It only remains to be seen whether, under the legal decisions which have been pronounced, it can be held that in such a case as the present, in which a magistrate sitting in a Police Court has pronounced a sentence of imprisonment for a term, without the option of a fine, where he had no jurisdiction to do so, he is free from any action. I am unable to find, after an examination of the cases quoted in the debate, that they lead to any such conclusion. The case of *Haggart* was a case similar to *Waterston's* case, being based on remarks made by Lord President Hope about the conduct of an advocate. *Harvey* v. *Dyce* was a case of slanderous words used by a sheriff. The only other case founded on in opening by the reclaimer was the case of *Haggard* in Appeal Cases 1892. That case has no bearing on the present, as the question there turned upon the right of a judge to dismiss a civil case as vexatious. One other case was referred to in reply by the reclaimer—that of *Anderson* v. *Gorrie*, 1895, 1 Q.B. 668. That case also has no bearing, being the case of a Supreme Court judge of a colony, and it was held that his position was analogous to that of a Supreme Court judge in this country, and that he could not be sued for an act done in his capacity as judge, whether he acted rightly or wrongly.

On the question whether in this case it is necessary to aver specific malice, and to put malice in issue, I concur with the Lord Ordinary that the case being one in which the wrong complained of was an entirely *ultra vires* act by the magistrate, it is not necessary for the pursuer to prove malice. I adopt the words of Lord Pitmilly, who said in a similar case—"It is no matter whether it was from error or malice, if . . . grossly illegal and irregular, the party is entitled to claim damages alike from the private party and the judge."

But I guard myself, as he did, from its being supposed that any *culpa levissima* would warrant damages against a judge.

This doctrine is emphatically confirmed by Bell in his Principles, where too he says—"He (the magistrate) will also be liable if there be gross irregularity in imprisonment, though no malice be shown."

I would therefore move your Lordships to adhere to the Lord Ordinary's interlocutor. His Lordship has held that the case is not suitable for trial by jury. In accordance with practice, the discretion of the Lord Ordinary will not be interfered with except in very special circumstances. But in the present case I am satisfied that the Lord Ordinary has exercised his discretion wisely.

The Court refused the reclaiming note, adhered to the interlocutor reclaimed against, and remitted the cause to the Lord Ordinary to proceed.

Counsel for the Pursuer (Respondent)—George Watt, K.C.—Ingram. Agent—Henry Robertson, S.S.C.

Counsel for the Reclaimer—Morison, K.C.—Murray. Agents—Macpherson & Mackay, S.S.C.

Thursday, May 30.

FIRST DIVISION.

GOODWINS, JARDINE, & COMPANY, LIMITED, *v.* CHARLES BRAND & SON.

(Reported *ante* July 19, 1905, 7 F. 995, 42 S.L.R. 806, and March 15, 1907, 44 S.L.R. 553.)

Expenses—Taxation—Fees to Counsel—Proof and Hearing in Outer House—Hearing in Inner House—Cause of Value and Complexity.

In a cause dealing with the supply of material for a large railway contract there was in the Outer House a proof lasting four days, followed by a hearing on evidence lasting two days, and in the Inner House a hearing lasting four days. The pursuers having been successful, and having been awarded expenses, charged the following fees for senior and junior counsel respectively, viz., thirty and twenty guineas for each day of the proof, fifteen and ten guineas for each day of the hearing on evidence, twenty and fifteen guineas for each of the first three days of the hearing in the Inner House, fifteen and ten guineas for the fourth day. The Auditor allowed for the first day of the proof twenty and fifteen guineas, and for the remaining days fifteen and twelve guineas, for the hearing on evidence twelve and four guineas, and for the hearing in the Inner House for the first day fifteen and twelve guineas, and for the remaining days twelve and ten guineas.

On a note of objections, *held* that the Auditor should have considered the largeness of the amount at stake in the cause and its complexity, involving much preparation, and fees *allowed* for the proof of twenty-five and eighteen guineas for the first day and twenty and fifteen guineas for the remaining days, and for the hearing on evidence fifteen and ten guineas for each day, the fees in the Inner House remaining as taxed.

Shaw & Shaw v. *J. & T. Boyd*, March 7, 1907, 44 S.L.R. 460, *approved*.

This case is reported *ante ut supra*.

On March 26, 1906, the Lord Ordinary (DUNDAS) after a four days' proof (March 5 to 8), and a two days' hearing (March 14 and 15), had pronounced an interlocutor making findings. The defenders reclaimed, but the First Division after a four days' hearing (February 18 to 21, 1907), on March 15, 1907, pronounced this interlocutor—"Adhere to the said interlocutor except *quoad* the second and eighth findings in lieu of which findings find (second) that the pursuers are entitled to charge in respect of the girder work in dispute at the rate of 13s. 3d. per hundredweight, and (eighth) that the pursuers are entitled to interest upon the sums for which decree falls to be pronounced in their favour at the rate of 4 per centum per annum from

13th October 1899 to the date of raising the action, viz., 24th October 1902, and thereafter at the rate of 5 per centum per annum till payment: Therefore find the defenders liable to the pursuers under the first conclusion of the summons in the sum of £3486, 4s. 3d., and under the second conclusion in the sum of £3724, 4s. 7d., both with interest as aforesaid, and decern: Find the pursuers entitled to expenses both in the Outer and Inner House, subject to deduction of one-fourth of the taxed amount thereof as modification, and remit. . . ."

