the lending of money. I think that the agent should see that the fidelity he owes to the one party for whom he acts is not interfered with by any duty to the opposite party.

It appears to me that there is no difficulty as regards the first question that comes before us in this case. The duty of the defender Mr Smillie was to advise his client Mrs Oastler as to the sufficiency of the security on which her money was to be lent. Of course it is a different thing if nothing is left to his own discretion. If all he had to do as regards this transaction was to draw the deeds and pay over the money, then he has no responsibility. But here the facts are not so, and the pursuer is entitled to look to her agents to see that they invest her money upon a good and sufficient security. Accordingly the defenders confess that the security upon which Mrs Oastler's money was invested was not a good and sufficient security. But they say that it had been agreed between Brownlee and the pursuer that her money should be laid out in this special security. I do not believe that any such agreement had ever been entered into. The burden of proof is upon the defenders to show that they really had no discretion in the matter, and the presumption raised by the evidence is all the other way. I concur in thinking that the judgment should be for the pursuer.

LORD RUTHERFURD CLARK—I agree.

The Court pronounced this interlocutor:—

"Find in fact—(1) That in November 1874 the pursuer employed the defenders as her agents to invest a sum of £600, then placed by her in their hands; (2) that she did not authorise the defenders to invest the said sum, or any part of it, on a second or postponed security, but instructed them to invest it as a first charge on good heritable security; (3) that the defenders, in disregard of these instructions, lent £400 of the said sum to two brothers of the defender Thomas J. Smillie, on a bond and disposition in security of subjects in Braehead Street, Rutherglen Road, Glasgow, then recently acquired by them at the price of £1350; (4) that the said subjects were charged with a feu-duty of £15, and an heritable debt of £1000, which exhausted their value, and the said sum of £400, with interest thereon to the amount of £80, has been lost to the pursuer: Find in law that the defenders are bound to indemnify the pursuer for the loss thus sustained by her: Therefore sustain the appeal: Recal the judgment of the Sheriff-Substitute appealed against: Ordain the defenders, jointly and severally, to make payment to the pursuer of the sum of Four hundred and eighty pounds sterling, with the legal interest thereof from the date of citation to this action till paid, the pursuer being bound thereupon to deliver to the defenders, at their expense, an assignation to the said heritable debt: Find the pursuer entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Pursuer — Lorimer. Agent — William Black, S.S.C.

Counsel for Defenders—Comrie Thomson—Orr. Agents—W. & F. C. M'Ivor, S.S.C.

Saturday, October 30.

OUTER HOUSE.

[Lord Fraser, Ordinary.

MITCHELL INNES AND OTHERS.

Process—Choosing Curators—Caution—Caution Restricted by Lord Ordinary.

This was an action of choosing curators. The pursuers were the minor children of the late William Mitchell Innes.

Two curators were nominated by the pursuers and accepted office, and their nomination was sustained by the Court. Thereafter inventories were given up, and the curators ordained to find caution in due form of law.

The rental of the heritage belonging to one of the pursuers, the only son of the deceased, was £26,196, 6s. 5d., and his moveable estate was of the value of £17,865, 0s. 4d., the moveable estate of the others amounting to £3037, 5s. 2d.

The curators and the pursuers moved the Lord Ordinary to restrict the caution to £5000, or to such other sum as to the Lord Ordinary should seem proper.

The Lord Ordinary pronounced this interlocutor:—"Having heard counsel for the pursuers and curators, and considered the minute for them, restricts the caution to be found by the curators to the sum of £9500 sterling."

Counsel for Pursuers—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, October 30.

SECOND DIVISION.

[Lord Lee, Ordinary.

URQUHART *v.* M'KENZIE.

Reparation — Slander — Probable Cause — Relevancy.

A person was sued for damages for having, as was alleged, falsely and maliciously had the pursuer arrested on a criminal charge. Nature of averments which were *held* relevant to entitle the pursuer to an issue. Lord Rutherfurd Clark *dissented*, holding that the pursuer's own averments showed that the defender had probable cause for acting as the pursuer alleged.

This was an action by Donald Urquhart, a farmer at Lamington, near Tain, against Alexander M'Kenzie, hotel-keeper, Bonarbridge, Sutherlandshire, in which the defender claimed £500 as damages for injury to his character by the pursuer having, as he alleged, wrongfully caused him to be apprehended on a criminal charge. The pursuer stated on record that he had attended a market at Ardgay, near Bonarbridge, and stayed over the night in the defender's hotel; that in the morning he rose early to attend the market, and went out without paying his bill, but meeting the defender at the market, offered payment, which defender refused to accept, saying he could not then tell the amount; that it was his intention

to call and pay it before taking the train homeward, but being unwell, and being also hurried he was unable to do so, and entered the train intending to remit the money after he returned; that when the train was on the point of leaving he saw defender on the platform, and beckoning to him offered to pay his bill, and produced a £1 note in payment of it; that the defender saying the bill amounted to 3s. 6d., handed him 16s. 6d. in change, but he (pursuer) fell to be credited with 1s. 6d. as change out of a florin handed to him by pursuer in the morning for a glass of whisky, and which change he had then been unable to give; that he told the defender of this but the train started before the matter was settled, and he called out that he would send the proper amount when he got home; that notwithstanding, on the arrival of the train at Tain the pursuer was, in consequence of a telegram sent at the defender's instigation, apprehended and searched by the police, and on the next day the defender, "falsely, maliciously, recklessly, and without just or probable cause," informed the procurator-fiscal that the pursuer had stolen the 16s. 6d.

