to have fallen through protestation where the protestation has not been extracted. But looking to the case of *Graham* v. *Boosie*, and the terms of the 23rd section of the Act of 1850, I have little doubt that that might happen. But in considering the meagre authorities on the subject and the object of the procedure, I am not satisfied that it is imperative to inflict the penalty in every case in which it might competently be inflicted. I think there is room for excuse and for judicial discretion, and in this particular case I doubt whether any previous practice or authority would warrant the dismissal of the action, and I think that I am not bound to dismiss it.

"Protestation is put up not to destroy a pursuer's action but to force it on. So long as it is in the minute-book it is a continuous demand on the pursuer to lodge his summons for calling, and if the pursuer calls the summons, that is in compliance with the defender's demand. A great deal is said by the writers on this point about scoring the protestation. So far as I can learn, that so-called scoring is effected by a marking on the entry in the minute-book that a certificate of the production of the summons with a view to calling has been exhibited, and the consequence of such a marking is that the keeper of the minute-book will not, after having made that entry, give warrant for extracting the protestation. But I find no ground for holding that the mere entry of a protestation will, while unscored, prevent the calling of a summons. The defenders could not object to it since it is just what they profess to desire. However, no doubt after the nine days have run, the position is different to this extent—that the defenders can manage to extract from the pursuer £3, 3s. of expenses. But it is to be noticed that scoring of the protestation is to be effected by the certificate that a summons has been lodged for calling. Now, in this case that summons was actually lodged for calling on the Monday, and it was from inadvertence, through ignorance, that this was not intimated to the keeper of the minute-book on the Monday (if that can be done on a Monday) or at the latest early on Tuesday morning. If that had been done, then the warrant to extract would not have been issued. In fact the summons was lodged with the Clerk of Court within the days allowed.

"The protestation was in substance satisfied. The default was not in failure to lodge the summons, but only in failure to intimate to the keeper of the minute-book that it had been lodged, and I doubt whether, after that, a warrant to extract would be effectual.

"There was nothing but a blunder—no culpable delay—and I have been referred to no authority or precedent for dismissing an action in such circumstances."

Counsel for the Pursuer—A. M. Anderson. Agent—Party.

Counsel for the Defenders—Kemp. Agent—Party.

Tuesday, March 16.

SECOND DIVISION.

[Lord Low, Ordinary.

MALCOLM *v.* DUNCAN.

Reparation — Wrongous Apprehension — Apprehension without Warrant.

A woman who was innocently in possession of stolen property was apprehended without a warrant by a police officer, who had been sent to her house to make inquiries, and taken by him to the police office, where after examination she was discharged. She afterwards brought an action against the police officer for wrongous apprehension.

Averments which *held* (*rev.* judgment of Lord Low) irrelevant to entitle the pursuer to an issue.

Reparation — Slander — Police Officer's Privilege.

A woman who was innocently in possession of stolen property was apprehended without a warrant by a police officer, who along with another had been sent to her house to make inquiries. In an action of slander raised by her against the police officer, the pursuer averred that the defender on the way to the police office repeatedly stated in a loud voice, in the hearing of the other police officer and of the pursuer's two sons, and of persons passing in the street, that the pursuer was the resetter and her son the thief of the stolen property.

Held (*rev.* judgment of Lord Low) that the pursuer was not entitled to an issue.

Mrs Teresa Kussick or Malcolm, wife of and residing with James Malcolm, cabman, 10 Brown Square, Edinburgh, with consent of her husband raised an action for £500 damages against William Duncan, a detective officer in the Edinburgh Police.

