were. It was in no way incident to a seaman's employment as such. Again, the sanction given by the ship's officers to the practice of leaving the ship's drinking water about in tins to cool might amount, and probably did amount, to an authority to the seamen to take this method of preparing for use the drinking water with which they had to be supplied, but it amounts to no more. There is no evidence that the sanction extended to the give and take which is spoken of. There is no evidence that the practice by which seamen drank where they had not drawn formed any part of the ship's routine or the men's employment. It may have been known to the officers; most things are that happen on board ship; but this is pure conjecture. I think that in doing what he did the respondent, so far as the evidence goes, added a risk of his own to the risks incident to his employment.

Where the question in debate is whether or not there is evidence to support a particular conclusion of fact, it is always necessary to begin by scrutinising the evidence given, and this equally where there is a full note of the evidence or only such a condensed summary of it as is given in this stated case. It is doubly necessary to be strict where the appellate tribunal must take the facts as found and is limited to the question of law, viz., whether there was evidence to support the conclusion. With all respect to Lord Guthrie, I think that such an expansion of the stated case by interpretation and inference as his judgment contains is inadmissible.

If any distinction at all is to be drawn, as of course it must be drawn, between arising "out of" and arising "in the course of" an applicant's employment, the stated case discloses no evidence of arising "out of." To hold that it does is either to make "arising out of" and "arising in the course of" mean the same thing, or is to carry the evidence by conjecture beyond the limits of the case. I think that the appeal should be allowed.

Their Lordships reversed, with expenses, the interlocutor appealed from, and set aside the arbitrator's award.

Counsel for the Appellants—Horne, K.C. —Neilson. Agents—Maclay, Murray, & Spens, Glasgow—J. & J. Ross, W.S., Edinburgh—Holman, Birdwood, & Co., London.

Counsel for the Respondent—Healy, K.C. —Scanlan. Agents—Thos. Scanlan & Co., Glasgow—E. R. M'Nab, S.S.C., Edinburgh —Herbert Z. Deane, London.

# COURT OF SESSION.

*Tuesday, January* 4, 1916.

## SECOND DIVISION.

[Sheriff Court at Perth.

## ADAMSON *v.* MARTIN.

*Reparation — Slander — Police—Chief-Constable — General Instructions — Slander by Actings — Photograph and Finger-prints in Register of Criminals.*

A minor accused of theft was liberated without bail on his mother undertaking that he would attend the pleading diet. Immediately after being liberated two police sergeants caused him to be photographed, and imprints of his fingers to be taken, in order that these might be retained by the criminal authorities and placed in an album and register of criminals. Neither his own nor his mother's consent was asked or obtained, nor was his mother allowed to accompany him to the room where the photograph and imprints were taken, though she asked leave to do so. The charge against him was subsequently found "not proven." In an action by him against the Chief-Constable, in whose custody the photograph and imprints were, to deliver to the pursuer the photograph and imprints, or, alternatively, to have them destroyed, and for damages, he averred that the police had acted in obedience to the defender's instructions and with his authority. *Held* (1) that the photograph and imprints had been taken without legal warrant, and that the pursuer was entitled to have them destroyed, but (2) (*diss.* Lord Salvesen) that a mere averment of general instructions was insufficient, and that the conclusion for damages was therefore irrelevant.

The Penal Servitude Act 1891 (54 and 55 Vict. cap. 69), section 8, enacts—"The Secretary of State may make regulations as to the measuring and photographing of all prisoners who may for the time being be confined in any prison. . . ."

Regulations under the above enactment, dated August 20, 1904, made by the Secretary for Scotland, provide, *inter alia*—"1. Subject as hereinafter mentioned, a criminal prisoner may be photographed and measured at any time during his imprisonment. 2. He shall be photographed either in the dress of the prison, or in the dress he wore at the time of his arrest or trial, or in any other dress suitable to his ostensible position and occupation in life. The photograph to be taken shall include a photograph of the full face and a photograph of the true profile of the prisoner. 3. The measurements to be taken may include—The length and breadth of the head; the length and breadth of the face; the length and breadth of the ears; the length of either foot; the length of the fingers of

either hand; the length of the cubit and hand, either right or left; the span of the arms; the prisoner's height when standing; the prisoner's height when sitting; the size and relative position of every scar and distinctive mark upon any part of the body; the external filament of the fingers and thumbs of both hands to be taken by pressing them, first upon an inked plate, and then upon paper or cardboard, so as to leave a clear print of the skin surface. 4. An untried criminal prisoner shall not be photographed or measured while in prison save by order of the Secretary for Scotland, or upon an application in writing signed by a procurator-fiscal, or upon an application in writing signed by an officer of police of not lower rank than superintendent and approved by a sheriff or sheriff-substitute, justice of the peace, or burgh magistrate, and all such applications shall set forth that from the character of the offence with which the prisoner is charged, or for other reasons, there are grounds for suspecting that he has been previously convicted, or has been engaged in crime, or that from any other cause his photograph and measurements are required for the purposes of justice."

