enacted that either party in an action for more than £40 might appeal as soon as an order or interlocutor allowing a proof had been pronounced in the inferior court (unless it were an interlocutor allowing a proof to lie *in retentis*, or granting diligence for recovery and production of papers). The effect of this was that any interlocutor allowing proof, except those specially excepted, was appealable. This interlocutor was an interlocutor allowing a proof, and was not one of those excepted. The right of appeal was not restricted to the case of interlocutors allowing a proof on the whole case, or upon the merits.

LORD JUSTICE-CLERK—I think this is an incompetent appeal. The interlocutor allowing proof did not allow a proof with regard to the merits of the case, but only a proof of certain averments which, if consistent with fact, would exclude the pursuer's case altogether. Now, in the case of *M'Coll* we held that the kind of interlocutor allowing a proof to which the Judicature Act refers is an interlocutor allowing a proof on the merits of a case, and that it does not refer to an interlocutor allowing a proof as to some preliminary question incidental to the main inquiry, a kind of interlocutor which so far from allowing a proof on the merits tends rather in the direction of excluding it. Looking to this case of *M'Coll* which was so recently decided, I am of opinion that this case should be dealt with in accordance with the views there expressed, and should therefore be dismissed. It will be quite competent for the pursuer, if he is successful in this preliminary inquiry, to appeal for jury trial when a proof on the merits is allowed.

LORD YOUNG—I also think this appeal is incompetent.

LORD TRAYNER — I agree, and have nothing to add to my opinion in *M'Coll*, to which I adhere.

LORD MONCREIFF was absent.

The Court dismissed the appeal.

Counsel for the Pursuer—G. Watt—W. F. Trotter. Agent—J. Struthers Soutar, Solicitor.

Counsel for the Defenders — Wilton. Agents—Robertson, Dods, & Rhind, W.S.

Wednesday, December 21.

SECOND DIVISION.

[Lord Low Ordinary.

M'TERNAN *v.* BENNETT.

Reparation — Slander — Privilege — Malice —Relevancy—False Charge by Police Constable.

An action of damages was raised against two police constables. The pursuer averred that he had been charged by the defenders with assaulting them, and convicted on their evidence and sentenced to imprisonment, that on the day of the assault he was a long distance from the *locus*, that after his conviction evidence of this was brought to the authorities and that he was liberated and the sentence quashed, and that his apprehension, conviction, and imprisonment were due to the unfounded statements and representations of the defenders, whose charges and evidence against him were false to their knowledge, and were malicious and without just or probable cause.

Held (*aff.* judgment of Lord Ordinary) that the pursuer had averred a relevant case of malice to go to trial.

Police — Statute — Statutory Limitation of Time within which Action must be Brought—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1.

The Public Authorities Protection Act 1893, sec. 1, provides, *inter alia*, that any action, prosecution, or other proceeding against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority shall not lie or be instituted unless it is commenced within six months next after the act complained of.

An action of damages was raised against two police constables for falsely and maliciously charging the pursuer with assaulting them and for giving evidence at the trial which led to his conviction and imprisonment. The action was not raised till six months after the event had elapsed.

Held (*aff.* judgment of Lord Ordinary) that the action was not excluded by the statute.

Process—Commencement of Action—Poor's Roll.

Opinion (*per* Lord Low) that proceedings by a person to get himself put upon the poor's roll in order that he might raise an action could not be regarded as the commencement of an action within the meaning of a statute limiting the time within which action must be brought.

By section 1 of the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61) it is enacted that where "any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect (*a*): the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof." . . .

On 15th April 1898 Owen M'Ternan, labourer, Glasgow, raised an action for £500 damages against Alexander Bennett and William Kilpatrick, both police constables in Glasgow, and against the Magistrates' Committee of the City of Glasgow. The pursuer subsequently abandoned his claim against the Magistrates' Committee, and the action as far as directed against them was dismissed.

