COURT OF SESSION.

Tuesday, July 15.

FIRST DIVISION.

[Lord Trayner, Ordinary.

HASTINGS AND OTHERS *v.* HENDERSON AND OTHERS.

Process — Reparation — Wrongous Apprehension and Imprisonment—Merchant Shipping Act 1854 (17 *and* 18 *Vict. cap.* 104), *secs.* 243, 246, *and* 533—*Merchant Seaman (Payment of Wages and Rating) Act* 1880 (43 *and* 44 *Vict. cap.* 16), *sec.* 12—*Summary Procedure Act* 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 35.

The master of a ship having reported to an inspector of police that certain of his seamen refused to go to sea, the inspector took them into custody. The seamen were thereafter served with a complaint in the form prescribed by Schedule A, No. 2, of the Summary Procedure Act 1864, at the instance of the master and with concurrence of the procurator-fiscal. The complaint craved warrant to apprehend the seamen, and set forth that they were liable to imprisonment and forfeiture of wages. On this complaint the Sheriff granted warrant to apprehend the seamen, and when they had been brought before him and pleaded not guilty, he granted warrant to commit them to prison till the day of trial, or till they found caution for their appearance, in virtue of which warrant they were detained a short time in custody.

Seven months afterwards the seamen brought actions of damages for wrongous apprehension and imprisonment against the shipowners, the master, the inspector of police, and the fiscal, in which they set forth (1) that they had been illegally apprehended in the first instance, inasmuch as the arbitrary power to arrest seamen given by sec. 246 of the Merchant Shipping Act 1854 had been repealed by the Merchant Seamen (Payment of Wages and Rating) Act 1880, and (2) that the complaint, contrary to sec. 533 of the Act of 1854, craved a warrant to apprehend instead of a warrant to cite the pursuers, and contrary to the provisions of the Act of 1880 craved the penalty of imprisonment against them, and that the warrants granted by the Sheriff for their apprehension and imprisonment were therefore illegal.

Held (1) that the pursuers had a good ground of action against the shipowners, the master, and the inspector of police, founded on their arbitrary arrest, but (2) that in so far as the actions were founded on the proceedings under the complaint, they were barred by the terms of sec. 35 of the Summary Procedure Act 1864, which required that all actions arising out of proceedings under it should be brought within two months.

In June 1889 William Hastings and others were employed as seamen on board the s.s. "Tay" of Grangemouth, of which the Carron Company were the owners, and James Charles was the master. By their contract of service it was provided that it should be "in the power of the master to dismiss any of the men, and in the power of the men to leave the service upon giving respectively notice at the pay-table." Upon Sunday, 2nd June 1889, the s.s. "Tay" was lying at Borrowstounness, and the seamen received payment of their wages. On Monday, 3rd June, they gave notice of their intention to leave the service. Early on Tuesday morning they were apprehended by Robert Chalmers, inspector of police, on board the "Tay," in consequence of having been charged by James Charles, the master, with refusing to go to sea, and were conveyed first to the police station at Borrowstounness, and then to Linlithgow. In the afternoon of the same day they were brought before the Sheriff-Substitute on a complaint at the instance of the master, Charles, a minute being annexed in which the Procurator-Fiscal at Linlithgow, William Horn Henderson, granted his concurrence. The complaint described the pursuers as presently in custody, and craved a warrant to apprehend them, and further set out that in respect of the provisions of sec. 243, sub-sec. 2, of the Merchant Shipping Act 1854, the pursuers were each liable to imprisonment for a period not exceeding ten weeks with or without hard labour, and also to forfeit out of their wages a sum not exceeding two days' pay with the costs of prosecution. Annexed to this complaint was a warrant whereby the Sheriff-Substitute granted warrant to officers-at-law "to search for and apprehend" William Hastings and the other respondents to the complaint, "and if necessary for that purpose to open any shut or lockfast places, and to bring them before the Sheriff of the Lothians and Peebles to answer to the foregoing complaint at the Sheriff Court-House, Linlithgow, and in the meantime to detain them in a police station-house or other convenient place, and also to cite witnesses and havers for both parties for all diets in the cause." The respondents having been brought before the Sheriff all pleaded not guilty. Thereafter the Sheriff on the motion of the complainer adjourned the diet to 10th June, and in the meantime granted warrant to commit the respondents to the prison at Edinburgh, therein to be detained until that time, or until they found caution to appear at all the diets of the Court under a penalty of £2 each. The seamen were thereafter detained for a short time in the police office at Linlithgow, but later on the same afternoon were liberated on bail. On 10th June 1889 the complaint was with consent of the Court deserted *pro loco et tempore* on payment to the respondents of £2, 2s. of expenses.