James Adamson, High Street, Perth, *pursuer*, brought an action in the Sheriff Court at Perth against Matthew J. Martin, Chief-Constable, Perthshire, *defender*, in which he craved the Court "to grant a decree against the defender to ordain him (*first*) to deliver to the pursuer within such time as the Court shall order all photographs, both negatives and copies, of the pursuer, and the original impressions of his fingers and all prints thereof taken on or about the 15th day of May 1914 in the County Police Office, Perth, by defender or on his behalf, or, alternatively, to ordain defender to destroy within such time as the Court shall order all said photographs, both negatives and copies, and the finger print impressions, at the sight of a person to be named by the Court; (*second*) to pay to the pursuer the sum of two hundred pounds (£200) with interest from date of citation."

The pursuer averred—"(Cond. 1) The pursuer is a minor and is employed by William Robertson, potato merchant, Perth. He was at the date after-mentioned a message boy with Dow, fishmonger, Perth. The defender is Chief-Constable of the Perthshire Constabulary. (Cond. 2) On 14th May 1914 pursuer was charged with stealing a bicycle near Craigend, Perth. On 15th May 1914 he was brought before the Sheriff-Substitute of Perthshire on said charge, when he pled "not guilty," and his trial was fixed for Monday, 18th May, at 12 o'clock. Admitted that pursuer was not apprehended and that his mother stated she would bring him to Court on 15th May. (Cond. 3) After the pursuer had pled "not guilty" and had been liberated without having to find bail, Detective-Sergeant Stewart, acting on behalf of defender, requested pursuer to wait in the witness room until another case was finished as he was to take him to the County Police Office to take some measurements and get some information. Pursuer, who was accompanied by his mother, was conducted by Detective-Sergeant Robertson from the County Buildings to the County Police Office. When they reached the County Police Office, Detective-Sergeant Robertson asked the pursuer to go upstairs. His mother wished to accompany him, but the said Detective-Sergeant Robertson refused to allow her to do so. (Cond. 4) When pursuer entered the police office he was taken by the said Sergeant Robertson to a back court where he placed pursuer's hands upon his breast and a mirror at the side of his face and photographed him in that position. The photograph included the full face and profile of pursuer. This is the position in which criminals are photographed under the Order or application approved as after condescended on. Thereafter he was taken back to the police office where, notwithstanding his repeated protests, his hands were forcibly smeared with a black composition and an imprint taken of his fingers by the said Sergeant Robertson. The said finger-print impressions were taken on a paper on which was printed 'To the Registrar of Habitual Criminals, London.' (Cond. 5) On 18th May pursuer was tried on said charge of theft, when he was acquitted and discharged. (Cond. 6) Defender has entire charge of the county constables, over whom he has the general disposition and government. The said Detective-Sergeants Stewart and Robertson were acting in the matter condescended on on behalf of defender and in obedience to defender's instructions and with his authority. . . . (Cond. 8.) Photographs and finger-print impressions legally taken in virtue of said regulations are circulated among the various police forces in the country, and the photographs are placed in an album in the County Police Office, Perth, for the purpose of certiorating the members of the various police forces that the persons whose photographs and finger-print impressions are taken are criminals and should be watched. Believed to be true that copies of finger-print impressions taken in virtue of said regulations are sent to Scotland Yard, London. (Cond. 9) Defender had no warrant or order or application signed and approved as required by said regulations to take or cause to be taken photographs of the pursuer or impressions of his finger-prints. Pursuer was not in prison, was untried, and was innocent of the charge which had been brought against him. Defender has the possession and control of said photographs and finger-print impressions, and on or about 15th May 1914 he placed or caused to be placed the photographs in an album containing a collection of photographs of criminals. Said album and finger-print impressions of which defender has possession and control are kept in the County Police Office, Perth, for the purpose of inspection, and were and are inspected by the Detective-Sergeants before mentioned and the members of the Perthshire Constabulary. Defender acted wrongously, illegally, and oppressively in taking, retaining, and placing, or in causing to be taken, retained, and placed, in said album said

photographs, and in taking and retaining or causing to be taken and retained said finger-print impressions of pursuer, who has suffered loss, injury, and damage thereby. Defender, by his illegal and unwarrantable actings as above condescended on, has falsely and calumniously represented to pursuer's mother, to the said detective-sergeants, and to the members of the Perthshire police force that pursuer is a criminal and that he should be watched as such. Pursuer has in consequence suffered and is likely to suffer much in his feelings and his reputation on account of the unwarrantable, illegal, and defamatory actings of defender."

