statute, I may observe that under the former law the personal obligation would not transmit against the disponee by the mere force of the disposition. If it was intended that he should become liable for the debt, the proper form was that he should grant a bond of corroboration. The effect of such a bond was not to discharge the original debtor, but to give the creditor in the security the further obligation of the granter of the bond. The creditor did not intervene. He merely accepted the bond of corroboration if he desired to be vested in the obligation of the granter.

The purpose of the statute was to provide a less cumbrous form for the transmission of the personal obligation. It deals with two cases — the disposition of the lands charged with the debt, first, on a lucrative title, succession, gift, or bequest, and second, on an onerous title.

In the first case it is declared that the heritable security, together with the personal obligation, shall transmit against the disponer without the necessity of any bond of corroboration or other procedure. It is obvious that in this case the intervention of the creditor is not required. He becomes the creditor of the disponee by the mere form of the statute. There seems no reason why a different rule should prevail when the title is onerous, though a mere disposition may not in that case be sufficient to transmit the obligation.

In the case of a disposition on an onerous title, the personal obligation does not transmit unless "an agreement to that effect appears *in gremio* of the conveyance." It is maintained that this means an agreement between the heritable creditor and the disponee. But while it is difficult to see why the creditor must intervene in the one case and not in the other, the necessity for the agreement is obvious.

When the disposition proceeds as on a lucrative title, the disponee takes the subject *cum onere*. There is no need for any declaration on his part that he is willing to become personally liable for the debt. His assent is implied as the legal inference from such a title. Consequently, the statute declares that the personal obligation shall transmit against him. In the case of an onerous title there is no room for any such implication. It is necessary that the disponee shall agree to be bound, or, in other words, that he shall signify his assent to that effect. Without such assent it would be manifestly unjust to bind him to pay the debt of the disponer. But when it is given the two cases become identical.

I am therefore of opinion that it is not necessary that the creditor shall be a party to the agreement.

It was further contended that the defender did not undertake to pay the debt, but that he merely became liable in an obligation of relief. I am of opinion that this contention is not well founded. The disposition bears that the defender "is to take on himself the obligation to repay" the debt charged on the lands, and that "the personal obligation shall be enforced against him by summary diligence." These words can have but one construction. They signify in the plainest terms the agreement or assent of the defender to be bound in the personal obligation, and he is consequently by force of the statute in the same position as if he had granted a bond of corroboration.

The case of *Carrick* was cited to us. In that case there was a great difference of judicial opinion. But in forming the opinion that our judgment should be in favour of the pursuer, I do not think that I am doing violence to it. In that case the obligation undertaken by the disponer was one of relief only, and consequently it was said that there was no assent on his part to come under a direct obligation to the creditor in the security. For obligation of relief is an obligation to the debtor and not to the creditor. At the same time I think it right to say that in my opinion the case deserves to be reconsidered.

The Lord Justice-Clerk and Lord Trayner concurred.

Lord Young was absent.

The Court adhered.

Counsel for Pursuers and Respondents—Rhind—Hay. Agent—John Clark Junner, W.S.

Counsel for Defender and Reclaimer—Guthrie — Guy. Agents — Reid & Guild, W.S.

Thursday, May 14.

FIRST DIVISION.

[Sheriff of Lanarkshire.

YOUNG *v.* MAGISTRATES AND COUNCIL OF GLASGOW AND OTHERS.

Reparation — Wrongous Apprehension — Responsibility of Magistrates and Town Council for Acts of Police — Glasgow Police Act 1866 (29 *and* 30 *Vict. c.* 273).

Held that an action of damages for wrongous apprehension by two constables belonging to the Glasgow Police force would not lie against the Magistrates and Council of that city, in respect that the management of the police force was vested by the Glasgow Police Act, not in the Magistrates and Council, but in a committee of the Magistrates.

Reparation — Wrongous Apprehension — Public Officer—Malice.

A woman who had been apprehended and charged with importuning passengers for the purpose of prostitution, by two constables, brought an action against them, averring that she had been apprehended close to her home, and when on her way thither; that the defenders when they arrested her refused to state any ground for her apprehension or to allow her to inform her mother thereof, but insisted on

taking her to the police office though they knew her address and that she would be available to answer any complaint preferred against her; that they treated her roughly on the way to the office; that her manner of life was virtuous and industrious; and that the defenders had acted maliciously and without probable cause.

Held (1) that malice and want of probable cause must be inserted in the issues; (2) that to warrant the insertion of malice there must be facts and circumstances averred on record from which malice might be inferred; and (3) that the averments made were sufficient to justify the inference of malice.

