signed for a totally different matter, and intended to be carried out in a different way from that which has been adopted here. The Sheriff is said to have known these properties, that he had been there. What does that signify, if he did not apply his mind to the real question at issue between the parties. Does any man scrutinise the boundaries of a place like this until it becomes a matter of special inquiry? It is quite out of the question. A man may pass by a place every day in the year without having the slightest appreciation of the real question at issue when it comes to be a dispute of this kind. On all these grounds, I think we should refuse the application.

LORD JUSTICE-CLERK—I am entirely of the same opinion. I quite agree that the Sheriff, in following out the statute, if it applied, ought to have gone himself to the ground, and to have acted upon his own judicial persuasions; but I am inclined to think that, apart from that altogether, this application ought never to have been presented, and ought not now to be entertained. I have no notion that the provisions of the statute could apply to a rocky strip of ground along the sea shore, such as this, or that the expense that is proposed for the erection of this fence is at all legitimate. I find that the prayer of the petition is to this effect —after praying that the respective portions of ground which are found to belong to either party should be adjudged respectively from one heritor to the other, it then proceeds in this way,—"and thereafter to find that the most suitable fence to be erected on the whole line is a strong wire fence, or such other fence as may be reported by the said George Brown, or the other person or persons to be named by your Lordship." Now, this strong wire fence is to be erected for the purpose of clearing the boundary between patches of ground, the value of which amounts altogether to two guineas a-year, and the expense of it, according to the estimates, is to be between £70 and £80. I think that is absolutely out of the question, and therefore I think we ought to dismiss this application. As to what we are to do with the expenses, I would suggest for the consideration of the gentlemen at the bar, before we decide that, that they should consider whether they cannot agree upon a line of march and a natural fence. If they can, there is no reason why we should not interpone our authority to anything they think reasonable; but if that suggestion is unavailing in the present circumstances, we must just dispose of the claim.

Mr MILLAR said he thought there was no prospect of any such agreement, and therefore he asked for the expenses of the appeal, and also for the expenses in the Inferior Court from the beginning of the objections on the part of Mr Sinclair.

After discussion—

The LORD JUSTICE-CLERK said—I think the appellant here should get the costs of the appeal in which he has been successful, and that the rest of the expense should be borne by either party.

The Court pronounced the following interlocutor:—

"Sustain the appeal, alter the judgment, and dismiss the application, and decern: Find the appellant entitled to expenses in this Court, and remit to the Auditor to tax and report."

Counsel for Petitioner—Solicitor-General (Clark) Q.C., and T. Ivory. Agent—Donald Beith, W.S.

Counsel for Respondent and Appellant—Millar, Q.C., and Marshall. Agent—G. L. Sinclair, W.S.

Friday, November 29.

FIRST DIVISION.

[Lord Mure, Ordinary.

MURRAY *v.* ALLAN & OTHERS.

Process—Summary Procedure Act 1864—*Day Trespass Act* (2 *and* 3 *William IV*, c. 68)—*Warrant—Apprehension—Action of Damages.*

It is provided in the 35th section of the Summary Procedure Act 1864, that "every action or prosecution against any sheriff, judge, or magistrate, or against any clerk of Court, procurator fiscal, or other person, on account of anything done in any case instituted under this Act, shall be commenced within two months after the cause of action shall have arisen, unless a shorter period is fixed by the special Act, and not afterwards."

It is also provided in the 11th section of the Day Trespass Act (2 and 3 William IV, c. 68) that "the justice before whom the charge shall be made, may, if he have reason to suspect, from information upon oath, that the party is likely to abscond, issue a warrant for apprehending such party, in the first instance, without any previous summons."