The pursuer pleaded, *inter alia*—"(1) The defender having unwarrantably and illegally taken or caused to be taken and dealt with as condescended on pursuer's photograph and impressions of his fingers, the pursuer is entitled to decree in terms of his first crave. (2) Defender having wrongously, illegally, and unwarrantably taken or caused to be taken and dealt with as condescended on photographs of pursuer and impressions of his fingers, is liable for the loss, injury, and damage thereby sustained. (3) Defender having defamed the character of pursuer to his loss and the injury of his feelings, the pursuer is entitled to reparation."

The defender pleaded, *inter alia*—"(2) The pursuer's averments are irrelevant. (3) The officers of whose alleged acts the pursuer complains not being the servants of the defender, the defender is not answerable for their acts, and he should be assoilzied from the conclusions of the writ so far as laid thereon."

On 8th February 1915 the Sheriff-Substitute (SYM) sustained the defender's second plea-in-law and dismissed the action.

The pursuer appealed to the Sheriff (JOHNSTON), who on 29th March 1915 refused the appeal and affirmed the interlocutor of the Sheriff-Substitute.

The pursuer appealed to the Court of Session, and argued—The police had exceeded their powers. The power of the police to take photographs and fingerprints of convicted criminals was regulated by statute—Prevention of Crime Act 1871 (34 and 35 Vict., cap. 112), sec. 6; Penal Servitude Act 1891 (54 and 55 Vict., cap. 69), sec. 8. It was impossible to say that, where the Legislature had found it necessary to give the police statutory powers to photograph convicted criminals, they already had the same powers at common law to do this in regard to all other persons. The acts complained of amounted to defamation and constituted an actionable wrong. It was possible to slander a person by acts without words—*Drysdale* v. *Earl of Rosebery*, 1909 S.C. 1121, and *per* Lord Salvesen at p. 1123, 46 S.L.R. 795; *Monson* v. *Tussaud*, [1894] 1 Q.B. 671. Further, if there was an actionable wrong the Chief-Constable was responsible, because the constables did what they did on his general instructions. He had the power of appointing and dismissing constables and the control and general governance of them—Police (Scotland) Act 1857 (20 and 21 Vict. c. 72), sec. 6; *Nimmo* v. *Stuart*, 1832, 10 S. 844; *Hollands* v. *Richardson*, 1843, 5 D. 1352; *Melvin* v. *Wilson*, 1847 9 D. 1129, *per* Lord Jeffrey at p. 1136; *Pringle* v. *Bremner & Stirling*, 1867, 5 Macph. (H.L.) 55, 4 S.L.R. 233; *Somerville* v. *Sutherland*, 1899, 2 F. 185, 37 S.L.R. 128. A master was liable for a slander committed by his servant—*Ellis* v. *National Free Labour Association*, 1905, 7 F. 629, 42 S.L.R. 495; *Beaton* v. *Corporation of Glasgow*, 1908 S.C. 1010, 45 S.L.R. 780. In the present case the Chief-Constable admitted that the articles were in his possession and under his control. There was no privilege in the present case—*Adam* v. *Allan*, 1841, 3 D. 1058—but in any event there was sufficient recklessness and gross negligence as to infer malice—*Urquhart* v. *Grigor*, 1864, 3 Macph. 283.

Argued for the defender—The police had acted under their common law powers. They had power at common law to avail themselves of all scientific aids to the detection of crime. The mere taking of a photograph of a person against his will was not a legal wrong. Nor in the case of the finger-prints had any wrong been committed unless it were an assault, which was not founded on. In any event there was not sufficient specification of instructions given by the Chief-Constable. A mere averment of general instructions was not enough. The relation of master and servant did not exist between the Chief-Constable and the constables—Barclay's Digest of the Law of Scotland (4th ed.), 1880, p. 689, *s.v.* "Police," dealing with the case of *Nimmo* v. *Stuart*, *cit. sup.*; *Bain* v. *Burnet*, 1857, 19 D. 405, *per* Lord Neaves at p. 407. The pursuer was not entitled to delivery of the articles because they were not his property. In any event the acts complained of were privileged and there had been no publication—*Innes* v. *Adamson*, 1889, 17 R. 11, 27 S.L.R. 26; *Buchan* v. *North British Railway Company*, 1894, 21 R. 379, 31 S.L.R. 273; *Malcolm* v. *Duncan*, 1897, 24 R. 747, 34 S.L.R. 625; *Southern Bowling Club, Limited* v. *Ross*, 1902, 4 F. 405, *per* Lord Kincairney at pp. 408-413, 39 S.L.R. 292.

