behalf of the defender was that the pursuer was intending to abscond. That hardly enters into a question of relevancy, as the pursuer has not stated anything to show this, and we are not entitled to examine the statements of the defender. The pursuer is a sailor, and for some months before the arrest had been employed on board a vessel which made regular trips between Holland and this country. He was therefore only leaving this country in the regular course of his employment. Even if he had been going away altogether there is no evidence showing that there was no time to get a regular warrant for his apprehension before the ship sailed.

In all the circumstances I think that the pursuer has sufficiently stated a relevant case against the defender.

LORD YOUNG—I am of the same opinion. I must say I think the case is a clear one. It is a general rule of law, well defined and recognised, that no man or woman can in this country be deprived of his or her liberty without a warrant from a magistrate. There are certain exceptions to this rule. The Police Acts of large towns give large powers to police constables, one being to apprehend without warrant women known to be of bad fame importuning men upon the street; another being to apprehend without warrant men suspected of intention to commit crime, or persons caught in the act of transgressing the law. And under the common law anyone is entitled to apprehend and take to the police office without a warrant a person whom he finds committing crime against himself; and again a passer-by on the street is entitled to interfere and assist in taking into custody a person robbing another man. But the proposition here is, that a man who is charged with having obtained ten shillings and sevenpence upon false representations six months previous may be served by a sergeant of police or any other person without a warrant on board a ship which is his common place of business, and where he has been for the intervening six months; handcuffed; taken to Edinburgh and then to Falkirk, and locked up for the night in the police office without food or bed or cover of any description. This latter statement is said not to be true, but it is averred. The suggestion that it is not necessary in such circumstances to go before a magistrate and state a case, and ask him for a warrant to apprehend and lock-up—that this may be done by a policeman of his own act, or upon the instructions of a superior officer, is the most extravagant proposition I have heard submitted to this Court for a long time. It is utterly and absolutely illegal.

LORD RUTHERFURD CLARK—*Prima facie* the apprehension of the pursuer by the defender was illegal, and he is therefore entitled to raise the action. It may be that the defender can show at the trial that the apprehension was legal, but I think that he will have great difficulty in doing so.

LORD JUSTICE-CLERK—I have purposely said nothing on the point whether a police constable from one county is entitled to arrest a person in another county.

LORD TRAYNER was absent.

The Court adhered.

Counsel for the Pursuer — Salvesen — James Mackintosh. Agents — Snody & Asher, S.S.C.

Counsel for the Defender — Comrie Thomson — Dundas. Agents — Dundas & Wilson, C.S.

Friday, October 20.

FIRST DIVISION.

HARRIS *v.* HOWIE.

Trust—Removal of Trustee—Appointment of Judicial Factor.

A petition was presented for removal of the sole trustee under a will, on the ground that he had paid away part of the funds of the trust in discharge of a claim by the testator's father for the amount of advances alleged to have been made by him for his son's education at college, although there was no legal evidence of the validity of the claim.

The Court, without expressing any opinion as to whether there was sufficient legal evidence instructing the claim, *refused* to remove the trustee or appoint a judicial factor, in respect that it was not alleged that the trustee had paid the claim in *mala fide*, and that there was no reason to apprehend danger to the estate remaining in his hands.

Dr Howie died on 11th January 1884. He left a will whereby he appointed his brother John Howie to be his sole executor and universal disponee, and bequeathed him his whole estate and effects, but in trust always for the following purposes—(1) Payment of debts; and (2) that the income and part or whole of the capital of the estate should be applied for the maintenance and education of his (Dr Howie's) two daughters, Anne and Jeanie, in such shares and proportions as his trustee might think proper, and that if any balance remained at their majority or marriage, the same should be payable to them in equal shares, and that in the event of the decease of one, the balance should be payable to the survivor, whom failing his heirs whomsoever. The truster also nominated John Howie to be tutor and curator to his said daughters.

Dr Howie was survived by both his daughters. After his death his brother John Howie accepted the office of trustee and tutor and curator, and entered on the administration of the trust. Dr Howie's estate was given up as amounting to £736, and his daughters were also entitled at the date of his decease to a sum of £1500 from

the estate of their maternal grandfather. This latter fund was administered by John Howie along with the estate left by Dr Howie.

