find any deliverance of the Sheriff to which they can be held to apply as queries put on appeal in the stated case. But while entertaining this technical doubt I do not feel called on, if your Lordships think they should be answered, to express my view upon them. I think that the answer to be given to them should be an affirmative answer, viz., that the letter has not been superseded, and that it is still competent to proceed by registration of the memorandum.

LORD TRAYNER concurred.

LORD MONCREIFF—Under the Act, section 1 (3) where a question as to the amount or duration of compensation has been settled by agreement there is no room for arbitration; it is excluded. The workman's proper course is to get a memorandum of agreement recorded (Second Schedule (8)).

Here the compensation was settled by agreement, and therefore the Sheriff-Substitute held rightly that arbitration was excluded.

I would therefore answer questions one, two, and three in the affirmative.

LORD YOUNG was absent.

The Court answered the questions of law in the affirmative, recalled the interlocutor of the Sheriff-Substitute, and remitted to him to dismiss the application.

Counsel for the Appellant — Salvesen, K.C.—Munro. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Respondents—Campbell, K.C.—Younger. Agents—Morton, Smart & Macdonald, W.S.

Thursday, November 28.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MASON *v.* ORR.

Reparation — Assault — Police Constable — Regulation of Traffic.

To make a relevant case of assault against a police officer on duty it is necessary to aver either that the order which the officer was seeking to enforce was outside the scope of his duty; or that the pursuer was willing to comply with the officer's order and that consequently force was unnecessary; or that the force used was manifestly in excess of the requirements of the case.

Averments of assault against a police officer engaged in the regulation of traffic which *held* irrelevant as not fulfilling any of the above requirements.

David Mason, manufacturer, 123 Argyle Street, Glasgow, raised an action against John Orr, superintendent of police, Glasgow, concluding for payment of £500 as damages for assault.

The pursuer's firm were tenants of premises at 123 Argyle Street and 8 and 12 Maxwell Street, Glasgow. Their landlords were the Glasgow and South Western Railway Company, and their premises on the south and west were situated on the North Drive, forming part of the entry into St Enoch's Station, and had a back entrance thereon.

During the visit of the Duke and Duchess of Fife to open the Glasgow Exhibition in May 1901 they had occasion several times to enter or leave the city by St Enoch's Station.

The pursuer in the present action averred that a foot-pavement extending along the North Drive to the extent of 15 yards or thereby was part of the property leased by his firm from the railway company.

He further averred—"Cond. 7. In the course of said 3rd May it became known that the Duke and Duchess of Fife would again arrive at St Enoch Station at about four o'clock in the afternoon on their way to Renfrew, and on the approach of that hour the pursuer's work-girls, to the number of thirty or forty, again left his premises and lined the pavement forming part of the premises tenanted by him as aforesaid. The pursuer gave permission for them to do so, and about the time when the Royal party were expected to arrive he himself left the factory and stood on the pavement beside the work-girls. Observing a Glasgow and South-Western Railway inspector in charge of the arrangements at the station, the pursuer as a matter of courtesy asked him if he had any objections to the work-girls occupying the pavement. Said inspector said 'Certainly not.' The pursuer thereupon returned to the girls, who were standing quietly on the pavement beside the wall of the pursuer's premises. Thereupon an inspector of police began to molest the pursuer's workers, ordering them into the pursuer's factory. The pursuer told him that the pavement formed part of his premises, and that he had given his workers permission to stand where they did. (Cond. 8). The inspector thereupon went to get instructions from the defender, who was standing a short distance away. In the meantime the pursuer entered his premises and remained inside for a little. He was recalled to the North Drive by the noise caused by the defender and two or three policemen pushing his work-girls down the steps into the warehouse. The pursuer on coming into view observed the defender catching hold of the girls by the arms and pushing them with needless violence down the steps and towards the door of the warehouse. One of the workers was thrown down the stairs, and her foot was severely sprained by the fall. Another worker also fell and had her dress torn. The pursuer went outside the factory and on to the pavement forming part of his premises, and informed the defender that he must cease abusing the girls in the way he was doing. The defender thereupon got into a temper and caught hold of the pursuer by the arm, and pushed and dragged him with unnecessary violence down the steps, saying 'I will

damned soon show you what I will do with you.' The pursuer along with his work-girls was hustled by the defender and pushed down the steps in the direction of the glass door of his factory, and crushed and assaulted. The defender stationed two policemen on pursuer's premises at the pursuer's entrance, and prevented both the pursuer and his workers getting out of the premises, as they required and had a right to do.

