EVANS, ... APPELLANT.
M'LOUGHLAN, ... RESPONDENT.

1861.
Feb. 19*th and* 21*st.*

Jurisdiction—Court of Session and Scotch Exchequer.—The Scotch Exchequer Statutes do not deprive the Court of Session of its general jurisdiction, although the jurisdiction of the Exchequer may be co-ordinate.

Revenue Offences—Power and Duty of Justices.—If the justice has jurisdiction under the 79th section of the 7 & 8 Geo. 4. c. 53., the Court of Session cannot issue a suspension; but if the justice has not jurisdiction, the Court of Session may interpose.

Excise Officer's Power of Summary Arrest and Detention.—Under the 33rd section of 7 & 8 Geo. 4. c. 53., officers of excise may do all that is reasonable by way of arrest and detention for the purpose of having the matter adjudicated upon.

Per the Lord Chancellor: There is power given to the excise officer, and to all who are acting in his aid, to arrest and detain the offender, and convey him before a Justice; p. 93.

Per the Lord Chancellor: If there are twenty magistrates applied to, and each of them improperly refuses to hear the case, it is clear that the man must be detained till some magistrate is found who will administer the law; p. 95.

Per Lord Chelmsford: Inasmuch as the officer is to convey the offender before a magistrate, there must necessarily be some detention following the arrest, in order to enable him to perform his duty in that respect; p. 101.

It would appear that the jurisdiction of the justice will not be affected by an unreasonable delay on the part of the excise officer in bringing the person charged before the justice.

Per Lord Cranworth: The magistrate is simply to inquire whether the offence was committed. It is not his business to ascertain whether the prisoner has been brought before him *quam primum*; p. 98.

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THE Respondent, on the 22nd March 1858, was arrested by two officers of excise, the Appellant being one of them, upon a charge of "illicit distillation."

Having been taken in the very act, the Respondent was forthwith lodged in the police office at Airdrie, to be there kept until a magistrate could be got to convict him of the charge, and to punish him for his offence.

A difficulty arose in finding a willing magistrate. The first justice applied to declined to act; the next made excuses; so that it was not until the 24th of March that a magistrate, Mr. Torrance, was induced to hear the case.

Mr. Torrance was satisfied with the evidence, and in pursuance of the 7 & 8 Geo. 4. c. 53., committed the Respondent to the House of Correction at Airdrie, there to be kept to hard labour for three calendar months. The Respondent presented a note of suspension and liberation to the *Lord Ordinary* (Lord Benholme) in the Bill Chamber. His Lordship granted warrant for the Respondent's liberation, and afterwards remitted the cause to the *Lord Ordinary* in Exchequer Causes (Lord Ardmillan) under the 21st section of the 19 & 20 Vict. c. 56.

On the 18th December 1858 Lord *Ardmillan* found that the proceedings complained of by the Respondent were "irregular and illegal," chiefly on the ground that there had been an undue delay in resorting to a magistrate, and that the Respondent had been kept all the time in confinement, that is to say, "during "the night of the 22nd, the whole day of the 23rd, "the night of the 23rd, and up to the forenoon of the "24th March, 48 hours in all," as the *Lord Ordinary* declared by his note.

The cause having been carried to the Inner House, their Lordships of the Second Division, on the 18th

February 1859, suspended the whole proceedings, including the magistrate's warrant of commitment; but inasmuch as the Complainer had been already released, they found it unnecessary to grant any warrant for his liberation. They, however, found him entitled to expenses.

The Appellant, Evans, deemed it right to appeal against these Interlocutors to the House of Lords. He was supported by the *Lord Advocate* (*a*), Mr. *Welsby*, and Mr. *Russell*;—who insisted in the first place that the Court of Session had no jurisdiction in the case, for that by the Treaty of Union, Article 19, 6 Anne, c. 26., and the 19 & 20 Vict. c. 56., the matter, being one of revenue, was properly and exclusively within the cognizance of the Scotch Court of Exchequer. Secondly, they urged that even if the Court of Session had jurisdiction, there was no illegal or unreasonable detention of the Respondent, the circumstances of the case being considered.

