intimated to pursuer's agents that their clients were not to proceed with the appeal.

Thereafter the pursuer presented a note to the Lord Justice-Clerk, in which he stated, *inter alia*, that after leave to appeal to the House of Lords had been granted, defenders' agents requested to know the names of the London solicitors who were to act for the pursuer in the appeal, in order that they might advise their London solicitors accordingly; that pursuer's agents thereupon instructed London solicitors to act for him, and advised the defenders' agents thereof; that various meetings and some correspondence took place between the London solicitors of the defenders and the London and Edinburgh solicitors of the pursuer, and that in consequence thereof pursuer had incurred legal expenses to his Edinburgh and London solicitors which could not be recovered in his account of expenses in the action at his instance against the defenders. The pursuer therefore craved the Court, "in respect of such leave to appeal to the House of Lords having been granted to [the defenders], and they having intimated that they are not to proceed with an appeal, and in consequence [the pursuer] having been put to legal expenses, to allow him to make up an account thereof, and to remit the same to the Auditor to tax and report. . . ."

On the note appearing in Single Bills, counsel for the pursuer moved that the prayer be granted.

There was no appearance for the defenders.

LORD JUSTICE-CLERK—I do not think that this note should receive effect. The condition of matters is this. The case before us has been finally disposed of by a judgment which took it entirely out of our hands. The only thing that remains to be done is to decern for expenses, and a petition for leave to appeal to the House of Lords having been granted, there can be no further proceedings in this Court. That being so, and the appeal having been dropped, we are now asked to give a decerniture allowing or modifying expenses incurred by the petitioner in connection with the appeal. I think that is out of the question, and I am clear that we have no power to do any such thing.

I may add that it is very doubtful, indeed, even if the case had proceeded, whether these expenses would have been included in the costs as they might be granted by the House of Lords.

LORD ARDWALL—I entirely concur. We have asked for authority, but counsel has frankly stated that there is no authority for the prayer of this note, and, apart from authority, it appears to me that the prayer asks us to do something which it is incompetent for us to do, viz., to deal with the expenses of an appeal to the House of Lords after we have exhausted the case so far as this Court is concerned. If the appeal had gone on these expenses would have formed part of the expenses to be dealt with by the House of Lords when the case came before them, and the fact that the appeal has not been proceeded with does not give this Court any right to deal with them.

LORD MACKENZIE—I concur.

LORD DUNDAS was absent and LORD SALVESEN was sitting in the Lands Valuation Appeal Court.

The Court refused the prayer of the note.

Counsel for the Pursuer — Macdonald. Agents—Paterson & Salmon, Solicitors.

Wednesday, February 8.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

SHAW *v.* BURNS.

Reparation — Wrongous Information to Police—Malice—Averments—Relevancy.

A cellarman who had been dismissed from his employment with a firm of wine merchants brought an action of damages against the manager, in which he, *inter alia*, averred that after being fifteen years in the firm's employment his health broke down through overwork; that after his discharge from the infirmary the defender sent for him to come and see him at his office; that on his doing so the defender began to blackguard the pursuer's wife and the pursuer; that while the pursuer was in the infirmary the defender had called for the pursuer's wife, and intimated that he would require the house which the pursuer and his wife then occupied; that at a second interview with the pursuer and his wife he (the defender) expressed himself in very angry terms with the latter for having written to a friend of the head of the firm on behalf of her husband, and that he then and there dismissed him from the firm's employment; that on the pursuer asking for a certificate of character the defender refused to give him one; that on a subsequent day the pursuer, while waiting in the street for a paper, was accosted by two policemen, who informed him that a complaint had been lodged against him for threatening the firm's employees, and asked him to move on; and that his being so asked was due to the defender having informed the police that he (the pursuer) was threatening the defender's life, and was loitering about with the intention of doing the defender harm.

Held that malice had been relevantly averred.

Process—Issue—Form of Issue—Competency of Putting in Issue the Alleged Consequent Damage.

A pursuer is not entitled in every case to put in issue not only the facts which constitute the ground of action but also the alleged consequent damage, *e.g.*, where the damage alleged is an unusual consequence.

On 31st October 1910, Andrew Shaw, Dalry Road, Edinburgh, *pursuer*, brought an action against William Burns, Clifton Terrace, Edinburgh, *defender*, for £200 damages for having, as he alleged, given wrongous information to the police, in consequence of which he (the pursuer) was accosted in the street by two policemen and ordered to move on. The pursuer had been for about fifteen years prior to 1910 in the employment of Messrs W. & A. Gilbey, wine merchants, as cellarman and warehouseman at their stores in Clifton Terrace, Edinburgh. The defender during that time acted as manager for Messrs Gilbey at the stores in question.

