years complete, it being understood and declared that my said trustees shall divide the annual profits of said moneys to the said child or children until they shall respectively receive their proportions of the sums as above directed. *Tenthly*, Declaring also, that in the event of the said James Aberdein and John Aberdein both dying leaving lawful issue, then and in that case my said trustees shall, immediately after the death of the last survivor, sell and dispose of the remainder or half of the said trust-estate, the other half having been previously set apart for the heirs of the first deceaser, as before directed, and that either by public roup or private bargain, as they may think proper, and shall hold the free produce of the said trust-estate for the use of the child or children of the last survivor of my said two sons, and shall divide the same between or amongst the child or children of the said last deceaser, in the same way and manner as is provided for the children of the first deceaser; and farther declaring, that in the event of the first deceaser of my said two sons dying without lawful issue, his share and interest in the said trust property shall be held by my said trustees and applied by them for the use and behoof of the survivor, my said two sons, or his issue as aforesaid. *Eleventhly*, In the event of both the said James Aberdein and John Aberdein dying without lawful issue, or failing such issue, then and in that case my said trustees shall immediately thereafter dispose of the whole trust-estate under their management, either by public roup or private bargain, as they may think fit; and my said trust-estate being thus converted into cash, I appoint my said trustees, after paying all necessary and proper expense attending the execution of the present trust, to pay to the treasurer for the time being of the Dundee Female Society, for the uses and purposes of that Society, the sum of £100 sterling, and to divide the residue and remainder of the said proceeds as follows, viz.:—One-fourth to the treasurer for the time being of the Gaelic School Society," &c.

Mr Aberdein was survived by his two sons, both of whom, however, are now dead. John died in 1856, leaving seven children; James died in 1865 without issue. The present competition arose among the children of John, and related to the share which would have fallen to the children of James had he left children. The property was almost entirely heritage, and John's eldest son claimed the whole of the shares in question as the heir-at law of the testator, on the footing that the trust-deed made no provision for the particular case which had occurred—viz., by the *second* deceaser of the two brothers dying without issue. The younger children, on the other hand, claimed that the whole property should be equally divided, contending that although the contingency which had occurred had not been expressly provided for, it had been so by implication.

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—"The Lord Ordinary having heard parties and considered the debate, with the record in the competition, productions, and whole process, Finds that the trust-deed and settlement executed by the deceased James Aberdein, and under which the real raisers and pursuers are trustees, is so framed as, under its terms, to operate in the matter of the succession of the truster a conversion of his estate, so far as the same was heritable in his own person, into moveable estate; so that, as respects the said matter of succession, the same, whether consisting in point of fact of heritage or of moveables, must be treated and dealt with in point of law as moveable; and, with reference to the preceding finding, sustains the first plea in law stated on behalf of the claimants Jane Aberdein and William Aberdein, and of Eliza, Jemima, and Oswald Aberdein respectively: Repels the first plea in law for the claimant John Aberdein; and, before further answer, appoints the cause to be enrolled that parties may be heard as to the application of the present interlocutor, in the matter of ranking the several and specific claims of the parties, claimants in the competition; reserving meantime the matter of expenses.

"*Note.*—Nothing is in law more true than that the Court cannot make a will for one who, though he may with a settled intention to do so have made the attempt, has failed in the execution of his purpose. But when the attempt has been made, it is the duty of the Court to endeavour by all fair modes of interpretation to arrive at and to construe the true meaning of the writing; and the cases are few in which this cannot, with such accuracy as the law requires, be accomplished. Here the Lord Ordinary is not perhaps driven to consider or to deal with an extreme case of this class; but however that may be, his own opinion in regard to the true intention of the truster, the deceased James Aberdein, is now given effect to and embodied in the present interlocutor. The Lord Ordinary has not dealt specifically with the claims for the parties, but he assumes that, when the questions of law which have been raised and are now disposed of, so far as respects the Lord Ordinary's judgment, are finally settled, their application will not give rise to further serious question."

The eldest son reclaimed.

FRASER and KINNEAR for him.

BIRNIE and MACKINTOSH for Younger Children.

The Court, while regarding the case as one of difficulty, were of opinion that there was sufficient evidence of the testator's intention to divide his property equally among his grandchildren. The grounds of judgment, as stated by the Lord Justice-Clerk, were shortly these—(1) It was clear that the truster intended to dispose of his whole property; (2) The residuary bequests were to take effect only in the event of both sons dying without issue; (3) In no part of the deed was there any indication that one grandchild shall receive more than another.

Agents for Eldest Son—Murray, Beith & Murray, W.S.

Agents for Younger Children—James Webster, S.S.C., and N. M. Campbell, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, March 14.

LORD ADVOCATE *v.* ROBERTSON.

(Before LORD JUSTICE-CLERK and LORD NEAVES.)

Indictment—Relevancy—Slandering a Judge—Common Law—Act 1504*—Desuetude—Specification—Privileged Communication.* An indictment charged a panel with the crime of slandering a Judge in reference to his official conduct or capacity at common law, and also with the

crime of "murmuring" a Judge, as set forth in chapter 104 of the Act passed in the seventh Parliament of James V. of Scotland, dated 1504, and with the publication of the slander. The indictment contained only one minor, and the *species facti* set forth was that the slander lay in two letters written and sent by the panel to the Lord Chancellor and to the Home Secretary. Relevancy of indictment *sustained*. Observed, *per* Lord Neaves, that the statute in question is not in desuetude.

