Friday, May 23.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

GRAHAM *v.* STRATHERN.

Reparation—Illegal Apprehension—Action against Procurator-Fiscal—Alleged Malversation of Statutory Powers — Loss of Statutory Protection—Relevancy—Malice —Want of Probable Cause — Summary Jurisdiction (Scotland) Act 1908 (8 *Edw. VII, cap.* 65), *sec.* 59.

A bank teller, who in the ordinary course of his business had given Treasury notes in exchange for six five-shilling pieces which were coin of the realm, but which proved to be part of a collection of old British coins which had been stolen, having refused to hand over the coins on demand to detectives, was charged on a warrant under the Summary Jurisdiction (Scotland) Act 1908 at the instance of the procurator-fiscal with resetting the coins and detained in the bank premises until the coins were delivered, whereupon no further steps were taken under the warrant. In an action of damages at the teller's instance against the procurator-fiscal the pursuer averred that the actings of the defender were wholly illegal and without the authority of any law or statute, that the pursuer's detention or imprisonment in the bank's premises was illegal, unjust, and oppressive, that the defender knew the whole circumstances under which the pursuer had received the coins, that he (the defender) knew it was the duty of the pursuer as bank teller to refuse to part with moneys entrusted to him on behalf of the bank except upon the instructions of his superior officer, and that he (the defender) well knew that all the criminal elements required to constitute the crime of reset were absent. *Held* that as the pursuer had failed to show that the defender had acted outwith the Summary Jurisdiction (Scotland) Act 1908 the action was excluded by the provisions of section 59 of that Act, and that accordingly it fell to be dismissed as irrelevant.

The Summary Jurisdiction (Scotland) Act 1908, sec. 59, enacts—"No judge, clerk of court, or prosecutor in the public interest shall be liable to pay, or be found liable by any court in damages for or in respect of any proceeding taken, act done, or judgment, decree, or sentence pronounced under this Act, unless the person suing has suffered imprisonment in consequence thereof, and such proceeding, act, judgment, decree, or sentence has been quashed, and unless the person suing shall specifically aver and prove that such proceeding, act, judgment, decree, or sentence was taken, done, or pronounced maliciously and without probable cause. . . ."

On 29th June 1923 Andrew Walter Burton Graham, 263 Kilmarnock Road, Shawlands, Glasgow, bank teller of the British Linen Bank at their Hutchesontown branch, *pursuer*, brought an action against John Drummond Strathern, Procurator-Fiscal for the Lower Ward of the County of Lanark, *defender*, in which he concluded for £1000 damages in respect of illegal apprehension.

The following narrative is taken from the opinion (*infra*) of the Lord Justice-Clerk: —"The action—an action of damages—is brought by a bank teller in the employment of the British Linen Bank in Glasgow against the Procurator-Fiscal for the Lower Ward of the County of Lanark in that city. The basis of the pursuer's claim is the issue of a warrant for his arrest on a charge of reset, the warrant having been issued at the instance of the defender. The circumstances leading up to the issue of the warrant are as follows; and here, as I am concerned only with the relevancy of the pursuer's averments, I confine my attention to them:—It appears that about the end of April 1923 a man came into the branch of the bank in Glasgow at which the pursuer was employed as teller, viz., the Hutchesontown branch, tendered six five-shilling pieces, and asked for notes in exchange. The pursuer, acting in accordance with the custom which regulates such matters, handed the man Treasury notes in exchange for the coins and placed the latter in the till. At the end of the day these coins along with other coins were assembled for transmission to the head office of the bank, and the pursuer's relationship to them terminated. On 2nd May 1923 two detectives visited the bank accompanied by a man in their custody, who, they said, had stolen certain silver coins. They questioned the pursuer regarding the transaction to which I have alluded. The pursuer identified the man in question as the man to whom he had given notes in exchange for six coins. The detectives demanded these coins from the pursuer. The pursuer declined to give them up and explained that they had been immixed with the bank's money. He further informed the detectives of the circumstances in which he had obtained the coins, and added that he could not part with them without the bank's instructions. The detectives then interviewed the bank agent, Mr Russell, who confirmed the pursuer's view of the matter. Mr Russell further stated that he must await instructions from the head office of the bank in Edinburgh, and that he hoped to receive these next day. The detectives thereupon withdrew, stating that they would return on the following day. Mr Russell reported the matter to the head office in Edinburgh, and on 3rd May received instructions from them to retain the coins pending consideration of the situation, and at the same time to forward fuller particulars of the transaction. The instructions so received by Mr Russell were duly communicated to the pursuer. On the same date, 3rd May, a detective officer called at the bank and demanded the coins from the pursuer. The latter informed the detective, Mr Russell being at the time out upon bank business, that he had been instructed to retain the coins pending further inquiry.

The detective officer intimated to the pursuer that he would apply for a warrant, took the pursuer's name and address, and declining to await the return of the bank agent departed. The same afternoon at 3 p.m. two detectives called at the bank, presented a Sheriff's warrant of that date, and read it over to the pursuer. It charged him with resetting the coins referred to, and with failing to hand them over when asked to do so. The bank agent at this point intervened, and persuaded one of the officers to accompany him to see the defender on the subject. The other officer remained at the bank in charge of the pursuer. Mr Russell obtained an interview with the defender and explained the whole circumstances to him. In particular, he told the defender that the pursuer had not possession of the coins, that he had acted throughout on the instructions of the bank, that there was no ground for his arrest, and that he should forthwith be liberated. Mr Russell also undertook that the coins would be handed over to the police. The pursuer was thereupon freed from the surveillance of the detective officer who had remained at the bank, and no further steps were taken against him under the warrant."

The pursuer pleaded, *inter alia*—"1. The defender having wrongfully, illegally, and maliciously and without probable cause procured and put in operation against the pursuer a warrant for pursuer's apprehension and imprisonment, and thereby caused his apprehension and deprivation of personal liberty, *et separatim* having by his actings defamed the pursuer, is liable to the pursuer in damages. 4. The proceedings complained of having been taken by the defender without warrant in law or statute, the fifth plea-in-law for the defender should be repelled."

The defender pleaded, *inter alia*—"1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons the action should be dismissed. 2. The defender in the matter complained of having acted throughout in the *bona fide* execution of his duty as procurator-fiscal without malice and with probable cause should be assoilzied. 3. The defender being privileged in the actings complained of, he is entitled to absolvitor. 4. The warrant complained of having been formally and regularly applied for and competently granted the defender is entitled to absolvitor. 5. The action being excluded by section 59 of the Summary Jurisdiction (Scotland) Act 1908, in respect (*a*) that pursuer has not suffered imprisonment in consequence of the proceedings complained of, (*b*) that the said proceedings have not been quashed, and (*c*) that the said proceedings were not taken maliciously and without probable cause, the defender should be assoilzied."

The pursuer proposed the following issues:—"1. Whether on or about 3rd May 1923 the defender wrongfully, illegally, and without probable cause, and without warrant in law or statute, did procure a Sheriff's warrant, and did thereunder in the branch bank of the British Linen Bank at Hutchesontown, Glasgow, cause the pursuer to be charged with the reset of coins of the realm, to the loss, injury, and damage of the pursuer? 2. Whether on or about the said date the defender did wrongfully, and without warrant in law or statute, cause to be preferred against the pursuer a charge of reset of theft, and did thereby falsely and calumniously represent that the pursuer had been guilty of a crime inferring dishonesty, to the loss, injury, and damage of the pursuer?"

On 7th December 1923 the Lord Ordinary (BLACKBURN) disallowed the issues proposed for the pursuer and dismissed the action.

