*Saturday, June* 1.

## SECOND DIVISION.

[Lord Craighill, Ordinary.

### WATSON *v.* M'CULLOCH.

*Issues—Landlord's Sequestration for Rent—"Wrongfully"—"Maliciously."*

In an action of damages for illegal sequestration for rent, which had followed upon a warrant contained in a small-debt summons, the Court *held* that it was not necessary to prove malice and want of probable cause, and that the word "wrongfully" should alone be inserted in the issue.

*Observations* on the use of the words "maliciously," "wrongously," &c., in such cases.

This was an action for damages for wrongous sequestration by a landlord for house-rent, raised by Robert Watson, writer, Largs, against Robert M'Culloch, spirit merchant, Glasgow. It was averred that M'Culloch had taken out a small-debt summons of sequestration and sale before the Sheriff Court of Kilmarnock, and that he had in virtue of the warrant contained in the summons sequestrated the pursuer's effects in a house let by him to the pursuer, as to the payment of the rent for which disputes had arisen between them.

The Lord Ordinary (Craighill) approved of the following issue for the trial of the cause:—"Whether, on or about the 16th day of November 1877, the defender wrongously and oppressively sequestrated the effects, or a portion thereof, belonging to the pursuer in the house occupied by him at Gogo Side, Largs, in security of the rent of said house for the half-year from Whitsunday to Martinmas 1877, to the loss, injury, and damage of the pursuer?"

The defender moved the Court to vary the issue by substituting the words "maliciously and without probable cause" for the words "wrongously and oppressively."

Argued for him—This was a case of an ordinary legal remedy, like that of arrestment on the dependence, where it was settled that malice and want of probable cause must be put in issue. It was not a case where a special diligence or remedy was asked, to which the Court applied its mind before it granted it. In the Small-Debt Court the clerk was in the habit of granting a warrant of sequestration without any inquiry. That had happened here.

Authorities—*Wolthekker* v. *Northern Agricultural Co.*, Dec. 20, 1862, 1 Macph. 211; *Kennedy* v. *Police Commissioners of Fort-William*, Dec. 12, 1877, 15 Scot. Law Rep. 191.

At advising—

Lord Ormidale—I think it extremely desirable in the matter of issues that we should adhere to the established form, for this obvious reason, that by so doing we prevent much litigation for the future. It appears to me that this case is ruled by the principles laid down in *Wolthekker* v. *Northern Agricultural Co.* (1 Macph. 211), and in *Kennedy* v. *The Police Commissioners of Fort-William* (15 Scot. Law Rep. 191). Landlords' sequestrations are expressely referred to by Lord President Inglis in the former case as falling under the category of cases in which the applicant must be answerable for the truth of the statement on which he obtains his warrant. I think it unnecessary and undesirable to say more than that it is a settled rule that in actions of damages for wrongful sequestration it is not necessary for the pursuer to establish malice and want of probable cause.

Lord Gifford—I am of the same opinion. In the case of arrestment on the dependence of an action it is quite fixed that malice and want of probable cause must be inserted in the issue; and there is certainly great force in the argument submitted to us, that the same rule should be applied to the present case, where the warrant of sequestration seems to be issued with as little consideration and as much as a matter of course as a warrant of arrestment on the dependence. But I am not disposed to extend the rule laid down in *Wolthekker* and similar cases beyond what has been actually decided.

I think that the present case will be perfectly well tried with the word "wrongfully" only in the issue.

Lord Young—(who sat in this Division in the absence of the Lord Justice-Clerk)—I concur. I think that the case will be very well tried with the word "wrongfully," which I prefer to "wrongously," as being more correct and more easily pronounced. I do not regard "oppressively" as a convenient term, for although it is employed in some statutes, it is a very difficult word to define. The same observation as to difficulty of definition applies also to "maliciously," which is moreover ambiguous and misleading. We borrowed the word from the English law, and in England the attempt is now being made, by a bill introduced by the Government into Parliament, to eliminate the term from criminal procedure on account of this very ambiguity. A jury will always fancy that the idea of some spite is contained in the word, and accordingly every explanation has to be given in order to make it clear to their minds that the legal meaning of the word is not the same as the popular one.

"Wrongfully," the old Saxon word, I prefer. Its meaning is "off the straight," wrong, or "wrung," which I believe to be the etymology. Whether the one word or the other be used here will be all the same as regards the verdict of the jury, and I think "wrongfully" will entirely try the questions raised.

The Court therefore ordered the word "wrongfully" to be inserted in the issue instead of "wrongously and oppressively."

Counsel for Pursuer (Respondent) — Mair. Agent—W. Officer, S.S.C.

Counsel for Defender (Reclaimer)—Balfour—Lorimer. Agents—Ronald & Ritchie, S.S.C.

*Tuesday, June* 4.