On the night of 5th November 1890 Jessie Young was apprehended by James M'Corriston and Malcolm M'Phee, two constables belonging to the Glasgow police force, and taken to the police office and there charged by them under sub-sec. 30 of sec. 149 of the Glasgow Police Act 1866 with importuning passengers for the purpose of prostitution. She subsequently brought an action of damages in the Sheriff Court of Lanarkshire against M'Corriston and M'Phee, and the Magistrates and Council of Glasgow as their employers.

She averred, *inter alia*—"(Cond. 2) The pursuer resides with her mother at 31 Willowbank Crescent, Glasgow. . . . (Cond. 3) The pursuer is a dressmaker, and is virtuous and industrious, and ever since her father's death, which occurred about four years ago, has been the chief support of the household. The pursuer is, and was at the date of her arrest after mentioned, engaged to be married. (Cond. 4) On Wednesday night, the 5th day of November last, the pursuer, after her work was done for the day, called at the house of a friend, Mrs Reid, residing in Garnethill, and Miss Reid, daughter of Mrs Reid, offered to accompany the pursuer home. On reaching the entrance to pursuer's house the defenders M'Corriston and M'Phee . . . sprang forward and arrested pursuer and Miss Reid. . . . Miss Reid and pursuer inquired what was wrong, but the defenders M'Corriston and M'Phee replied that they would know that when they got to the Cranstonhill Police Office, and declined to state any grounds for the arrest. The pursuer desired that she should acquaint her mother before accompanying the policemen, but this they refused. Although they knew that pursuer lived at the place where arrested, and would have been available at any time to answer to any alleged complaint that might be preferred against her, and although pursuer and Miss Reid offered to go quietly, they were roughly treated by the policemen M'Corriston and M'Phee, being dragged along by the arms, and jostled and hustled in presence of a large crowd of persons who had collected, and were taken to the Western Police Station at Cranstonhill. . . . (Cond. 5) On arriving at said police station the constables M'Corriston and M'Phee charged the pursuer and Miss Reid with importuning under section 149, sub-section 30, of the Glasgow Police Act 1866, which applies to prostitutes or night-walkers loitering in any road, street, court, or common stair, or importuning passengers for the purpose of prostitution. Both declared their innocence of the charge. The superintendent or other officer in charge at the police station refused to accept the charge against Miss Reid, and told her she might go; but he detained pursuer, on the ground, as he stated, that he had seen her there before. She explained that she once appeared as a witness in a case, but had never been charged with any offence. Ultimately she was liberated on a pledge of 15s., and was requested to appear at the Court the following morning. (Cond. 6) The pursuer, accompanied by a friend, attended the Court the following morning, but mistaking the hour of Court, and the calendar being a very light one, she arrived at the Court just as it had risen, being about a quarter of an hour late. Notwithstanding that Miss Reid's brother was present in Court, and craved a continuation till the following Saturday to allow of witnesses being brought forward, the sitting Magistrate declared the bail forfeited. (Cond. 7) The pursuer being anxious to have her character cleared of the foul charge laid against her, the matter was reported to the Chief Constable; and at a meeting with him it was arranged that the charge should be again brought up and evidence led for the prosecution and the defence, and the charge disposed of on the evidence, and Saturday, 29th November last, was fixed for that purpose. (Cond. 8) Pursuer along with her witnesses and agent attended at the hour named, but the sitting Magistrate on the advice of the assessor declined to hear the case. (Cond. 9) In apprehending the pursuer as aforesaid, the defenders, the said M'Corriston and M'Phee, acted maliciously, oppressively, and illegally, and without any just or probable cause. In executing the arrest they used great harshness and acted with quite unnecessary force and violence. . . . The charge preferred against her was utterly groundless, and was also made maliciously and oppressively by the said defenders."

The defenders pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (2) Privilege. (3) The defenders M'Corriston and M'Phee not being employed or paid by, or under the control of the other defenders the Magistrates, &c., they are not liable for their acts, and they (the Magistrates, &c.) should therefore be assoilzied with expenses. (4) The defenders M'Corriston and M'Phee having acted on the occasion referred to on reasonable grounds, and in the execution of their duties, and in virtue of the powers conferred on them by the Glasgow Police Act 1866, they as well as the other defenders should be assoilzied with expenses."

On 4th February 1891 the Sheriff-Substitute (ERSKINE) allowed a proof before answer.