A complaint was brought before the Justices of the Peace for the county of A. under the "Summary Procedure Act" 1864. The offence charged was under the "Day Trespass Act," and an oath of verity by a credible witness to the statement in the complaint was produced to the Justice of the Peace. The complaint contained no direct information that the party charged was likely to abscond, but set forth that he had refused to tell his name and place of abode. On this the Justice issued a warrant to apprehend him. He was accordingly apprehended, and five months afterwards he raised an action of damages for wrongful apprehension. *Held* that the apprehension was something done "in a case instituted under the Summary Procedure Act 1864," and that the action of damages raised on account of that apprehension, not having been brought within two months after the cause of action had arisen, must be dismissed under section 35 of the Summary Procedure Act 1864.

This was an action of damages raised by William Murray, fish merchant, Fraserburgh, against John Allan, solicitor, Banff, and Mearns and Knight, police constables there, for wrongful and illegal apprehension. The circumstances were as follows —George King, the gamekeeper at Craigston, averred that he had found the pursuer and another man named Gordon Smith trespassing upon the lands of Craigston in pursuit of game. In consequence of this information, the following complaint against the pursuer and Gordon Smith was presented to the Justices of the Peace for the county of Aberdeen, under the Summary Procedure Act 1864.

"*Under the Summary Procedure Act* 1864.

"Unto the Honourable Her Majesty's Justices of the Peace for the County of Aberdeen;

"The complaint of the Right Honourable James Earl of Fife, &c., proprietors of the lands and others after mentioned.

"Humbly sheweth that William Murray and Gordon Smith, residing at Bridge of Dee, near Aberdeen, have both and each, or one or other of them, contravened the Act passed in the second and third years of the reign of his late Majesty King William the Fourth, c. 68, intituled 'An Act for the more effectual prevention of trespasses by persons in pursuit of game in that part of Great Britain called Scotland,' and particularly the second section of said Act, actors or actor, or art and part, in so far as in the daytime, between the beginning of the last hour before sunrise and the expiration of the first hour after sunset of Monday the 13th day of November 1871 years, the said William Murray and Gordon Smith having both and each, or one or other of them, committed a trespass by unlawfully entering, or being in the daytime in or upon a wood or plantation situated on the left-hand side of the road leading from Plaidy to Turriff, and adjoining the farm called Ferneystripe, occupied by William Hay, a farmer, there situated, the said wood or plantation in the parish of Turiff and county of Aberdeen, and belonging in property to the complainers, in search or pursuit of game, or of deer, roe, woodcocks, snipes, quails, landrail, wild ducks, or conies: And the said William Murray and Gordon Smith having each or one or other of them been required by the gamekeeper or servant of the person having the right of killing the game upon such land, to wit, by George King, gamewatcher, residing at Midtown, in the parish of King Edward and county of Aberdeen, forthwith to quit the land whereon they both or each or one or other of them were so trespassing, and also to tell their or each or one or other or both or their or his christian name or names, surname or surnames, and place or places of abode, the said William Murray and Gordon Smith did both, or each or one or other of them, after being so required, refuse to tell their or his real name or names, and place or places of abode, or did each, or one or other or both of them, give such a general description of his or their place or places of abode as was illusory for the purpose of discovery, whereby the said William Murray and Gordon Smith are each liable, upon being summarily convicted thereof before a Justice of the Peace, at the instance of the owner or occupier of such land, or of the Procurator-Fiscal for the county, on proof on oath by one or more credible witness or witnesses, or confession of the offence, or upon other legal evidence, to forfeit and pay a sum of money not exceeding £5, together with expenses of process.

"That this complaint is founded upon said Act, and upon sections 1st, 2d, 3d, 7th, 8th, and 11th thereof.

"May it therefore please your Honours to grant warrant to Officers of Court to search for and apprehend the said William Murray and Gordon Smith, and to bring them before any one or more, as may be competent, of your Honours, to answer to this complaint, and thereafter to convict both, and each or one or other of them, of the foresaid contravention, and to adjudge both, and each or one or other of them, to suffer the penalties provided by the said Act."

In support of this complaint the following oath of verity was made in presence of Mr James Rust, J.P.—"Compeared George King, gamewatcher, residing at Midtown, in the parish of King Edward and county of Aberdeen, a credible witness, who being solemnly sworn, depones that what is contained in the foregoing complaint is true, as he shall answer to God. Three letters delete."