The pursuer averred—"(Cond. 2) The pursuer's work was very arduous and his hours very long. He started work at 6 a.m. and did not finish till any time between 6 and 9·30 in the evening. He was allowed half an hour off for breakfast and an hour for dinner. In June 1908 the engineman at said stores turned ill, and thereafter the pursuer had also to do his work for him with the exception of about three months (October-January) each year. The pursuer's health, which had always been excellent, began to give way under the strain of so much work and so long hours, and about the month of June 1910 the pursuer began to feel very ill both physically and mentally, and had difficulty in sleeping at nights. A doctor was called in, and he ordered the pursuer to take a week's holiday. On the expiry of that period the pursuer returned to his work, but was only able to stay at it for two or three days when he again had to stop and go to bed. He was thereafter removed to the Infirmary, where he stayed for about three weeks, when he was discharged as recovered. A day or two thereafter the defender sent for the pursuer to come and see him at his office. The pursuer went, and the defender, after asking for the pursuer's health, immediately started to blackguard the pursuer's wife and the pursuer himself. It appears that while the pursuer was in the Infirmary the defender had called for the pursuer's wife, and intimated that he would require the house in which pursuer and his wife were staying. The pursuer's wife was very much surprised and annoyed at such an intimation, thinking that it meant the defender was going to dispense with her husband's services altogether. She accordingly wrote to a former employer of her own, who, she was aware, was a friend of the head of Gilbey's firm, to see if anything could be done for her husband. In consequence of said letter a communication was received by the defender from the head of the firm in regard to the matter. The defender was much annoyed at receiving this communication, and at a second interview shortly afterwards between the pursuer and the defender the latter expressed himself in very angry terms with reference to what had been done by the pursuer's wife, and he then and there, after giving to the pursuer a small sum of money in name of salary for the time he was ill, dismissed him from the firm's employment. The defender clearly showed by his conduct and language that he was animated by feelings of the bitterest animosity towards both the pursuer and his wife. . . . (Cond. 3) The pursuer and his wife accordingly left the house which they had occupied at the stores and went to stay in lodgings. The pursuer asked the defender for a certificate of character as a workman, but the defender refused to give him one, although the pursuer had worked for him faithfully and well, and had never given the defender any reason to find fault with him. This the defender did to gratify the feelings of spite and ill-will which he had come to entertain against the pursuer and his wife, and to revenge himself against them for what the pursuer's wife had done as above condescended on. The result has been, that although the pursuer has applied for several situations he has failed to get one. On or about Monday, 12th September 1910, the pursuer had gone out for a walk, and on his way home, about 1 o'clock p.m., while he was waiting at the corner of Clifton Terrace and Grosvenor Street for the first edition of the evening paper to arrive, the defender, his wife, and a lady friend passed on the pavement. They saw the pursuer, and the pursuer saw them, but he took no notice of them. Shortly after they had passed, and while pursuer was still waiting for his paper, a sergeant of police and a police constable approached him. The sergeant asked pursuer if he was Shaw, to which pursuer replied in the affirmative. The sergeant then told the pursuer that he had had a complaint lodged against him for threatening Gilbey's workers. Although the pursuer stoutly denied the charge, for which there was not the slightest foundation, the constables ordered him to move on and not to stand about again as he was doing. The pursuer had no option but to do so. He was very much upset by the action of the constables, done as it was in broad daylight on the public street, and while there were many people passing. . . . (Cond. 4) . . . On inquiries being made it was discovered, and the pursuer now avers, that the defender on or about the said 12th September 1910 lodged a complaint with the Chief-Constable, which complaint was transmitted to the police-office at Torphichen Street, with instructions to attend to it. Said complaint was to the effect that the pursuer was threatening the defender's life or person, and was loitering about in order to get the opportunity of doing him (the defender) personal harm. (Cond. 5) The said charge and statement were absolutely false and without the slightest foundation, and were calumnious, and were made by the defender maliciously and without probable or any cause, in the knowledge that they were false, and they were made merely in order to gratify the feelings of ill-will which he then entertained towards the pursuer and his wife, as a result of the incidents above condescended on. The charge made against pursuer is that of a serious criminal offence, and falsely accused him with threatening the

life and person of defender, and intending to do him grievous bodily harm. . . ."

The defender pleaded, *inter alia*—"(1) The pursuer's averments being insufficient and irrelevant to support the conclusions of the summons, the action should be dismissed."