At advising—

LORD JUSTICE-CLERK—The pursuer was born in June 1897. In August 1912, when he was fifteen, he was convicted of theft by the Sheriff of Perthshire. As to this theft the Sheriff-Substitute says—"It was a small theft, that 'of a quantity of apples,' and he was 'admonished and dismissed.'" On 14th May 1914, being then in his seventeenth year, he was while employed as a message boy by a tradesman in Perth charged with stealing a bicycle near Perth. He was not apprehended, his mother's undertaking that he would attend the pleading diet on 15th May being accepted as sufficient. He duly attended said diet, accompanied by his mother, and pleaded not guilty, and was liberated without bail, the trial being fixed for 18th May. The Sheriff-Substitute, after hearing the evidence, found the charge not proven, and the pursuer was acquitted and discharged.

On 15th May, after being liberated without bail as I have said, two detective sergeants of the Perth police force caused the

pursuer to be photographed and imprints of his fingers to be taken in order that the photographs and imprints might be retained by the criminal authorities.

The pursuer sues the defender, who is the Chief-Constable of Perthshire, in order that —[*His Lordship read the prayer of the initial writ*].

I am of opinion that the pursuer is entitled to decree in terms of the first conclusion of the summons, and that the defender ought to be assoilzied from the second conclusion.

As to the first conclusion, in the course of the argument before us it was agreed that parties' rights fell to be determined by common law. Careful provisions have been made by statute and statutory orders and regulations as to the photographing of criminals and taking imprints of their fingers. It was admitted that these did not apply, and I am not prepared to assent to the view that the pursuer is a criminal in the sense of these provisions even if they had otherwise applied.

In my opinion there is no common law which would authorise what was here done in the way of photographing the pursuer and taking imprints of his fingers. What was so done was therefore in my opinion illegal, and neither the defender nor anyone else is entitled to retain the results of such illegal actings. I am therefore of opinion that the pursuer is entitled to decree in terms of the second alternative of the first conclusion of the summons, the destruction to take place at the sight of the Sheriff-Clerk in presence of the parties' agents.

As to the second conclusion of the summons, the case against the defender depends mainly on condescendence 6. It is admitted that the defender did not personally interfere in the matter, and had no personal knowledge in regard thereto. It was also admitted by the pursuer's counsel in answer to questions from the Bench that the pursuer did not affirm that any special instructions were given by the defender as to the said proceedings. The defender was not the master or employer of the officers who actually did what is complained of. In these circumstances I think the pursuer's averments as to the claim of damages are irrelevant and wanting in specification. I think they amount to no more than what Lord Shaw called "a vacuous generality"—*Caledonian Railway Company* v. *Symington*, 1912 S.C. (H.L.) 9, at p. 12, 49 S.L.R. 49, at 50. I am therefore of opinion that the defender should be assoilzied from that conclusion.

LORD DUNDAS—The most substantial conclusion of the initial writ is, to my mind, that for £200 in name of damages. The damages are admittedly sought solely on the ground of defamation. The alleged defamation arose from certain actings by two police sergeants at Perth, and it is beyond question that, as Lord Dunedin put it in *Drysdale*, 1909 S.C. 1125, "there may be an actionable wrong of the nature of slander by actions alone." But the defenders called are not the offending sergeants. The sole defender is the Chief-Constable of Perthshire. The officers are not, I apprehend, his servants. They are, to use the words of Lord Kincairney in *Girdwood*, (1894) 22 R., at p. 13, "not the servants of the chief-constable, sheriff, or justices, but of the State, with distinct duties imposed on them by statute." The Chief-Constable, however, might, no doubt, be responsible for the sergeants' actings if they were directly instructed by him. It is therefore necessary to see what the pursuer's averments of such instructions are. They are contained in cond. 6. Apart from the words "on behalf of defender, and . . . with his authority," which seem to be of no material import, the pursuer's bare averment is that the sergeants "were acting in the matter condescended on . . . in obedience to defender's instructions." The defender in answer denies this, and explains that his "general instructions" in regard to photographs and finger-tip impressions related to "persons in custody" as specified, and that he had no knowledge of the particular facts about this pursuer, "and gave no instructions whatever relating to him." Now, on the pursuer's own showing he was not at the time of the alleged happenings a "person in custody." He had been charged with theft, but "was not apprehended" though the police had a warrant for his apprehension, and it was "after the pursuer had pled not guilty and had been liberated without having to find bail," that the photographs and finger-prints were taken. He was plainly, therefore, not within the scope of the defender's "general instructions" as averred in ans. 6, and there were according to the same averments no special instructions relating to him. Article 6 of the condescendence ends, no doubt, with the words "defender's explanation is denied." But I do not think that a bare averment that the sergeants were acting "in obedience to defender's instructions," coupled with this general denial, is such as to entitle the pursuer to go to proof on this crucial point in the case, looking to the definite specification in the answer. I consider that in order to make cond. 6 relevant the pursuer would require to make some such statement as that he believes and avers that the defender's instructions whether general or special were in effect that photographs and finger-tip impressions were to be taken, if necessary by force, in the case of persons not in custody. The pursuer's counsel admitted that he was not in a position to make any such statement. Nor do I find any relevant averment that it was the defender who placed the photographs in the album. On these grounds, I think, agreeing with the learned Sheriff, that the pursuer's averments in support of his crave for damages are irrelevant as against this defender. It would, in my judgment, be a grievous hardship that a chief-constable should be compelled to face an action of damages upon averments such as are here before us as to his complicity in or responsibility for alleged illegal actings on the part of subordinate police officers.

