

The Court adhered to the interlocutor of 8th January 1907 reclaimed against.

Counsel for the Pursuer (Respondent)—  
 M'Clure, K.C.—A. M. Anderson. Agent—  
 John Stewart, S.S.C.

Counsel for the Defenders (Reclaimers)—  
 Scott Dickson, K.C.—Murray. Agents—  
 Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, November 23.

SECOND DIVISION.

[Lord Salvesen, Ordinary.]

MACKENZIE v. CLUNY HILL HYDRO-  
 PATHIC COMPANY, LIMITED.

*Reparation—Master and Servant—Liability of Master for Wrongful Act of Servant—Relevancy of Averments—Hydro-pathic Company—Manager—Forcible Detention of Guest without Good Reason.*

A lady brought an action of damages against a hydro-pathic company, averring that following upon a dispute between her and another lady staying in the establishment, the company's manager requested her to come to his private room, where the other lady and her husband were, and having got her there refused to allow her to leave until she had apologised to the lady, and forcibly detained her for a period of fifteen minutes against her will.

Held that a relevant ground of action had been stated against the hydro-pathic company.

This statement of law approved by Lord Lindley in *Citizens Life Assurance Co. v. Brown*, [1904] A.C. 423, at pp. 427-428, adopted by the Lord Justice-Clerk and Lord Stormonth Darling:—“Although the particular act which gives the cause of action may not be authorised, still if the act is done in the course of employment which is authorised, then the master is liable for the act of his servant.”

Mrs Martha G. Breeze or Mackenzie brought this action against the Cluny Hill Hydro-pathic Company, Limited, in which she sued for £400 damages. (At the same time she raised a separate action against Mr Robertson, mentioned *infra*, in which the Lord Ordinary allowed an issue in which she obtained an award of damages.)

She averred—“(Cond. 2) On or about 19th August 1906 the pursuer was residing at the defenders' hydro-pathic, Forres, owned by the defenders, who are a limited company. The manager thereof at said date was Thomas M'Nair, who was entrusted by the defenders with the management of the hydro-pathic, and the supervision of the comfort of the guests in the defenders' hydro-pathic. (Cond. 3) Late in the evening of the date in question the defenders' said manager went to the recreation room, where pursuer was, and requested her pres-

ence in his private room, saying that a lady who was ill wished to see her, and in accordance with the said request the pursuer went to the said private room. The pursuer went to the said room by request of the said Thomas M'Nair, believing, as was the fact, that in making the said request he was acting as the defenders' manager. (Cond. 4) When the pursuer arrived in the said private room she found there a Mr and Mrs Robertson, of 2 Lily-bank Gardens, Hillhead, Glasgow, who were her fellow-guests in the Hydro-pathic. The said Mrs Robertson had for some reason or another unknown to the pursuer conceived an ill-will against her. There were also present Mrs M'Nair, wife of the said Thomas M'Nair, and the said Thomas M'Nair. The pursuer was detained for a considerable period against her will in the said private room, and an assault was committed upon her by the said Alexander Robertson. The said Alexander Robertson also slandered her by calling her a low woman, and alleging she had previously caused disturbances 'here.' The pursuer endeavoured to leave the manager's room. She put her hand on the handle of the door, and the said Alexander Robertson then stepped between her and the door, and struck her hand from the handle. Mr and Mrs Robertson then both placed themselves against the door to keep it shut. The pursuer then pointed out to the defenders' manager that she was being forcibly detained in the said room, and asked him to see that she was allowed to leave, but this the said manager refused to do. The said manager, for some fifteen minutes, then aided and abetted the Robertsons in preventing the pursuer from leaving the said room in manner aforesaid. The said manager neither ordered nor even requested the Robertsons to let the pursuer out, nor did he ring the bell or take any other steps open to him to have the pursuer's detention ended. Had the defenders' manager requested the Robertsons to allow the pursuer to leave the room the pursuer believes and avers they would have done so. Had the manager summoned assistance by ringing the bell, or in any other way, assistance would have been forthcoming and the pursuer's detention ended. Although the pursuer was anxious to leave the said room, and so expressed herself to the defenders' manager, she was nevertheless detained and prevented from leaving the said room for a considerable period (about fifteen minutes) by the said manager, who said he would not allow her to leave the room till she had apologised to Mrs Robertson for slamming a door in her face, a thing she, the pursuer, had never done. . . . (Cond. 5) In asking pursuer to go to his private room, and in detaining her there against her will as aforesaid the defenders' manager was acting within the scope of his employment, and in the supposed furtherance of the defenders' interests. He had no right in the circumstances to induce the pursuer to go to his room when he knew as he did that the Robertsons had an ill-will towards

