The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 188, enacts—"(1) Every liquidator appointed by a company in a voluntary winding-up shall, within seven days from his appointment, send notice by post to all persons who appear to him to be creditors of the company that a meeting of the creditors of the company will be held on a date, not being less than fourteen nor more than twenty-one days after his appointment, and at a place and hour to be specified in the notice, and shall also advertise notice of the meeting once in the *Gazette* and once at least in two local newspapers circulating in the district where the registered office or principal place of business of the company was situate; (2) at the meeting to be held in pursuance of the foregoing provisions of this section, the creditors shall determine whether an application should be made to the Court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, and if the creditors so resolve an application may be made accordingly to the Court at any time, not later than fourteen days after the date of the meeting, by any creditor appointed for the purpose at the meeting; (3) on any such application the Court may make an order either for the removal of the liquidator appointed by the company and for the appointment of some other person as liquidator, or for the appointment of some other person to act as liquidator jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection either together with or without any such appointment of a liquidator, or such other order as, having regard to the interests of the creditors and contributories of the company, may seem just."

On February 23, 1912, J. H. Marlow, 54 Marchmont Crescent, Edinburgh, representative of Minton, Hollins, & Company, Stoke-on-Trent, creditors of Messrs Cherry & Company, Limited, tile layers, Glasgow, presented a petition to the First Division under section 188 of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) for the appointment of a committee of inspection in the voluntary winding-up of Cherry & Company, Limited.

The petition stated "That Cherry & Company, Limited, was registered and incorporated on the 26th December 1901, and its registered office is situated at 215 St Vincent Street, Glasgow. The capital of the company is £2000 sterling, divided into 1980 5 per cent. preference shares and twenty ordinary shares of £1 each.

"At an extraordinary general meeting of the shareholders of the company, held on 22nd January 1912, the following extraordinary resolution was duly passed—'That it has been proved to the satisfaction of this meeting that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same, and accordingly that the company be wound up voluntarily.' Mr George A. D. Scott, writer, 170 Hope Street, Glasgow, was appointed liquidator. . . .

"At a meeting of the creditors of the company convened by the liquidator, held at Glasgow on 9th February 1912, it was decided that application be made to the Court for the appointment of a committee of inspection in name of the petitioner, and that the names of John Henry Marlow, Edinburgh, representative of Messrs Minton, Hollins, & Company, Stoke-on-Trent (the petitioner), and Robert Watson, tile layer, 14 Dundrennan Road, Langside, Glasgow, be suggested for appointment as members of that committee."

The prayer of the petition was as follows—"May it therefore please your Lordships, after such intimation and service, if any, as your Lordships shall think fit, to appoint the petitioner John Henry Marlow and the said Robert Watson, or such other persons as to your Lordships may seem fit, as a committee of inspection in the voluntary winding-up of Cherry & Company, Limited, as authorised by the said statute. . . ."

The petition appeared in the Single Bills on 27th February, when counsel for the petitioner moved the Court to make the appointment craved. The Court continued the petition till the following day in order that evidence of the liquidator's consent might be obtained. On 28th February counsel for the petitioner produced a letter from the liquidator consenting to the prayer of the petition being granted.

The Court granted the application.

Counsel for the Petitioner—W. T. Watson. Agents—Pearson, Robertson, & Finlay, W.S.

Thursday, February 8.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

CHALMERS *v.* BARCLAY, PERKINS, & COMPANY, LIMITED.

Reparation—Slander—Malicious Prosecution—Private Prosecutor—Malice and Want of Probable Cause—Sufficiency of Averments—Merchandise Marks Act 1887 (50 *and* 51 *Vict. cap.* 28).

B., P., & Co. had for some time sold to C. stout in barrels for bottling. They had also supplied him with labels—on which his name appeared—to be fastened on the bottles in which he sold their stout. In May 1910 they purchased from him, through an agent, a quantity of stout which he sold as theirs. On 4th July 1910 their solicitors wrote him stating that on an examination this stout had been found to be several degrees lower in specific gravity than the stout which had been sold to him. They added—"This discloses that a very serious tampering in the way of adulteration has taken place with

the stout issued to you by" B., P., & Co. "and bottled by you, and we have their instructions to take proceedings against you for that offence." They then proceeded to say that he was given an opportunity to apologise, that the apology was to be advertised at B., P., & Co.'s discretion, that he was to pay a sum to an infirmary, and that if he did these things no further proceedings would be taken. C. denied the charge and refused to do what was proposed.

On 23rd September 1910 B., P., & Co. served a complaint on him under the Merchandise Marks Act 1887, the particular offence charged being that he had applied their label to and sold certain bottles of stout, the stout therein contained being either not manufactured by them or diluted so as to be below the standard of quality which they supplied. After a trial before the Sheriff, C. was found not guilty. He thereupon raised an action of damages for slander and malicious prosecution against B., P., & Co., in which he asked two issues, one based on the letter and one on the complaint. His averments with regard to malice and want of probable cause did not amount in substance to more than that the defenders had launched their complaint against him without sufficient and adequate investigation. The Lord Ordinary (Ormidale) refused an issue on the letter in respect that it led up to and was part of the same incident as the complaint, but allowed an issue based on the complaint.