Opinion—[*After narrating the facts*]—"The first references on record by the pursuer to the part played by the defender in the proceedings complained of are contained in condescendences 8 and 9, and refer to the visit paid to him by Mr Russell. These are followed by a series of general averments in condescendence 10, that the proceedings taken by the defender were illegal and without the authority of any law or statute, and that he had acted maliciously and without probable cause in preferring against the pursuer a charge of reset upon which the warrant for his arrest had proceeded. One has to turn to answer 8 for the defender to find that the charge had been made under the Summary Jurisdiction Act of 1908, and in his fifth plea-in-law the defender founds upon section 59 of that Act as excluding the present action. That section provides that no prosecutor in the public interest shall be found liable by any Court in damages for any proceedings taken under the Act unless the person suing has suffered imprisonment in consequence thereof and the proceeding has been quashed, and unless the person suing shall specifically aver and prove that the proceeding was taken maliciously and without probable cause. It was not maintained for the pursuer that if the defender was justified in taking proceedings under this statute he is not entitled to rely on the immunity provided by the above section. I do not think the construction of the section presents any serious difficulty. It requires, as a preliminary to any action of damages against a public prosecutor, that any proceedings initiated by him under the Act should have been carried to trial, should have resulted in imprisonment, and should thereafter have been quashed. These preliminary conditions being satisfied, the person suing must in order to succeed in his action aver and prove malice and want of probable cause on the part of the prosecutor in initiating the proceedings. It is quite certain that in the present case one of these preliminary conditions has not been satisfied, as the proceedings have not been quashed. Abandonment of the proceedings is quite a different matter to what I understand to be desiderated by the section, namely, that the proceedings have been brought before the High Court and set aside. Further, I entertain no doubt that the pursuer has not suffered imprisonment within the meaning of the section. His

only averments on this point are that after being arrested he was 'imprisoned in the bank's premises and not allowed to depart therefrom' (cond. 8), which he thereafter refers to as his 'detention or imprisonment in the bank's premises.' In my opinion imprisonment, to come within the meaning of the section, must be suffered in a prison, and I entertain little doubt—although it is unnecessary to decide the point in this action—that the section refers to imprisonment following upon a sentence for which the quashing of the proceedings would provide no such recompense to the person suing as would have been provided had the sentence been only the imposition of a fine. Accordingly, it is quite clear that if the defender was justified in proceeding under the statute this action fails without any necessity of considering the relevancy of the pursuer's averments of malice and want of probable cause.

"But although the pursuer's record has no reference to the Summary Jurisdiction Act, he has a plea (No. 4) that the proceedings complained of having been taken without warrant in law or statute the defender's fifth plea-in-law should be repelled. There is no averment on record that in electing to proceed by a complaint under the Summary Jurisdiction Act the defender had made an incompetent or unauthorised use of the provisions of the Act. But it was argued that to charge a person with so serious a crime as reset was to make an unwarranted and unjustified use of a Summary Act, and accordingly that the defender was not entitled to shelter himself under its protective clauses. That a complaint might be made under a Summary Procedure Act of such a character as to deprive the complainer of the right to appeal to its protective clauses was stated by Lord President Inglis in *Ferguson* v. *M'Nab* (12 R. 1089), where the Act in question was the Summary Procedure Act of 1864, but the learned Judge goes on to describe the sort of charge he had in mind as being one which did not set forth 'any known offence, either statutory or at common law, but some indifferent or ludicrous act inferring no legal consequences of any kind.' The charge in this case being one of reset, the dictum quoted does not go far to assist the pursuer's case. But the argument also proceeded on what is, in my opinion, an erroneous assumption that the proceedings having been initiated by a summary complaint would have to be disposed of summarily. There is no reason whatever, so far as I am aware, why proceedings which have originated in a summary charge should not, if further investigation justify it, be reported to Crown counsel, with the result that a prosecution by way of indictment might be ordered.

"It is a little difficult to ascertain from his general averments what the pursuer founds on as his real grounds of action. But the terms of his first plea-in-law suggest that he mixes up indiscriminately two quite distinct grounds on which the actings of a public prosecutor may be attacked. It is there pleaded that the defender acted 'wrongfully, illegally, and maliciously and without probable cause,' and these four charges appear to me to confuse two quite separate issues. The position of a public prosecutor is a highly privileged one, and the presumption that he is doing his duty honestly and *bona fide* is a very strong one—*per* Lord President Inglis in *Beaton* v. *Ivory*, 14 R. 1061. But if a prosecutor acts outwith his duty, or makes a departure from regular procedure which amounts to illegality, his privilege will avail him nothing. Two cases illustrating this ground of action against public prosecutors are *M'Crone* v. *Sawers* (14 S. 443), where the prosecutor had attempted to exercise his powers outwith the ambit of his jurisdiction, and *Bell* v. *Black* (3 Macph. 1026), where he had obtained an illegal warrant within his jurisdiction and had acted upon it. In both cases it was held that the prosecutor could not plead privilege as a defence. But in the latter case Lord President Inglis expressly points out (p. 1029) that the prosecutor's privilege applies in all cases 'when he prosecutes an offender *ad vindictam publicam* for a criminal offence, and where the prosecution fails on the merits and it turns out that the defender is innocent, no action of damages will lie against him unless it be averred that he acted maliciously and without probable cause.' No distinction can in my opinion be drawn between a charge which has been abandoned and a prosecution which has been conducted to a final conclusion and fails on the merits. The abandonment proceeds upon the footing that the accused's innocence has been established at an earlier stage than if he had been put on trial. To plead as the pursuer does that the defender acted wrongfully and illegally assumes that he acted in a manner which does not entitle him to shelter himself behind his privilege, while to plead that he acted maliciously and without probable cause assumes that the plea of privilege is open to him. At the end of the discussion I was left in doubt as to whether the pursuer's action is presented on the ground that the defender's actings in this case were privileged or not.

"As I understood the argument, the averment principally founded on to support the conclusion that the defender had acted illegally is that which sets forth that the essentials necessary to establish the crime of reset were absent from the case. This same averment was, however, also founded on at a later stage as an averment instructing malice. In my opinion it amounts to no more than an averment of want of probable cause in law. 'Want of probable cause may mean . . . in fact or . . . in law'—*per* Lord Neaves in *Craig* v. *Peebles* (3 R. 446)—and want of probable cause is not sufficient to exclude the prosecutor's plea of privilege, although it may be sufficient to assist in rebutting it. The averments contained in condescendence 10 apply to the charge of reset quite independently of the statute under which the charge was made. They set out that in making the charge the defender acted illegally, recklessly, maliciously, and without probable

cause, and for the sole purpose of bringing wrongful pressure to bear upon the pursuer so as to compel him to comply with the police demands. This means that the defender acted as he did solely for the purpose of recovering possession of the stolen coins in order to bring the thieves to justice. To make a charge of reset for such a purpose against an innocent person may be a rash and unwarrantable proceeding, but if the true purpose was that described in the above averment, it is difficult to justify the averment which follows, that the defender acted corruptly and in malversation of his office and not for the vindication of law and justice. I do not consider that it is necessary for me to deal specifically with this latter averment, which is not supported by any independent facts, and is merely an inference from the fact that the defender had made a charge of reset against the pursuer. In view of the dictum already quoted of Lord Justice-Clerk Inglis in the case of *Bell* v. *Black*, I entertain no doubt that the action of defender in making a charge of reset is protected by privilege, and accordingly that this action could in any event only have been allowed to proceed if the pursuer has relevantly averred malice and want of probable cause. I shall deal with the question of whether there was any justification in law for a charge of reset under the head of want of probable cause, and I need only add that in a case of this kind I think a pursuer's averments require to be narrowly scrutinised. The position of a public prosecutor, and particularly the position of a public prosecutor in Glasgow, is such that it would be detrimental to the public service in the highest degree if he were to be subjected to actions of damages, unless they clearly disclosed that he had acted outwith his duties altogether or in a spirit of malice without any probable cause. These two things, malice and want of probable cause, are quite distinct and separate, and the pursuer must prove them both—*West* v. *Mackenzie*, 1917 S.C. 513, *per* Lord Justice-Clerk Scott Dickson. But malice and want of probable cause react on one another to some extent. In the case of *Stewart* v. *Sproat* (1858, 1 P.L.M. 82), which was an action of slander against a member of a parochial board for a statement made at a meeting of the board, Lord Justice-Clerk Inglis charged the jury (p. 90) that 'the want of probable cause may go some way to indicate the existence of a bad motive, and therefore you may take that perhaps as being an element in considering the question of malice also. But don't confound the two things. Want of probable cause and malice are not the same thing, as I have already explained, and the want of probable cause may in many cases not even in the least degree indicate the presence of malice, because it may show mere want of due consideration or mere rashness, or something of that kind.' On the other hand, in *Urquhart* v. *Dick* (3 Macph. 932), an action of damages against a procurator-fiscal for having made an ill-founded charge against a woman of concealment of pregnancy and child murder, Lord Kinloch charged the jury that 'in order to establish malice it is not necessary to establish personal hostility or ill-will towards a particular individual. If a thing is done against duty, with a reckless disregard of the interests or feelings of the individual, that thing is done maliciously in the eyes of the law.' I find it a little difficult to reconcile these two directions, as Lord Kinloch goes the length of saying that want of probable cause alone may provide complete evidence of malice, while Lord Justice-Clerk Inglis lays down that there must be some evidence of malice independent of want of probable cause, although want of probable cause may go some way to indicate a malicious motive. It rather appears to me that the illustration Lord Kinloch gives of a public prosecutor having done a thing 'against duty' is an illustration of a case where the prosecutor had *ipso facto* debarred himself from pleading privilege, and accordingly of a case where no question of malice could have arisen. The views expressed by Lord Justice-Clerk Inglis are in accordance with those of the learned Judges of the Court of Appeal in the case of *Brown* v. *Hawkes* (1891, 2 Q.B. 718), and the conclusion I come to is that where it is necessary to prove want of probable cause and malice to justify an action against a public prosecutor for proceedings taken by him, evidence of want of probable cause, even if so complete as to make it difficult to understand how the proceedings came to have been taken, is not in itself sufficient to justify the action without some evidence of malice, but if there is evidence that the public prosecutor was actuated by an indirect motive in taking the proceedings, then that might be sufficient in the complete absence of probable cause to justify the conclusion that the true motive was a malicious one.