The Justice then issued a warrant on 15th November 1871, under which the pursuer was apprehended. In consequence of this apprehension the pursuer, on 13th May 1872, raised an action of damages. The principal ground of the action was, that the warrant upon which the apprehension took place was neither preceded by a summons nor by an information on oath that the pursuer was likely to abscond, although the 11th section of the Day Trespass Act, under which the proceedings bore to have taken place, made it the essential preliminary of such a warrant that either a summons or an information on oath should have preceded it. It was therefore pleaded that the apprehension was illegal and wrongful, and that therefore the pursuer was entitled to reparation.

In defence of this action, it was pleaded, *inter alia*—"The damages claimed being in respect of alleged illegality of proceedings against the pursuer, and these proceedings having been taken under the Summary Procedure Act 1864, and the pursuer having allowed more than two months to elapse without raising his action, the action is barred by the 35th section of the said Act."

The Lord Ordinary pronounced the following interlocutor and note;—

"6th *November* 1872.—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions: Finds that this action is not excluded by the 35th section of the Summary Procedure Act, 1864; and before further answer, Appoints the case to be put to the Roll of Wednesday, the 13th instant, with a view to the adjustment of issues for the trial of the cause.

"*Note.*—The provisions of the 35th section of the Summary Procedure Act, which require that actions of the present description should be commenced within two months after the cause of action shall have arisen, appear to the Lord Ordinary to be confined to things done in cases 'instituted under the Act.' Now the matters here complained of relate to a warrant of immediate apprehension, which, as the Lord Ordinary reads the Act, is not made competent in all cases, but is, by the 6th section, authorised only where apprehension is otherwise competent. The question, therefore, whether the proceedings complained of were 'instituted under the Act,' must, it is thought, be disposed of by the provisions of the Day Trespass Act 2d, and 3d William IV., cap. 68, on which the complaint is founded. By the 11th section of that Act, justices are authorised to grant warrant for immediate apprehension only when there is 'reason to suspect, from information upon oath, that the party is likely to abscond.' But in the present case it does not appear that any such information was laid before the justice. The warrant does not itself bear that there was, neither does the oath upon which the warrant purports to proceed; and in the statement upon which the application is rested it is not alleged that there was any intention on the part of the pursuer to abscond, or any apprehension in that respect upon the part of the petitioners. In these circumstances, it appears to the Lord Ordinary that

the warrant for the apprehension of the pursuer was an incompetent proceeding, inasmuch as it was not granted in compliance with the requirements of the Day Trespass Act.

"In the somewhat analogous case of the apprehension of a party as in *meditatione fugæ*, the application and relative disposition always bear that the creditor has reason to believe that the party means to leave the country; and where no such oath is taken, the warrant cannot legally be granted; *Robertson*, 20th June 1812. Now the Lord Ordinary sees no reason why, in a case of the present description, similar evidence that the provisions of the Day Trespass Act have been complied with, should not be preserved *in gremio* of the warrant or in the proceedings. There is, however, not only no evidence *ex facie* of the proceedings in this case to the effect that the pursuer was likely to abscond; but it is not alleged on the part of the defenders in the record that any such information upon oath was laid before the justice, while there is, on the other hand, a substantial allegation on the part of the pursuer that no such information was emitted upon the occasion. The Lord Ordinary has therefore come to the conclusion that the proceedings were not taken in compliance with the requirements of the Day Trespass Act, and were consequently not properly instituted in the sense of the 6th and 35th sections of the Summary Procedure Act.

"The question of relevancy cannot, in the view the Lord Ordinary takes of it, be at present satisfactorily disposed of, because, although there may be cases in which an officer who merely executes an *ex facie* legal warrant, which is afterwards found to be illegal, has been held not to be liable in damages; and an agent may not in all cases be liable in damages for putting in force a warrant illegally obtained, if done by express directions from his employer,—there is, in the present case, a distinct allegation that both agent and officer were aware of the irregularity of the proceedings, and acted maliciously in obtaining and executing the warrant; and assuming this to be proved, the Lord Ordinary is not prepared to hold that they are not responsible. He has therefore, before answer on the question of relevancy, appointed issues to be given in with a view to their adjustment."

