the money, and that was an end of his claim. When the £1500 was paid to Scott it became his property, and he could spend it, so far as Cleland was concerned, in any way he pleased. If that is so, that, in my opinion, is an end of the case.

The Court recalled the Lord Ordinary's interlocutor and granted decree for payment of £190.

Counsel for the Defender and Reclaimer—Gloag—Kennedy. Agent—D. Lister Shand, W.S.

Counsel for the Pursuer and Respondent—Darling—W. C. Smith. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, July 19.

FIRST DIVISION.

[Lord Fraser, Ordinary.

BEATON *v.* IVORY.

Reparation—Wrongous Apprehension and Imprisonment—Sheriff—Malice—Relevancy.

In an action of damages for wrongous apprehension and imprisonment against the Sheriff of a county, on the ground that the pursuer had been arrested by an officer without a written warrant, under general verbal instructions given by the defender—*held* that the action was irrelevant, because there was no averment of special facts and circumstances from which malice could be inferred.

Observations (*per* the Lord President) on the cases of *Scott* v. *Turnbull*, July 18, 1884, 11 R. 1131, and *M'Murchy* v. *Campbell and Maclullich*, May 21, 1887, 24 S.L.R. 514, and on the nature of the averments necessary to support an action of damages for judicial slander.

This was an action at the instance of John Beaton, cowherd, residing at Herbista, Kilmuir, in the Island of Skye and county of Inverness, against William Ivory, advocate, Sheriff of Inverness, Elgin, and Nairn, concluding for £500 damages in respect of wrongful arrestment and imprisonment.

The pursuer's averments were as follows:—"(Cond. 2) On 27th October 1886 the pursuer was engaged in his ordinary occupation of herding cattle on the pasture ground of Peingown, the neighbouring township to Herbista, when he was accosted by two police-constables, one of whom was Constable Grant of Edinbane, near Portree, who demanded his name, which the pursuer gave. Grant then apprehended the pursuer, and marched him down to the township of Herbista, where he gave the pursuer in charge of a body of marines. The pursuer asked Grant the reason of his arrest, but got no reply. The pursuer was then marched (in custody of the marines) three miles to Duntulin Bay, put on board the gunboat "Seahorse," and conveyed as a prisoner to Portree, where he arrived about 11 p.m., and was taken to the prison and confined in a cell. Next day he was brought before Sheriff-Substitute Hamilton, and questioned by the Procurator-Fiscal for more than an hour. He was not again taken before the Sheriff, but was detained in prison until the following Saturday, October 30th, when he was liberated without any explanation for his arrest. No document was served upon the pursuer showing why he was arrested and detained in custody, nor have any further proceedings been taken against him."

"(Cond. 3) Grant possessed no warrant for arresting the pursuer, nor had any information been received either by him or by the defender, or by any of the authorities, charging the pursuer with the commission of a crime. Grant arrested the pursuer in obedience to general instructions given to the police by the defender, who was personally present at the township of Herbista, where he had come with a large body of police and marines for the purpose of apprehending the parties who had (as was alleged) deforced a sheriff-officer near Herbista two days before. The instructions referred to were that the police should search for, apprehend, and convey to prison every person whom they could find in the locality where the alleged deforcement took place. In order to incite the police to make arrests the defender promised a medal to every constable who should effect an apprehension. The said instructions were illegal and oppressive, and the apprehension of the pursuer in pursuance thereof was wrongful, and was moreover malicious and without probable cause on the part of the defender. The defender had no probable cause for believing that the pursuer had been concerned in the alleged deforcement. In point of fact the pursuer was not present at the deforcement, but was more than a mile away at the time repairing the roof of his house. Both the pursuer and his wife and others informed the defender of these facts shortly after the pursuer's apprehension, but the defender nevertheless persisted in detaining him in custody."

He pleaded—"The pursuer having been wrongfully arrested, and detained in prison by the instructions of the defender, and, *separatim*, the defender having acted maliciously and without probable cause, the pursuer is entitled to decree as concluded for."