"Turning now to the averments of malice in the present case, there are none that can be described as independent averments of malice. It is true that pursuer's counsel founded on the statement in condescendence 7, where it is said that one of the detectives said to the pursuer in the bank, 'I will make it hot for you, my man,' as an independent averment of malicious motive on the part of the defender. It was argued that in this matter the Procurator-Fiscal and the police must be treated as one. But even if the Procurator-Fiscal is to be held responsible for the inaccuracy of the reports submitted to him by the police, and it is clear from the defences that the information laid before him differed in many essentials from the version of the facts now presented by the pursuer, I cannot hold that a casual remark made by an individual of the police, which is clearly outwith his duty, can be taken as evidence of a malicious motive on the part of the defender. The other two averments which were founded on as indicating malice are, first, that contained in condescendence 9, where it appears in the pursuer's explanations in reply to the defender's answer. The answer sets out that the defender had agreed not to proceed further with the warrant, and

this is admitted by the pursuer subject to what is described as an 'express admission' of a statement not contained in the answer, 'that the warrant, which had been issued merely *in terrorem* and in malversation of the powers vested in the defender was withdrawn as soon as the defender ascertained that its purpose had been served.' Next, in condescendence 10, it is stated—'The defender well knew that all the criminal elements which were required to constitute the crime of reset were absent. He, however, preferred a charge of reset against the pursuer in order to bring wrongful pressure to bear upon him, so that he might be induced, without examination, to comply with any demands the police officers might choose to make.' The first part of this latter averment, I have already said, is no more than an averment of want of probable cause. But the second part, and the averment in condescendence 9, ascribes to the defender a motive for making the charge other than that of convicting the pursuer of the crime charged. The motive ascribed is the recovery of the stolen articles, and I would hesitate to hold that such a motive could be properly described as an '*indirect*' motive where the crime charged is reset. I do not think it would be difficult to figure cases where the recovery of the stolen goods might be a much more important result of such a charge than the ultimate conviction of the resetter. This averment appears to me to be more appropriate to want of probable cause than to an indirect motive unconnected with the charge made from which malice may be inferred. It is no more than an inference drawn from the fact that the charge was made. If specific and independent averments of malice are required in such a case as this, and in my opinion they are required, I do not think that the pursuer's averments are sufficient to justify the action.

"If I am right in so holding, that is the end of the case, but even if I had been of opinion that an indirect motive had been independently averred, I am further of the opinion that the averments of want of probable cause do not disclose such a complete absence of probable cause as to justify the conclusion that the indirect motive alleged must have been malicious. I deal first with the averment that the essentials necessary to constitute the crime of reset were absent from the case. This proceeds on the assumption that the coins being legal tender, *i.e.*, dated subsequent to 1816, and having been taken by the defender in exchange, the property in the coins immediately passed to the bank. It was argued that no one could be guilty of the crime of reset unless he was feloniously in possession of stolen property with the purpose of detaining it from the true owner, and that as in this case the true owner was the pursuer's employers, and as he took the money in the course of his duty, he could not possibly be guilty of the crime charged. I do not think it is necessary to consider what appears to me to be open to some doubt, whether a bank could successfully maintain in a question with the former owner that the property in coins which, even if current, are plainly identifiable, which have an independent value from a collector's point of view, and which have been admittedly stolen, passes to the bank because they have quite *bona fide* been exchanged for coinage of equal value. I entertain no doubt, however, that the bank would be entitled to be reimbursed by the former owner in the face value of the coins. It must not be overlooked, too, that in this case one of the coins taken in exchange is of doubtful currency. But for the present I assume that the averment that the property passed to the bank is well founded, and that the pursuer retained possession of them in the interests of his employers. I entertain no doubt that a conviction for reset would not be justified unless it were proved that the person charged was retaining the property against the true owner—Hume, vol. i, pp. 113 and 115. But that learned author goes on to say (p. 115)—'But ordinarily the vicious purpose is presumable from the same circumstances of evidence which establish the panel's knowledge of the condition of the goods; so that when this has been proved it will be with him to substantiate in the way of exculpation, and as he best may, the alleged innocent or laudable intention with which he wittingly detained the stolen property of another.' Accordingly it appears to me that in considering whether the defender had or had not any probable cause for charging the pursuer with reset, the true question is whether the pursuer has relevantly averred facts brought to the defender's knowledge which must have necessarily substantiated his innocent or laudable intention in detaining the stolen coins after he became aware that they had been stolen. Now, one of the weaknesses in the pursuer's case is that he nowhere avers that what passed at the bank according to his own account was ever reported to the defender. I do not think it was necessary for him to aver what the police reported to the defender, but it cannot be readily assumed against the defender that the police report was in conformity with the pursuer's own version of all that took place in the bank. Indeed it is clear from the defences lodged that the matter was represented by them in a very different light. But dealing with what passed in the bank as being correctly narrated in the pursuer's own averments the question comes to this, do these averments disclose facts and circumstances sufficient to exclude any suspicion that he might not have been guilty of retaining possession of the coins from personal motives and not with an entirely innocent and laudable intention. No one now suggests that in obstructing the police he acted at the worst otherwise than foolishly. His averments as to the coins being legal tender which he was bound to accept lack point, as he nowhere says that prior to their being handed over to the defender he or the police had any knowledge about them other than that they had formed part of a collection of old British coins which had been stolen, and