The Court, while *agreeing* with the Lord Ordinary that an issue could not be allowed on the letter, *refused* an issue on the complaint in respect that it was privileged and that there was no relevant averment of facts and circumstances from which malice and want of probable cause could be inferred.

Observations on the degree of privilege enjoyed by a private prosecutor.

Francis Christie Chalmers, wholesale bottler and aerated water manufacturer, Aberdeen, *pursuer*, brought an action against Barclay, Perkins, & Company, Limited, brewers, London, *defenders*, in which he sued for £5000 as damages for slander and malicious prosecution.

The pursuer had for some years bought the defenders' stout in barrels for bottling purposes.

He made the following *averments, inter alia*—"(Cond. 4) One day in the end of May 1910 the pursuer on going into his premises was told that a Mr Bain had ordered four dozen bottles of defenders' stout, and that these had been despatched to him. Said bottles had, the pursuer believes, been taken from the stock of bottled stout lying on the shelves of the pursuer's store. The pursuer attached no importance to said purchase, and heard no more thereof until on or about 5th July 1910, when he received from the defenders' law agents in Aberdeen a letter dated 4th July 1910, which is produced and referred to. Said letter, which was written on the instructions of the defenders, stated that the stout bought by Mr Bain was in bottle, one lot bearing pursuer's name and the other the number '1241,' and that all the samples bearing the label with pursuer's name proved, on analysis, to have an original gravity of from 1064·09 to 1067·46 instead of 1073. The letter then proceeded in the following terms:—'This discloses that a very serious tampering in the way of adulteration has taken place with the stout issued to you by Messrs Barclay, Perkins, & Company, and bottled by you, and we have their instructions to take proceedings against you for that offence. Before taking the matter into Court, however, they have accepted our advice to give you an opportunity of suitably apologising, and we are therefore instructed to say that if you will give them a letter acknowledging the fault complained of and apologising therefor, to be advertised at the discretion of our clients, and will pay a sum of say ten guineas to the Aberdeen Royal Infirmary and the expenses to which our clients have been put in the matter, they will take no further proceedings with regard to it. Failing your consenting to this course, however, we shall have no help but take the matter into court, when we need not say the consequences must be much more serious to you.' By said letter the defenders represented that the pursuer had adulterated stout supplied to him by them, and had, for his own profit, dishonestly and fraudulently sold the adulterated mixture to his customers as stout of the defenders' manufacture, and that he was thus guilty of an offence for which he was liable to prosecution. The said charge against the pursuer contained in said letter was false and calumnious, and was made with gross recklessness and with malice. The pursuer was much hurt in his feelings that any such accusation should be made against him, and it occasioned him very great anxiety and disturbance of mind, especially looking to the fact, hereinafter referred to, that owing to the stout in question having been entirely disposed of, he was deprived of the means of instantly proving his innocence. The pursuer was, and is, entirely unable to understand for what reason the said charge was made. There was no ground for any such charge, and no person acting with due care and without gross recklessness could have made it. The pursuer through his agents immediately repudiated the charge made against him. (Cond. 5) By 5th July 1910, the date of receipt of said letter, the barrel or barrels of defenders' stout from which said four dozen bottles had been drawn had been returned empty to defenders, and all the stout which had been bottled therefrom had been disposed of. The pursuer had thus no opportunity of making any comparison between the quality of the stout alleged by the defenders to have been contained in said bottles, and the bulk from

