Court must deal with cases which are not provided for in accordance with what appears to be the intention of the testator, as that may be gathered from the provisions which he has actually made. In the case which has occurred I agree with your Lordships for the reasons which you have stated, that in authorising the proposed payments we shall act in accordance with the truster's instructions.

The LORD JUSTICE-CLERK and LORD MONCREIFF were absent.

The Court found and declared in answer to the question put in the special case that the third parties thereto were entitled to pay to the first party a part of the residue of Mr Cairns' estate for the purposes specified in article 9 of the case, and also to make payment to the first party for the future or termly of an allowance out of the income of the estate during the survivance of the second party.

Counsel for the First Party—Salvesen, K.C.—Christie. Agents—Simpson & Marwick, W.S.

Counsel for the Second and Third Parties—Dundas, K.C.—Clyde. Agents—Smith & Watt, W.S.

Tuesday, February 19.

FIRST DIVISION.

[Lord Low, Ordinary.

PYPER *v.* INGRAM.

Fishings—Herring Fishery Acts—Trawling—Seizure of Nets before Conviction—Reparation—Privilege—Public Official—Orders of Superior—Malice and Want of Probable Cause—Herring Fishery (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 23), *sec.* 6 (1)—*Herring Fishery (Scotland) Act Amendment Act* 1890 (53 *Vict. cap.* 10), *sec.* 3.

The captain of a Government vessel, employed under the Fishery Board in the prevention of illegal trawling, informed the Board that he had detected a trawler at work within the prohibited limits. The Board instructed A, a fishery officer in Aberdeen, to seize the nets of the trawler in question on her arrival at that port, and A accordingly effected the seizure. A prosecution was instituted, but the charge was ultimately withdrawn. The owner of the trawler brought an action against A, concluding for damages for injury caused to the nets in consequence of the seizure, and for the loss of a day's trawling owing to the want of them. He did not aver malice or want of probable cause. It was held by the Lord Ordinary, after a proof before answer, and acquiesced in, that the trawler had not been proved to have been fishing within the prohibited limits on the occasion on which she was sighted by the cruiser. *Held* (1) (*affirming* judgment of Lord Low, Ordinary, but on different grounds) that section 3 of the Herring Fishery (Scotland) Act Amendment Act 1890 (which is substituted for sub-section 3 of section 6 of the Herring Fishery (Scotland) Act 1889) authorised the seizure of a trawler's nets before a conviction for illegal trawling had been obtained against him; and (2) (*reversing* judgment of Lord Low) that malice and want of probable cause being neither averred nor proved against A, he was not liable, and that he was entitled to absolvitor.

The Herring Fishery (Scotland) Act 1889 (52 and 53 Vict. cap. 23) enacts (section 6 (1))—"It shall not be lawful to use the method of fishing known as beam-trawling or other trawling within three miles of low-water mark of any part of the coast of Scotland." The Herring Fishery (Scotland) Act Amendment Act 1890 enacts (section 3)—"The third sub-section of the sixth section of the Herring Fishery (Scotland) Act 1889 is hereby repealed, and in place thereof the following provision shall have effect—Any person who uses any method of fishing in contravention of the sixth section of the Herring Fishery (Scotland) Act 1889, or of any bye-law of the Fishery Board duly confirmed, shall be liable, on conviction under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding one hundred pounds . . . and every net set, or attempted to be set, in contravention of this section shall be forfeited, and may be seized and destroyed, or otherwise disposed of by any superintendent of the Herring Fishery or other officer employed in the execution of the Herring Fishery (Scotland) Acts."

On 23rd November 1898 the commander of the cruiser "Brenda," employed by the Fishery Board for Scotland in the detection of illegal trawling, intimated to the Fishery Board that he had detected the "North Star" trawling within the three-mile limit. On 25th November the following telegram was received from the Board by James Ingram, Fishery Officer, 7 Crown Terrace, Aberdeen—"'North Star' A 393, detected trawling in territorial waters by 'Brenda.' Please to take steps to seize and store port trawling gear on arrival of trawler." In obedience to this telegram Ingram took possession of the nets and gear on the arrival of the trawler at Aberdeen.

On 2nd December John Lyon, captain of the "North Star," was served with a complaint under the Herring Fishery Acts, charging him with illegal trawling on the occasion in question. This charge was ultimately withdrawn.

William Pyper, owner of the "North Star," brought an action against Ingram, concluding for payment of £48, 19s. 10d. as damages (1) for injury done to the nets in consequence of the seizure, and (2) for the loss of a day's trawling owing to the want of them. He averred that the seizure was made wrongfully, illegally, and unwarrantably, and that in consequence thereof the nets

were spoiled and rendered useless. He further averred that he had been detained in Aberdeen for one day until new gear was obtained, and had thereby lost one day's fishing with a resulting loss, which he estimated at the sum of £10, 15s. There were also averments that Ingram had failed to use proper care in the stowage of the nets after their seizure, but these were not insisted in. He did not aver malice or want of probable cause.