that they had been subsequently exchanged at the bank. Further, on the pursuer's own admission, it is now clear that he would have been entitled to reject one of the coins as not bearing to be of a later date than 1816. Next, he avers that before the first visit of the detectives the coins had been placed with other silver coins in lots of £100, and his books had been balanced, and that he had no further concern in the matter. He states that this was communicated to the detectives on their first visit, and he immediately afterwards states that he told them that he could not part with the coins because they were the property of the bank. I have already said that these two averments appear to me to be quite inconsistent, and the latter one assumes that he still had possession of the coins. On the next day, when the detectives returned, he informed them of the dilatory instructions received from the head office and stated that he had express instructions from the bank agent to retain the coins. I, of course, am bound to accept that the message from the head office as set out in condescendence 4 was received at the branch office, but I have to consider what effect the statement by the pursuer at the time that such a message had been received would have on the minds of those to whom the statement was made. Now, considering that it is admitted that the coins were identifiable, that they formed part of a collection which had been stolen, that they were urgently required by the police to bring the perpetrators of the theft to justice, that no question was raised that these coins had come into the possession of the bank otherwise than in ordinary course, that no question as to the right of property was involved in the handing over of the coins to the police for the purpose for which they were required, and that in any event only a trifling matter of thirty shillings was at stake, the instructions alleged to have been received from the head office appear to me to be such as would have justified the police or the defender in assuming at the time, either that no such instructions had been received or that they had been received after a total misrepresentation from the local branch to the head office of the true facts of the case. In either event this might, to my mind, justify a reasonable suspicion that the pursuer was endeavouring for his own purposes to shelter himself behind the bank. I cannot reach the conclusion that what passed at the bank, even if reported to the defender in accordance with the pursuer's own averment, was sufficient to substantiate beyond doubt that his motives in retaining the coins were laudable and innocent, and that his duty to his employers alone prevented him from acceding to the request to part with the coins. Indeed I think it is doubtful in law whether the pursuer's public duty to render every assistance possible to the police in the exercise of their duties was not paramount to his duty to his employers, and I am not prepared to assume that the defender should have accepted the law on this point to be as stated in the pursuer's averments in condescendence 10. Nor do I think that it can be overlooked that it would not be extravagant for the defender to have assumed that the only obligation on the pursuer after parting with thirty shillings of the bank's money in exchange for the coins was to account to the bank for thirty shillings in current coin, and that the pursuer, without any fraudulent intent, might have considered himself justified in retaining possession of the coins he received if they were of interest to himself or likely to be so to any of his friends. For these reasons I have come to the conclusion that the defender might reasonably have suspected that the pursuer, without any fraudulent intent, had appropriated the coins received to himself, and that the property in them had never *de facto* been transferred to the bank. The averments as to what the pursuer said and did do not appear to me to be sufficient to exclude such a suspicion, and accordingly I am of opinion that he has not relevantly averred want of probable cause on the part of the defender in charging him with reset. But if I am wrong in so thinking, it seems to me to be at all events clear that the pursuer has not averred such complete want of probable cause as could be used to strengthen and support his averments of malice, and as his averments of malice are insufficient in themselves I am of opinion that the action must be dismissed.

"I have dealt with this case at greater length than I should otherwise have done in respect that it was argued before me with much earnestness and ability by leading counsel of the highest standing at the Bar. But it appears to me somewhat ridiculous that any necessity for raising such an action should ever have arisen. The least modicum of tact or common sense on one side or the other might have avoided the proceedings which were eventually taken. I am at a loss to understand the attitude taken up, according to the pursuer's averments, by the officials at the local branch. There should have been as little difficulty and as little delay at the start in handing over the coins to the police for the purpose for which they were required as there was apparently at the end after the pursuer had been arrested. Instead of wasting time, steps should have been taken immediately to provide the police with the evidence required to bring a criminal to justice. To suggest, as is done on record, that the defender should have availed himself of the powers for search of stolen goods conferred on him by the Glasgow Police Acts, and should have searched the bank, appears to me to be foolish in the extreme. In criticising the action of the defender, it must at least be said that his defences show that it was represented to him that the pursuer had taken up a much more aggressive and obstructive attitude than his own averments represent. Further, the result of the defender's charge shows that the obstructions were easily surmountable by the local branch. But even so, it appears to me that he acted somewhat hastily, and that under the circumstances he would have been well advised to have got into tele-

phonic communication through his subordinates with the head office in Edinburgh before resorting to a charge of reset against the pursuer."

The pursuer reclaimed, and argued—It was proposed to strike out the words "and without probable cause" from the first issue. The second issue was not now asked for. The simple issue now was whether the pursuer had been illegally charged with reset. There was no justification for obtaining the warrant. The Procurator-Fiscal, while ostensibly acting in discharge of his powers, was really acting beyond his powers in arresting the pursuer on a charge of reset. No privilege attached to such an abuse of office. There was nothing clandestine in the conduct of the pursuer, and thus the requisites of "reset" were absent—Hume, pp. 113 and 115, vol. i; Alison, vol. i, p. 328. In this case the object of the alleged reset was not "property" in the ordinary sense, but "money" which was outside the law of vindication—Bell's Prin., par. 528. In dealing with "coin" as with "bearer-bonds" it was sufficient that proper value had been given—*Walker & Watson* v. *Sturrock*, 35 S.L.R. 26. Even if it had not been money, the circumstances of the case did not justify a charge of reset. Being money, pursuer could not be charged with reset on what was an innocent possession. Therefore the obtaining a warrant for the apprehension of the pursuer was not an "act done" in the sense of section 59 of the Summary Jurisdiction Act. The purpose of the Act was to obtain the conviction of persons charged with offences under the Act. Here the purpose was to make the pursuer produce certain coins which were not in his possession but in the possession of the bank, as defender knew. Had the charge been proceeded with the defender would not have got possession of the coins. He had therefore acted without the protection of the Act. Where, as here, the defender's action was outwith the scope of the Act then there was no obligation on pursuer to prove "malice" and "want of probable cause"—*Bell* v. *Black*, 1863, 3 Macph. 1026; *Nelson* v. *Black & Morrison*, 1866, 4 Macph. 328, 1 S.L.R. 83; *Murray* v. *Allan*, 1872, 11 Macph. 147, 10 S.L.R. 85; *Bell* v. *Morrison*, 1865, 5 Irv. 57; *Ferguson* v. *M'Nab*, 1885, 12 R. 1083, at p. 1089, 22 S.L.R. 717; *Russell* v. *Lang*, 1845, 7 D. 919; Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), sec. 88. The case should be sent to trial by jury.

Argued for defender—The defender's proceedings were within the scope of the Act, and the action therefore must be dismissed. Section 59 gave protection to the Procurator-Fiscal even if the motive were oblique. It was sufficient that the proceedings bore to be under the Act. The section was purposely made very wide, and pursuer must prove more than "malice and want of probable cause." Pursuer must be held to admit facts stated on record which he had not denied. The innocence of the pursuer was not a necessary inference from these facts. Every element of the crime of reset was present except what was in the mind of the pursuer. There was thus probable cause. Further, his averments did not disclose a case showing that the Procurator-Fiscal had acted so extravagantly as to be outwith the protection of the Act. Malice must be specified—*Beaton* v. *Ivory*, 1887, 14 R. 1057, 24 S.L.R. 744; *Chalmers* v. *Barclay, Perkins, & Company, Limited*, 1912 S.C. 521, *per* Lord Salvesen at p. 532, 49 S.L.R. 465; *Ferguson* v. *M'Nab*, 1885, 12 R. 1083, 22 S.L.R. 717. This was one of the cases foreseen by the statute which gave absolute protection even in case of malice. Where averments of malice were equally consistent with malice and the absence of malice, then the privileged party was presumed to have acted without malice—*A B* v. *X Y*, 1917 S.C. 15, *per* Lord Salvesen at p. 22, 54 S.L.R. 37; *Rae* v. *Strathern*, 1924 S.C. 147, 61 S.L.R. 93. The warrant was duly and properly obtained, and the defender could only be made responsible if it were shown that it was obtained maliciously and without probable cause. Except where a conviction had been obtained and then quashed, the protection given by the Act was absolute. In any event before the case went to a jury, a proof as to whether the defender acted *ultra vires* of the Act would be necessary—*White* v. *Dixon*, 1875, 2 R. 904; *M'Creadie* v. *Thomson*, 1907 S.C. 1176, 44 S.L.R. 783; *Williamson*, 1915 S.C. 295, 53 S.L.R. 433.

At advising—

LORD JUSTICE-CLERK (ALNESS)—This case was presented to us as one which involves questions of considerable public and indeed constitutional importance. I think it does. I will only add that it also involves questions which intimately affect the rights and interests of private individuals.

[*After the narrative quoted supra (see p.* 494) *his Lordship proceeded*]—The pursuer avers that the warrant was issued *in terrorem* and in malversation of the powers vested in the defender, and that it was withdrawn so soon as its purpose, viz., the surrender of the coins, was served. He further avers that that course could not have been adopted by the defender without grave dereliction of duty if he conceived that the crime of reset had actually been committed. The pursuer proceeds to aver that the defender's proceedings were wholly illegal and without the authority of law or statute, and that they were taken maliciously and without probable cause. Facts and circumstances bearing upon the latter averment are set out in detail, but for a reason which will presently become apparent I do not find it necessary to rehearse them. The pursuer says that the warrant was issued at the instance of the defender, not because he thought the pursuer had been guilty of reset, but in order to bring wrongful pressure to bear upon him to comply with the officer's demands. He avers that the defender acted corruptly and in malversation of his office, not for the vindication of law and justice. He finally avers that, if the defender wanted the coins, he should have obtained a warrant for their recovery under

the Glasgow Police Act 1866. In these circumstances the pursuer tabled two issues, the first of which puts the question whether the defender wrongfully and illegally procured a warrant for the arrest of the pursuer on a charge of reset and caused him to be charged with that crime, and the second of which puts the question whether the defender slandered the pursuer by making a charge of dishonesty against him. The Lord Ordinary after hearing argument disallowed both issues and dismissed the action as irrelevant. The pursuer reclaimed, and we have now to decide whether or no the judgment of the Lord Ordinary is well founded.