The pursuer appealed for jury trial, and proposed the following issues for trial of the

cause:—"It being admitted that the defenders the Magistrates and Council of the city and royal burgh of Glasgow are Commissioners of Police of the said royal burgh, constituted by and acting under the Glasgow Police Acts 1866 to 1890, and that the other defenders the said James M'Corriston and Malcolm M'Phee are constables in the western division of the city of Glasgow, employed and acting under and in virtue of the said Acts—Whether on or about 5th November 1890 the said Magistrates and Council or the said James M'Corriston and Malcolm M'Phee, acting under their authority and for whom they are responsible, wrongfully, maliciously, and without probable cause apprehended the pursuer, or caused her to be apprehended, at or near the house of her mother at 31 Willowbank Crescent in Glasgow, and conveyed her or caused her to be conveyed to the Cranstonhill Police Office in Glasgow, to the loss, injury, and damage of the pursuer? Whether, place and date foresaid, the said defenders in apprehending the pursuer as aforesaid acted oppressively and with unnecessary force and violence, and dragged her by the arms and jostled and hustled her, whereby she was injured in her person, to the loss, injury, and damage of the pursuer? Whether on or about the date foresaid, at the said Cranstonhill Police Office, the said Magistrates and Council, or the said James M'Corriston and Malcolm M'Phee, acting under their authority and for whom they are responsible, wrongfully, oppressively, maliciously, and without probable cause charged the pursuer, or caused her to be charged with the offence of importuning under section 149, sub-section 30, of the Glasgow Police Act 1866, to the loss, injury, and damage of the pursuer? Damages laid at £500.

Argued for the defenders—1. *In the case of the Constables.*—Where an action was brought against a public officer for alleged wrongful acts done by him when acting within the scope of his employment, the rule was not only that malice and want of probable cause should be inserted in the issues, but that to warrant the insertion of malice facts and circumstances from which malice might be inferred should be averred by the pursuer on record—*Beaton* v. *Ivory*, July 19, 1887, 14 R. 1057; *M'Murchy* v. *Campbell*, May 21, 1887, 14 R. 725; *Innes* v. *Adamson*, October 25, 1889, 17 R. 11; *Macaulay* v. *North Uist School Board*, November 26, 1887, 15 R. 99. With these cases might be contrasted *Lightbody* v. *Gordon*, June 15, 1882. No doubt in the above cases where the rule referred to had been applied, the public officers had been superior in grade to police constables, but the principle of these cases applied to the present, as the protection given to the defenders in these cases was granted to them for the benefit of the public service in order to enable them to do the duty imposed upon them fearlessly—*Urquharts* v. *Grigor*, December 21, 1884, 3 Macph. 283. In the present case there were no averments on record to justify the inference of malice, and therefore the first and third issues should be disallowed. The second issue stood on a different footing. It involved a charge of assault or something like it, but should be disallowed in respect that there were no sufficiently specific averments made on record to support it. 2. There was no case against the Magistrates and Council. In the first place, there was no authority for the view that an employer could be made responsible for the malicious acts of his servant. It was also difficult to see how malice could be proved against a corporation, and as a matter of fact there were no averments of malice made against the Magistrates and Council. In the second place, the Glasgow police force was not under the control of the Magistrates and Council, but of the Chief-Constable, subject to the supervision of a statutory committee of the Magistrates—Glasgow Police Act 1866, sections 84 and 86.

Argued for the pursuer—1. *In the case of the Constables.*—The rule that facts and circumstances from which malice might be inferred must be averred on record was only applicable to, and had only been applied in, actions of damages against persons holding positions of importance in the public service, and was not applicable to a case like the present, where the defenders were merely police constables. Further, malice might be inferred from the averments made on record. 2. The Magistrates and Council were responsible for the acts of the constables as their servants. The appointment of the statutory committee did not exclude the responsibility of the Corporation—Glasgow Police Act 1866, sections 88 and 134; *Goff* v. *Great Northern Railway Company*, 1861, 30 L.J. Q.B. 148. Though there were no cases in which a master had been made responsible for the malicious acts of his servants, there were cases where employers had been made liable for the fraud of their servants, and the principle of these cases applied here—*Mackay* v. *Commercial Bank of New Brunswick*, 1874, 5 Privy Council Rep. 394; *Houldsworth*, 6 R. 764.

At advising—

LORD PRESIDENT—As regards the first question which arises on the proposed issues, I entertain no doubt that the action will not lie against the Magistrates, either as such or as Commissioners of Police. It appears to me that the pursuer has mistaken altogether the position of the Magistrates in this matter. They are bound to maintain a police establishment and to provide money for that purpose, but the management of the police is in other hands—the hands of the committee of management and the Sheriff—and therefore the constables charged with effecting a wrongous apprehension are not the servants of the Magistrates as Commissioners of Police, and they cannot be made answerable in the matter. This observation applies equally or perhaps with greater force to the 2nd issue than to the others. But then comes the question whether the issues to be allowed in the case of the constables must be qualified by the insertion of malice and want of probable cause. I think they must be so qualified.

