ing should be closed at nine o'clock instead of eleven. What the magistrates did was to provide that the whole of the public-houses under their jurisdiction should close at ten o'clock. Not that they provided that in so many words. They acted with more ingenuity, and provided that their order should apply to a certain district, but they included in that district the whole of the town of Rothesay, which was plainly in excess of their powers, and a perversion of the statutory powers committed to them to a purpose to which they were not meant to apply, and therefore the Court granted decree of reduction.

The present case raises the question whether it is proper or expedient that the pursuer should have his licence renewed. On that question the Magistrates pronounced their judgment, an appeal was taken to Quarter Sessions, and the judgment was affirmed, and unless we go outside the statute excluding our jurisdiction altogether, I do not see how we can get the better of it.

There is one question which at first sight appears to give a ground of challenge, which would in certain circumstances be competent. It is said that the Provost was disqualified from acting as Judge in the matter under section 13 of the Home Drummond Act, which enacts "that no justice of the peace or magistrate in any county or royal burgh, who is a brewer, maltster, distiller, or dealer in or retailer of ale, beer, spirits, wine, or other exciseable liquors, or who shall be in partnership with any person as a brewer, maltster, distiller, or dealer in or retailer of ale, beer, spirits, wine, or other exciseable liquors, shall act as such justices of peace or magistrate respectively in the execution of this Act; nor shall any justice of the peace or magistrate act in the granting of any certificate when he shall be the proprietor or tenant of the house or premises for which such certificate shall be applied for;" and whatever is done in contravention of these provisions is declared null. But the only allegation made on record against the Provost is that he was a trustee on a sequestrated estate, part of which consisted of a public-house business. He did not hold the licence himself, and he was not a retailer, nor was he a dealer in exciseable liquors, therefore that part of the section does not apply. He was also neither a proprietor nor a tenant of the house in regard to which the application for a licence was made, therefore the section has no application.

Putting that objection out of the question I cannot see any ground upon which the Lord Ordinary should have allowed an inquiry, and I therefore think that the interlocutor should be recalled, and the action dismissed as irrelevant.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action as irrelevant.

Counsel for the Pursuer and Respondent —V. Campbell — Hay. Agents — Wylie, Robertson, & Rankine, W.S.

Counsel for the Defenders and Reclaimers —Asher, Q.C.—Wilson. Agents—J. & A. Peddie & Ivory, W.S.

Saturday, November 1.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

WILSON *v.* PURVIS.

Reparation—Slander—Issue—Innuendo—Law-Agent—Privilege.

The trustee on a bankrupt estate instructed his agent to insist on the delivery of a cutting machine which had been removed from the bankrupt's premises by A, who claimed a right to it, unless proof of such right were given. The agent then wrote to A saying that he had been instructed to apply to him for the evidence of his right to remove the machine, and that unless he received such evidence or the machine by a certain day he would put the matter in the hands of the fiscal without further notice.

In an action of damages for slander at the instance of A against the agent—*held* (1)—following *Mackay* v. *M'Cankie*, 10 R. 537—that the letter was capable of being read as bearing the innuendo that the pursuer had been guilty of theft; and (2)—*dub.* Lord Kinnear—that as on the face of the letter the defender had exceeded his instructions, he was *prima facie* not in a privileged position, and that malice need not be put in issue, but that it would be for the Judge who presided at the trial, if the evidence disclosed a case of privilege, to direct the jury that they could not find for the pursuer unless they were satisfied that the defender acted maliciously in writing the letter complained of,

In January 1890 William Wright having become insolvent granted a trust-deed for behoof of his creditors in favour of W. S. Steel, accountant in Glasgow. On 19th February Steel wrote to J. R. Wilson, who had removed a cutting machine from Wright's premises, in these terms—"I understand that you removed from Mr Wright's premises in Stranraer a cutting machine which you had sold to him on time payment. Kindly let me have copy of your agreement, as I can find no trace of the transaction amongst Mr Wright's papers." No reply to this letter was sent by Wilson. After writing again without effect, Steel wrote to J. W. Purvis, solicitor, Glasgow, in these terms—"At foot you will find copy of two letters which I have written to a Mr Wilson, 38 Lady Lawson St. in Edinbro', but to which I have received no reply. Kindly take the matter in hand, and insist upon delivery of the machine in question

failing required proof, and charge Wilson with your expenses."