which the bottles had been filled in the previous month of May. (Cond. 7) In said letter of 4th July 1910 from defenders' law agents in Aberdeen, the defenders stated that the original specific gravity of their stout was always maintained at the figure of 1073, and that the stout purchased for purposes of analysis by the said Mr Bain on or about 27th May 1910 as above mentioned varied from 1064·09 to 1067·46, and it was upon the variation of gravity from their alleged standard of 1073, and that alone, that the charge of tampering by way of adulteration was founded by defenders. It is very difficult from analysis alone to identify any particular sample of stout as of any particular manufacture, and it is impossible for a manufacturer, as the defenders well knew, to say by a mere gravity test whether any specific stout is the stout of his own manufacture. The term 'original gravity' applied to stout means the density or gravity of the wort in its unfermented state. As is well known to all chemists and brewers, in the course of the process of fermentation of the wort, certain chemical changes occur which have the effect of altering the gravity of the liquid, and after fermentation it is not possible even by the most careful analysis and calculation to ascertain accurately what was the original gravity of the particular stout. Any such attempt to find the original gravity is always subject to a certain margin of error, the variation depending upon a number of factors, the effect of which cannot be determined with accuracy. Accordingly a manufacturer of stout or beer who wishes to ascertain with any approximation to accuracy whether a particular stout is a stout manufactured by him, is in the habit of adopting other well known scientific tests in addition to the gravity test. Even if all the known tests are adopted it cannot be affirmed with certainty from mere analysis that any stout is the stout of a particular manufacturer. These facts are common knowledge to persons engaged in brewing, and were well known to defenders. Further, even if the defenders could have determined by the result of the gravity test whether the stout in question was stout of their manufacture as supplied to the pursuer, the defenders' chemists in performing the said test failed to take into account essential factors which must be considered before an attempt can be made to estimate 'original gravity,' and the defenders knew, or ought to have known, that the said test was absolutely inadequate for the purpose of determining whether or not the pursuer was guilty of adulterating the stout supplied by them and fraudulently selling it as their stout. Nevertheless, upon no other ground than the absolutely inadequate foundation of an alleged gravity test, the defenders made the charge in the said letter of 4th July 1910, and instituted the prosecution hereafter referred to. Further, the defenders make and deal very largely in a stout of a lower specific gravity than that which had been ordered from them by the pursuer, and they did not adopt in their brewery any specific precautions to secure with certainty that on every occasion the stout they were sending to the pursuer was not said stout of a lower grade of gravity, and the individual barrels of stout which they sent to pursuer were not sampled or tested before being despatched to him. In point of fact the stout consigned to the pursuer was frequently of the lower standard of specific gravity. (Cond. 8) On or about 23rd September 1910 a complaint under the Summary Jurisdiction (Scotland) Act 1908 was served upon the pursuer at the instance of the defenders. The complaint charged the pursuer at the instance of the defenders with having, on 28th May 1910, in response to an order by Alexander Henry Bain, spirit dealer, 82 Regent Quay and 2 Commerce Street, both in Aberdeen, sold four dozen reputed pint bottles of stout which had been bottled by pursuer, and that prior to said sale and delivery the pursuer had falsely applied to seven or one or more of said reputed pint bottles of stout the defenders' registered trade-mark (blue label), thereby implying, contrary to the fact, that the stout contained in said seven or one or more reputed pint bottles was the brown stout manufactured by the defenders, and of the standard of quality of the stout so manufactured and sold by the defenders as their brown stout (blue label), contrary to the Merchandise Marks Act 1887, sec. 2 (1) (*b*), whereby the pursuer was alleged to be guilty of an offence against the said Act, and had become liable on summary conviction to the penalties set forth in section (2) (3), sub-section (11), of the said Merchandise Marks Act 1887, and in terms of section 14 of said Act to the costs of the prosecution. . . On 22nd December 1910 the Sheriff gave judgment finding the pursuer not guilty, and the defenders liable to him in the costs of the prosecution. . . . (Cond. 9) At the trial of said case, although the pursuer was charged with having sold seven bottles of stout not manufactured by the defenders, or not of the standard of quality of defenders' stout, evidence was led in regard to only four of said bottles. No evidence whatever was led by the defenders in regard to the other forty-four bottles which had been purchased by the said Mr Bain. At the trial it transpired that the only ground which the defenders had for making the said charge and instituting the said complaint against the pursuer was their allegation by them that the stout in said four bottles was not of the original specific gravity of 1073 or at the lowest 1072. The defenders failed to prove in said proceedings that all the stout despatched from their brewery had an invariable standard of not less than 1073 or 1072 original specific gravity, and it was admitted that the defenders did manufacture a special draught porter of not more than 1068 original specific gravity. Moreover, it was not proved that the stout supplied to the pursuer was not or might not have been defenders' said draught porter, no identification of individual barrels sent to customers having ever been

attempted. (Cond. 10) As above stated, the defenders on procuring the said four dozen bottles of stout on 28th May 1910, did not advise the pursuer that the same were obtained for the purposes of investigation, and they did not afford him any opportunity of having their analysis checked. They waited until all the stout from the barrels from which said four dozen bottles were supplied was exhausted before intimating any complaint to the pursuer. During the period between the beginning of September and the end of October 1910 they themselves supplied to the pursuer, upon orders for the same stout as previously supplied to him, stout of a lower standard of gravity than 1072, although they were on the point of prosecuting him for adulterating or tampering with their stout, for no other reason than that it did not reach the standard of gravity. (Cond. 11) The prosecution against the pursuer, who is a well-known citizen of Aberdeen, was extensively reported in Aberdeenshire newspapers, and as it extended over a number of weeks public attention was widely drawn to it. During the whole time that said prosecution was pending the defenders published twice a week in each of the *Aberdeen Journal* and *Aberdeen Free Press* an advertisement in the following terms, viz.:—

'CAUTION TO THE PUBLIC.

'BARCLAY, PERKINS, & CO.

'When buying London stout, ask for Barclay, Perkins', and insist upon seeing their name on the label, as other stouts are being sold with labels similar in colour and appearance, which deceive the eye. Barclay, Perkins' London stouts are the best, and have stood the test for more than 200 years.'