On 11th January 1911 the Lord Ordinary (SKERRINGTON) approved of the following issue—"Whether, on or about 12th September 1910, the defender falsely, calumniously, maliciously, and without probable cause, informed, or caused information to be given to the Chief-Constable of the City of Edinburgh, or one of his subordinate officers, accusing the pursuer of having loitered in or near Clifton Terrace, Edinburgh, with the object of doing personal injury to the defender, in consequence of which the pursuer, while standing in or near said terrace, was accosted on said date by two police officers and ordered to move on, to the loss, injury, and damage of the pursuer? Damages laid at £200."

Opinion.—"The pursuer was for many years a cellarman and warehouseman in the employment of an English firm of wine merchants which has a branch in Edinburgh managed by the defender. His wages were paid weekly, and latterly he had in addition a free house in the firm's premises, and acted as engineman. In this action he claims damages because of the defender's having given information to the police to the effect that after the pursuer had been dismissed and had left his house he loitered near the business premises with intent to do personal injury to the defender. It was debated whether such an action is properly one of slander. I respectfully agree with the present Lord President that a person who denounces another to the police has passed from the region of mere words to that of deeds—*Webster* v. *Paterson & Son*, 1910 S.C. 459, p. 468. In such cases the issue may either be similar to an issue of slander with the addition of 'without probable cause,' and with a statement of the consequences following on the information, as in *Lightbody* v. *Gordon*, 1882, 9 R. 934, 19 S.L.R. 703; or it may simply inquire whether the defender maliciously, and without probable cause, caused the pursuer to be apprehended—as in *Douglas* v. *Main*, 1893, 20 R. 793, 30 S.L.R. 726. In the present case, as the pursuer was only accosted by two police-officers in the public street and ordered to move on, he has properly founded his proposed issue primarily upon the information to the police, though he brings prominently before the jury the fact that the information was accepted as true, and was to some extent acted on. Subject to verbal corrections the issue is in proper form. The damage of which the pursuer complains consists partly of injury to his health alleged to be due to the accusation of a crime at a time when, he says, that his health was, and was known by the defender to be, precarious. Founding upon two English decisions as to special damage in slander actions—*Alsopp* v. *Alsopp*, 5 H. and N. 534; *Roberts* v. *Roberts*, 5 B. and S. 384—the defender's counsel asked me to delete these averments upon the ground that mental or physical illness is not a direct and natural consequence of an accusation of crime. I know of no rule of law or practice in Scotland which entitles me to prevent the pursuer from proving, if he can, that he has suffered in health as a direct consequence of the defender's action. I cannot now decide that such a result is impossible. If the jury is properly directed at the trial, the defender ought not to suffer any prejudice from the admission of such evidence.

"As regards the relevancy of the averments of malice, the pursuer avers that the defender made the charge to the police knowing it to be false. In actions like the present there is no general rule that facts independent of the act complained of, and showing antecedent malice, must be averred—*Brown* v. *Fraser*, 1906, 8 F. 1000, 43 S.L.R. 741. A person smarting under an injury may make an accusation against a stranger without caring whether it is true or false. There is also force in Lord Young's observation that a man may have an enemy without knowing of it—*M'Ternan* v. *Bennett*, 1898, 1 F. 333, 36 S.L.R. 239. Lastly, although want of probable cause does not prove that the defender acted maliciously—as he might have been honest but stupid—the absence of reasonable ground for believing the charge may be some evidence that the defender did not in fact believe it to be true—*Clark* v. *Molyneux*, 1877, 3 Q.B.D. 237, and Cases in Cooper on Defamation, p. 205. Accordingly, I should be slow to refuse the pursuer an issue unless it was clear from his own averments that a jury could not competently come to the conclusion that the defender had made the accusation to the police from some indirect motive, and not for his own protection or out of duty to the public. In the present case, however, the pursuer alleges antecedent malice. He avers that his mental and bodily health having given way, he was removed to the Infirmary, where he stayed for three weeks. Meanwhile the defender called upon the pursuer's wife and told her that he would require the house in which she and her husband lived. It is not alleged that in so acting the defender was influenced by any motive except his duty to his principals, or that he was not entitled to resume possession of the house. The pursuer's wife was, however, 'very much surprised and annoyed,' because she thought that the defender intended to dispense with her husband's services. Unfortunately (as after events proved) she got a former employer of her own to write to one of the principals on behalf of the pursuer. The result was a 'communication' from the principal to the defender which 'much annoyed' the latter. After the pursuer had left the Infirmary there followed two interviews between him and the defender. At the first interview the defender 'blackguarded the pursuer's wife and the pursuer,' and at the second he 'expressed himself in very angry terms with reference to what