The defender pleaded—"(1) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons."

On 28th May 1887 the Lord Ordinary (Fraser) found that the averments of the pursuer were not relevant, and dismissed the action.

"*Opinion.*—The claim in this case is for damages against the Sheriff of the county of Inverness, because it is alleged that he wrongfully arrested and detained in prison, maliciously and without probable cause, the pursuer of this action.

"The circumstances, as appearing from the record, are these. The pursuer, who is a herd, was apprehended on the 27th of October 1886, taken to Portree and detained there for three days, when he was liberated. The person by whose orders the pursuer was apprehended and detained was the defender, the Sheriff of the county of Inverness. In this county, and especially in the island of Skye, there had occurred tumultuary proceedings; meetings were held at which resolutions were passed of a very illegal character—pointing to the resistance of payment to the landlords of their rents. The law had been set at defiance by the deforcement of an officer of the law, and it was found necessary to

supplement the ordinary executive officers of the law by additional police force and Royal Marines in order that judgments of courts of law should be carried out. At the head of this force of police and marines was the Sheriff of the county, and along with him there came the officer of the law (Alexander Macdonald, a messenger-at-arms) who had been deforced. The Sheriff gave verbal instructions to the police to apprehend all those who could be identified as persons who had been guilty of this deforcement; and Macdonald identified the pursuer as one of these persons, and he was immediately taken into custody and carried to Portree.

"At Portree the pursuer was brought before the Sheriff-Substitute upon the charge of mobbing and rioting, and of obstructing and deforcing the messenger-at-arms in the execution of his duty; but after consideration of the matters laid before him the Sheriff-Substitute found that there was not sufficient evidence to justify a committal for trial, and the pursuer was liberated.

"Everything here was regularly gone about in usual course with one exception. There was no written warrant for the apprehension of the pursuer, and consequently the apprehension, it is said, was illegal.

"Now, this proposition is untenable. A magistrate, according to the law of Scotland, is entitled, if he sees a crime committed, at once himself to apprehend the delinquent, or to give a verbal order to any policeman or citizen to do so. Nay, although he does not himself see the crime committed, but is informed upon credible authority that it has been committed, he may give a verbal order to pursue and apprehend the suspected person. Baron Hume states that in such a case it 'is a sufficient justification of a verbal order to the informer and others, to pursue and take the individual, thus positively charged, who might escape through the delay of waiting for a written warrant' (2 Hume 75). The messenger in the present case was deforced by a mob of people, the names of whom he did know, but the faces of whom he remembered. The deforcement took place on the 25th of October 1886. The Sheriff with the police and marines came to the ground on the 27th of October, and the police received orders from the Sheriff to apprehend any person identified by the deforced messenger, and upon these general instructions the pursuer was apprehended. What the Sheriff here did was entirely within his power. He met an assemblage of people, but had then no means of ascertaining the names of the persons who were the wrongdoers except by getting them pointed out on the spot by the deforced messenger. Written warrants were out of the question in such circumstances. Before a formal complaint and warrant could be written out the wrongdoer would have been away over the hills.

"It would be idle to send this case for trial in any view, seeing that malice must be proved. Now, to say that the action of the Sheriff was malicious is to contradict the statement upon the record to the effect that the pursuer was apprehended under 'general instructions'—unless, indeed, it be meant to be averred that the Sheriff had malice against the whole population of crofters. In what he did the Sheriff in this case evinced firmness and resolution, and if he had not done so he would not have done his duty. If the chief magistrate of a county, responsible for its peace, were to lie under the threat of actions of damages for what he did in the *bona fide* execution of his duty, the result would be that his powers to quash tumult and insurrection would be altogether paralysed. It seems to be forgotten that the freedom from responsibility for damages—the absolute privilege that is given to the chief magistrate endeavouring to do his duty—is given to him not for his own sake, but for the sake of the public, whose servant he is, and for the advancement of justice. Upon this ground the Lord Ordinary is of opinion that no relevant case has been stated for the pursuer, and that the action must be dismissed."

