initio. That must always be determined according to the event. The question of duration can only be determined when there is a call for review as provided for in the 16th section of the Act.

Now if that be the case, in order to make any particular agreement an agreement under the statute it is only necessary that it contains the terms which the Sheriff has used. For it is perfectly indifferent whether the memorandum of agreement says that the appellants "agreed to pay compensation under the Act at the rate of," &c., or adds "during total disablement," or adds "continuing the payment thereof until the same is ended," &c. These three forms are precisely the same in result, and no agreement is an agreement under the statute which does not in one form or another provide for liability and amount and leave duration to be determined at the proper time and from time to time.

I therefore think that though the Sheriff has sanctioned the recording an agreement which includes the latter expression the words are innocuous, because if they were not there they must be implied. Accordingly I agree with your Lordship in the way in which you propose to answer the questions.

LORD MACKENZIE—I am of the same opinion. I think that the conclusive answer to the first question that is put is to be found in the terms of the receipt which is quoted in the case, because that bears that the workman received from the employers a sum of money, "being weekly compensation to date under the Workmen's Compensation Act 1906, under which Act I elect to claim for personal injury by accident." He made the claim under the Act. The payment was made to him in satisfaction of that claim, and the employer was content to accept a receipt which expressly bore that it was received "under the Workmen's Compensation Act 1906."

Now, under these circumstances the Sheriff had ample justification for finding in fact that the agreement was made in terms of the Workmen's Compensation Act 1906. I am unable to see as regards the second question which is put, how, when that conclusion is reached, it is possible to say that the true construction of the agreement is not just that it is in terms of the Workmen's Compensation Act 1906, which is scheduled as part of the agreement. If that conclusion is reached, then all that the Sheriff has done in granting warrant for the memorandum being recorded in the terms which are complained of here is merely to write at a greater length what is contained in the finding of fact that he sets forth in the latter part of the case.

The Court answered the questions of law in the affirmative.

Counsel for the Appellants—Horne, K.C. —Aitchison. Agent—Robert Millar, S.S.C.

Counsel for the Respondent—Constable, K.C.—T. G. Robertson. Agents—Gardiner & Macfie, S.S.C.

Friday, July 4.

SECOND DIVISION.

[Sheriff Court at Glasgow.

SHIELDS *v.* SHEARER AND ANOTHER.

Reparation — Wrongous Apprehension — Privilege—Malice and Want of Probable Cause—"Reasonable Grounds of Suspicion"—Glasgow Police Act 1866 (29 *and* 30 *Vict. cap. cclxxiii*), *sec.* 88.

Process—Issue—Form of Issue—"Without Reasonable Grounds of Suspicion"—Illegal Apprehension by Police Constable —Glasgow Police Act 1866 (29 *and* 30 *Vict. cap. cclxxiii*), *sec.* 88.

The Glasgow Police Act 1866 enacts—Section 88—"It shall be lawful for the Chief-Constable or for any superintendent, lieutenant, or constable acting under or appointed by him . . . without any other authority than this Act, to do any of the following acts within but not beyond the city, viz.—They may search for, take into custody, and convey to the police office any person who is either accused or reasonably suspected of having committed . . . a penal offence."

In an action of damages for wrongful arrest against two police constables who, acting under the Glasgow Police Act 1866, had apprehended the pursuer without a warrant, *held* that the *bona fide* belief of the constables that they had acted reasonably was not sufficient to justify their plea of privilege, and that it was unnecessary to put in issue malice and want of probable cause, and issue approved whether defenders "wrongfully and illegally and without reasonable grounds of suspicion apprehended the pursuer."

The Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), sec. 88, is quoted *supra in rubric.*

Stephen Shields, Creeslough, County Donegal, *pursuer*, brought an action in the Sheriff Court at Glasgow against James Shearer and John Bruce, police constables, Glasgow, *defenders*, in which he claimed damages for illegal arrest.