Objections that the slander was not set forth with sufficient specification, and that the letters containing it were complaints against the conduct of the Judge, which the panel was entitled to make, and that therefore the slander was privileged, and could not form an article of dittay, *repelled*.

Panel pleaded guilty to the charges at common law, and was sentenced to be imprisoned for one month, and to pay a fine of £50, or to be imprisoned for another month.

Alexander Robertson, Dundonnochie, whose name has been frequently before the public in connection with the opposition to the Dunkeld Bridge pontage, was called upon to answer a charge of slandering Sheriff Barclay. The prosecution was conducted by the Solicitor-General, assisted by Mr H. J. Moncreiff; while Mr Mair appeared on behalf of the prisoner.

The indictment charged the panel at common law with the crime of slandering a Magistrate or Judge in reference to his official conduct or capacity; and further charged him with the crime of "murmuring" a Judge, as set forth in an Act passed in the seventh Parliament of James V. of Scotland. By chapter 104 of that Act, which bears date 1504, "it is statute and ordained in times cumming that all Justices, Scheriffes, Lordes of Session, Baillies of Regalities, Provest and Baillies of Burrowes, and uther deputes and all uther Judges, spiritual and temporal, alsweill within regalities as royaltie, sall do trew and equal justice to all our Soveraine Lordis lieges, without ony partial counsel, rewardes, or buddes taking, further then is permitted of the law, under the paine of tinsel of their honour, fame, and dignitie, gif they be tainted and convicted of the samin; and gif ony maner of person murmuris ony Judge, temporal or spiritual, alsweill Lordes of Session as others, and proovis not the samin sufficientlie, he sall be punished in semblable maner and sorte as the saide Judge or person quhom he murmuris, and sall pay ane paine arbitral, at the will of the King's grace, or his councel, for the infaming of sik persones." The crime libelled was declared to have been committed, in so far as (1) the said Alexander Robertson did, on 30th December 1869, in the house occupied by him at Dundonnochie, wickedly and feloniously write and subscribe the following letter:—

"To the Right Hon. Lord Hatherley,
Lord Chancellor.

"My Lord,—I am under the necessity of complaining to your Lordship of the conduct of Hugh Barclay, Esq., Sheriff-Substitute and a Magistrate of this county, who, for eighteen months, has been misapplying those powers intrusted to him for the safety of the public, and for the repression of crime, in order to maintain a fraud upon the lieges, or what is at least an exaction which cannot be enforced by the laws of the realm.

"Owing to my open and legitimate opposition to the imposition referred to—viz., the Dunkeld Bridge pontage—I have been subjected to a malicious persecution by Sheriff Barclay, and, in consequence of his partiality, my privileges of citizenship have been invaded, and my personal protection rendered insecure while in the peaceful exercise of my lawful rights. Sheriff Barclay has committed myself and others to prison wantonly, maliciously, and without probable cause, thus, as it were, taking upon him to suspend our Habeas Corpus Act; in my own case alleging that I was exercising too great an influence over the minds of the people in the north country.

"On the 18th July 1868 Sheriff Barclay, forgetting his status as a magistrate, and acting as a criminal detective officer, personally dogged me, and made inquiries regarding what time I would leave a hotel which I was calling at in Dunkeld. He watched me passing the pontage-gate, and, while I was standing beside it, he assaulted me, and, addressing foolish challenges to me, did all he could to get me involved into a squabble. He also caused several parties to intercept my progress on the highway, and interfered with the Procurator-Fiscal of the county in the due and ordinary discharge of his duties, in order to get me more severely punished for simply acting in my own defence. Sheriff Barclay, in the month of September last, again acted as a detective, and made undue efforts to get me criminated in an act of malicious mischief, while he could have learned, by the simplest inquiry, that I was not in the locality at the time of its perpetration, and could not possibly have been guilty of the crime he was determined to fasten upon me.

"In June last year Sheriff Barclay swore in seventy special constables, selected on account of their partiality in the civil, and while doing so, was guilty of a falsehood, in openly stating that they were not sworn in to protect the pontage gate. Sheriff Barclay, since that time, has given several of these constables every encouragement to commit crime, and has in various ways shielded them from justice while their hands were imbrued in the blood of their fellow-citizens, they having, at the same time, been under oath to protect the peace. Still further to protect the imposition complained of, Sheriff Barclay, under misrepresentations, got a detachment of the military stationed at Dunkeld, although none of those in charge of the peace ordinarily had been deforced in the exercise of their duty.

"Still more, Sheriff Barclay has stationed a county constable at Dunkeld Bridge for the unlawful purpose of interfering with the civil rights of the citizens, and for constantly annoying passengers, and at all times trying to provoke them into assaults, or breaches of the peace.