On 1st March 1890 Purvis wrote to Wilson as follows:—"*Wright's Trust*—I have been instructed by the trustee in the above, who has already written you twice on the subject, to apply to you for evidence of your right to remove from Wright's premises a cutting machine which you removed without his permission. Unless I have this evidence or delivery of the machine by Tuesday morning, I shall place the matter in the hands of the fiscal without further notice." Wilson therefore brought an action of damages for slander against Steel and Purvis, founding upon the letter written by Purvis above quoted.

The pursuer averred that he had let the machine in question on hire to Wright, and removed it, as he was entitled to do, by the terms of his contract, because the latter became insolvent and unable to pay the hire. The letter falsely and calumniously implied, and was intended by the defender Purvis to imply, that the pursuer had been guilty of the crime of theft. Said letter was written and said charge of theft was made against the pursuer by the defender Purvis maliciously, without instructions, from his client for the purpose of concussing the pursuer into an abandonment of his right of property in said machine, and to gratify a feeling of ill-will against him.

The pursuers abandoned the case as against Steel, as he disclaimed having given Purvis any authority to write the letter complained of.

Purvis pleaded—"(2) The action is irrelevant. (3) The statements complained of not being slanderous, defender should be assoilzied, with expenses. (4) The statements made by the defender in the said letter are privileged."

The Lord Ordinary (KINNEAR) approved of the following issue for trial of the cause—"Whether said letter is of and concerning the pursuer, and falsely, calumniously, and maliciously represents that he was guilty of the crime of theft by having stolen a cutting machine from the premises of William Wright, baker, Stranraer, to the loss, injury, and damage of the pursuer?"

The pursuer moved the First Division to vary the issue by deleting the word "maliciously" therefrom.

The pursuer argued—(1) The letter would bear the innuendo sought to be put upon it—*Mackay* v. *M'Cankie*, January 27, 1883, 10 R. 537. (2) There was no case of privilege, as the defender had clearly exceeded his instructions and made use of a threat of criminal proceedings in order to force the pursuer to abandon his claim. Malice need not therefore be put in issue.

Argued for the defender—(1) The letter would not bear the construction put upon it. (2) A communication to a procurator-fiscal was privileged, and accordingly malice and want of probable cause ought both to be put in issue—*Craig* v. *Peebles*, February 16, 1876, 3 R. 441; *Croucher* v. *Inglis*, June 14, 1889, 16 R. 774. Though intimations of the matter was not made to the fiscal, there was no reason to doubt that the defender had *bona fide* intended to report the matter to him.

At advising—

LORD PRESIDENT—This seems to me to be a very small and a very narrow case. At first sight it appeared to me to be very doubtful whether there was any issuable matter at all, but I think the case of *Mackay* v. *M'Cankie*, 10 R. 537, is a sufficient precedent to justify us in granting an issue.

The only question therefore left for our consideration is, what is the form of the issue to be allowed? Is the word "maliciously" to be inserted in it, as has been done by the Lord Ordinary, or is it to be omitted in terms of the motion before us? That matter, I think, depends a good deal upon the state of the record, and the record informs us that the defender acted as the agent of the trustee on a bankrupt estate, and that he received from the trustee instructions with regard to the recovery of a cutting machine which had been removed by the pursuer from the premises of the bankrupt, and that the defender carried out his instructions by writing the letter complained of by the pursuer.

Now, I do not think that there can be any doubt on the face of the letter that it goes beyond the instructions which the defender had received, and therefore *prima facie* he is not in a privileged position at all. The defender apparently wrote, at his own hand and of his own motion, a letter which is understood to contain a representation that the pursuer had been guilty of theft, and a threat that if the pursuer did not return the property he had stolen the defender would give information to the procurator-fiscal. I am therefore of opinion that the word "maliciously" need not be inserted in the issue, and that the motion to that effect should be sustained.

It is necessary to add that if the facts as they come out at the trial give a different complexion to the case, as there may be, for aught we know, a good ground for the defender's claim of privilege, it will be quite in the power of the Judge who presides at the trial, malice having been averred on record, to direct the jury that they cannot return a verdict for the pursuer unless malice has been proved against the defender. That is not, however, sufficient to justify the insertion of the word "maliciously" in the issue.

To the extent I have explained I differ from the Lord Ordinary as to the form of the issue to be allowed.

