conducted, and an opportunity given to the witness of explaining or revising if necessary the opinion which he had previously given on this question. As Professor M'Call's scientific opinion given in the Glasgow case was put to him in cross-examination, I see nothing wrong in the reference which the Magistrates have made to it in this case for the purpose of testing the validity of his opinion.

As regards the reference made to published works, it appears from the context that they are only referred to on a point not necessary to the decision of the case, viz., whether the presence of local tuberculosis would make the carcase unwholesome and dangerous. But in the concluding paragraph of their opinion the Magistrates say they were satisfied on the evidence that the heifer was affected by general tuberculosis, and it was common ground that this would suffice to vitiate the carcase, making it unfit for food. I therefore see nothing in the opinion which would entitle the complainer to have the conviction quashed on the ground that it proceeded on evidence not before the Magistrates.

None of the other objections to the proceedings appear to me to be of any moment. And, first, I am clearly of opinion that it is not a good objection to the complaint that it does not set forth the special disease or cause of unfitness of the carcase for human consumption. In many cases it would be impossible to give such a concise statement of the nature of the unsoundness as would be suitable for insertion in a complaint, and I think that this is a matter as to which some latitude must be allowed to a prosecutor. If the complaint is not sufficiently specific, the defender may move for an adjournment, and demand explanations or notice of the kind of case that is to be made against him. It is not said that in this case the defender was taken by surprise or misinformed as to the ground of complaint, and it appears from the proceedings that he came to the trial prepared to answer the complaint by suitable evidence. The objection is therefore altogether unsubstantial.

Secondly, It is said that under the statute the Magistrates had no power to proceed *de plano* with the trial; that they were bound to adjourn to a future day. I think they were entitled to proceed on the same day if this could be done without injustice, and as the case was adjourned for the purpose of hearing the defender's witnesses, it cannot be said that he was prejudiced by the course that was taken.

The third objection is that the complaint is alternative. Its language is certainly not of the clearest; but I think that in fair construction the reference to that part of the statute which authorises seizure on probable cause is only a part of the narrative leading up to a definite charge of contravention of the statute. The conviction is quite explicit as to the nature of the offence, and even if there were grounds of objection to the complaint, the objection might have been obviated by the deletion of the words objected to as ambiguous or misleading. Your Lordships are always unwilling to deal with objections to complaints that have not been taken in the Inferior Court, and in the present case the fact that the objection was not taken at the proper time is a sufficient reason for refusing to entertain it.

Lastly, It was urged that as the prosecutor must begin by applying for authority to seize the carcase, he ought to include a conclusion for a penalty in his first application, and that if he does not do so he cannot afterwards prosecute for penalties. But as I read the statute, the authority to seize may be given without a formal complaint in writing, and it may be necessary to take proceedings for the condemnation of a carcase before it is known whether there is a case for conviction. If unnecessary expense is caused by duplicate procedure, this may be dealt with by the Magistrates in awarding expenses.

LORD WELLWOOD and LORD LOW concurred.

The Court sustained the conviction.

Counsel for the Complainer—M'Kechnie—Guy. Agent—James Drummond, W.S.

Counsel for the Respondent—Lord Advocate Balfour, Q.C.—Ure. Agent—

COURT OF SESSION.

Saturday, December 24.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

REID *v.* COYLE.

(*Ante*, May 13, 1892, vol. xxix, 638, 19 R. 775.)

Reparation—Slander—Malice and Want of Probable Cause — Privilege — Statements by Physician Called in to Attend Patient.

In an action of damages by a midwife against a medical practitioner the jury returned a verdict for the pursuer on the first and fourth issues, which were in these terms—(1) "Whether on 15th October 1891 . . . the defender falsely and calumniously stated to Stephen Moore that the pursuer had poisoned his wife Mrs Agnes Moore" . . . (4) "Whether on 20th October 1891 . . . the defender falsely, calumniously, and maliciously, and without probable cause, stated to Archibald Mackenzie, detective-officer, that Mrs Moore, wife of Stephen Moore, had been poisoned by a drug given to her by the pursuer which had caused her death." . . . The Judge directed the jury that the statements contained in the first issue were privileged, and that malice must be proved, and no objection was made by the pursuer.

The only evidence of malice adduced by the pursuer as affecting either the first or the fourth issue was the evidence of Mackenzie, who proved that the statements made to him were not volunteered by the defender, but were used in the course of the defender's replies to Mackenzie's inquiries made officially by him.

Held that the verdict was unsupported by evidence, and a new trial *granted.*

Observations by Lord Trayner as to the limits within which the existence of malice at an earlier date may be inferred from proof of malice at a later date.