The pursuer averred—"(Cond. 3) During the afternoon of Saturday, 12th October 1912, the pursuer went to Great Clyde Street, Glasgow, and visited a number of hawkers' barrows, which on Saturdays only are allowed by the police authorities to stand in Great Clyde Street aforesaid for trading purposes. At one of said barrows the pursuer purchased a white metal watch for the sum of 1s. 6d., which was duly paid by him. The pursuer retained said watch in his possession until the Monday following, viz., 14th October 1912, when being doubtful as to whether said watch was worth the money he had paid for it, he visited a watchmaker's shop and asked the man in charge to examine said watch and let him know the value thereof. The pursuer was informed that if he got

the offer of 1s. for said watch he should accept it as it was not worth any more. (Cond. 4) The pursuer accordingly took the watch in question to the premises of —— Maguire, broker, Glebe Street, Glasgow, and asked the salesman to buy it from him. The latter after looking at the watch declined to purchase it. While the pursuer was in said shop he observed a man standing in front of the counter of said shop. He did not know at the time that said man was connected with the police force, but he now avers that it was one of the defenders. The latter took the watch from the pursuer and handed it back to him after examining it, stating 'It is not worth anything.' (Cond. 5) After the incident referred to in the immediately preceding article the pursuer left said shop and crossed the street to the shop of J. & A. Ferris, who are general dealers at 51 and 53 Glebe Street, Townhead. He asked the person in charge of said shop (a woman) to buy said watch. The saleswoman examined said watch, asked pursuer what he wished for it, and on his replying 2s. made him an offer of 1s. 6d., which offer the pursuer accepted, and on receiving payment left said shop. (Cond. 6) When pursuer left said shop he proceeded in the direction of Stirling Road, Glasgow, which is in the vicinity of Glebe Street aforesaid. While walking along said road he was approached by the defenders who were in plain clothes, who stopped him and asked him what he had done with the watch. Pursuer stated that he had sold it, and on being asked further by the said defenders to show them the shop where he had sold said watch, the pursuer immediately took them to the shop of the said J. & A. Ferris. The said defenders made inquiries of the woman in charge, who informed them that it was the fact that pursuer had called at said shop and sold said watch for 1s. 6d., and showed them the record of the transaction in her books. She further informed them that she was quite satisfied that the pursuer had come into possession of said watch honestly. The defenders said that they were not satisfied as to this, and insisted on the said saleswoman delivering over to them the watch in question, which she did. With reference to the defenders' averments in answer, the circumstances under which defenders apprehended pursuer as stated in answer are denied, and it is explained and averred that in acting as they did on the occasion libelled the defenders were not acting in the honest discharge of their duties as police constables, but were acting arbitrarily, capriciously, and unjustifiably. The pursuer at no time on the occasion libelled acted in such a manner as to excite suspicion in the mind of any reasonable person. (Cond. 7) The pursuer was immediately thereafter arrested by the defenders and marched through the streets to the St Rollox Police Office in their custody, the pursuer walking between the defenders and being held by them by his arms. On arrival at said Police Office the defenders falsely, maliciously, and without probable cause stated to the official in charge that they had arrested the pursuer on the ground that they had found him in possession of a watch of which he was unable to give a satisfactory account. Thereafter the defenders proceeded forcibly to search him, but found nothing to incriminate the pursuer in any way whatever. He was locked up and detained in said Police Office until the following morning, viz., Tuesday, 15th October 1912. This was done notwithstanding that the pursuer explained that he had purchased said watch as before stated. It is explained and averred that a list of all watches reported to the police authorities as stolen is in the possession of the various detective officers of the city the morning following the report of their loss. The watch in question was not a stolen watch, nor was it described on the list above referred to, and this was well known to the defenders before and at the time of the arrest of the pursuer by them. (Cond. 8) On the morning of said Tuesday, 15th October 1912, the pursuer was brought before the magistrate on said charge, and at the request of the superintendent of police at St Rollox Police Court was remanded for inquiry. He was taken back to the cells, and again locked up until the following morning, viz., Wednesday, 16th October 1912, when he again appeared before the magistrate officiating in said Police Court, and was discharged. . . . (Cond. 10) In apprehending the pursuer and conveying him through the public streets of Glasgow to St Rollox Police Office, Glasgow, and there lodging a charge against him of being found in possession of a watch of which he was unable to give a satisfactory account, and in thereafter submitting him to the indignity of a search, and detaining him as aforesaid, the defenders acted illegally, unwarrantably, and maliciously, and without probable or any cause. The defenders had no warrant for the apprehension of the pursuer, and were not entitled to apprehend the pursuer in the circumstances condescended on. Furthermore, the charge made by the defenders against him was a false charge, and was made without probable or any cause. The defenders, however, acted arbitrarily and capriciously, and in an unjustifiable manner in the circumstances, in respect that they stopped and questioned the pursuer as aforesaid, refused to believe either the statements of the said saleswoman in said shop of said J. & A. Ferris or of the pursuer, and arrested and conveyed him to the Police Office. This they were not entitled to do, and had they inquired further they would have found that the pursuer was not a thief nor an associate of thieves, and that it was impossible for them to trace stolen property to his possession for the reason that pursuer never was in possession of such property, nor was he ever guilty of the crime of theft."