her, and that she would be unprotected, and he was bound to have at once seen that she, the defenders' guest, was allowed to leave the room when she wished to. He failed in his duty, and along with Robertson and his wife detained her in the said room for a considerable period. Such detention was illegal and improper, and the defenders are liable therefor to the pursuer for the loss, injury, and damage occasioned thereby. (Cond. 6) Through the illegal actings of the defenders' servant as above condescended on the pursuer was illegally detained for a considerable period in the defenders' room, and thereafter subjected to assault and slander by the illegal and improper actings of the defenders' said manager in inviting her into the said private room, and thereafter allowing her to be detained there against her will. By the said detention the pursuer suffered in her feelings and health, and was subjected to great indignity, and the matter soon became known in the establishment."

The pursuer pleaded—“(1) The pursuer having suffered loss, injury, and damage through the wrongs and illegal actings of the defenders' servant as condescended on, decree should be granted as craved. (2) The defenders' servant, acting within the scope of his authority from the defenders, having wrongously induced the pursuer to enter his private room, and thereafter having wrongfully detained the pursuer there as condescended on, decree should be granted as craved.”

The defender pleaded, *inter alia*—“(2) The pursuer's averments are irrelevant, and insufficient to support the conclusions of the summons.”

On 10th January 1907 the Lord Ordinary (SALVENSEN) found that the allegations of the pursuer were not relevant and sufficient to support the conclusions of the summons, and decerned.

*Opinion.*—“The pursuer of this action avers that on 19th August 1906 she was a guest in the hydropathic belonging to the defenders, that on the evening of that day she was summoned by the manager to his private room, and that when she arrived there she was slandered and assaulted by two fellow guests—Mr and Mrs Robertson. She has already raised an action against these persons in which issues have been adjusted—there being no question of the relevancy of her averments as against them. She maintains, however, that she has a separate ground of action against the present defenders on the ground that their manager detained her in the room against her will for a considerable period (about fifteen minutes). She avers that in doing so he was acting within the scope of his employment and in the supposed furtherance of the defenders' interests.

“The injury which the defenders' manager is said to have done to the pursuer is so small as to be almost microscopic. It is not said even in the amended record that he laid hands upon her or that he in any way actively contributed to her detention in the room. This is part of her grievance against Mr Robertson, who is

said to have stood against the door and prevented her opening it. The complaint against the manager seems rather to be that he did not intervene to protect her against the Robertsons by ringing the bell or otherwise summoning assistance, or by requesting the Robertsons to permit her to leave. It is not suggested that he could thereby have prevented the alleged assault, but only that he might possibly have shortened her detention in the room by some minutes. Even against the manager, therefore, it does not appear to me that it would be possible to construct a relevant case. It follows that if there can be no action against the servant because of his non-intervention in the quarrel between the pursuer and the Robertsons there can be no possible claim against his employers.

“There is, however, another and separate ground on which I think that the defenders are entitled to be assolizied. It was decided in the case of *Poultton, L.R., 2 Q.B. 534*, that the scope of a servant's authority is always limited to such acts as the employers could lawfully do themselves. For a mistake or excess in committing such an act by a servant his employer may well be held responsible, but not for an act which the employers cannot be supposed to have authorised, because they had no authority to do it themselves. I assume that it is part of the duty of a manager of a hydropathic to attend to the comfort of the guests as the pursuer avers, but it would be odd if I were required to hold that this impliedly authorised him to be a party to the detention of one guest in order to gratify the ill-will of another. The pursuer was unable to cite any authority for such a novel proposition. The only case referred to was that of *Bryce v. The Glasgow Tramway Company, 6 S.L.T. 49*. It has in my opinion absolutely no application. The act which the servant in that case was alleged to have done in a careless and reckless manner was an act which it was his duty towards his employers and in their interests to do, and accordingly the action was well directed against his employers.

“I shall accordingly assolizie the defenders, and I have the less hesitation in doing so as it appears to me to be plainly in the interests of the pursuer that she should not be embarrassed with a second action for damages arising out of the self-same *species facti* as have already been remitted for trial by a jury. If she succeeds in that case she will recover full compensation for all injury that she has suffered; if she fails it is scarcely conceivable that she could recover against the present defenders.”