The defenders reclaimed.

For them it was argued that the proceedings were legal and competent throughout, for there was enough before the magistrate to entitle him to suspect that the pursuer was likely to abscond. But even if the proceedings were not strictly in accordance with the statutory regulations, there was no such flagrant departure from them, or such irregularity, as to deprive the defenders of the protection of the statute. Although a person is not justified at all events, merely because he thinks he is doing what the statute authorises, yet if he acts in *bona fide*, and has some ground in reason to connect his own act with the statutory provisions, he will be held to have acted under the statute, and will be entitled to claim its protection. If the proceeding in this case was not entirely in accordance with the statutory provisions, it deviated so slightly from these provisions that it must be held to have been a proceeding under the statute; and therefore, by the 35th section of the Summary Procedure Act, this action should have been raised within two months after the proceeding complained of. *Russell* v. *Lang*, June 25, 1845, 7 D. 919; *Melvin* v. *Wilson*, May 22. 1847, 9 D. 1129; *Scott* v *Muir and Annan*, Dec. 18, 1868, 7 Macph. 270; *Knox and M'Arthur* v. *Montgomery*, June 7, 1865, 3 Macph. 890; *Cook* v. *Leonard*, 1827, 6 Bamwall and Cresswell 351; *Watt* v. *Ligertwood*, May 24, 1870, 8 Macph. 77, H.L.; *Scott* v. *Muir*, 6 Scot. Law Rep. 206.

It was argued for the pursuer that the magistrate had no such information upon oath as could be held to be a reasonable ground for suspecting that the pursuer was likely to abscond, and that therefore the proceeding was entirely contrary to the provisions of the statute. Even if the grounds of the complaint had happened to have been such as to point to the likelihood of the party absconding, the magistrate would have had no right on that account to have granted the warrant; for what the statute required was a separate oath, to the effect that the party was likely to abscond, and not merely a general oath of the verity of the grounds set forth in the complaint. On these grounds it was argued that this could not be held to be a case instituted under the Summary Procedure Act 1864, and that therefore the defenders were barred from pleading the 35th section of that act. *Cann* v. *Clipperton*, June 13, 1839, 10 Adol. and Ellis. 582; *Richardson* v. *Williamson*, June 1, 1832, 10 S. 607; *Sandiman* v. *Breach*, July 4, 1827, 7 Bamwell and Cresswell 96; *Kitchen* v. *Shaw*, May 5, 1837, 6 Adol. and Ellis. 729.

At advising—

LORD PRESIDENT—This is an action to recover damages for the illegal apprehension of the pursuers upon an alleged warrant granted by a Justice of the Peace of Aberdeenshire, bearing to be under the Day Trespass Act. The 11th section of this Act provides that "The Justice may summon the party charged to appear before himself, or any one or two Justices of the Peace, as the case may require, at any time and place to be named in such summons, and if such party shall not appear accordingly, then (upon proof of the due service of the summons by delivering a copy thereof to the party, or by delivering such copy at the party's usual place of abode to some inmate thereat, and explaining the purport thereof to such inmate) the justice or justices may either proceed to hear and determine the case in the absence of the party, or may issue his or their warrant for apprehending and bringing such party before him or them as the case may be, or the justice before whom the charge shall be made may, if he shall have reason to suspect, from information upon oath, that the party is likely to abscond, issue such warrant, in the first instance, without any previous summons." Now, it is quite clear that, in order to entitle a justice to issue a warrant without a previous summons, he must have reason to suspect that the party is likely to abscond, and the information which leads to this suspicion must be before him upon oath. So, when a warrant is issued without these conditions being complied with, it is irregular, and is not granted under the Act—and this is what is urged by the pursuer. He avers that the warrant was not in compliance with the terms of the Act, and was therefore illegal.