The defenders pleaded, *inter alia*—"(1) The action is irrelevant. (2) The defenders having been acting as police constables in the honest discharge of their duties under

the powers conferred upon them by the Glasgow Police Act 1866, section 88, without malice and with probable cause, are privileged."

On 25th February 1913 the Sheriff-Substitute (LYELL) allowed a proof.

On 1st March 1913 the pursuer required the cause to be remitted to the Second Division of the Court of Session.

The pursuer proposed the following issue for the trial of the cause—"Whether on or about 14th October 1912 the defenders wrongfully and illegally apprehended the pursuer in or about Glebe Street, Townhead, and conveyed him to the St Rollox Police Office in Glasgow, to his loss, injury, and damage."

The defenders objected to the issue, and argued—The defenders had acted in conformity with their duty and in pursuance of the powers conferred on them by the Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), section 88. Under that section the discretion was the discretion of the constables, and they were therefore privileged, and were not liable unless malice and want of probable cause were proved against them—*M'Cormack* v. *Glasgow Corporation*, 1910 S.C. 562, *per* Lord Kinnear at p. 567, 47 S.L.R. 493; *Leask* v. *Burt*, October 28, 1893, 21 R. 32, *per* L. J.-C. Macdonald at p. 35, 31 S.L.R. 30; *Young* v. *Magistrates of Glasgow*, May 16, 1891, 18 R. 825, 28 S.L.R. 645; *Hill* v. *Campbell*, December 9, 1905, 8 F. 220, 43 S.L.R. 226; *Cameron* v. *Hamilton*, February 1, 1856, 18 D. 423; *Hassan* v. *Paterson*, June 26, 1885, 12 R. 1164, 22 S.L.R. 775; *Denholm* v. *Thomson*, October 22, 1880, 8 R. 31, 18 S.L.R. 11; *Beaton* v. *Ivory*, July 19, 1887, 14 R. 1057, 24 S.L.R. 744. In *Harvey* v. *Sturgeon*, 1912 S.C. 974, 49 S.L.R. 717, the facts were different, and that was the only case where an issue had been allowed against a constable acting under statutory authority without the insertion of malice and probable cause. The case of *Pringle* v. *Bremner and Stirling*, May 6, 1867, 5 M. (H.L.) 55, 4 S.L.R. 18, was distinguishable, because in the absence of statutory authority arrest without a warrant disclosed a *prima facie* case of wrong. There was no averment of malice in the present case, and it appeared from the averments that the constables had acted quite reasonably. In these circumstances the action should be dismissed as irrelevant, or in any event malice and want of probable cause should be put in issue.