## FIRST DIVISION

### DUKE OF ATHOLE *v.* ROBERTSON.

*Proof—Act* 17 *and* 18 *Vict. c.* 34, *sec.* 1—*Citation of a Witness Resident Beyond the Jurisdiction of the Court.*

Where a party whom it is desired to cite as a witness in terms of the 1st section of the Act 17 and 18 Vict., cap. 34, is a party to the cause, and has his ordinary residence in Scotland, the slightest suggestion that the proposed witness has anything to say at all material to the case will justify the Court, in the exercise of its discretion, in ordering the issue of a warrant of citation.

Circumstances and averments in consequence of which the Court (*dub.* Lord Shand) ordered a warrant of citation of a witness to be issued under the 1st section of the Act 17 and 18 Vict., c. 34.

A question regarding the citation of a witness residing outside the jurisdiction of the Court, under the Act 17 and 18 Vict., c. 34, sec. 1, arose in this case, which was a petition and complaint at the instance of the Duke of Athole against Alexander Robertson for breach of interdict. The respondent had denied the right of the complainer to levy pontage dues from those making use of the bridge over the Tay at Dunkeld, and had further himself on several occasions in February 1868 forced a passage across the bridge without paying toll. The complainer in consequence obtained an interdict against the respondent, who nevertheless persisted in crossing without payment. This petition and complaint was therefore presented. The respondent failing to appear, the Court, on 9th January 1872, granted warrant to arrest and imprison him, but as he had fled the country this order could not at the time be enforced. In the present year he returned to Scotland, and recommenced his practice of using the bridge without payment. The complainer called upon him to appear before the Court, but without effect, and in consequence was obliged to cause him to be apprehended under the warrant of 1872.

The respondent now lodged answers. He averred *inter alia*—"(4) The whole statements of the complainer are denied. The respondent was on 16th May current informed that he could pass the toll as often as he so pleased, and he has since availed himself of the said permission without payment being demanded. The complainer has himself condoned any offence which may have been committed."

The Court having allowed both parties a proof, the respondent presented a note to the Lord President praying his Lordship to move the Court under the Act 17 and 18 Vict. cap. 34, sec. 1, to order a warrant of citation commanding the complainer to attend the proof. The complainer was at the time living in London, and the note set forth that he was "an important witness for the respondent."

Argued for the respondent—The complainer was a necessary witness on the question of condonation; also as to whether he had really authorised the proceedings, and as to the true proprietorship of the bridge.

Argued for the complainer—The matter was by the Act entirely within the discretion of the Court, who would not order a witness to attend unless they were satisfied that there was a high probability of knowledge on his part, and that it was impossible to get the same evidence from others within the jurisdiction of the Court. But the complainer knew nothing personally about the matter, and the respondent had averred nothing which the complainer only could prove. As to condonation, that was not averred by the respondent; at least he had not stated by what specific acts the complainer had condoned his offence.

Authority—*Allen* v. *Duke of Hamilton*, 1867, 2 L.R. (C.P.) 630.

At advising—

LORD PRESIDENT—It has been very properly said that in acting under section 1 of the Act 18 and 19 Vict. we are exercising a discretion, and it would be very strange if our duty was not of that nature, because the statute empowers us to summon persons who are not within our jurisdiction, and who may never have been within our jurisdiction, and who, if they were not entitled to object, might be dragged here for the purpose of annoyance when they had nothing at all to say. But it is very different where we are dealing with a person who has before resided in Scotland, who has an estate and all his great interests in Scotland, and who is also a party to the suit in which it is proposed to call him. I confess that in a case of that kind the slightest suggestion of the proposed witness having anything to say at all material to the case would be a sufficient ground for granting the warrant. In the present case the respondent has averred that the Duke of Athole has condoned the offence which he now seeks to have punished. In these circumstances I think that in the exercise of the discretion given to us by the statute it is our duty to grant this warrant.

LORD DEAS and LORD MURE concurred.

LORD SHAND—I am not disposed to differ, but I confess I have more difficulty than your Lordships in granting this application. If the witness had been resident in this country the respondent would have been entitled to cite him. But when a witness is resident in England the Legislature has given us jurisdiction to cite him, but has also given a certain discretion to the Court. In such circumstances it is not enough that the party should say that he is a material witness. He must show the necessity of citing him. It does not seem to me that the witness being a party to the suit makes any difference, nor that his ordinary residence is in Scotland. The fact that he is resident in England entitles him to the protection of the Court. If the points to be proved were those which the respondent has mainly brought forward—whether the Duke authorised the proceedings, or whether he was proprietor of the bridge, or whether the accounts were properly kept—I am quite clear that I should have been for refusing the application. Even on the question of condonation I have some difficulty. I think it was the duty of the respondent to state what particular acts constituted condonation. But as there has been a general allegation of condonation, and as your Lordships are of opinion that that is enough, I am not disposed to differ.

Counsel for Complainer — Balfour — Low. Agents—Tods, Murray, & Jamieson, W.S.

Counsel and Agent for Respondent—Party.