is the question of damages, and although I think the Lord Ordinary has given a very ample measure under that head, still looking to all the circumstances, I do not think there has been any sufficient ground shown to us for interfering with his judgment in that matter.

LORD YOUNG—I agree that the interlocutor of the Lord Ordinary should be affirmed, but I confess I do not think the case at all a clear one or free from difficulty, but I would not differ from the Lord Ordinary's interlocutor in such a case as this without very strong reasons for doing so.

Upon the question of whether the defenders were entitled to dismiss the pursuer for disobedience to orders I agree with your Lordship there is no case. When I said that the case was not a clear one or free from difficulty, I referred to the question of the endurance of the contract. I am not clear that the parties to this contract intended it to endure for a year, or that they stipulated that it should endure for a year or indeed for any specific period, and it is necessary therefore to take into consideration the terms of the agreement. I am the more influenced in this course by the Lord Ordinary's judgment and by your Lordship's opinion, as well as by the letter of the pursuer of 3d June 1889, in which he states his understanding of the agreement—that it was to last for one year—and the failure of the defenders to repudiate that construction of the contract. I should not like to decide that there is any presumption on the one hand that a contract was intended to last for a whole year, or on the other hand, that it was terminable at the pleasure of the parties, in such a case of employment as we have here, which is simply the case of a man in Glasgow employed to sell there the biscuits of an Edinburgh biscuit manufacturer.

Looking at the contract itself I am not disposed to read into it anything more than that it implies a reasonable notice must be given, but looking to the specialities of this case, and especially to the terms of the letter to which I have referred, and the absence of any repudiation of it by the defenders, I am willing to assent to our adhering to the Lord Ordinary's interlocutor without giving my agreement to any general rule of law.

LORD RUTHERFURD CLARK—I also agree, but I do so entirely upon the specialties of this case.

LORD LEE concurred.

The Court adhered.

Counsel for the Appellant—A. J. Young—Kennedy. Agent—Alexander Campbell, S.S.C.

Counsel for the Respondent—Guthrie—Wilson. Agents—Dove & Lockhart, S.S.C.

Wednesday, June 11.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

WILLIAMSON *v.* ROBERTSON AND ANOTHER.

Reparation—Slander—Licensing Court—Agent Acting as Counsel—Absolute Privilege.

Held that an action of damages for slander will not lie against an agent in respect of statements made by him while pleading before a Licensing Court in support of a petition against the granting of a licence.

Reparation—Slander—Licensing Court—Party to Proceedings before Meeting—Privilege—Issue.

In an action of damages for slander the pursuer averred that the defender, as a party to a petition against the granting of an application by the pursuer for a licence, had written a letter to the agent for the petitioners containing the false and slanderous statement that the pursuer was addicted to drink, which statement the agent read in the Licensing Court; that the defender knew that the statement was untrue, and that it was incompetent to make it in Court, but that he maliciously and without probable cause instructed the agent to make the said statement in Court for the purpose of defaming the pursuer and defeating his application for a licence.

Held that the pursuer was entitled to an issue for trial of the cause, putting the following questions to the jury—"Whether the defender wrote the letter complained of to the agent, and maliciously instructed the said agent to read it in a Licensing Court about to be held at Lerwick; Whether the agent, acting on the instructions so maliciously given, did read the letter in the presence and hearing of certain persons named; and Whether the letter was of and concerning the pursuer, and falsely, calumniously, and maliciously represented the pursuer to be so addicted to drink as to be an unfit person to hold a grocer's licence, to his loss, injury, and damage?"

At the Licensing Court held at Lerwick on 29th October 1889, Bryden Williamson, merchant at Booth of Sand, in the county of Shetland, applied for a grocer's licence for his premises. A petition against the granting of the licence was lodged by some objectors, and Andrew John Robertson, S.S.C., appeared in support of the petition. The objections stated in the petition did not refer to the applicant's character. After speaking to the objections Mr Robertson read the following letter dated 26th October 1889 which he had received from Mr W. H. Umphray, a party to the petition—"Dear Sir,—There is an attempt on the part of the man who now has the Sand shop to obtain

a spirit licence. Mr Williamson, independent minister here, is to go down to town to support petition against this. He will require a legal adviser, and is to call on you. You will see by the accompanying correspondence that very little time was allowed to put in objections, but we managed to lodge a petition on the 23rd, which was the time required; but at the same time we gave intimation that another petition was being signed, and we gave Mr Bryden Williamson copies of both petitions. A certificate you will receive herewith. We are in the hope that the Justices will not grant it for the reasons there stated. There never has been a licence in this quarter, and would like very much to prevent it. I shall enclose a copy of the reasons given for objecting to it in each of the petitions, that you may consider them before the Court. Mr Williamson is really not a fit person to have a licence. He likes it too well himself, as the Rev. Williamson will tell you. . . . *P.S.*—In case anything should prevent the Rev. Mr Williamson getting to town, you will please attend meeting without him, and do your best to prevent licence being granted."

