to what are proved to be the ordinary conditions in the trade. Now, applying that rule here, I do not think there has been any proof amounting to this, that an inspection of a lazarette ladder was a thing which in ordinary circumstances would take place at the commencement of each voyage. In other words, I think it was necessary that these minor matters should be left to the person in charge of the ship, generally the master, and that consequently when the ladder came, by some reason or other, to be worn out—it may have been by things being bumped on it or some other reason—this was just one of those things which the master, or the man delegated by the master, ought to have discovered. It might have been put right by any temporary precaution. The putting of the steps safe is an operation anybody with tools and a screw could have done at once. They may not have made, as one of the witnesses put it, a tradesmanlike job of it, but safety might have been secured.

I accordingly come to the conclusion that the pursuer here is really in a dilemma. Either the fault was latent altogether, in which case nobody was to blame, or it was just one of those things rightly left by the employer to some other person, and, if this was negligence, it was negligence of fellow servants, in respect of whose negligence the pursuer cannot recover, not, as Lord Cairns pointed out, owing to any technical rule, but simply because pursuer has failed to show that the employer has been guilty of any negligence towards him. Upon these grounds I am of opinion that the result the Sheriff has come to is right, and that the appeal should be dismissed.

LORD ADAM—I am of the same opinion.

LORD M'LAREN—I agree with your Lordship and have nothing to add.

LORD KINNEAR was not present at the hearing.

The Court pronounced this interlocutor—

"Find in terms of the findings in fact and in law in the interlocutors of the Sheriff-Substitute and of the Sheriff, dated 6th January 1904 and 16th February 1905 respectively: Refuse the appeal, affirm the said interlocutors, of new assoilzie the defender from the conclusions of the petition, and decern: Find the defender entitled to the expenses of the appeal, and remit," &c.

Counsel for Pursuer and Reclaimer—M'Lennan, K.C.—J. W. Forbes. Agent—J. Ferguson Reekie, Solicitor.

Counsel for Defender and Respondent—Younger, K.C.—Jameson. Agents—Boyd, Jameson & Young, W.S.

Thursday, December 7.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

CAMPBELL *v.* COCHRANE.

Reparation—Slander—Judicial Slander—Privilege—Communication to Pursuer's Agent by Defender—Malice—Relevancy.

An employer, replying to a claim on the ground of wrongous dismissal, made by a dismissed servant through an agent, wrote, *inter alia*—" . . . I may inform you that the reason of" the servant's "dismissal was that I found him appropriating my butter to his own use, which butter he was in duty bound to deliver at my house." And later in another letter—"I do not anticipate any difficulty in proving that" the servant "did dishonestly take my butter." *Held* (recalling the judgment of Lord Ardwall) (1) that the communications were of the nature of pleadings and entitled to the highest privilege; (2) that facts and circumstances from which to infer malice were not relevantly averred; and consequently (3) that no issue could be allowed.

Opinion (*per* Lord M'Laren) that the facts and circumstances necessary for an inference of malice in the case must have been antecedent to and independent of the dismissal.

On 11th August 1905 John Campbell, Welton Farm, Blairgowrie, brought an action against Major Archibald Hamilton Cochrane of Dalnabreck, Ballintuim, Blairgowrie, to recover £500 as damages for slander contained in two letters written by the defender to the pursuer's agents. Campbell had been engaged by Major Cochrane's gamekeeper (Ross) to manage a small farm for his master. In the course of his work he considered he was interfered with by Ross and saw his master with regard to the matter, and shortly afterwards, at a second interview, he was dismissed on a month's notice. Having taken legal proceedings for wrongous dismissal he was successful in his action, and it was in the negotiations prior to that action that the letters complained of were written.

The pursuer averred—"With that object"—[*i.e.*, to get his relations with Ross put on a proper footing]—"the pursuer called upon the defender on the evening of Monday, 31st August 1903, and desired that a meeting be arranged by the defender at which Ross should be present, as he deemed it unfair to make any statement about Ross until he should be present to hear and answer same. The defender took offence at the attitude of the pursuer in insisting that Ross be present at the interview, and, becoming angry, replied that if Ross was interfering with his work, it was no business of the pursuer's whatever, and that he would not tolerate complaints from servants, and he could not have anyone about his place that would

