LORD GUTHRIE—I am of the same opinion. Whether there should not be some change in the earliest stage of such proceedings as those before us, namely, in the practice of granting a certificate of poverty without any consideration whatever of what the amount may be that is being earned by the applicant is a question not directly before us. But so far as we are at present concerned it is quite clear that we should not be as we now are in a position of helplessness unless somebody appears to state objections. Whatever papers disclose, apparently we can do nothing unless there is an objector.

The larger question that Mr Crawford referred to, namely, whether the present scale of income that will entitle an applicant to be put upon the poor's roll, which was fixed at a time when money was much more valuable than it is now, should not be altered, may require also to be considered, but is not directly before us now.

The Court found the applicant entitled to the benefit of the poor's roll, and remitted to counsel and agent for the poor to conduct the case.

Counsel for the Applicant — Crawford. Agent—W. Macduff Urquhart, S.S.C.

HOUSE OF LORDS.

Friday, April 3.

(Before the Lord Chancellor (Haldane), Lord Kinnear, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

SHIELDS *v.* SHEARER AND ANOTHER.

(In the Court of Session, July 4, 1913, 50 S.L.R. 794, and 1913 S.C. 1012.)

Reparation—Illegal Apprehension—Issue —Glasgow Police Act 1866 (29 *and* 30 *Vict. cap. cclxxiii*), *sec.* 88—*Malice and Want of Probable Cause in Issue.*

In an action of damages for wrongous arrest brought against two Glasgow policemen who had apprehended the pursuer without warrant, an issue "whether on or about 14th October 1912 the defenders wrongfully, illegally, and without reasonable grounds of suspicion 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," *approved.*

This case is reported *ante ut supra*, where will be found the Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), sec. 88, and the pursuer's averments.

The defenders appealed to the House of Lords.

At the conclusion of the argument on behalf of the appellants, counsel for the respondent being present but not being called upon—

LORD CHANCELLOR — It would only be with reluctance that I should criticise a decision come to in the Court of Session on a question of procedure, but on the present occasion I find myself, for reasons I will presently state, entirely in accordance with the views of the learned Judges who have decided this case in the Court below; and I am strengthened in my sense of concurrence by the fact that three of your Lordships who have large experience in connection with Scottish procedure are of the same opinion. Of the issue as framed I only proposed to say that it seems to me, if it is justifiable, a convenient course to have adopted for the bringing to justice of the case before us.

The real question seemed to me, at a very early stage of the opening of the Solicitor-General for Scotland, a question of substance—the question whether it is necessary for the pursuer to prove that malice in fact was in the minds of the police when they took steps which resulted in what he alleges was his false imprisonment.

Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he can only act within the law. He may therefore be guilty of malice in law, although so far as the state of his mind is concerned he acts ignorantly, and in that sense innocently. Malice in fact is quite a different thing. It means an actual malicious intention on the part of the person who has done the wrongful act, and it may be, in proceedings based on wrongs independent of contract—a very material ingredient in the question of whether a valid cause of action can be stated.

What has happened in the present case is this, that an issue has been framed under a statute which governs these matters in Glasgow, and an issue which substantially follows the words of that statute. The issue proposed is—". . . [*quotes, v. sup. in rubric*] . . .," and the damage is laid at £100. In order to succeed on what is the real question of substance underlying this case, the learned Solicitor-General frankly admitted that he would have to say that if the defenders the police wrongfully and illegally, without reasonable grounds of suspicion, apprehended the pursuer, still the pursuer could not succeed without proving that malice in fact which I have distinguished from malice in law.

I asked the learned Solicitor-General, than whom no one is more competent to answer the question, whether he could produce any train of authorities in the Court of Session, or any decision of this House, which introduced what would be a most startling demarcation between the law as it exists in Scotland and the law as it exists here, and he replied with candour that he could not. There was one case, the case of *Young*, which we were all agreed was a case which related to a different state of matters. That being so, it appears to me that the issue

which has been framed in this case is an issue which really is more favourable to the defenders than the issue which they would normally have were the case treated as one merely at common law. They have got such protection as the statute which prevails in Glasgow gives them. If they can succeed in bringing themselves within the words of justification which that statute enacts, then they will succeed.

The conclusion I have come to is that the Court of Session have taken a very convenient course in this case—a course in which there being no challenge on the part of the pursuers as to the form of issue I entirely agree—and I therefore move your Lordships that this appeal be dismissed, and dismissed with costs.