Argued for the pursuer—The present case was ruled by *Harvey* v. *Sturgeon, cit. sup.*, from which it was indistinguishable, and the issue proposed was similar to the issue allowed in that case. In order to support the plea of privilege there must be a warrant to arrest, except in certain clearly defined cases, viz., (*a*) where a person was caught in the act of committing a crime, (*b*) where an accusation was made to the police of an offence being committed or recently committed, (*c*) where power to arrest without a warrant was conferred by statute. When statutory authority was invoked the person making the arrest must show that he acted within the statute—*Mitchell* v. *Magistrates of Aberdeen*, January 17, 1893, 20 R. 253, 30 S.L.R. 351; *Sutherland* v. *Magistrates of Aberdeen*, November 24, 1894, 22 R. 95, 32 S.L.R. 81; *Pringle* v. *Bremner & Stirling, cit. sup.*; *Lundie* v. *MacBrayne*, July 20, 1894, 21 R. 1085, 31 S.L.R. 872. There must be reasonable suspicion to justify the arrest. The mere fact of suspicion was not sufficient; nor did the fact that the defenders were constables raise a presumption that they had reasonable ground to suspect. It was therefore unnecessary to put in issue malice and want of probable cause—*Milne* v. *Smiths*, November 23, 1892, 20 R. 95, *per* Lord M'Laren at p. 100, 30 S.L.R. 105; *Lightbody* v. *Gordon*, June 15, 1882, 9 R. 934, *per* L.P. Inglis at p. 938, 19 S.L.R. 703. In any event the averments disclosed a case of malice and want of probable cause.

At advising—

LORD SALVESEN—In this case the pursuer sues for damages in respect of an alleged illegal apprehension and detention in custody for a period of two days. The defenders, who are police constables in Glasgow, maintained that the action was irrelevant on the ground that their actings were privileged and that there was no sufficient averment of malice. They attempted to distinguish the case from that on which the Sheriff-Substitute had proceeded (*Harvey* v. *Sturgeon*); and they further asked us to reconsider that decision and the issue which was there allowed. The importance of the decision from the point of view of the police force in Glasgow is no doubt great; and, speaking for myself, I should have been very willing to have submitted the case for consideration by a larger tribunal had I been satisfied on the fuller argument which has now been submitted to us that the previous decision was open to question. As, however, I have been confirmed in the view that the decision was right, I see no reason why we should take this course.

There is a distinction between the facts in the case of *Harvey* and those averred here that is not without some force. No charge was made against the pursuer Harvey after he had been brought to the police office; whereas in the present case the pursuer was charged before a magistrate with being found in possession of a watch of which he was unable to give a satisfactory account. He was remanded on the first occasion for inquiry; and when he was brought up next day before the magistrate officiating in the Police Court he was discharged. The fact that the present pursuer was brought up before a magistrate and that a definite charge was made against him may have a bearing on the defence, but does not necessarily lead to the conclusion that he has not stated a relevant case.

The main foundation of the action is that the pursuer was apprehended without a warrant. At common law such an apprehension is *prima facie* illegal except

in certain well-defined cases. If a policeman has seen an offence committed or "has such evidence as is equivalent to personal observation" (to use the words of Lord M'Laren in *Lundie* v. *MacBrayne*) he is, of course, entitled to apprehend the accused and bring him before a magistrate. No such special circumstances occur here. According to the pursuer's allegation he had simply on the day of his apprehension sold to a broker a watch which he had purchased some days before; and even the defenders do not say that they personally observed or had been informed that he had committed an offence. At common law, therefore, the apprehension of the pursuer was *prima facie* an illegal act.