"I have strong reasons for believing that Sheriff Barclay has been unduly influenced in the course he has taken in the above instances by the acceptance of money to such an amount as to bias his judgment; and I am also persuaded that, had my friends made themselves agreeable to him by doing the same, the results would have been different. I have no means of knowing whether he looks for more gratifications; but there can be no doubt whatever that his partiality as a judge and as a magistrate (whether amounting to utter corruption of office or not) his collusion with those interested

in protecting the fraud or exortion complained of, his disrespect to the supreme legislature of the nation by tampering with Acts of Parliament, and the falsehoods of which he has been guilty, and other acts in the same cause, have brought a great scandal upon the administration of justice in the county of Perth, and tended to bring the laws of the land into contempt.

"Trusting that the serious complaints I have made will receive your Lordship's early attention, I have the honour to be, my Lord, your Lordship's humble servant, "ALEX. ROBERTSON."

and addressed the said letter to the Right Hon. Lord Hatherley, Lord Chancellor of Great Britain; and this with intent to slander Hugh Barclay, Esq., Sheriff-Substitute of Perthshire, in reference to his official conduct and capacity. Under a second count, the panel was charged with having on 31st December 1869, with similar intent, addressed the following letter to the Home Secretary:—

"SIR,—I regret that I should be under the necessity of again complaining to you of the gross partiality—amounting, I believe, to corruption of office—on the part of Hugh Barclay, Esq., Sheriff-Substitute and a magistrate of this county, who has perverted his high functions in order to maintain, encourage, and uphold a fraud, or exhortation on the public—or what cannot be enforced by the law of the land. And, further, there is evidence for believing that Sheriff Barclay has been influenced by the acceptance of money, and that to a large amount.

"Whether this be so or not, there can be no doubt that he, as a judge, has received private visits from interested parties, and has been guilty of collusion in reference to criminal trials; he has encouraged parties to prevaricate on oath; and he has tampered with the evidence of others who could prove guilt; he has in the same interest volunteered false statements on the bench; he has committed people to prison against whom no charge could be brought, and freed their opponents when proved guilty—all to support an extortion.

"To such an extent has the partiality of Sheriff Barclay been manifested that it has frequently received the condemnation of the public, and drawn down the animadversions of the public press; it has given encouragement to the commission of crime; it has brought the administration of the law into contempt; and created a scandal on the purity of the Courts of Justice.

"In these circumstances, I have once more to urge that you will not shrink from your duty in at once seeing that the penalties provided by the Act of 1540, c. 104, are enforced without delay.—I am, &c., "ALEX. ROBERTSON."

A third count charged that on 30th or 31st December 1869 the panel made copies of the above letters; that on 3d January 1870, at a public meeting of the inhabitants of Birnam, he stated that he had written such letters, and subsequently furnished copies thereof to the *Perthshire Advertiser* and *Dundee Courier*, in both of which journals they were published; and that in this way he wickedly and feloniously published the said letters with intent to slander, and thereby did slander, the said Sheriff Barclay in reference to his official conduct and capacity.

The LORD JUSTICE-CLERK was about to ask the panel to plead, when

MR MAIR said he had certain objections to state to the relevancy of the indictment. The first was that he had not, on the face of it, any specification of what the slander consisted in which, it was said, the panel had uttered. The letters to the Lord Chancellor and the Home Secretary were set forth at length; but there was nothing whatever said as to what the particular slander was—as to what particular language was used by the panel which was slanderous. All he found was that "all this, or part thereof, the panel did with intent to slander, and did thereby slander, the said Hugh Barclay." He submitted that in a criminal indictment that was not sufficient. The panel was entitled to know the precise slander which was complained of against him. There were several things in both the letters which unquestionably were not slanderous. He did not know, therefore, what particular charge he was to meet. Was he to understand that the slander consisted in charging Sheriff Barclay with gross partiality, amounting to corruption in office, or with perverting his high functions in order to maintain, encourage, and uphold a fraud or extortion upon the public? Or was he to understand that the slander consisted in saying that Sheriff Barclay received private visits from interested parties, and that he had been guilty of collusion in reference to criminal trials? Or was he to understand that the slander consisted in the statement that the Sheriff dogged the panel, and made inquiries as to what time he would leave a hotel which he was calling at in Dunkeld? Suppose it had been the case that, instead of two letters, a pamphlet or a correspondence had passed between the panel and various other parties. In such a case it would not have been sufficient merely to quote the pamphlet or the correspondence, and to say at the end that, in writing that pamphlet or entering into that correspondence, he did so with intent to slander, and did thereby slander, a particular individual. It was necessary for the representatives of the Crown to let him know distinctly the precise language which they maintained was slanderous. Even supposing that this were a civil proceeding and not a criminal one, he did not think that a summons such as there was here would be sufficient. Their Lordships were aware that in an ordinary action of defamation it was not sufficient simply to set forth the letter in which the defamation was said to have occurred. One must go beyond that, and say that the defender, in writing the letter, did mean to say so and so of the pursuer. Supposing a letter were written by one person to another charging a party with theft, it would not do merely to set forth the letter. It would be necessary in a case tried in a Civil Court to state that the defender said so and so in the communication, meaning to say that the pursuer was a thief, and that the language was used of and concerning him. If that were the case in a civil proceeding, much more was it required in a proceeding like the present. That was the first objection he had to the indictment; but there was another, and he thought a much more formidable one. It appeared upon the very face of the indictment itself that the letters complained of, in which the slander was said to have been made, were not addressed to the Sheriff himself or to any private party, but to the Lord Chancellor and the Home Secretary. They were letters which, according to their tenor, were written for the purpose of complaining of the official conduct of Sheriff Barclay; and they were letters inviting inquiry into that conduct. He submitted that they