In June 1893 Dr Howie's daughters being then aged eleven and ten respectively, their aunt Miss Maggie Harris, with whom they had lived since their father's death, presented a petition craving the Court to sequestrate the trust-estate, to remove John Howie from the offices of trustee and tutor and curator, and to appoint a judicial factor.

The petitioner averred, *inter alia*—"It has been ascertained that some time after Dr Howie's death the said John Howie junior paid away to his father John Howie senior, out of the funds under his charge, as trustee and as tutor and curator, a sum of £175 or thereby in discharge of a pretended claim by the said John Howie senior for expenses of aliment and education alleged to have been incurred on behalf of the deceased Dr Howie, his son. The said John Howie senior was taken before a J.P., and swore to the correctness of his account, which was then paid." The petitioner also complained that the income hitherto received by her from John Howie for behoof of Dr Howie's daughters did not exceed £57, 10s. per annum, and that John Howie refused to increase this allowance, though, as she alleged, it was impossible to continue their upbringing on so small an expenditure. She expressed the belief that John Howie's conduct in refusing to increase the allowance for the children's maintenance was partly due to the fact that in the event of the death of the children, who were not in robust health, he would himself succeed to a considerable part of the estate under his charge.

John Howie lodged answers in which, *inter alia*, he averred—"In his early days Dr Howie, after being educated as a pupil teacher, desired to attend college and qualify himself as a doctor of medicine. As he was possessed of no funds, and his father, who was a builder in Alyth, was comparatively a poor man, it was arranged between them that Dr Howie should keep a pass-book, in which he was to enter all the advances made by his father towards his board and college expenses. Dr Howie did so—the advances, as shown by the pass-book, amounting to £183, 17s. 6d. When on his deathbed, Dr Howie sent for the respondent, whom he had appointed his sole trustee and executor, exhibited to him the pass-book, and charged him to repay out of his estate to his father the amount of the advances made by him. After the said John Howie senior filed an affidavit and claim before a Justice of the Peace for the above advances, and emitted an oath as to the correctness thereof, the respondent, acting on the instructions given by the deceased, paid the same. The pass-book, affidavit and claim are herewith produced and referred to." He submitted that the prayer of the petition should be refused.

The pass-book produced contained entries of sums received and expended by Dr Howie while he was at college. Various sums were entered as having been received from his father; other sums as received from other members of his family or from himself; while certain sums were entered merely as cash received, without any statement of the source from which they were derived. The father's claim included both the sums entered as received from him and also the sums entered merely as cash received.

Argued for the petitioner — Advances made by a father to a son for the son's education or to start him in life create no debt exigible from the son unless the son has granted a written obligation to repay the sums advanced—*Nisbet's Trustees* v. *Nisbet*, March 10, 1868, 6 Macph. 567. [Lord Kinnear—In *Williamson* v. *Allan*, May 29, 1882, 9 R. 859, it was laid down that a written acknowledgment by a son of the receipt of money from his father opened the door to the admission of evidence of the *animus* with which the money had been given by the father.] There was here no such writ under the son's hand as to instruct the claim made by the father. Apart from the fact that the parties stood in the relation of father and son, the writ here relied on was jottings in an account-book, and these were not sufficient to instruct a loan—*Wink* v. *Speirs*, March 23, 1868, 6 Macph. 657. Further, the sum paid to the father included sums which were not entered in the account-book as having been received from him. In paying the father's claim the respondent had sacrificed the interests of the estate in his charge, and had committed a breach of trust. A sufficient case had therefore been made out for the trustee's removal—*M'Whirter* v. *Latta*, November 15, 1889, 17 R. 68, *per* Lord Lee, 71. But if the Court thought it preferable they might adopt the course followed in a recent case, and sequestrate the estate without removing the trustee—*Stewart* v. *Morrison*, July 14, 1892, 19 R. 1009.

Argued for the respondent—Before the Court could grant this petition they must be satisfied that there had been distinct malversation on the part of the trustee—*Gilchrist's Trustees* v. *Dick*, October 20, 1883, 11 R. 22; *Taylors* v. *Horn and Others*, July 18, 1857, 19 D. 1097. But there was no allegation here that the payment complained of had been made dishonestly and not in *bona fide*, and the petitioner's case therefore failed. Further, the trustee had acted rightly in paying the father's claim, as it was a proper debt legally exigible from the son's estate. If the advances were to be treated as a slump transaction, the debt was sufficiently vouched under the son's hand, and if they were to be taken separately, they were mostly under £8, 6s. 8d. and parole proof was competent.