The defenders, however, appeal to section 88 of the Glasgow Police Act 1866, which provides that police constables may within but not beyond the city "search for, take into custody, and convey to the police office any person who is either accused or reasonably suspected of having committed either within the city or at any place whatsoever beyond the city a penal offence." As the pursuer's apprehension took place within Glasgow it is obvious that his arrest by police constables without a warrant is not necessarily an illegal act. If the person apprehended by them is reasonably suspected of having committed a penal offence they are protected although it may be proved that he was entirely innocent. The defenders' counsel maintained that the question of reasonableness is one entirely in the judgment of the police constable who effects the arrest, and that therefore he is privileged if he did not act maliciously. I cannot so construe the language of the section. Such a construction gives no effect whatever to the word "reasonable"—a word which is carefully inserted in this and most of the succeeding clauses of the same section which deal with similar powers conferred upon police constables. I think the section does not empower a police constable to arrest any person merely because he *bona fide* suspects that person of having committed a penal offence. Such a suspicion, although honestly entertained, may be entirely without reasonable ground, and I think it would be remarkable if a police constable were to have the same absolute protection in arresting a person without a warrant which he undoubtedly enjoys when he is effecting an arrest in pursuance of a proper warrant. Apart from the case of *Harvey*, which raised a similar question under somewhat different circumstances, there is no authority upon the point. In the case of *Young* the constables against whom an issue was allowed had acted under the same section of the Glasgow Police Act of 1866 but under a clause which does not say anything about reasonable ground of suspicion. In the argument it was, moreover, admitted that the words "maliciously and without probable cause" must be inserted in the issues directed against the constables. The form of the issue was therefore not considered, and the only question argued was whether the facts and circumstances averred were such that malice could be inferred from them. The case is therefore no authority for the proposition that police constables enjoy an absolute privilege when acting in the *bona fide* discharge of what they believe to be their duty—a privilege which could only be displaced not merely by an averment that they acted without probable cause, but by averments from which it might reasonably be inferred that they were actuated by some illegitimate motive. On the other hand, in the case of *Lundie* v. *MacBrayne* an issue was allowed in respect of an alleged illegal apprehension without malice and want of probable cause being inserted in the issue, although there, as here, a statutory warrant was pleaded as justifying the conduct complained of. In order to allow the defenders the protection of the enactment on which they rely it must be shown that they acted within its terms—in other words, that they had reasonable grounds of suspicion for taking the pursuer into custody. The reasonableness of their conduct is a matter for the jury, and does not depend entirely on the *bona fides* of the defenders. If it were otherwise every citizen might be exposed to arrest without any remedy simply because a constable *de facto* harboured a suspicion against him of having committed some penal offence, however stupid and unreasonable such suspicion might be.

It does not however follow that we should adopt the form of issue which was allowed in the case of *Harvey*. No discussion took place there as to the form except as to whether malice and want of probable cause should be inserted. What happened was that the pursuer's counsel called attention to the case of *Pringle* v. *Bremner*, where the House of Lords thought that the words "wrongfully and illegally" only should go into the issue. That, however, was not a case where any protection was afforded to the constables by statute. As regards one of the wrongs, namely the arrest and imprisonment of the pursuer without a warrant, the Lord Chancellor (Lord Chelmsford) made the following observations—"But then it is said, the constable having discovered matters which in his judgment brought home to the pursuer complicity in the alleged crime, he was justified in exercising his discretion upon the subject, and in apprehending the pursuer and lodging him in prison. Again I say, answering in the same way as I answered with regard to the searching for papers, the result will either justify him or will not justify him; if the papers he seized really proved or gave a fair and reasonable ground to believe that the pursuer was implicated in the grave crime which was charged, then, although the officer might have had no warrant for his apprehension (and he had no warrant upon this occasion), yet the event would justify him, and he would protect himself by the circumstances afterwards discovered." In other words, as

I read the passage, the constable who arrests a person without a warrant takes the risk of justifying the apprehension.