The pursuer averred—"(Cond. 2) About ten o'clock on the night of 18th December 1896 the pursuer's son John Malcolm, a boy aged twelve, found in Guthrie Street, Edinburgh, among some refuse, a number of clinical thermometers. Several of them had been broken, but there remained ten whole ones. These he picked up and carried home. On the way home he gave one to a girl, Emily Sutherland, who also resides at said No. 10 Brown Square, and after he got home he handed the remaining nine to the pursuer, who showed them to her husband. The pursuer and her husband did not know what the articles were or whether they were of any value, but it was arranged that the pursuer's husband should on the following day take them to Mr Hume, instrument maker in Lothian Street—the said James Malcolm's stance being in College Street adjoining — to ascertain whether they were of any value. It was the intention of the pursuer and her husband, if the found property were of any

value, to take steps to restore same to the rightful owners thereof. (Cond. 3) On the following afternoon, viz., 19th December, the pursuer, as she had not received any message from her husband in regard to the said articles which he had in terms of said arrangement taken away with him about two hours previous, sent her daughter Annie Malcolm to Malcolm's stance in College Street to see her father about the matter. The girl there ascertained that her father had gone to Powderhall with a 'fare,' and returning home told the pursuer so. The pursuer accordingly obtained from the said Emily Sutherland the said thermometer which had been given to her, and thereafter sent her son Robert Malcolm, a lad about fifteen years of age, to Mr Stevenson, instrument maker in Forrest Road, Edinburgh, with it, to make the same inquiries as it had been arranged her husband should make at Hume's, in order to have information before the shops would be closed on Saturday afternoon. She also gave her son a note or line to hand to Mr Stevenson, which was in these terms:—'Please would you be kind enough to let me know if this article is of any value, as my boy found a parcel containing some of them, if they are worth advertising, and oblige, yours respectfully, T. MALCOLM.' The boy Robert Malcolm took the thermometer and the note to Mr Stevenson. Mr Stevenson having read the note and examined the thermometer sent for a policeman. After the policeman came, Mr Stevenson gave him the said note and the thermometer, and informed him that he believed the said article was part of property reported to have been stolen. The said Robert Malcolm told them how the same had come into his brother's possession. The policeman, notwithstanding, took the boy in charge, and marched him to the police office in High Street, holding him by the wrist all the way. While going to the police office they passed Chambers Street, where the pursuer lives, and the boy asked the policeman to go with him and see his mother, telling the constable that he would there receive a full explanation. The policeman refused to do so. (Cond. 4) After arriving at the police office the policeman and the boy were interviewed by two detectives, namely, the defender and another detective named Strachan. The defender was then told of the circumstances under which the thermometers had been found, where they were, how the boy had taken one of them to Stevenson's, and he was given the said note from Mrs Malcolm. . . . The defender, accompanied by Strachan and the boy, then proceeded to the pursuer's house. The pursuer was not at home when the defender arrived. She was out in quest of her son Robert, the report of his arrest having been brought to her by a boy who knew her son. On arriving at the house the defender saw the pursuer's mother Mrs Teresa Kussick. The defender said something to her about some thermometers having been stolen. Mrs Kussick expressed surprise. 'Yes, stolen,' the defender said, 'and you know all about them.' He was asked to sit down to await the pursuer's return, but he refused to do so. He proceeded to search the house, and the pursuer's repositories, including three drawers. He then turned over a bed and carpet, and searched an oven, after which he proceeded to search Mrs Kussick's bedroom. This searching of the pursuer's house was done illegally and without any warrant, and was unnecessary and uncalled for, as the defender had received full information in regard to the thermometers, and where they were. There was no reason to suspect that any stolen property was hidden in the said house and repositories. The defender then sent out Strachan to search for the pursuer, who, however, returned to her house before Strachan did. The defender then accused the pursuer of knowing that the thermometers had been come by dishonestly, and said 'She would very shortly know that, for she would be locked up in the police office.' The pursuer again explained to the defender how the property had been come by, how she had one in her possession, where the others were, and the reason why her husband had taken them away, and she offered to go to Powderhall for them, but the defender nevertheless told her that she must go with him to the police office and that he was going to take her there. The pursuer asked to be allowed to walk alone, and not under charge of the defender. Notwithstanding this, the defender assaulted the pursuer by pushing her violently from the kitchen in her house into the house passage, and again from the house passage into the staircase. He then forcibly and against her will compelled her to accompany him to the police office, and conducted her there along George IV. Bridge and High Street. This occurred between three and four o'clock on the afternoon of Saturday, the said 19th December. The defender and the said detective Strachan are well-known to the public as members of the Edinburgh Police Force. (Cond. 5) On the way down the stair from the pursuer's house the pursuer, the defender, and the said Robert Malcolm and John Malcolm were met by Strachan. The defender then falsely, calumniously, maliciously, and without probable cause, said to the said Strachan, of and concerning the pursuer, and in the presence and hearing of the said Strachan, of the pursuer and of her said two sons, *i.e.*, John Malcolm and Robert Malcolm, or one or more of them, 'This is the lady that has caused all the trouble, and this' (John Malcolm) 'is the boy that stole the articles. He is the thief and she is the resetter,' or used words of the like import and effect of and concerning the pursuer. The defender, on the way to the police office, frequently repeated the said false and calumnious accusation, and said that the pursuer was a resetter, and would be put in the lock-up. This he said in a loud voice in the presence and hearing of the persons above mentioned, or one or more of them, and also of persons passing along the street. He spoke in the same fashion all the way along to

