damages for wrongous apprehension, malice and want of probable cause have hitherto, so far as I know, been always inserted, and I think it would be unsafe to adopt the usual style in such an unusual and unprecedented case as this. The issue ought in my opinion to be expressed as nearly as possible in terms of the pursuer's record." . . .

The defender reclaimed, and also moved to vary the issue by deleting the word "wrongfully," and substituting the words "maliciously and without probable cause." He argued—There was no issuable matter stated on record. It was not said that the defender made any charge of crime against the pursuer. All that was said was that she ordered the constable to apprehend him. It was not relevant to say that the police constable took him in charge because he had been back to Kilconquhar, but that was all the averment came to. In an action against a person for having caused another to be arrested upon an unfounded criminal charge, the words "maliciously and without probable cause" were always inserted in the issue. If that was not done here, the result would be that the defender, who was not alleged to have made any criminal charge, would be in a worse position than if she had done so.

Counsel for the pursuer were not called upon.

At advising—

LORD JUSTICE-CLERK—This is a peculiar case, even upon the pursuer's own averments, and it is difficult to believe that the facts can be as represented. But the pursuer's averment comes to this, that upon a certain occasion he was apprehended by the constable Patterson on the order of the defender. The question therefore is, whether the orders of the defender are sufficiently averred to admit of an issue being allowed, and I think that they are, and that the pursuer is entitled to have the case sent to trial.

The defender, however, says that if an issue is to go to trial it is essential that the words "maliciously and without probable cause" should be inserted. I think it is established law that, if a person should accuse another of a crime, and direct a public official to arrest him as being charged with that crime, that person is acting in pursuance of a constitutional right, or even it may be of a constitutional duty, and that, in any action by the person arrested against the person who gave the order, the words "maliciously and want of probable cause" must be inserted in the issue. That is not the case here, however; it is not alleged that the defender accused the pursuer of any crime, in consequence of which accusation the constable apprehended the pursuer. It is only said that the defender ordered the constable to apprehend the pursuer without making any charge of crime, and in so doing it cannot be said that the defender had any constitutional right or duty. I therefore think that the Lord Ordinary was right, and that these words should not be put into the issue.

LORD RUTHERFURD CLARK—I think it is plain that this record is relevant.

LORD TRAYNER—I think there is here a relevant averment of wrongous apprehension, and that the issue adjusted by the Lord Ordinary is the proper issue to try that question.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuer—Wilson—Guy. Agents—Patrick & James, S.S.C.

Counsel for the Defender—Comrie Thomson—Dundas. Agents—Dundas & Wilson, C.S.

Tuesday, November 20.

FIRST DIVISION.

[Sheriff Court at Peterhead.

HESLOP *v.* RUNCIE.

Process—Proof—Reference to Oath—Cross-examination.

Observations by Lord Adam and Lord Kinnear to the effect that in a reference to oath the deponent's counsel is not entitled to cross-examine him, as if he were a witness in a proof *prout de jure*, but may only suggest questions to the presiding judge to be put to the deponent, for the purpose of throwing light on any matters which the deposition may have left in obscurity.

On 14th April 1894 an action was brought by William Heslop against George Runcie in the Sheriff Court at Peterhead, under the Debts Recovery (Scotland) Act 1867 for payment of the sum of £42, 17s. 8d.

The defender pleaded that he had deposited a sum of £35 with the pursuer, and that this sum fell to be deducted from the sum sued for. He referred the case to the pursuer's oath, and on the construction of the oath the Sheriff-Substitute (BROWN) decerned against the defender as concluded for.

The Sheriff (GUTHRIE SMITH) having recalled the Sheriff-Substitute's judgment, and given decree for the sum sued for less £35, the pursuer appealed to the Court of Session.

The defender produced in process as his proof the notes of the pursuer's deposition under the reference to oath. From these it appeared that the pursuer had been examined by the defender's agent and by the Court, that he had been cross-examined by his own agent on his own behalf, and that he had subsequently been re-examined by the defender's agent.

At advising—

The LORD PRESIDENT expressed the opin-

ion that the oath was negative of the reference.

