having received payment of the legacy provided to him, the petitioner is willing to renounce the same provided he is relieved of his trusteeship. The trust not being gratuitous, the petitioner has no power to resign under the Trusts (Scotland) Act 1861, and the trust-deed does not provide for his resignation. The present application is therefore necessary."

The petitioner's co-trustees, who were called as respondents, lodged answers to the petition, in which they stated that, while they had no desire to prevent the petitioner resigning his office if the Court should hold that the facts of the case rendered such resignation competent and necessary or expedient, they considered that the trust-estate ought to be relieved of all expense arising from proceedings which the petitioner himself had needlessly occasioned.

Authority for petitioner—*Alison*, February 3, 1886, 23 S.L.R. 362.

At advising—

LORD JUSTICE-CLERK—The facts as stated to us in this petition are very simple. The petitioner learned that he was appointed trustee on the estate of the testator and accepted office. He afterwards discovered that the duties were more burdensome than he was willing to undertake, and he says he accepted under a misapprehension of the extent of the duties, and expresses his desire to be allowed to resign.

If the petitioner had been a gratuitous trustee, he would have been entitled under the Trusts Act of 1867 to resign provided he had fulfilled all his duties up to the date of resignation. But the Act expressly declares that a non-gratuitous trustee cannot resign by virtue of it. The petitioner is therefore not entitled to resign by virtue of the Act, as on accepting office he became entitled to £100 in terms of the trust-deed.

The only ground on which the petitioner asks for authority to resign is that which I have stated. He does not say that he is unable to perform the duties required of him. He does not state that the trust will suffer from causes over which he has no control if he is forced to continue in office. He only states that he now finds the duties of the trust will take more time than he is willing to devote to them.

There have been cases in which non-gratuitous trustees have been allowed to resign, but the Court in these cases considered that it was in the interests of the trust that the trustee should be allowed to resign. An example of such cases is that of *Sir Archibald Alison*, quoted by Mr Constable, whose duties in his profession made him necessarily inefficient as a trustee. But there is no such consideration in this case. The testator thought the petitioner a suitable person to administer the trust. We have no reason to doubt that he can fulfil the duties. The only ground on which he wishes to resign is that he thinks the duties too heavy. Such a ground is not sufficient to entitle us to interpone authority to his resignation.

LORD RUTHERFURD CLARK—I concur. I am very sorry that an unwilling trustee should be held bound to perform his duties, but I do not see how we can help it.

LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"In respect that no sufficient reason has been tendered entitling the petitioner to resign the office of trustee under the trust-disposition and settlement of the late Matthew Andrew Muir, Refuse the prayer of the petition, and decern: Find the petitioner liable for the expenses of this application and of the expenses incurred by his co-trustees."

Counsel for the Petitioner—Constable. Agents—Livingston & Dickson, W.S.

Counsel for the Respondents—Dundas. Agents—W. & J. Burness, W.S.

Tuesday, November 20.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

PEFFERS *v.* THE DOWAGER COUNTESS OF LINDSAY.

Reparation — Wrongous Apprehension — Malice and Want of Probable Cause — Issue.

The pursuer in an action of damages for wrongous apprehension averred that the defender, without accusing him of any crime, had ordered a police constable to apprehend him, that upon this order the constable had apprehended him and taken him to the police office, where he was released as no charge was preferred against him.

Held (1) that the pursuer had stated a relevant case of wrongous apprehension caused by the defender, and (2) that the words "maliciously and without probable cause" need not be inserted in the issue.

In this action Adam Peffers, coachman, residing in Edinburgh, sued Jeanne Marie Eudoxie, Dowager Countess of Lindsay, Kilconquhar, Fifeshire, for £500 in name of damages for wrongous apprehension.