It is further provided by the 17th section of the Day Trespass Act, that "all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be commenced within six calendar months after the fact

committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defender one calendar month at least before the commencement of the action." Now, the pursuer brought this action within one month, the time required after giving notice, and within the six months prescribed by the Day Trespass Act.

But he is met by the objection that the complaint was also brought under the Summary Procedure Act of 1864, which contains another and different limiting clause. The 35th section of that Act provides that "every action or prosecution against any sheriff, judge, or magistrate, or against any clerk of Court, procurator fiscal, or other person, on account of anything done in any case instituted under this Act, shall be commenced within two months after the cause of action shall have arisen, unless a shorter period is fixed by the special Act, and not afterwards." Now, this clause does not exempt any person from being accountable for wrong done under the Act, it merely limits the time during which the party aggrieved must take his remedy. In all cases like the present there would be no hardship in making the action be brought within two months, while it is extremely important that persons engaged in prosecutions should not have claims against them extending over an indefinite period. The provision is therefore of a beneficial character, and ought not to be subjected to a judaical interpretation. Giving full and fair effect to the provision, and having in view the object of the statute, we have to decide whether it applies to the case before us. The proceeding here is certainly instituted under the Summary Procedure Act. We are not left in doubt as to the meaning—"All proceedings for summary conviction for any offence, whether at common law or under any Act of Parliament, and all proceedings for the recovery of any penalty which may be sued for or recovered in a summary form, whether such proceedings are at the instance of a public or private prosecutor or complainer, may be instituted by way of complaint in one or other of the forms set forth in the schedule (A.) to this Act annexed; and it shall not be necessary to mention in any complaint any Act of Parliament other than the Act declaring the offence for which a conviction is sought, or imposing the penalty or forfeiture which is claimed; and it shall be sufficient to refer to the Act or section of the Act founded on, without setting forth the enactment in words at length; and where it is necessary that any such complaint should be made upon oath of the complainer, or of a credible witness, such oath may be in the form of schedule (B.) to this Act annexed." The form in Schedule (A.) is applicable to common law offences, and the form in Schedule (B.) to statutory offences. Here the prosecutor framed the complaint in terms of Schedule (B.), beginning with the important words "Under the Summary Procedure Act 1864." But it is admitted that the first thing which was done was the irregularity of the justice in issuing a warrant without any previous summons, and without having information upon oath that the party was likely to abscond. I assume that a wrong had been committed—that is, that there was here a miscarriage of justice for which the pursuer would have been entitled to ask the verdict of a jury if the action had been brought in time. One might fancy cases brought under the Act where the wrong was of such a nature that the limiting clause of the statute would not be held to apply at all. We have seen cases where the complaint had so little connection with the Act of Parliament that it would be a grievous wrong to apply the limiting clause. If a man having obtained a warrant under the Act, proceeds illegally and by violence to apprehend the accused, and brings him before a Justice, the Act will not apply at all. People may go so absurdly and extravagantly wrong as to put themselves beyond the protection of the statute. Or, if he proceed to arrest and poind without any warrant, no one can doubt that he had no protection under the Act. In order to plead the clause of the statute, the defender must show that he was apparently acting within its provisions. It is not easy to draw the line, but it is easy to describe extreme cases on either side. It is easy to imagine how the slip of a pen might make the whole proceeding null and void. The question is to which side of the line this case belongs. I have not much difficulty in saying that this case belongs to the latter class and not to the former. It is true that there was no separate oath from which the justice might infer that the accused intended to abscond. But there was an oath to the verity of the complaint, which contained statements of a peculiar kind. It states not only that the pursuers were illegally trespassing in pursuit of game, but also when they were required to tell their names and places of abode they "refused to tell their real names or places of abode, or did give such a general description of his or their place or places of abode as was illusory for the purpose of discovery." These facts make up part of the statutory charge. But it appears to me that the statute contemplates a separate oath that the deponent believes that the accused intended to abscond, or an oath to facts on which such a belief is based. But can it be said here that the prosecutor has gone so extravagantly wrong as to put himself beyond the limiting clause of the statute? This was a very venial transgression of the Act and I am therefore compelled to differ from the judgment of the Lord Ordinary, and to hold that the action is excluded by the 35th section of the Summary Procedure Act.

