that trusting to the defender's repeated promises and entreaties, she has made preparations for the marriage according to the custom of the country. The pursuer's sister says that the pursuer had told her before Whitsunday that the defender had sought her, and that she was not to tell their mother that she was to be married to him; but her brother says that in June she told him that the defender had made a proposal of marriage to her, and that she preferred him to some others who were paying their addresses to her. The pursuer's own case is that she did not accept the defender till the 8th of November.

In regard to direct evidence—on which the discussion mainly turned in the Court here—all that the pursuer adduced is a statement by her mother that the defender on 9th November told her that he was going to marry the pursuer; and the evidence of the pursuer's brother, who says that the defender came to his house on the 11th of November, and in answer to his remark, "I understand you and Susan are to be married," replied, "Oh, ay; but it is likely to go against me for some time yet." The pursuer further relied upon a certain amount of intimacy between her and the defender, and his courtship, and also a common report about the marriage, which the defender never disclaimed. The defender, since the date of the alleged promise, and in December 1861, has married, and he alleged that between May and November of the same year he was engaged to his present wife. The Sheriff-Substitute (Watson) and the Sheriff (Davidson) adhering, found that the pursuer had not proved her case. The pursuer advocated.

To-day the Court altered these judgments, and found for the pursuer, assessing the damages to which she was entitled at £25. The Court proceeded mainly on the direct evidence of the pursuer's mother and her brother, holding that the question put by the latter and the defender's answer to it were not explainable on any other theory than an engagement. The Court also relied on the courtship of the defender and on the rumour of marriage, which he had not disclaimed.

Thursday, Dec. 21.

FIRST DIVISION.

NELSON *v.* BLACK AND MORRISON.

Reparation—Public Officer. (1) Held that a pursuer of an action of damages against a procurator-fiscal for slander contained in a petition to a Sheriff, must take an issue of malice and want of probable cause. (2) Issue founded upon the obtaining of a warrant to search which was said to be illegal, but which was not executed, disallowed, no damage being relevantly averred.

Counsel for the Pursuer — Mr Watson and Mr M'Lean. Agent—Mr W. Miller, S.S.C.

Counsel for the Defenders—The Lord Advocate and Mr A. Moncrieff. Agents—Messrs Murray & Beith, W.S.

David Nelson, residing at Glenduckie, sued the defenders, who are joint Procurators-Fiscal of Fife, at Cupar, for damages (1) in respect of their having on 25th December 1864 presented a petition to the Sheriff of Fife, in which they falsely and calumniously represented the pursuer to have been participant in the crimes of conspiracy to take the life of Mr Edgar, the minister of Dunbog, and of Mr Ballingall, farmer, Dunbog, and of writing and sending certain threatening letters to them; and (2) in respect of their having wrongously applied for and obtained from the Sheriff-Substitute of Fife a warrant written on the foresaid petition to search the pursuer's dwelling-house and repositories, which warrant they thereafter published to several parties, to the loss, injury, and damage of the pursuer. The warrant to search, although executed against other parties was not executed against the pursuer. Mr Bell of Glenduckie, one of the parties against whom it was executed, presented a suspension, and the warrant was set aside, so far as it regarded him, by the High Court of Justiciary. Other three parties—Mrs Black and her two sons—also obtained suspension. The present pursuer was proceeding to suspend the same when it was intimated to him that it had been withdrawn as against him. The defenders now admit that this withdrawal was not made till several days after the warrant had been obtained. The pursuer says he incurred considerable expense in preparing his suspension before the withdrawal had been intimated to him.

The case was before the Court upon a report by Lord Ormidale on issues. The pursuer contended that he was entitled to damages against the defenders for the slander contained in the petition, without proving that it was done maliciously and without probable cause, in respect the application was *ultra vires* of the defenders as fiscals; was not presented by them in the discharge of any official duty; and had been pronounced to be illegal by the Court of Justiciary in quashing the warrant. The pursuer also founded upon the opinions of the Judges of the Second Division of the Court in adjusting issues in an action of damages which had been raised by Mr Bell against the present defenders, which, he maintained, virtually decided the illegality of the defenders' whole proceedings (Bell *v.* Black and Morrison, 37 Jurist, 247 and 543).