The pursuer reclaimed, and argued—The action was relevant. The averments showed that the manager was engaged, not in a private quarrel but upon matters connected with hydropathic business, and it was settled law that a master was liable for everything done by his servant wrongously or the reverse, provided it was done in the course of his service or employment—*Citizens Life Assurance Company v.*

*Brown*, [1904] A.C. 423, Lord Lindley at 427-428, the theory of the law being that a master, by putting his servant in a position which enables him to act in a certain way, is responsible, although the servant may in fact have acted wrongly and in a manner the master could not expressly have approved—*Limpus v. London General Omnibus Company*, 1862, 1 H. & C. 526; *Ward v. The General Omnibus Company*, 1873, L.J., 42 C.P. 265; *Dyer v. Munday*, [1895] 1 Q.B. 742; *Wood v. North British Railway Company*, February 14, 1899, 1 F. 562, 36 S.L.R. 407; *Ellis v. National Free Labour Association*, May 12, 1905, 7 F. 629, 42 S.L.R. 495; *Maxwell v. Caledonian Railway Company*, February 5, 1898, 35 S.L.R. 449; *Bryce v. The Glasgow Tramway and Omnibus Company*, June 14, 1898, 6 S.L.T. p. 49. The Lord Ordinary had completely misapprehended *Poulton v. London and South-Western Railway Company*, 1867, L.R., 2 Q.B. 534. The defenders' argument, based on the maxim *de minimis*, was fallacious. If a wrong had been committed the pursuer was entitled to ask a jury to assess the damage.

Argued for the respondents—The action was irrelevant. There were two classes of case in which an employer might be sued for an act done by his servant—*first*, where the action was laid upon a contract made by the servant on behalf of the master; *second*, where the action was laid upon a wrong committed by the servant. In the former case the presumption was against the master, and he was *prima facie* liable; in the latter (the case here) the presumption was in his favour. To overcome the presumption in the master's favour and make a relevant case it was necessary to aver (1) facts from which it could be inferred that the act was done in the course of his employment or service; (2) facts showing that the act which was done was for the master's benefit. There were no such facts here. The pursuer's averments showed that the whole thing was a private quarrel in which the manager had taken a side without any possible benefit to his employers. The following cases were founded on—*Poulton, cit. sup.*; *Wardrope v. Duke of Hamilton*, June 24, 1876, 3 R. 876, 13 S.L.R. 568; *Lundie v. MacBrayne*, July 20, 1894, 21 R. 1085, 31 S.L.R. 872; *Gillespie v. Hunter*, May 23, 1898, 25 R. 916, 35 S.L.R. 714. Further, however, the pursuer had already, in her action against Robertson, obtained damages covering the whole incident, which she was not entitled to split up into different actions—*Hassan v. Paterson*, June 26, 1885, 12 R. 1164, 22 S.L.R. 775; *Ferguson v. Colquhoun*, July, 19, 1862, 24 D. 1428. Lastly, the whole affair was trifling: *de minimis non curat pretor*.

LORD JUSTICE-CLERK—I cannot see any ground for treating this case as one which ought to be disposed of without the facts being first ascertained. Such cases necessarily depend very much on the particular facts, and if this record does not present such features as make it necessary to assume that the manager of the hydro-

pathic establishment was not acting in the course of his employment, then I think it must be allowed to go to trial.

I do not think a case of this kind can be dealt with on any application of the *de minimis* principle, at least until the whole facts are found. It is the facts alone on which an application of the question of *de minimis* can arise.

We had a suggestion from the Solicitor-General that the manager could not be acting in the course of his employment, because the pursuer says that he induced her to go to his room because a fellow-guest had conceived an ill-will towards her and he knew it, and that therefore he was acting not as manager but in the private interests of the other guest. That, of course, is a statement which she will be entitled to prove. But the case is of this kind, that this lady says that she went willingly to the manager's room and was detained there against her will for an appreciable time. The manager certainly got her to go there while acting in the course of his employment, and I do not see any ground for saying that on the statements made on this record he must have ceased so to act before she was detained. I must say I think the statement quoted to us from the opinion of Lord Lindley in the case of the *Citizens Life Assurance Company v. Brown*, [1904] A.C. 423, at pp. 427-8, is applicable to this case—"The law upon this subject cannot be better stated than it was by the acting Chief-Justice in this case. He said—'Although the particular act which gives the cause of action may not be authorised, still if the act is done in the course of employment which is authorised, then the master is liable for the act of his servant.'" I can have no doubt that the manager of a hydropathic establishment is authorised to interfere in the way referred to in this case when there is a quarrel between guests, and to bring them together to have the matter put right. If in the course of so doing he commits an actionable wrong, I have no doubt the master is liable. I propose to your Lordships that we allow an issue.

LORD STORMONTH DARLING—It is only because we are reversing the judgment of the Lord Ordinary that I add anything to what has been already said by your Lordship. The main question at this stage of the case is whether there are relevant averments of an actionable wrong for which the manager's principal, *i.e.*, the Hydropathic Company, may be liable. I think it must be admitted that the wrong, if wrong there was, was a very small one, for the averments of the pursuer at most amount to this, that the manager persuaded the pursuer to enter his private room, and detained her there against her will for some fifteen minutes.