Ingram lodged defences, in which he averred that the "North Star" had been engaged in illegal trawling on the occasion when she was sighted by the "Brenda." He referred to the sections quoted above, and to section 11 of the Sea Fisheries Act 1883.

He pleaded, *inter alia*—"(1) The action is irrelevant. (2) The seizure complained of having been made by the defender in virtue of the statutory powers referred to on record, pursuer's claim for damages is unfounded. (3) The defender having acted in good faith and on reasonable information and without malice in the execution of the duties of his office, he is entitled to absolvitor, with expenses. (4) The seizure complained of having been lawfully made, the defender should be assoilzied."

On 23rd November 1899 the Lord Ordinary (Low) allowed a proof before answer.

Opinion.—"The first question which was argued is, whether a fishery officer is justified in seizing a net under the third section of the Herring Fishery (Scotland) Act 1890, unless the owner of the net has been convicted of contravening the sixth section of the Herring Fishery (Scotland) Act 1889, which prohibits trawling within the three-miles limit.

"The third section of the Act of 1890 provides that any person who contravenes the sixth section of the Act of the previous year 'shall be liable, on conviction under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding one hundred pounds . . . and every net set or attempted to be set in contravention of the said section, shall be forfeited, and may be seized and destroyed or otherwise disposed of by any superintendent of the herring fishery or other officer employed in the execution of the Herring Fishery (Scotland) Acts.'

"I am not prepared to say that a net can never be lawfully seized under that enactment unless there has been a previous conviction. I think that a contravention of the sixth section of the Act of 1889 could not be established unless it was proved that the accused had actually fished, or (to use the words of the enactment which I have quoted) set his net, within the prohibited area. A net, however, may be seized if it has been 'attempted to be set,' although something may have happened to prevent its actually being set.

"Whether, however, that view is sound or not, it is plain that the Act gives no warrant for the seizure of a net unless it has been either set or attempted to be set within the prohibited area, and if the pursuer's averments are true, as they must be assumed to be at this stage, his net was seized without any warrant.

"The defender, however, pleads that the pursuer's averments are irrelevant, because malice is not averred. That plea is founded upon the general rule that an action against a public officer for something which he has done in the execution of his duty will not be sustained unless malice is sufficiently averred. But that rule does not apply to the case of a public officer acting altogether outside the scope of his duty, or, while ostensibly acting in the execution of his duty, doing that for which he has plainly no warrant. In such cases it is not necessary to aver malice—*Bell* v. *Black & Morrison*, 3 Macph. 1026; *Pringle* v. *Bremner & Stirling*, 5 Macph. (H.L.) 55.

"In this case I am of opinion that it was not necessary for the pursuer to aver malice. The defender is an officer acting under certain statutes, and with no powers except those which are conferred by the statutes; and, as I have already pointed out, if the pursuer did not set, or attempt to set, his net within the three-miles limit, there was absolutely no warrant for seizing it.

"The defender also appealed to a statutory protection which he says is applicable to his case, that, namely, contained in the fifty-ninth section of the Herring Fishery Act 1808. It is there provided that no officer 'acting in the execution of the provisions of this Act . . . shall be liable to any action, suit, or prosecution for or by reason of any act, matter, or thing done in the execution of his office, and for the carrying of the provisions of this Act into execution, . . . and not done by him maliciously.' Assuming that the defender is entitled to claim the benefit of that protection, I do not think that it aids him, because it seems to me that an act for which there was no statutory warrant could not be regarded as 'a thing done for the carrying of the provisions of the Act into execution.'

"It was also argued for the defender that, as he only acted in obedience to orders which he received from his superiors, he cannot be held liable. Now, the orders which the defender alleges he received are not admitted, and in any view they would require to be proved; but as at present advised, I do not think that the pursuer has any concern with the instructions under which the defender acted, but is entitled to sue the defender as the person by whom the wrong was committed.

"I am therefore of opinion that there must be inquiry in this case, but I think that it is safer to make the proof before answer."

Proof was led, which was mainly devoted to the question whether the "North Star" had or had not been trawling within the three-mile limit on the occasion in question. On this point the Lord Ordinary held that illegal trawling had not been proved, and the case was argued in the Inner House upon the footing that his Lordship's judgment on this point was correct.

On 17th April 1900 the Lord Ordinary pronounced the following interlocutor:—"Decerns against the defender for payment to the pursuer of the sum of £38, 4s. 10d.

sterling, in full of the conclusion of the summons, with interest thereon as concluded for," &c.