Mr. *Chambers* and Mr. *Neish* appeared for the Respondent, citing *Craig* v. *M'Colm* (*b*), *Guthrie* v. *Cowan* (*c*), *Anderson* (*d*).

At the close of the argument the following opinions were delivered:—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*e*):

My Lords, I entertain a clear opinion that the Interlocutors appealed against ought to be reversed, but not at all on the ground that the Court of Session have no jurisdiction over such matters. The Court of Session had jurisdiction over such matters, and no Act of Parliament has been passed to deprive that

(*a*) Mr. Moncreiff.
(*b*) 16th May 1801; Hume's Dec. 252.
(*c*) 10th Dec. 1807, F. C. (*d*) 28th Feb. 1811, F. C.
(*e*) Lord Campbell.

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high tribunal of the jurisdiction which it once enjoyed. And although the Court of Exchequer would have had co-ordinate jurisdiction in such a matter, it does not at all follow that when it was brought into the Court of Session it would have been *coram non judice.*

If this proceeding could have been impeached on the ground that the justice had not jurisdiction over the offence with which the Respondent was charged, I am of opinion that in that case the Court of Session would have had jurisdiction, and would have been fully entitled to hear the objections that were raised. But, my Lords, upon looking at the Act of Parliament it appears to me quite clear that the 79th section takes away any jurisdiction from the Court of Session in this case. It lies upon the Respondent to show that the suspension, by which the proceedings were commenced before the Court of Session, was regularly sued out. By the 79th sect. of the 7 & 8 Geo. 4. c. 53, it is enacted, "that no writ of certiorari" (that would apply to England) "or other writ or process shall be issued at the suit of any Defendant out of any of His Majesty's Courts of Record in England, Scotland, or Ireland, nor shall any bill of suspension, advocation, or reduction be passed, nor shall any letter or letters of suspension, advocation, or reduction, or any other proceeding be issued out of the Court of Session or Court of Justiciary in Scotland, to supersede, sist, stay, remove, or in anywise affect any information or judicial proceeding before the Commissioners of Excise or Commissioners of Appeal in this Act after mentioned, or before any justice or justices of the peace, in the United Kingdom in pursuance of this Act." Therefore if the justice before whom Mr. M'Loughlan was brought, was acting in pursuance of the Act and had jurisdiction in the matter, the suspension

was incompetent and the Court of Session had no jurisdiction.

Now, my Lords, it seems to me that the learned Counsel for the Respondent have utterly failed in showing that the justice had not jurisdiction. For it is enacted by the 33rd section of the same Act of Parliament that creates the offence, that "it shall be lawful for any officer of excise and all persons acting in his aid and assistance" (and in this case I know not whether the officer of police might not be considered as acting in aid and assistance of the officer of excise, if it were necessary to consider that)—"it shall be lawful for any officer of excise, and all persons acting in his aid and assistance to arrest and detain every person so discovered and to convey him or her before one or more justice or justices of the peace for the county, shire, division, city, town, or place wherein such person shall be so discovered as aforesaid." Here there is power given to the excise officer, and to all who are acting in his aid to arrest, detain, and convey the offender before a justice.

Then come the words which give jurisdiction to the justice: "and it shall be lawful to and for such justice or justices of the peace, on confession of the party or by proof on the oath of one or more credible witness or witnesses made of such offence, to convict every such person so discovered as aforesaid."

It is not disputed that the magistrate who acted in this case would have had jurisdiction if he had been the magistrate to whom the Respondent was taken in the first instance, on the 22nd of March, in order to make the complaint before him. If the Respondent had been immediately conveyed before that magistrate, and that magistrate had proceeded to hear and to decide, no question could have been made about the jurisdiction. But it so happens that the

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arrest being on the 22nd of March (I believe there is some doubt about the dates) it was not, according to the statement in the case, till the 24th of March that the hearing took place. And it is said that during that interval the Respondent could not be considered as having been detained under the authority of the Act.