The pursuer made averments to the following effect—He had been coachman to the late Earl of Lindsay at the time of his death, and his engagement did not expire earlier than 12th June 1894. After the Earl's death he was informed that he must leave on that date. Upon 2nd June he went to Wormiston, the residence of the present Earl, and received permission from him to remain in the house which he then occupied. Upon his return constable Pattison met him and threatened to apprehend him. Upon 3rd June the

assistant factor on Kilconquhar estate informed him that he must go upon the next day. On this occasion constable Pattison again threatened to apprehend him, but no charge was formulated against him. Upon 4th June the pursuer again went to Wormiston, and obtained a letter from Lord Lindsay, which was afterwards recalled without intimation to him, granting him the use of the house he occupied at Kilconquhar. He then returned to Kilconquhar House and requested to see the defender for the purpose of inquiring upon what charge or grounds she had ordered him to be apprehended. The defender would not see the pursuer, but sent a message to him that he had better be very quiet and go away. The pursuer thereafter left the policies of Kilconquhar House with the intention of going to Edinburgh. When he was on the high road leading to the railway station he was overtaken by constable Pattison, who drove up in the message cart belonging to the defender. Constable Pattison having alighted, came forward to the pursuer, and laying his hand upon the pursuer's shoulder, said 'What's this you have been doing again—you have been up at Kilconquhar again,' and upon pursuer remonstrating and stating that he had a perfect right to go there, Pattison said 'You are my prisoner—come along with me to Elie.' The pursuer asked upon what warrant or authority or charge he was thus apprehended, and offered to produce the letter which he had got from the Earl of Lindsay. He was, however, ordered to take a seat in the cart, and was drawn under arrest, and in the custody of constable Pattison, to Elie Police Station. Upon entering the police office the pursuer again asked upon what charge he was apprehended, but could get no information except that he had been to Kilconquhar House again. He was soon afterwards set at liberty. In acting as he did constable Pattison acted on the express instructions of the defender. The defender, in ordering the said constable Pattison to apprehend the pursuer and to take him into custody, grossly slandered the pursuer, and meant and intended to represent that he had been guilty of some crime, and led, or attempted to lead, the constable to believe that the pursuer was guilty of crime—she well knowing that the pursuer had not been guilty of any crime, or of any conduct warranting her to call the police to her assistance."

The defender denied that the pursuer had ever been apprehended at all.

Upon 8th November 1894 the Lord Ordinary approved of the following issue for trial of the cause—"Whether on or about 4th June 1894 the defender wrongfully ordered constable Pattison, police constable, Colinsburgh, to apprehend the pursuer, and whether constable Pattison, acting on that order, apprehended the pursuer, to the loss, injury, and damage of the pursuer? Damages laid at £400."

"*Opinion.* — This is a singular and novel case, and I have experienced much difficulty in adjusting the issues. Three have been proposed — the first, an issue to try a question of wrongous apprehension. As proposed, it was expressed in the ordinary style, except that no mention was made of any charge or information on which the apprehension proceeded, as is, I think, customary in issues for wrongous apprehension. I have, however, found one case—*Thomson* v. *Adam*, November 14, 1865, 4 Macph. 29—in which an issue of wrongous apprehension, in which nothing was said about a charge or information, was approved of. In that case it was averred that a criminal charge had been made. But the singularity of this case is that it is not averred that the defender made any charge or lodged any information against the pursuer at all. All that is averred is that she directed her servants to order a police constable to apprehend the pursuer and to lock him up, and that the constable, in obedience to that order, apprehended him, and took him to the police office, where he was immediately liberated, for the very sufficient reason that there was no charge against him. I think there is a relevant averment of apprehension by the constable. I had some doubt whether it was relevantly averred that the apprehension had been caused by the defender.

"It is difficult to believe that a constable would apprehend a man on a mere order without warrant or charge or information. Nevertheless the pursuer makes that improbable averment, and the mere improbability of his story is no sufficient reason for denying him an opportunity of proving it. I have come to the conclusion that it is relevantly averred that the defender wrongfully caused the apprehension of the pursuer.

"In the issue as originally proposed the question was put whether the apprehension was caused maliciously and without probable cause. But at the debate the pursuer maintained that these words should be deleted, and that he should be allowed an issue whether the defender caused his apprehension wrongfully. I am unable to resist this contention. No doubt in an ordinary action of damages for wrongous apprehension, malice and want of probable cause are always inserted in the issue. But they seem inappropriate in this case. The pursuer has perilled his case on the mere assertion that the defender caused the apprehension of the pursuer by her mere order. In such a case the question whether she acted without probable cause would be wholly unmeaning seeing there is no information or charge alleged about which probable cause could be affirmed or denied, and the case appears to me not to be on the averments a case of privilege. For the defender is not said to have availed herself of her legal right of appealing to the constituted authorities, but to have done a thing which she had no legal right to do. She is said to have ordered a constable to apprehend an unaccused man.