the police office, and he kept continually telling the pursuer of what she would receive in the 'lock-up.' (Cond. 6) At the said police office the pursuer gave her name, address, and age, and again told the circumstances connected with the possession of the property. The defender then proceeded to take the boy John Malcolm apart from his mother and examined him. The boy told him the same story about the finding of the thermometers. The defender thereupon asked him 'if his mother had not told him to make this story up.' The defender then threatened the boy with a birching if he would not admit the false accusation of theft and reset made against him and his mother. (Cond. 7) The pursuer was thereafter told she might go, but before she was finally released the detective Strachan took her and her son John to Guthrie Street. There Strachan was shown by John Malcolm the place where the thermometers had been found by him. On looking about the spot there was found a piece of a broken one, and Strachan took possession thereof. The pursuer was then allowed to return home. The pursuer thereafter saw her husband, and got from him the rest of the thermometers which he had taken to Mr Hume's, and about which he had made due inquiry, and all the thermometers which the boy John had found were handed over to the police at the said police office between six and seven o'clock on the said Saturday evening. At the same time, on the pursuer's request, the said note herewith produced, which had been sent to Mr Stevenson, and which had since been in the defender's possession, was redelivered to the pursuer. (Cond. 8) The defender acted unreasonably, wrongfully, illegally, maliciously, and without probable cause towards the pursuer. Before going to the pursuer's house he was told the whole facts about the said thermometers and had possession of the said note. In these circumstances his proceeding to search the pursuer's house without a warrant was unreasonable, wrongful, illegal, malicious, and oppressive. The accusation which he made against the pursuer, to the effect that she was a resetter, was slanderous, malicious, and untrue, and was known to him to be so, and was made without probable cause. In assaulting the pursuer and compelling her to go to the police-office, the defender acted unreasonably, wrongfully, and oppressively, and also maliciously and without probable cause. Further, he had no warrant. The pursuer was a law-abiding citizen with a fixed residence, and the defender had no reason to believe that the pursuer was about to abscond. By the wrongful and unwarrantable actings of the defender she has suffered grievously in her feelings, and has been damaged in her reputation among her friends and neighbours. Her being marched by the defender to the police-office as condescended on, was witnessed by her neighbours and the public, and the matter has been the cause of talk in the vicinity of her abode. The defender has been called upon to make reparation, but he declines to do so, and thus the present action has been rendered necessary."

The defender pleaded, *inter alia*—"(1) No relevant case."