Mrs M'Connon or Reid, wife of Alexander Reid, and residing at 78 George Street, Whiteinch, sued Patrick Coyle, druggist and Licentiate of the Faculty of Physicians and Surgeons, Glasgow, 300 Dumbarton Road, Partick, for £250 damages for alleged slander.

The following issues were adjusted by the Second Division for the trial of the cause—"Whether, on or about 15th October 1891, in the house 42 Smith Street, Whiteinch, occupied by Stephen Moore, the defender falsely and calumniously stated to the said Stephen Moore that the pursuer had poisoned his wife Mrs Agnes Moore, or used words to a like effect, to the loss, injury, and damage of the pursuer? (2) Whether, on or about 17th October 1891, in said house 42 Smith Street, the defender falsely and calumniously stated to the said Stephen Moore that the pursuer had poisoned his wife Mrs Moore, by a drug she had given her, or used words to a like effect, to the loss, injury, and damage of the pursuer? (3) Whether, on or about 19th October 1891, and in or near Dumbarton Road, Partick, Glasgow, the defender falsely and calumniously stated to the said Stephen Moore that there was no doubt that his wife Mrs Moore had been poisoned by the pursuer, and that he ought to give information to the police authorities to that effect, or used words to a like effect, to the loss, injury, and damage of the pursuer? (4) Whether, on or about 20th October 1891, and in Dumbarton Road near Whiteinch, the defender falsely, calumniously, and maliciously, and without probable cause, stated to Archibald Mackenzie, detective-officer, Partick, that Mrs Moore, wife of Stephen Moore, had been poisoned by a drug given to her by the pursuer, which had caused her death, or used words to that effect, to the loss, injury, and damage of the pursuer?" The trial took place upon 19th, 20th, and 21st October, and the jury found for the pursuer on the 1st and 4th issues, and on the 2nd and 3rd for the defender. The defender obtained a rule upon the pursuer to show cause why there should not be a new trial upon the ground that the verdict was contrary to evidence.

It appeared that upon 12th October 1891 the pursuer was called in as a midwife to attend the wife of Stephen Moore in her confinement. Mrs Moore was besides suffering from a suppuration in her thumb. The pursuer gave her a dose of ergot of rye, the operation of which is to ease the pains of labour, but which should not be given until labour has begun. It was admitted that the pursuer was entitled and was a fit person to use ergot of rye if she used it properly. The size of the dose was a contested point, the pursuer stating she had given an ordinary dose of half a teaspoonful, the husband stating that his wife had alleged the amount to be half a teacupful. Upon the same day Dr Macaulay was called in to see Mrs Moore, and upon Thursday 15th October the defender was called in for consultation. Labour came on upon Friday, and a child was born which died upon Saturday. Mrs Moore died upon Sunday, and upon Monday Moore got this certificate of death from Dr Macaulay—"Said to be some drug—gangrene of hand and arm." He took this to the registrar, and was told to go to the police office. A *post-mortem* examination of Mrs Moore's body was made under a warrant of the Sheriff of Lanarkshire, and the result was that the examiner found the cause of death was blood poisoning due to putrefactive changes of the tissue of the hand. Dr Dunlop, who conducted the examination, deponed that he thought it impossible that this condition could have been caused by the administration of ergot of rye.

Mrs Reid, the pursuer, deponed—"On Monday, 12th October 1891, I was called by Stephen Moore to attend his wife in confinement. I had attended her before, and had been engaged for this confinement. I went to Mrs Moore's house. I did not expect confinement so soon. She said she felt very ill, and complained of pains in the abdomen. I examined her; she had symptoms of premature labour. She was very feverish and excited. She said she felt very ill, and asked if I had nothing that would give her ease. I had nothing but labour-tea, which I thought might cause the pains to cease for a little. I gave her half a teaspoonful of ergot of rye in water. It was the liquid extract. It is understood to assist labour. She took it, and said she felt a little better. The pains left her. She complained of dimness of sight. When I was leaving she said her thumb was festering. I advised an oatmeal poultice with soda. I saw her thumb. There was a wound on the side, and there was a swelling up the arm. I was there about one hour ten minutes. I left word, if she got worse, to send for me immediately. I heard no more till 7 p.m. that day, when I got a message that I would not be required, as they had called in a doctor."

Stephen Moore deponed—"My wife supplied me with the information that she had died from an overdose of poison. She told me several times that she had been poisoned. Dr Coyle never told me that she had died of poisoning. I never asked Dr Coyle what my wife died of. I knew the cause of my wife's death. My wife told me. Dr Coyle did not tell me what she died of. I did not ask Dr Coyle what she had died of. . . .