LORD ADAM—I agree with your Lordship that the case of *Mackay* v. *M'Cankie* is a sufficient authority for granting an issue in this case, as the facts alleged on record in the two cases are similar. The only question accordingly is with regard to the form of the issue, whether the word "maliciously" should be removed from it or not.

On that question my opinion is that the matter of privilege should be disposed of at the trial. The defender acted as the

agent of Mr Steel in trying to recover from the pursuer a cutting machine which the latter had taken possession of. The parties, till the writing of the letter complained of, had been entirely engaged in treating the matter as one of civil right, and the instructions which the defender got were to insist on the delivery of the machine. Instead of doing that he wrote the letter in question, which the pursuer avers accuses him of theft. If the pursuer succeeds in proving the innuendo he has placed upon the letter, I am not at present disposed to think that there was any privilege. At the same time, facts may arise at the trial to show that the defender's position was privileged, and I agree with your Lordship that in that case it will be the duty of the Judge who presides at the trial to direct the jury that they cannot return a verdict for the pursuer unless they are convinced that the defender acted maliciously.

LORD M'LAREN—From my experience of this class of cases I am inclined to the view that it is impossible to lay down any absolute rules with regard to the right of the pursuer to have his case sent to a jury on words not necessarily libellous in themselves. In several recent cases we have assoilzied the defender on the ground that the words complained of did not in their reasonable construction entitle the pursuer to reparation. In sending this case to trial I wish to guard against being supposed to hold that every person who thinks a crime has been committed, and gives notice of his intention to give information to the fiscal, is open to an action of defamation of character, because it may very well be that a person who thinks that a case calling for the intervention of the Criminal Courts of the country has arisen may be only doing what he thinks fair and reasonable in giving notice of his intention to lodge information to the party concerned, and if he is only prevented from following up such notice, and giving information by explanations which satisfy him that he was mistaken, I should not hold that any libel had been uttered by him. There may, on the other hand, be other cases where, *prima facie*, the threat of a criminal prosecution is used to get a party to comply with the defender's demands. The case here seems to me to be a proper case to go to a jury.

As to the form of the issue, I do not see that there is here any case of privilege. Such a case would only arise if the notice is followed up. I can quite understand the point of view of the Lord Ordinary, who looks upon the letter as just the initial step in a prosecution, and holds that the defender is entitled to the same privilege as a person who gives information to the fiscal, but I am not satisfied of the fact that the letter is the initial step in a prosecution. It will be for the Judge at the trial to consider whether or not a case of privilege has been made out.

LORD KINNEAR—If all your Lordships are of opinion that the question whether the pursuer can gain a verdict without satisfying the jury that the letter complained of was written maliciously should be left to the Judge who presides at the trial. I do not wish to dissent from that view, but I could not concur in the judgment if it implied that the pursuer would be entitled to a verdict although malice had not been proved. I cannot assent to the view of one of your Lordships that there can be no privilege because of the variation between the written instructions given to the defender by his client, and the terms of the letter which he himself wrote in carrying out these instructions. That may or may not be evidence tending to prove malice. But it appears to me to have no bearing on the question whether it is necessary that malice should be proved.

The Court varied the issue by deleting the word "maliciously" in terms of the motion.

Counsel for the Pursuer—Shaw. Agent—P. Morison, S.S.C.

Counsel for the Defender—M'Kechnie. Agent—William Black, S.S.C.

Friday, November 7.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MOLLESON (WHYTE'S JUDICIAL FACTOR) *v.* WHYTE.

Trust—Administration of Trust—Application for Power to Sell—Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 3.

Section 3 of the Trusts Act 1867 makes it competent for the Court of Session to grant authority to the trustees under any trust-deed to sell the trust-estate or any part of it "on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof." By the Trusts Act 1884 (47 and 48 Vict. cap. 63), sec. 2, it is provided that in construing the Act of 1867 "trustee" shall include tutor, curator, and judicial factor.

A testator conveyed his whole estate, heritable and moveable, to trustees for certain purposes, empowering them to sell the same (with the exception of the lands of B. and M.)

A judicial factor having been appointed on the trust-estate in place of the trustees, presented a petition for power to sell the lands of B. and M. *Held* that the power of sale craved was inconsistent with the intention of the trust, in respect that the testator, in granting a power of sale to his trustees, had specially excepted the lands of B. and M., and petition *refused*.

George Whyte of Meethill, Aberdeenshire, died in 1869. He left a trust-disposition and settlement by which he provided the liferent of his estates to his widow, legacies of