The defender denied the pursuer's account of the dispute as to the money. He also denied that he had charged the pursuer with theft or caused him to be apprehended. He pleaded, *inter alia*, that the pursuer's statements were irrelevant.

The Lord Ordinary allowed issues to be lodged, and on 15th October approved of the following issue:—"Whether on or about 1st December 1885 the defender, maliciously and without probable cause, caused the pursuer to be apprehended on a charge of theft, and searched by a police-officer at Tain, to the loss, injury, and damage of the pursuer?"

The defender reclaimed, and argued—The pursuer's own statement showed that there was probable cause for the defender's action, even assuming, which he denied, that he had caused him to be arrested and charged with theft. The action was therefore irrelevant—*Craig* v. *Peebles*, February 16, 1876, 3 R. 441. It had been held that what constituted probable cause was a question for the Judge and not for the jury, and here probable cause appeared from the pursuer's own averments—*Urquhart* v. *Dick*, June 10, 1865, 3 Macph. 932; *Lightbody* v. *Gordon*, June 15, 1862, 9 R. 934.

Argued for the pursuer—The action was relevant. It set out, and the pursuer offered to prove, that the defender had no reason to suspect the pursuer, as he had shown himself willing to settle his bill by beckoning to him to come up to his carriage, but the train had moved off before he could get the amount rightly settled, and he would have sent the amount to the landlord afterwards.

At advising—

Lord Justice-Clerk—I think I indicated at the beginning of this case that I thought it ought never to have been brought here, and I think so still. Neither party comes well out of the transaction. Certainly the pursuer does not. He was preparing to go off by the train without paying his bill at the hotel, and in fact he did so go off, and took with him the landlord's money. I think it probable he did not mean to do so, but the landlord telegraphed to the next station to get his money back, and the pursuer was arrested. The pursuer says he was arrested on a charge of stealing the money, and that that was caused by the defender. That is matter for proof. I think there must be proof of the circumstances alleged to have taken place on the record, and I would approve of the issue before us.

Lord Young—I have not been able to come to any other conclusion as regards this case. This is not the first case in which the pursuer's case has seemed a very improbable one, but one in which the Judges have thought impossible to refuse him an opportunity of proving it. Looking at the way in which the pursuer's statements are met by the defender, I do not think we can refuse him an opportunity for trial. The question is simply this—Is it possible that keeping within the statements on the record he may establish the case he makes upon that record? The pursuer's case is, that the defender caused him to be apprehended as a thief at the railway station at Tain, and that in so doing he was acting maliciously and without probable cause, and that the next day he lodged a complaint with the procurator-fiscal accusing him of theft. That is a perfectly relevant case. The defender in answer says that he did not act at all in the manner described by the pursuer. We have a most explicit denial of the pursuer's statements, and in looking at the whole question we cannot leave that denial out of account. The defender's answer to condescendence 4 for the pursuer is in these words—"Denied. The defender made no charge of theft against the pursuer either to the procurator-fiscal or to the police, and gave no instructions for the apprehension of the pursuer at Tain railway station, and if he was apprehended there the defender has no responsibility for the proceeding." Now, that answer raises a simple issue of fact, whether the pursuer did or did not order the arrest of the defender? But then the record goes on to imply that although he did not do it, yet if he had done it, it was only with probable cause. According to my experience, such alternative pleading is always apt to have an unfavourable effect on the case of the party using it. We cannot leave the defender's denial out of view. I appreciate the view that has been urged upon us for him, that if the pursuer has set out all the circumstances of the case upon record, and from his own statement it appears that the defender must have acted with probable cause and without malice, we should find there is not a relevant case. But I am not prepared to take that course here. I do not remember any such case, and if we took that view here it would be the first of the kind. But I cannot collect from the record more than that the pursuer's case is an unpromising one. He did not pay his bill in the morning, though he says he had no intention of bilking his landlord, and he further says he did not pay it because he was unwell in the afternoon, but he got into the train, and as the train was about starting he saw his creditor, the landlord, and calling him up he said he would give him a £1-note if he could give him change. The landlord gave him the change, but did not get his money, and the result was that the train went off, carrying away the pursuer with both the change and the £1-note. That certainly looks very suspicious, but I cannot say that the pursuer is not entitled, by proving the whole circumstances of the case, to show that the landlord (the de-

fender) had no probable cause for acting as he did, and that he himself was not a thief. It is not according to principle, I think, and certainly not according to precedent, to throw out a case such as this, and not to enter into an inquiry at all.