The pursuer also averred that he was "thus assaulted and humiliated wrongously and maliciously by the defender in the presence of crowds of people, and also in the presence of his own servants," and that he had suffered in reputation as well as in his feelings and person.

The defender denied that the pavement was part of any property let to the pursuer's firm, or that it validly could be let. He further denied that he had "laid hands upon the pursuer, or pushed or dragged him down the steps."

He pleaded—"(1) The pursuer's averments are neither relevant nor sufficient to support the conclusions of the summons. (3) The defender having acted within the line of his duty, and without violence, and in the interests of the safety of the public, should be assoilzied from the conclusions of the action, with expenses."

The pursuer proposed the following issue:—"Whether on or about the 3rd of May 1901, at or near the premises tenanted by the pursuer at North Drive, St Enoch's Station, St Enoch's Square, Glasgow, the defender assaulted the pursuer, to the loss, injury, and damage of the pursuer?"

The defender objected to an issue being allowed.

The Lord Ordinary (KINCAIRNEY) on 3rd July 1901 pronounced an interlocutor approving of the issue.

Opinion.—"The pursuer proposes to put in issue whether the defender, who is Superintendent of Police in Glasgow, assaulted him. The defender has contended that there is no relevant averment of assault, but that in any case the pursuer cannot get an issue without malice and want of probable cause—*Young* v. *Magistrates of Glasgow*, May 16, 1891, 18 R. 825; *Malcolm* v. *Duncan*, May 17, 1897, 24 R. 747; and that there was no relevant averment of malice or want of probable cause—*Innes* v. *Adamson*, October 25, 1889, 17 R. 11. But *Young* and *Malcolm* were actions of damages for wrongous apprehension. This is an action of damages for assault, and if assault be well averred there is no need for an averment or an issue of malice or want of probable cause, and the circumstance that the defender is Superintendent of Police, and was acting in that capacity at the time of the alleged assault, seems to make no difference. I have had considerable difficulty in holding the averment of assault to be relevant, but I have come to the conclusion that it is. The defender denies *in toto* the pursuer's averments of assault, and if it appears at the trial that in what he did he was acting in the performance of his duty, and did not overstep its bounds, he will of course be entitled to a verdict. Meanwhile I think the case must go to trial, and that it may be tried on the issue proposed."

The defender reclaimed, and argued—1. No issue should be allowed. The defender was in the course of executing his duty, and did no more than he was entitled to do when engaged in police duty. If a constable when on duty did some action *ejusdem generis* with police duty, to make a relevant case against him for such action there must be some averment analogous to that of malice in a case of wrongous apprehension, to the effect that the constable did something outside his duty—*Malcolm* v. *Duncan*, March 17, 1897, 24 R. 747, 34 S.L.R. 625; *Fowler* v. *Hodge*, November 3, 1896, 24 R. (J.C.), 17, 34 S.L.R. 161. The mere averment of "assault" here was not sufficient. It was not enough to say that the pursuer had been "pushed," for that was an act clearly necessary to regulate the traffic and clear the pavement. The *gravamen* of the charge now seemed to be that the pursuer had been "assaulted" on his own steps, but this was all part of one continuous act, *i.e.*, of clearing the pavement. This was a street where on ordinary occasions the public had a right to go, and the question of the title to the pavement had no significance. The police had right to be in the street as part of the general scheme of regulation of traffic, and were in no sense trespassers. 2. If an issue were allowed it should embrace details, such as "wrongfully and illegally pushed and hustled"—*M'Gillvray* v. *Main*, January 26, 1901, 3 F. 397, 38 S.L.R. 302; *Maxwell* v. *Caledonian Railway Company*, Feb. 5, 1898, 25 R. 550, 35 S.L.R. 449.

Argued for the respondent—1. The police had no right to interfere with the private rights of the pursuer on a *locus* which was his own property as leased by him from the Railway Company. Except by permission of the company the police had no right to be there. Nor had they higher rights than any other person—that is to say, they must do their duty and no more. The assault here was outside the scope of such duty. It was sufficiently averred that it was so. The defender's real line of defence was that he never touched the pursuer, and that was a plain fact for the jury. 2. "Assault" was quite a common form for an issue. Words such as "unnecessary violence" were not suitable for the case—*Anderson* v. *Barr*, March 11, 1847, 9 D. 929; *Ewing* v. *Mar*, December 22, 1851, 14 D. 314.