Now, it is allowed by the Counsel for the Respondent in this, one must admit, ably argued case, that all that is reasonable may be done by way of detention for the purpose of having the matter adjudicated. And it is not disputed, I presume, that if Mr. M'Loughlan had been taken to the house of a justice, and the justice had been at dinner, he might lawfully have been detained in the hall, or introduced into the drawing room, or into a picture gallery to amuse himself until the repast was over, and the matter might then be heard. Indeed Mr. *Neish* allows that the excise officer might have taken him to his (the officer's) house and detained him there. But the objection is, that instead of being in the officer's house he was taken to a prison, and a police officer was asked to take care of him. Well, I say again, referring to these sections of the Act of Parliament, that the police officer in doing that might be considered as acting in aid of the excise officer, at all events he was acting for the excise officer, and the excise officer must be considered as the party who is detaining him. *Qui facit per alium, facit per se.* He, for the excise officer, did detain him, and it is allowed that there was no detention whatsoever, beyond what was essentially necessary for the matter being adjudicated. There was no malice, no violence, no harsh treatment, and no time at all was wasted. The excise officer does his best to find a justice to hear the case. He goes first to one man and then to another, and

then he consults the officer who represents the Government at Airdrie, and he advises him, I think to go to Hamilton. He goes to Hamilton. He does his best to find a justice, down to the 24th, when Mr. Torrance is found, and the proceedings are consummated.

It seems to me quite clear that it must be considered that there was a continuity of detention, that it was always either by the excise officer, or by some person acting in aid of the excise officer; and there is no doubt that if a justice could have been found sooner, the detention would have been abridged.

It was said by the learned Counsel for the Respondent that this was not in the heart of the Highlands, that Airdrie is a very populous place, and that there are a great number of magistrates there. But if it be admitted that in the heart of the Highlands, where magistrates are rare, the Respondent might have been detained till a magistrate could be found, then, if in any other part of the country there are twenty magistrates applied to, and each of them improperly refuses to hear the case, it is clear that the man must be detained till some magistrate is found, who will administer the law.

Under these circumstances, it appears to me that Mr. Torrance had jurisdiction, just as much as if he had been present at the time when the unlawful distillation was discovered, and had sat at the outset of the proceedings to hear and adjudicate.

Van Boven's case is, I think, in point, because it shows, that even although the detention be for an unreasonable time, that does not affect the case. I do not think that the detention in the present case was for an unreasonable time; and if a jury had had to try that question, I think any jury would have said that there was no detention for an unreasonable time.

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One noble and learned Lord has intimated his opinion (*a*), in commenting upon Van Boven's case (*b*), that that would not have interfered with the jurisdiction of the justice when the hearing actually took place. In that case, the Act of Parliament gave power to detain for a reasonable time, and the jury expressly found that he had been held in custody for an unreasonable time, but still the determination was that that did not interfere with the jurisdiction of the magistrate.

That being so, all the other questions disappear. The Court of Session having no jurisdiction to suspend the proceedings before the justice, because the justice had jurisdiction in the matter, and the suspension being incompetent, the other questions that have been discussed at the bar do not arise.

I am almost ashamed to refer to some of the objections that have been made, such as that there was only one witness examined; for the Act of Parliament says that the proof of one witness shall be sufficient. And again, that the officer filled up a blank warrant. Although those objections, received a certain countenance from the *Lord Ordinary*, I must say that they seem to me to be wholly frivolous, and I am sorry that they should have received countenance in that quarter.