The craves for delivery or otherwise for destruction of the photographs and impres-

sions seem to me to stand in a different position. I am not for granting the crave for delivery. The things are not the pursuer's property, and should not, I think, be given over to him. But I can see no good reason why they should not be destroyed. So far as the photographing is concerned the pursuer's averments seem to me to disclose, or at least to be quite consistent with, a case of consent on his part. As to the finger-prints, he says, though this is denied, that "notwithstanding his repeated protests his hands were forcibly smeared." This, if proved, might amount in law to an assault, but no case of that sort is made on record. The sting of the averments, however, both in regard to the photographs and the finger-tip impressions, lies not in the mere fact of the operation, but in the statement that the reproductions were made with a view to their retention, and that they are in fact retained in what I may call for short a "rogues' gallery." The learned Sheriff-Substitute's opinion seems to me to proceed upon a misconstruction of a circular issued in 1904 by the then Secretary for Scotland, now Lord Dunedin. He considers that it empowered or recommended police-officers to take finger-prints "on their own initiative" of persons detained at police-stations and lock-ups, and upon that assumption argues that the actings complained of were within the spirit if not the letter of the circular, and that the pursuer can scarcely complain of them on the ground that the police, having a warrant for his apprehension, were so lenient as not to detain him but to allow him to go free without bail pending his trial. The Sheriff-Substitute's assumption is, in my judgment, erroneous. I do not think that the circular warranted or suggested such action in the case of untried persons detained at police-stations by police-officers at their own hand, and without making an application to a sheriff or magistrate of the same kind as is requisite in terms of section 4 of Lord Dunedin's Regulation of 20th August 1904 in the case of untried criminals in prisons. The Sheriff-Substitute's reading of the circular, which is dated 1st September 1904, only a few days later than the Regulation, seems to me to be quite inadmissible. I think that the photographing and taking finger impressions for the purpose alleged in the circumstances set forth were illegal. In so holding I do not wish to prejudice any valid plea which the sergeants might be able to substantiate if the pursuer should sue them in damages for defamation. I should think that his damage would in any case be very slight. But the actings complained of were not, in my judgment, warranted by the Regulation or the circular referred to or by common law. We ought therefore, in my opinion, to order the photographs and finger-tip impressions to be destroyed. I cannot suppose that such an order could be in any way contrary to the public interest, and there is no suggestion to that effect in the defender's record.

LORD SALVESEN—This action raises a novel and in some aspects an important question as to the liability of a chief-constable for the actings of his subordinates which are alleged to have been done in obedience to his instructions and under his authority. The facts are very simple. The pursuer was convicted as a boy of fifteen on a charge of theft. The Sheriff-Substitute who convicted him says that it was a small theft—that of a quantity of apples—and that although convicted he was only admonished and dismissed. He further remarks that the circumstances might have justified him in treating it as a case of mischief rather than one of theft, and that he has often himself suggested "the taking of that course when appropriate, and has avoided the recording of a crime of dishonesty against a young person." The conviction in question was recorded in 1912.