The pursuer made the following averments:—"(Cond. 2) On 11th May 1897 the pursuer went from Broughton, Peeblesshire, where he had been working as a labourer, to Hamilton, and there enlisted in the Fourth (Militia) Battalion 26th (Cameronians) Scottish Rifles. He served with the militia from 11th May until 24th July 1897. He slept in the barracks every night, and never was in Glasgow between these dates." The pursuer further averred that he completed his term of service for the year on Saturday 24th July 1897. He went to Glasgow on that day ,and about 7 p.m. he was arrested in Annfield Street by two constables and informed that he was wanted on a charge of assaulting the police. Although protesting his ignorance of the matter he was arrested and conveyed to the Eastern Police Office, Tobago Street. There he was charged with assaulting the two defenders when on duty on 29th May 1897. "The defenders both stated that the pursuer had assaulted them, and kicked them and had struck the defender Alexander Bennett on the head with a glass bottle in Abercromby Street on Saturday night, 29th May, when they were conveying the pursuer's brother to the police office." The pursuer was then lodged in the cells to await his trial. The trial took place on 26th July when the defenders pretended to identify the pursuer as the man who had assaulted them, and although he persisted in denying his guilt, and said he could bring witnesses to prove that he was not in Glasgow on that date, he was convicted by Bailie Carswell and sentenced to 60 days' imprisonment. Evidence having been brought before the authorities subsequently to 26th July, that the pursuer was in Hamilton on 29th May, the remainder of the sentence was remitted, the pursuer was released, and on 15th December the conviction and sentence were quashed by the High Court of Justiciary. "(Cond. 8) The said wrongous apprehension, conviction, and imprisonment were due to the unfounded statements and representations of the defenders Alexander Bennett and William Kilpatrick. When they brought these charges against the pursuer they were on duty and acting as constables, and were in the service and employment of the defenders the Magistrates' Committee. In making the charges condescended on, and in causing the pursuer's arrest and imprisonment, the defenders Alexander Bennett and William Kilpatrick acted wrongfully, injuriously, and illegally. The pursuer was well known to them before and at the date of the alleged assault, and their charges and evidence against him were false to their knowledge, and were malicious and without just or probable cause."

The pursuer pleaded—"(1) The defenders Alexander Bennett and William Kilpatrick having wrongfully, illegally, and maliciously obtained the arrest, conviction, and imprisonment of the pursuer, he is entitled to decree against these defenders.

The defenders pleaded—"(1) The action is excluded by the Statute 56 and 57 Vict. c. 61. (2) The action is incompetent. (4) The action is irrelevant."

On 20th July 1898 the Lord Ordinary (Low) pronounced the following interlocutor:—"Before answer, and under reservation of the pleas of parties, appoints the pursuer to lodge in process a draft of the issue or issues which he proposes for the trial of the cause as between him and the said defenders."

Note.—. . . . "The only question which was argued in the Procedure Roll was, whether the Public Authorities Protection Act 1893 applied to the case of the remaining defenders Bennett and Kilpatrick.

"The main object of the Act is to limit the time within which 'any action, prosecution, or other proceeding' may be brought against 'any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority.'

"These words are very wide, and capable of covering a great variety of cases, and I think that they include the case of a police-constable acting in the execution or intended execution of his duty.

"The defenders founded upon the pursuer's averment in article 8 of the condescendence, that when they brought the charges complained of, 'They were on duty and acting as constables.' The averment is plainly made with a view to the claim against the Magistrates' Committee, and it is not an averment that the defenders, in charging the pursuer with assault and giving evidence against him at his trial, were acting in the execution or intended execution of their duty as constables. It is merely an averment that when the defenders made the alleged unfounded charge against the pursuer they were in fact on duty as constables.

"The pursuer's case is that the defenders maliciously made the charge against him knowing it to be false. There may be something to be said upon the question whether the pursuer has averred a relevant case of malice to go to trial. That question has not been argued, the parties agreeing that it would be more conveniently stated upon the issues proposed by the pursuer in the event of the case not being thrown out under the Act of 1893. I must therefore assume at this stage that the pursuer has stated a relevant case of malice and want of probable cause, and I must also assume that his averments are true. But if so, I am of opinion that I cannot, at this stage at all events, hold that it is a case falling within the statute.