There remains the further question whether a bare allegation of malice is sufficient without any allegation of facts and circumstances from which malice may be inferred. I think that where an arrest is made as in this case, and it is alleged that it was either made with unnecessary violence or accompanied by abusive language, and that the person arrested was perfectly respectable, these are facts and circumstances from which malice may be inferred, and therefore I am disposed to hold that there are sufficient averments on record to warrant the insertion of malice and want of probable cause.

LORD ADAM—I am of the same opinion. I think there is no case whatever against the Magistrates and Town Council. I think the police constables are the servants and act under the authority of the Committee of the Magistrates—who are a statutory body different from the Magistrates and Town Council. Along with the Sheriff they appoint the Chief Constable, and they are the authority who have the charge and control of the police. It is now proposed to make the Magistrates and Town Council responsible for the conduct of persons with whose appointment they have nothing to do. This would be a complete novelty, and I think we must dismiss the action as against the defenders.

Upon the other question in the case, I also agree with your Lordship. The circumstances attending the arrest, as set forth upon record, are in my view sufficient to suggest malice without any more specific averment.

LORD M'LAREN—Concurring as I do with your Lordships, I have only to add that I think the argument which has been addressed to us for the pursuers is founded on a mistaken analogy between cases like the present, and cases in which an employer of labour is held responsible for the negligent acts of persons in his employment on the principle *respondeat superior*. The relation between the Magistrates and the police is not a relation of employment, but is an official relation constituted by statute. The police of Glasgow are subject to the joint orders of the Magistrates' Committee and of the Sheriff, just as in the counties of Scotland the county constables are subject to the joint control of the Sheriff and the Police Committee (now the Standing Joint-Committee of the County Council, and of the Commissioners of Supply). The Town Council, who are the Police Commissioners of Glasgow, have no right to interfere with the police in the execution of their duties in relation to the apprehension and detention of prisoners, and therefore the Town Council cannot be responsible for the negligent performance of these duties.

I do not say that where the police are acting under the direct orders of the Sheriff or a Magistrate the official who gives the order may not be made responsible in an action containing proper substantive averments of malice towards the person aggrieved. According to the case of *Beaton* v. *Ivory*, a merely formal averment of malice would not be sufficient to take the case out of the region of the privilege which belongs to the higher executive officers in relation to their public duties.

With regard to the action as directed against the constables, without going so far as to say that a naked averment of malice would be sufficient to displace the officer's privilege, yet as it is here alleged that the arrest was carried out in an offensive and arbitrary manner, this, together with the constable's refusal to accept the pursuer's tender of her address and offer to attend the Police Court, constitutes a circumstantial case entitling the pursuer to an issue in the form proposed with the addition of the words "maliciously and without probable cause."

LORD KINNEAR was absent.

The pursuer having withdrawn the second issue proposed, the Court approved of the two following issues for trial of the cause:—"Whether on or about 5th November 1890 the said James M'Corriston and Malcolm M'Phee maliciously and without probable cause apprehended the pursuer at or near the house of her mother at 31 Willowbank Crescent in Glasgow, and conveyed her to the Cranstonhill Police Office in Glasgow, to the loss, injury, and damage of the pursuer? Whether on or about the date foresaid, at the said Cranstonhill Police Office, the said James M'Corriston and Malcolm M'Phee maliciously and without probable cause charged the pursuer with the offence of importuning, under section 149, sub-section 30, of the Glasgow Police Act 1866, to the loss, injury, and damage of the pursuer? Damages laid at £500."

Counsel for the Pursuer—M'Kechnie—Guy. Agents—James Drummond, W.S.

Counsel for the Defenders—Ure. Agents—Campbell & Smith, S.S.C.

Tuesday, May 26.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

THE INTERNATIONAL EXHIBITION OF ELECTRICAL ENGINEERING AND INVENTIONS 1890, & ROBERTSON (LIQUIDATOR) *v.* LEE BAPTY.

Jurisdiction—Domicile—Citation.

An Englishman who had been appointed general manager of an Electrical Exhibition held in Edinburgh, by letter of guarantee subscribed to the guarantee fund for the sum of £500. The Exhibition resulted in a loss, the association which carried it on was wound up on 5th November 1890, and in terms of the articles of association the loss fell to be assessed first upon