Opinion.—"The proof which was allowed in this case was before answer, and accordingly certain questions which were previously discussed in the procedure roll have again been very fully argued, and as the case is of some importance, it is right that I should state the opinion which I have formed although it is the same as that which I indicated when allowing a proof.

"The first question is, whether seizure of a net is competent unless there has been a conviction? The question is one of difficulty owing to the want of precision in the statutory provisions.

"By section 6, sub-section (1), of the Herring Fishery (Scotland) Act 1889 it is provided that it shall not be lawful to use the method of fishing known as beam trawling or otter trawling within three miles of low- water mark off any part of the coast.

"By sub-section (3) of the section it is provided that 'Any person who uses any method of fishing in contravention of this enactment shall be liable, on conviction under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding five pounds for the first offence, and not exceeding twenty pounds for the second or any subsequent offence; and every net set or attempted to be set in contravention of this section shall be forfeited, and may be seized and destroyed, or otherwise disposed of by any superintendent of the herring fishery or other officer employed in the execution of the Herring Fishery (Scotland) Acts.'

"That sub-section was repealed by the third section of the Herring Fishery (Scotland) Act Amendment Act 1900, and another section substituted. The new clause only altered the provisions of the repealed clause to the effect of substituting for the fines of £5 and £20 a fine not exceeding £100, and failing immediate payment of the fine imprisonment for a period not exceeding sixty days. The new clause was in other respects (including the provision in regard to seizure of nets) just a repetition of the repealed clause.

"Now, I should have thought that forfeiture of the net was one of the penalties to follow upon conviction if it had not been for the words 'or attempted to be set.' The only charge which could be made under the section would be of using the method of fishing known as beam trawling or otter trawling within the prohibited area, and it is plain that in order to justify a conviction under such a charge it would be necessary to prove that such method of fishing had actually been used, or in other words that the trawl net had been set. If it turned out that the accused had attempted to set the net, but had been prevented from actually setting it, there could be no conviction, because however evil his intention he could not in that case be said actually to have used any method of fishing whatever.

"The statute might have made an attempt to set a net within the prohibited area an offence, for which upon conviction the penalty was to be forfeiture of the net attempted to be set. But that course has not been adopted. The statute does not declare that it shall not be lawful to attempt to set a net within the prohibited area, and it seems to me that a complaint libelling a mere attempt to set a net would be irrelevant.

"I therefore think that the clause forfeiting the net and giving authority to seize it must be regarded as conferring a power separate from and independent of a prosecution for and conviction of a contravention of the Act, and as being a statutory declaration that a net either set or attempted to be set within the prohibited area shall be thereby forfeited and liable to seizure.

"Reference was also made to the provisions of the Sea Fisheries Regulation (Scotland Act 1895. By section 10, sub-section (1), of that Act it is enacted that the Fishery Board may by bye-laws 'direct that the method of fishing known as beam trawling and otter trawling shall not be used in any area or areas' within thirteen miles of the coast. By sub-section (4) it is provided that any person who uses any method of fishing in contravention of such bye-laws shall be liable in a fine not exceeding one hundred pounds, and failing payment to imprisonment for a period not exceeding sixty days, 'and every net set or attempted to be set in contravention of any such bye-law may be seized and destroyed or otherwise disposed of by any superintendent of herring fishery or other officer employed in the execution of the Herring Fishery (Scotland) Acts: Provided always that if no conviction shall follow, any net so seized shall be forthwith returned, and due compensation made for any loss or damage occasioned thereto by such seizure.'

"I think that it is competent to consider that Act, because the 10th section of it, the 6th and 7th sections of the Act of 1889, and the amending Act of 1890, deal with beam and otter trawling, and form the statutory code on that subject.

"It is plain that one object of section 10 of the Act of 1895 was to make the penalty the same in all cases in which trawling was carried on within a prohibited area. There are four separate prohibited areas contemplated in the Acts of 1889 and 1895. Section 6 of the Act of 1889 deals with the three-miles limit, and also with certain sea lochs and bays; section 7 of the same Act deals with the area within a line drawn from Duncansby Head to Rattray Point; and the Act of 1895 contemplates (I understand it has never been put into force) the defining of certain areas within thirteen miles of the coast.

"Now, the penalty for contravening the provisions of the 7th section of the Act of 1889 (which was dealt with by subsection (2) of that section) was the same as that provided by section 6, and the same power to seize nets was given. The Act of 1890 increased the penalty for a contravention of section 6 of the Act of 1889, but did not alter the penalty under

section 7 of that Act. By sub-section (5) of section 10 of the Act of 1895, however, sub-section (2) of section 7 of the Act of 1889 was repealed, and it was provided that the provisions of sub-section (4) of section 10 of the Act of 1895 should be substituted therefor. I have already pointed out that the penalty in the latter sub-section is the same as that provided in the Act of 1890. The result therefore was to make the penalty for illegal trawling the same, whether the contravention was of the 6th section or of the 7th section of the Act of 1889, or of the 10th section of the Act of 1895.

