore, before the parties were aware what course the House would adopt in the case of *Duncan v. Findlater*.

I have much satisfaction in finding that the decision this House has come to has the sanction of Lord Moncreiff and Lord Fullerton, expressed at a period before this question was first discussed at your lordships bar. For I find that in January 1836 Lord Moncreiff, in the case of the Commissioners of Police, founded on by the appellant (*ante p. 169.*) expresses an opinion consistent with that adopted by your lordships; and that in this case Lord Fullerton expressed a similar

¹ M'Lean & Robinson, 921.

THOMSON
 v.
 MITCHELL.
 ———
 28th July 1840.
 ———
 Ld. Chancellor's
 Speech.
 ———
 ———

opinion. There was not, therefore, that unanimity among the judges in the Court of Session, which might seem to exist when the case was disposed of by the Inner House; for we have the authority of those two learned judges, who, at periods before this question was discussed in this House, had expressed opinions contrary to that of the Inner House, and in conformity with the principle ultimately sanctioned in this House. I would therefore advise your Lordships to reverse the judgment of the Court of Session.

Mr. *Attorney General* moved, that the House do direct that the appellant be allowed his costs in the Court below, subsequent to the date of the Lord Ordinary's interlocutor, which did allow him costs.

The *Lord Chancellor*.—I think this House ought now to make such an order as it is of opinion the Court of Session ought to have made; i. e. to adhere to the interlocutor of the Lord Ordinary, with expenses.

The House of Lords ordered and adjudged, That the said interlocutor appealed from in the said appeal, in so far as the same is therein appealed from, be and the same is hereby reversed: And it is further ordered, That the said James Mitchell (the pursuer in the action of damages mentioned in the said appeal) do pay or cause to be paid to the said John Thomson the appellant, or to the clerk for the time being of the general commissioners of police for the city of Edinburgh and the adjoining districts, all the costs and expenses incurred in the said Court of Session, as well before the Lord Ordinary as before the Inner House thereof, by the said John Thomson, as representing the said commissioners of police in defending the said action: And it is further ordered, That with this declaration the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

RICHARDSON and CONNELL, Solicitors.