Although said advertisement did not mention said prosecution or pursuer's name, yet it conveyed to the ordinary readers of said newspaper, as it was intended to do, that the pursuer was one of those who was guilty of the offence specified in the said advertisement, or of some similar fraudulent act, and that there was some intimate connection between the said prosecution of the pursuer and the terms of the advertisement. (Cond. 12) The prosecution of said complaint and the grave charge of fraud therein made has caused the pursuer serious loss and damage in addition to personal suffering. His reputation as a business man has been very seriously injured. Other brewers, such as Messrs Bass & Company, of Burton-on-Trent, have raised difficulties as to continuing to supply him with their goods, and his whole credit and character as a man and a trader have been shaken. There was not a vestige of foundation for the charge made in said letter of 4th July 1910, or in the complaint lodged against pursuer. Both the letter and the complaint were written and formulated without any adequate investigation on the part of the defenders. If the defenders had made such careful and adequate investigation as the circumstances called for, and as they could without difficulty have made, they would themselves have discovered that there were no grounds whatever for charging the pursuer with adulterating the said stout. The defenders made said false and calumnious charge and instituted said complaint recklessly and maliciously, and without caring whether the same was true or false, and without probable or any cause. The very slightest inquiry would have revealed to the defenders that the stout supplied by them to the pursuer was not of a uniform standard of gravity, but they took no pains to confirm the basis on which the whole charge rested, and recklessly and wantonly launched into proceedings against the pursuer which were certain for the time at least to cause him great damage and discredit. This they did in the belief that said prosecution, whether successful or unsuccessful, would advertise their stout and assist them in pushing their wares in the Aberdeen market. In so doing the defenders showed a malicious and wicked disregard of the pursuer's interests, character, and position. . . ."

The pursuer pleaded — "(1) The statements in said letter of 4th July founded on in article 4 of the condescendence being of and concerning the pursuer, and false and calumnious, and having been uttered maliciously, to the loss, injury, and damage of the pursuer, he is entitled to reparation. (2) The defenders having recklessly, falsely, and maliciously, and without probable cause, slandered the pursuer by charging him with having fraudulently adulterated their goods, and the pursuer having suffered injury thereby, are liable to pursuer in reparation. (3) The defenders having recklessly, maliciously, and without probable cause instituted the prosecution condescended on against pursuer, to his loss, injury, and damage, are liable to pursuer in reparation."

On 23rd December 1911 the Lord Ordinary disallowed an issue laid on the letter of 4th July 1910 and allowed the following issue laid on the complaint — "Whether on or about 23rd September 1910 the defenders maliciously and without probable cause served or caused to be served upon the pursuer and prosecuted to a final issue a complaint in the terms set forth in the schedule hereto annexed, to the pursuer's loss, injury, and damage? Damages laid at £5000."

Opinion.—"In this case the pursuer has proposed two issues, but I have come to the conclusion that there is only room for one. Fairly considered, I think that the letter of 4th July 1910 must be read as merely leading up to and forming a step in the prosecution which followed in September. There was, no doubt, an interval of ten or eleven weeks between the receipt of the letter and the service of the complaint, and in this respect the present case differs from the cases of *Ferguson* v. *Colquhoun*, 24 D. 1428, and *Hassan* v. *Paterson*, 12 R. 1164. But this arises really from the nature of the charge. It was not an accusation of theft or some other criminal offence with which the police are

familiar, and which in ordinary course would be followed up at once by lodging a complaint with the police and then leaving the public authorities to deal with it. The letter contained a notice that if certain proposals were not accepted proceedings would be instituted in Court. The proposals were not accepted and proceedings were taken in Court. The delay was considerable, but I cannot hold it was undue. Both the letter and the prosecution were concerned with precisely the same incident, the alleged tampering with the defenders' stout before putting it into the bottles which were sold to Mr Bain as containing the stout of the defenders as supplied by them. It seems to me, therefore, that the letter and the prosecution form parts of the same occurrence, and that the pursuer has suffered only one wrong for which he seeks reparation. The proposed issues are in no sense alternative, but the pursuer sues only for one sum of damages and makes no attempt to appraise the extent of the several injuries sustained by him in respect of what he now contends were distinct and separate wrongs.

"Accordingly I shall disallow the first issue proposed.

"It is not disputed by the pursuer that malice and want of probable cause must go into the second issue, but the defenders maintain that there is no record for malice, that the averments thereanent amount to no more than a general allegation of malice, and that such is not relevant where, as they contend is the case here, the occasion is privileged. There must be, they say, specific averments of facts and circumstances from which malice can be inferred, and they further contend that these facts and circumstances must be extrinsic to and independent of the incident or incidents which constitutes or constitute the wrong. Many authorities were quoted. I have read and considered them all. I do not propose here to resume them. They appear to me to be not in all respects consistent, but there are two classes of cases in which facts and circumstances must be averred. First, cases of judicial slander, and second, cases directed against public officials. The present is not in either of these classes. It is said that a higher degree of privilege exists in the case of a private prosecutor than in the cases embraced in these two classes. In my judgment that is not so. It seems to me that a private prosecutor, as in this case, is primarily at least acting in his own and not in the public interest, and that to lodge and follow forth a complaint charging another man with an offence involving the imposition of a very serious penalty is an essentially different proceeding from the raising or defending a civil action. At the same time, in my judgment, the occasion here was privileged, but the privilege was not of so high a degree as in cases of judicial slander or those in which public officials are the defenders, and therefore the pursuer is not to be held to such strict averments of facts and circumstances as are required in cases of that class.