were therefore of a privileged character; and if they were of a privileged character, they could not be taken cognisance of in a criminal Court. It might be that the statements contained in them were slanderous. He assumed that those statements were so; but that was no reason why a party should not be allowed to complain to the Lord Chancellor or the Home Secretary, inviting inquiry into the judicial conduct and character of a magistrate. There were some observations by Lord Gifford in the case of *Haggart's Trustees* against the *Lord President* which bore upon this matter, and which he might quote. His Lordship said:—"I look upon it as extremely essential that, in every part of Her Majesty's dominions, all Judges, however high their rank and station, are responsible for their official conduct; and most lamentable would be the position of the country were it otherwise, for, however great their elevation, Judges are still but men, and are subject to all the errors and infirmities of human nature." And the redress, where a Judge had abused his discretion, was by appeal to the Sovereign in Counsel or to Parliament. What he said was this, that the panel was doing no more than exercising a constitutional privilege in making his complaint to the Lord Chancellor or the Home Secretary. He did not know whether these were the proper parties to whom to make application; but the panel believed that they were, and he believing so, any communication which he might make to them was of a privileged character, and could not be made the ground of a criminal prosecution against him. There were various cases on record in which communications were so favoured that, although they might contain slander, the party was, at all events, so much protected that he could not be made amenable to the criminal law. Suppose that, instead of writing the two letters, in which the slander was alleged to be contained, the panel had addressed a petition to Parliament embodying the very statements which were to be found in them, would the Crown, in such a case as that, have been entitled to gag the petitioner's mouth by at once raising a criminal prosecution against him. It would be absurd to maintain anything of the kind. It would be the most effectual way of depriving a party of his constitutional privilege of having inquiry made into the judicial conduct and character of a Judge. In "Russell on Crimes," it was stated that a communication fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest was concerned, was a privileged communication, and, if made in the regular and proper course of proceeding, would not be libelous.

The Lord Justice-Clerk—That is under the English law.

Mr Mair—Under the English law. The learned gentleman went on to cite Russell, to the effect that where the defender wrote a letter to the Secretary of State, imputing to the town-clerk and clerk to the justices of a burgh bribery in the latter office, it was held that such letter was not privileged, because the Secretary of State had no direct authority in respect of the matter complained of; but that a memorial presented to the Home Secretary, complaining of the conduct of a Justice of the Peace during a Parliamentary election, and asking for inquiry, was a privileged communication; for, although the Lord Chancellor was consulted as to the removal of Justices of the Peace, the memorial might be considered as addressed to the Queen through the Secretary of State. That was just the kind of case with which the Court had now to deal. Even supposing—what he was not willing to admit—that the Lord Chancellor and Home Secretary were not the proper parties to whom the letters in question should be addressed, that might be no matter, because by either of those functionaries the communication might have been forwarded to the Queen, by whom redress might have been given. He submitted, therefore, that the communication was necessarily one of a privileged kind, and if it were so, he cared not although it might contain statements of the most flagrantly slanderous character. A party who fancied he had been aggrieved by the conduct of a Judge, was settled to complain to the Queen, and to ask an inquiry into the Judge's conduct and character. In the letters libelled there was nothing beyond a complaint setting forth in detail the various charges which the panel brought against Sheriff Barclay, and calling for an inquiry into the matters so complained of. After citing additional authorities as to the extent to which a person making such communications was protected, Mr Mair went on to submit that it would lead to very extraordinary consequences if such a charge as that in the libel could be sustained. He thought he was right in assuming that every member of the community had a constitutional right to complain of a judge's judicial conduct and character, and to apply for redress; but in the event of the complaint containing slanderous matter—and it was scarcely conceivable that there could be a complaint of such a kind without language of a slanderous kind being used in it—if such a charge as the present were sustained, it would just come to this, that upon the complaint being made, the party complaining would be effectually gagged by a criminal prosecution. But, apart from this, he might have seen a case for the Crown if the indictment had set forth, not merely that the letters were written wickedly and feloniously, but that they were written maliciously, and knowing that the statements in them were false. In the indictment before the Court, however, there was nothing beyond the words "wickedly and feloniously," which certainly did not amount to malice. Before leaving this objection, he asked their Lordships to suppose that, instead of applying to the Home Secretary or Lord Chancellor, the panel had gone to the Circuit Court of Perth, and, on the occasion of the Judges asking whether any complaints were to be made against any of the Sheriffs within the circuit, had openly came forward and read the letters complained of. Would the Court in a case of that sort have been entitled to commit the person to prison upon the ground that he was guilty of slandering a magistrate? He apprehended that such a thing would not be tolerated, because it would just be denying to the party the power of doing what he was invited to do. If, however, such a proceeding would be incompetent, he held that it was equally incompetent to bring a criminal charge in a case like the present, where the party was doing nothing more than applying to the proper quarter for redress. To come next to the statute libelled on, it was stated in the subsumption of the indictment that the panel was guilty of slandering a judge, and of the crime of murmuring a judge. He did not know the legal signification of the word "murmuring," and what the statute meant by the term was certainly not ex-

plained in the indictment. There was, in short, no minor proposition applicable to the statutory charge. The learned counsel went on to refer to certain recorded cases resembling in some points the one under discussion, and remarked that he was not aware of any case in which a charge similar to the present had been sustained.

