open question, which will certainly not be determined by this case, for the fair inference from the facts here is, that this was a transaction in the ordinary course of business.

There is nothing very remarkable in the circumstance of an article of this kind being returned when the purchasers found they had no use for it. It is not indeed a transaction in the ordinary course of business in the sense of being a sale of an article in which the bankrupts dealt, or which the other parties were to use for the purposes of their trade, but it is an ordinary enough circumstance in the course of business. It is a transaction, or, to speak more correctly, it is incident to transactions in which the parties were ordinarily engaged.

It is on that ground, combined with the entire absence on the part of both parties of any intention to create a preference, that I think our judgment must be based.

The Court pronounced an interlocutor, which, after certain previous findings in fact, proceeded :—

> Find that on said 6th September 1875 the price of the lathe due under the sale by the defenders to the said bankrupts was unpaid, and that they were on the return of the lathe credited in the defenders' books with its value : Find that on the said 6th September the defenders had no expectation or suspicion that the bankrupts were insolvent or likely to stop payment : Find that the bankrupts had no apprehension or expectation that they would require to stop payment : Find that neither the defenders nor the bankrupts had any intention to create any preference in favour of the defenders, or to satisfy or pay the debt of £180 due by the bankrupts to the defenders for the price of the said lathe, to the prejudice of other creditors of the bankrupts : Find that in these circumstances, and in law, that the return of the lathe was made in the ordinary course of business, and is not reducible under the Act 1696, c. 5 : Therefore assoilzie the defenders, and decern, &c.

Counsel for the Pursuer (Respondent)—Asher —Jameson. Agent—John Martin, W.S.

Counsel for the Defenders (Appellants) — M'Laren—Begg. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, December 12.

SECOND DIVISION.

KENNEDY *v.* POLICE COMMISSIONERS OF FORT-WILLIAM.

Reparation—Wrongous Interdict—Relevancy—Liability of Police Commissioners under Statute 25 *and* 26 *Vict. cap.* 101—*Malice and Want of Probable Cause.*

> The Police Commissioners of a burgh, appointed under the General Police Act, 25 and 26 Vict. cap. 101, interdicted the owner and occupier of certain premises in said burgh from executing certain alterations upon his premises which he had commenced. Upon appeal which the interdict was recalled.—*Held*, in an action of damages against the Commissioners for wrongous use of interdict, that the defenders' position as Commissioners gave them no more protection than would be afforded to other members of the public, none being afforded them under the statute ; that the action was relevant ; and that it was not necessary for the pursuer to aver malice and want of probable cause.
>
> *Distinction* (*per* Lord Ormidale) between actions of damages for use of legal forms of process, *e.g.*, arrestment, and for the use of special diligence, *e.g.*, interdict or *meditatione fugæ* warrant.

The pursuer in this action, Colin Kennedy, was proprietor and occupier of a tenement which formed the north-west corner of Church Square in Fort-William. It was separated from Church Square by a piece of ground about 11 feet wide, enclosed by a dwarf wall and railing. On 1st July 1876 the pursuer entered into a contract to have certain works executed, whereby the front of his premises should be carried considerably nearer Church Square, and a considerable portion of the ground should be built upon. A petition was presented on 1st August 1876, and interim interdict was on 2d August granted against the operations by the Sheriff-Substitute of Inverness-shire, at the instance of the Police Commissioners of Fort-William, which was a police burgh under the General Police Act of 1862. That was on the allegation that the line of building was not being adhered to. The Sheriff thereafter recalled the interdict, and on appeal the Court of Session affirmed his decision.

The Commissioners had proceeded upon an order made upon Kennedy by which they had assumed power to prevent the building, and which it was now found by the above-mentioned judgment they had had no power to make. Pending the process of interdict, the pursuer submitted the order to review, when the Sheriff-Substitute pronounced an interlocutor quashing it. Thereafter a note of suspension and interdict was presented by the Commissioners to the Court of Session, praying the Court "to interdict, prohibit, and discharge the pursuer from building beyond the line of the outer column or pillar of the house adjoining that now in course of erection by him in Church Square, within the burgh of Fort-William ; and further, to ordain the said respondent to set backward the said building now in course of erection by him in Church Square, Fort-William, to the line of the outer pillar or column of the adjoining houses or buildings in said Square;" and craving interim interdict. The note was passed without granting interdict, and the case was reported to the Second Division, in respect of contingency with the appeal in the interdict case originating in the Sheriff Court at Fort-William. Upon January 9, 1877, the note of suspension was refused, with expenses.