had been done by the pursuer's wife.' He also dismissed the pursuer from the firm's employment and refused him a certificate of character. The defender was within his legal rights in so acting, but the pursuer attributes his dismissal and the refusal of a character to malice on the part of the defender and to a desire for revenge. These averments of malice look very like an attempt to prove *ignotum per ignotius*. *Prima facie* the defender as deputy employer must be assumed to have acted honestly and from a sense of duty to the common employer. Even if the jury should think that he acted mistakenly and harshly, it would not follow that he acted maliciously. But I think that the pursuer has stated a case which entitles him to have the decision of a jury. I have adjusted the issue."

The defender reclaimed. He also craved the Court to vary the issue approved of by the Lord Ordinary by deleting the words "in consequence of which the pursuer, while standing in or near said terrace, was accosted on said date by two police-officers and ordered to move on."

Argued for reclaimer—The case was irrelevant, in respect that (1) malice was not relevantly averred, and (2) the injury complained of was too remote to be remitted to probation. (1) No action lay for giving information to the police, unless malice and want of probable cause were both relevantly averred. It was not enough merely to aver that the defender acted maliciously in making the charge complained of; facts must be alleged which would entitle a jury reasonably to infer malice. Moreover, such facts must be independent of the incident giving rise to the action, and must show antecedent ill-will on the part of the defender — *M'Ternan* v. *Bennett*, December 21, 1898, 1 F. 333, 36 S.L.R. 239; *Macdonald* v. *M'Coll*, July 18, 1901, 3 F. 1082, 38 S.L.R. 781; *Brown* v. *Fraser*, June 27, 1906, 8 F. 1000, 43 S.L.R. 741; *Kufner* v. *Berstecher*, 1907 S.C. 797, 44 S.L.R. 508. Such facts were awanting here. (2) No damage could possibly result from merely being asked to "move on"—*Sheppeard* v. *Fraser*, January 26, 1849, 11 D. 446. That being so, the issue should be altered as proposed in the notice. The following cases were referred to—*Webster* v. *Paterson & Son*, 1910 S.C. 459, 47 S.L.R. 307; *Lightbody* v. *Gordon*, June 15, 1882, 9 R. 934, 19 S.L.R. 703, and *Lundie* v. *MacBrayne*, July 20, 1894, 21 R. 1085, 31 S.L.R. 872.

Counsel for respondent were not called on.

LORD PRESIDENT—According to the pursuer's story there seems to me to be very little ground upon which the action may be maintained, and there seems a great deal of matter which is probably not really relevant. But it is one of those cases where I do not see my way to take the matter away from investigation altogether, and where I am afraid we must simply trust that the jury will attend to the instructions which the Judge will give to them at the trial as to what is and what is not relevant.

So far as the question of malice is concerned the averments are not ample, but I think they are sufficient to allow the pursuer to prove the general relations which he had with the defender antecedently to the act complained of, in order that he may convince the jury, if he can, that the defender's action in communicating with the police was an action which was done to gratify the private spite of the defender, and was not done in the legitimate use of his rights as a citizen to appeal to the police for protection or for the maintenance of good order, or to secure the discipline of the streets.

Then as regards the question of damage it certainly does come down to the very minimum when all that was done by the police was to order a man to move on, because whatever the origin of that order or the reason for which it was issued, the actual effect of being moved on is at the moment the same. If I am told, as I suppose everybody has been told, by a policeman to "move on" and I hear the injunction, it does not seem to me to make any difference as to the harm that injunction does me whether when I come to meditate what had caused the policeman to act, I consider that he acted because he thought me a suspicious character or a thief, or because he thought the pavement unduly crowded. It comes down to the very minimum of damage, and I should have been prepared to have turned the action out of Court upon that ground had it not been for one thing, namely, that the mere moving on was only one consequence of the information given to the police. The wrong, if there was a wrong, was in the information given to the police. Now it is roundly asserted that the complaint to the police was to the effect that the pursuer was threatening the defender's life and person, and was loitering about in order to get an opportunity of doing the defender personal harm. That is put into the issue by putting to the jury whether the information given was accusing the pursuer of having loitered with the object of doing personal injury to the defender. That seems to me to save the relevancy. Accordingly I think the reclaiming note should be refused.