"In regard to the contention that there are here no facts and circumstances evidencing an oblique motive independent of the prosecution and what led up to it, I had at first some difficulty in not giving effect to it in view of the dicta of Lord M'Laren in the case of *Campbell* v. *Cochrane*, 8 F. 205. But a careful perusal of these satisfies me that his Lordship had in his mind the particular circumstances and the kind of slander with which that case was concerned. It was a case, moreover, in which the Court held that the presumption of privilege was of the highest order. It seems to me that the way in which a person sets about the institution of a private prosecution may very clearly disclose malice, and that a reckless disregard of the alleged offender's interests as evidenced by a want of reasonable care and adequate investigation in preparing his charge is a sufficient averment on which to found malice. Many of the averments in this case are undoubtedly of a somewhat general nature, but I am not prepared to dismiss the action without giving the pursuer an opportunity of proving what he alleges. The letter of 4th July is in the most absolute terms. No opportunity for excuse or explanation is offered. Then there is a resumption or continuance of trading for ten or eleven weeks. There are, *inter alia*, averments that the proper means of testing the stout had not been adopted, that in fact the defenders' stout is of varying gravity and not up to the figure alleged by the defenders, and that the stout supplied to the pursuer was frequently of the lower standard of gravity. There is also the matter of the advertisement referred to in cond. XI, and while it appears to deal not with adulteration but with simulate labels, it is averred that it was intended to convey, and did convey, to readers of the news paper that the pursuer—whose prosecution was proceeding intermittently in the Sheriff Court at the time—was guilty of the offence specified in the advertisement.

"Holding as I do that there must be some inquiry, I see no reason for not sending the case to a jury. I shall approve of the second issue as the issue for the trial of the cause."

The defenders reclaimed, and argued—The action was irrelevant. In a privileged case specific or extrinsic facts from which malice could be inferred must as a rule always be set forth. There was here no averment indicating antecedent malice. Averments of facts and circumstances inferring malice were essential in cases of judicial slander, or where public officials were defenders—*A* v. *B*, 1907 S.C. 1154, 44 S.L.R. 870; *M* v. *H*, 1908 S.C. 1130, 45 S.L.R. 874; *Campbell* v. *Cochrane*, December 7, 1905, 8 F. 205 (Lord M'Laren at 214), 43 S.L.R. 221; *Shaw* v. *Burns*, 1911 S.C. 537, 48 S.L.R. 432. Moreover, this case was *a fortiori* of cases of judicial slander, where the pursuer in the action was protecting himself alone. Here the privilege was higher, for it was against the public interest that a person who had grounds

for believing that an offence had been committed should be deterred from proceeding by fear of the consequences. The whole case on malice resolved itself into one of inadequate investigation and insufficient tests. It was said that malice must be inferred from the recklessness with which proceedings were taken, but it was not said that no inquiry had been made. The defenders had an undoubted title to prosecute with the consent of the procurator-fiscal—*Burns* v. *Turner*, December 17, 1897, 25 R. (J.) 38, 35 S.L.R. 265.

Argued for the pursuer (respondent)—In the first place, the pursuer was entitled to an issue on the letter alone. The charge made in the letter was different from that in the complaint; in the former the charge was a common law crime — Macdonald's Criminal Law (3rd ed.), 85—in the latter a statutory offence under the Merchandise Marks Act 1887 (50 and 51 Vict. c. 28), sec. 2 (1) (*b*). The letter, moreover, was not a privileged communication, and accordingly averments from which malice and want of probable cause could be inferred were not necessary as regards it. Malice did not require to go into the issue—*Wilson v. Purves*, November 1, 1890, 18 R. 72, 28 S.L.R. 76; *Reid* v. *Moore*, May 18, 1893, 20 R. 712, 30 S.L.R. 628; if it did, the averments were sufficient. As regards the complaint, it was launched so recklessly and so entirely without reasonable grounds that in the circumstances any jury would be entitled to infer malice without any averment of antecedent ill-will. The defenders made their charge without adequate investigation and without asking any explanation. They gave the pursuer no opportunity of testing the stout. While it was no doubt true that both malice and want of probable cause must go in issue, the necessary implication from the above facts was that the defender had acted from illegitimate motives and without any ground whatever—*Ingram* v. *Russell*, June 8, 1893, 20 R. 771, 30 S.L.R. 699; *Brown* v. *Fraser*, June 27, 1906, 8 F. 1000, 43 S.L.R. 741; *Hulton & Company* v. *Jones*, [1910] A.C. 20; *Urquhart* v. *Dick*, May 11, 1865, 3 Macph. 932; *The Quartz Hill Gold Mining Company* v. *Eyre*, 1883, 11 Q.B.D. 674; *Lundie* v. *MacBrayne*, July 20, 1894, 21 R. 1085, 31 S.L.R. 872; *Laidlaw* v. *Gunn*, January 31, 1890, 17 R. 394, 27 S.L.R. 317; *Finburgh* v. *Moss's Empires, Limited*, 1908 S.C. 928, 45 S.L.R. 792; *Musgrove* v. *Newell*, 1836, 1 M. & W. 582; *Hicks* v. *Faulkner* (1878) 8 Q.B.D. 167; Pollock on Torts (8th ed.) 316.