In reply to a question from the Bench,

Mr MAIR said he did not maintain that a party would be privileged in publishing any privileged communication; but he submitted that the objection he had stated as to want of specification applied to the last part of the indictment.

Mr MONCREIFF said that it was with the view of distinctly stating the offence which the prisoner was alleged to have committed under the statute that the expression "murmuring" was used. The Court would observe that there were three separate offences charged. While in regard to the first two it might be open to the prisoner to plead that his letters were privileged communications, the same thing could not be pleaded in regard to the third charge, which related to the publishing of the letters. Mr Mair had not adverted to that charge; so that whatever the fate of the first two charges might be, the third remained unassailed. As to the first objection stated, he apprehended that it was only in cases of ambiguous expressions being used that even in civil cases it was necessary to explain the meaning which the pursuer held the words to bear. Where the words were perfectly unambiguous, and the meaning did not admit of doubt, it was sufficient to libel the words themselves, and to say that in using them the defender was guilty of slander. In the present case he thought no difficulty could be experienced. The letters were written with great deliberation and great distinctness, and the charge was, that in writing these letters, which from beginning to end the prosecutor characterised as slander, the prisoner had slandered Sheriff Barclay. As to the second objection, it occurred to him that the present was not the time for stating a plea of that sort on behalf of the panel. He did not concede at the outset that in any case might the panel be entitled to address a scurrilous communication to the Home Secretary or the Lord Chancellor. He should contend that the doing so would be a crime to be dealt with, provided always that the letters sent were slanderous and calumnious. But even supposing that there might be cases in which the prisoner would be entitled to make such a communication, it depended upon the nature of the case; and it was a question for the jury whether in the circumstances the communication was to be held as privileged or not. As far as the Scotch law was concerned, he did not think there was any authority to say that a man might write a scandalous letter to anyone, even the person to whom it referred, without being liable in damages; and the truth of this proposition, he thought, would be evident when their Lordships remembered that by the law of Scotland it was a sufficient foundation of a libel to send a scandalous letter to the person himself, even although the letter went no further. Such was the case in regard to private individuals, and still more so in regard to a Judge.

The LORD JUSTICE-CLERK—The question of privilege would not arise if the letter was only addressed to the Judge himself.

Mr MONCREIFF admitted that it would not; but, he added, if it was an offence which could be prosecuted to send a calumnious letter to the man himself, *a fortiori* it must be a greater offence to complain of a Magistrate to one having the power of reprimanding or dismissing him. While he thought this held good at common law, he considered that in the present case the statute possibly assisted the prosecution. That statute appeared to him to be meant to meet the case of a complaint against a Judge, made in the proper quarter, but which was calumnious and ill-founded. He thought, therefore, that, assuming the communications made by the prisoner to have been made to the proper parties, he yet fell under the statute. In support of his contention, the learned gentleman proceeded to remark upon certain cases, including those cited by Mr Mair.

The SOLICITOR-GENERAL said the Sheriff was responsible, it might be, to the Home Secretary, but not in any way to the Lord Chancellor. Therefore there could not, he contended, be any privilege claim as to the letter sent to the Lord Chancellor. But, supposing there were a privilege claim, the mere fact of the existence of the privilege would not prevent the crime libelled from being committed. It would be a very strange doctrine if a letter was written with intent to slander a Judge, to a person entitled to take steps for having that Judge removed, to say that that was not a crime. The accused might justify himself if he could show that the letter was sent for a proper purpose; but if the purpose of sending it was to slander, surely the crime was as great, or even greater, in the case of its being sent to persons in distinguished positions. Now, he undertook to show that the letters libelled were sent for the purpose of slandering, not for the purpose of obtaining an inquiry. As to the objection touching the framing of the libel, he submitted that there was enough in the minor proposition to support not only the common law charge, but the statutory charge—the indictment having been framed in this matter according to ordinary form.

Mr MAIR having been heard in reply.

LORD NEAVES said he was of opinion that the indictment was relevant in all its parts. With regard to the charge at common law, it could not be doubted that the slandering of a Magistrate in his official capacity was a crime. As to the statute, the only matter connected with relevancy depended on the question whether the Act cited was still in force. On that subject he could entertain no doubt, because he saw that on various occasions it had been libelled upon and recognised by the Court as a subsisting statute. As to the meaning of the word "murmuring" used in the statute, he was sorry the counsel for the panel did not understand it, but it could mean nothing else but dispersing complaints and murmurs against a judge's equity and honesty, such as would destroy his usefulness if proved, and the dissemination of which ought to be punished if false. Coming to the minor proposition of the libel, it was, he took it, quite well established that where there were different charges, particularly where there was a statutory charge and a common law charge of an analogous and cognate kind, one minor might be sufficient to cover both majors, provided the facts set forth in the minor made it an exemplification of the offences charged in each of the two majors. It was said the minor did not specify the slander complained of. Many a man had been called a rogue in a sneer styling him an honourable man. What was ironical required explanation, but when it was stated in clear language that a