The pursuer reclaimed, and argued—(1) That the general order of the Sheriff was illegal, and that consequently the pursuer was entitled to an issue without averring malice. (2) Even if he was within the law in making the general order, the Sheriff carried it out so recklessly as to justify the inference that he acted maliciously—*Cameron* v. *Hamilton*, February 1, 1856, 18 D. 423; *Bayne* v. *Macgregor*, March 14, 1863, 1 Macph. 615, 627; *Urquhart* v. *Dick*, June 10, 1865, 3 Macph. 932; *Denholm* v. *Thomson*, October 22, 1880, 8 R. 31. Further, the Lord Ordinary had no right to consider the official documents produced by the defender in judging of the relevancy, which contained allegations which the pursuer had no opportunity of answering. He should have looked at nothing but the pursuer's averments.

It was argued for the defender—(1) That there was no case where the pursuer in an action of damages for wrongous apprehension was held entitled to an issue without an averment of malice—*Arbuckle* v. *Taylor*, May 1, 1815, 3 Dow 160; *Urquhart* v. *Grigor*, December 21, 1864, 3 Macph. 283; *Rae* v. *Linton*, March 20, 1875, 2 R. 669; *Craig* v. *Peebles*, February 16, 1876, 3 R. 441; *Hassan* v. *Paterson*, June 26, 1885, 12 R. 1164. A general allegation of malice would not do with a specific allegation of facts and circumstances—*Urquhart* v. *Grigor*, *supra*; *Scott* v. *Turnbull*, July 18, 1884, 11 R. 1131; *M'Murchy* v. *Campbell and Maclullich*, May 21, 1887, 24 S.L.R. 514. In order to prove malice it was not necessary to show personal malice, but at the same time it was not sufficient to prove want of probable cause. (2) The Lord Ordinary was quite entitled to look at the documents. They were official documents—a signed information and a warrant of commitment—and were really part of the *res gestæ*.

At advising—

Lord President—The questions under consideration depend upon the terms of the third article of the condescendence, in which the pursuer avers that Grant, the police officer who apprehended him, "possessed no warrant for arresting the pursuer, nor had any information been received either by him or by the defender or by any of the authorities charging the pursuer with the commission of a crime. Grant arrested the pursuer in obedience to general instructions given to the police by the defender, who was personally present at the township of Herbista, where he had come with a large body of police and marines for the purpose of apprehending the parties who

had (as was alleged) deforced a sheriff officer near Herbista two days before. The instructions referred to were, that the police should search for, apprehend, and convey to prison every person whom they could find in the locality where the alleged deforcement took place." Now, the allegation that general instructions were given to apprehend the persons who were suspected of having been engaged in deforcing an officer two days before is not in any respect relevant. I think that was a very proper course to pursue upon the face of it, because the averment of the pursuer implies, and impliedly admits, that there had been a deforcement at Herbista two days before, and that it had been found necessary to assemble a large body of police as well as marines for the purpose of ensuring the apprehension of the persons who had been engaged in the riotous proceedings. It was said further that the instructions referred to were that the police should search for, apprehend, and convey to prison every person whom they found in the locality where the alleged deforcement took place. Now, undoubtedly that is the strongest averment the pursuer has made, and *prima facie* there is a kind of recklessness about such an order as that everybody in the locality was to be apprehended; but we cannot help knowing—indeed it is patent upon the face of the record—that Herbista was a small township, and that the riot two days before had been of a very serious character, probably involving in it almost, if not all, the inhabitants of that township. They must have been very numerous, because it was found necessary to assemble so large a force, as the pursuer himself admits, to put them down.