At advising—

LORD JUSTICE-CLERK—The circumstances out of which this case has arisen are that the defenders, the well-known brewers' firm of Barclay, Perkins, & Company, had been for some time supplying stout to the pursuer to be bottled for the purposes of his trade, and supplying him with their labels, on which the pursuer's name also appeared, to be fastened on the bottles in which they sold the stout to customers who purchased by bottle. In the month of May 1910, the defenders by an agent bought a quantity of stout from the pursuer which he sold as the defenders' stout. The defenders' solicitors some little time after wrote to the pursuer stating that on examination the stout the pursuer sold was several degrees lower in specific gravity than the stout the defenders sold to him. They then in the letter wrote thus—"This discloses a very serious tampering in the way of adulteration, . . ." and added, "we have instructions to proceed against you for that offence." The letter then proceeded to say that they had persuaded their clients to give the pursuer an opportunity for apologising, the apology to be advertised at the defenders' discretion, a sum of say £10 to be paid to the Aberdeen Royal Infirmary, and the defenders' expenses. The letter concluded by saying that if these things were done the defenders would take no further proceedings. The pursuer declined to do these things, and denied that there had been any tampering. The matter did not proceed further till 23rd September 1910, when a complaint at the defenders' instance was served on the pursuer the terms of which are set forth in the condescendence. The case was tried, and the Sheriff-Substitute gave a verdict of not guilty.

Thereupon the pursuer raised the present action, and asked that he might have two issues, one for the statements made in the letter, and another for the statements made in the complaint. The Lord Ordinary, holding that although there was a considerable interval of time between the letter and the complaint, the letter and the complaint were parts of one incident, and if a wrong was committed it was one wrong and one injury, refused the first issue proposed. An argument was addressed to us for the pursuer against that view, but it did not impress me. I think upon the question of one issue or two the Lord Ordinary came to a right conclusion. Accordingly, the question now is, shall the pursuer be allowed an issue based on the complaint upon the record as it stands. The true question involved is whether, as the nature of the case is such that the question of malice must be directly put in issue, the averments of malice to be found in the condescendence are such as to give him a right to the issue he asks for. Such a question is always one of some nicety, particularly where the slander relates to a charge preferred before a court of justice, in which, as Lord Abinger said in the case of *Laidlaw* (1 Meason & Welsby 582) "questions of probable cause and of malice are mixed together."

It must be kept in view that every slander has the element of malice in it. In a case of gratuitous slander where the person uttering can have no defence that he acted from an interest that he had, or from a duty lying upon him, no question of proving malice arises, and no such question is put in the issue. The law implies malice in such a case; it requires no special proof. On the other hand, in cases of privilege the insertion of the word "mali-

ciously" is essential in the issue. It is to be proved by the pursuer substantively. He cannot succeed unless he brings proof to show that there was malice. In such a case the law does not presume malice. The pursuer must by evidence oust the defender from his position of privilege by proving that he acted from antecedent malice, to gratify which he gave vent to the slander—in other words, that the evidence shows that gratification of his own malicious feeling and not the doing of duty or the assertion of interest was the motive of his action. I adopt the words of Lord M'Laren in the case of *Campbell* when he said—"In order to make a case of malice there must be facts alleged which are independent of the immediate cause of circulating the slander, from which the jury might legitimately infer some antecedent malice, ill-will, or indirect motive as the origin or cause of the slander." I differ from the Lord Ordinary when he rejects the case of *Campbell* as not ruling the present case. It is true that that case was a slander of a servant, but I am unable to understand how such a case differs from this case as regards the necessity for setting forth facts from which specific malice may be inferred. I cannot read Lord M'Laren's statement as being applicable to some privileged cases and not to others. To me it appears that whenever it is admitted that a case is one which from its nature requires that the pursuer must present the question whether what was done was done maliciously as a fact which he must prove, he must set forth alleged facts which if proved will prove it—prove, that is, that when the defender did what he is said to have done he did so to gratify malice conceived against the party wronged. In saying this I do not wish to be understood as suggesting that the way in which the slander is put forth may not in certain cases be sufficient to enable a jury to imply antecedent malice. For example, if a defender not only makes a charge in the proper quarter or brings a complaint where the law allows him to prosecute, but goes about gratuitously uttering his accusation broadcast to people who have no interest in the matter, acting in gross recklessness and in a manner indicating a vindictive spirit, that such facts if set forth may not justify the granting of an issue in a privileged case. Such facts may be sufficient to imply that the defender acted from positive malicious motive and was gratifying a formed malice. There is an illustration of this in the case of a banker who made an accusation in the presence and hearing of a number of clerks, having no occasion to do so. But here there is no such case. The defender took no action except causing a letter to be written to the pursuer, and when the pursuer refused to admit what it was alleged he had done, bringing the complaint to have the matter tried in a court of justice. There is nothing of the nature of malice to be implied from these acts. I see nothing in the record to suggest that the defenders went beyond what was reasonably to be held to be within their right, which was held to be a sound criterion in *Ingram* v. *Russell* and *Douglas* v. *Main*.

The case of *M.* v. *H.*, S.C. 1908, p. 1130, is important in the consideration of the present question. There the co-defender was assoilzied for want of corroborating evidence of the wife's confession, yet the co-defender was not allowed to take an issue of slander against the husband without averments of circumstances inferring malice.

