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

unnecessary violence to the jury, and (2) erroneously assumed that for a police constable to use any force at all in making an arrest was an actionable wrong.

This was an action of damages, raised in the Sheriff Court at Hamilton, at the instance of Thomas Benjamin Hill, restaurateur, Windmillhill Street, Motherwell, against Donald Campbell and William Smith, police constables, Motherwell, in which the pursuer prayed the Court to grant decree ordaining the defenders, jointly and severally and severally, to pay to the pursuer the sum of £300 sterling, or alternatively the sum of £150 each.

The pursuer averred—"(Cond. 2) On or about the night of Saturday the 15th or early morning of Sunday the 16th days of July 1905, and while quietly and peacefully engaged in his business, he was without any reason or warning being given suddenly accosted and illegally and wrongously arrested by the defenders acting in concert as police constables aforesaid. Defenders without permitting him to put on his coat and vest, which were off at the time, and either ignoring or refusing pursuer's request to be allowed to put his garments on, conveyed him in custody from the back door of his said place of business through Windmillhill Street and Brandon Street and Clyde Street of the said burgh, in the presence of a number of residenters of Motherwell, and brought to the local police office in the street last named, and therein the defenders, acting as aforesaid, falsely and maliciously and without probable cause charged the pursuer to the officer in charge, Inspector Moir, with having in the rear of the restaurant in Windmillhill Street aforesaid occupied by him behaved in a riotous manner and committed a breach of the peace by shouting and swearing in a loud voice, and making use of abusive language towards the defenders and challenging them to fight with him, all of which was untrue. As stated, the arrest of the pursuer was not only illegal, irregular, wrongful, and oppressive, and in gross violation of their duty as police constables, but the charge preferred against him by the defenders was false and made maliciously and without probable cause. Admitted that pursuer was convicted and fined 10s., the alternative being five days' imprisonment, but explained and averred that said conviction proceeded on erroneous use of the evidence and law. (Cond. 3) While being conveyed to the police office as aforesaid pursuer was assaulted by the defenders. Offering no resistance to his arrest he protested against his being so wrongously arrested, but in spite of his remonstrances 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 examination and treatment the following morning. Said arrest of pursuer by defenders and their subsequent abusive behaviour were entirely outwith the scope of their employment as police constables."

The pursuer pleaded—"(1) The defenders having wrongously and illegally arrested the pursuer, and conveyed him in custody through the public streets of Motherwell to the police office there, and having assaulted him while taking him there, all as before condescended on, are liable in damages therefor. (2) The defenders having falsely, maliciously, and without probable cause charged the defender with having committed the offence hereinbefore set forth, slandered the pursuer, and being therefore liable in damages, decree should be granted therefor."

The defenders pleaded—"(1) Privilege. (2) The pursuer having by his own conduct as condescended on necessitated his apprehension by the defenders, is barred from insisting in the present action. (3) The defenders having acted throughout in the course of their duty and without malice, and having done nothing which they were not entitled to do as police constables to preserve the peace, should be assoilzied, with expenses."

The Sheriff-Substitute (THOMSON) having allowed a proof, the pursuer appealed for jury trial, and proposed the following issues:—"(1) Whether on or about the night of Saturday the 15th, or early morning of Sunday the 16th, both days of July 1905, the pursuer was wrongly and forcibly taken into custody and removed from his restaurant in Windmillhill Street, Motherwell, to Motherwell Police Office, in custody by the defenders Donald Campbell and William Smith, while acting as police constables, to the loss, injury, and damage of the pursuer? (2) Whether on or about the night of Saturday the 15th, or early morning of Sunday the 16th, both days of July 1905, in the Police Office, Motherwell, the defenders Donald Campbell and William Smith, or one or other of them, falsely, maliciously, and without probable cause, charged the pursuer to Inspector Moir, the officer in charge, with having in the rear of the restaurant in Windmillhill Street, Motherwell, occupied by the pursuer, behaved in a riotous manner and committed a breach of the peace by shouting and swearing in a loud voice, and making use of abusive language towards the said defenders, and challenging them to fight, or made one or other of these charges, or charges of a like import, of and concerning the pursuer, to the loss, injury, and damage of the pursuer? Damages laid at £300." During the discussion the pursuer also proposed the following issue:—"(3) Whether on or about the night of Saturday the 15th or early morning of Sunday the 16th, both days of July 1905, the pursuer was wrongously, maliciously, and without probable cause apprehended by the defenders, &c. (as in the first proposed issue."