"The penalties for contravention being thus made the same in all cases, I know of no reason why there should be a difference in regard to the power of seizing nets; and if I am right in the view which I have expressed as to the construction of section 6, sub-section (3), of the Act of 1889, there is no difference in this respect, that in every case power is given to seize a net which has been illegally used or attempted to be used, although there has been no conviction.

"It is true that there is still this distinction that, in a case under the 7th section of the Act of 1889, or under the Act of 1895, there is no declaration of forfeiture; and it is provided that, if no conviction shall follow, 'the net so seized shall be forthwith returned' (although apparently it may be destroyed in the meantime) and compensation made for any loss occasioned; while under section 6 of the Act of 1889 the net is declared to be forfeited, and nothing is said about returning the net or making compensation. I do not know whether any distinction was intended or not. I see no reason, however, for any distinction, and my impression is that none was intended, and that the distinction which remains is the result of an oversight. But however that may be, I am of opinion, for the reasons which I have given, that there is not the distinction contended for by the pursuer, but that in all cases a net may be seized although there has been no conviction.

"It was further argued most strenuously for the defender, that being a public officer acting in the execution of his duty, he could not be found liable in damages unless malice was established. If malice is necessary, it is plain that the pursuer cannot succeed. The Fishery Board received a letter from the commander of the Government boat 'Brenda' that he had found the 'North Star' trawling within the three-mile limit, and the Fishery Board thereupon instructed the defender to seize her net. The defender accordingly carried out these instructions, as he was bound to do, and in doing so he appears to have endeavoured to study the convenience of the owners of the trawler as much as it was in his power to do. There was therefore clearly no malice.

"I remain, however, of the opinion which I previously indicated, that it is not necessary in this case that the pursuer should prove malice. The power conferred by the statute upon a fishery officer to seize a net (if I have interpreted aright) is a very large power, and one which, from considerations of public interest, authorises what would otherwise would be a serious encroachment upon the rights of private property. The condition upon which the power is given is that the net shall have been 'set or attempted to be set' within the prohibited area. If that condition is not in fact fulfilled, a fishery officer has no more right to seize a net than anyone else. The statutory warrant depends upon the existence of the fact, and if the fact does not exist there is no warrant. The distinctions which have been drawn in actions against public officers between cases in which it is necessary to prove malice and want of probable cause and cases in which it is not necessary to do so are somewhat subtle. The cases in which difficulty has been felt have, however, mostly been in regard to officers—like constables of police—who have duties of a general and continuing character to perform, and who in the execution of their duty have made a mistake. In such cases the officer is not in the general case liable, unless he has acted maliciously. But where that which is complained of consists of one act, not done as part of a routine of general duty, but requiring a special warrant, it seems to me that the only question is, Had the officer that warrant? If he had not the warrant, then he has done that which he had no right to do, and he is in no way privileged.

"I may refer to the case of *Bell* v. *Black & Morrison*, 3 Macph. 1026. In that case a procurator-fiscal had obtained and put in force a warrant from the Sheriff to search the house of John Bell, farmer, for documents and all other articles tending to establish Bell's participation in a crime with which he was not charged. There seems to have been no reason to suppose that the procurator-fiscal had not acted in good faith, but in an action of damages against him at the instance of Bell it was held that it was not necessary to allege and put in issue malice and want of probable cause. It was held that the warrant was one which the Sheriff had no power to grant, and the Lord Justice-Clerk (Inglis) said, 'Whenever that is the case, the party putting such warrant into execution is liable for the consequences. In this a procurator-fiscal is no more privileged than any private person.' It seems to me that the principle there laid down is applicable here.

"I now come to the question of fact, upon the answer to which it seems to me that the pursuer's case depends—the question, namely, Whether the 'North Star' was or was not found trawling within the three-miles limit?

[*His Lordship then dealt with the evidence, finding it not proved that the "North Star" was within the three-mile limit.*]

"In regard to the amount of damages, I think that it is proved that the warp and the net were destroyed for fishing purposes by the way in which they were stored; and that being so, it is not disputed that the amount claimed by the pursuer—£38, 4s. 10d.—is reasonable. The pursuer

also claims £10, 15s. for the loss of a day's trawling. I do not think that that claim is proved, because the weather was so stormy on the day of the seizure that I think that it is more than doubtful whether it would have been possible to fish. Some vessels seem to have put to sea upon that day, but there is no evidence that any trawlers were able to fish.