LORD KINNEAR—I entirely agree with my noble and learned friend on the woolsack, and I have nothing to add to what he has said.

LORD DUNEDIN—I also agree with what has just been said by my noble and learned friend on the woolsack. I think, perhaps, I had better add to what he has said that I think my noble and learned friend has used terms which are not perfectly familiar terms in Scotland—I mean "malice in law" and "malice in fact"—but which are exactly represented, in the cases which have turned upon these matters, by the distinction between cases where malice may properly be inferred from the mere wrongful act that is done, and cases where it is necessary in the Scotch phraseology to aver acts and circumstances out of which malice may be inferred—such a case, for instance, as the case of *Beattie* v. *Ebury*. In other words, to use the words of my noble and learned friend in *Beattie* v. *Ebury*, there would not have been a relevant case against the Sheriff Principal unless they had been able to aver malice in fact, which they were not able to do.

The common law upon the question that we have here been dealing with seems to me plain beyond all question. The first point is that in a case of this sort you are bound to take the averment of the pursuer alone, and not the defence which is made by the defender; that was laid down in this House by the Lord Chancellor in the case of *Pringle* v *Bremner*, 5 Macph. (H.L.) p. 55. Taking that, in this case we find that there are no circumstances according to the pursuer which justify the arrest at all, and when that is so, I think it is absolutely clear upon the authorities that all that was necessary for the pursuer to put in issue were the words "wrongfully and illegally," without any more, leaving any question of privileged situation to be dealt with by the learned Judge at the trial. The only case that has been quoted against that is the case of *Young*, and I am perfectly satisfied that in *Young's* case the admission of the words "maliciously and without probable cause" in that issue was due to the concession of the counsel concerned, and not consequent upon the matter being argued. There have been countless cases since, not only cases in the books, but cases in which one may invoke one's own personal knowledge of procedure where the pursuer has made averment as here, and the issue was "wrongfully and illegally," and that alone.

Then we come to the question, does the Glasgow Police Act make any difference, which says that constables are to be allowed to arrest if they have reasonable grounds of suspicion? Upon that clause the appellants here argued that that meant that a constable was allowed to arrest if he said he suspected, and that the mere fact that he said he suspected absolutely closed the question. I should be sorry indeed to suppose that the liberties of the subject in Glasgow have been so interfered with as they would have been if an Act of Parliament had been passed with the meaning the appellants put upon it. Upon that matter I will only say that I entirely agree with that portion of Lord Salvesen's judgment which deals with that matter.

That being so, the only question that remains is whether it was advisable in this case to alter the old form of issue and to put in the particular words of the statute. I agree with my noble and learned friend on the woolsack in thinking that the course adopted has been quite convenient. I would like to say this, that upon the question of the mere form of the issue, which is merely what is a convenient way of trying the case, I should think your Lordships' House would be slow indeed to interfere with the learned Judges of the Court of Session unless you were thoroughly convinced that what they had done would in some way or other lead to a result which would not be in accordance with justice in the interest either of the pursuer or the defender.

I agree in the motion that has been made.

LORD ATKINSON—I concur. I have some hesitation in expressing any opinion on a matter of Scotch pleading and practice, but it certainly would appear to me that the issue as framed is more favourable to the defenders than they are entitled to.

I think human liberty is such a valuable thing in this country—and I think it is the same in Scotland—that a person who invades it by arresting an individual must justify his action in that respect. The Solicitor-General for Scotland was extremely candid in saying that his quarrel in this issue was that it was not so framed as to lay upon the plaintiff the burden of proving affirmatively that the act of the constable was done with ill-will. I do not think there is any principle of law which would throw that burden upon him, and I am very happy to say that it is so. I do not think any case was cited before your Lordships which would justify your coming to any such conclusion. I think the issue as framed practically enables the parties to raise the defence based upon the Glasgow statute, and there is no sound objection to it.

LORD SHAW—I agree. In determining as to an issue the rule is elementary that the allegations of the pursuer must be taken as they stand. The case is very simple. It is, as alleged, this, viz., that the pursuer being

the lawful owner of a watch, was arrested for having it in his possession.