find fault with Ross, and to remember that he was master there and no one else. Still in a temper, he discussed with the pursuer the terms of his engagement as arranged with Ross, and admitted that he was bound by these terms, and agreed to have a meeting of parties in his presence on the following Wednesday, at which the subject could be fully discussed. Up to this date the defender personally had acted towards the pursuer in a kindly manner, and indicated that he appreciated the services of the pursuer and his wife. As the result of the said meeting, however, the defender conceived a strong dislike to the pursuer. On the . . . 2nd September the pursuer, Ross, and defender met in front of Dalnabreck House, and the terms of the pursuer's engagement were discussed. Ross, in reply to a question from the defender, stated that he had no recollection of what he had said at his meeting with the pursuer in April prior to the engagement, and stated that he did not remember what he had said about butter on that occasion. He further declined to contradict the pursuer's narrative of the terms of his engagement. The defender then told the pursuer that he could not find fault with Ross, as Ross had been with him for over five years, and that the pursuer would have to leave, and that he would get a month's warning. The pursuer replied that he was a yearly engaged servant, to which the defender rejoined that he was not, and that he considered all servants were monthly servants. The defender added that he knew the law well, for he had been a justice of the peace and had sat on the justice bench in England and that the law was the same in Scotland as in England. The pursuer replied that 'that might be the case in England, but it was not in Scotland,' and he declined to accept the statement as correct. The defender thereupon became very angry at the pursuer for daring to contradict his statement of the law in Scotland, and the personal dislike to the pursuer which he had conceived at the previous interview became very much increased and very pointed. . . . The defender closed the interview by giving pursuer one month's notice to leave, repeating that he would have no one about the place that would find fault with Ross. . . . It was well known not only to the defender but also to Ross and the other outdoor servants as well as the indoor servants of the mansion-house who came to the dairy for supplies, that the pursuer was taking an allowance of 1 lb. of butter or less per week, and he did so quite openly as part of the stipulated remuneration for his own and his wife's services at Dalnabreck. At the interview on 2nd September foresaid the defender accepted the pursuer's claim to butter as a right in terms of his engagement, and from that date onwards until he quitted the defender's service the pursuer continued to take the allowance of butter to which he had a right. So far from the defender offering any objection to that course he knew it was being taken as before and acquiesced in that. The defender did not on that or any other occasion suggest to the pursuer personally that the latter was stealing his property nor use any language that would bear that inference. On the contrary he was so well satisfied with the absolute truth of the pursuer's narrative of the terms of his engagement that the defender upbraided the gamekeeper Ross for having given such good terms. . . . . The pursuer consulted Mr Nelson, solicitor, Blairgowrie, with reference to the notice given to him to leave whereby his yearly engagement was brought to an end at the Martinmas term in place of the following Whitsunday. Mr Nelson, by letter to the defender, dated 2nd February 1904, intimated the details of the pursuer's claim for reparation and inquired whether he had any proposal to make for settlement. The pursuer being reluctant to take court proceedings desired that the defender should have a full opportunity of settling amicably. By letter, dated 4th February 1904, the defender replied to Mr Nelson as follows, viz.—'In answer to your letter of February 2nd, I write to inform you that John Campbell was not engaged by me by the year, but on the same condition as all my other servants—one month's notice on either side; also I may inform you that the reason of Campbell's dismissal was that I found him appropriating my butter to his own use, which butter he was in duty bound to deliver at my house.' The said letter is produced herewith and referred to. The statement in said letter that the pursuer was found by the defender 'appropriating' his butter 'for his own use' was false, malicious, and calumnious, and was intended to mean and does mean that the pursuer had dishonestly appropriated and stolen butter belonging to the defender. The defender well knew that the only question under discussion was the duration of the pursuer's contract of service, and the said malicious statement contained in said letter was gratuitous and unwarranted, and was false in the knowledge of the defender, and was uttered without any cause. It was wrongfully made for the purpose of gratifying his animus against the pursuer, and in so uttering the said slander the defender was giving way to the malice and ill-will he had conceived against the pursuer, before condescended on. (Cond. 10) The pursuer's agent Mr Nelson, in reply by letter dated 5th February, remarked that according to his information the defender was in error when he said that the pursuer was engaged by the month, and as a final effort to avoid court proceedings he suggested that the pursuer was quite prepared to meet the defender in an amicable settlement if possible. The defender immediately replied by letter, addressed to the said Mr Nelson, dated 6th February 1904, that it would serve no good purpose to argue in this matter, and added these words, *inter alia*, viz.—'I do not anticipate any difficulty in proving that Campbell did dishonestly take my butter.' That statement charging the pursuer with dishonesty is a repetition of the gross slander narrated in the preceding article.