"I shall therefore give decree for £38, 4s. 10d."

The defender reclaimed, and argued—Taking the case on the assumption that the "North Star" was not guilty of illegal trawling, two questions arise—(1) Was the seizure of the net authorised by the statute? (2) Was the pursuer liable in damages? (1) On this point the Lord Ordinary was right, though he might have rested his decision on broader grounds. Though the point was not expressly dealt with in the Act, it was clear that the power to seize the net must mean a power to seize it at the time of apprehension. The procedure was that the cruiser, when a trawler was found at work within the three-mile limit, brought her into port. If there was no power to seize the net, then the statute was unworkable, because once the trawler had left the port to which she was brought on apprehension, she might never be found again. Even if there was no special power in the Act, the defender, as an officer engaged in the execution of the criminal law, was entitled to seize the net, on the same principle that entitled a constable to seize stolen goods to be used as productions at the trial. (2) The defender here was acting in the course of his duty, under instructions which he was bound to obey. Therefore, whether he was or was not empowered by the statute to seize the net, he was privileged in doing so, and no action of damages would lie against him unless malice and want of probable cause were averred.—*Rae* v. *Linton*, March 20, 1875, 2 R. 669; *Beaton* v. *Ivory*, July 19, 1887, 14 R. 1057; *Macaulay* v. *School Board of North Uist*, November 26, 1887, 15 R. 99; *Goschen* v. *Raleigh* [1898], 1 Ch. 73; *Poll* v. *Lord Advocate*, March 16, 1899, 1 F. 823. In a recent case, an issue against a police constable for acts done in the course of his duty was refused, even although malice and want of probable cause were averred. — *Malcolm* v. *Duncan*, March 17, 1897, 24 R. 747. The fishery officer here was really a constable of the sea, and entitled to a similar protection. The cases of *Bell* v. *Black & Morrison*, July 28, 1865, 3 Macph. 1026, and *Pringle* v. *Bremner & Stirling*, May 6, 1867, 5 Macph. (H.L.) 55, on which the pursuer relied, were quite unlike the present; they were cases of an officer acting without a proper warrant in matters in which a warrant was necessary.

Argued for the respondent—(1) On the proper construction of section 3 of the Herring Fishery (Scotland) Act 1890, *quoted supra*, forfeiture of the net was only competent after conviction. Had anything else been intended, there would have been a provision for compensation, as in section 10 of the Sea Fisheries (Scotland) Act 1895, quoted in the opinion of the Lord Ordinary. (2) The pursuer was not concerned with the question whether the defender acted under instructions from the Fishery Board or not. The question really was—Had he any authority, statutory or at common law, to seize the nets? If he had not, he was liable in damages, whether he acted under instructions or not. Assuming the respondent's argument on the first point to be correct, it was obvious that he had no statutory power of seizure. Nor had he any power at common law. No doubt certain public officers, such as sheriffs and police constables, had a large measure of protection, but the reason was that they were entrusted at common law with large discretionary powers. But a fishery officer was not a police constable, and had not the same discretionary powers. He was appointed to carry out the provisions of certain statutes, and if he did what these statutes did not authorise, he had no more protection than any private individual. He was acting without a warrant, and, on the principle of *Bell* v. *Black & Morrison* and *Pringle* v. *Bremner & Stirling*, both cited *supra*, he was liable in damages whether he acted maliciously or not. Even if it were held that the seizure of the nets was legal, still the defender was liable. It was, of course, not argued that the statute gave any power of forfeiture without a conviction. If not, the nets must be restored, and the defender was liable for any damage they had sustained. His protection must be looked for in the statutes on the subject, and they gave him none.

At advising—

LORD PRESIDENT—On the night of 22nd November 1898 the "North Star," a steam trawler belonging to the pursuer, was trawling off the Aberdeenshire coast, and shortly after midnight she was sighted by the Fishery Board cruiser "Brenda." The persons on board the "Brenda" allege that the "North Star" was trawling within three miles from the coast, but this was denied by the persons on board the "North Star," and after a proof of considerable length, the Lord Ordinary held that it had not been proved that at the time in question the "North Star" was trawling within the prohibited area.

The defender did not impugn this conclusion before us, but took the case upon the assumption that illegal trawling had not been established. So taking the case, two questions arise, both of which were fully argued—(First) whether it is lawful, under the Scottish Sea Fishery Acts, to seize trawl-nets prior to conviction of illegal trawling; and (second) whether, assuming seizure prior to conviction to be authorised by the Act, a Fishery officer, who, in obedience to orders from the Fishery Board, has, prior to conviction, seized a net belonging to a trawler, is liable in damages to the owner of the net for doing so where no conviction is afterwards obtained, or it is not proved in some other action or proceeding that the trawler

was trawling within the prohibited area. The Lord Ordinary has answered both of these questions in the affirmative.

