change of circumstances before he took upon himself to close the road without consent of the trustees.

The appeal was accordingly dismissed, with expenses.

Agents for Appellant — Jardine, Stodart & Frasers, W.S.

Agents for Respondent—Melville & Lindesay, W.S.

Tuesday, June 28.

FIRST DIVISION.

STEWART *v.* KYD.

Malice—Slander—Privilege—Procurator—Trial. In an action of damages for slander, uttered by the defender while acting as procurator during the course of the trial of a cause before the Sheriff-court of Perthshire, *held* that malice must be put in issue.

This was an action of damages for slander at the instance of Alexander Stewart, farmer, Moulinarn, Perthshire, against George Kyd, solicitor, Perth. The defender acted as agent for the pursuer in an action of breach of promise against the defender's son John Stewart. The pursuer alleged that the proof in said action was taken before Sheriff Barclay at Perth, on Wednesday the 22d of December 1869. After some evidence had been led, the defender, acting as Miss Scott's agent, adduced the pursuer as a witness. The pursuer was put upon oath, and his examination had just commenced when the following question was put to him by the defender, "Did not the minister or any of the office-bearers tell your son, in your presence, that he had behaved to Miss Scott like a scoundrel?" The pursuer answered "No" to this question; and Mr M'Leish, the agent on the other side, having observed upon it, "That's quite unnecessary, my Lord—just a little newspaper sensation," the defender then made the following statement, or used words to a similar effect:—"I want the truth, and I don't expect it from this man, or from any of his clan." The following issue was proposed by the pursuer:—

"Whether the defender, in open court, at Perth, on 22d December 1869, when the pursuer was adduced and put on oath as a witness for Miss Catherine Scott, in an action at her instance against John Stewart, did falsely and calumniously say of and concerning the pursuer, 'I want the truth, and I don't expect it from this man, or any of his clan,' meaning that the pursuer was not speaking the truth as a witness, and was an untruthful person, to the loss, injury, and damage of the pursuer?"

Damages laid at £500.

The Lord Ordinary (ORMIDALE) approved of this issue. In a note his Lordship said—"The defender objected to the pursuer's issue as now approved of, on the ground that it ought to contain a charge of malice, in respect that, on the pursuer's own showing, the case belongs to the privileged class. It may turn out, when the facts are fully expiscated at the trial, that the defender, when he uttered the slanderous expressions in question, was protected by privilege; but at present, and looking at the case as it is stated by the pursuer, the Lord Ordinary is not satisfied that the defender is entitled to any privilege. It does not appear from the pursuer's statements that the defender, when he uttered the expressions complained of, was in the course of addressing the Sheriff on the import of the proof,—that indeed could not be, for the proof was not concluded; or that he was in the course of objecting to the admissibility of the pursuer as a witness,—that indeed could not be, as the pursuer was adduced as a witness by the defender himself; or that he was in the course of objecting to or supporting the admissibility of any question,—and that could not be, as the only question to which the expressions complained of can be said to have had any relation had been put and answered without objection. In short, the Lord Ordinary cannot see, from the statements of the pursuer—which, of course, he undertakes to prove—that the defender was, when he uttered the expressions complained of, in the exercise of any right, or discharge of any duty, professional or otherwise. On the contrary, it rather appears to the Lord Ordinary at present, and judging solely, as he is bound to do, from the pursuer's own statement, that the defender, in uttering these expressions, went beyond his right and duty, and rashly and publicly made a slanderous observation regarding the pursuer, which neither had, or could have had, any bearing or effect on the cause in which he was at the time engaged as agent for one of the litigants. It may be that the defender acted at the moment on some provocation given him by an irregular remark of the opposite agent, but that cannot be held to excuse him in making an unjustifiable attack in open court upon the pursuer, whom he had just commenced examining as a witness for his own client. The Lord Ordinary thinks, therefore, that the pursuer is entitled to an issue in the form of that now approved of. It may, however, as the Lord Ordinary has already remarked, turn out at the trial that the defender was privileged in what he said,—and the Lord Ordinary is not to be understood as prejudging that view of the matter in the slightest,—in which event he will be entitled to the benefit of his plea of privilege, just as if the pursuer expressly charged malice against him in the issue. (See *M'Bride* v. *Williams & Dalziel*, 28th January 1869; 7 Macph. 427.) The defender therefore cannot, in the end, suffer any injury by the course which has now been taken should it appear at the trial that, in uttering the expressions complained of, he was in the exercise of his right, or discharge of his duty, as a professional man, acting on behalf of a litigant.

"No objection was taken to the terms of the pursuer's issue, assuming that he is not bound to insert in it a charge of malice against the defender."

The defender reclaimed.

STRACHAN for him.

SOLICITOR-GENERAL and LANCASTER in answer.

At advising—

LORD PRESIDENT—The scene of this slander was the Sheriff-court of Perthshire, and the occasion the trial of an action of breach of promise at the instance of Catherine Scott against John Stewart. The cause was in course of trial, and the defender in this action was acting as procurator for Miss Scott, when the words which are the cause of this action were used. It is quite clear, therefore, that the defender was acting professionally, and was invested with a character which gave him privilege. It remains to be seen when evidence is led whether the expressions used will be justified by profes-

sional privilege; but I have no doubt that malice ought to be inserted in the issue.

LORDS DEAS, ARDMILLAN, and KINLOCH concurred.

The issue was altered as follows:—The words "and maliciously" were added after the word "calumniously;" and for the words "was not speaking" were substituted the words "would not speak."