I recollect my wife's arm getting inflamed. I went for Dr Macaulay on Monday the 12th. Her arm had not been inflamed before that. He recommended linseed poultice. Dr Macaulay called a second time on the Monday; and on Tuesday, 13th October, my wife's hand was lanced. The swelling got worse. Dr Coyle was called in on Thursday. Dr Coyle on that day said, after examining the state of my wife and her hand, 'My dear woman, you are poisoned.' Before he made his examination, my wife had informed him that Mrs Reid had been there. He said nothing to me about Mrs Reid. . . . (Q) After seeing your wife did he call you aside?—(A) Yes, on the second time. He said—'My good man, I can do nothing for you. Perhaps your wife may not live over to-night.' That was all. My wife called me to her bedside. Dr Coyle did not say then she had been poisoned. I did not ask him the cause of her condition. I thought from what Dr Coyle said that she was still suffering from the poison."

Dr Macaulay deponed—"Taking together the sickness, prostration, paralysis of bladder and lower limbs, discolouration of vomit, and the fact that half a cupful was the quantity of ergot administered, I attributed these (gangrenous) symptoms to the administration of the ergot. I am still of that opinion. I found proof of that on Wednesday, and before the woman died. The loss of power of limbs, both feet, and arms, was so significant of poisoning. Half a teacupful of ergot of rye is undoubtedly a poison. . . . I called late on Thursday, and was sent for early on Friday. She was in labour, and the baby was shortly after born. The appearance of the child, its discoloured condition, and the absence of natural discharges, confirmed my opinion as to the excess of the dose of ergot. I think I have only once attended a confinement where there was such absence of natural discharge. That suggested an overdose of ergot. I thought the bluish colour of the baby was the effect of the ergot through the mother's blood. There was nothing peculiar about the delivery; nothing which would account for the condition of the child."

Dr Coyle deponed—"I got a message from Dr Macaulay on Thursday 15th October, and met him about mid-day in Moore's house. We went over case. I found the case very difficult. The low condition of the woman, and the marked development of gangrene in her hand puzzled me. I was quite at a loss. Dr Macaulay had made incisions to relieve tension, so as to promote circulation. Mrs Moore told me that on Monday morning she had got half a teacupful of labour tea from Mrs Reid. I was much surprised. Dr Macaulay had mentioned that briefly on our way up. She told me she had become sick and giddy, had lost power of walking, her arms were affected, and she had lost use of bladder. Generally she felt very ill. She said—'Mrs Reid has poisoned me.' I said that is a very serious thing to say. She repeated it. Dr Macaulay and I thought that the circulation of blood was seriously affected in the arm. There having been a slight wound on thumb, its circulation would be weakened, and we thought that the gangrene which developed was due to action of ergot on debilitated constitution of a pregnant woman, and showed first in hand because of enfeebled circulation due to wound. Ergot affects bloodvessels, and leads to constriction and obstruction, and that with local impaired circulation might cause gangrene, there being debilitated condition of system. That is my view now. . . . *Cross.*—As to the first issue, I made the general remark to Moore that I thought his wife had been poisoned. I went into no particulars. I was answering Moore's question, and I had in my mind the phenomena of the case. In using the word poisoned, I referred to nothing but the ergot. . . . Regarding the fourth issue, the statement I made was a brief *resumé* of the case, and that I had been informed that Mrs Reid had given half a teacupful of labour tea. That I could not explain phenomena on ordinary grounds, and that I believed that the dose had been given; and if so, that it had had a poisonous effect on the deceased woman."

In support of her averment that the defender had entertained feelings of hostility towards her since September 1891, the pursuer called a Mrs Peters, who deponed that in that month her child was attended by the defender. A syringe for an enema was required, and a neighbour applied to the pursuer for it. "Mrs Reid came. She asked if there was a doctor attending, and was unwilling to interfere lest the doctor should be angry. She treated the child. Dr Coyle came next morning. He asked me if I had got the enema. I said no. I said a friend had come up to see baby after he had left, and that she had no small enema, and did not think it required on. He asked if it was Mrs Reid, the midwife. I said yes. He said I don't approve of these midwives. He was not very angry, and said he would come back. *Cross.*—Dr Coyle had been treating the child, and had ordered a starch enema. Mrs Reid advised me to give it starch by the mouth. I told Dr Coyle that she had advised that instead of giving starch by enema it should be given by mouth. It was then he said he disapproved ef these midwives. That was all he said. He attended the child till its recovery."