In January 1890 William Hastings and the other seamen brought actions against the Procurator-Fiscal, Henderson, against

the police sergeant, Chalmers, and against the Carron Company, the owners, and James Charles, the master of the "Tay."

In addition to the facts above set forth the pursuer averred—In apprehending the pursuers the defender Chalmers acted at the request and instigation of the defender, Charles. In arresting and detaining them, Chalmers acted wrongfully, illegally, and without warrant. In causing the arrest and detention of the pursuers, and in making and prosecuting the complaint against them, the defender Charles acted with the authority and consent, in the knowledge and under the express instructions, of the defenders the Carron Company. The whole actings of the defenders the Carron Company and Charles above set forth were wrongful and illegal. They had no power without legal warrant to apprehend or to cause the apprehension of the pursuers in the circumstances condescended on. The arbitrary power to arrest seamen without warrant, formerly given to masters by section 246 of the Merchant Shipping Act 1854, was repealed by 43 and 44 Vict. cap. 16. The complaint ultimately served upon the pursuers at Linlithgow was also illegal. Contrary to the provisions of section 533 of the said Merchant Shipping Act, said complaint craved a warrant to apprehend, instead of a warrant to cite the pursuers. Contrary to the provisions of the Merchant Seamen Payment of Wages and Rating Act 1880 (43 and 44 Vict. cap. 16) the complaint craved the penalty of imprisonment against the pursuers. The warrants for the apprehension and imprisonment of the pursuers were thus entirely illegal.

The complaint was prepared and presented by the defender Henderson on the instructions of Charles and of the Carron Company. In granting his concurrence and becoming a party to the complaint, and also in undertaking to present and prosecute the complaint, and in obtaining and using the said warrants, Henderson was acting wrongfully and illegally, and in wanton violation of the duties of his office, and under the Acts of Parliament relating to the matters in question. When the complaint was prepared and concurrence thereto granted by the defender Henderson, he was well aware that the arbitrary power of imprisoning seamen originally given by the Merchant Shipping Act 1854, and the power to inflict sentence of imprisonment under section 243, sub-section 2 of that Act, had both been repealed by the said Act 43 and 44 Vict. cap. 16. Nevertheless, he wantonly granted said concurrence, and applied for an illegal warrant to apprehend the pursuers, and thereafter for another illegal warrant to imprison the pursuers in default of bail, and concurred in a complaint craving an illegal sentence of imprisonment. If the defender Henderson was ignorant of the provisions of said Acts of Parliament, he was grossly negligent in the discharge of the duties of his office, and acted with culpable recklessness in concurring in and presenting said complaint.

The defenders pleaded, *inter alia*—"(1) That they should be assoilzied in respect of the terms of the Summary Procedure Act 1864 (2) That the action was incompetent. And (3) That the pursuers' averments were irrelevant."

By section 35 of the Summary Procedure Act 1864 it is provided—"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."