Here it is admitted that the pursuer was found not guilty of the complaint made against him. But that does not at all imply want of probable cause. The many cases passed by the *probabilis causa* reporters do not all result in the success of the party for whom probable cause had been found. Therefore the acquittal of the pursuer cannot be founded on to establish that there was no probable cause. I should be inclined to hold that if a case occurred in which a total want of probable cause was shown, it might be possible to infer specific malice from that fact. But there is no such case here.

The final question is—Are there any averments made on this record setting forth facts which if proved would set up a case of malice entertained? I cannot find any. The word "maliciously" and the word "malicious" are used over and over again, but no specific or extensive facts of any kind are set forth as a foundation for an issue involving malice as applicable to the particular case.

I only think it right further to notice in a word that I cannot give any effect to the averments in cond. 11 relating to an advertisement warning the public to see when buying the defenders' stout that their name was on the label, as other stouts were being sold with labels similar in colour and appearance. This it appears to me can have no bearing whatever on the matter. It is not suggested anywhere that the pursuers had used labels which had not the defenders' name on them but were similar in appearance to the defenders' labels in order to sell stout as being the defenders' which had never been brewed by them. I cannot myself see how the pursuer, had he been suing the defenders for slander on that advertisement, could have innuendoed it so as to make it apply to him.

My conclusion is that the pursuer has failed to set forth any such averment of malice upon the record as to entitle him in this privileged case to obtain the issue which he demands.

LORD DUNDAS—I also think that the pursuer is not entitled to an issue, and that the action should be dismissed.

LORD SALVESEN—This is an action of damages arising out of the failure of a prosecution at the instance of the defenders against the pursuer for an offence under the Merchandise Marks Act, the particular offence charged being that the pursuer had applied the defenders' label to certain

bottles of stout which were either not manufactured by the defenders or had been diluted so as to be below the standard of quality which they supply. After a trial before the Sheriff the pursuer was found not guilty, and he now claims compensation for the injury to his trade and feelings which such proceedings and the publicity which they obtained were likely enough to inflict. It is admitted that although the prosecution was not at the instance of the procurator-fiscal, but at the defenders' own instance with his concurrence, both malice and want of probable cause must go into the issue. The question is whether the pursuer's averments disclose a relevant case either of malice or of such recklessness in the institution of the prosecution as in the eye of the law to amount to malice.

In considering this question it is of course important to consider what is the degree of privilege to which the defenders are entitled. The Lord Ordinary has held that their privilege was not of such a high degree as in cases of judicial slander or those in which public officials are defenders. I am not able to concur in this opinion. In a case of judicial slander malice alone goes into the issue, whereas it is admitted here that the pursuer cannot succeed unless he proves malice and want of probable cause. This clearly demonstrates that the privilege is of the highest order, and the reason is not far to seek. It is against the public interest that persons who have information leading them to suppose that an offence punishable under the criminal law has been committed should be deterred from taking steps to secure the offender's punishment by the fear that if the prosecution failed they would be civilly answerable in damages. It is for this reason that the motive with which information is given or such a prosecution instituted is of less importance than in ordinary actions of slander. A person who has probable ground for believing that another has committed a crime has a duty as a citizen to set the machinery of the law in motion against him, and will be protected even though it can be shown that he was actuated by malice in so doing. This differentiates a claim arising out of a prosecution which proves to be unfounded from most cases of privileged slander.

The law nevertheless recognises that an action of damages will lie for an abuse of criminal proceedings, but before an issue is allowed the pursuer must aver facts and circumstances which, if proved, disclose a clear case of abuse. In the present case I think he has failed to do so. Malice in the sense of spite or animosity entertained by the defenders against the pursuer is here entirely out of the question. The pursuer had been the defenders' customer for years; and there is nothing in the record to suggest that there had been any break in friendly relations. Nothing could be more against the defenders' interests in their dealings with other customers than that they should be known to have preferred an unfounded charge of adulteration against a customer, especially one of old standing, in the knowledge that the charge was false; and the suggestion made at the debate that they might conceivably do so for the purpose of advertising the quality of their goods, is almost fantastic. If, then, malice in the ordinary sense is excluded, the pursuer must aver that the information which the defenders possessed when they preferred this charge against him was such that it could not have induced the belief in the mind of any reasonable man that an offence had been committed. In my opinion the averments fall far short of this, and indeed amount to nothing more than that the defenders did not make an adequate investigation into the facts—in other words, did not make certain of securing a conviction before they preferred the charge. Similar averments might be made in every case where a prosecution had in fact failed. It appears from the letter founded on by the pursuer that the defenders based their charge of adulteration on an analysis of certain pints of stout which had been bottled by the pursuer and sold under their label. That analysis established that the specific gravity of the stout in question varied from 1064 to 1067 instead of 1073, which the defenders say is the gravity of the stout which they had sold to the pursuer. If it had been averred either that no such analysis was ever obtained, or that the defenders had no reasonable grounds for believing that the original gravity of the stout which they sold was 1073, the pursuer's case might have been relevant; but there are no averments of this kind. All that the pursuer says is quite consistent with a *bona fide* mistake having been made by the defenders, either as to the original gravity of the stout which they supplied or as to the inference which they drew from the lower specific gravity of the stout which the pursuer sold under their label. If so, there is nothing from which malice can be inferred, and we have therefore no option but to refuse an issue.