Now the power of arrest of a citizen in Glasgow does not appear to me in any way different from what it is in other places in Scotland. Very frequently no warrant is required. And of course there are certain protections afforded. In addition to the ordinary rules of the common law, the Glasgow Police Statute bears upon the subject. I desire, since the case has reached this House, to say that I adopt entirely what I consider, if I may say so, to be the excellent summary of the position given by the learned Sheriff-Substitute. He says—"By virtue of section 88 of the Glasgow Police Act 1866 a police constable has power to arrest without a warrant any person whom he may reasonably suspect of having committed a crime. But it rests upon the constable to prove that his suspicion was reasonable and his act therefore justifiable. It may quite well be that the defenders here will be able to establish at the proof that the pursuer brought his arrest upon himself by his own furtive and suspicious behaviour, by his giving confused and contradictory accounts of how the watch came into his possession, and the like. If that be so, the defenders were doing no more than their duty in arresting him."

I had great difficulty in understanding what it was the appellants desired. After a brief argument it was admitted that the pursuer's averments did contain issuable matter. It turned out ultimately that the appellants wished put into this issue the word "maliciously." The form of the issue is this—"... [*quotes, v. sup. in rubric*] ..." To this hour I do not understand what "maliciously" would add to that. For if a constable has arrested a citizen without reasonable grounds even of suspicion against him, the law would demand no further proof of malice. With regard to actions of slander it has long been established that malice is implied by the reckless use of words without any consideration whether they were true or not; and with regard to false or improper apprehension or imprisonment the law is also elementary, that malice is implied from recklessness whether the citizen arrested is innocent or not. Accordingly, when the statute in Glasgow says that it is no defence unless there is reasonable ground for suspicion, it appears to me that the statute simply lays down in so many terms, in broad and popular terms, what might have been given in the old legal form by the words "maliciously and without probable cause."

The difficulty in this case is said to have arisen from one sentence in Lord Salvesen's opinion. I think it right to call attention to that, because I think it ought to be said, in justice to the learned Judge, that that sentence has been misconstrued. No doubt the learned Judge says that "the constable who arrests a person without a warrant takes the risk of justifying the apprehension." The learned Solicitor-General for Scotland argued that that must mean that the *onus* was upon the constable, but the learned Judge in the succeeding sentence shows that that is not so, for he cites the statute, and he says—"The presumption is that the officer acts in pursuance of his duty, and the pursuer must rebut this presumption;" and he concludes his judgment by saying this, in which I entirely agree—"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 their liability being pointedly brought under the notice of the jury." It humbly appears to me that those sentences of Lord Salvesen make clear where the *onus* lies, viz., that it rests upon the pursuer.

But with regard to the form of issue, my noble and learned friend has referred to the practice—and I am aware that the general, or at least frequent, practice is—that the insertion of the words "wrongfully and illegally" in the issue as presented to the jury is enough. Where the pursuer's averments do not show that the defender was in any position of privilege this is necessarily so. When thereafter and in the course of the trial privilege is disclosed and determined by the judge, the judge then charges the jury that they must also be satisfied that the action was done maliciously or without probable cause. In these cases, therefore, before the jury comes to determine its verdict, their duty is to consider the black type with "wrongfully and illegally," and to remember (if they can) the judge's charge that they must also find further that the act was done maliciously, or maliciously and without probable cause. This course is *ex necessitate* inexact, and might conceivably produce mishap if the jury omitted to recal the judge's charge.

But what the learned Judges of the Second Division have done in this case seems to me to be eminently fair to both parties—a good reason for preserving this issue, which is not the subject of any cross appeal. They have in point of fact taken this statute, which it is admitted covers the position of the defenders, and put in the forefront of the issue and before the faces of the jury the actual and complete thing which must be affirmatively established. I think that nothing could more clearly direct the minds of the jury to the true point. I accordingly approve highly of the issue as it has been put. I think it a model form.

Their Lordships dismissed the appeal with expenses.

Counsel for the Pursuer and Respondent—Roberton Christie, K.C.—Scanlan, M.P. Agents—J. F. Reekie, Edinburgh—Herbert L. Deane, Westminster.

Counsel for the Defenders and Appellants—The Solicitor-General (Morison, K.C.)—Macquisten—M'Kinnon Wood. Agents—John Lindsay, Town Clerk, Glasgow—Campbell & Smith, S.S.C., Edinburgh—Martin & Company, Westminster.