By interlocutor dated 5th March 1897 the Lord Ordinary approved of the following issues for the trial of the cause—"(1) Whether, on or about 19th December 1896, the defender maliciously and without probable cause apprehended the pursuer in her house at No. 10 Brown Square, Edinburgh, and thence took her to the Police Office of Edinburgh, to the loss, injury, and damage of the pursuer? Damages laid at £300. (2) Whether, on or about 19th December 1896, at or near No. 10 Brown Square, Edinburgh, in the presence and hearing of pursuer's sons, Robert Malcolm and John Malcolm, or one or more of them, the defender falsely and calumniously said, 'This is the lady' (meaning thereby the pursuer) 'that has caused all the trouble, and this is the boy' (meaning thereby the said John Malcolm) 'that stole the articles. He is the thief, and she is the resetter,' or words to a like import and effect, to the loss, injury, and damage of the pursuer? Damages laid at £100."

To this interlocutor the Lord Ordinary appended the following note:—

"I am of opinion that the pursuer's averments are sufficient to entitle her to have the case sent to trial, and the main question appears to me to be whether she is bound to put malice and want of probable cause in issue.

"The pursuer argued that the defender, by apprehending her and taking her to the police office without a warrant, acted illegally and altogether beyond his powers as a police constable, either at common law or under the Police Statutes, and could not therefore plead privilege. The proper issue, the pursuer contended, was one of wrongful apprehension, leaving it to the Judge who presided at the trial to deal with a case of privilege if it arose.

"Now, I think that it is impossible to distinguish with precision the cases in which a police officer may apprehend without a warrant from those in which he may not do so. The question was very carefully considered in the case of *Peggie* v. *Clark*, 7 Macph. 89, which in many respects was not unlike the present, and the Lord President there said—'I am of opinion that, under special circumstances, a police officer is entitled to apprehend without a warrant, and it will always be a question whether the circumstances justify the apprehension.'

"The circumstances, as averred by the pursuer, under which the defender came to take her to the police office are shortly these:—Upon the night of 18th December the pursuer's son John found in the street a number of clinical thermometers. On the following day the pursuer's husband, who is a cabman, took all the thermometers except one away with him when he went to his work, with the intention of asking an instrument maker, who had a shop near his stance, about them. In the afternoon of the same day the pursuer, not having heard from her husband, sent another son,

Robert, a lad of fifteen, to Mr Stevenson, instrument maker in Forrest Road, with the remaining thermometer, and a note in the following terms:—'Please would you be kind enough to let me know if this article is of any value, as my boy found a parcel containing some of them; if they are worth advertising.'

"Mr Stevenson had heard that there had been a theft of clinical thermometers, and accordingly he called a policeman, who took the boy, the note, and the thermometer to the police office. The defender and another detective named Strachan were on duty there, and having examined the boy they took him along with them to the pursuer's house. The pursuer was out at the time, and Strachan went to look for her. The pursuer, however, returned to her house before Strachan did, and after an interview with her, the defender took her back with him to the police office. The pursuer was examined at the police office, and Strachan then went with her and her son to the place where the thermometers were said to have been found, and a piece of a broken thermometer was there discovered. The pursuer was then allowed to go home.

"Now, in going to the pursuer's house and making inquiries there, I think that the defender was plainly acting within the scope of his duty. There seems to have been, in fact, a theft of clinical thermometers, and the circumstances under which Robert Malcolm came to Mr Stevenson's shop with a thermometer of the kind which had been stolen were suspicious. The defender therefore began the proceedings complained of in a capacity in which he was privileged.

"The pursuer, however, contended that it was so plainly illegal for the defender to take the pursuer to the police office without first obtaining a warrant from a magistrate, that he lost the protection of his privileged position. Even upon the pursuer's own statement, I think that it is impossible to say that the defender's act was so plainly illegal that he is not to be treated as being, *prima facie*, a police officer in the discharge of his duty. If it appears from the evidence that the defender was not justified in taking the pursuer to the police office without a warrant, that will be an element for the consideration of the jury upon the question of malice.

"I am therefore of opinion that the issue upon the apprehension and taking to the police office must be laid upon malice and want of probable cause.

"The pursuer also asks a separate issue for assault. Now, the alleged assault consisted simply in the defender's using some force to compel the pursuer to go to the police office. It is therefore only an incident in the alleged wrongful apprehension, and although it may be material upon the question of malice, it does not, in my opinion, entitle the person to a separate issue.