The first question depends upon certain statutory provisions to which I shall now advert.

By the Herring Fishery (Scotland) Act 1889 (52 and 53 Vict. cap. 23), sec. 6, sub-sec, 1, it is declared that "It shall not be lawful to use the method of fishing known as beam trawling or otter trawling within three miles of low-water mark of any part of the coast of Scotland." Subject to certain provisos not material to the present question, it is by sub-section 3 of section 6 declared that fishing in contravention of that enactment shall infer certain penalties. I do not read that sub-section because it was repealed by the Herring Fishery (Scotland) Act Amendment Act 1890, and a new sub-section in the following terms was substituted for it:—"Any person who uses any method of fishing in contravention of the Herring Fishery (Scotland) Act 1889, or of any bye-law of the Fishery Board duly confirmed, shall be liable on conviction under the Summary Jurisdiction (Scotland) Acts to a fine not exceeding £100, and failing immediate payment of the fine, to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment if no imprisonment has followed on the conviction; and every net set, or attempted to be set, in contravention of this section shall be forfeited, and may be seized and destroyed, or otherwise disposed of, by any superintendent of the herring fishery, or other officer employed in the execution of the Herring Fishery (Scotland) Acts." The question under this section is, whether, as the pursuer maintains, a net can be seized only after conviction, or whether, as the defender contends, it can be seized prior to conviction.

While I agree in the conclusion at which the Lord Ordinary has arrived on this part of the case, I am unable to concur in the reasons for which he has reached that conclusion. He says that he would have thought that forfeiture of the net was one of the penalties to follow upon conviction if it had not been for the words "attempted to be set," that the only charge which could have been made under the section was of using the method of fishing known as beam trawling or otter trawling within the prohibited area, and that it is plain that in order to justify a conviction under such a charge it would be necessary to prove that such method of fishing had actually been used, or in other words that the trawl-net had been set. Differing from the Lord Ordinary, I think that the statutory offence might be committed not only by the net being actually set, but by its being attempted to be set. The offence is, as already stated, created by section 6 (1) of the Act of 1889, which declares that "It shall not be lawful to use the method of fishing known as beam or otter trawling within three miles of low-water mark of any part of the coast of Scotland;" it is not declared that the offence shall consist in setting the net, and "the method of fishing known as beam or otter trawling" might in my view be "used" by throwing the trawl overboard and attempting to set the net, although it might not actually have reached the bottom of the sea or got into a proper fishing position there. To require a prosecutor to prove the latter proposition would be to ask him to discharge an *onus* which it would be almost impossible to discharge unless the net was hauled up and found to contain fish. The words of section 3 of the Act of 1890 already referred to are—"any person who uses any method of fishing in contravention of the 6th section of the Herring Fishery (Scotland) Act 1889," shall be liable to the penalty therein mentioned, and attempting to set a net appears to me to be using a method of fishing in contravention of that enactment. This view is confirmed by the declaration in the same section that "every net set, or attempted to be set, in contravention of this section shall be forfeited," &c. This seems to me to show plainly that an attempt to set a net would be a contravention of the section.

Taking this to be so, I think that by force of section 3 of the Act of 1890 the net is forfeited *vi statuti* when the offence is committed, and that it may be seized prior to trial or conviction. It is true that the forfeiture is only effective if the commission of the offence is established, but the effect of the failure to prove the offence when it was believed upon probable grounds that it had been committed will be afterwards considered.

I may add that any other construction of the Act would lead to its becoming almost a dead letter, seeing that if the net could not be seized at the time of the illegal fishing, it could not in many, probably in most cases, ever be seized at all. The trawler might go away, never returning to the locality, or if found there on a subsequent occasion, it might deny that it had the same trawl on board as it had at the time of the illegal fishing, and might decline to say where the trawl then in use was. It seems to me that the Act should be so construed as to make it effective for its declared purpose if the language employed in it will reasonably bear a construction which will accomplish this result.

The pursuer maintained that even assuming that the defender was entitled to seize the net, he was not entitled to seize the warp, which the pursuer contends is not a part of the net. It appears to me, however, that this contention is not well-founded, as the warp is an essential part or adjunct of the net when it is in fishing condition. Further, the defender was specially ordered by his official superiors to take the warp.