In 1914 a charge was brought against the pursuer at the instance of the procurator-fiscal of having stolen a bicycle. A warrant to apprehend him was granted but was not put in force, as his mother stated that she would bring him to Court on the appointed day, which was the 15th of May 1914. She did so, and he was then asked to plead; and having pleaded "not guilty" he was liberated without having to find bail. A detective-sergeant thereafter requested him to wait in the witness-room until another case was finished, as he was to take some measurements and get some information. The pursuer, who was accompanied by his mother, was conducted by another detective-sergeant (Robertson) to the County Police Office, where he was requested by the same sergeant to go upstairs. His mother asked leave to accompany him, but the detective-sergeant refused to allow her to do so. All this is admitted, with this addition, that the purpose for which Detective-sergeant Robertson wanted him to go upstairs was to get his description. What happened upstairs is concisely narrated in cond. 4. Sergeant Robertson took him to the back court, where he placed the boy's hands on his breast and a mirror at the side of his face and photographed him in that position, the photograph including both the full face and the profile. Thereafter he was taken back to the police office, where, "notwithstanding his repeated protests," his hands were forcibly smeared with a black composition and an imprint taken of his fingers by the said Sergeant Robertson. He was then allowed to go. On the 18th of May he was tried on the charge of theft but was acquitted. The pursuer has since learned that the position in which he was photographed was that prescribed by one of the regulations issuing from the Scottish Office under the Penal Servitude Act 1891 (54 and 55 Vict. cap. 69), section 8, and that his photograph was placed along with those of criminals in an album kept for and by the County Constabulary of Perthshire in the County Police Office in Perth. The finger-tip impression, which the pursuer says was taken on a paper on which was printed "To the Registrar of Habitual Criminals, London," is admittedly also in the possession and under the control of the defender.

The pursuer contends that these circumstances disclose an actionable wrong, and he asks that the defender should be ordained to deliver up the photograph taken, both negative and copies, and the original impression of his fingers and all prints thereof, or that the defender should be ordered to destroy them. He also concludes for a sum in name of damages.

The first defence was that all that happened was done with the consent of the pursuer, and that this sufficiently appears from his averments. I am unable to reach that conclusion. It must be kept in view that the boy was only sixteen or seventeen years of age; that his mother was refused permission to accompany him, although she was his natural guardian; and that the request which was made to him to go upstairs and go through the various operations detailed had all the appearance of an order. It is nowhere suggested even in the defences that the pursuer or his mother was told the purpose for which his attendance was required outwith her presence. I doubt whether a boy of that age could validly give such a consent to his prejudice, but I am very clear that there is nothing from which we can infer consent. I suppose that, according to the defender, it was the pursuer's duty to have asked, before obeying the sergeant's request, what right he had to make it, and for what purpose he asked him to attend in another room, and if he was refused information on this subject to have absolutely declined to accompany the sergeant upstairs. I doubt whether even an adult, who was not something of a lawyer, would have thought of putting such questions or of taking up this attitude. The man who made the request had already taken upon himself to refuse to permit the boy's natural guardian to be present. He was clothed with apparent authority and must have known perfectly well that compliance was yielded to him in his official capacity and in no other. In order that the defender should establish such a defence, it would require, in my judgment, to appear from the pursuer's averments that the purpose of the request was explained to the pursuer and to his mother, and also the fact that the sergeant had no right to enforce compliance. A defence based upon consent might be sustained in such circumstances, but should not be inferred from mere acquiescence by a minor. If this is true with regard to the averments relating to the photographs, it is still more so with regard to the finger-prints, for the pursuer says that he protested against his fingers being blacked, and that in spite of his protests the impression was obtained by force.

The next question is whether what happened was an actionable wrong. The defence originally maintained was that the proceedings were authorised by circular No. 441 issued from the Scottish Office and quoted at length in the defences. Substantially, I think, that is the defence that still appears on record. In answer 9 the defender, after setting forth the terms of the circular, says that it is the custom of the police throughout Scotland, acting on the circular, to take and retain photographs and finger-print impressions of any person who is charged with an offence and who has previously been convicted of theft. The implication is that according to the defender's interpretation of the circular this can be done without the consent of such a person, and that although it was so done, the police were nevertheless acting within their rights It is impossible to read answer 9 in any other way, and counsel for the defender were quite unable to explain how this long statement found a place on the record unless with the object of justifying the actings complained of. Oddly enough the defender now feels himself constrained wholly to abandon this line and to rest his defence on the alleged common law right of the police to photograph any person who they have reason to suppose may contravene the law of the country in future. Indeed, I understood Mr Sandeman to maintain a common law right in every citizen to photograph anyone without his consent and to use such a photograph for any purpose that he pleased. As a corollary to this proposition he maintained a right of property in the negatives and photographs taken, and therefore resisted the first conclusion of the action. I do not feel it necessary for the purposes of this case to consider the general proposition how far members of the public can complain of being photographed, when the photographer is able to take an instantaneous photograph from a place where he is legitimately holding his instrument, although as at present advised I am of opinion that there is no such absolute right. The circumstances with which we are dealing, however, here do not raise this general question. A boy of seventeen is induced (I use no stronger term) by a policeman into being photographed in the position in which criminals are taken by the police, and has further to submit to have a forcible impression taken of his finger-tips. It was said that the latter at all events constituted an assault in law and that the word "assault" is not used on record. I do not think this is of the smallest consequence. The question is whether the pursuer has set forth a relevant case in support of his first plea-in-law, in which these proceedings are described as unwarrantable and illegal, whatever the technical description of them may be. I am of opinion, differing from the Sheriffs, that this question must be answered in the affirmative.