The defenders, on the other hand, insisted that the pursuer was bound to put malice and want of probable cause in issue, in respect procurators-fiscal were privileged to this extent in the discharge of their official duty. This was a proceeding of that kind. The judgments of the High Court of Justiciary and of the Second Division only decided that the warrant was bad, and that the search made in Bell's case was illegal, and rendered the fiscals liable in damages without the necessity of alleging against them malice and want of probable cause. That did not dispose of the legality of the application by the defenders. As regarded the second issue there was no damage, in respect the warrant had never been executed.

Lord Ormidale reported favourably to the pursuer's contention upon the issues.

The case was debated upon Tuesday. To-day the Court gave judgment.

The LORD PRESIDENT delivered the leading judgment of the Court. His Lordship said—There are two issues proposed in this case. With regard to the first, the question seems to be limited to this—whether it is necessary for the pursuer to insert that the defenders' statements were made maliciously and without probable cause. This is a case of an application by the procurators-fiscal for a warrant for recovery of documents in reference to a charge of sending threatening letters, and to an alleged conspiracy to do violence to Mr Edgar and Mr Ballingall. In this application the pursuer says he was slandered, in respect he was falsely accused of having been participant in these crimes; and upon that footing seeks damages against the defenders. Procurators-fiscal have certain duties to discharge in the interests of justice, and in the ordinary discharge of such duties they are protected, unless it be proved that they acted maliciously and without probable cause. In this case it is said that it is not necessary for the pursuer to take such a burden of proof upon him, because the warrant which the defenders asked for and obtained was an illegal warrant, and being of such a kind was such as they were not entitled to ask; and so it is argued that they had no privilege in making the statements upon which they did ask it. Questions of nicety and difficulty may arise in some cases as to how far a procurator-fiscal is outwith the ordinary protection accorded by the law when he concludes a petition by asking something which he is not entitled to demand; and these questions must be determined by the nature of the illegality involved in the demand. If "to search reposi-

tories" be something beyond all law and reason, that is one kind of illegality. If, on the other hand, it be merely illegal to search them in the way asked and granted here, that is a different kind. The one illegality touches the substance of the proceedings; the other points to some error or omission in the same, or want of caution in carrying them out. Were the illegality of the first kind the pursuer might be entitled to an issue without malice and want of probable cause; but if the illegality be of the second order I am of a different opinion. I think this case comes under the latter class. Under this application it was competent to the Sheriff to have granted a legal warrant. For example, had he limited the search to particular documents, or appointed it to be carried out under his own eye, I am not prepared to say that that would have been an illegal warrant. Now, although that has not been done, I do not think that the defenders' application was out and out and in substance contrary to law. Therefore I am of opinion that the pursuer must take upon him the burden of showing that the defenders' statements were made maliciously and without probable cause. As regards the second issue, it is laid, not upon the petition, but upon the warrant, and is proposed as a separate demand. The pursuer had some difficulty in explaining what injury had been sustained by him other than through the slander, by reason of the warrant having been taken out and kept up against him—it having never been executed against him. The only way in which the granting of the warrant was said to have entailed a separate injury upon him was that he had been put to the expense of preparing a suspension of the warrant before its withdrawal had been intimated to him. I do not think grounds have been laid for that pecuniary claim. The pursuer does not say that the taking out of the warrant was intimated to him. He came to hear of it through its having been executed against the other persons affected by it. Before incurring the expenses of preparing a suspension of it he ought to have applied to the defenders to know the meaning of it, when in all probability its withdrawal as against him would have been intimated. But there is something of a different character in this issue. It is said that the pursuer sustained injury from the publication of the warrant. This publication may give greater cogency to a claim for damages for the calumny. The calumny involved here is of a peculiar kind. It is more of the nature of a judicial slander than anything else. The pursuer will be allowed an opportunity of amending the issues in conformity with the views now expressed, and of considering how the second issue is to be framed if put separately, or whether the whole matter might not be embodied in one issue founded upon slander done maliciously and without probable cause.