The only further objection that I think it right to take notice of is, that there as no written information, and that, consequently, there was not any jurisdiction in the justice. If this had been a proceeding under a different clause of the Act of Parliament, not where there has been an arrest, but an immediate procedure for obtaining an adjudication, and the infliction of a penalty, I think there might have been good reason for such an objection; but it

(*a*) This was in course of the argument by Counsel.
(*b*) 9 Q. B. 669.

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is quite clear that the Legislature, in enacting this *festinum remedium*, of arresting parties taken *in flagrante delicto*, and having an immediate conviction, contemplated that it should be done without the formality of a written information, and without the formality of a regular conviction. Those steps may be necessary, and often are necessary and proper, when there is a regular proceeding which is supposed to take place before a magistrate ; but this is a special proceeding to be adopted for the purpose of putting down an offence which it is very difficult to meet ; namely, the offence of unlawful distillation, and it seems to me that if parties were allowed to raise such objections as these, the very object of the Act would be defeated. All that it appears to me judicially necessary for us to decide is, whether this suspension was competent or not. I say that it was incompetent, because the magistrate had jurisdiction ; and the suspension being incompetent, I must advise your Lordships that the Interlocutors of the Court of Session should be reversed.

Lord Cranworth's opinion.

Lord CRANWORTH :

My Lords, I entirely concur with my noble and learned friend. The 33rd section of the Statute in question makes it the duty of any officer of Excise, upon finding a person *in flagrante delicto* engaged in illicit distillation, to arrest and detain him, and bring him before one or more justice or justices of the peace, in order that he may there be dealt with. And the duty then imposed upon the justice to hear and determine the case, and to fine the party 30*l.* if he is convicted, either upon his own confession, or by the evidence of one witness, and in default of his payment, then to commit him, for a certain time, to prison.

Now, here the officer of excise, Evans, did find

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M'Loughlan engaged in illicit distillation, did arrest him, did detain him, and did bring him before a justice of the peace; and the first point that was argued was, that it was the duty of the justice of the peace to inquire whether he had been brought *quam primum* before him. Now, in my opinion, the justice of the peace not only had no obligation to make such an inquiry, but he would have been doing that which he would not have been justified in doing had he stopped to make such an inquiry. He might just as well have inquired whether the arrest had been unnecessarily harsh as to have inquired whether the detention had been unnecessarily long. The justice of the peace had no duty to perform except to proceed upon the case as the case of a person taken *flagrante delicto* having been arrested and detained by the officer and brought before him. That, therefore, I think, disposes altogether of the question about unreasonable detention. . . . . .

But I must say that looking at it as a question of fact, if I had to decide it only as a juryman, I should say that there was no unnecessary detention at all. The man was taken, and for aught that appears would have been immediately brought before the justice that same evening, if a justice could have been found. But for some reason not explained the officer of excise goes first to one justice of the peace and then to another, and none of the justices chooses to entertain the jurisdiction; till at last, forty-eight hours after the man had been taken, the excise officer does find a gentleman of the name of Torrance, who does entertain the jurisdiction, and convicts him. It appears to me, therefore, that this question of unreasonable detention, which seems to have been the only ground on which the Court of Session proceeded, entirely falls to the ground. It was not a question that could come into contest before the

justice, even if the facts had warranted it, and in truth the facts would not warrant it, if it had come before the justice.

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That may be considered as a question of substance; all the other questions are questions really and entirely of form. I had at one time a doubt whether the conviction was drawn up in the proper form; but I think that what was pointed out by my noble and learned friend is unanswerable on that subject, namely, that the substance being right, the authority of the Court of Session to inquire into the form is taken away by the 79th section of the Statute.

That the Court had jurisdiction to inquire into such a matter, if it had appeared on the face of the proceedings that the justice was actually without jurisdiction, I can entertain no doubt. I do not think that the Statute meant to give exclusive jurisdiction to any justice of the peace, or to any tribunal, to imprison one of Her Majesty's subjects without it being distinctly shown on what ground he was imprisoned, and that he was lawfully imprisoned. But all the rest being entirely matter of form, the right of suspension is taken entirely away.