The pursuers (respondents) presented a note of objections to the Auditor's report. The objections were as to the fees allowed to counsel.

The fees charged and those allowed by the Auditor were :—

Date. 1906.		Fees charged.			Fees allowed by Auditor.		
Mar. 5.	Senior Counsel for Proof	£33	1	6	£22	1	0
,,	Junior Counsel . .	22	1	0	16	10	9
Mar. 6.	Senior Counsel . .	33	1	6	16	10	9
,,	Junior Counsel . .	22	1	0	13	4	7
Mar. 7.	Senior Counsel . .	33	1	6	16	10	9
,,	Junior Counsel . .	22	1	0	13	4	7
Mar. 8.	Senior Counsel . .	33	1	6	16	10	9
,,	Junior Counsel . .	22	1	0	13	4	7
Mar. 14.	Senior Counsel for Hearing . . .	16	10	9	13	4	7
,,	Junior Counsel . .	10	17	6	4	9	0
,,	Agent . . .	1	13	4	1	10	0
Mar. 15.	Senior Counsel . .	16	10	9	13	4	7
,,	Junior Counsel . .	10	17	6	4	9	0
,,	Agent . . .	1	13	4	1	10	0
1907.							
Feb. 18.	Senior Counsel for Hearing (Inner House) .	22	1	0	16	10	9
,,	Junior Counsel . .	16	10	9	13	4	7
Feb. 19.	Senior Counsel . .	22	1	0	13	4	7
,,	Junior Counsel . .	16	10	9	10	17	6
,,	Agent . . .	2	0	0	1	13	4
Feb. 20.	Senior Counsel . .	22	1	0	13	4	7
,,	Junior Counsel . .	16	10	9	10	17	6
,,	Agent . . .	2	0	0	1	13	4
Feb. 21.	Senior Counsel . .	16	10	9	13	4	7
		£414	19	2	£260	15	8
	Taxed off				154	3	6
					£414	19	2

(The fee of ten guineas charged for junior counsel on February 21 was not altered.)

Argued for the pursuers (respondents and objectors)—The Auditor had erred here in not considering the amount which was at stake in the cause, £10,917 having been sued for, and its complicated nature involving much preparation. These two facts entitled counsel to higher fees than would otherwise have been allowed—*Shaw & Shaw* v. *J. & T. Boyd, Limited*, March 7, 1907, *ante*, p. 460. Fees of twenty-five and fifteen guineas a-day to senior and junior counsel respectively at a jury trial had been allowed, and that in a case of less financial importance and less complexity—*Rees* v. *Henderson*, May 28, 1902, 4 F. 813, 39 S.L.R. 640. The fees charged should be allowed.

Argued for the defenders (reclaimers)—The Auditor was right, and his taxation should be upheld. Fees similar to those he had allowed had been approved in other cases of lengthy proofs—*Burrell & Son* v. *Russell & Company*, October 24, 1900, 3 F. 12, 38 S.L.R. 8. *Rees* v. *Henderson*, *cit. sup.*, was not in point, being a jury trial, and counsel in jury trials being entitled to higher fees—*Wilson* v. *North British Railway Company*, December 13, 1873, 1 R. 304, 11 S.L.R. 155.

LORD PRESIDENT—The question raised in this note of objections is as to fees to counsel. Taking the fees of senior counsel in the case, I find that thirty guineas and twenty guineas were paid and that twenty guineas and fifteen guineas have been allowed by the Auditor. Now, I have nothing more to say than what I said in the case of *Shaw* v. *Boyd* which was quoted to us. My observations in that case were concurred in by your Lordships. In the case of *Shaw* v. *Boyd* I indicated quite clearly that there were cases where what may be looked upon as a normal fee might fairly be exceeded. I said that I did so as a guidance for the Auditor in future. I have no doubt this case which we have before us is *a fortiori* of *Shaw* v. *Boyd*. In this case your Lordships have the advantage of having heard the whole argument and read the proof, so that you are quite familiar with the circumstances of the case. The two considerations which I put before your Lordships in *Shaw* v. *Boyd* for fixing what is a proper fee were—first, the trouble involved in the preparation of the case, and second, the amount at stake. The amount at stake here is very large—very much larger than in the case of *Shaw* v. *Boyd*. Then as regards trouble in preparation, the trouble in preparation in this case must have been very considerable, because the case was complicated, and there was the necessity for anterior preparation in connection with a great many technical drawings. That being so, I think that the fee here ought to have been allowed on a larger scale than the ordinary one. Therefore I propose that the fees of the senior counsel should be twenty-five guineas for the first day and twenty guineas for the other days, and that the fees for junior counsel should be altered in the same proportion.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court sustained the objections to the extent of £41, 6s. 2d., and gave decree.