"The pursuer further asks an issue of slander. That matter is in a different position from those with which I have been dealing.

"The pursuer's averment is that after the defender apprehended her, and when he was taking her downstairs, he met Strachan and the pursuer's two sons, Robert and John, and that he said that the pursuer was the lady who had caused all the trouble, and that her son John was the thief, and she was the resetter. The defender, the pursuer avers, frequently repeated the accusation in a loud voice on the way to the police office, and in the hearing not only of Strachan and her sons but of passers-by.

"Now, if that is true, as I must at this stage assume it to be, I do not think that the defender can plead privilege. No charge had been made against the pursuer by anyone, no duty lay upon the defender to announce his opinion of her criminality, and nothing was to be gained by his doing so. He would have been quite entitled to tell Strachan that he considered it to be necessary to take the pursuer to the police office, and he might have explained to Strachan his reasons for coming to that conclusion, but according to the pursuer's averments he went very far beyond anything of that sort.

"I therefore think that the pursuer is entitled to an issue of slander in ordinary terms. Of course it will be open to the Judge before whom the case is tried to direct the jury that in this case also malice must be established, if the result of the evidence is to disclose a case of privilege."

The defender reclaimed, and argued—There was no ground for granting any issue. There was no relevant or issueable case stated on record. In the first place the defender was entitled to arrest without a warrant. And if that was so, then he stood in a privileged position, and it was not enough for the pursuer to use merely the phrase that he acted maliciously and without probable cause; there must be circumstances disclosed on record showing that this was the case. A police officer was *prima facie* authorised by his holding his office to make an arrest. The whole matter in the present case arose out of Mr Stevenson giving the boy in charge, and the subsequent report to the police. The present defender was sent to the house, and in going there and taking steps to investigate the matter he only acted in the discharge of his duty. This was not a case like *Peggie* v. *Clark*, *infra*, where the initiative was taken by the defender. The other cases founded on by the pursuer were also not in point. In *Leask* v. *Burt*, *infra*, the arrest was made months after the alleged offence. In *Pringle* v. *Bremner and Stirling*, *infra*, the defenders had not the protection of the policeman's mandate or the detectives' appointment, and acting under a warrant to search for wood they took possession of letters. As to the case of *Young* v. *Magistrates of Glasgow*, *infra*, the jurisdiction exercised in that case was a delicate one, and it could form no precedent in a matter like the present. In the present record no facts had been

stated inferring malice. There was no allegations of ill-will. As to the alleged slander, an issue was only taken as regards the slander in the house. This was part of the *res gestae* of the arrest; the alleged statement was said in making the arrest, and the words were addressed to a fellow constable at the time of the apprehension. It was therefore privileged — *Hassan* v. *Paterson*, June 26, 1886, 12 R. 1164. It would have been a different matter if there had been a relevant averment that the words had been used before specified members of the public on the way to the office. But they were not so; they were only uttered in presence of the accused and the defender's fellow-detective. In any view, the words "maliciously and without probable cause" must be inserted in the second issue.

Argued for pursuer—The case should go to trial. This was not a proper case of apprehension. The detective had abused his powers. If an arrest was made without a warrant that was done in order to take the accused before a magistrate. Here the arrest was made in order that the detective might conduct his inquiry in a more comfortable manner for himself. In order to do this he had taken a respectable woman through the public streets to the police office. He had thus acted illegally. The purpose of apprehension was to bring the person arrested before a court, not in order to precognosce—*Peggie* v. *Clark*, November 10, 1868, 7 Macph. 89; *Leask* v. *Burt*, October 28, 1893, 21 R. 32. The pursuer was the wife of a householder, and it was ridiculous to say that the detective could have any apprehension that she would abscond. The words "wrongly and illegally" should be inserted in the first issue in place of the words "maliciously and without probable cause"—*Pringle* v. *Bremner and Stirling*, May 6, 1867, 5 Macph (H.L.) 55, opinion of Lord Chancellor Chelmsford, p. 60. The facts and circumstances stated on record were sufficient to infer malice — *Young* v. *Magistrates of Glasgow*, May 16, 1891, 18 R. 825. As to the issue of slander, the detective was not entitled after the apprehension of the pursuer to call her a resetter and her son a thief. It was a gratuitous and uncalled for insult—*Douglas* v. *Main*, June 13, 1893, 20 R. 793.