Lord Deas—This is a question of some difficulty, but I arrive at the same conclusion as your Lordship. The 11th section of the Day Trespass Act provides that the justice may issue a warrant for apprehension if he shall have reason to suspect from information upon oath that the party is likely to abscond. Now the error in the present case was that the Justice did not issue the warrant upon a separate oath, but upon an inference from the whole circumstances that the pursuer was likely to abscond. And this causes great difficulty, for although the information upon which the Justice acted was upon oath, yet what was sworn to contained nothing more than was essential to the complaint under the statute.

Undoubtedly this was an error, and the question is, whether it was such an error as to take the proceeding from under the protection of the statute. Now the true test in such a case is, I think, well laid down in the case of *Cann* v. *Clipperton* (10 Adol. and Ellis 582). Mere good faith is not enough; but the party acting as in execution of a statute must also have some ground in reason to connect his own act with the statutory provisions. Now in this case I do not think that the inference drawn by the Justice from the circumstances set forth in the sworn complaint was so unreasonable that this

case cannot be said to have been instituted under the statute. I therefor concur with your Lordship, that this action is barred by the pursuer having allowed more than two months to elapse without raising it.

LORD ARDMILLAN—I am not able to take the same view as the Lord Ordinary has taken of the question which has here arisen. This is an action of damages, raised on the 13th May 1872, for an apprehension, said to be unlawful, on 15th November 1871. The proceeding in which the warrant for this apprehension was issued commenced by a complaint, which was, and bears in terms to be, under the Summary Procedure Act, at the instance of Lord Fife's Trustees. The offence charged was under the "Day Trespass Act," and especially the 2d section; and an oath of verity by a credible witness to the statements in the complaint was produced to the Justice of Peace. On this, the Justice granted warrant to apprehend, which he is entitled to do under the 11th section of the Day Trespass Act—"if he have reason to suspect, from information on oath, that the party is likely to abscond."

It is pleaded for the pursuer Murray that the warrant is bad and the apprehension unlawful, because the Justice had no information on oath from which he was entitled to suspect that Murray was likely to abscond. The Statute (the Day Trespass Act) does not require a separate oath in addition to the oath of verity, nor is it necessary that the oath bear in express words that the party is about to abscond, or is likely to abscond. It is enough if the oath of verity contains statements from which the Justice, reading and construing it fairly, has "reason to suspect" that "the party is likely to abscond."

Now, in this case the statements in the complaint, and to which the oath of verity applies, were such as might have led, and did lead, the Justice to suspect "that Murray was likely to abscond," and he issued his warrant accordingly. The oath is to the truth of the complaint, and the complaint bears that "the said William Murray and Gordon Smith did both, or each or one or other of them, after being so required, refuse to tell their or his real name or names, and place or places of abode, or did each, or one or other or both of them, give such a general description of his or their place or places of abode as was illusory for the purpose of discovery." He may or may not have drawn a correct inference under the circumstances. I do not say that the Justice was altogether correct in the inference which he did draw. It would have been a wiser and better course to have insisted on a separate oath, or at least a more explicit statement, in regard to the expectation or probability of Murray's absconding. But there were within the complaint, and within the oath of verity, some grounds for expecting or suspecting such a step on his part, and the Justice, on considering these grounds, recognised their sufficiency and granted his warrant. For the wrong said to have been done by apprehension under that warrant this action of damages has been brought.