Agent for Pursuer—Alexander Morison, S.S.C.
Agent for Defender—David Milne, S.S.C.

Wednesday, June 29.

RANKING *v.* TOD AND OTHERS.

Bill of Lading—Freight—General Average—Bottomry Bond—Arrestment. Messrs T. & Co. bought from Messrs M. Brs. a cargo of wheat, and received through their agents Messrs H. & Co. a bill of lading endorsed "Deliver the within cargo to the order of Messrs H. & Co. with whom account for your freight as per charter-party without recourse to us, (Signed) M. Brs." It was proved by the bought-note that the price included freight and insurance, and that average and bottomry bond were "to be on account of and settled by sellers." The master and owner of the ship were not parties to the sale. In a question between Messrs T. and certain parties who had arrested in their hands the amount due as freight to the master and owner of the vessel, *held* that Messrs T. & Co. were not entitled to deduct from the sum due as freight (1) the amount of a bottomry bond; nor (2) the amount of general average due by them.

This was an action at the instance of the Messrs Ranking against Messrs A. & R. Tod, millmasters, Leith, the arrestees, and Francis Debono, the owner of the brig "Reggenti," lying at Leith, and also against Barbara, the master of the said vessel, for the purpose of making forthcoming the sum of £450, the property of the owner and master of the vessel, said to have been arrested in the hands of Messrs A. & R. Tod in payment of a sum of £350 due by Debono to the pursuers. Upon 5th March 1869 the pursuers raised an action against Debono, and Barbara, the master of the "Reggenti," in which, upon 5th May, they obtained decree ordaining the defenders to make payment to them "of the sum of £350 sterling, being the amount contained in a bill drawn by the said Francesco Debono upon, and accepted by, the said Salvatore Barbara, dated 3d October 1868, and payable eight days after the arrival of the said brig or vessel 'Reggenti,' at port of discharge in Great Britain or Ireland, or the Continent of Europe, between Havre and Hamburg, to the order of James Bell & Co., and endorsed by the said James Bell & Co. to the pursuers, with the legal interest on the said sum of £350 from the 6th day of March in the year 1869, being the date of citation to the action, until paid, together with the sum of £11, 10s. 2d. sterling, being the taxed amount of the expenses of process, and 14s. 6d. sterling as the dues of extract." In virtue of the warrant to arrest contained in the summons in said action, the pursuers, on the 6th of March 1869 caused Andrew Webster, messenger-at-arms, to arrest in the hands of the defenders, Messrs A. & R. Tod, arrestees, the sum of £450 sterling, more or less, due and addebted by the said Messrs A. & R. Tod to the said Francesco Debono and Salvatore Barbara.

The defenders' statement of facts was as follows:—"The defenders, who are millmasters and corn-merchants in Leith, purchased through Harris Brothers & Company of London, from Messrs Melas Brothers of London, on 12th February 1869, a cargo of wheat per the 'Reggenti,' supposed to consist of 2800 chetwerts (about 2016 quarters), at the price of 47s. 9d., less 2 per cent., per quarter, delivered; said price to include freight and insurance; that is, the seller to pay freight and insurance. The ship was under bottomry, and average was due; and it was expressly stipulated in the bought note, 'The average and bottomry bond to be for account of, and settled by, sellers.' By the terms of the bargain, therefore, the whole freight, insurance, average, and bottomry were due and to be paid by the sellers; but in practice in such cases, where the sellers are not at the port of discharge, it is not unusual for the purchasers to pay necessary charges as for the seller, the purchasers getting credit therefor as part of the price. The ship 'Reggenti' arrived in Leith on or about 22d February 1869, and endorsed bills for the cargo were duly sent to the defenders; the defenders, in exchange therefor, giving, as usual, their draft for the price; but as it was understood that the defenders would pay to the captain the balance of freight, they got credit in account with the sellers for the estimated balance of freight, which balance was estimated by the sellers to be £256, 14s. 6d. The substance of the transaction was, that the defenders paid the sellers the full price of the wheat, but retained in their hands £256, 14s. 6d. to meet the unpaid balance of freight. On the arrival of the vessel the captain applied to the defenders, as the consignees, for a payment to account of the balance of freight, to enable him to proceed with the discharge. The defenders complied with this request, and paid the captain, on 26th February 1869, £150, and on 2d March £50 farther, to account of the balance of freight, as per receipts produced. The discharge of the cargo proceeded between the 26th of February and the 8th of March. Between the 4th and 8th of March, however, various arrestments were used in the defenders' hands against the captain and owner of the ship. In particular—(1) On 4th March 1869 an arrestment, on a dependence, was used in the defenders' hands at the instance of Soltz, Zoff, & Company, shipbrokers, Leith, for £50. (2) On 5th March 1869 an arrestment to found jurisdiction was used in the defenders' hands at the instance of Messrs Heath & Company, merchants, London; and next day, 6th March 1869, an arrestment on the dependence was used in the defenders' hands at the instance of Heath & Company for £120. (3) On same 6th March 1869 there was used in the defenders' hands, first, an arrestment to found jurisdiction at the instance of the present pursuers; and then an arrestment on the dependence, at the pursuers' instance, for £450. A subsequent arrestment was used on 13th March 1869 at the instance of Messrs H. Clarkson & Company, shipbrokers in London, for £50. The arrestments used at the pursuers' instance, though used on the same day as Messrs Heaths', were some hours later. After the discharge of the cargo had been completed on 8th March 1869, the captain made out his freight account, in which, after giv-