The case as presented to us differs in several material particulars from the case as presented to the Lord Ordinary. I should at this point explain that the defence is founded on section 59 of the Summary Jurisdiction (Scotland) Act 1908, which requires as a condition of the competency of such an action as this that (*a*) the pursuer should have suffered imprisonment in consequence of the proceedings complained of, (*b*) that the proceedings should have been quashed, and (*c*) that the proceedings should have been taken maliciously and without probable cause. In the Outer House the pursuer maintained to the Lord Ordinary that these conditions were satisfied in this case, but before us he admitted that that argument was foreclosed to him by the case of *Rae* v. *Strathern* (1924 S.C. 147), which was decided by the First Division after this case was heard by the Lord Ordinary but before it was heard by us.

The pursuer in the course of his argument before us also abandoned his claim to the second issue proposed by him to the Lord Ordinary, and limited his claim to the first issue, deleting from it the words "and without probable cause."

Further, withdrawing a concession which his senior counsel had made before the Lord Ordinary, and which is referred to at the outset of the Lord Ordinary's opinion, viz., that the case should be tried without a jury, the pursuer's counsel maintained to us that he was entitled to a jury trial. He did so on the ground that the reason for the concession which he had made in the Outer House, viz., that difficult questions in law were involved in the application of the Summary Jurisdiction Act to the case, had now disappeared by his abandonment of his case under the statute, and he contended that his right to a jury trial was now unchallengeable.

It comes to this, that the pursuer's counsel admits that if the statute applies to the proceedings of which he complains he has no case, and that he confines himself to a claim to submit to a jury the issue whether the defender wrongfully, illegally, and without warrant in law or statute procured the warrant and charged him with the crime of reset to which it refers. In these circumstances I have, as I have already indicated, abstained from resuming with particularity the averments of the pursuer on record regarding malice and want of probable cause. No issue which involves these topics is now proposed to be submitted to a jury. Indeed, the pursuer maintains that his case is independent of these questions, and is, as we shall see, of quite another character.

What then precisely is the case which the pursuer claims the right to submit to a jury? It is, as I understand it, of this character—He argued that the purpose of the Summary Jurisdiction Act was to obtain the conviction of persons charged under it with the offences so charged, and that proceedings for any other purpose are not proceedings under the Act. He maintained that the purpose of the proceedings in this case was not to prosecute him for reset but merely to obtain possession of the coins in question, and that therefore the proceedings were outside the Act and the protection which it affords. In other words, the pursuer contended that the defender while ostensibly acting in discharge of his official duty was really misapplying his powers, that a charge of rape or murder would have been as much or as little justified as the charge of reset which was made, and that the defender was accordingly deprived of all statutory protection. The pursuer finds his case epitomised in one sentence of the Lord Ordinary's opinion, where his Lordship says—"But if a prosecutor acts without his duty, or makes a departure from regular procedure which amounts to illegality, his privilege will avail him nothing." The pursuer's success, in short, depends upon his having averred the defender out of the protection of the Act. The question is, Has he done so?

Now when one considers the warrant complained of it is *prima facie* unimpeachable. It bears to have been applied for and granted under the Act—to have been granted by a Judge who had power to grant it, and to have been put in execution by competent officers in a competent manner. When one analyses the pursuer's argument, which I have already endeavoured to recapitulate, it amounts to this, that the defender in what he did was animated by a wrong motive. Whereas that motive should have been to prosecute the pursuer for reset, it in truth was, so the pursuer says, to concuss him into surrender of the coins. That that was the defender's real motive would appear to be plain not only from the pursuer's averments but also from the defender's admissions. I refer in particular to what he says in the record. The defender desired delivery of the coins, and that without delay, in order to the successful prosecution of the persons who had stolen them. Now I have no hesitation in saying for myself that while the motive of the defender may have been entirely laudable, the method he adopted in giving effect to it was, to say the least of it, regrettable. It is manifest that his proper course, if he desired to recover the coins, was to have applied for a search warrant under the Glasgow Police Act 1866, rather than to have applied for a warrant charging the pursuer with reset. The defender nowhere says that he intended to prosecute the pursuer for reset, and when

the warrant had served the purpose for which it was intended, *i.e.*, once the coins were surrendered, the proceedings against the pursuer were dropped. But that by no means concludes the matter. The protection afforded to public officials by the Act is of manifest and, I take it, deliberate amplitude, and naturally so. Take the case of a procurator-fiscal. His hands would be paralysed in the performance of his duty were he haunted by the dread of blackmailing actions as the result of the instant and difficult decisions which he must from time to time make, and the prompt and drastic action which he must from day to day authorise and initiate. Parenthetically let me say, to prevent misunderstanding, that I do not for a moment suggest that this is a blackmailing action. Indeed, it is manifestly far from that. I am merely concerned with the obvious justification which the Legislature can claim for the strength of the palladium with which they have surrounded public officials in the discharge of difficult duty. It is not as if, should the protection of the statute be abused, the officials concerned would remain unpunished. It is not as if they were armed with an indemnity in the event of their employing their powers to further their own ends. It is plain that gross abuse by public officers of the high trust committed to them would be visited by severe penalties if not by instant dismissal at the hands of the public authorities whose servants they are. Now to confine one's attention to one part of the statutory protection, it is plain that that protection extends to an act done "maliciously," for no action will lie unless the pursuer can establish the concurrence of the other three statutory conditions as well; and that concurrence is not now suggested in this case. Now what does malice mean? In a cognate department of law a malicious act has been defined as an act done from an oblique motive. Now that is precisely the character of the act attributed by the pursuer to the defender. If that view is sound, the defender can claim the protection of the statute, and if the statute applies, the pursuer by his own admissions has no case. The learned Dean of Faculty argued in terms—I noted his words at the time—that the defender *was animated by a motive not to convict the pursuer but by another motive*, and he maintained that where the conduct of a procurator-fiscal was dictated *by a purpose other than to obtain a conviction* he forfeited the protection which the Act conferred. In other words, the criterion to be applied in determining whether the defender is within or without the statutory protection is according to the learned Dean to be found in the state of the defender's mind. The conclusion of the matter then appears to be this. The pursuer's case depends on averring the defender out of the Act. He claims to have done so by averring that the defender was animated by an oblique motive. But then that is just malice, and malice *per se* will not avail to elide the operation of the Act. That is a simple view; yet it appears to me to be conclusive of this case. I am therefore of opinion that, so far, the pursuer has not succeeded in freeing himself of the trammels of the Act of Parliament.

That instances have arisen and may yet arise where statutory protection, such as concerns us here, will be of no avail to a defender is of course clear. Illustrations of that proposition are afforded by decisions which were cited by the pursuer, but which so far from supporting his case, appear to me to be eloquent by way of contrast to it. For example there is the case of *Bell* v. *Black and Morrison* (3 Macph. 1026) in which damages were claimed in respect of the obtaining and executing of an illegal warrant by a procurator-fiscal against the pursuer, and in which it was held that malice and want of probable cause need neither be averred nor put in the issue. The basis of the decision was the illegality of the warrant complained of, the judge who granted it having had no power to do so. It was said from the bench that the warrant was as illegal as if a party were brought up by warrant for examination under torture. Another case illustrating the same principle is the case of *M'Crone* v. *Sawers* (13 S. 443) in which a procurator-fiscal was held liable in damages because the warrant complained of was granted to take effect in a place with respect to which there was no jurisdiction in the judge to grant it. In both cases the warrant, which was the basis of the action, was incompetent. But here the warrant was granted by a judge who had power to grant it, and it was granted, moreover, for execution within his jurisdiction. It therefore appears to me that this case is in sharp contrast to these, and that it is incapable of assimilation to them either in fact or in law. The pursuer's counsel were unable to cite any case since the passing of the Act of 1908 in which it was held that a defender had put himself outside the pale of the statutory protection.