Archibald Mackenzie, a detective-officer in the police office, deponed—"I met Dr Coyle on the Tuesday before *post-mortem* examination, before 12 o'clock. I told him that there was to be a *post-mortem* examination at 12·30. He said that there was no doubt that the woman died of poison by a drug given to her by the midwife Mrs Reid. He also said that she was a dangerous woman to be at large, and that she should get penal servitude. He said he had no doubt she was a murderess in this case. I heard the result of the *post-mortem* by Dr Dunlop. Dr Dunlop's account differed from Dr Coyle's statement. *Cross.*—I did not mention to

anyone that Mrs Reid was a murderess or deserved penal servitude till I told it to defender's agent when he called on me. . . . I took his statement to be made to me in my character as police officer inquiring about this matter."

At advising—

LORD TRAYNER—In this case four issues were sent to the jury, and with regard to the second and third the verdict was for the defender. On the first and fourth a verdict was returned for the pursuer. A new trial is now moved for by the defender on the ground that the verdict on the first and fourth issues is contrary to evidence.

We are informed that the learned Judge who presided at the trial directed the jury that the statement complained of in the first issue, if made by the defender, was privileged, and that in order to succeed on that issue the pursuer required to prove that that statement was made maliciously. That direction was not excepted to, and I think it clear that the direction was sound. With regard to the fourth issue no such direction was necessary, it being there expressly put, whether the statement to which it refers was made by the defender maliciously and without probable cause.

I take it for granted that the statements referred to in both the first and fourth issues were made by the defender. The question, therefore, before us is, whether there was evidence laid before the jury establishing that these statements were made, in the one case maliciously, and in the other maliciously and without probable cause. But before dealing with these issues separately and with the evidence relative to them, it is of some importance to have regard to the pursuer's averment on record as to the cause from which the alleged malice on the part of the defender towards the pursuer took its rise. On this matter the pursuer's case, as alleged, is that the defender has entertained feelings of malice towards the pursuer since September 1891, in which month the pursuer had interfered with the defender's treatment of one of his patients—the child of a Mrs Peters—and that he has "looked upon the pursuer as his opponent in his profession and his enemy." The earlier part of this statement is contradicted by Mrs Peters, the only witness called by the pursuer in support of it, while the latter part is not supported by any evidence whatever, and, indeed, appears to me to be extravagant. The pursuer's only averment, therefore, as showing the origin, or indeed existence, of the alleged malice, is, so far as the proof goes, shown to be without foundation. What I may call the general case of malice has thus entirely broken down.

With regard to the first issue, there is absolutely no proof that at the time the statement thus complained of was made, the defender entertained feelings of malice towards the pursuer, or spoke of her or her conduct maliciously. It is contended that the evidence of the witness Mackenzie, speaking to something said by the defender about a week afterwards, proves malice, and that this may be carried back, so as to prove malice existing on the part of the defender, and influencing his statements at the earlier date. I do not doubt the propriety in some cases of inferring the existence of malice at one date from proof of something showing malice at a later date. Malice generally exists for a longer or shorter period before it finds expression in words or actions. Thus, if a man makes a statement on one day, and is found voluntarily and perhaps somewhat recklessly repeating it on subsequent occasions in such circumstances as to infer malice, that proved malice may not unreasonably be carried back so as to affect the first statement. But for my own part I should be very careful in the application of this view, and would only give it effect where the circumstances of the case led irresistibly, or at least with considerable certainty, to the conclusion, that the whole statements from first to last were maliciously uttered. I think we have no such case here. The statement to which Mackenzie speaks in his evidence was not volunteered by the defender. It was an expression used (if ever used) in the course of the defender's replies to Mackenzie's inquiries made officially by him. I am not therefore prepared to admit that that statement can qualify any malice in connection with the statement which forms the subject of the first issue. But whether the views I have expressed are accepted or not does not appear to me to be very material to the decision of the question now before us. The only evidence of malice adduced by the pursuer as affecting either the first or fourth issue is the evidence of Mackenzie, and I am of opinion that that is not proof of malice. The pursuer is bound to establish malice just as clearly as she is bound to prove the utterance of the words of which she complains. The kind of evidence available to prove these two things is different, but proof of each is essential to the pursuer's success.

Now, in my opinion, there is no evidence of malice except Mackenzie's, and the unsupported testimony of one witness is not proof. I do not regard this as a case in which the jury arrived at their verdict on a balancing of conflicting testimony—if I had done so, I should not have interfered with their verdict—but a case where a verdict has been returned without proof to support it.