But were it not that the pursuer here is under an obligation to aver and prove malice as the condition of his succeeding in his case against the defender, I should be rather inclined to say that we could not disregard that averment, and must have sent the case to trial. There is, however, a very special protection surrounding the defender in the execution of his duty as Sheriff of the county, and responsible for the peace of the county, and that protection extends to this, that he will not be liable for anything he did in the performance of that duty, unless it be shown that he was actuated by malicious motives of some kind. The mere use of the word "malice" in a case of this description is quite insufficient to fulfil that condition upon which alone such an action can be entertained. The presumption in favour of a public officer, that he is doing no more than his duty, and doing it honestly and in *bona fide*, is a very strong one, and certainly ought not to be overcome by a simple use of the word "malice." Plainly it is the duty of the pursuer in a case of this kind to aver facts and circumstances from which the Court or a jury may legitimately infer that the Sheriff was not acting in an honest discharge of his duty, but was acting from an improper or malicious motive. What I have said is not to be taken as announcing the proposition that in every case where malice requires to be libelled it is necessary to be so specific. There are cases in which an averment of malice in general terms may be sufficient as between private individuals, but I do not know of any case in which an action has been sustained against a public officer in the execution of his duty, where the presumption of proper motives has been held to be displaced by a mere general averment of malice. It would, I think, be most unfortunate if any such rule were to be introduced into practice, because it is for the benefit of the public, and for the interests of justice and good government, that public officers acting in the execution of their duty should be surrounded by very considerable protection. The circumstances brought out in the condescendence are, I need hardly say, not such as to warrant any inference of malicious motives, and therefore in that respect I conceive the record to be irrelevant.

I am much inclined to adopt the opinion expressed by the Second Division of the Court in the case of *M'Murchy* v. *Campbell and Maclullich*, 24 S.L.R. 514. I would only like to say with regard to the opinion of one of the Judges in that case that he seems a little to have misunderstood my observations in *Scott* v. *Turnbull*, 11 R. 1131. It is very important in such matters that there should be no misunderstanding, and that must be my apology for making this comment. Lord Rutherfurd Clark says that he does not altogether agree with the rule "so broadly stated." Now, that was a case of judicial slander where the averment complained of was strictly relevant, and it was in reference to such a case as that that my observations were directed. I never meant to lay down a rule to be applied to all cases. The case of judicial slander is a very strong case. If the averment made is pertinent to the cause, it is assumed to be made from the desire of the party making it to urge everything he can in support of his case. Now, that is a very proper motive, and the fact of the statement being due to that motive will protect the party. If the averment is not only pertinent but relevant the case is still stronger. It is a duty incumbent on the party not only to himself, but to his adversary and to the Court, to make the averment, if his case would be incomplete without it. These presumptions in favour of the party making the averment are very strong, and I have thought it right to make these observations because the case of judicial slander is very special. In the present case I am of opinion that this record is irrelevant, in the absence of any averment of facts and circumstances from which malice on the part of the Sheriff could be inferred.

Lord Mure—I am quite of the same opinion. In cases of this description it is absolutely necessary that there should be a distinct and relevant averment of malice and want of probable cause in the action complained of. It is perfectly settled that a mere general averment will not be sufficient. There must be a relevant averment of facts and circumstances from which malice may be inferred. The question here is, whether such an averment is to be found in the third article of the condescendence. I do not think there is there any such averment. Had the question arisen entirely in reference to the first ground of the Lord Ordinary's judgment, I should have felt some difficulty, for in a record made up as this one has been, in the absence of official documents, it is doubtful how far those documents can be looked at in a question of relevancy. But I agree with your Lordship upon the other ground, in reference to which the Lord Ordinary says that "it would be idle to send this

case to trial," and then refers to the general statement. It is said that malice may be inferred from the fact that the instructions given to the police were general, and that they were to the effect "that the police should search for, apprehend, and convey to prison every person whom they could find in the locality where the alleged deforcement took place." But I think that the view is sound, that the very generality of the instructions shows the absence of malice towards individuals. It is highly desirable that public officials should have the utmost protection in the discharge of their duty. Here deforcement had taken place and a large body of police and marines were necessary to quell the disturbance, and the Sheriff had a duty to perform. If on such averments as these the Court were to entertain actions of this sort, officials would be paralysed in doing what they thought right and proper in the exercise of their duty.

Lord Shand and Lord Adam concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—J. C. Thomson—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defender and Respondent—D.-F. Mackintosh—Jameson. Agents—J. & A. Peddie & Ivory, W.S.