On 30th May the Lord Ordinary (TRAYNER) repelled the first and second pleas above stated in the case of all the defenders, and appointed the pursuers to lodge issues. To this interlocutor in Henderson's case he appended the following opinion:—"If the pursuers had alleged nothing against the defender except that as procurator-fiscal he had granted his concurrence to a complaint at the instance of a private prosecutor, such concurrence being necessary to enable the private prosecutor to raise and insist in his complaint, I would have hesitated to find the summons relevant. Such a concurrence in my view does not imply any statement on the part of the procurator-fiscal to the effect that the complaint is either relevant or true, but merely that *prima facie* the complaint presents questions which ought to be investigated and determined. But the pursuers aver that the defender not only granted concurrence but that he prepared the complaint in question, and prosecuted it before the Sheriff, and if that is true (assuming that the complaint was illegal), then the defender was a party to the wrong done to the pursuers equally with the private prosecutor, and is answerable directly to the pursuers for the wrong so done. This I take to be settled on the authority of the case of *Smith & Company* v. *Taylor, &c.*, 10 R. 291.

"That the complaint in question was illegal I have no doubt. It sets forth that the pursuers were lawfully engaged as seamen on board the 'Tay'; that they had refused without reasonable excuse to proceed to sea 'contrary to the Act 17 and 18 Vict. cap. 104, sec. 243, sub-section 2,' whereby the pursuers were each 'liable to imprisonment for any period not exceeding ten weeks, with or without hard labour,' and also at the discretion of the Court to a certain forfeiture of wages; and it prays for warrant to apprehend the pursuers, and 'thereafter convict them of the aforesaid contravention, and to adjudge them to suffer the penalties provided by the said Act.' The penalties here referred to can only be the penalties mentioned in the body of the complaint as provided by the section of the statute there cited.

"Now, I regard that complaint and its prayer as illegal, because the provision of the Act of 1854, which authorised the punishment of sailors refusing to go to sea without reasonable excuse by imprisonment, was

repealed by the Act of 1880 (43 and 44 Vict. cap. 16), sec. 12, which contains besides a direct provision (sec. 10) that sailors in that position 'shall not be liable to imprisonment.' The complaint was therefore not only unwarranted by law but was contrary to law.

"The defender pleads that this action, not having been raised by the pursuers within two months after the cause of action had arisen, is excluded by the 35th section of the Summary Procedure Act 1864. But in my opinion the defender cannot take any benefit from that clause. This is not a case of irregularity of procedure merely, or error committed in following out the provisions of a statute. It is a case where the complaint was based upon a statute no longer in existence, and which craved a decree contrary to express enactment. The proceedings complained of could only have been instituted under the Summary Procedure Act 1864, or the Summary Jurisdiction Acts 1864 and 1881, if they were warranted by the provisions of some Act of Parliament in force, but I have difficulty in seeing how the Summary Procedure Act can have any application to an Act of Parliament which has been repealed."

On 11th June the Lord Ordinary approved of the following issues for the trial of the cases. In the action against the Carron Company and Charles—"(1) Whether on or about 4th June 1889 the defender James Charles wrongfully apprehended, or caused to be apprehended, the pursuers at Borrowstounness, to the loss, injury, and damage of the pursuers? (2) Whether on or about 4th June 1889 the defenders the Carron Company wrongfully apprehended, or caused to be apprehended, the pursuers at Borrowstounness, to the loss, injury, and damage of the pursuers? (3) Whether on or about 4th June 1889 the defender James Charles presented, or caused to be presented, a complaint against the pursuers in the Sheriff Court of the sheriffdom of the Lothians and Peebles at Linlithgow, and thereupon wrongfully obtained and used, or caused to be obtained and used, warrants for the apprehension and imprisonment of the pursuers, to the loss, injury, and damage of the pursuers? (4) Whether on or about 4th June 1889 the defenders the Carron Company presented, or caused to be presented, a complaint against the pursuers in the Sheriff Court of the sheriffdom of the Lothians and Peebles at Linlithgow, and thereupon wrongfully obtained and used, or caused to be obtained and used, warrants for the apprehension and imprisonment of the pursuers, to the loss, injury, and damage of the pursuers? Damages laid at £100 for each pursuer." In the action against Chalmers—"Whether the defender, on or about the 4th day of June 1889, wrongfully apprehended the pursuers at Borrowstouness, to the loss, injury, and damage of the pursuers?" In the action against Henderson—"Whether the defender, on or about the 4th day of June 1889, presented, or caused to be presented, in the Sheriff Court of the Sheriffdom of the Lothians and Peebles at Linlithgow, complaint against the pursuers, and thereupon wrongfully procured and used, or caused to be procured and used, warrants for the apprehension and imprisonment of the pursuers, to the loss, injury, and damage of the pursuers?"