Upon the whole, therefore, I think that the Court of Session have certainly come to an erroneous conclusion, and that the Interlocutors must be reversed.

Lord CHELMSFORD:

Lord Chelmsford's opinion.

My Lords, I agree with my noble and learned friend upon the Woolsack, that the general jurisdiction of the Court of Session is not taken away by any of the provisions of the Acts to which reference has been made. If, therefore, the magistrate had been acting without any jurisdiction, I apprehend that it would have been competent to the Court of Session to have entertained these proceedings. But supposing the

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magistrate has jurisdiction, then, according to the opinion of my noble and learned friend upon the Woolsack, in which I entirely agree, the 79th section of the 7 & 8 Geo. 4. c. 53. took away from the Court of Session the power of issuing a suspension. Therefore in this case the real substantial question is, whether the magistrate had or had not jurisdiction, under the circumstances, over the particular case.

Now, I confess that, upon the question of the magistrate's jurisdiction, I am unable to agree either with the conclusion at which the Court of Session arrived, or with the reasons which they have given for that conclusion. They thought that the proceeding under the 33rd section of the 7 & 8 Geo. 4. c. 53., was incompetent in consequence of what they regarded to be an illegal detention of the Respondent, because he was not brought before the justice in the manner prescribed and authorized by the Statute,—that it ceased to be a proceeding on immediate arrest under the Act from the nature of the detention, the Respondent not being conveyed before the justice by the excise officer but being brought up as a prisoner in the hands of the gaoler.

It is to be observed that upon this single point upon which the Court of Session decided, the *Lord Ordinary* seemed rather to be of opinion that the detention or imprisonment, or whatever it is to be called, was not sufficient in itself to make void the conviction. And I think it is perfectly clear that it could not have that effect; for let us look to the object and to the words of the 33rd section of the Act upon which the question turns. The object of that section of the Act was to provide for the *immediate apprehension* of offenders who were likely to escape from justice; and accordingly it empowers the officer, where any person is discovered assisting in

the illegal manufacture, that is, the illicit distillation of spirits, "to arrest and detain every person so discovered, and to convey him or her before one or more justice or justices of the peace for the county, shire, division, city, town, or place wherein such person shall be so discovered as aforesaid." Then it enacts that "it shall be lawful to and for such justice or justices of the peace, on confession of the party, or by proof, on the oath of one or more credible witness or witnesses, made of such offence, to convict every such person so discovered as aforesaid."

So that the officer is empowered to "arrest and detain." "Arrest" and "detention" are here in a certain sense synonymous terms; but inasmuch as the officer is to convey the offender before a magistrate, there must necessarily be some detention following the arrest, in order to enable him to perform his duty in that respect.

Now, detention is of various kinds. It may be by the officer keeping hold of the person that he has so arrested and detaining him in that manner. It may be by locking him up in a room under the charge of some persons who are entrusted to watch over him while the officer goes for the purpose of finding some justice of the peace. And it is admitted, on the part of the Respondent, that such detention would be lawful in every case where the room or the parties who were watching that room were under the control of the officer. But it is said that in this particular case the man having been lodged in a gaol, from that moment the detention ended, in the sense of the Act of Parliament, and that a new species of custody, in the nature of an imprisonment, changed the character of the detention, and made the party no longer under the control of the officer.

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Now it appears to me that you cannot, by using the term "incarceration" or "imprisonment," alter the nature of the thing. It may still be detention, although the detention is in a gaol or lock-up house, and not in a private house, in which it is admitted that the detention would be lawful under the Act of Parliament; because, after all, the persons who have the control over and the custody of the offender are aiding and assisting the officer in the detention of the offender. It is not a change of custody as long as they are holding him upon the authority of the officer and for the purpose of detaining him under the Act of Parliament.