judge had taken money for his judgment, he could not understand how that could be made plainer. As to the letters being privileged, he recognised in the strongest manner the right of the subject to go to the fountain of justice and seek for redress when wrong had been done. He was disposed to think that the old Act of 1540 included complaints made to the proper quarter. Even where the complaint was made in the most correct, specific, and intelligible manner, he was pretty sure the object of the statute was that, if the complaint could not be proved, the party making it did so at his own risk. In certain circumstances he should be very slow to interfere in that course of proceeding. If a party made a complaint to the proper quarter against a judge, whether the highest in the land or the humblest, setting forth maladministration and corruption, and made his complaint in such a way as admitted of its being taken up and investigated, he should be very slow to say that next day the Procurator-Fiscal should charge that party with slander. But it depended a great deal on the nature of the communication made, and also on the animus displayed. Now, the communications made in this case appeared to him to be communications which it was utterly impossible for the authorities to investigate. There was no specification given of what the charges were. They were stated in such a way that no inquiry into them could be commenced. Not only so; instead of leaving the letters in the hands of the parties to whom they were addressed, the accused, as the concluding part of the indictment alleged, resorted instantly to an expression of public opinion, and in that way circulated throughout the country complaints against the efficiency of an acting Judge, without specification of any kind — a procedure calculated to destroy the Sheriff's usefulness without bringing the matter to any kind of issue. His Lordship concluded by repeating that, in his opinion, the indictment should be allowed to stand.

The LORD JUSTICE-CLERK concurred in the result at which his learned brother had arrived. With regard to the second of Mr Mair's objections, his Lordship said that plea could not be maintained against the last part of the indictment, because, in so far as the prisoner was charged with having published the slanderous statements, it was clear that the defence of privilege could not be sustained. With regard to the first part of the indictment, he did not think the plea of privilege could be sustained to the effect of preventing the indictment from being tried. He was not prepared to say that, apart from the proof of facts, of motive, or intent, the allegation made was not relevant. He concurred with Lord Neaves that it was the right and privilege of every citizen of this country to make his complaint against whomsoever or on what ground soever that complaint might be made. As long as that right was exercised in good faith and honesty, he did not think its exercise could ever form the foundation of a criminal charge. On the other hand, if the form of complaint was only made a cover for private malice, he thought it was not to be assumed as an abstract proposition that that would be covered by the plea of privilege. Therefore, it would remain a very serious question for the jury how far the official character of the persons to whom the letters were addressed should protect the prisoner in making the charges they contained; and while the whole question of the intent to slander was brought forward, he concurred in thinking that the Court could not in the present stage prevent the prosecutor from proving his allegations.

After a pause,

The LORD JUSTICE-CLERK said—Alexander Robertson, you have been served with a copy o this indictment. Are you guilty or not guilty?

The Prisoner—I admit having written the letters; but I did so in the endeavour to obtain redress of an alleged grievance. I admit having used language stronger than was necessary on the occasion. So far as that is concerned, I wish to withdraw the strong expressions; but, at the same time, I must say I had great provocation for what I did.

The LORD JUSTICE-CLERK—That is a plea of not guilty.

A Jury having been empannelled,

Mr MAIR said—Perhaps the Court would ask the panel again to plead.

The LORD JUSTICE-CLERK—Alexander Robertson, I ask you if you are guilty or not guilty?

The Prisoner—I plead guilty to the first two charges—the charges at common law; but under great provocation.

The SOLICITOR-GENERAL—I cannot accept the plea with the qualification. I might be willing to accept it otherwise.

Mr MAIR—Perhaps the panel would withdraw the qualification if asked again to plead.

The LORD JUSTICE-CLERK—Alexander Robertson, it is my duty again to ask you if you are guilty or not guilty?

The Prisoner—I am guilty of the first two charges—the charges at common law. I withdraw the plea of provocation.

The SOLICITOR-GENERAL—I think it not inconsistent with my duty—the duty which I owe to the public—to accept that plea *simpliciter*. I therefore merely ask the Court to instruct the Jury to return a verdict against the panel in terms of his own confession.

The LORD JUSTICE-CLERK—The prisoner having pleaded guilty to the charges at common law, and the prosecutor having accepted the plea, the duty of the Jury is fortunately a very easy one. It is simply to return a verdict in terms of the plea which has been tendered.

The Jury having given the verdict directed,

The SOLICITOR-GENERAL moved for sentence.