Argued for the defender Henderson—The case fell strictly within the words of section 35 of the Summary Procedure Act 1864. That section assumed that some irregularity had been committed, and it was therefore no argument to say that the section did not apply because the complaint concluded for an incompetent penalty. If the complaint was instituted under the Act that was enough—*Ferguson* v. *M'Nab*, June 12, 1885, 12 R. 1083, *per* Lord Shand 1090. Further, there was nothing in the complaint which forced the Sheriff to do one single thing which he was not entitled to do under the Merchant Shipping Act. It concluded for fine or imprisonment, and was perfectly competent in craving the first penalty, as the pursuers had been guilty of an offence in refusing to go to sea which rendered them liable to a fine—*Murray* v. *Allan, &c.*, November 29, 1872, 11 Macph. 147; *Ferguson* v. *M'Nab, supra.* If an issue were to be allowed at all "malice" and "want of probable cause" must be put in issue.

Argued for the defenders the Carron Company and Charles:—In regard to the 1st and 2nd issues—In refusing to go to sea the pursuers had committed an offence—Merchant Seamen (Payment of Wages and Rates) Act 1880 (43 and 44 Vict. cap. 16), sec. 10. Chalmers had therefore a right to apprehend them without a warrant—County Police Act 1857 (20 and 21 Vict. c. 72), sec. 12. If Chalmers acted within his right in apprehending the pursuers there was no room for an action against the Carron Company and Charles. In regard to the 3rd and 4th issues the argument submitted for Henderson on the provisions of the Summary Procedure Act 1864 was adopted.

The reclaiming-note for Robert Chalmers was not insisted in.

Argued for the pursuers—In the action against Henderson sec. 35 of the Summary Procedure Act did not apply. It was not enough to give the defender the benefit of that section that the complaint was entitled a complaint under the Summary Procedure Acts. It must be in a reasonable sense under those Acts, and it clearly was not so. The complaint was an incompetent application for an incompetent penalty—*Cook* v. *Leonard*, 1827, 6 B. & C. 351; *Roberts* v. *Orchard*, Dec. 12, 1863, 2 Hurl. & Colt. 769. It was not necessary to put "malice" or "want of probable cause" in issue—*Miller* v. *Hunter*, March 23, 1865, 3 Macph. 740; *Strachan* v. *Stoddart*, November 13, 1828, 7 Sh. 4; *Richardson* v. *Williamson, &c.*, June 1, 1832, 10 Sh. 607. In the action against the Carron Company and Charles—(1) In regard to the 1st and 2nd issues—The constable had no right or reasonable ground for apprehending the pursuers—*Peggie* v. *Clark*, November 10, 1868, 7 Macph 89. His action could afford no excuse to these de-

fenders. (2) In regard to the 3rd and 4th issues, the argument already stated in the action against Henderson was adopted.