At advising—

LORD JUSTICE-CLERK—The defender in this case received information from his superiors at the police office of a theft of certain articles, and was informed that a message had come from the pursuer's house stating that she was in possession of part of the stolen property, and he was sent to the house in the course of his duty and service as a detective officer. At the house he made inquiries, and as the result of these inquiries made up his mind that the pursuer ought to be apprehended in connection with the theft. Whether she was to be charged with participation in the theft or with reset of the stolen articles was a separate question with which he had nothing to do. Now, it is said that in these circumstances he acted maliciously and without probable cause. As regards probable cause, the defender here, being a police officer, and having instructions from his superiors, was, I think, quite entitled to arrest that person if the result of the inquiries at the house were not satisfactory, and as regards malice, unless there is something averred of a distinct kind, separate from the mere fact that he did arrest the woman, I do not think she can be entitled to an issue. Here there are averments that he was rather rough in his action in getting her to leave the house. That, of course, may happen in such cases, but there would need to be some very distinct averments beyond the mere fact of pushing the person outside her door in order to get her to go to the police office before malice could be held to be relevantly averred. It is said that she wanted to go to the police office alone, but that he insisted upon accompanying her. That is a matter entirely in the discretion of the officer if he thinks there is any risk of his prisoner escaping, or if he thinks that the prisoner, on the way to the police office, may get rid of property on her person. It is entirely in his discretion whether or not he should keep his prisoner so near him as to prevent the risk of either of these things happening. There may be many cases in which a detective officer may allow a person to go to the police office at some distance in front of him, or even on the other side of the street. But he takes the risk, and if anything does happen he will be reproved by his superiors for having done such a thing. But in this case, where the woman was ostensibly charged with reset of certain stolen articles, or at least being connected with articles which had been taken dishonestly, I cannot hold that it is a sufficient averment entitling the pursuer to an issue involving malice, to say that he insisted on accompanying the woman, or on her accompanying him to the police office. I think, on the whole matter, as regards the first issue, that the pursuer has stated no relevant case entitling her to such an issue.

The second issue is one of slander, and is to the effect that at a certain time and place, in the presence and hearing of Strachan, a brother detective, and the pursuer's two sons, the defender charged her with being a resetter. Now, Strachan was another police officer who was engaged in inquiries into the same matter, and, as is stated on the record, was going to look for the father. It is quite to be expected that when the defender met his brother officer engaged upon an inquiry into the same matter as himself, he should make a statement to him regarding the person he had in custody, and that statement was made, taking the words of the issue, in an offensive form, and accusing the person of being a resetter. But that is just what a police officer in such circumstances might do. "Here is the woman, I have got her now, and I accuse her of

reset." That seems to me to be not a statement in the circumstances which can be held to have been of the nature of slander. It is said to have taken place in the hearing of the pursuer's sons Robert and John Malcolm, but these were two boys who themselves were mixed up with the affair that was being dealt with, and there is no relevant allegation that these words were said in such a way as to be heard by any other people than the police officer and the two boys, who knew perfectly what she was being taken for. There is a vague statement on record that it was said loud enough to be heard by people in the street, but that is not a relevant statement. Had anything of that kind been distinctly averred, with names stated, it might have required consideration. But the statement made was one by a police officer to another in the course of carrying out duty in the detection of crime, and taking it as described in the record I am unable to hold that any relevant case for an issue of slander has been averred. I see no ground for inferring that the defender was doing anything more than as an officer making a charge in the execution of his office. There is no precedent for treating such a case as one of slander. Upon the whole matter I have come to the conclusion that the pursuer has not stated a relevant case.