It was false, malicious, and calumnious, and was intended to mean, and did mean, that the pursuer was a dishonest man and a thief, and had theftuously and feloniously taken the defender's butter. The defender well knew that the only question under discussion was the duration of the pursuer's contract of service, and the said malicious statement contained in said letter was gratuitous and unwarranted, and was false in the knowledge of the defender, and was uttered without any cause. In so repeating the said slander the defender was giving way to the malice and ill-will he had conceived against the pursuer, before condescended on, and the slander was uttered for the purpose of gratifying his personal animus against the pursuer." . . .

On 10th November 1905 the Lord Ordinary (ARDWALL) pronounced the following interlocutor:—"Repels the first plea-in-law for the defender: Allows amended issues to be lodged as proposed at the bar, and, that having been done, approves of the said amended issues, and appoints the same to be the issues for the trial of the same."

Opinion.—. . . . "I have at present to decide whether the pursuer has set forth a relevant case. The first contention put forward by the defender in support of his plea against the relevancy is that there is here a case of absolute privilege, and he relied on the case of *Watson* v. *Jones and M'Ewan*, [1905] A. C. 480, in support of this contention. I think *Watson* v. *Jones and M'Ewan* was concerned with a very different question from the present, namely, what privilege a witness had in the preliminary stages of an action before he entered the witness-box. A witness has an absolute privilege as was established in that case, and as was understood, though not decided to be the law before that case came up, and the other case of *Rome* v. *Watson*, 25 R. 733, cited for the defender, was a case establishing the absolute privilege of a counsel or solicitor speaking on behalf of a client.

"The statements in the letters complained of here are not statements either of a counsel or of a witness; they are letters written by one of the parties to a dispute to the agent of the opposite party, who is about to raise an action against him. Now, undoubtedly letters written in these circumstances are entitled to a privilege, and a privilege of a very high order. They were written in answer to letters which very naturally elicited the statements which are made, but they are not, in my opinion, entitled to the absolute privilege which has been applied to the case of witnesses, advocates, or solicitors. They enjoy a privilege more resembling the privilege which attaches to statements on record in ordinary cases of judicial slander. I therefore hold that the plea against the relevancy, so far as founded on absolute privilege, must be repelled.

"These letters being privileged, as a consequence malice must be relevantly averred on record, together with facts and circumstances from which malice may be inferred. Now that is the question of difficulty here, whether the averments of malice set forth on record by the pursuer are sufficient. I must say that, taking a general view of the case, I think it rather improbable that this old gentleman of 85 was actuated by malice towards this servant whom he knew very little about, and who was just treated in the ordinary way a master would treat a servant with whom he had a dispute; but while that may be *my* impression upon the general view of the case, I am bound to examine the specific statements made on record, and, examining these, I am forced to the conclusion that a relevant case of malice has been here averred, because the general statement of the pursuer comes to this, that a question arose about the terms of the pursuer's engagement, whether it was an engagement terminable on a month's notice, or whether it was an engagement for a year. The pursuer practically says that in the course of this dispute the defender improperly dismissed him upon a month's notice, on the ground, first of all, that that was according to the terms of his engagement; but he says the defender further, in order to justify this dismissal, brought into the question of dismissal the other question about the appropriation of butter by the pursuer. Now the suggestion is, all through the pursuer's record, that this was a sort of afterthought, and in support of that it is said in article 8 of the condescendence that it was very well known both to all the other servants and also to the defender that the pursuer was taking this butter, that he was taking it quite openly as part of his remuneration, and that he was also taking it even after his dismissal as long as he remained at the defender's farm, and that, notwithstanding all that, the defender put forward this appropriation of butter both in the letters which are complained of and in the record as a serious offence against honesty which justified the dismissal of the pursuer. Now, these are circumstances from which I think malice might be inferred.

"But the matter does not altogether stop here, because the pursuer not only avers these circumstances, but further avers very specifically that at a meeting on 2nd September 1903 the defender got into a war of words with him, first about the law of Scotland as compared with the law of England, and in the next place with regard to the attitude of the pursuer towards Ross, the gamekeeper, who was apparently a sort of factotum in the absence of the defender at his English residence, which lasted most of the year, he being only in Scotland for some three months in the autumn. Now, the pursuer says that the defender lost his temper with him at that time, and the result was a personal dislike to the pursuer on the defender's part which lasted down to the present date. Now, that may be perfectly unfounded or imaginary, but it is averred on record, and of course if the pursuer makes a statement that the defender was actuated by personal

dislike in what he said or wrote, that is a case of malice. Accordingly, whatever may turn out to be the truth of this case, which I regret has been brought before me at all, I think I must hold that on the record as it stands sufficient facts and circumstances are averred from which malice may be inferred. I accordingly will allow the issues, amended as I have suggested."