At advising—

LORD M'LAREN—This is an action against the Superintendent of the Central Division of the Glasgow Police for an alleged assault, and the question is whether a relevant case has been stated? The pursuer has his place of business in Argyle Street, Glasgow, and in connection with his premises there is a back entrance into a street adjoining the St Enoch Station of the Glasgow and South-Western Railway, which street is known by the name of North Drive. The doorway is below the level of the street,

and is approached from the street by descending three steps.

The pursuer's case is that on 3rd May last, on the occasion of the opening of the Glasgow Exhibition by the Duke and Duchess of Fife, he and a number of the workpeople in his employment were standing on the pavement in front of his premises waiting to see the Duke and Duchess, who were to pass through the street on their return to St Enoch Station from the Exhibition; that the defender, who was there on duty, and the policemen under his command, proceeded to clear the pavement, and that when the pursuer interfered and insisted that his workpeople were entitled to occupy the pavement, he was pushed down the steps and roughly handled by the defender.

Now, it is often necessary that the members of the police establishment in the discharge of their duty should use force, it may be to protect individuals who are being wronged, or to keep order in the streets. The police are entitled to use force when necessary in the discharge of their duties, and he would be a very inefficient police officer who should confine himself to speaking to people and leaving them alone if they refused to obey orders. To make a relevant case of assault on the part of a police officer on duty, it appears to me that it is necessary to aver either (1) that the order which the officer was seeking to enforce was unlawful, that is, not within the scope of his duty; or (2) that the pursuer was willing to comply with the order, in which case the use of force would be unnecessary; or (3) that the force used was manifestly in excess of the requirements of the case.

As to the first exception, the pursuer states that he was entitled to be on the pavement with his workpeople, because the pavement is his property. Pavements usually are the property of the householder, but this right of property is subject to the public use of the pavement as a thoroughfare, and it was admitted at the Bar that North Drive is a public street on occasions when the arrival of persons of public station is expected to attract a crowd. The magistrates are entitled to make use of the police force to keep the streets clear, and it is for them in the exercise of their discretion to give such orders through the police as they think fit for ensuring safety and good order. On this occasion the police were keeping North Drive clear against the arrival of the Duke and Duchess, who had come to represent the King at the opening of the Exhibition, and in my opinion the pursuer had no higher right than any other member of the public to occupy the pavement on an occasion when the street was by lawful authority being kept clear.

The second exception does not arise, because the pursuer admits that he refused to leave the pavement, and claimed the right to occupy it by himself and his workwomen.

As to the third exception, the averments of the pursuer do not come up to a case of force manifestly in excess of what was requisite. He does not say that a baton was used, or that he was even struck; still less that he was injured in his person. His statement is, "the pursuer along with his workpeople was hustled by the defender, and pushed down the steps in the direction of the glass door of his factory, and crushed and assaulted." I do not know how a street can be cleared except by "hustling" and "pushing" the people who refuse to move. When there is a crowd of persons present this must result in a certain amount of "crushing;" and as to the word "assaulted," this seems to be only the pursuer's view of what the pushing and hustling amounted to, because there is no averment of any separate or individual assault. It would, of course, be impossible for an officer on duty to measure the degree of the force which he uses so precisely as to know whether any individual in the crowd should be pushed down one, two, or three steps of the stair as the result of his effort, nor do I understand that the pursuer's case depends on any such minute criticism. His view is that the police had no right to interfere with him, and in this I think he is in error. In the result, I am of opinion that the defender is entitled to be assoilzied from the action.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for the Pursuer and Respondent—Shaw, K.C.—J. C. Watt. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defender and Reclaimer — The Lord Advocate, K.C. — Craigie. Agents—Campbell & Smith, S.S.C.

Thursday, November 28.

FIRST DIVISION.

[Sheriff of Argyll.

MACPHERSON *v.* JAMIESON.

Prescription—Triennial— Interruption — Spirit Merchant's Account—Entries made Illegal by Statute — Pactum illicitum — Sale of Spirits Act 1750 (24 *Geo. II. c.* 40) (*Tippling Act*)—*Act* 1579, *c.* 83.

Entries in an account which are struck out by the Sale of Spirits Act 1750 (Tippling Act) do not interrupt the triennial prescription.

The Sale of Spirits Act 1750 (24 Geo. II. c. 40) (Tippling Act), sec. 12, enacts—"That from and after 1st July 1751 no person or persons whatsoever shall be intitled unto or maintain any cause, action, or suit for, or recover either in law or equity any sum or sums of money, debt, or demand whatsoever, for or on account of any spirituous liquors, unless such debt shall have really been and *bona fide* contracted at one time, to the amount of twenty shillings or upwards."