Now, when the party, under these circumstances, is brought before the magistrate, I quite agree with my noble and learned friend opposite, that the magistrate has nothing to do with the mode in which the party has been dealt with after he has been arrested. When he is discovered and is immediately arrested by the officer, then the jurisdiction of the magistrate would attach; and it would be no part of the duty of the magistrate to inquire, when he found that there had been a delay, as in this instance, of two days, why it was that the party arrested *flagrante delicto* was not immediately brought before him. The whole of his duty is to ascertain whether the offence has been committed; whether the party was discovered assisting in the illegal distillation; and if he were so discovered, and immediately arrested, that is quite sufficient to give the magistrate jurisdiction, and the magistrate has no duty to inquire further, or to ascertain whether, since his arrest, he has been actually in the immediate keeping of the officer, or whether he has been in some other custody, but still under the charge of the officer and under his control.

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This case was likened, by the *Lord Justice-Clerk*, to the case of *Hay* v. *Linton*(*a*); and yet it is impossible to conceive any one thing more distinguishable from another than the case of *Hay* v. *Linton* from the present case. What was the case of *Hay* v. *Linton?* It was a proceeding under an Act of Parliament which authorized constables to bring before a magistrate any child under fourteen years of age found wandering in the streets without any home, proper guardianship, or visible means of subsistence; and the magistrate was authorized, if no person appeared, after intimation being given, to provide for the child and find security to that effect, to order such young person forthwith to be transmitted to and received at any reformatory school. Now where a destitute child is brought before a magistrate under the provisions of that Act, it is quite clear that when intimation has been made, the child is to be taken care of in the meantime until it can be ascertained whether any person will appear and give the requisite security; but in that case, instead of taking care of the child in that manner, the magistrate granted a warrant to detain the child in the cells of the police office. Therefore, when the child was brought up after the period of intimation had expired, it was insisted, or rather it was afterwards insisted, when the child had been sent to the reformatory, that the jurisdiction of the magistrate had ceased, because the character and condition of the child had altogether changed; and so the *Lord Justice-Clerk* puts it very clearly, when the order was afterwards pronounced, the child was no longer before the magistrate in the position contemplated by the Statute, that is, brought before him immediately upon being found in the streets in a state of destitution; but, on

(*a*) 2 Irvine's Justiciary Cases, 333.

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the contrary, was brought up as a prisoner from the cells of the police office.

Now what possible analogy can there be between that case and the present? Is the character of the immediate arrest changed in this case by reason of the subsequent detention? Is there any change in the evidence to prove that the party was discovered in the act of illicit distillation? It is clear that the analogy between the two cases altogether fails, and that there was nothing whatever in the circumstances of this detention, even supposing it had been an illegal detention, which would take away from the magistrate that jurisdiction which attached to him under the Act by reason of the discovery which was made of the party, and the immediate arrest upon that discovery.

I wish that it may be understood that I do not intend to express any opinion which might countenance the delay which took place, upon the present occasion, in carrying the offender before a magistrate. My noble and learned friend on the opposite side of the House thinks that there was no unnecessary delay, and he may be right in that respect. But I am bound to say that, even if there was an improper delay, the officer was placed in a situation of great difficulty and embarassment in consequence of the refusal of one or more of the magistrates to hear the case. However, I am so perfectly clear with regard to the question as to the jurisdiction of the magistrate not having been taken away, that I could not have entertained any doubt whatever upon the subject, if it had not been for the very high respect which I entertain for the judgment of the learned Judges of the Court of Session who have decided this question.

With regard to the other objections which have been raised, in my opinion they are really very

frivolous. I entirely concur with the opinion which has been expressed by my noble and learned friends, and I think that upon the present occasion the Interlocutors ought to be reversed.

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Interlocutors reversed, with a Remit, and a direction to refuse the Note of Suspension, and to do further in the Cause as should be just and consistent with the House's direction and judgment.

TIMM—HOLMES, ANTON, TURNBULL, AND SHARKEY.