The 35th section of the Summary Procedure Act is in the following terms:—"Every action or prosecution against any sheriff, judge, or magistrate, or against any clerk of court, procurator-fiscal, or other person, on account of anything done in any case instituted under this Act, shall be commenced within two months after the cause of action shall have arisen, unless a shorter period is fixed by the special Act, and not afterwards." This section does not exclude redress, or protect a wrongdoer, or sanction injustice. But it limits the period within which any prosecution can be raised. If this section here applies, it is obvious that this "action or prosecution" is too late, and must be dismissed accordingly, for the "case" in which the thing complained of was "done" was commenced by a complaint bearing to be "under the Summary Procedure Act," and greatly more than two months have elapsed since the "cause of this action" arose. The only question, as I think, is —Whether the 35th section of the Act applies? and that question involves the other question—Whether the case was "instituted under the Act?" I have no doubt that it was so instituted. On the face of this complaint it bears so to be. It came before the Justice in the form of a proceeding under the Act, and unless his conduct in granting the warrant on his own view of the oath of verity took the case out of the statute, it was a warrant granted—a something done—in a case instituted under the Act. To an action of damages such as this, the protection of the statute especially applies; and some Judges who have doubted of its application to a suspension or process of review, where there was clearly an irregularity, had no doubt that it applied to an action of damages.

To administer aright this clause of limitation of action requires careful discrimination on the part of the Court, and some questions of difficulty may arise.

On the one hand, it is manifest that the clause of limitation and of protection is not required where there has been no error or irregularity of procedure. It is designed to meet the case, and to protect from prosecution after a limited time, where there has been irregularity. Therefore, to say that this warrant for apprehension, being irregular, is for that reason beyond the reach of the limitation and protection of the Act, is just to exclude the clause of limitation in every case except where it is not required.

On the other hand, a mere colourable proceeding under the statute will not be within the protection. Nor will a silly belief—a foolish imagination—that a proceeding is in pursuance of the statute, or that a case is instituted under the statute, entitle a wrongdoer to the statutory protection.

Between these two classes of cases the case now before us is presented.

Unless cut out of the definition of "a case instituted under the Act," by the unjust and oppressive nature of the inference from the oath of verity, this case is within the clause of limitation, and the defenders are now protected from this action of damages by the lapse of the period to which such prosecutions are limited.

Now, I am of opinion that the Justice was not acting oppressively or unjustly, or in a manner grossly unreasonable, in drawing the inference which he did from the oath of verity, and in granting warrant for apprehension. I agree with your Lordship in thinking that he erred—but erred innocently—and that he had some reasonable grounds, though not quite correct or adequate grounds, for taking the view which he did of the oath of verity. This is just the case contemplated as within the protection.

I therefore apply the 35th section to the case, to which, as an action of damages, I think it especially appropriate.

The result is, that in my opinion the Lord Ordinary's interlocutor should be recalled, and the action dismissed.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed the action.

Counsel for the Pursuer — Scott and Rhind. Agent—William Officer, S.S.C.

Counsel for the Defender—Shand and M'Lean. Agent—Alex. Morison, S.S.C.

Friday, November 29.

FIRST DIVISION.

[Sheriff Court of Forfar.

BRODIE *v.* DYCE.

(*Ante*, vol. ix. p. 628.)

Filiation—Presumption pater est quem nuptiæ demonstrant—*Proof—Competency.*

A husband and wife separated soon after marriage, and did not again live together. After the lapse of nearly five years, the wife gave birth to a child. She alleged that A, a farmer who lived near, was the father of the child, and raised an action of filiation and aliment against him. A proof having been led, it was established that at or about the time when the child must have been procreated, the husband and wife, although living only about 16 miles apart, did not meet, and could not have had conjugal intercourse. It was also established that A had access to the wife, who was a woman of loose character, under suspicious circumstances. *Held* that the presumption *Pater est quem nuptiæ demonstrant* had been rebutted, and that the wife had instructed sufficiently that A was the father of the child.

Held that clear evidence to the satisfaction of the Court that *de facto* a husband has not had intercourse with his wife, and cannot therefore be the father of his wife's child, is sufficient to rebut the presumption *Pater est quem nuptiæ demonstrant.*

Opinions—that if it had been required it would have been competent to have adduced the evidence of the mother and her husband.