[The sum of £41, 6s. 2d. was arrived at thus:—Fees allowed by Court in Outer House, Inner House fees remaining as taxed—

March 5	Senior Counsel	£27	11	3
	Junior ,,	19	16	10
March 6	Senior ,,	22	1	0
	Junior ,,	16	10	9
March 7	Senior ,,	22	1	0
	Junior ,,	16	10	9
March 8	Senior ,,	22	1	0
	Junior ,,	16	10	9
March 14	Senior ,,	16	10	9
	Junior ,,	10	17	6
	Agent - -	1	13	4
March 15	Senior Counsel	16	10	9
	Junior ,,	10	17	6
	Agent - -	1	13	4
		£221	6	6

£221, 6s. 6d. was £55, 1s. 7d. more than the

corresponding taxed fees of the Auditor, but there fell to be deducted the one-fourth of modification, viz., £13, 15s. 5d., leaving £41, 6s. 2d.]

Counsel for the Pursuers (Respondents and Objectors) — Morison, K.C. — Black. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defenders (Reclaimers)— Murray. Agents — Alexander Morison & Company, W.S.

Saturday, June 1.

FIRST DIVISION.

[Sheriff Court at Glasgow.

MORRISON *v.* VALLANCE'S EXECUTORS.

Process — Citation — Registered Letter — "Last Known Address"—"Legal Domicile or Proper Place of Citation"—Service by Registered Letter Addressed to a Defender Known to be Furth of Scotland at his Last Known Address being the Pursuer's House—Citation Amendment (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 77), *sec.* 3 — *Act of Sederunt, December* 14, 1805, *sec.* 1.

In an action in the Sheriff Court in 1893, by a sister against a brother who had lived in her house but had left, not forty days previously, to go to sea as a doctor, service was effected by registered letter addressed to him there as his last known residence. The pursuer took in the letter and alleged that it was forwarded to the defender, but its receipt by him was not proved. Subsequently the pursuer obtained decree in absence, and on the brother's death in 1906 she claimed on his estate. His executors had themselves sisted as defenders in the action, and reponed against the decree. They pleaded that the proceedings were void on the ground of incompetent service.

Held that the pursuer was barred by her actings from pleading that the citation was good under the Citation Amendment (Scotland) Act 1882, sec. 3.

Opinion by the Lord President, preferring the dictum of Lord President Robertson in *Corstorphine* v. *Kasten*, December 13, 1898, 1 F. 287, 36 S.L.R. 174, to that of Lord Jeffrey in *Brown* v. *Blaikie*, February 1, 1849, 11 D. 474, to the effect that after a person goes from his last known place of residence in Scotland his domicile of citation remains for forty days at that residence.

Process — Citation — Defenders Appearing but Objecting to Citation — Executors Objecting to Citation on Deceased — Sheriff Courts (Scotland) Act 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 12, *sub-sec.* 2.

The Sheriff Courts (Scotland) Act 1876, sec. 12, enacts — "With regard to writs issuing from the Sheriff Courts the following provisions shall have effect. . . . (2) A party who appears shall not be permitted to state any objection to the regularity of the execution or service as against himself of the petition by which he is convened."

Held that executors of a deceased defender against whom decree in absence had gone out, having had themselves sisted as defenders and reponed against the decree in absence, were entitled to plead that the service had been irregular and the proceedings therefore void.

The Citation Amendment (Scotland) Act 1882 (45 and 46 Vict. cap. 77), sec. 3, enacts— "In any civil action or proceeding in any court or before any person or body of persons having by law power to cite parties or witnesses, any summons or warrant of citation of a person, whether as a party or witness, or warrant of service or judicial intimation, may be executed in Scotland by an officer of the court from which such summons, warrant, or judicial intimation was issued, or any officer who according to the present law and practice might lawfully execute the same, or by an enrolled law agent, by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served, or to his last known address, if it continues to be his legal domicile or proper place of citation, or to the office of the keeper of edictal citations, where the summons, warrant, or judicial intimation is required to be sent to that office, a registered letter by post containing the copy of the summons or petition or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation."

The Act of Sederunt 14th December 1805 (passed in relation to the Bankruptcy Act 1793 (33 Geo. III, cap. 74), which was repealed in 1814) provides—"(1) That where any person against whom legal diligence is meant to be executed, or who is to be cited as a party in any judicial proceeding, has left the ordinary place of his residence, which may render it doubtful whether he is within the kingdom of Scotland or not, and consequently whether the charge or citation against him ought to be executed at his dwelling-house or at the Market Cross of Edinburgh and Pier and Shore of Leith, when he is not personally found, it shall in time coming be held and presumed that the said person after forty days' absence from his usual place of residence, but not sooner, is furth of the kingdom of Scotland; and therefore, that within the said forty days the citation or charge may be at his late dwelling-house, but after that period must be at the Market Cross