"But in issues adjusted in actions of

damages for wrongous apprehension, malice and want of probable cause have hitherto, so far as I know, been always inserted, and I think it would be unsafe to adopt the usual style in such an unusual and unprecedented case as this. The issue ought in my opinion to be expressed as nearly as possible in terms of the pursuer's record." . . .

The defender reclaimed, and also moved to vary the issue by deleting the word "wrongfully," and substituting the words "maliciously and without probable cause." He argued—There was no issuable matter stated on record. It was not said that the defender made any charge of crime against the pursuer. All that was said was that she ordered the constable to apprehend him. It was not relevant to say that the police constable took him in charge because he had been back to Kilconquhar, but that was all the averment came to. In an action against a person for having caused another to be arrested upon an unfounded criminal charge, the words "maliciously and without probable cause" were always inserted in the issue. If that was not done here, the result would be that the defender, who was not alleged to have made any criminal charge, would be in a worse position than if she had done so.

Counsel for the pursuer were not called upon.

At advising—

LORD JUSTICE-CLERK—This is a peculiar case, even upon the pursuer's own averments, and it is difficult to believe that the facts can be as represented. But the pursuer's averment comes to this, that upon a certain occasion he was apprehended by the constable Patterson on the order of the defender. The question therefore is, whether the orders of the defender are sufficiently averred to admit of an issue being allowed, and I think that they are, and that the pursuer is entitled to have the case sent to trial.

The defender, however, says that if an issue is to go to trial it is essential that the words "maliciously and without probable cause" should be inserted. I think it is established law that, if a person should accuse another of a crime, and direct a public official to arrest him as being charged with that crime, that person is acting in pursuance of a constitutional right, or even it may be of a constitutional duty, and that, in any action by the person arrested against the person who gave the order, the words "maliciously and want of probable cause" must be inserted in the issue. That is not the case here, however; it is not alleged that the defender accused the pursuer of any crime, in consequence of which accusation the constable apprehended the pursuer. It is only said that the defender ordered the constable to apprehend the pursuer without making any charge of crime, and in so doing it cannot be said that the defender had any constitutional right or duty. I therefore think that the Lord Ordinary was right, and that these words should not be put into the issue.

LORD RUTHERFURD CLARK—I think it is plain that this record is relevant.

LORD TRAYNER—I think there is here a relevant averment of wrongous apprehension, and that the issue adjusted by the Lord Ordinary is the proper issue to try that question.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuer—Wilson—Guy. Agents—Patrick & James, S.S.C.

Counsel for the Defender—Comrie Thomson—Dundas. Agents—Dundas & Wilson, C.S.

Tuesday, November 20.

FIRST DIVISION.

[Sheriff Court at Peterhead.

HESLOP *v.* RUNCIE.

Process—Proof—Reference to Oath—Cross-examination.

Observations by Lord Adam and Lord Kinnear to the effect that in a reference to oath the deponent's counsel is not entitled to cross-examine him, as if he were a witness in a proof *prout de jure*, but may only suggest questions to the presiding judge to be put to the deponent, for the purpose of throwing light on any matters which the deposition may have left in obscurity.

On 14th April 1894 an action was brought by William Heslop against George Runcie in the Sheriff Court at Peterhead, under the Debts Recovery (Scotland) Act 1867 for payment of the sum of £42, 17s. 8d.

The defender pleaded that he had deposited a sum of £35 with the pursuer, and that this sum fell to be deducted from the sum sued for. He referred the case to the pursuer's oath, and on the construction of the oath the Sheriff-Substitute (BROWN) decerned against the defender as concluded for.

The Sheriff (GUTHRIE SMITH) having recalled the Sheriff-Substitute's judgment, and given decree for the sum sued for less £35, the pursuer appealed to the Court of Session.

The defender produced in process as his proof the notes of the pursuer's deposition under the reference to oath. From these it appeared that the pursuer had been examined by the defender's agent and by the Court, that he had been cross-examined by his own agent on his own behalf, and that he had subsequently been re-examined by the defender's agent.

At advising—

The LORD PRESIDENT expressed the opin-