The pursuer averred that the whole proceedings, and, in particular, the application for interim interdict on 1st August 1876, were wrongful and ruinous, and without just or probable cause,

and to his loss, injury, and damage. He therefore raised this action of damages.

It was averred by the defenders that the pursuer, contrary to the terms of the General Police and Improvement (Scotland) Act 1862, and without any warning, had commenced the preliminaries to the alterations on his premises, which involved the projection of the line of his house a considerable distance beyond the adjoining houses, and that before any part of the wall had been removed they had intimated their objection. That the pursuer had requested an opportunity of meeting the defenders, and after a meeting that they had given him permission to project the line a certain distance. That he had then appealed under sections 169, 396, and 397 of the Police Act, which they maintained was the proper course, but had proceeded with his alterations, which it was discovered involved a projection of the line of his house some distance beyond the line specified by the Commissioners. That in these circumstances, after intimation to the pursuer, they had considered it their duty to apply for interdict as already narrated. That throughout the whole of the proceedings they had been acting in good faith, and in the exercise of what they believed and were advised was their statutory duty, necessary for the protection of public interests.

They pleaded, *inter alia*—"(5) The proceedings having been taken by the Commissioners on reasonable grounds, and in the *bona fide* performance of their public duty under the statute, they are not liable in damages."

The Lord Ordinary (RUTHERFURD CLARK) granted the pursuer an issue in the following terms:—"Whether the defenders, by means of an interdict obtained by them against the pursuer on or about 2d August 1876, wrongfully prevented the pursuer from proceeding with building operations there in course of being executed by him on his premises in or near Church Square, Fort-William, to the loss, injury, and damage of the pursuer."

The defenders reclaimed.

Argued for them—(1) The law of Scotland did not hold Commissioners, such as the defenders, responsible for an innocent mistake in circumstances like the present, even on pursuer's showing. A public duty was laid upon the defenders to interfere; they were acting in *bona fide;* their actings were reasonable, and for a public purpose, and they were exercising a *quasi* judicial power, and an action against them could not be held relevant. This difficulty would have been avoided if the pursuer had taken the proper remedy and gone to the Sheriff under sections 169, 396, 397 of Police Act. (2) The recal of an interdict did not always prove that the party applying for it was wrong, to the effect of affording ground for an action of damages. Where a question arose in *bona fide* between conterminous proprietors in heritable subjects, there could be no action of damages arising from the use of an interdict to maintain the *status quo* (which was all the defenders in this case did), assuming that there was no *mala fides*, any more than there could be from raising a declarator. In the cases where an issue had been granted, a distinction had been drawn between cases connected with heritable property and cases founded upon contract or relating to moveables. This case could not be relevant without such an averment as would support the words "without probable cause." There must be a suggestion of some deceit.

Authorities—*Craig* v. *Peebles*, Feb. 16, 1876, 3 R. 441; *Begg* v. *Jack*, Oct. 26, 1875, 3 R. 35; *Miller* v. *Hunter*, March 23, 1865, 3 Macph. 740 (L. J.-C. Inglis upon distinction between a case of contract and a case of merely maintaining present state of possession); *Moir* v. *Hunter*, Nov. 16, 1832, 11 Shaw 32; *Volthekker* v. *Northern Agricultural Coy.*, Dec. 20, 1862, 1 Macph. 211; *Gordon* v. *Royal Bank*, 5 Shaw 164; *Abel, &c.* v. *Edmonds*, July 10, 1863, 1 Macph. 1061 (Lord Ordinary's note, 1064); *Gilchrist* v. *Anderson*, June 20, 1857, 29 Scot. Jur. 411; *Reid* v. *Bruce*, July 11, 1855, 17 D. 1100; *Robinson* v. *N. B. Railway*, March 10, 1864, 2 Macph. 841.