The issues allowed were—"(1) Whether on or about 4th February 1904 the defender wrote and sent, or caused to be written and sent, to J. Sidey Nelson, solicitor, Blairgowrie, a letter in the terms second set forth in Schedule I annexed hereto; whether said letter is of and concerning the pursuer, and falsely, calumniously, and maliciously represents that he had stolen butter belonging to the defender, to the loss, injury, and damage of the pursuer? (2) Whether on or about 6th February 1904, the defender wrote and sent, or caused to be written and sent, to J. Sidey Nelson, solicitor, Blairgowrie, a letter in the terms second set forth in Schedule II annexed hereto; whether said letter is of and concerning the pursuer, and falsely, calumniously, and maliciously represents that he had stolen butter belonging to the defender, to the loss, injury and damage of the pursuer?"

The defender reclaimed, and argued—No facts and circumstances were averred on record sufficient to infer malice. Moreover, the communications complained of were absolutely privileged—*M'Ewan* v. *Watson*, [1905] A.C. 480, July 28, 1905, 42 S.L.R. 837. If such a rule of law were set up as was here propounded, all approach to a settlement in similar cases would be barred.

Argued for pursuer—The Lord Ordinary had indicated two grounds for holding that facts and circumstances were set forth sufficient to infer malice. His judgment should be affirmed. On challenge the defender had given a false reason, not in his mind at the time of dismissal, for that act, and the knowledge he had that it was false inferred malice. There was on record a relevant averment of ill-will to the pursuer, and that in consequence the slander was uttered. In any case, the privilege was not absolute, and the case of *Macdonald* v. *M'Coll*, July 18, 1901, 3 F. 1082, 38 S.L.R. 781, gave the rule as to what extent facts and circumstances must be averred.

Senior counsel were not called upon.

LORD PRESIDENT — This is an action which the Lord Ordinary characterises in the first line of his note as being, to some extent at all events, a frivolous and vexatious action. It may be that there are some circumstances in which, according to the law of Scotland, we are bound to entertain frivolous and vexatious actions, but I do not think they exist here. The circumstances out of which the case arose are that the pursuer was engaged as a farm manager by the defender, the actual engagement not being made by the defender personally but by his gamekeeper. The pursuer and the gamekeeper do not seem to have got on very well together, and accordingly the pursuer craved an interview with the defender, at which he made the statement that the gamekeeper interfered with him in his work. The defender, who seems to have been attached to the gamekeeper, an old servant—I am taking all this, of course, on the pursuer's averment—took the gamekeeper's part, and after discussion dismissed the pursuer. He did so upon the ground that he had a right to dismiss him upon a month's warning. The pursuer, on the other hand, took up the position that he was not engaged by the month, but by the year, and that consequently his dismissal was wrongful, and he intimated to the defender that he held the defender liable for the damages incurred. At the same interview there had been a certain amount of discussion of the terms of the pursuer's engagement, and incidentally in this discussion, there had been more or less raised the question of whether the pursuer was or was not entitled to take some butter, which he made for his master, for his own use. Following upon this the pursuer, having been dismissed, raised an action for wrongous dismissal in Perth Sheriff Court, but before he did so he instructed his agent to write a letter to the defender making a claim, and this his agent did upon the 2nd February 1904. In answer to that letter, which concluded with the pecuniary amount of the claim, the defender wrote the first of the letters complained of in this action, and it is in these terms:—"Sir,—In answer to your letter of February 2nd, I write to inform you that John Campbell was not engaged by me by the year, but on the same conditions as all my other servants — one month's notice on either side. Also, I may inform you that the reason of Campbell's dismissal was that I found him appropriating my butter to his own use, which butter he was in duty bound to deliver at my house. I do not consider, nor will I admit, that he has any claim whatsoever on me." The pursuer's agent answered that letter in a letter in which he controverted the law as to a yearly engagement, and pointed out that the butter question would be a matter of proof; that he did not think that before the Sheriff that would be sufficient reason to entitle the master to dismiss the servant without paying compensation; and then the letter winds up by saying—"Failing a settlement by Monday, I have no other alternative but to serve a summons." To that the defender answered by a letter, which is the second letter complained of in this case, and which is in these terms:—"Sir,—It would serve no good purpose to argue in this matter. I do not anticipate any difficulty in proving that Campbell did dishonestly take my butter. If you consider it to be to the advantage of your client and yourself to bring this matter into Court you will do so." After that the action went on, and the result of that action was that the learned Sheriffs—for it went from the Sheriff-Substitute to the Sheriff-Depute—held that in