This was an action of filiation and aliment raised in the Sheriff-court of Forfar by Betsy Paterson or Brodie, Forfar, against James Dyce, farmer near Forfar. The Sheriff found for the defender, and the pursuer appealed to the Court of Session. The Court allowed the pursuer to lead additional proof by witnesses other than the pursuer and her husband, for the purpose of showing that the husband had no access to the pursuer, so as to have connection with her at such time as would account for the conception and birth of the child born on 9th May 1871. The circumstances under which the Court pronounced this interlocutor, as well as the proceedings in the Sheriff-court, are reported *ante*, vol. ix. p. 628.

The circumstances of the case before the Court when they ordered the additional proof were shortly these. The pursuer was a married woman, but had lived separate from her husband, James Brodie, since a few weeks after her marriage, which occurred on 12th November 1866. She was, on her own showing, a woman of notoriously immoral character, having had an illegitimate child before her marriage to Brodie, and another subsequent to that event. The child concerning whom this action was raised was born on 9th May 1871, and the pursuer swore that Dyce was the father of the child. It was also proved that he (Dyce) had been with the pursuer under the most suspicious circumstances at or about the time when the child must have been procreated.

The additional proof allowed by the Court was taken on commission by the Sheriff-Substitute of Forfar, and the evidence which was led accounted fully for the time of the pursuer and her husband at the period when the child must have been procreated, and went to show that they could not have had intercourse.

It was argued for the pursuer that upon the whole evidence the presumption of law that the husband of the mother was the father of the child had been rebutted, and that the pursuer had sufficiently instructed that the defender was the father of her child.

It was farther argued that, if the Court were of opinion that the evidence was not sufficient to rebut the presumption *Pater est quem nuptiæ demonstrant*, it was competent to examine the pursuer and her husband to prove that there had been no access.

Gurney v. *Gurney*, 8 Law Times, 380; *Morris* v. *Davies*; 5 *Clark* v. *Fenelly*, 163; *Atchly* v. *Sprigg*, 33 L.J. (Chan. Rep.) 345; *Sibbet* v. *Ainslie*, 3 Law Times, 583; *Sandy* v. *Sandy*, July 4, 1823, 2 S. 453; *Mackay* v. *Mackay*, Feb. 14, 1855, 17 D. 494; *Beattie* v. *Baird*, 1 Macph. 273; *Jobson* v. *Robertson*, 10 S. 594.

It was argued for the defender that the proof was not sufficient to establish that there had been no intercourse between the pursuer and her husband. It was proved that they were living only a few miles apart, and the proof had not so fully accounted for their time, and could not, from the nature of the case, so fully account for their time, as to make it certain that they had not met, and had not had conjugal intercourse with each other. Such evidence, it was maintained, was not sufficient to elide the presumption *Pater est quem nuptiæ demonstrant.* It was further argued that, if the proof already allowed were insufficient to rebut the presumption of paternity, it was incompetent to supplement that evidence by the examination of the pursuer and his husband.

Ridcout's Trusts, 10 Law Rep. 41; Taylor on Evidence, 838; *Ridcout's Trusts*, 39 L.J. (Chan. Rep.) 192; *Legge* v. *Edmonds*, 25 L.J. (Chan. Rep.) 125; *Rex* v. *Rook*, 1 Wilson 340.

At advising—

Lord Ardmillan—On the first question raised here, and the only question decided by the Sheriff-Substitute, I have come to the same conclusion as the Sheriff-Substitute. Apart from the question of presumed legitimacy, arising from the fact that the pursuer is a married woman, I cannot say that I think the case attended with much difficulty. If this had been one of the ordinary cases of filiation, I could not have avoided the conclusion that the case is sufficiently proved against the defender. The pursuer's character is very bad. That fact does, on the one hand, detract considerably from her credibility, and render corroboration necessary; but, on the other hand, her notoriously bad character makes a visit to her at night by a married man, a most suspicious fact, from which scarcely any inference can be drawn except one unfavour-