I arrive at these conclusions upon a consideration of section 3 of the Act of 1890, taken along with the provisions of the Act of 1889, independently of any inferences arising from section 10, sub-section 1, of the Sea Fisheries Regulation (Scotland) Act 1895, upon which the Lord Ordinary's opinion on this part of the case is to some

extent based. In that sub-section there is no provision for the statutory forfeiture of the net, although it may be seized, destroyed, or otherwise disposed of by the Superintendent of Fisheries, and it is also provided that if no conviction shall follow the net so seized shall forthwith be returned, and due compensation made for any loss or damage occasioned thereto by the seizure. This section does not apply to the present case, as it is directed against fishing in contravention of bye-laws, which by sub-section 1 of section 10 of the Act of 1895 the Fishery Board is authorised in certain events to make, but which have not as yet been made. The provision for paying compensation for damage caused by seizure must necessarily refer to seizure prior to trial, as it is in the event of no conviction following that the net seized is directed to be returned and due compensation made for the loss or damage occasioned to it by the seizure. While I doubt the competency of referring to this section for the present purpose, it would, if it could be competently referred to, support the conclusion at which I have arrived upon the independent grounds already stated, that a net may be seized prior to conviction.

The second question is, whether assuming the seizure of a trawl-net prior to conviction to be lawful, the defender is liable for the damage alleged to have been done to the port-trawl-net of the "North Star" which was seized by him, and for the loss of a day's fishing; and in considering this question it is necessary to advert to the official position held by the defender, and to what he did with reference to the seizure of the net.

When the commander of the "Brenda" saw the "North Star" trawling as he believed within the three-mile limit, it was his duty to report, and he did report, to the Fishery Board for Scotland what he had thus seen, and that Board, on 25th November 1898, sent to the defender a telegram in the following terms:—"'*North Star*,' A. 393, detected trawling in territorial waters by 'Brenda.' Please take steps to seize and store port-trawling gear on arrival of trawler." The defender is senior Fishery Officer at Aberdeen. He is, I understand, a British Sea Fishery Officer, acting under section 11 of the Sea Fisheries Act 1883 appointed by the Board of Trade, and he is a Fishery officer under the Fishery Board, having all the powers and privileges of a superintendent of the herring fishery. Acting upon the instructions conveyed by the telegram, with which, as an officer under the Board he was bound to comply, the defender took possession of the port trawling-gear, including the trawl warp of the "North Star," on her arrival at Aberdeen on 1st December 1898. The trawling gear was put by the defender into a store on 2nd December 1898. The master of the "North Star" was served with a complaint at the instance of the Procurator-Fiscal charging him with trawling within the prohibited area, but he was not actually brought to trial.

From what has been already stated, it is clear that the defender had nothing to do with reporting the alleged illegal trawling to the Fishery Board, or with the decision of that Board that the trawling gear should be seized. He simply acted in obedience to the orders of the Board, which he was bound to obey, without having the power to exercise any judgment with regard to whether the trawling gear should be seized or whether it should be kept, but the Lord Ordinary is nevertheless of opinion that the pursuer is entitled to claim damages from him without proving malice or want of probable cause, neither of which things is alleged by the pursuer. His Lordship says that the condition of the power of seizure is that the net shall have been "set or attempted to be set" within the prohibited area, and that if that condition is not fulfilled a Fishery official has no more power to seize the net than anyone else. It is not easy to reconcile this view with the opinion of the Lord Ordinary that it was lawful to seize the net prior to trial. If it was lawful to do so (and I think for the reasons already given that it was), the action of the Fishery Board and their officer must have been determined by the information possessed prior to the trial, and if that information made the seizure reasonable, in other words if there was probable cause for it, the propriety of what the officer did by direction of the Board could not be affected by the prosecution either being abandoned or failing. Further, it is to be observed that the defender had neither the duty nor the right to inquire into the facts; he was bound to obey the orders of the Fishery Board. I am not aware of any case in which it has been held that a person so situated was liable to an action of damages unless malice and want of probable cause were alleged and proved. His Lordship refers to the case of *Bell* v. *Black and Morrison*, 3 Macph. 1026, but in that case the joint procurator-fiscals (defenders) applied for, obtained, and put in force an illegal warrant. It was held that the Sheriff had no power to grant the warrant, but the procurator-fiscals had asked and obtained it, and in these circumstances the responsibility for its being obtained and put in force rested upon them. It seems to me that that case, and all the others in which public officials have been held liable, are essentially different from the present, where the defender had nothing to do either with initiating the proceedings or deciding to seize the net. It would be a singular result if such an officer, in order that he might safely perform his duties, was bound to require evidence first of the fact that the trawling had been within the prohibited area, and second, that it was proper that the net should be seized, but there is no indication in any of the statutes that a Fishery officer is either entitled or bound to enter upon any such inquiries before he obeys the order of his official superiors, who, he was entitled and bound to assume, had satisfied themselves that the circumstances requisite to justify the act could be proved before they gave him