Much stress was laid on the absolute and positive nature of the charge contained in the letter of 4th July, and on the stringent terms which the defenders imposed as a condition of not taking proceedings against the pursuer. These, however, are quite consistent with the view that the defenders *bona fide* believed that only one inference could be drawn from the information before them, although this must now be taken to have been a mistaken belief. I therefore agree with your Lordships in holding that we must recal the interlocutor of the Lord Ordinary and dismiss the action.

LORD GUTHRIE—I concur. In this case both parties have reclaimed. In regard to the respondents' ground for reclaiming, namely, the Lord Ordinary's dissallowance of a separate issue on the letter of 4th July 1910, I think the Lord Ordinary was right, that if there was a case for inquiry before a jury the letter and subsequent unsuccessful prosecution must be taken together and only one issue allowed.

But I think, with your Lordships, that the pursuer has failed to make a relevant case for inquiry. The Lord Ordinary's

judgment depends on two grounds. First, that in a case of alleged malicious prosecution the privilege of a private prosecutor is less than in a case of judicial slander or in a case of public prosecution. I agree with your Lordship's grounds for rejecting that view. But, second, the Lord Ordinary holds that the law's undoubted requirement, in a case of alleged malicious prosecution where no antecedent or extraneous malice is suggested, of facts and circumstances showing such recklessness in word or deed as will infer malice, can be satisfied by an averment that before the prosecution was raised no adequate investigation was made into the ground of complaint. As I read the pursuer's averments, they do not amount in substance to anything more.

Counsel did not and could not found on the mere fact of an unsuccessful prosecution. Their points were (1) charging an offence in the letter of 4th July 1910 without first asking an explanation. But this element has occurred in many previous cases, and has never been held to affect the question of privilege. It might have been kinder on the part of the reclaimers, as well as more politic in dealing with an old customer, to ask for an explanation before making a charge, but the reclaimers did not forfeit their position of privilege by not doing so.

(2) The reclaimers, it is said, showed malice by failing to give the respondent an opportunity of testing the liquor on which they founded their complaint. But if the respondent was put at a disadvantage thereby it was his own fault. On receipt of the letter of 4th July, had he asked for a sample and been refused it, there might have been some ground for this complaint. But he made no such request.

(3) The reclaimers are charged with failure to make "adequate investigation" before writing the letter and instituting the prosecution. Seeing the hopelessness of this point as a fact or circumstance inferring malice, the respondent's counsel tried to construe the record as in substance charging that no antecedent investigation whatever was made. In view (*a*) of what is averred by the respondent, (*b*) what is not denied by him, and (*c*) his failure to suggest what the reclaimers should have done in the way of tests, I think this attempt failed.

I may add that the respondent's averments in cond. 7, as well as much of his counsel's argument, proceeded on the mistaken view that the reclaimers' complaint against him was that he was supplying stout not of their manufacture. That charge was involved in their complaint, but the essence of the charge was that he was supplying stout not of the quality of their manufacture.

(4) Respondents' counsel maintained, as a fact inferring malice on the part of the reclaimers, that they made their charge and instituted their prosecution against the respondent for selling stout as theirs which was under their standard quality, when in point of fact, to their own knowledge, they had no standard of quality whatever. Such an averment might well have been relevant as a fact inferring malice. It would have involved knowledge on the reclaimers' part that no prosecution properly defended could possibly succeed. Obviously such an improbable averment would require very clear statement. I shall only say that I am unable to find it on record, and no motion was made for amendment.

On the whole matter, I am unable to find any averments by the respondent inconsistent with the reclaimers' good faith, and with their having had probable cause for writing the letter and instituting and carrying through the prosecution complained of. This being a privileged case, the respondent is therefore not entitled to proceed with the action, and the action must be dismissed.

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

Counsel for Pursuer (Respondent) — Horne, K.C.—Macquisten. Agents—Alexander Morison & Company, W.S.

Counsel for Defenders (Reclaimers)—G. Watt, K.C.—Munro, K.C.—Macmillan. Agents—Macpherson & Mackay, S.S.C.

HOUSE OF LORDS.

Monday, March 11.

(Before the Lord Chancellor (Loreburn), Lord Macnaghten, Lord Atkinson, Lord Shaw, and Lord Robson, with Nautical Assessors.)

ALEXANDER STEPHEN & SONS, LIMITED *v.* ALLAN LINE STEAMSHIP COMPANY, LIMITED.

(In the Court of Session, May 17, 1911, 48 S.L.R. 745, and 1911, S.C. 836.)

Ship — Collision — Pilot—Fault — Onus of Proof — Presumptions — Merchant Shipping Act, 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 633.

Circumstances in which, *approving* the judgment of the Lord President in which he deals with the *presumption of fault* when a collision occurs between a moving and a stationary vessel, and the necessity of averring and proving *specific fault on the part of a compulsory pilot* in order to obtain the benefit of section 633 of the Merchant Shipping Act 1894, the defenders were assoilzied in an action of damages arising out of a collision between their vessel, a moving vessel under a compulsory pilot, and the pursuers' vessel, a stationary vessel moored to a wharf.

This case is reported *ante ut supra.*

The pursuers, Alexander Stephen & Sons, Limited, appealed to the House of Lords.