As regards the motion to vary the issue, I confess if the matter was quite open I should have been rather in favour of keeping out of the issue the statement of the fact which followed upon the information being given—I mean "in consequence of which the pursuer was moved on." But it seems to me that in former cases it has been recognised that a statement of a consequence such as this may properly be put in the issue, and in this case I do not see any harm in its being put in. I only mention this because I do not think that a pursuer will be entitled in every case to have such a statement put in issue, because if what followed upon the information was an unusual consequence, then I do not

think that it at all follows that the defender is to be held liable for that consequence.

LORD KINNEAR—I agree. I think that the case is a very narrow one, but that it must go to a jury. Upon the second point I agree also that it is not in general desirable or in accordance with our usual practice to put to the jury as a question of fact in the issue not only the facts which constitute the ground of a claim but the consequent damage to the pursuer. I am not at all persuaded that it is in general for the interest of the pursuer to do anything of the kind, because if he does he ties up his claim for a verdict upon the main ground of action, with a finding which he might completely fail in establishing without failing to prove his general case. It rather seems to me that in most cases it would be more embarrassing for the pursuer than the defender to have an unnecessary consequence put in his issue.

But I agree that we ought to follow the practice which seems to have been adopted, especially in the case of *Lightbody*, and in the present case I do not think it is likely to do any harm. I think we should approve of the issue.

LORD JOHNSTON — I am of the same opinion, and have nothing to add.

LORD MACKENZIE was absent.

The Court adhered, refused the motion to vary the issue, and remitted to the Lord Ordinary to proceed as accords.

Counsel for Pursuer (Respondent)—Crabb Watt, K.C.—Kemp. Agent—T. E. Gilbert Taylor, Solicitor.

Counsel for Defender (Reclaimer)—Morison, K.C.—A. M. Mackay. Agents—M. MacGregor & Company, W.S.

Thursday, February 9.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

THE NATIONAL BENEFIT TRUST, LIMITED *v.* COULTER.

Contract — Offer and Acceptance — Consensus in Idem—Locus Pœnitentiæ—Rei interventus—Payment.

The proposal form of a benefit investment company contained an application "for a bond for £300, the monthly subscription to be thirteen shillings, payable on the first day of each month for a period of thirty years, such bond to be issued in accordance with your usual conditions." An applicant having filled up and returned the form, received in reply "a bond certificate," stating that the holder was entitled to receive a bond "subject to the usual conditions, a copy of which is endorsed hereon, and the same can be had upon application and payment of the stamp duty payable thereon, all subscriptions payable in the meantime being subject to the same conditions." These conditions provided, *inter alia*, that a register of all bonds or certificates issued should be kept at the company's office, and that the registered holder would be regarded as exclusively entitled to the benefit of the bond. The applicant paid the monthly subscriptions for over seven years and then sought to repudiate the contract. The company having brought an action against him for declarator that a valid and binding contract had been concluded by the offer, certificate, and subsequent payments, *held* that though the contract might be incomplete, and might have been repudiated by the defender at the time he received the certificate, still by the subsequent payments made by him under the conditions by which he would have been bound if he had received the bond, he had effectually set up the contract.

Laing v. *Provincial Homes Investment Company, Limited*, 1909 S.C. 812, 46 S.L.R. 616, *distinguished per* Lord Ardwall.

The National Benefit Trust, Limited, incorporated under the Companies Acts, 1862 to 1886, and having their registered office at 10 Finsbury Square, London, *pursuers*, brought an action against Charles Coulter, ironmonger, Broxburn, *defender*, in which they sought declarator that a valid and binding contract had been concluded between the pursuers and the defender in virtue of pursuers issuing to defender, in reply to his application for a bond, a certificate that he was entitled to receive a bond, and by defender accepting the certificate and making monthly payments thereunder for a period of more than seven years. There was also a conclusion that defender was not entitled to demand repayment of the monthly subscriptions already paid by him, or any part thereof, or any sum in respect thereof, until he had made payment of these monthly subscriptions for a period of thirty years as stipulated in the contract.

The pursuers pleaded—"(1) A valid and binding contract having been concluded between the pursuers and the defender as above condescended on, the pursuers are entitled to decree of declarator as concluded for, with expenses. (2) In the circumstances stated, the defender is barred *personali exceptione* from disputing the validity of the contract concluded between him and the pursuers."

The defender pleaded—"(3) Decree of declarator should be refused and the defender assoilzied in respect that no valid and binding contract exists or existed between the parties owing to the absence of *consensus in idem*, and to there being no *termini habiles* for the completion of said bond. (4) The defender having only consented to be bound by a bond issued in terms of his said order, and said bond not having been granted and delivered, he is not bound in any way to the pursuers,