The pursuer's counsel cited as supporting their argument a passage in the opinion of the Lord President (Inglis) in *Ferguson* v. *M'Nab*, 12 R. 1083, at p. 1089. It is in these terms:—"It may be necessary, however, to add, that a prosecution bearing to be under that Act may be so absurd in character that it cannot with propriety be said to be under any statute at all. A complaint might be brought professedly under the statute, not setting forth any known offence either statutory or at common law, but some indifferent or ludicrous act inferring no legal consequences of any kind. Then *in scena non in foro res agitur*. It is not a judicial proceeding at all, and can receive no protection from any statute." That passage illustrates the learned Dean's proposition that a procurator-fiscal may step outside the protection of the Act, and may become a mere wrongdoer. But I am clear that this case does not fall within the ambit of that doctrine. The learned Dean of Faculty also referred to the case of *Murray* v. *Allan*, 11 Macph. 147. In that case the Lord President (Inglis) said (at p. 151)—"We have seen cases where the complaint had so little connection with the Act of Parliament that it would be a grievous

wrong to apply the limiting clause. If a man, having obtained a warrant under the Act, proceeds illegally and by violence to apprehend the accused, and brings him before a Justice, the Act will not apply at all. People may go so absurdly and extravagantly wrong as to put themselves beyond the protection of the statute. Or, if he proceeded to arrest and poind without any warrant, no one can doubt that he had no protection under the Act. *In order to plead the clause of the statute, the defender must show that he was apparently acting within its provisions.*" Again it seems to me that this case is far removed from the hypothetical cases which the Lord President figures, but it would appear to satisfy the requirement which the last sentence, which I have quoted from his opinion, embodies.

The defender's counsel relied on a large number of cases as supporting their contention that the action is irrelevant. Among these the most important were *Beaton* v. *Ivory*, 14 R. 1057; *Chalmers*, 1912 S.C. 521; *A B* v. *X Y*, 1917 S.C. 15; *Shiells*, 1914 S.C. (H.L.) 33. I consider myself absolved from the necessity of examining these cases in detail, as I have formed the opinion that the pursuer has failed in argument to establish the relevancy of his case on principle or by reference to authority. The aspect of the case with which we were alone concerned at the hearing does not, it is true, bulk large in the Lord Ordinary's opinion, but by a different route I have reached the same destination as he, and I accordingly propose to your Lordships that we should affirm his judgment and refuse the reclaiming note

LORD ORMIDALE—Your Lordship has fully narrated the circumstances, as stated by the pursuer, which have given rise to the present action, and it does not appear to me necessary again to recite them. It is impossible to avoid an impression of regret that the pursuer who, after a long period of service in the bank, for the last four years of which he has acted as teller, and during the whole of which he has enjoyed the confidence and support of his employers, should have found himself in the unfortunate and painful predicament of being arrested on a charge of reset. Fortunately, his detention by the police was in the bank premises, and endured for an extremely brief period. He has raised the present action, in which he concludes for payment of £1000 in name of damages, to vindicate his character. It is directed against the Procurator-Fiscal for the Lower Ward of the County of Lanark at Glasgow, at whose instance the warrant for his apprehension was granted. The Lord Ordinary has refused the issues proposed for the pursuer and dismissed the action. At the hearing before us the second of the issues proposed for the pursuer was withdrawn. The first was amended by the deletion of the words "and without probable cause." What accordingly we have to decide is whether the pursuer is entitled on the averments made by him to present to the jury the following question—"Whether on or about 3rd May 1923 the defender, wrongfully, illegally, and without warrant in law or statute, did procure a sheriff's warrant, and did thereunder in the branch bank of the British Linen Bank at Hutchesontown, Glasgow, cause the pursuer to be charged with the reset of coins of the realm, to the loss, injury, and damage of the pursuer?"

I agree with your Lordship that he is not, and that the reclaiming note should be refused. In my opinion the action is excluded by the Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), section 59, which enacts—"No judge, clerk of court, or prosecutor in the public interest shall be liable to pay or be found liable by any court in damages for or in respect of any proceeding taken, act done, or judgment, decree, or sentence pronounced under this Act, unless the person suing has suffered imprisonment in consequence thereof, and such proceeding, act, judgment, decree, or sentence has been quashed, and unless the person suing shall specifically aver and prove that such proceeding, act, judgment, decree, or sentence was taken, done, or pronounced maliciously and without probable cause. In the Outer House the pursuer maintained that the circumstances averred by him disclosed the equivalents of imprisonment and of quashing, as well as malice and want of probable cause. He did not present that contention to us, but argued that the defender had acted entirely outwith his duty and not in pursuance of the statute at all; that he had no intention of proceeding to a conviction of the crime charged, which was the true and legitimate purpose of procedure under the Act; that his sole object was to force from the pursuer the delivery of certain coins which were required for evidence in another prosecution; that the issue of the warrant was merely *in terrorem;* and that accordingly when the coins were ultimately handed over by Mr Russell, proceedings were at once dropped. Now this contention, when considered in the light of the pursuer's averments, means no more than that the defender was actuated by a corrupt or oblique motive, in other words, that he took the proceedings he did maliciously and not in the honest belief that the circumstances, as he knew them, justified the apprehension of the pursuer on a charge of reset. In other words, it satisfies one, but only one, of the conditions which, in terms of section 59, require fulfilment. The mere fact that, on a satisfactory explanation being given by Mr Russell, coupled with a surrender of the coins, proceedings were dropped, in no way suggests an original dishonest motive on the defender's part. The instant delivery of stolen property by the recipient thereof, when he comes to know that it is stolen property, with a reasonable account of how it came to be in his possession, *will* at once discharge the authorities from the necessity of taking further steps; but in the present case owing, I think, in part to the attitude taken by the pursuer, and in part to the action or inaction of his superiors, an authoritative explanation

and delivery of the stolen goods was delayed, and the police apparently thought that they were being hampered in the execution of their duty, and the retention of the stolen property too readily suggested reset. The whole affair was blundered. The pursuer says that the defender knew all the circumstances as he, the pursuer, narrates them. He does not specifically aver how he came to know them, and, as the defender was not himself present at the bank on any occasion, the necessary inference is that his knowledge of what occurred was derived from what was told him by the police. In other words, he acted, as he was at once bound and entitled to act, on information laid before him by the police. Thereafter all that the Procurator-Fiscal himself actually did bears to have been done under the Act. He duly put the matter before the Sheriff-Substitute, and duly received a warrant whose legality under the statute is not disputed, and it was legally executed. The circumstances here are entirely different from those in *M'Crone* (13 S. 443) and *Bell* (3 Macph. 1026), in the first of which the warrant extended beyond the jurisdiction of the judge who granted it, while in the other the warrant, on its own terms, was not a warrant known to the law at all. Here there was no flaw in the procedure adopted and followed forth by the defender, and there was nothing he did of so extravagant or fantastic a nature as to take him outside the statute. All that he did purported to be done "under" the statute, and he has therefore the full indemnity of privilege provided by the statute. It is not an absolute privilege, but a very high privilege, and it has been provided in order to enable the officials who enjoy the protection to perform their duties, often of a difficult and delicate nature, freely and fearlessly according to the best of their judgment. It will not, of course, protect an official who is guilty of criminal misconduct; but a case of that nature would fall to be dealt with by the criminal authorities and not by a civil Court.