Further, with regard to the fourth issue, the pursuer has to make out that the defender's statement was made without probable cause. I think it is impossible to affirm this on the evidence. I think the whole evidence, certainly the weight of evidence, is the other way, and that in finding for the pursuer, affirming the want of probable cause, the jury have either misunderstood the evidence or disregarded it.

I am therefore of opinion that this verdict cannot stand, and that the motion for a new trial should be granted.

LORD KINCAIRNEY—I entirely concur with the conclusions stated by Lord Trayner, and in the main with the considerations stated in support of them.

At the same time, I am not able to say there was no proof of malice, or that the witness Mackenzie was the only witness who gave evidence as to the alleged malice. I think there was more evidence of malice that the jury might quite fairly take into consideration, and I think I quite rightly left it to the jury to say whether there was malice on the part of the defender. But I agree that the verdict is against the evidence to such an extent and degree as to warrant us recalling it and granting a new trial. It is certain no malice was proved to have been shown by the defender.

In the fourth issue malice and want of probable cause was libelled, and had to be proved. I think it is proved that these two doctors paid considerable attention to the case, and came to a certain conclusion as to the cause of Mrs Moore's death, and that the opinion they then formed was an honest opinion formed after consideration. Whether it was a right or a wrong opinion, it was arrived at deliberately, and if that be so, it is impossible for us to affirm that they had no probable cause for what they did.

LORD JUSTICE-CLERK—I concur in the result at which your Lordships have arrived. As regards the first issue, the direction given by the learned Judge to the jury was that if they found for the pursuer they must find that the defender was actuated by malice against her, and as that was a proper direction, I assume that the jury found there was malice on his part. Now, it is remarkable that the only basis upon which the pursuer went in making an allegation of malice under this issue was a statement said to have been made by the defender to a Mrs Peters sometime before the occurrence of the event which led to this case. But when Mrs Peters is examined she denies that the defender ever made any statement showing ill-will against the pursuer. Now, this allegation, which was false, was the only proof of malice against the defender except the evidence of Mackenzie, the detective officer. Mackenzie's evidence does not relate to that time at all; it is concerned solely with what happened after the death of Mrs Moore, but the pursuer maintains that in some way it may be carried back and used as corroborative evidence of the malice libelled under the first issue. But malice is a definite and separate part of the case, requiring to be alleged and proved as much and as clearly as any other part of a case, and Mackenzie's evidence is not evidence that the defender bore any malice against the pursuer before the death of Mrs Moore at all.

As regards malice and want of probable cause in the fourth issue, the doctors who had attended the case considered it before they gave a certificate as to the cause of death, and came to the conclusion which was embodied in the certificate, and I think it quite clear that they had probable cause for coming to that conclusion. There, I think, the pursuer has not proved what she was bound to prove under this issue, that there was a want of probable cause for the defender acting in the way he did.

The Court granted a new trial.

Counsel for the Pursuer—Shaw—M'Watt. Agents—Carmichael & Miller, W.S.

Counsel for the Defender—Comrie Thomson—Burnet. Agents—Cuthbert & Marchbank, S.S.C.

Tuesday, January 24, 1893.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ROYAL BANK OF SCOTLAND *v.* PRICE AND OTHERS.

Process — Multiplepoinding — Double Distress—Competency.

A sum lodged with a bank on deposit-receipt was claimed after the depositor's death by his granddaughter, who alleged that the deceased had made her a donation of the deposit-receipt and its contents. The sum was also claimed by the deceased's sons in name of *legitim*. The granddaughter was executrix-nominate under the will of the deceased, but declined to confirm or stand upon her title as executrix.

Held that there was double distress, and that it was competent for the bank to raise a multiplepoinding.

This action of multiplepoinding was raised by the Royal Bank in the following circumstances, the narrative being taken from the opinion of the Lord Ordinary (KYLLACHY):—The Royal Bank raised the action as holders of a fund of over £1000, which the deceased Charles Dunlop deposited in one of their branches on 1st June 1891. He received, it appears, in exchange, a deposit-receipt which, it is said, he at the same time endorsed in the presence of the bank agent. Some months afterwards, his granddaughter (Mrs Price) brought the deposit-receipt to the bank and desired payment, alleging that her grandfather had made her a present of the amount. The bank agent, however, learning from her that her grandfather had been very ill, and was in fact, unconscious, declined in the meantime to pay the money, and next day the old gentleman died.

It appears that the granddaughter claims the money exclusively, on the ground of the alleged donation. That is the sole title which she puts forward. She says, no doubt, that she is also executrix-nominate of the deceased, and his universal legatory. But she expressly declines to stand upon her title as executrix. That is to say, she declines to confirm so as to give the bank a valid discharge in that character.

On the other hand, the deceased's two