"It was argued that the object of the Act was to give an absolute protection after the lapse of six months to a public officer

for anything done while acting within the scope of his duty. I was inclined at first to think that that was the intention and meaning of the Act, especially as it seems to have been contemplated that the question of the application of the Act to a particular case should be disposed of without inquiry. But upon consideration I am unable to construe the Act as applying to every case in which a public officer has been acting within the scope of his duty, or in the ostensible execution of his duty. The words are 'in pursuance or execution or intended execution' of a public duty. Now, the word 'intended' seems to me to introduce the element of motive or intention, and I am unable to see how it can be said that the defenders intended to execute their duty, when the averment, which I must assume to be true, is that they intentionally acted contrary to their duty. I think that the Act was intended to protect a public officer acting in good faith, although he may have acted under a mistaken view of his duty and powers, or carelessly or rashly, but was not intended to protect an officer who deliberately violates his duty and takes advantage of his public position for the purpose of gratifying his private malice. It may be said that such an interpretation of the Act would enable a prisoner to avoid it, by simply averring that the act complained of was done maliciously and without probable cause. To some extent that is true, but it is to be remembered that it is not sufficient merely to aver malice and want of probable cause, but facts and circumstances from which malice may be reasonably inferred must be disclosed. I do not know, however, that such considerations are of much importance, because in my opinion the natural meaning of the words used in the Act is that the provisions are to be applied only in the case of a public officer who acts in good faith—intends to execute his duty—and until the actual facts are ascertained, the question whether or not the Act applies must mainly depend upon the relevancy and sufficiency of the pursuer's averments.

"As I have said, I have as yet heard no argument upon the question of relevancy, although the defenders indicated that they had something to say upon the question. I therefore shall not repel the plea upon the statute at this stage, but shall order issues, and in the discussion upon the issues the relevancy of the pursuer's averments will be considered, and the precise questions which the pursuer seeks to have tried will be brought to a point.

"I should add that the pursuer also contended that the application of the Act was excluded by the fact that although this action was not commenced within six months, proceedings to have the pursuer put upon the poor's roll were commenced and partly carried through within that time. It was argued with much plausibility that these proceedings should be regarded as the commencement of the action within the meaning of the statute, as the defenders had thereby full notice of the claim, and under the provisions of the Act of Sederunt the pursuer was bound to bring his action within three months of his admission to the poor's roll, otherwise his admission was held to be thereby recalled. It might have been reasonable and sufficient for the object which the statute had in view to allow an action of this kind to proceed, if the pursuer, being a person of no means, presented his application for admission to the poor's roll within six months after the occurrence complained of. But the words of the Act seem to me to be explicit. The words are—'The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months.' Now, the natural meaning of the words 'the action' is the action in which it is sought to make the public officer liable—that is, in this case, the present action—and not any preliminary proceedings. Further, a distinction is taken between the institution of an action and the commencement of an action. The distinction is of importance. I take it that an action may be instituted, as for example by signetting the summons, and yet will not be commenced in a question with the opposite party until citation. Thus it is provided by the 118th section of the Public Health Act 1867 that certain actions 'shall be commenced within two months after the cause of action shall have arisen.' It was held in *Alston* v. *MacDougall*, 15 R. 78, that an action in which the summons was executed after the expiry of the two months was too late, although the summons had been signetted within the two months. I regard that judgment as an authoritative statement of what is to be regarded as the commencement of an action for the purpose of such an enactment as that with which I am now dealing."

The pursuer lodged an issue, and on 18th October 1898 the Lord Ordinary pronounced the following interlocutor:—"Repels the first plea-in-law for the defenders Bennett and Kilpatrick: Approves of the issue as now adjusted and settled, and appoints the same to be the issue for the trial of the cause."

Note.—"I am of opinion that I must allow an issue in this case. No doubt, reading the record, one's impression is that this was probably at worst a case in which two policemen who had made a mistake in the identity of a man, perhaps somewhat rashly persisted in their assertion that he was actually the person who had assaulted them. But then at this stage one must take the averments of the pursuer and assume them to be true. He says, in the first place, that upon the night in which the assault was said to have been committed he was in the militia barracks at Hamilton, a long distance from the *locus* of the assault. And then he says that he (the pursuer) was well known to these two defenders before and at the date of the alleged assault, and that their charges against them were false to their knowledge. Now, if that be true one cannot conceive a clearer case of malice, because if they knew him, and if, in making the charge against him of assaulting them, they quite knew that they were mak-

ing a false charge, then of course that is a malicious and malignant action on their part. These are his averments, and I think that he is entitled to an issue upon them, and to ask a jury to say whether he suffered the imprisonment to which he was subsequently condemned by reason of the malicious charge made against him by these two defenders without a probable cause. . . .