Lord Young—I am of the same opinion. It is certainly our duty to see that the liberty of the subject is not unlawfully invaded by the police, but in performing that duty, and considering cases which are brought before us with a view to the discharge of it, we must also be careful not to pronounce conduct on the part of the police to be an unlawful invasion of liberty, which would substantially prevent the police from doing their duty in the interests of the public. In this case I think there are not allegations upon the record against the police officer who is said to have unlawfully invaded the liberty of the subject to show that he did so, or that he exceeded his duty to the public as a police officer in anything he did. The policeman was sent for to the shop in Forrest Road and got the information from Mr Stevenson, the shopkeeper, upon which he, in the discharge of what he thought to be his duty, without any warrant from the Magistrate, took the boy from the shop to the police office. It is not alleged that in doing so he exceeded his duty, or unlawfully invaded the liberty of the subject, so that the pursuer may be taken to admit that police officers may have occasion to interfere with the liberty of the subject —boy, man, or woman—without any warrant from the magistrate, and still be pronounced to have been proceeding only in the discharge of a police officer's duty. Now, after the information was given at the police office upon the subject by the boy, and by the policeman reporting what he had been informed by Mr Stevenson, it was thought to be a proper police duty, in the interests of the public, to send the defender, a detective, to make inquiries upon the subject at the father's house. He went there and made inquiries, and got the information which he is said upon record to have got. The question we have to consider is, whether he unlawfully invaded the liberty of the defender (the boy's mother)—exceeded his duty to the public as a police officer—in requiring her to accompany him to the police office, and, I suppose, intimating that he would really compel her to go if she was not prepared to go without the use of force. Now, I am of opinion that upon the statement on record, his conduct was not in excess of his duty, but according to his duty. It would be his duty, in considering the matter, with or without the aid of consultation with brother police officers, or superior police officers at the office, to determine whether it was reasonable and proper to detain her with the view of being brought before a magistrate next morning, if that could not be done sooner, or whether the proper and reasonable thing to do was to set her at liberty at once, It was conceded by counsel for the pursuer that if the police had come to the conclusion that it was proper to bring her before a magistrate next day there would be no objection to taking her from her house to the police office without any warrant from a magistrate; but as the police came to the conclusion upon consideration that the reasonable thing to do, in her interest, and consistently with their duty to the public, was to discharge her without detention, and without taking her before the police magistrate, the pursuer's counsel said that made their conduct in taking her to the office without a warrant illegal. I cannot assent to that, and the only thing that has seriously to be considered is whether the circumstances are such that we cannot account reasonably for the officer's conduct in taking her to the office and reporting the whole facts there for consideration, and that we must attribute his conduct to improper motives and malice; or whether in taking her there he acted in such an outrageous and violent manner as to be in that respect violating his duty as a policeman. I do not think, taking the case as stated by the pursuer, that there is anything to make a case of that kind, and I am therefore of opinion that we would be interfering with the police in the proper and reasonable exercise of their police duty in the interest of the public if we were to hold that the averments here are such as to show any violation or excess in the performance of that duty by the present defender.

With regard to the second issue, I agree with your Lordship that there is here no relevant averment of a charge of slander. I cannot say that I ever heard of a case of a policeman being charged with slander, and an action for slander being brought against him for mentioning to the person himself whom he was taking to the police office—"I am taking you there because you are a resetter, and your little boy stole the things." I suppose most policemen would tell a brother officer what they were taking a

person to the police office for. I asked if there were any precedent, and was informed there was none. If it had been supposed that this was slander we should before this year 1897 have had some actions against policemen for slander of the kind, and if we were to hold this case relevant we should probably have a considerable number of them in the future.

LORD TRAYNER—I am not so clear as your Lordships on the second issue, but my doubts are not sufficient to make me dissent. On the first issue I am quite clear, and have nothing to add.

LORD MONCREIFF was absent.

The Court dismissed the action as irrelevant.