the order. There was not in this case any departure by the defender from the duties of his office or any mistake in performing these duties. The decision in the case of *Macaulay* v. *North Uist School Board*, 15 R. 99, appears to me to have a very direct bearing upon the present case. A father had been convicted of failure to educate his children, upon a complaint by the compulsory officer of a school board, and in default of payment of a fine was sentenced to three days' imprisonment, and was imprisoned accordingly. The conviction was quashed by the High Court of Justiciary on the ground that neither a certificate under the Act of 1872, nor a sufficient attendance-order under the Act of 1883, had been produced to the Sheriff-Substitute. The father then brought an action of damages against the school board, but did not set forth specific averments of malice. It was held that the error having been committed by a public board in the performance of its duty, it was necessary for the pursuer to set forth malice, and as he had not done so, the action was dismissed as irrelevant. This case seems to show that an action could not have been maintained against the Fishery Board for giving the instructions which they gave to the defender, seeing that they were (in the words of Lord Rutherfurd Clark) in that case, "acting in the exercise of what they believe to be their statutory powers." The Lord Ordinary says in this case:—"The condition upon which the power 'to seize a net' is given is that the net shall have been 'set or attempted to be set' within the prohibited area. If that condition is not in fact fulfilled, a Fishery officer has no more right to seize a net than anyone else." The first part of his statement is quite true, but it is no more true than it is that the production of a certificate or an attendance-order is a condition-precedent to a prosecution under the Education Acts. Still, because the School Board of North Uist acted in good faith, though without the statutory conditions-precedent, they were held not liable in damages, in the absence of a proper averment of malice, and from this judgment it seems to me to follow that the defender is not liable, when neither malice nor want of probable cause is either alleged or proved against him. If the action of the Fishery Board in giving the order was privileged, I think that it follows *a fortiori* that the action of the defender in obeying it must also be privileged. The case of *M'Pherson* v. *M'Lennan*, 14 R. 1063, may also be referred to, and the case of *Malcolm* v. *Duncan*, 24 R. 747, affords an illustration of the privilege possessed by a police officer acting under the instructions of his superior officer. I am therefore of opinion that there is nothing in the present case to displace the general rule that although a public officer may have committed an error in the discharge of his duty, he cannot be made responsible without an allegation and proof of malice and want of probable cause, especially when the error (if there was an error) was not his, but that of some other person whom he was bound to obey.

In this connection I may refer to 48 Geo. III. cap. 110; 23 and 24 Vict. cap. 92, sec. 3; 46 and 47 Vict. cap. 22, sec. 14; and 58 and 59 Vict. cap. 42, sec. 19 (4), which seem to show that such officers as the defender were intended to have the powers and immunities of constables. With reference to sec. 14 of the Act of 46 and 47 Vict. cap. 22, it is proper to point out that sections 268 to 272 of the Customs Consolidation Act 1876 (39 and 40 Vict. cap. 36) were repealed by the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61).

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be recalled, and that the defender should be assoilzied.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN, having been absent at the hearing, gave no opinion.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defender from the conclusions of the action.

Counsel for the Pursuer and Respondent — Guthrie, K.C. — W. Brown. Agents — Alex. Morison & Co., W.S.

Counsel for the Defender and Reclaimer —Sol.-Gen. Dickson, K.C.—C. N. Johnston. Agents—Carmichael & Miller, W.S.

Wednesday, February 20.

FIRST DIVISION.

[Lord Low, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* CORPORATION OF GLASGOW.

Water Supply—Compulsory Powers—Ultra vires—Road—Bridge—Railway—Tunnel — Statute — Construction — Waterworks Clauses Act 1847 (10 *and* 11 *Vict. cap.* 17), *secs.* 28, 29, *and* 32.

A body of water commissioners had statutory authority to lay a line of water-pipes along a road which at one place was carried over a railway by means of a bridge or tunnel. *Held*, on the construction of sections 28, 29, and 32 of the Waterworks Clauses Act 1847, that it was *ultra vires* of the commissioners to break open the brickwork of the arch which formed the bridge, or the roof of the tunnel, and to lay the pipe-track there.

Glasgow and South-Western Railway Company v. *Magistrates of Glasgow*, July 17, 1894, 21 R. 1033, *affirmed* May 13, 1895, 22 R. (H.L.) 29, *followed.*

Water Supply—Compulsory Powers—Ultra vires—Power to Break open Tunnels—Bridge Carrying Road over Railway—Statute—Construction—Ejusdem generis—Road—Railway—Bridge—Tunnel—Waterworks Clauses Act 1847 (10 *and* 11 *Vict. cap.* 17), *sec.* 28.

Section 28 of the Waterworks Clauses Act 1847 authorises the undertakers of