The respondents (defenders) moved that the action should be dismissed as irrelevant, and argued—There was no issuable matter

on record. The issues proposed could not be granted. Want of probable cause must be in them for the defenders otherwise were only doing their duty, but the conviction which was admitted showed that there was probable cause both for the arrest and the charge. There was indeed no averment on record of want of probable cause in regard to the arrest. Malice must also go into the issues, and a mere averment of malice was not enough against a public official. Specific facts and circumstances must be set forth from which malice could be legitimately inferred—*Beaton* v. *Ivory*, July 19, 1887, 14 R. 1057, 24 S.L.R. 744. No appeal had been taken against the conviction, and standing the conviction the present action was irrelevant —Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. c. 62), sec. 3; *Maclellan* v. *Miller*, December 7, 1832, 11 S. 187; *Gilchrist* v. *Anderson*, November 17, 1838, 1 D. 37; *Young* v. *Mitchells*, June 12, 1874, 1 R. 1011, 11 S.L.R. 582; *Kennedy* v. *Wise*, June 21, 1890, 17 R. 1036, 27 S.L.R. 813.

Argued for appellant (pursuer)—It was unnecessary that want of probable cause should go into the first issue, as there was there put in issue the use of unnecessary violence in the arrest. The pursuer's averments on that point were amply specific, and the first issue was modelled on the issue approved in similar circumstances by the Court in *Wood* v. *North British Railway Co.*, February 14, 1899, 1 F. 562, 36 S.L.R. 407. [LORD KINNEAR—In that case the constables were acting not as constables but as servants of the railway company.] [LORD PRESIDENT—In *Wood's* case want of probable cause was not necessary, so if this issue is modelled on *Wood* the issue is wrong.] If it were necessary, a third issue would be proposed similar to the first, but inserting malice and want of probable cause *quoad* the apprehension, viz., "Proposed Additional Issue"—(3) "Whether the pursuer was wrongously, maliciously, and without probable cause apprehended by the defenders, &c." [LORD PRESIDENT—If you go to trial on that issue and the conviction is proved would the judge not direct the jury that there was probable cause? In what way can probable cause be better proved than by a conviction?] In any event, the pursuer was entitled to an issue of unnecessary violence without inserting malice or want of probable cause—*Wilson* v. *Bennett*, January 16, 1904, 6 F. 269, 41 S.L.R. 216.

LORD PRESIDENT—This is an appeal from the Sheriff Court in an action of damages at the instance of a restaurateur against two police constables in Motherwell, and the question now before the Court is whether the issues proposed by the pursuer ought to be granted. The averment of the pursuer is that on a certain night in his own premises he was suddenly accosted and illegally and wrongously arrested by the defenders, acting in concert as police constables of the burgh of Motherwell. He goes on to say that they conveyed him in custody from the back door of his place of business to the local police office, and falsely and maliciously and without probable cause charged him to the inspector there with having committed a breach of the peace. He then goes on to say that he was convicted in the Burgh Court and fined 10s. He further alleges that while being conveyed to the police office he was assaulted by the defenders, and he explains that by saying that he was subjected to gross and unnecessary violence, held by the wrists and his arms twisted, and that "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 examination and treatment."

The two issues the pursuer proposed originally were, first, whether he was wrongly and forcibly taken into custody, and, second, whether the defenders falsely and maliciously and without probable cause charged him with breach of the peace. His counsel now proposed a third issue, namely, whether he was wrongously, maliciously and without probable cause apprehended. As regards these two last issues I am clearly of opinion that they cannot be granted, and for the very simple reason that the pursuer has averred himself out of Court upon the matter of probable cause, and therefore cannot be granted an issue the success of which must depend on proof of want of probable cause. The case was simply one of an arrest and a charge made by ordinary police constables acting admittedly in the scope of their duty, and in a place where they had a right to make arrests and charges. Doubtless if they did that without probable cause, and in order to gratify their own spite, they would be liable to an action of damages, but unless malice and want of probable cause were proved against them the action could not succeed. But it appears to me that if a conviction followed on the complaint that was made, as is here admitted, it is idle to say that the constables had no probable cause in preferring the complaint. The conviction might have been wrong in this sense, that it is possible, if there had been a review of the facts, the Court of review might have taken a different view from the presiding Magistrate, but none the less it could never be said that there was no probable cause for making the complaint if the result was that the proper tribunal before whom the complaint was heard found a conviction. Therefore upon the pursuer's own showing he has disentitled himself to either of these two issues.