LORD ADAM—[*After expressing his concurrence with the Lord President as to the result of the pursuer's deposition*]—It appears from the so-called "defender's proof" that all through the reference to oath, the pursuer was treated as though he had been called as a witness in an ordinary case. He was examined, cross-examined, and re-examined both by the parties and by the Court. Now, this is quite foreign to my recollection of the practice prevailing in a reference to oath in the Sheriff Court. It is true that for the purpose of clearing up the matter deponed to by the party under oath, his agent may request the judge to ask him certain questions, and the judge may at his discretion ask him such questions, but such licence cannot be extended in the manner in which it has been in the present case.

LORD KINNEAR—[*After expressing his concurrence with the Lord President as to the result of the pursuer's deposition*]—I wish to add that I agree with Lord Adam as to the practice in an examination of a party on a reference to his oath. The deponent's counsel is not entitled to cross-examine him as if he were a witness in a proof *prout de jure*. He may suggest questions to the judge, who will put them to the deponent if he thinks it right to do so for the purpose of clearing up any matter which the deposition has left in obscurity. But that is all the discretion of the judge.

LORD M'LAREN was absent.

The Court sustained the appeal, recalled the interlocutor of the Sheriff, and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Pursuer — Salvesen. Agent—A. Morison, S.S.C.

Counsel for the Defender—W. Brown. Agent—Party.

HIGH COURT OF JUSTICIARY.

Thursday, November 22.

(Before the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Trayner.)

STEWART *v.* LANG AND SINCLAIR.

Justiciary Cases — Process — Citation — Service of Complaint before Principal Made Out — Discrepancies between Service Copy and Principal Complaint.

Proceedings in a police court prosecution were instituted by the service upon the accused of what purported to be a copy of a complaint signed by one of the joint-fiscals of the Court, but in point of fact the principal complaint was not made out or signed until after service. The accused was convicted of the offence charged. The Court *suspended* the conviction, on the ground that there was no charge against the accused when service was made, and that the whole proceedings were irregular and illegal.

Opinions by the Lord Justice-Clerk and Lord Trayner against the validity of proceedings under a complaint on the ground that the service copy of the complaint differed in essential particulars from the principal.

Duncan Stewart, police constable in Glasgow, was convicted of assault in the River Bailie Court at Glasgow, upon the following complaint—

"*Glasgow, 13th July* 1894.

"*Unto the Honourable Bailie of the River and Firth of Clyde, or the Judge of Police appointed under The City of Glasgow Act* 1891.

"The complaint of the Procurator-Fiscal of Court, Humbly sheweth,—That Duncan Stewart, a police constable in Glasgow, and residing at 188 Holm Street, Glasgow, is charged that, on the 28th June 1894, while at Berth 2, Queen's Dock, north side of the harbour of Glasgow, he did assault John Jolly, residing at 4 Grace Street, Anderston, Glasgow, and did strike him and kick him. — May it therefore please your Honour, on the said Duncan Stewart complained upon appearing, or being brought before you, in virtue of the powers contained in The Clyde Navigation Consolidation Act 1858, to answer to this libel, to fine and amerciate him in a penalty not exceeding £5; and failing payment, to grant warrant to commit the said Duncan Stewart to Barlinnie Prison, therein to remain for a period not exceeding sixty days, unless said penalty shall be sooner paid; or alternatively, without penalty, that the said defender be sentenced to imprisonment in the said prison for a period not exceeding sixty days.—According to Justice, &c. A. SINCLAIR, *P.-F.*"

The proceedings had been instituted by the service upon Duncan Stewart of a document which bore to be a copy of a complaint signed by J. Lang, the other fiscal of the River Bailie Court. In point of fact the principal complaint was not in existence when the copy was served upon the accused, and was not made out or signed till the morning of the trial. The service copy of the complaint, besides bearing a different signature from the principal, was addressed to the River Bailie only, and not to the Judge of Police, nor did it libel the City of Glasgow Act of 1891. Further, in the prayer of the service copy the last sentence of the prayer in the principal complaint, beginning with the words "or alternatively without penalty," was omitted.

The Court found "the libel proven, in so far as the said defender did assault the said John Jolly by striking him," and convicted the said defender thereof, and imposed a fine of £1, 1s.