LORD HUNTER—In my opinion this action is excluded by the provisions of section 59 of the Summary Jurisdiction Act 1908. That section provides—[*His Lordship quoted the section*]. The protection thus provided by statute to officials in the position of the defender is special. Actions which might have been maintained at common law are excluded. When the case was before the Lord Ordinary the pursuer apparently maintained that he had suffered imprisonment within the meaning of the section. That would still leave the question to be determined whether or not the record contains relevant averments of malice and want of probable cause on the part of the defender. When the cause was before us, however, pursuer's counsel did not maintain that he could make out a case of imprisonment in consequence of what occurred. His contention was that the Act did not apply, the conduct of the defender amounting to an abuse of his office as Procurator-Fiscal. When the pursuer's averments are examined, it is evident that the procedure adopted by the defender appears to have been *ex facie* regular and in conformity with the provisions of the statute dealing with prosecutions. He must have received information from detectives that certain coins, which had been stolen from a collection of old British coins, were in the possession of the pursuer, who refused to deliver them up. He applied to the Sheriff and obtained a warrant for the apprehension of the pursuer on a charge of reset. It is, I think, unfortunate that the defender thought it advisable to take this course, and the pursuer may rightly feel aggrieved at the indignity that was placed upon him. At the same time, the policy of the Act is to give complete protection, subject to certain exceptions which are not here applicable, to public officials acting within the powers conferred upon them. It was the defender's duty, when he received information as to the theft of the coins, to make every endeavour to have the criminals discovered and brought to justice. There is no suggestion that the defender had any other object than this public one in acting as he did, and I do not think therefore that he has rendered himself liable in an action of damages.

LORD ANDERSON—I cannot help thinking that the line of conduct adopted by the pursuer and his superiors, when the defender asked for the stolen coins, accounts mainly, if not entirely, for the happenings of which the pursuer complains. It is the duty of every good citizen to aid the public authorities in suppressing crime. When the pursuer was told that the coins were required for the purposes of a criminal trial his sense of public duty ought to have induced him to hand them over at once. Instead of doing so he evaded compliance with the request of the police by excuses which it is not surprising that the detectives considered unconvincing and suspicious. The attitude of the officials at the head office of the bank was even more extraordinary. They instructed retention of the coins pending consideration of the matter by them. What was there to consider? They knew that the police were urgently demanding the coins for public purposes. They knew, or ought to have known, that the coins would be returned after the housebreaker had been tried, or their value made good to the bank. They had a public duty to discharge. Their failure, in these circumstances, to order immediate delivery of the coins to the police was thus, in my opinion, unintelligible and reprehensible and the main cause of all that followed. The Lord Ordinary has attached some blame to the defender. I am not prepared to associate myself with this censure, as I do not know what report the defender received from the police. It is a matter of common knowledge, or, at all events, of judicial knowledge, that a procurator-fiscal acts on written information supplied to him by the police. We are bound to assume that an experienced official like the defender did not act without

having had supplied to him police information which justified the proceedings which he took. There is a presumption that a public prosecutor does his public duty honestly and *bona fide—Beaton*, 14 R. 1057, Lord President Inglis at p. 1061. A procurator-fiscal has no motive to perform his public duties with harshness or excess of zeal. Apart from civil judicial proceedings he is not uncontrolled in the exercise of his duty. His office is subject to the supervision of the Lord Advocate. If a public prosecutor is ignorant or careless he may be dismissed from office. If he acts maliciously he may be prosecuted for malversation of office. A conviction improperly obtained by him may be set aside by the High Court of Justiciary. But both the common and statute law properly confer upon public prosecutors a wide protection from civil actions of damages at the instance of those who consider that they have been aggrieved by the mode in which prosecutions have been conducted. The law recognises that it is a contingency of communal life that a member of the community may be erroneously charged with crime. In the ordinary case that contingency must be faced by the aggrieved individual with what equanimity he can command. He knows that, if innocent, an erroneous prosecution can do him no permanent injury. He is debarred from vindicating his wrong by an action of damages. The common law recognises that a public prosecutor, when discharging his public duties, occupies a position of high privilege. At common law, therefore, he can only be sued for damages for wrongous prosecution if the pursuer is in a position to make specific averments that he acted from malice and without probable cause—*Urquhart*, 3 Macph. 932; *Beaton*, 14 R. 1057.

The protection afforded by the common law to public prosecutors against actions of damages was enlarged by the provisions of section 59 of the Summary Jurisdiction (Scotland) Act 1908. Such actions in reference to "any proceedings taken" under that Act are only allowable in certain special circumstances. Four conditions of competency of such actions are imposed by the said section. (1) The common law rule is specifically declared. The enactment implies that the position of a public prosecutor is one of high privilege, and it is provided that the person suing an action of damages must specifically aver that what is complained of was done maliciously and without probable cause. (2) The person suing must have suffered the real injury of imprisonment. If the punishment has been a fine, it is implied that sufficient reparation may be obtained by procuring the quashing of the conviction and repayment of the fine. (3) The proceeding complained of must have been quashed. (4) The action of damages must have been commenced within two months after the proceeding complained of, unless a shorter period is fixed by the special statute under which proceedings were taken.

To entitle a public prosecutor to this statutory protection he must have been proceeding "under the Act." The defender's counsel conceded that there were circumstances in which a public prosecutor might not be entitled to invoke the statutory protection. What are these circumstances? (1) A public prosecutor can prosecute only for crime committed within his jurisdiction. If he acts outwith the ambit of that jurisdiction he cannot invoke the statutory protection—*M'Crone*, 13 S. 443. (2) A public prosecutor can initiate a criminal prosecution only on the warrant of a competent judge. If he proceeds without a warrant, or on a warrant from a judge who is not qualified to grant it, he does not enjoy the statutory privilege—*Bell*, 3 Macph. 1026. (3) If a prosecutor purports to prosecute on a charge which does not set forth "any known offence either statutory or at common law, but some indifferent or ludicrous act inferring no legal consequences of any kind," he acts outwith the statute and cannot claim its protection—*Ferguson*, 12 R. 1083, Lord President Inglis at p. 1089. It is plain that none of these propositions applies to the present case. The occurrences which led to the proceedings complained of happened within the defender's jurisdiction, they proceeded on the warrant of a competent judge, and the charge in the complaint related to a well-known crime.

The pursuer nevertheless contends that, in the circumstances disclosed in his averments the defender has forfeited his right to found on the provisions of the Act. It is maintained that the defender in what he did was not proceeding under the Act. Before considering this contention, I shall refer to two matters dealt with by the Lord Ordinary which, on the arguments submitted to us, do not appear to be pertinent to the question at issue. The Lord Ordinary suggests that the pursuer's counsel argued that the defender should, in the case of a crime so serious as reset, have proceeded by way of indictment and not complaint. No such contention was made on the reclaiming note; on the contrary, it was disclaimed. What the pursuer complains of is not the form which the prosecution took, but the fact that a prosecution was taken at all. It was maintained for the pursuer that any prosecution, whether summary or solemn, was in the circumstances, wholly wrongous and illegal. Again, the Lord Ordinary devotes a considerable portion of his opinion to a consideration of the topics of malice and want of probable cause. He reaches the conclusion that the pursuer's averments do not relevantly aver malice, and that they disclose that the defender had probable cause for taking the proceedings complained of. I agree with the conclusions of the Lord Ordinary on these two points, but on the argument submitted to us, consideration of the questions of malice and probable cause is beside the mark. These matters are relevant and pertinent only if it be conceded or established that the defender was privileged in what he did. If the occasion was privileged and fell within the statutory enactment, the pursuer's counsel conceded that they were out of Court, inasmuch as the pursuer had not

been imprisoned either *in pœnam* or by way of detention. On this footing, as the first statutory condition of an action of damages had failed, it was obviously unnecessary to investigate the questions of malice and want of probable cause. The foundation of the pursuer's argument, however, was that the occasion was not privileged, and that the defender had forfeited the protection which the Act of Parliament gave him. He had not acted under the Act, it was urged, but entirely outwith the Act. On that line of argument it is plain that the questions of malice and want of probable cause do not emerge.