Lord Craighill—I am of the same opinion. I think there is a great deal to be said for the view that the defender had probable cause for acting as he did, but I am not quite satisfied that he has made out such a case on the statements of the pursuer himself in the record. If it is the fact that the train started while these two parties were engaged in a dispute about the amount of the bill, and before they had expected that it would start, then I think that it is not conceivable on the face of it that the pursuer intended to steal the defender's money after he had called him up to the train on purpose to pay him his account. I therefore concur with your Lordship.

Lord Rutherfurd Clark—I am sorry to differ from your Lordships. The case is a peculiar one, and probably enough it is unique in the particular to which Lord Young has alluded—that the pursuer's averments are such that the defender founds his case of probable cause upon them. I am of opinion, however, that the pursuer has not stated a relevant case. We are concerned only with the case that the pursuer makes upon record, and as the alleged charge of theft was made to a public authority, it is clear that he has no case unless he can show that the accusation against him was made maliciously and without probable cause. If the pursuer had said that the defender had made the accusation with probable cause, then he would not have stated a relevant case, and although he has not used those words, I think it quite plain from the statements he does make upon record, that the defender had probable cause for acting as he did. In the first place, it is not said by the pursuer they were acquainted; so far as the record goes they must be taken to be total strangers. The pursuer lived in the defender's hotel, and left without paying his bill. He did not return, and the next proceeding in the case is that while the pursuer was in the train and the defender was on the platform, the pursuer beckoned to him to come to the carriage. Now the result, according to the pursuer's own statements, was this. The pursuer asked what his bill was and produced a one-pound-note, the defender gave him the change after deducting the amount of his bill, and then a dispute arose as to what the amount of his bill really was. While this dispute is going on the train moves away, carrying off the pursuer, who calls out to the defender that he will send him the amount from home; he does not say where his home is. He does not say that there was any difficulty in returning the defender's change to him. I see no difficulty in his doing so, but he chooses to keep both sums without giving any explanation. Such is the case on the pursuer's own statements. He does not say that he told the defender where his home was, and how could the latter, seeing his money carried off in this way, do anything but suspect, and with probable cause, the dishonesty of the pursuer? It may be quite true that he was not dishonest, but that he laid himself open to the strongest suspicion of his honesty is what his statement on record itself shows. And strongest suspicion of dishonesty is just probable cause, and I think the defender had, on the pursuer's own showing, a right to have the strongest suspicion of his honesty.

It is said that the defender denies that he ever made the charge of theft, and that that denial is of importance. I do not think so. We are only concerned here with the relevancy of the pursuer's case on record, and it seems to me that the case is just as clear as if the pursuer had put upon record the statement that the defender made a charge of theft against him with probable cause, which would not have been a relevant charge. I think his explanations amount to the same thing.

The Court refused the reclaiming-note, with expenses, and remitted the case back to the Lord Ordinary for jury trial.

Counsel for Pursuer—Rhind—A. S. Paterson. Agent—J. D. Macaulay, S.S.C.

Counsel for Defender—Jameson—M'Lennan. Agent—Wilson & Mackay, S.S.C.

Thursday, October 14.

OUTER HOUSE.

[Lord Fraser and Lord Trayner.
Bill Chamber.

ROBERTSON *v.* THE TRUSTEES FOR THE ESKDALE DISTRICT OF DUMFRIES COUNTY ROADS.

Road—Obstruction—Public Monument—Interdict—Popularis Actio—*Title to Sue—Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. c.* 51), *secs.* 27, 32, *and* 123.

The Road Trustees of Eskdale District of Dumfriesshire, acting under the Roads and Bridges (Scotland) Act 1878, proceeded to remove a statue, which had been erected by public subscription in 1842, from its site in the market-place of Langholm to a new site on which they had got leave to place it. The Court *refused* to grant to ratepayers and residenters in the town, and to subscribers to the monument erection fund, interdict against the proceedings, *holding* that they had no title to sue, and that under the 27th section of the Act of 1878 the complainers should have sought redress by appeal to the County Road Board.

William Easton Robertson, residenter and ratepayer in Langholm, and manufacturer there, raised this process of suspension and interdict against the Trustees for the Eskdale District of Dumfries County Roads, to prevent them removing a statue of Admiral Sir Pulteney Malcolm from the market place of Langholm to a site within the Library grounds of that town. He set forth that he had been appointed at a meeting of the inhabitants of Langholm to take steps to prevent the removal of the statue.

The following facts appeared from the pleadings in the case:—Langholm was a burgh of barony. The inhabitants had adopted the Burgh Police Act, 3 and 4 Will. IV. c. 46 (1833), but only as