HIGH COURT OF JUSTICIARY.

Wednesday, July 20.

(Before the Lord Justice-Clerk, Lord Young, and Lord Craighill.)

GRAY AND OTHERS *v.* BREMRIDGE.

Justiciary Cases—The Pharmacy Act 1868 (31 *and* 32 *Vict. cap.* 121), *secs.* 1 *and* 15—"*Person*"—*Corporation.*

Section 1 of the Pharmacy Act 1868 enacts that "it shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title 'chemist and druggist' . . . unless such person shall be a pharmaceutical chemist, or a chemist and druggist within the meaning of this Act, and be registered under this Act." . . . Section 15 provides for the imposition of a penalty for contravention of section 1.

A prosecution was instituted against the individual shareholders of a company, registered under the Companies Acts, for contravention of section 1, in so far as they used the title "chemists and druggists" in connection with a shop occupied by the company where they carried on the business of wholesale and retail chemists and druggists, none of the shareholders being qualified under the statute. The drugs were compounded and dispensed by a duly qualified person. The Sheriff convicted. *Held*, on appeal, that the word "person" in section 1 did not apply so as to make a corporation liable to the penalty, and that the individual members of the corporation could not be prosecuted. Conviction *quashed.*

Richard Bremridge, Registrar under the Pharmacy Acts 1852 and 1868, with concurrence of the Procurator-Fiscal for the county of Edinburgh, charged Andrew W. Gray, Andrew Gray, William Taylor, Jane Maria Gray, David Ovens, James Fettes, and Marjory F. J. Fettes with an offence within the meaning of the 1st and 15th sections of the Pharmacy Act 1868, actors or actor, or art and part, in so far as during the period between the 1st day of December 1886 and the 17th day of May 1887, or during part of said period, the said Andrew W. Gray and others did unlawfully and in contravention of the 1st and 15th sections of the said recited Act, take, use, or exhibit the name or title of chemist and druggist, or chemist or druggist, in so far as the said parties did all and each, or one or more of them, put up, use, or exhibit, or cause or procure to be put up, used, or exhibited the name or title chemists and druggists above or in connection with a shop at No. 49 Leith Walk, Leith, occupied by them, or by the Leith Depôt (Limited), of which they were the sole partners or shareholders, and also with another shop at No. 33 Ferry Road, Leith, occupied by them, or by the Leith Depôt, (Limited), of which they were the sole partners or shareholders; and the said parties, all and each, or one or more of them, did during said period above libelled, or part thereof, within or near the aforesaid shops, unlawfully and in contravention of the said 1st and 15th sections of the said recited Act, issue to the public, or cause or procure to be issued to the public, in connection with the businesses or either of them carried on by them or by the said Leith Depôt (Limited), of which they were the sole partners or shareholders, in the premises aforesaid, printed circulars, labels, and advertisements having the words chemists and druggists printed or written thereon, none of the said parties being a duly registered pharmaceutical chemist, or a chemist and druggist within the meaning of the said recited Act.

The Sheriff-Substitute (Rutherfurd) held the complaint to be relevant, and found the charge proven.

The appellants took a Case for the opinion of the Court. The questions of law were—"(1) Whether the charge in the complaint is or is not relevant? And assuming the first query to be answered in the affirmative, (2) Whether the use and exhibition of the title chemists and druggists by the appellants, as aforesaid, was or was not a contravention of the 15th section of the Pharmacy Act 1868?"

The facts of the Case as found proved by the Sheriff-Substitute were as follows—None of the appellants were duly qualified chemists and druggists under the statute. They were the sole shareholders of the Leith Depôt (Limited), registered under the Companies Acts 1862 and 1867. The company had two shops, one at No. 49 Leith Walk, and the other at No. 33 Ferry Road, Leith. The objects for which the company was established, as set forth in the memorandum of association which was produced, were the carrying on of the business of wholesale and retail chemists and druggists, as well as that of selling and dealing in tea, tobacco, spices, perfumery, and