I think there is another reason, too, if it is necessary to slay the slain, why these issues should not be allowed, and it is that, on the principle laid down in the case of *Beaton* (14 R. 1057) there must be facts and circumstances set forth from which malice may legitimately be inferred. I find no such facts and circumstances set forth in the record here, and I therefore think that that is an additional ground for refusing these two issues.

There still remains the first issue. Into that issue it is not proposed to put "maliciously and without probable cause." It is admittedly founded on an issue that was approved by the Second Division in *Wood* v. *North British Railway Company* (1 F. 562). I humbly think that the pursuer was mistaken in thinking that he could frame an issue in this case on the model of the case of *Wood*, and that for the very good reason that *Wood's* case proceeded entirely upon the theory and upon the fact that the constables there were not ordinary city constables but were servants of the North British Railway Company. Indeed, it was obviously necessary that that should be the pursuer's theory in *Wood*, because he did not seek damages against the constables but against the Railway Company, who were only responsible if a wrong had been committed by their servants acting within the scope of their employment. In that case the pursuer averred that he was illegally and wrongously arrested by the company's servants. Now, it may be that, in point of fact, they were justified by the powers conferred by the Railway Regulation Act in making the arrest, but the averments were that there were no such circumstances as to justify them in exercising these powers, and that their act was that of ordinary railway servants and unjustifiable. In that case it was averred that the arrest was not only wrongful but that there was undue violence used, and accordingly the Second Division held, and I assume rightly, that it was not necessary to have a separate issue for these two things but that the whole matter might be tried in one issue which used the words "wrongly and forcibly." But that issue cannot be adapted to a case where, as here, it is necessary to have malice and want of probable cause to make a relevant issue. Therefore the first issue being based on an issue which was applicable to a different state of circumstances, is not an issue which can be granted in this case.

I do not for one moment say that there might not be a case where an issue would be granted in respect of the use of improper violence by police constables, and that without any question of malice or want of probable cause. The expression "want of probable cause" has no application to such circumstances, the question being whether the violence used can be justified as necessary. I have no doubt whatever that a police constable is not to be allowed, in excess of his duty, to take advantage of his position and brutally assault a person who is rightly in his custody. But that class of case would never be allowed to proceed unless there were very distinct averments to that effect. The averment here, although to a certain extent an averment of unnecessary violence, is really not sufficient to found a case of that class. The pursuer says he was held by the wrists and his arms were twisted, but these appear to me to be the ordinary circumstances of nearly every arrest, and I confess that the idea seems to me to be ridiculous that every pickpocket who is hauled along the street, by averring that the policeman twisted his arms a little further round than he need have done, should have as a matter of right an action of damages and a jury trial, in which twelve jurymen would be called upon to determine the precise angle of distortion at which the arms ought to be in taking a struggling man along a street. If, on the other hand, really serious violence is specifically averred, then that would be a case for allowing an issue. But, as I have said, I think there are no such averments here, and on the grounds that I have stated I am for refusing all the issues.

LORD KINNEAR—I am of the same opinion. I do not think that the first issue here can be allowed, for it assumes that for a police constable to use force in taking a man whom he has arrested to the police office is an actionable wrong. Now that in itself is not a wrong which would entitle the arrested man to recover damages; though it may be that if unnecessary violence has been used by the police constable an action might lie. I do not think that the pursuer alleges or intends to allege any such violence as would entitle him to an issue on that ground. But my objection to this issue is that it does not put the question of unnecessary violence to the jury at all, for the jury would be quite justified in returning an affirmative finding on this issue if they thought force had been employed, even though that force was not in their opinion more than was indispensable.

As to the second and third issues, they both appear to me to give rise to the same objection. These two issues follow on the averment that the defenders arrested the pursuer, took him to the police office, and there stated to the inspector the grounds on which their charge against him was preferred. Now, it is admitted that the pursuer can have no claim for damages for these actings except on a relevant averment of malice and want of probable cause. I agree with your Lordship that want of probable cause must be excluded here, for it is admitted that there was probable cause inasmuch as the charge when inquired into resulted in a conviction.

I agree further that there are no sufficient averments of malice to be sent to a jury, for it is settled that in alleging the malicious exercise of a public duty, such as that of a police constable effecting an arrest, it is necessary, not only to aver malice in general terms, but to set forth specific facts and circumstances from which malice can be legitimately inferred. The presumption is that those who are acting in discharge of a public duty are acting honestly; and the onus is on the pursuer to set forth facts and circumstances which, if proved, will displace the presumption of honesty, by showing that in point of fact they were acting maliciously. There are no such facts and circumstances averred here, and I therefore agree with your Lordship that these issues must be disallowed.