Argued for pursuer—There was not here such a case as involved the question of the position of the defenders. They were a public body, but not public officers, and, as here, simply in the position of a body of the pursuer's neighbours. Public bodies such as the defenders were in the same position with regard to third parties as the rest of the public. As a body of statutory trustees they could have no protection beyond what the statute gave them—*Christie* v. *Thomson*, June 12, 1858, 20 D. 1114. In regard to the defenders' contention that there was a distinction between cases relating to heritable property and those relating to moveable property or founded upon contract, there had been no principle to this effect laid down. If this was the case, the result would be that a meddlesome neighbour would be in a better position than a contractor, which was absurd. It was a mere accident that in cases relating to moveables or founded upon contract an issue had been granted, while cases relating to heritable property had failed. Here the defenders were in excess of their duty in applying for interdict, and an action was relevant against them without any averment of malice or want of probable grounds.

Authorities—*Stephen* v. *Police Commissioners of Thurso*, March 3, 1876, 3 R. 535; *Duncan* v. *Findlater*, Aug. 23, 1839, 1 Rob. App. 911; *Begg* v. *Jack* (quoted *supra*).

At advising—

LORD ORMIDALE—This is an action of damages for the wrongous use of interdict, and is a sequel to the case reported of date January 9, 1877, 4 R. 266. The defenders' objection was not so much to the terms of the issue as to the relevancy of the action for any issue or trial at all. They contended that in the circumstances, as disclosed and referred to by the pursuer himself, he had no maintainable claim for damages on account of what was obviously a mere mistake on the part of the defenders in regard to their statutory powers as Police Commissioners having charge, to some extent, of the streets of Fort-William, and right of interference with the buildings abutting on the same. As I think it would require to be shown very clearly and unmistakeably, before the Court would be warranted in intercepting an action in its progress to trial, that it was subject, on the ground referred to, to such an objection as that—and as I think this has not been shown—I have no hesitation in declining

to adopt the course suggested by the defenders, having regard to the pursuer's allegations. What the jury may do, and be entitled to do, when the whole circumstances are disclosed in evidence before them is another matter, which the Court cannot at present anticipate or deal with.

But the defenders also objected to the relevancy of the pursuer's action, and to the terms of the issue as settled by the Lord Ordinary for its trial, on the ground that it did not charge the defenders with having obtained the interdict complained of in *mala fide* and without probable cause; and in support of this objection various cases, relating not only to interdicts but also to the use of arrestments and inhibitions and *meditatio fugæ* warrants, were referred to.

Now, it is quite true that in actions of damages for the wrongous use of arrestments it was, I think, conclusively settled by the cases of *Brodie* v. *Young*, 19th February 1851, 13 D. 737, and *Henning* v. *Hewetson*, 12th February and 28th July 1852, 14 D. 487, as a general rule, that malice and want of probable cause must be averred by the pursuer and inserted in the issue. The reason of this is very aptly and correctly stated by Lord Moncreiff in the former of these cases, where he said—"Arrestment is a legal form of process, and a party using it *utitur jure suo*." It is of course assumed that the writ of arrestment itself, as well as the mode in which it has been used, is unobjectionable in form and regularity; and that being so, a party resorting to such a diligence merely does what every one is entitled to do, and is answerable only for the consequences if he has acted maliciously and without probable cause.

But in regard to actions of damages for the use of *meditatio fugæ* warrants the rule is different; for in *Ford* v. *Muirhead*, 19th May 1858, 20 D. 949, it was settled that an averment of malice and want of probable cause is not necessary, in respect that such warrants were not given as matter of ordinary right, but only as extraordinary remedies and on very precise and cogent statements by the party applying for them. When, therefore, it turns out that the statements in respect of which such a warrant has been obtained are incorrect, and that the warrant ought not to have been applied for, the party so in error is responsible in an action for the injury and damage caused by him, without it being necessary to aver or charge in the issue malice and want of probable cause.