At advising—

LORD PRESIDENT—The reclaiming-note for William Horn Henderson is presented against the interlocutor of Lord Trayner in an action at the instance of certain seamen against Mr Henderson for what may be generally described as wrongous imprisonment and wrongous apprehension, and there can be no doubt that the action, looking at the averments of the pursuer, is a perfectly relevant and well laid action. But there is a preliminary question which requires to be disposed of, and that is whether this action, which is quite a relevant and good action in itself, has not been brought too late. The Lord Ordinary decided that question in favour of the pursuers, but we have had an argument and a very able argument upon the construction of the 35th section of the Summary Procedure Act which if it be well founded excludes the action altogether as being brought too late. The imprisonment took place under an application or complaint presented to the Sheriff of the Lothians and Peebles at the instance of James Charles, master of the steamship "Tay" for the purpose of convicting the respondents in that complaint, and the pursuers of this action, of an offence under the Marine Shipping Company Act of 1854, and the 35th section of the Summary Procedure Act under which that complaint was presented provides that "every action or prosecution 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, the meaning of these words, I think, is not doubtful. Every action which is brought on account of anything done in any case instituted under this Act must be brought within two months. The complaint as it appears to me in the present case, at the instance of Mr Charles, and under which the reclaimer—acting as his adviser and concurring with him also as Procurator-Fiscal—is held to be answerable, was undoubtedly instituted under the Summary Procedure Act so far as form was concerned, because it is framed in precise accordance with the form given in the Schedule A No. 2 of the Summary Procedure Act, and there is no doubt that it not only was intended to be a complaint under the Summary Procedure Act but that in so far as form is concerned it was so. It might no doubt be that a thing professing to be and assuming the aspect of a complaint under the Summary Procedure Act might in substance be something quite different. But I do not think that can be said in regard to the present complaint, because it is a complaint which alleges an offence against the Merchant Shipping Act of 1884. It alleges that the parties complained against were engaged as seamen within the meaning of the Act of 1854 on board the steamship "Tay," and that they neglected or refused without reasonable cause to proceed to sea in said ship, which was then lying at Borrowstounness and ready and about to proceed to sea, contrary to the Act 17 and 18 Vict. cap. 104, section 243, sub-section 2.

Now, Mr Asher when the question was put to him could not dispute that that was a relevant allegation and an offence under the Merchant Shipping Act of 1854, and under the particular section and subsection therein libelled, and therefore it appears to me that it is very difficult indeed to say that this is not a case instituted under the Summary Procedure Act. It may contain conclusions or pray for penalties that are not warranted by the statute, but that does not affect the question whether it was instituted under the statute. It does allege that the parties complained against have become liable in consequence of their offence to imprisonment, and it prays for sentence of imprisonment accordingly. But that is not the only penalty craved, for it also prays for the forfeiture of wages, and in so far as that part of the prayer is concerned it is a perfectly good complaint under the Merchant Shipping Act, and therefore a good complaint under the Summary Procedure Act. It seems to be thought that the prayer for imprisonment so taints the whole complaint that it is impossible to give any legal effect whatever or to hold that it is brought under the Merchant Shipping Act of 1854 or the Summary Procedure Act, but that appears to me to be an entire mistake because it is provided in the 5th section of the Summary Procedure Act that all kinds of amendments may be made on such complaints, and I think there cannot be the least doubt that under the authority of that 5th section if this blunder of concluding for the penalty of imprisonment had been discovered when the complaint first came before the Sheriff, an amendment might have been at once suggested and made, striking out the application for imprisonment and leaving a perfectly relevant and good complaint after that had been struck out, so that I cannot entertain any doubt that this was a complaint instituted under the Summary Procedure Act, and as the action is undoubtedly an action on account of something done in such a case—that is to say, a case instituted under the Act—it falls within the meaning of the 35th section and cannot be brought after the lapse of two months.

I do not think it necessary to refer to any of the authorities that have been stated on this question, because I do not think any of them are applicable. I am not aware of any statute in which the words used in either requiring notice or in prescribing the terms within which the action must be brought are the same as they are in this 35th section. It appears to me that the words are very carefully selected in that 35th section, and are quite in accordance with the expressions used in other parts of the statute, and in particular in section 4 in which it is prescribed that all proceed-

ings for summary convictions or penalties which might 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." Now there the main word used is the same, "instituted"—instituted by way of complaint under this Act. The cases which have been cited under statutes have proceeded on terms of expression quite different from this, and therefore I do not think they have any application. I am therefore obliged to differ from the Lord Ordinary as regards this particular plea, and to hold that the action at the instance of the pursuer against Mr Henderson cannot now be insisted in, it having been brought more than two months after the injury complained of.