The next point raised was whether the defender can be made responsible for acts committed by his subordinates. I agree that they are not his servants in the ordinary sense, but they are bound to obey his orders, and indeed he has power if they decline to do so to dismiss or suspend them. The pursuer avers that what the sergeant did was in obedience to the defender's instructions and with his authority. If so there can be no doubt as to his responsibility; but it was said that the statement renders it doubtful whether he gave specific instructions in the pursuer's case or whether the constables were acting merely under general instructions, and that the pursuer

is bound to set forth which of these cases it is that he means to present, and that if he fails to do so the second conclusion must be thrown out as irrelevant. I confess that I consider this view untenable. Whether the defender gave specific instructions, or whether the constables acted on general instructions transmitted to them by the defender and involving a misinterpretation by him of the circular already referred to, I think is of no moment. The pursuer can have no inside knowledge of what goes on in the police office at Perth: and the complaint that a pursuer has failed to give due specification of his case is generally only applicable where the facts are within his knowledge. It would be strange indeed to dismiss the case on this ground when the defender does not repudiate what his subordinates did, but strenuously endeavours to justify their actings.

One other point was strongly urged, namely, that if there was a slander it had never been published. It is true that the album is not open for inspection by the public, but it may be inspected from time to time by members of the police force in the course of their duty, and I cannot conceive any form of publication of a defamatory statement which would be more injurious to the person defamed. To be conscious that by all members of the police force he is known as a person who requires to be watched, as being likely to commit crime, must be not merely peculiarly distressing to the feelings of an innocent person, but may involve him in serious trouble if he happens to be in proximity to a place where the police believe an offence has been committed. Publication is not the less real because it is confined to a limited number of persons—more especially as I cannot see that a policeman would commit an offence if he told others of the information he had received from the register of criminals. Even if that could be treated as a breach of duty on the footing that the information was obtained confidentially, there is nothing to prevent it being done except the discretion of the individual constable, and nothing to prevent his disclosing a fact of this nature after he had ceased to be in the force. But apart from this I do not think that any law-abiding citizen is bound to submit to being represented to successive members of the police force as being a person who is fittingly associated with notorious criminals in an album in which their features are preserved for identification.

The conclusion for damages is based mainly on the view that it constituted a slander to put the pursuer's photograph into an album kept for police purposes and to take his finger-tip impressions for the purpose of being sent to London in connection with the Register of Habitual Criminals. I do not doubt that it does. I can imagine nothing more slanderous than to put a man's photograph into what I understand is called "The Thieves' Gallery," and for the purpose that the police may keep an eye upon him and aid others in identifying him should he be suspected of crime. One can figure the case of the police employing a photographer to obtain the photograph of a person to whom the regulations do not apply, but whose photograph they desired for police purposes, and having so obtained the photograph from the unsuspecting victim, putting it into their album of criminals. It was seriously maintained that it was a complete defence to such an action that the person had in fact at a tender age been convicted of some petty theft and was thus a criminal. In my opinion it would be a grave abuse of the album if it were used for such a purpose. Nor can the defender found upon the fact that the pursuer had been arrested on suspicion of being concerned in another theft two years later. If he had been in custody and had been photographed in virtue of the Regulations, the photograph would have to be given up or destroyed in terms of them whenever he was acquitted. No doubt this only applies to persons who have not previously been convicted of crime; but if a photograph legally taken must be destroyed when a supposed thief has been discharged, it seems to me that the same result must follow if the photograph has been taken illegally. I do not doubt that the defender and his subordinates acted in good faith, although I think mistakenly, but that will not excuse him if a wrong was committed on his instructions. I fully recognise also that we must do nothing to hamper the police unduly in the discharge of their important duties, but it is still more important that the rights of individuals should be protected against encroachments on their liberty or injury to their character and reputation.

I am accordingly unable to concur with the opinion of your Lordships that the conclusions for damages should be dismissed. On the other, and what I regard as much the most important question, I concur in the view that we are justified without further inquiry in ordering the photographs and finger-tip impressions to be destroyed. This will prevent further publication of the slander involved in placing them in the album and register, but of course does not compensate the pursuer for any injury he has already suffered. I should not myself be disposed to assess this claim at a high figure, but the question involved in this controversy is not one of amount but of principle, and it is for this reason I have thought it proper to express my views with some fulness.