the circumstances of the case the engagement was a yearly one and not a monthly one, and that, although the "butter story" —I am quoting textually from the learned Sheriff's note—"is not a satisfactory one," there was no wilful dishonesty on the part of the servant, and that although the master had ground for dissatisfaction he had no right to dismiss him, and accordingly awarded damages of £25 to the pursuer.

The pursuer now brings this action in which he claims damages for slander or libel in the two letters which I have read to your Lordships. Now, I think upon the analogy of the case of *Watson* v. *M'Ewan* in Appeal Cases [1905], page 480, it is quite clear that a statement made by the defender as to what he would say if he were brought into Court by an action intended against him by the pursuer, is just in the same position as if the statement had been made in the Court in a pleading; and therefore I take it that the criterion to be applied to this case is the same as is applied in judicial slander. The law as to what is necessary in judicial slander is very well fixed, and I may read a few words of an opinion of Lord President Inglis in the case of *Beaton* v. *Ivory*, reported in 14 Rettie at page 1062, where he says this—"I think a case of judicial slander a very special case indeed, because there is a very strong presumption in such a case that if a man makes an averment which, whether it be irrelevant or not is at least pertinent to the case, he must be presumed to have made it from an honest motive, with a view to urging everything that he knows of in support of his case. That is a perfectly justifiable and proper motive, and it will protect the party making it against the consequences of any injury that he may have done by that statement to a third party. Now, this becomes all the more strong if the averment is not only pertinent to the case but is a perfectly relevant averment, for then it becomes the duty of the party to himself and to his advisers and to the Court to make the averment," —and his Lordship proceeded to hold that facts and circumstances must be averred from which malice could be inferred. The averments here are perfectly relevant to the case, and accordingly not only is the presumption of privilege of the highest order, but I think the averments must be scrutinised very strictly to see if there are any averments from which malice could possibly be inferred. I find no such averments in this case. And I say most strongly that the meaning of the expression, that there must be facts and circumstances averred from which malice can be inferred, goes to the nature of the facts and circumstances, and not to a kind of word-painting that a more or less ingenious counsel can put into the contents of the condescendence.

Now, here there was no statement of the kind complained of made at all until the pistol was placed at this gentleman's head by the threat of an action, and it seems to me that he was absolutely entitled to say what was his belief—that this man had been guilty of dishonesty. He has been found wrong, but nevertheless he was perfectly entitled to put that forward as a defence to the action; and I find no averment of facts and circumstances whatsoever which lead up to any malice as the inducing cause of making the statement. There is a certain amount of averment that this old gentleman, the defender, had got into a temper at this discussion which took place between him and the pursuer, and particularly he is said to have been very angry because, he being a justice of the peace in England, a Scottish farm servant had told him that his English law was not Scottish law, and would not accept his master as an authority upon the law of master and servant. That is scarcely a fact and circumstance which makes one come to the conclusion—the only conclusion that one must come to—that a person in putting in his defence a perfectly relevant statement is doing so, not with a view to make his case relevant, but with the view of doing a person an injury to his character.

I am clearly of opinion therefore that here there are no sufficient facts and circumstances averred, and that the issue should be refused and the action dismissed.

LORD M'LAREN—I am of the same opinion. From the observations of the Lord President in the case of *Beaton* (14 R. 1057), I should infer that that eminent lawyer was of opinion that, on the question of what constitutes a relevant averment of malice, a distinction might be taken between cases that fall within the category of judicial slander, and those where the slander is of a less highly privileged description, as for instance an action between a master and a servant. Since then, the nature of privilege in the latter instance has been considered in a case that was cited to us—the case of a dismissed barman who brought an action on the ground that his master refused him a character—I mean the case of *Macdonald* (3 F. 1082). Although I see no reason to doubt the soundness of the opinions expressed in *Macdonald's* case, it is not necessary that we should consider that case very carefully at present, because I agree with your Lordship that this case, although not literally a case of judicial slander, falls within the principle and the degree of protection which the law gives to judicial slander, just as the statement of a witness in precognition, although not a statement made in a judicial proceeding, and not a statement which would render him liable to prosecution for perjury, is nevertheless, for reasons of policy, within the degree of protection which the law gives to the statement of a witness in open court.