I think, however, that these averments are relevant and that the case must go to a jury. I am accordingly in favour of allowing an issue, although I hope that parties may yet see their way to settling this insignificant dispute. I think it unne-

cessary to attempt to improve on the statement of the law applicable to such cases which has already been made by many eminent judges. I am content to take the statement quoted by your Lordship from the opinion of Lord Lindley in the *Citizens Life Assurance Company v. Brown*, [1904] A.C. 423. Applying that law, I think the facts must be ascertained, unless it clearly appears from the pursuer's own averments that the servant was *not* acting in the course of his employment.

LORD LOW—I am of the same opinion. We are asked to throw out this action upon three grounds—*first*, that there are no relevant averments of an actionable wrong; *second*, that upon the averments it is evident that the manager was not acting within the scope of his employment or in the course of his duty; and *third*, that in any event the whole affair was trifling and the damage suffered negligible. In regard to the first of these grounds I have no doubt that a wrong, and in my view not a trifling wrong, has been averred. It is averred that the manager detained this lady in his room for fifteen minutes after the assault had been committed, and refused to let her go until she made an apology. If that be true, it was an outrage, and a relevant case has been stated.

As to the second ground I have nothing to add to what has been said by your Lordship. It cannot be doubted that the manager, at first at all events, intervened in his capacity as manager, and there must be inquiry to find out whether in his subsequent actions he abandoned that capacity and acted as a private individual. As to the third ground, if an actionable wrong was committed, it does not matter that *prima facie* the pursuer sustained but little injury; she is, at any rate, entitled to ask a jury to assess the damage.

LORD ARDWALL—I regret that I feel bound to concur with the opinion your Lordships have expressed that this case must be sent to a jury. I cannot accept without considerable qualification the law laid down by the Lord Ordinary, and although the case is a narrow one I am not prepared to say that it is irrelevant. While there is much force in Mr Murray's contention that the whole affair was really one incident, which a jury have already considered, and for which they have already awarded the pursuer a certain sum of damages, still, if the averments are carefully scrutinised, it is apparent that two separate wrongs are complained of—*firstly*, slander and assault by Robertson (the case already considered by a jury); *secondly*, illegal detention by the manager (the case in which an issue is now asked). It cannot, therefore, be maintained that the pursuer is not entitled in law, if not in equity, to bring a second and separate action. I express no opinion as to the nature of the injury she sustained—that is a question for the jury.

The Court recalled the interlocutor of the Lord Ordinary, and allowed the following

issue:—"Whether . . . the defenders' manager, Thomas M'Nair, acting within the scope of his employment by the defenders, having induced the pursuer to enter his private room in the defenders' hydropathic establishment, wrongfully detained her there, to her loss, injury, and damage."

Counsel for the Pursuer (Reclaimer)—G. Watt, K.C.—Spens. Agents—Bryson & Grant, S.S.C.

Counsel for the Defenders (Respondents)—The Solicitor-General (Ure, K.C.)—C. D. Murray. Agent—Robert Stewart, S.S.C.

Friday, November 29.

## SECOND DIVISION.

[Lord Ardwall, Ordinary.]

### DAVIDSONS v. LOGAN.

*Arbitration—Landlord and Tenant—Omission to Consider Subject Referred—Decree—Arbitral—Reduction—"Tenantiable Condition and Repair"—Obligation of a Landlord and of a Waygoing Tenant.*

A, the owner of a farm in his own occupation—who was thus in the position both of landlord and of outgoing tenant—let it for a period of nineteen years to B and C, the latter binding themselves in the lease "to accept of the whole houses and buildings, &c., on the said farm, when the same have been put into good order . . . as being in tenantable order and condition." A submission to arbiters and an oversman was subsequently prepared, which, proceeding on the narrative that B and C had by the lease become "bound to accept the buildings and others . . . as in good tenantable condition and repair when the same had been put into good order," referred to arbitration, *inter alia*, the sum payable by A to B and C in "respect of any of the houses and buildings, &c., not being in tenantable condition and repair, all as at the entry thereto" of the tenants. The arbiters awarded a sum which they arrived at by calculating the amount which an outgoing tenant would have had to expend to put the houses, &c., into tenantable condition and repair in a question with his landlord or an incoming tenant.

In an action of reduction at the instance of the tenant the Court reduced the award, *holding* (1) that at common law an obligation on the part of a landlord at the beginning of a lease to put buildings, &c., into tenantable condition and repair was more onerous and involved a higher standard than the obligation on the part of an outgoing tenant to leave them in the like condition; (2) that on a proper construction of the lease and submission it was the amount of the owner's obligation *qua* landlord, and not *qua*