On the same principle, I think it must be held as a general rule, applicable to the present and similar actions of damages in respect of ill-founded interdicts, that an averment or charge of malice and want of probable cause is not necessary. An interdict is not granted as matter of right. It is only granted on cause shown—that is, on a consideration and in respect of the representations of the party applying for it. If, therefore, it turns out that these representations are erroneous, or that for any other reason the interdict was ill-founded and ought not to have been applied for, it is only reasonable and just that the party obtaining and using it should answer for the injurious consequences, without it being necessary in an action of damages to aver, and in the issue to charge, malice and want of probable cause.

The distinction in this respect between actions of damages for the use of an interdict and actions of damages for the use of diligence, such as arrestment, is well brought out by the present Lord President, then the Lord Justice-Clerk, in the case of *Volthekker* v. *The Northern Agricultural Company*, 20th December 1862, 1 Macph. 211, which was an action of damages for the arrestment of a ship. His Lordship in that case, after explaining the principle on which it has been ruled that in actions of damages for the use of inhibition and arrestment it is necessary to instruct malice and want of probable cause, goes on to state—"But the rule does not hold in those cases where a party applies to the Court for some special diligence or remedy, and requires to make a statement or representation to the Court to give him the requisite authority, as in the cases of interdict, landlords' sequestrations, and warrants of parties in *meditatione fugæ*. In such cases the applicant must be answerable for the truth of the statements on the faith of which he obtains his warrant. Whether that statement was made in good faith or bad faith—if it was inconsistent with fact and unjustifiable—he must be answerable in the consequences." Accordingly, it was, in conformity with the principles which have now been explained, held, after full discussion, in the case of *Robinson, &c.* v. *The North British Railway Company* (10th March 1864, 2 Macph. 84), which was an action of damages for the use of interdict, that the action was relevant, and that an issue might and ought to be granted as it was, without the allegation or charge of malice and want of probable cause.

As that is comparatively a recent decision, and as the case of *Moir* v. *Hunter*, so much relied on by the pursuer here, was there considered and distinguished, it is unnecessary for me to say more than that I am quite satisfied with the issue the Lord Ordinary has in the present case approved of for the trial of the cause.

It is right, however, I should notice the plea which the defenders endeavoured to make, to the effect that as the present action is not against an individual, but a body of Commissioners, for their actings in discharge of their *quasi* public duty, they are entitled to a certain measure of protection, which an individual acting for himself and in his own interest would have no claim to. But as the statute under which the defenders here say they acted gives them no such protection, and as no authority was cited in support of their plea, while precedent, were it wanted, to the opposite effect is to be found in the recent cases of *Stephen* v. *The Police Commissioners of Thurso*, March 3, 1876, 3 Rettie 535, and *Young* v. *The Commissioners of the Harbour of Dumfries and the Navigation of the River Nith*, July 6, 1876, 3 Rettie 991, I have no hesitation in disregarding it. The defenders are just some of the police ratepayers of Fort-William chosen by the whole body to represent the interests of them all. They must therefore be answerable in the ordinary way, and in accordance with ordinary principles. They may or may not have relief over against their constituents, but as no such question is at present before the Court it would not be right to say anything that might be calculated to affect it one way or the other.

Lord Gifford—I agree with Lord Ormidale in thinking that the pursuer is entitled to the issue as adjusted by the Lord Ordinary.

It is often a matter of some difficulty and nicety to determine in what cases damages are claimable in respect of the wrongful or unwarrantable use of judicial proceedings, and in what cases the *bona fides* of the party or the possession of reasonable grounds will form a sufficient defence to him who has used or adopted the judicial proceedings, although he may ultimately be found not to have been right in doing so.

Some of the cases may be regarded as having been settled by a course of decisions. Thus, in general no action of damages will lie against a pursuer who has raised and carried on a groundless action which has ultimately been dismissed or from which the defender has ultimately been assoilzied. The only damages which can in general be claimed against a party who has brought and carried on an action which has ultimately been found groundless both in law and equity are the expenses of process, which the unsuccessful pursuer must pay to the defenders. The costs of suit are the damages for bringing a groundless claim.