Mr MAIR—I may be allowed a few observations before sentence is passed. The prisoner has pleaded guilty to the first two charges at common law, and he thus admits that the language he used was slanderous. At the same time, while he has given that plea, I think the circumstances under which the letters were written are, in regard to the punishment which your Lordships may consider it necessary to pronounce upon him, deserving of consideration. You will see that those letters have reference, not simply and generally to the judicial conduct and character of Sheriff Barclay, but to what is called the Dunkeld Bridge pontage. It is a matter of notoriety—I dare say it is known to your Lordships as well as the general community —that for a considerable time back there have been two parties who have espoused the one side and the other in connection with that pontage. Upon the one hand, persons have had reason to believe that the pontage was altogether illegal, and that the Duke of Athole, or others, had no right whatever, under the statute, to exact it; and these persons, rightly or wrongly, have taken every

means in their power to put an end to the exaction. Upon the other hand, there are persons who have espoused the exaction, and who have maintained its legality. On the side of those who have maintained its illegality, one of the most enthusiastic and prominent supporters was the panel at the bar. From the very first he has taken an active interest in the matter: and, rightly or wrongly, he has displayed considerable zeal in it—a zeal for which, perhaps, some may give him a degree of credit. He has spent his means and substance in the endeavour to put an end to the pontage; and he has done all he could otherwise do to have it terminated. It so happened that in the course of the proceedings which took place by those who are against the exaction certain parties were brought before Sheriff Barclay, charged not under the statute—which they might have been—for crossing the bridge without paying the pontage, or for doing injury to it, but charged before him at common law, and in every instance a conviction followed. In other cases—in cases of assault or breach of the peace—parties who were espousing the other side—and I think I may appeal to the Solicitor-General on the point—were not invariably punished; but all those who were were punished in a different manner from the people on the opposite side. That was one of the reasons why the panel, rightly or wrongly, charged the Sheriff with what is called in the letters "partiality." The prisoner himself was brought before him on more than one occasion, and had reason to think, from this conduct of the judge, that he was showing a partiality which was altogether unbecoming his position. I merely state these matters as matters which are connected with the case; and I think your Lordships are entitled to take them into consideration in dealing with the question of punishment. This is not like the case of a party who, without any warrant or justification whatever, but out of sheer and pure malice to the judge, has addressed communications to him, or to others, containing slanderous statements. This is the case of a party who believed at the time that he had reason to complain against the Sheriff; but who now admits that, in making a complaint, he slandered him in his individual conduct and character. In the circumstances, I have to express the hope that your Lordships will deal as mercifully as possible with the panel. I acknowledge that the language used in the letters was strong—very strong. The prisoner now confesses that it was so, and expresses his deep regret that he employed it. Seeing that there was not the slightest malice on his part towards the Sheriff, I trust your Lordships will not inflict a severe punishment upon him. He is a person of respectability—in one sense, it may be said, of reputation—and having regard to the whole circumstances, I think the ends of justice might be met by the infliction of a penalty.

The SOLICITOR-GENERAL—I rise with respect to a remark which has been made by Mr Mair, and which I think it necessary to answer. He appealed to me as if to corroborate the statement that with the two parties—the one desiring to have the toll abolished, the other desiring to have it continued—the Sheriff, in his judicial capacity, did not deal with equal impartiality—that he showed partiality to the one and not to the other. I am sorry he made that statement, for it is a statement which is not in any way correct; and I think it right, having regard to the position of the person assailed, to give it a denial as publicly as I can.

Mr MAIR—I did not mean to say, when I referred to the cases brought before Sheriff Barclay, that he was guilty of partiality.

The LORD JUSTICE-CLERK—I think what you said was this, that the punishment inflicted upon the parties was different.

Mr MAIR—I said so. I say so still; and, if my friend will not admit that, I will prove it. The difference was this——

The LORD JUSTICE-CLERK—I think you had better not go further. So far as your statement is concerned, we will give it all due consideration.

Their Lordships then retired for a few minutes. On returning into Court,

LORD NEAVES said—I certainly feel considerable satisfaction and relief at the termination of this case in the manner in which it has now come to a close. It is about thirty years since such a case was before the Court; and it is a very important thing that the law has been vindicated. The prosecutor, with a becoming desire to discharge his duty in a manner which should at once vindicate the law and not press too severely upon the prisoner, has seen cause to accept the modified plea; and I have no doubt that course was the right one, while at the same time it was, perhaps, a generous one. We are thus relieved from any consideration of the statute; and I confess I feel that to be a considerable relief. If the statute were the ground on which this conviction were to regulate us I fear the punishment would be severe; because we should be under the necessity of professing, at least, to inflict upon the prisoner the same punishment as upon a corrupt and partial judge. We are relieved from this under common law; and there the only charges which the panel has pleaded guilty to are the charges of sending a letter to the Lord Chancellor and another to the Home Secretary. These letters are very improper letters. They contain some matter which he might be entitled to submit to those parties; but they also contain what he has himself admitted to be slanderous. We are bound, to a certain extent, to regard the circumstances under which they were written. If the Crown had insisted on making it a case of dissemination, and of careful persistence, we should have been obliged to look that matter in the face; but I am glad to think we have the strongest reason to believe that those misstatements and misrepresentations were not the result of any malignant or personal feeling in the view of persecuting an individual. Such a thing as that would be very base, and would deserve high reprobation. What we have to do, however, is to check the rash, hasty, and ill-considered statements made against those who are administering justice—a most difficult task, in which it is very hard to please everybody, almost impossible I may say in general to please anybody. It cannot be that those who think themselves ill-used are to express their strong and enthusiastic views in this manner, whether publicly or privately. Still I am inclined to make some allowance, and to believe that the law has been vindicated in the present case by the conviction which has taken place upon the admission of the panel; and leaning towards the side of leniency rather than otherwise, I propose substantially the sentence which was pronounced in the case of Porteous—that the prisoner be sent to jail for one month and shall pay to the Queen a fine of £50, or be incarcerated for another month.