At advising—

Lord President—The petition contains a number of statements as to the administration of the trustee whom we are asked to remove, but attention has from the first been concentrated on one act of his

which is specially and strenuously challenged, namely, the payment of a sum of money as a debt due to the father of the deceased. It is important to observe that while the petitioner complains that the trustee's administration has resulted in a small annual sum only being available for the testator's children, at the same time she does not present any case to justify us in condemning the trustee for refusing to make advances for the children out of the capital of the estate. Up to the present the children have received from their father's estate and from another source about £60 per annum, and considering their tender age and moderate requirements it is not possible to condemn the trustee for exercising his discretion in the way he has done.

I pass on to observe that it does not appear to be part of the petitioner's argument that there is any substantial case of danger to the extant estate. Nothing is said about the circumstances or the general conduct of the trustee to cause any feeling of alarm as to the safety of the estate now in his hands. The only question therefore is, whether his action in paying the alleged debt was such that for the safety of the estate we should remove him or appoint a judicial factor? It is very important in a matter such as the payment of debt, that the petitioner does not go the length of asserting that the trustee acted fraudulently, or was party to a trumped up claim by the father of the deceased, whom it is suggested he might prefer to his nieces. The importance of such an averment would be so great, that in view of the fact that the petitioner has abstained from making it we must treat the case on the footing that she was not in a position to make it. The question therefore comes to be, whether the lax or too easy conduct of the trustee in making the payment complained of is a sufficient ground for removing him from the office of trustee. Taking the case in that light, it is certainly not the kind of case described by Lord President Inglis in the case of *Gilchrist's Trustees*, where he says—"In order to justify us in adopting so extreme a measure as the removal of a trustee, there must be something more than mere irregularity or illegality. We are not in the habit of removing trustees unless there has been a decided malversation of office." I do not think that on the story of the petitioner, especially as instructed and enlightened by the documents which have been founded on, there is any case of the kind described by Lord President Inglis. It may be the case that the debt was insufficiently instructed, and that the trustee lost part of the trust estate by too easily admitting the validity of the claim, but that is not enough to justify us in removing him from his office.

The alternative is that we should sequestrate the estate and appoint a judicial factor. That is a question which must be determined upon a consideration of the estate, and it is obvious that if we decided to grant sequestration the ratio of our judgment would be that an action might immediately be raised by the factor either to recover from the deceased's father the amount paid to him, or to force the trustee to pay that amount back to the trust estate. On the facts before us I am not going to say whether, if such an action were raised and came to be tried, our decision would be one way or the other. I can quite see that there are grounds on which the question might be canvassed whether there was legal evidence of the alleged debt, but the question we have to decide is whether we are to pledge the remaining £300 of the estate in a litigation for recovery of that portion which has been paid away, for if that were not done the sequestration would be nugatory. I do not think we should take that course, and I am moved largely to this conclusion by the fact that our decision does not in any way prejudice the question whether these children, when they come of age, may not, if so advised, try to get the money back. In short, we say nothing as to the propriety or otherwise of the payment in question.

I am therefore in favour of refusing the petition in both its branches, and I may repeat that in so doing we in no way prejudice the merits of the question regarding the payment made to the deceased's father.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court refused the petition.

Counsel for the Petitioner — Clyde. Agent—James Ayton, S.S.C.

Counsel for the Respondent — Shaw — Graham Stewart. Agents — Curror, Cowper, & Curror, W.S.

Thursday, October 26.

SECOND DIVISION.

BLAIR *v.* THE CALEDONIAN RAILWAY COMPANY.

Expenses—Fees to Counsel—Jury Trial—Discretion of Auditor.

In an account of expenses of a jury trial for damages for personal injury which lasted one day at the sittings, the Auditor reduced the fee of senior counsel from £21 to £13, 13s., and of junior counsel from £15, 15s. to £8, 8s.

Objections were lodged, on the ground that the Auditor had reduced counsel's fee below the sums which had been fixed to be the proper fees by decisions of the Court.

The Court *refused* to interfere with the Auditor's discretion.

This was an action for damages for personal injury. The case was tried at the July sittings 1893. The verdict was in favour of the pursuer. The defenders were found liable in expenses. When the case