The case made by the pursuer's counsel in argument is plainly disclosed in the form of issue which they ultimately proposed for the trial of the cause. The two issues which are appended to the reclaiming note were proponed in the Outer House. The first issue is one of wrongous prosecution, which, however (as it seems to me, improperly), libelled want of probable cause. The second issue is one of slander. Both issues are based on the same *species facti*, and the impression I formed and expressed at the debate was that it was incompetent to sue two distinct legal remedies with reference to the same set of facts. That appeared to me to be an attempt to obtain twofold reparation and to exact a double penalty for what was in truth but one wrong. It is unnecessary, however, to express a concluded opinion on this point, as it was not fully argued, and the pursuer's counsel agreed to the second issue being disallowed. They also deleted from the first issue the reference to probable cause. The case therefore which the pursuer desires to make to a jury, as disclosed by the issue now proposed for the trial, is that the defender wrongfully, illegally, and without warrant in law or statute, caused the pursuer to be charged with the crime of reset. The issue does not libel malice and want of probable cause because the pursuer's case is that the occasion was not privileged. It was conceded, as I have already observed, that if the pursuer's averments show that the occasion was privileged, the defence must prevail, as the statutory protection would then be open to the defender and the initial statutory condition of an action of damages (imprisonment) had not been satisfied. The sole point for decision is therefore this, whether, on the pursuer's averments, it must at this stage be held that the defender has lost or forfeited his statutory protection.

The proceedings complained of are *ex facie* regular. The complaint bears to be under the Summary Jurisdiction (Scotland) Act 1908; it relevantly libels the well-known crime of reset; it is signed by the defender's depute; and a warrant to apprehend for the crime charged was granted by a competent judge. That the prosecution, thus regularly initiated, was not continued to trial is plainly no ground for depriving the defender of the statutory protection. A criminal process may properly be abandoned if on fuller investigation the innocence of the accused is made manifest, or if on consideration of a full precognition the prosecutor considers it hopeless to expect a conviction. Where proceedings are ostensibly initiated under the Act, this appears to me to be sufficient to clothe the prosecutor with his statutory protection—see *Murray*, 11 Macph. 147. The pursuer, however, argued that this was not sufficient; that it was not enough to use the forms of the Act for a purpose which was not that of the statute. The duty of the defender under the Act, argued the pursuer's counsel, is to prosecute for crime; if he employs the forms of the Act for another purpose, he is not acting under the Act and cannot invoke its protection. In the present case, it is averred, the defender had no intention of prosecuting the pursuer for reset; his sole object in making the charge was to compel delivery by the pursuer of the stolen coins. The defender was using the pursuer as a pawn in the game between the housebreaker Williamson and the defender. The complaint against the pursuer was in truth a step in the criminal process against Williamson. These contentions are undoubtedly forcible and formidable, but I am of opinion that they are not well founded. I have already indicated that the averments of the pursuer give considerable support to what is maintained in defence, *i.e.*, that the defender had justification for charging the pursuer with reset. I take the case, however, as the pursuer's counsel presented it, namely, that it is relevantly averred that the defender charged the pursuer with reset for the sole purpose of compelling delivery of the stolen coins. The defender might have acted in the manner alleged either from ignorance or from malice. If the defender considered that he was entitled to use the means of a criminal prosecution to secure possession of the stolen coins, he was undoubtedly in error. The proper machinery for the alleged purpose was that prescribed by section 88 of the Glasgow Police Act 1866. But it seems to me that the statutory provisions were designed to protect a prosecutor, and in fact do protect him, from the civil consequences of such an error. The pursuer's case, however, is that the defender acted not in error but knowingly. This plainly appears from the averments in condescendence 10. The gravamen of the pursuer's allegations against the defender is that he deliberately, wilfully, and knowingly employed the statutory proceedings for a purpose which he was well aware they were inappropriate to effect. All this is just to allege that the defender was actuated by malice in taking the proceedings complained of. But it appears to me that the statute protects a prosecutor against the consequences of malicious actings unless imprisonment has resulted. That seems to be the plain import of the enactment. If the pursuer's contentions are sound, the statutory protection is of little avail. To deprive a prosecutor of its aid, a pursuer need do nothing more than aver that a prosecution was undertaken with an oblique motive. In the present case this is all that the pursuer has done, and in my opinion it is not enough. It

follows that the defender cannot competently be sued in an action of damages.

In a case like the present a person aggrieved is not without remedy, but as I have already indicated, it is a different remedy from that which has been chosen. If the pursuer's averments are well founded his remedy is to make complaint to the Lord Advocate, by whom alone a case of the nature alleged can be dealt with.

The result is that the interlocutor of the Lord Ordinary falls to be affirmed.

The Court adhered.

Counsel for Reclaimer (Pursuer)—Dean of Faculty (Sandeman, K.C.)—Moncrieff, K.C. —J. R. Gibb. Agents—Mackenzie & Kermack, W.S.

Counsel for Respondent (Defender)—D. P. Fleming, K.C.—J. M. Hunter. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Tuesday, May 27.

SECOND DIVISION

[Sheriff Court at Dundee.

TAYLOR & SON *v.* IRONS.

Workmen's Compensation Acts 1906 (6 *Edw. VII, cap.* 58) *and* 1923 (13 *and* 14 *Geo. V, cap.* 42)—*Procedure—Claim by Employers in Virtue of the Act of* 1923, *which Repealed War Addition Acts, to Discontinue Payment of War Additions—Application by Workman to Have the Matter Determined by Arbitration — Competency — Whether Application Barred by Recorded Agreement.*

The employers of an injured workman admitted liability and agreed to pay him compensation as for total incapacity under the Workmen's Compensation Act 1906 and the War Addition Acts 1917 and 1919, and a memorandum of the agreement was recorded. On 21st February 1922 the weekly payments under the 1906 Act were redeemed by payment of a lump sum. On 31st December 1923 the employers discontinued the payments under the War Addition Acts in reliance upon section 1 of the Workmen's Compensation Act 1923, whereupon the workman lodged a minute claiming that the dispute between him and his employers should be determined by arbitration. The employers contended that the minute was incompetent on the ground that all questions outstanding between the parties had been settled by agreement, and that the workman's proper procedure was to charge on the recorded memorandum. *Held* that the minute was competent.

Workmen's Compensation Acts 1906 (6 *Edw. VII, cap.* 58) *and* 1923 (13 *and* 14 *Geo. V, cap,* 42) — *War Additions to Weekly Payments—Liability of Employers to Pay War Additions where Weekly Payments under the Act of* 1906 *Redeemed—Interpretation of Proviso to section* 1 *of the Act of* 1923.

A workman who had been totally incapacitated by accident in the course of his employment was receiving weekly payments both under the 1906 Act and the War Addition Acts of 1917 and 1919. The payments under the former were redeemed on 21st February 1922. After 31st December 1923 the employers discontinued payment of the war addition on the ground that the proviso to section 1 of the Workmen's Compensation Act 1923, continuing in certain cases a workman's right to receive these additions, applied only where the weekly payments were still being made, and not where such payments had been commuted for a lump sum. *Held* that the proviso applied both to cases where the payments under the 1906 Act had been redeemed and to those where they had not, and that where, as here, the accident had happened prior to 31st December 1923, the workman was entitled to receive the payments in question.

The Workmen's Compensation Act 1923 enacts—Section 1—"The Workmen's Compensation (War Addition) Acts 1917 and 1919 shall cease to have effect after the thirty-first day of December 1923, and are hereby repealed: Provided that the addition provided for in the said Acts shall continue to apply to a weekly payment payable to a workman under the Workmen's Compensation Act 1906 (hereinafter referred to as the principal Act) or under any enactment superseded by that Act, in respect of total incapacity arising from an accident which occurred on or before the said thirty-first day of December, so long as the workman remains totally incapacitated, and the addition shall, for all purposes, be treated as if it were part of the weekly payment."

This was a Stated Case on appeal from a decision of the Sheriff-Substitute (MALCOLM) at Dundee in an arbitration under the Workmen's Compensation Acts 1906 and 1923 between G. C. Taylor & Son, sack manufacturers, Jamaica Street, Dundee, *defenders* and *appellants*, and John Irons, calender worker, 130 Alexander Street, Dundee, *pursuer* and *respondent*.

The Case stated—"This is an arbitration arising by way of minute following on a recorded memorandum of agreement between the parties. The *facts* out of which the question raised by the minute arises are not in dispute, and are as follows:—1. On 20th July 1921 the respondent, who was a calender worker in the employment of the appellants, was injured by accident arising out of and in the course of his employment with them. The injury resulted in the fingers of one of the respondent's hands and the thumb, forefinger, and middle finger of the other hand having to be amputated, whereby he was, and still is, totally incapacitated. 2. By agreement, dated 10th August 1921, the appellants admitted liability to the respondent in compensation under the Workmen's Compensation Acts, and agreed that during his