But where the pursuer of a claim which is ultimately repelled has used diligence of any kind upon the dependence, such as arrestment or inhibition, or where he has resorted to other steps pending the final ascertainment of his rights, such as arresting his supposed debtor as in *meditatione fugæ*, or asking and obtaining interdict *ad interim* against some act the legality of which depends upon the question involved in the litigation, and where such pursuer using such interim or precautionary diligence is ultimately found to be in the wrong, questions of much difficulty arise, in some of which I do not think any absolute and unbending rule can be said to have been fixed.

In the case of simple arrestment on the dependence, indeed, I think it may be held as fixed that the pursuer of an action who uses arrestments on the dependence and subsequently fails in his claim, will not be liable in damages for wrongous arrestment, even although by such diligence he detains a ship, or causes serious injury to the defenders, unless the defenders put in issue that the arrestment complained of "was used maliciously and without probable cause." See *Volthekker* v. *Northern Agricultural Co.*, 20th December 1862, 1 Macph. 211.

But the case of arrestment is specially distinguished from other cases in which the pursuer of a claim which is ultimately held to be groundless applies for and uses some special diligence or precautionary remedy which is not given as a matter of absolute right, and which he cannot use at his own hand, but for which he requires a special warrant, which may or may not be granted.

The present case of interim interdict pending the decision of a question of right falls under this last category, and I agree with your Lordship that the general rule is that such interdict is granted *periculo petentis*, and that if loss or injury is caused thereby the party who is in the wrong in applying for it will in general be answerable for the loss occasioned thereby. In some cases of interdict this is quite clear. Thus in *Miller* v. *Hunter*, 3 Macph. 740, where a landlord wrongfully interdicted his tenant from taking a way-going crop from 100 acres, and the effect of this was not only to deprive the tenant of the crop from the 100 acres to which by his lease he was entitled, but also to give the landlord or the incoming tenant the benefit of 100 acres fallow or green crop to which the landlord was not entitled, it was held without difficulty that the interdicting landlord must compensate the tenant for the loss he had sustained.

It is true that it is not in every case of an interdict which may ultimately be recalled that damages are due by the party interdicting. The case of the Dunoon Ferry—*Moir* v. *Hunter*, 11 S. 30—and one or two similar cases, I think may be explained on the principle that in these cases the interdict was really of the nature of a possessory judgment, containing the possession or exclusive possession which had been lawfully had on a habile title for seven years or more; and although the question of right was finally decided otherwise, still the possessory judgment at the time it was pronounced was right, and the interdict which enforced it could not be said to be at the time it was granted a wrongous interdict. No doubt it was recalled when in the process of declarator or in other process the ultimate question of right was decided, but still the possessory judgment was the proper and just judgment at the time when it was pronounced.

I think the present case falls under the general rule, and not under the exception. There was here nothing of the nature of a possessory judgment, or a possessory right warranting the interdict, and, as the Court have found, affirming the judgment of the Sheriff Principal, that the interdict ought not to have been granted, I think the Lord Ordinary is right in granting the usual issue of damages.

LORD JUSTICE-CLERK—I entirely concur in the exposition of the law as given by your Lordships, and have nothing to add except that the result of our opinion is that we approve of the issue for the trial of the cause as adjusted by the Lord Ordinary. What may be the position of the case at the trial is quite another matter.

The Court adhered.

Counsel for Pursuer (Respondent)—Balfour—Mackintosh. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Defenders (Reclaimers) Lord Advocate (Watson)—Guthrie Smith. Agents—Irons & Roberts, S.S.C.

Wednesday, December 12.

FIRST DIVISION.

THOMSON AND OTHERS (CRAWFORD'S TRUSTEES), PETITIONERS.

Writ—Registration—Production for Approval by Court where Deed ordered by them to be executed.

A petition was presented for the purpose of obtaining the sanction of the Court to a scheme for working a trust that could not be worked in conformity with the directions of the original trust-deed, and after certain procedure the Court appointed the trustees to lodge in process a deed in conformity with certain directions given by them. The trus-