LORD JUSTICE-CLERK—The sentence which has been proposed by Lord Neaves is not the sentence which would necessarily have followed a conviction upon the other parts of the indictment. If the panel had been convicted not merely of writing these statements—statements which he admits to be slanderous—but of having published them to the world, unquestionably it would have been the duty of the Court to have inflicted a punishment of a very different character. We are relieved from that necessity by the Solicitor-General having accepted the plea which has been tendered; and we have only to deal with the case of an application made in a public matter to officials of the Crown, but containing in it the substance of a slanderous imputation on a judge. I am anxious, in announcing the sentence to the prisoner, that the ground upon which the Court is in a position to limit the sentence to what Lord Neaves has proposed, and which I have stated, should be clearly understood. It is quite true that it is the right of every subject of this country to resort to the proper authorities in order to obtain redress of grievances, and the language in which such complaints are couched will not be very scrupulously or accurately scanned, if the motive be a true and legitimate one. But the prisoner has admitted by his plea that the statements which were made against the Sheriff were not true, but slanderous. In the circumstances, the sentence which has been proposed by Lord Neaves, and which the Court now pronounce, is one which I trust will answer all the purposes of justice in the case. I hope it will be a warning to the panel, in the conduct of public discussion, to respect that which every one is bound to respect—I mean what he owes to his neighbour, and still more what he owes to the established judicatories of the country. The sentence of the Court is, that the prisoner be sent to jail for a month, and that he pay a fine of £50 to the Crown, or suffer imprisonment for another month.

HOUSE OF LORDS.

Monday, February 28.

CAMPBELL *v.* LEITH POLICE COMMISSIONERS AND ANOTHER.

General Police Act 1862—*Private Street—Notice.* The Police Commissioners of Leith having resolved to put the provisions of the 150th section of the Act in force in regard to a certain private street, gave notice as required by the 394th section of the statute. *Held* (altering judgment of the Second Division) that the operations in question required notice to be given under the 397th section of the Act.

This was an appeal from a judgment of the Second Division of the Court of Session as to the construction of certain sections of the General Police Act 1862. The appellant, the late John Archibald Campbell, was the owner of certain property in Leith, between Commercial Street and Madeira Street, one part of which was called Prince Regent Street, and the other end of which, being near North Leith Church, was open and unenclosed, and used chiefly for depositing logs of timber. The Police Commissioners having considered this street was not sufficiently paved and flagged, proceeded to deal with it under the Police and Improvement Act, and considering that it came under the definition of a private street, and not a public street, they directed their surveyor to prepare plans for paving it. They duly posted a notice in a conspicuous place at each end of Prince Regent Street, in terms of the 394th section, stating their intention to cause it to be paved, and stating a day when all parties interested would be heard by the Commissioners. At the time appointed nobody interested appeared to object, and the Commissioners ordered the work to be proceeded with. The 150th and 151st sections of the Act made all the expenses of paving a private street payable by the owners of the property abutting on such street, in proportion to the extent of their frontage. The appellant Campbell had not received any notice of these intentions or proceedings; and as the proposed works would cost several hundred pounds more than the entire value of the ground, which was trifling, he presented a note of suspension and interdict, praying the Court of Session to suspend the proceedings, and prohibit the Commissioners from interfering with North Junction Street. In his reasons for the suspension, he averred that the Police and Improvement Act 1862 had not yet come into force in Leith at the date of the resolutions of the Commissioners; that the Commissioners were not entitled to proceed with the paving of Prince Regent Street, seeing that they had not given notices of their intention, pursuant to the 394th section, and other sections; that no such street as Prince Regent Street existed in that part of the suspender's property, which was below Madeira Street and Great Junction Street; and that all the proceedings of the Commissioners were null and void, and *ultra vires*. The Commissioners, in answer to the suspender, alleged that the street in question fulfilled the definition given of a private street in the Police Act 1862, which they had power under the 150th section to cause to be properly paved; that they had proceeded according to the statute and given due notice, and that no objection was made within the time allowed; and, moreover, that their proceedings were well founded, and that the Act provided that the only appeal against the decision lay with the Sheriff, but which procedure had not been adopted by the suspender; that therefore the suspender had no right to appeal to the Court of Session; but if he had, then the proceedings were valid and regular, and in conformity with the Police Act. The Lord Ordinary (ORMIDALE) held that the street was a private street, and therefore that due notice had not been given according to the 397th section of the Act; and that the proceedings were irregular; and the interdict was made perpetual. Afterwards, the Second Division held that, though the street was a private street, yet that no notice under the 397th section was required, for that section applied only to public streets; and therefore the interdict was recalled, and judgment given for the Commissioners. The Court refrained from saying whether the Commissioners were bound even to have given the notices required by the 394th section. All that they decided was, that the notices required by the 397th section did not apply to the case. The 150th section of the Police Act 1862 enacts that wherever it would conduce to the convenience of the inhabitants and be for the public advantage if provision were made for the levelling, paving, &c., of private streets which have been laid out and