"I shall, then, repel the plea under the statute, and approve of the issue as adjusted."

The issue as adjusted was in the following terms:—"Whether on or about the 24th July 1897 the defenders Alexander Bennett and William Kilpatrick falsely, maliciously, and without probable cause, charged the pursuer in the Eastern Police Office, Glasgow, with having assaulted them on the evening of Saturday, 29th May 1897, in Abercromby Street, Glasgow, in consequence of which the pursuer was tried, on or about 26th July 1897, in the Eastern Police Court, convicted, and sentenced to sixty days' imprisonment, and incarcerated in Barlinnie Prison, to the loss, injury, and damage of the pursuer? Damages laid at £500."

The defenders reclaimed, and argued—(1) The case with which the pursuer came into Court was that the defenders, when they accused the pursuer of having assaulted them, were acting in the execution of their public duty. It was plain from Cond. 8 that nothing was set forth against the defenders except breach of duty. The 88th section of the Glasgow Police Act 1866 emphasised the common law, because it authorised constables appointed under it to apprehend any person accused or reasonably suspected of having committed, *inter alia*, any assault. If a policeman committed an assault, that was going beyond his duty, but his giving evidence on a charge of assault was, on the face of it, an execution of his statutory duty. On these grounds the action was incompetent under the Public Authorities Protection Act 1893, as it had not been raised within the six months. (2) The action was irrelevant. It would not do for the pursuer to make a general averment of malice as in Cond. 8. Facts and circumstances must be stated which would justify the accusation of malice. If the constables stated what they believed to be true it was impossible to infer malice—*Lightbody* v. *Gordon*, June 15, 1882, 9 R. 934, and a mere statement by the pursuer that these statements "were false to their knowledge" was not sufficient to entitle him to an issue. Besides, the statements made by the defenders on which the pursuer had been convicted were made in Court while they were witnesses. The defenders were therefore absolutely privileged while making them, and no action could lie against them on account of such statements—*Williamson* v. *Umphray*, June 11, 1890, 17 R. 905; *Rome* v. *Watson*, March 10, 1898, 25 R. 732.

Counsel for the pursuer were not called upon.

At advising—

Lord Justice-Clerk—I do not think that any sufficient grounds have been stated for interfering with the interlocutor of the Lord Ordinary. In the first place, as regards the limitation of the statute, that limitation applies only to a case in which it is manifest, from what appears in the record, that the person who is being sued in an action of damages was at the time in the execution of a public duty. Now, the incident which leads to this case is that two police constables made a charge against a third person to their superior officer in the police that he had been guilty of the offence of assaulting them on a previous occasion. I do not think that that falls within proceedings in the execution of their public duty. They are practically citizens making a complaint against another citizen for having done something to them, and it might be an assault upon them while in the execution of their duty, but I do not think it could be said that they were anything else than citizens giving information that they had been assaulted by a person named. These restrictions in regard to execution of duty, and limitations as to period of action, must be kept within very strict limits. They have a very great value indeed in preventing cases being trumped up after an interval of time, but as regards the case with which we have to deal I think great caution must be exercised not to press their application too far, so as to exclude ordinary inquiry in cases of this sort. Then as regards the relevancy, the pursuer here has indicated it to be his wish to prove before a jury that what the defenders did was done maliciously and without probable cause. Of course in order to constitute a slander at all in a case of privilege it is always necessary to qualify it by making out that it was made falsely and without probable cause. I think that the averments of the pursuer here are very distinct, that these two persons, in the absolute knowledge that they were stating what was not true, and from a malicious motive, made the statement. There may be no truth whatever in the pursuer's case, but dealing solely with his averments at present I see no grounds for refusing him the remedy which he asks.