With regard to the other reclaiming-notes, there is one to which the same decision that I venture to suggest to your Lordships will also apply. I mean the case in which the Carron Company and Mr Charles, the master of the "Tay" steamship, are reclaimers.

The first and second issues in that case are not affected by the questions that I have given my opinion upon, because they complain of an apprehension of the pursuers before any proceedings were taken under the Summary Procedure Act at all—before an application or complaint was made to the Sheriff. In regard to the third and fourth issues, in that case they will be excluded if your Lordships agree with me as to the application of the 35th section of the Summary Procedure Act.

And then as regards the third case—the case in which Chalmers is reclaimer—the issue in that case being entirely an issue as to the wrongous apprehension before the complaint was instituted is not affected by the 35th section.

I should therefore be for sustaining the plea under the 35th section as regards the action against Mr Henderson, and as regards the third and fourth issues in the action against the Carron Company and Charles, and for adhering to the interlocutors of the Lord Ordinary *quoad ultra*.

LORD SHAND—I do not doubt that if there had been no clause in the Summary Procedure Act limiting the time within which actions on account of anything done in a case instituted under the Act might be brought, the pursuers of these three actions would have had a good claim or would have had a relevant claim of damages against Mr Henderson, the procurator-fiscal, and also against the captain of the vessel, Charles, and against the Carron Company, with reference to the proceedings which took place under the complaint presented to the Sheriff. There would have been a relevant complaint, and I rather go further and say, having now heard the argument on that subject, that I do not see that there would have been any answer to a claim of damages on the part of the pursuers as against these persons assuming that it was proved that Mr Henderson and the Carron Company initiated and carried on these proceedings as is alleged; but although that be so, I am of opinion with your Lordship that the action brought against Mr Henderson has been brought too late. The statute provides that claims of this class with reference to proceedings under the Summary Procedure Act shall be brought within two months from the date when the cause of action has arisen. That is a very useful and salutary provision. The alternative is that the right of action may subsist for many years, and the purpose of this clause is to compel parties, if they are to raise actions of this kind, to do so so long as the matters are entirely fresh in the minds of the parties, and evidence in pursuit and defence are quite available. But I am clear here that the clause excluding the action does apply. Your Lordship has read the clause, and its provision is this—that every action against any 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." This action is based on something said to have been done in a case, and in a case instituted under this Act. The simple question, I think, with reference to actions of this kind is this—is there a complaint of something done in a case instituted under the Summary Procedure Act? Now, with reference to that question I have only to say that I still adhere to the opinion expressed in the case of *Ferguson* v. *M'Nab*. Your Lordship has said that none of the cases which were referred to really apply to the present, and I entirely agree with that remark, excepting of course the two cases which have already occurred under this very statute—*Murray* v. *Allan* and the case of *Ferguson*, to which I have referred. In the case of *Ferguson* I ventured to say that if we find that a complaint has been framed and authorised by section 4 of the statute and the relative schedule, and the proceedings bear to be carried out under this statute, the adoption of that form of complaint marks the proceedings as being taken under the statute. In this case the proceedings were so adopted, and I think this case was marked as being adopted under the Summary Procedure Act. It occurs to me further to suggest, in addition to what I said in the case of *Ferguson*, that the best test of the question whether the complaint really was brought under the Summary Procedure Act is to apply to it the different provisions of sections 6, 7, and 8 of the statute. Section 5 gives a very much wider power of amendment than ever was given to any of the previously existing Acts. I cannot doubt that this complaint having been in the form in which it was these provisions would have applied to it. But they would only have applied to the complaint, because it was a complaint brought under the Summary Procedure Act. So under section 6 there were considerable powers given to the Sheriff which he had not before—a power which is the basis of the proceedings under