The question then is, whether a relevant case of malice is here averred. Now, I can hardly think that it would ever be fair to a defender that the law should be satisfied with a mere general averment of malice. No doubt there may be degrees. A party may be held to more strict averments in one class of cases than in another, but I think one obvious reason for requiring

some specification is that the defender, when he goes to trial, ought to know the case that he is to meet and should be put in a position, if necessary, to lead evidence to disprove the case that is to be made against him. But merely to say that a statement is malicious gives no clue whatever to the line of action which the pursuer intends to take at the trial. Especially would the defender seem to be entitled to that notice in a case of judicial slander or one that would fall within the principle and degree of protection afforded to judicial slander. In considering whether the statements made in the record lead up to the theory that the defender had conceived an ill-will towards the pursuer and had made a case of dishonesty out of what was really and in substance only a misunderstanding, I have been looking at these statements to see whether there is anything which the defender can be called upon to meet that admitted of proof one way or the other, but it seems to me that the averments resolve merely into an imputation of motives—that you are to infer from his hostile tone towards the pursuer that he was actuated by ill-will. But in order to make a relevant case of malice there must be facts alleged which are independent of the cause of dismissal, independent of the immediate cause of circulating the slander, from which the jury might legitimately infer some antecedent ill-will or indirect motive as the origin or cause of the slander. It will not do to say that there were interviews which led up to the dismissal—that culminated in the dismissal —because that is all really part of one transaction. I do not see that ill-will arising out of the self-same cause of difference is in any different position from ill-will or malice inferred from the dismissal itself, which clearly would not be sufficient. I think there must be some tangible antecedent circumstance from which the jury may or may not, if the facts are proved, infer that the statement was not a fair statement but one made from malevolent feelings towards the pursuer, but I find no such averments here, and I am therefore of opinion that the action should be dismissed.

LORD KINNEAR concurred.

The Court disallowed the issues.

Counsel for the Pursuer and Respondent —Watt, K.C.—Malcolm. Agent—William C. Morris, Solicitor.

Counsel for the Reclaimer and Defender —Morison — J. Macdonald. Agents — Gordon, Falconer, & Fairweather, W.S.

Saturday, December 9.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Hamilton.

HILL *v.* CAMPBELL AND ANOTHER.

Reparation—Alleged Illegal Arrest—Alleged False Charge—Public Officer—Police Constable—Malice and Want of Probable Cause—Arrest and Charge by Constable on which Conviction has followed—Issue —Relevancy.

In an action of damages against two police constables for an alleged illegal arrest and an alleged false charge made by them while admittedly acting within the scope of their duty, the pursuer averred no facts and circumstances from which malice might be inferred, and admitted that he was convicted on the charge of which he complained.

Held that the pursuer was not entitled to an issue either *quoad* the arrest or *quoad* the charge, inasmuch as (1) while want of probable cause was essential to an issue, the conviction showed that there was probable cause, and (2) the pursuer had failed to set forth on record facts and circumstances from which malice might be legitimately inferred.

Reparation—Arrest—Public Officer—Police Constable — Unnecessary Violence in Making Arrest—Issue.

In an action of damages against police constables, the pursuer, who had been arrested and charged by them while acting within the scope of their duty, and had subsequently been convicted on the charge, proposed the following issue:—"Whether . . . the pursuer was wrongly and forcibly taken into custody . . . by the defenders while acting as police constables."

In support of the issue he *inter alia* averred that "he was violently seized by the defenders and subjected to gross and unnecessary violence. He was held by the wrists by the defenders, one on each side, and his arms twisted, and considerable and unnecessary violence was applied to him, causing several bruises on one of his arms, as well as swelling with considerable pain, in consequence of which he had to submit himself to medical inspection and treatment the following morning."

Held (1) that the issue was inappropriate and must be disallowed in as much as the insertion of malice and want of probable cause was unnecessary unless the question was as to the use of improper violence, and (2) that the averments were insufficient to found a case upon improper violence.

Wood v. *N.B. Railway Company*, February 14, 1899, 1 F. 562, 36 S.L.R. 407, *distinguished.*

Opinion (*per* Lord Kinnear) that the issue (1) failed to put the question of