LORD GUTHRIE — The defender pleads that if the pursuer is entitled to have the photographs and finger-print impressions in question delivered to him or destroyed, he, the defender, is not the proper person to be sued. But the defender admits that in virtue of his office he has the control of the album in which the photographs are contained, and that the finger-print impressions are in his possession as Chief-Constable of Perthshire. On this part of the case I therefore think that the defender's first plea is unfounded. On the merits I think the pursuer is entitled to succeed. I am only sorry that, without raising any question of legal right, the defender should

not have undertaken to destroy the photographs and finger-print impressions, looking to the petty nature of the offence and the youth of the pursuer at the time. That course not having been adopted, and it being necessary to decide the question, I am of opinion that the photographs and finger-print impressions were taken against both the spirit and the letter of the law. It is evident that at one time the defender's advisers thought that they could maintain the right of the police without a warrant to take such photographs and finger-print impressions in the case of an untried prisoner not in custody. Otherwise the appeal on record to the Under Secretary's letter of 1st September 1904 and the averment in answer 9 as to the custom of the police are unintelligible. In the defender's pleas, however, these Regulations are not founded on, and in the argument before us they were ignored. The defender maintained in regard to both photographs and finger-prints that he had not exceeded his common law rights, and in addition in regard to the photographs that the pursuer's averments showed that what was done took place with the pursuer's consent. It is not necessary to impugn the right of anyone to photograph an individual in a public place, whether that individual is conscious or unconscious, willing or unwilling. It is sufficient that the circumstances of this case, as disclosed by the averments of both parties, preclude any such question arising. Looking to the age of the pursuer and the refusal of the defender to allow his mother's presence, I look upon the case as one of compulsion within police premises. The police seem to me to have acted exactly as they would have done had the pursuer been in custody and had they obtained a warrant in terms of the Regulations of 20th August 1904. The pursuer not having been in custody, and the police not having obtained a warrant, the photographs and finger-prints were unwarrantably obtained. The case could not have been met by an interdict against the police making any use of the photographs and finger-print impressions. The pursuer was justified in taking the present proceedings, and I agree with your Lordships in thinking that the proper course is to order the destruction of the articles in question.

The second conclusion is in an entirely different position. It is admitted that the whole acts complained of which are said to warrant the pursuer's demand were committed by two sergeants of the Perthshire County Constabulary without the defender's knowledge. It is not said that the defender can be made liable for the acts of these officers under the law of master and servant, for under the Statute of 1857 they were not his servants. Nor is it alleged that he had given them any special instructions in relation to this case, or in relation to any identical or similar case. The pursuer perilled his case on the bald averment, which can be extracted from condescendence 6, namely, that the sergeants "were acting in obedience to defender's instructions." I agree with the Sheriff in thinking that this averment of general instructions without any specification is not sufficient in a case of this kind. The pursuer was asked in the course of the debate whether he wished to make his averment more specific, as, for instance, by averring, in reference to the defender's answer which he merely denies, that with the defender's knowledge and authority photographs and finger-print impressions were in practice taken of persons not in custody and without obtaining a warrant. But he declined to make his averment more specific. Therefore in my judgment, so far as the defender is concerned, the pursuer's action based on the alleged slander must be dismissed as irrelevant.

The Court pronounced this interlocutor—

"Recal the interlocutors of the Sheriff and the Sheriff-Substitute appealed against, dated respectively 29th March 1915 and 8th February 1915: Find that the taking of the photographs and finger-print impressions complained of and admitted on record was contrary to law, and that the pursuer is entitled to have the same destroyed: Therefore ordain the defender to destroy within ten days from this date all photographs, both negatives and copies, of the pursuer, and also the original impressions of his fingers and all prints thereof taken on or about 15th May 1914 in the County Police Office, Perth, and that in the presence of agents for the parties and at the sight of the Sheriff-Clerk of the county of Perth: *Quoad ultra* dismiss the action, and decern."

Counsel for the Pursuer and Appellant —Chisholm, K.C. —Macgregor Mitchell. Agents—J. Miller Thomson & Co., W.S.

Counsel for the Defender and Respondent —Sandeman, K.C.—MacRobert. Agents—Carmichael & Miller, W.S.

*Tuesday, January* 4.

## SECOND DIVISION.

[Lord Hunter, Ordinary.

## ABBOT *v.* NORTH BRITISH RAILWAY COMPANY.

*Reparation — Railway — Negligence — Passenger Alighting when Train not at Platform—Invitation to Alight—Relevancy.*

A female passenger brought an action of damages for personal injury against a railway company, in which she averred that on her arrival at her destination, which was a terminus, the carriage in which she was seated was not able owing to the length of the train to be brought up opposite the platform, that she and other passengers in the carriage waited a quarter of an hour or thereby, and that as no one appeared to assist them to alight they proceeded to do so themselves, in the course of which the pursuer fell and was injured. She