Counsel for Pursuer—W. Campbell—W. Thomson. Agent—Charles George, S.S.C.

Counsel for Defender—Balfour, Q.C.—Guy. Agent—Peter Macnaughton, S.S.C.

Wednesday, June 17, 1896.

OUTER HOUSE.

[Lord Kincairney.

GIBSON & COMPANY *v.* ANDERSON & COMPANY.

Reparation—Decree in Absence—Breach of Agreement to Stop Action—Malice.

A raised an action in the Debts Recovery Court against B, who made a payment to account, on the express undertaking by A that the action would be stopped. Through a mistake decree in absence was taken, with the result that B suffered injury through the consequent publication of his name in certain black lists. In an action of damages by B against A, *held* (*per* Lord Kincairney)—*distinguishing Davies & Company* v. *Brown & Lyell*, June 8, 1867, 5 Macph. 842—that the pursuer was entitled to an issue without an averment of malice, on the ground that the injury resulted from breach of an express contract by A that the action should be stopped.

See the sequel of the present case in *Gibson & Company* v. *Anderson & Company*, February 23, 1897, *ante*, p. 435.

This was an action of damages at the instance of Gibson & Company, retail chemists, Edinburgh, against Anderson & Company, wholesale chemists there, under circumstances which are fully stated in the opinion of the Lord Ordinary.

On 17th June 1896 the Lord Ordinary (KINCAIRNEY) approved of the issue proposed by the pursuers.

Opinion. — "The averments on which this action of damages is founded are these —That on 5th November 1895 the defenders raised an action against the pursuers in the Debts Recovery Court (I presume at Edinburgh) for £43, 14s. 6d. That on 6th November Mr Anderson (sole partner of Anderson & Company, defenders) agreed on payment of £25 to allow a reasonable time for payment of the balance, and intimated that if that payment were made there would be no occasion for the attendance of the pursuers at Court, as Mr Anderson 'would undertake to see that all proceedings in the pending action would be at once stopped,'—thus the pursuer concurred in this agreement, and in implement of it paid £25 to the defender early on Friday 8th November; that the defender instructed his agent by letter to stop proceedings, but that on 11th November his agent took decree in absence for the balance. The pursuers say that the agent's explanation was that the defender's letter did not reach him until after decree had been taken. That explanation, however, does not concern this case, for the defender does not dispute his responsibility for the act of his agent. There is no averment of malice. Indeed, the pursuers' averment that the defender directed that the proceedings should be stopped of itself negatives malice. No proceedings were adopted to enforce the decree.

"The averment as to damage is that 'the name of the pursuers' firm was posted in public prints in the list of persons against whom decree in absence had been obtained,' and in the black list and other lists of a similar character, whereby the pursuers' credit had been greatly injured.

"This is not a very usual kind of action; such actions having usually been based on wrongous use of diligence. The defenders have maintained that it is irrelevant for want (1) of an averment of malice, and (2) of an averment of damage caused by this act of the defenders. The defenders' argument was rested on the case of *Davies & Company* v. *Brown & Lyell*, 9th June 1867, 5 Macph. 842, which undoubtedly closely resembles this case. That was an action of damages on account of a decree in absence taken by the defenders against the pursuer notwithstanding payment of the sum sued for. It was decided that the pursuers were entitled to an issue with malice and want of probable cause inserted, but not to an issue without malice and want of probable cause. I doubt whether in such a case the insertion of want of probable cause would now be insisted on, having regard to the recent case of *Rhind* v. *Kemp & Company*, 13th December 1893, 21 R. 275, in which in an action of damages against a debt collector for having taken a decree in absence against the pursuer in name of his constituent after the action had been settled, and contrary, as was averred, to his constituent's instruction. An issue whether he had taken the decree maliciously was adjusted in the Inner House.

"These cases decide (1) that there may be an action of damages for taking a decree in absence after the sum sued for has been paid although no negligence has followed, but (2) not unless the decree has been taken maliciously.

"There is, however, a little difficulty as to the precise point decided in the case of