Here it is not alleged that the pursuer had in fact committed the crime with which he was charged, but looking to the provisions of the statute this is, I think, not necessary to justify the constables. It is enough if the jury think that they did not act without reasonable grounds of suspicion, and it is important that this should be put pointedly in issue rather than explained as it might be by the judge at the trial. The presumption is that the officer acts in pursuance of his duty, and the pursuer must rebut this presumption. I propose, therefore, that the issue which we allow should be expressed as follows—"Whether on or about 14th October 1912 the defenders wrongfully and illegally, and without reasonable grounds of suspicion, apprehended the pursuer," and so on, as in the form proposed. It is said that this is a departure from the stereotyped form, and that the Court ought to be slow to introduce any novelties into the forms of issue. I assent generally to that view, but each issue must be adjusted according to the particular circumstances of the case, and there is no authority which settles conclusively the form of issue where a police constable effects an arrest without a warrant but acting under statutory authority. It is obvious that the pursuer cannot succeed unless he convinces the jury that the defenders had no reasonable cause to suspect him of the crime charged, and it is desirable that officers of the law should as far as possible be protected in the discharge of their duty by the grounds of liability being pointedly brought under the notice of the jury.

LORD DUNDAS—I agree that an issue ought to be allowed in the terms suggested by Lord Salvesen and that substantially upon the grounds he has so fully explained. I have had an opportunity of reading his opinion and I add nothing more.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

The Court recalled the interlocutor of the Sheriff-Substitute of Lanarkshire, dated 25th February 1913, varied the issue by adding after the word "illegally" in the second line thereof the words "and without reasonable grounds of suspicion," and with this addition approved of the said issue.

Counsel for the Pursuer and Appellant—Watt, K.C.—A. M. Mackay. Agent—J. Ferguson Reekie, Solicitor.

Counsel for the Defenders and Respondents—Morison, K.C.—Macquisten. Agents—Campbell & Smith, S.S.C.

Friday, July 4.

SECOND DIVISION.

TENNENT AND OTHERS (MONTGOMERIE-FLEMING'S TRUSTEES).

Succession — Testament — Construction — Liferent or Right of Occupancy of House.

A testator in his trust-settlement expressed a wish that his son and four daughters should live together at his house so long as they remained unmarried, but that in the event of the marriage of the son he should occupy the house, and the trustees were directed in that event to convey it to him under such burdens as existed at the testator's death, and since the unmarried daughters would thereby be "deprived of a residence," it was provided that the son should pay an annuity to each of them during spinsterhood. The residue of the estate was bequeathed to the extent of two-sixths to the son in fee and to the extent of one-sixth each to the daughters in liferent and their issue in fee.

Held that the interest of the son and unmarried daughters in the house was a mere right of occupancy and not a liferent.

Hugh Tennent and others, testamentary trustees of James Brown Montgomerie-Fleming of Kelvinside, Glasgow, *first parties;* Mrs Elizabeth Tennent Montgomerie-Fleming or Carre, and others, the whole married children of the testator, *second parties;* James Brown Montgomerie-Fleming, only son of the testator, *third party;* and Miss Margaret Mary Montgomerie-Fleming, an unmarried daughter of the testator, *fourth party*, presented a Special Case for the opinion and judgment of the Court of Session.

The testator died on 18th June 1899, leaving a trust-disposition and settlement by which he conveyed his whole estate to the first parties as trustees, and provided—"*In the fourth place,* it is my wish and desire that on the death or second marriage of my said wife, my children should, so long as they remain unmarried, live together at Beaconsfield House, Kelvinside. And further, as it is my wish and desire that my son James Brown Montgomerie-Fleming, junior, should occupy Beaconsfield House on his marriage, I hereby direct and appoint my said trustees, on the death or second marriage of my said wife, if and when the whole of my daughters are married, or when my son is married, whichever of these latter events shall first happen, to assign and dispone to my son the said James Brown Montgomerie-Fleming, junior, and his heirs and assignees, the said Beaconsfield House . . . but that under such burdens as may at the date of my death exist over the said subjects: Declaring that as my unmarried daughters will, on my son's marriage and entry to and occupation of Beaconsfield House and pertinents before mentioned,