LORD PEARSON concurred.

LORD M'LAREN was not present.

The Court disallowed the issues, dismissed the action, and decerned.

Counsel for Pursuer and Appellant—M. P. Fraser. Agent—D. Hill Murray, S.S.C.

Counsel for Defenders and Respondents—Guthrie, K.C.—W. Thomson. Agents—Ross, Smith, & Dykes, S.S.C.

Saturday, December 23.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

KEITH *v.* LAUDER.

Reparation—Slander—Slander with respect to Trade—Privilege—Malice—Probable Cause—Ship—"Register of Defaulting Crews"—Member of Association which Kept Register Reporting Seaman as Defaulter.

A was chief engineer of a steam trawler belonging to a fishing company of which B was manager. The fishing company was a member of an association of owners of fishing vessels. The members of the Owners' Association had resolved that a "Register of Defaulting Crews" should be kept, and that if a member of the crew of a steam trawler belonging to a member of the association, after engaging to go to sea in such trawler, should absent himself or refuse to go to sea, or should come on board in a state of intoxication, the member of the association should report to its secretary the name of the member of the crew, and the offence committed by him, for insertion in the register. A register accordingly was so kept. A, without due notice, left the said steam trawler when she was ready to go to sea, and so delayed her departure. B reported to the secretary of the Owners' Association that A had been drunk and had refused to go to sea, and accordingly A's name and the said alleged offences were entered in the register. The Court after proof were of opinion that in making the report B was not actuated by malice, and that he had reasonable grounds for believing that the statements of and concerning A contained in the report were true.

Held (1) that B was privileged in making the report, and in respect that he did not make the report maliciously was not liable in damages to A for slander, and (2) that the circumstances did not disclose any other ground upon which A was entitled to claim damages from B.

The pursuer in this action, which was raised in the Sheriff Court at Aberdeen, was George Keith, an engineer, who had for some time been employed on board fish-trawling vessels. Thomas Lauder, the defender, was the manager of the Aberdeen Icelandic Steam Fishing Company, Limited. For about a fortnight prior to 30th September 1904 the pursuer had been employed as chief engineer on board the steam trawler "Princess Melton," which belonged to the said Steam Fishing Company, but on that date he left the "Princess Melton" and refused to go to sea, in consequence of which she was delayed in harbour for more than a day.

The Icelandic Steam Fishing Company, Limited, was a member of the Aberdeen Steam Fishing Vessels Owners' Association, Limited, which company was formed in 1902 for the purpose, *inter alia*, of "collecting and circulating statistics and other information relating to the fishing or shipping industries or any trade or business connected therewith." The Association, in November 1903, had resolved that its members should report men who being engaged to go to sea should absent themselves or refuse to go to sea or come on board in a state of intoxication, and that a list of the men so reported should be kept for the information of all its members; the list so kept was called the "Register of Defaulting Crews." On these reports the secretary of the Association, if he did not think the matter too trivial, sent out circular letters to its members, about 15 or 20 in number, informing them of those reported to it, but no penalty attached to an owner choosing to employ a seaman so reported, and sometimes he did so.

The pursuer admitted that on 30th September 1904 he left the "Princess Melton" when she was about to sail for the fishing ground, but maintained that he was justified in so doing because certain defects in the machinery of which he had previously complained had not been put right. But it appeared from the evidence that these repairs were not serious and could have easily been repaired temporarily. It further appeared that although the pursuer knew at 11 o'clock in the forenoon that the repairs were not to be made until another trip, he had remained about the ship until the afternoon, when he went on shore for a pint of beer, and that it was only on his return on board after being sent for that he refused to go to sea. (For a fuller account of the evidence on this matter *vide* Lord Low's opinion, *infra*.) The pursuer further himself admitted he was under the influence of drink at the time but denied that he was drunk.

On Monday, 3rd October, the defender met the secretary of the Owners' Association, Paul, and a Mr Doeg, a member of the Association, and told them about the pursuer's conduct of 30th September. Doeg expressed the opinion that the matter should be reported. The defender then asked his superintendent engineer Walker to report the matter to the superintendent porter at the fish market, Smith, who, subject to the secretary's instructions, kept the register of defaulters. Walker however forgot to do so.

On 6th October the pursuer raised an action in the Small Debt Court for arrears of wages against the Aberdeen Icelandic