Lord Young—I am of the same opinion. With regard to the six months' limitation under the statute, I am of opinion that it does not apply to this case. With regard to the relevancy, the only objection to the relevancy is that no explanation of the grounds upon which the pursuer imputes malice to these defenders is given. I would like to say, with reference to a remark by your Lordship, that malice is just as essential to any slander as falsehood. It is absolutely essential. There is no slander without malice. The only difference between a privileged and a non-privileged case is that falsehood and malice are presumed if the occasion is not privileged and the fact of slanderous conduct and slanderous words has been proved, but if the occasion is privileged then the falsehood and the malice must be proved as matter of fact. I should like

just to make this observation, that I think that sometimes too strong and too general observations have been made in some of the cases about the necessity for the pursuer stating the grounds upon which he imputes the malice which is the ground of his action. There are cases, no doubt, in which the Court, in the exercise of its judicial discretion, may throw out a case because there is nothing to indicate that there could have been malice. If the case, looking to the circumstances disclosed, is such that the pursuer might be expected to state some grounds, if there were any, they should be stated. But, on the other hand, there are many cases —and in fact there certainly may be any number of cases—in which one man acts maliciously towards another, who has no idea what has made him malicious, what his malice is founded upon, or what has stirred up his malicious feeling. He may say, with perfect truth and honesty, "I cannot conceive why he should have any malice against me, but his conduct shows that he has; he has made a false statement; I can prove that he knew it to be false, and I aver that; I will prove it out of his own mouth; and if he did that then he must have acted maliciously, although I cannot conceive what has stirred his malice." There is rather a striking remark by somebody—I forget who it was—who said, "I cannot conceive what has set that man up against me—what has stirred his ill-will against me—I never did him a good turn in my life," as if people were very often malicious towards those to whom they were indebted for some favour. But the cases, I repeat, must be common, where a man says that another has conceived an ill-will against him, and has shown a malignant feeling towards him, but that he cannot for the life of him discover what the other's grounds for it are. Therefore I am disposed to qualify the generality and the strength of the observations made in some of the cases about the necessity for a pursuer setting out his grounds or the facts upon which he can prove that there was malice as the motive for the action or conduct of which he complains. What I have just said is more regarding your Lordship's observation than at all applicable to the particular case in hand, because I think that even those Judges who have made those remarks—the most strong remarks—would not have thought them applicable to this particular case with which we are dealing.

LORD TRAYNER—When I read the interlocutor of the Lord Ordinary I formed the opinion that it was well founded, and I have not heard anything in the course of the discussion to shake that view.

LORD MONCREIFF concurred.

The Court pronounced the following interlocutor:—

"Refuse the reclaiming note: Adhere to the interlocutor reclaimed against: Find the pursuer entitled to expenses since the date of said interlocutor, and remit to the Auditor to tax the same and to report to the said Lord Ordinary, to whom remit the cause to proceed therein as accords, with power to him to decern for the taxed amount of the expenses hereby found due."

Counsel for the Pursuer — Younger — Peddie. Agent—James M'William, S.S.C.

Counsel for the Defenders—Shaw, Q.C.—Lees—Deas. Agents—Campbell & Smith, S.S.C.

Wednesday, December 21.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

BRUCE *v.* J. M. SMITH, LIMITED.

Reparation—Slander of Property—Special Damage—Issue—Innuendo—Malice.

The following paragraph appeared in a newspaper:—"People in the north-western district of the city have discovered a new distraction in watching the rents which are appearing in the frontage of a new property still unoccupied. A year or so ago the building collapsed owing to an insecure foundation, but it has been run up again. Signs of fresh weakness are already evident, and there is much speculation as to the future on the part of small crowds which gather in the evening and gaze blankly at the building. The Master of Works may hear that his services are required—when the tenement comes down with a run for the second time."

An action of damages was raised by the proprietor of the building referred to against the publishers of the newspaper, for loss, injury, and damage caused to him by reason of the publication of this paragraph. The pursuer averred that he did a considerable trade in the erection of dwelling-houses and shops for sale and lease, but made no statement of special damage.

Held (*aff.* judgment of Lord Ordinary) (1) that the action was relevant, and (2) that the pursuer was entitled to an issue in which there was no innuendo and in which malice was not inserted.

Form of issue approved.

On 15th November 1897 John Wilson Bruce, accountant in Glasgow, raised an action for £2000 damages against J. M. Smith, Limited, proprietors and publishers of the *Glasgow Evening News*, and having their registered office at No. 67 Hope Street, Glasgow.

The pursuer averred that he was a large holder of property throughout the city, and that he did a considerable trade in the erection of dwelling-houses and shops for sale and lease. "(Cond 2) About two years ago the pursuer purchased a steading of ground in New City Road, Glasgow, for the purpose of erecting a large block of shops and dwelling-houses of a superior class.