The other Judges concurred, Lord DEAS remarking that he did so with the qualification that as the Court held that the defenders' application was not in substance incompetent, it was not necessary to consider or determine whether the protection accorded by law to judicial statements would apply to proceedings taken by fiscals.

PRINGLE *v.* BREMNER AND STIRLING.

Reparation—Public Officer. Question as to the relevancy of an action of damages against police officers for searching a person's repositories and apprehending him without a warrant.

Counsel for Pursuer—Mr Watson and Mr MacLean. Agent—Mr W. Miller, S.S.C.

Counsel for Defenders—The Lord Advocate and Mr A. Moncrieff. Agents—Messrs Murray & Beith, W.S.

This is an action at the instance of James Pringle, millwright, near Newburgh, in the county of Fife, against J. F. Bremner, chief constable, and James Stirling, serjeant, in the Fifeshire constabulary. The grounds of action are two in number—(1st) That on 24th December 1864 the defenders came to the pursuer's house, stating that they had a warrant to search the same, which they accordingly did. They, it is alleged, also searched the pursuer's repositories, examined all his private books and papers, and seized and took away a number of the same. The pursuer says that they had no warrant for these proceedings. (2) That the pursuer was, on the same day, apprehended by the defenders, and lodged in the Police Office at Cupar; all without warrant. For these proceedings he sues the defenders for damages. In defence the defenders do not say that they had a warrant for the examination and seizure of the pursuer's papers, or for his apprehension; but that, holding a warrant to search his premises for other articles, they accidentally came upon a number of papers which seemed to them to throw light upon a matter which was then under investigation by the Procurators-Fiscal and police, and which was connected with the matter in regard to which they were making a search. They therefore thought it their duty to take possession of the documents, and to take the pursuer into custody, and take him to Cupar for examination before the Sheriff; which, however, in respect of the lateness of the hour, had to be delayed till the following day. It was not disputed by the pursuer that the after proceedings were regular and legal. But the pursuer says on record that the defenders did not accidentally come upon his papers in the course of their search for other articles, but that they in the beginning of their search proceeded to examine his books and papers.

The case was before the Court on Tuesday on a report by Lord Ormidale as to issues. The pursuer proposes to put two issues to a jury—1st, Whether this search for and seizure of his papers was wrongful and illegal? and 2d, Whether his apprehension and incarceration were wrongful and illegal?

The pursuer has no allegation that the actings of the defenders were malicious and without probable cause, and he contended that he was not bound to allege this, in respect this case was *a fortiori* of Bell *v.* Black and Morrison (37 Jurist, 257 and 543), when such a search as had been here made was pronounced illegal, though done by warrant of a sheriff, and in which it had been decided that it was enough to put in issue that it was wrongous and illegal. With regard to the apprehension, the pursuer was lawbiding, and was apprehended without warrant in reference to occurrences which had happened a considerable time before. The pursuer referred to Dunbar *v.* Stoddart, 11 D. 587, to show that where a case of privilege was not admitted by him on record he was entitled to get to a jury without putting malice and want of probable cause in issue, leaving this to be ruled upon the trial.

The defenders contended that a case of privilege was raised by the admissions on record. This was not like the case of Bell. Here the officers were lawfully in the pursuer's premises making a legal search, and had they not seized the papers they found the evidence would have been lost. The pursuer had been afterwards committed for trial upon a charge of sending a threatening letter. The defenders were entitled to apprehend the pursuer in the circumstances without warrant.

The Court to-day, considering that it was important to know the way in which the search for papers had been begun and executed—parties being at issue thereupon—and the record not supplying the information required, before pronouncing any judgment as to issues, appointed pursuer to state specifically what he alleged with regard to these matters.

Thursday, Dec. 21.

SECOND DIVISION.

HATTON *v.* CLAY AND M'LUCKIE.

Landlord and Tenant—Removing. Objection to the relevancy of a summons of removing repelled, and decree of removing granted.