the statute to grant a warrant, or to refuse that and only give a warrant of citation. And so in regard to section 8, as to the execution of warrant, it authorises warrants under that statute to be executed by an officer of a class who could not, generally speaking, execute such warrants if they were not brought under the particular statutes to which the Summary Procedure Act was made applicable, so that I take it that this particular complaint was, if you look at the series of the provisions contained in the Summary Procedure Act, plainly a complaint brought under that Act, and if so, I can see no reason for holding that section 35 does not apply just as much as the other sections. It has been said that a case may occur or may be figured in which it will be found that although the words "under the Summary Procedure Act" are prefixed to the complaint, and the form of the complaint is in terms of the schedule, the privilege contained in the clause of limitations does not apply. I can only say for my part at this moment that I am not able to figure such a case unless it be a case of the kind suggested by Mr Asher, in which a person pretending to hold the office of Procurator-Fiscal, but having no right to the office or to prosecute in that way, thought fit to bring a complaint which he was not entitled to bring. But without saying that such a case may not occur I shall only say that it appears to me that in the general case if a complaint has the mark of being brought under the Summary Procedure Act, and the proceedings are followed out apparently in terms of that statute that an action arising from anything that takes place in such a case must be brought within the two months. And so I concur with your Lordship in thinking that the issue in the action against Mr Henderson, and the third and fourth issues in the action against the Carron Company and Mr Charles, must be disallowed.

In regard to the other issues, I think it is to be observed that the complaint there is not of anything done under the Summary Procedure Act. It is a complaint of unwarrantable apprehension, and is founded on common law, and in regard to the claim made under that head the question of limitation does not apply, and I concur with your Lordship in thinking the issue must be allowed.

LORD ADAM—The proceedings complained of in this action took place in the Sheriff Court under a complaint bearing to be brought under the Summary Procedure Act, and that complaint charged the respondents, the present pursuers, with having committed an offence contrary to the 243rd section of the Mercantile Amendment Act of 17 and 18 Vict. cap. 104. So far as I can see, the offence so charged against the pursuers was an offence which the Sheriff had perfect jurisdiction to entertain, and I do not understand that that has been disputed; but then it is said the complaint went on to aver that the respondents were liable to imprisonment for a period not exceeding ten weeks with or without hard labour, and so on, and for that it is said, and said truly, there was no warrant. As has been suggested by your Lordship, in accordance with a question put during the argument, supposing an application had been made to the Sheriff to delete these objectionable words, nobody doubts that the Sheriff could and might have ordered them to be deleted.

He had the power to order the deletion of these words presumably because he had jurisdiction over the case. If he had no jurisdiction he could not have made an interlocutor ordering it to be amended. Therefore that admits the Sheriff's jurisdiction. What, then, have we to deal with? A complaint brought before the Sheriff, who had sole jurisdiction to deal with it; and in course of dealing with the complaint before him a certain warrant was granted which it is said the Sheriff had no power to grant. Well, is not that something done in a case instituted under the Summary Procedure Act? I confess I cannot see any doubt about it. It seems just a proceeding under the Act and nothing else. If that is so, and I think it is clear that it is so, the Act says that any action brought with regard to such procedure must be brought within two months.

There is no cutting down of a person's rights for any injury done. It is simply limiting the time within which such an action should be brought, and I have no hesitation in agreeing with your Lordship that these proceedings are protected by the 35th section of the Act. It is not in the least necessary to say what action would or would not be protected by this clause, but I can see one thing that would. If it had been averred here that these proceedings were not *bona fide*, but were oppressive, or something of that sort, then it would not be within protection given by the Act, but this case is a *bona fide* case instituted under the Summary Procedure Act, and it is very difficult for me to see how it should not, or in what circumstances it should not be protected. I also concur with your Lordships in reference to the other issues.

LORD M'LAREN concurred.

In the action against Henderson the Court recalled the Lord Ordinary's interlocutor, sustained the plea for the defender first above noted, and assoilzied the defender. In the action against the Carron Company and Charles they sustained the same plea to the extent of disallowing the 3rd and 4th issues approved of by the Lord Ordinary, and *quoad ultra* they adhered. In the action against Chalmers they adhered.

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