The present action was raised by Bryden Williamson against Robertson and Umphray for payment conjunctly and severally of £1000 in name of damages and *solatium* for the slanders alleged to be contained in the said letter.

The pursuer averred, *inter alia*—"After speaking to the objections to the petition, Mr Robertson, acting on the instructions of the other defender, said he wished to refer to the applicant's character. The agent for the pursuer objected, on the ground that there had been no notice given of such a reason in the petition, whereupon Mr Robertson said he had a letter in his hand from a Justice of the Peace, and that in virtue of section 12 of 25 and 26 Vict. cap. 35, he was, as agent for said Justice of the Peace, entitled, without any notice being required, to read it. He thereupon read to the Court a letter he had received from the defender Mr Umphray (who is not a Justice of the Peace) dated 26th October 1889 (quoted above). No prior notice having been given of the said letter, or of the matters contained in it, as required by statute, Mr Robertson was allowed to read it only because he falsely represented that it was the letter of a Justice of the Peace of Shetland, and pleaded the privilege of a Justice of the Peace to object without notice. Until this subterfuge was adopted by Mr Robertson the Justices refused to hear him regarding the charges he sought to make against the pursuer's character. . . . The statements in said letter are of and concerning the pursuer, and falsely and calumniously represent him as unsteady in his habits and addicted to drink to such an extent as to render him an unfit person to hold a grocer's licence, and further that his intemperate habits were known in the district. . . . The defenders both knew that it was incompetent and illegal to make the said statements in Court, and that the statements were untrue, but they made them maliciously for the purpose of defaming pursuer, and thus succeeding in opposing his application. Besides making the said false and calumnious and malicious statements regarding the pursuer to the defender Andrew John Robertson, in the said letter as condescended on, the defender Mr Umphray maliciously and without probable cause, or any cause, instructed Mr Robertson to make the said statements in open Court for the purpose of defaming the pursuer's character, and so lowering him in the opinion of the Justices of the Peace as to make it impossible for them to grant the licence sought. . . . The pursuer has since ascertained and avers that the refusal of the licence was entirely due to the slanderous statements contained in the said letter. . . . The statements were not only false and calumnious, as defenders knew, but were made by them maliciously and without probable cause, or any cause. They were not relevant or pertinent to the reasons of objections stated in the petition lodged in Court."

The defender Umphray pleaded, *inter alia*—"(2) The statements contained in said letter of 26th October 1889 being confidential communications between agent and client are absolutely privileged, and the defender should therefore be assoilzied. (3) The defender Andrew J. Robertson having no instructions or authority from the defender to publish the said letter or to make any statement as to the pursuer personally, this defender should be assoilzied. (4) In any view, the importing by the said Andrew J. Robertson of the said letter into the proceedings before the licensing Justices, being a statement by, or on behalf of, a party to judicial proceedings, is privileged."

The defender Robertson pleaded, *inter alia*—"(2) The statement complained of having been uttered by the defender whilst pleading as a procurator in a court of law, was privileged absolutely."

The pursuer proposed the following issues for the trial of the cause—"(1) Whether the defender William Hay Umphray wrote, or caused to be written and delivered, or caused to be delivered, to the defender Andrew John Robertson the letter printed in the schedule hereto appended? And whether the said letter or part thereof is of and concerning the pursuer, and falsely and calumniously represents that the pursuer was so addicted to drink as to make him an unfit person to hold a grocer's licence, to the loss, injury, and damage of the pursuer? (2) Whether on or about 29th October 1889, in the Court House, Lerwick, in the presence and hearing of, . . . or one or more of them, the defender Andrew John Robertson read to the Justices then sitting in the Licensing Court the letter printed in the schedule hereto appended, and whether the said letter or part thereof is of and concerning the pursuer, and falsely and calumniously represents that the pursuer was so addicted to drink as to make him an unfit person to hold a grocer's licence, to the loss, injury, and damage of the pursuer? (3) Whether on or about 29th October 1889,

in the Court House, Lerwick, in the presence and hearing of the persons aforesaid, or one or more of them, the defender Andrew John Robertson, on the instruction of the defender William Hay Umphray, read to the Justices then sitting in the Licensing Court the letter printed in the schedule hereto appended, and whether the said letter or part thereof is of and concerning the pursuer, and falsely and calumniously represents that the pursuer was so addicted to drink as to make him an unfit person to hold a grocer's licence, to the loss, injury, and damage of the pursuer? Damages laid at £1000."

The Lord Ordinary (KYLLACHY) on 8th February 1890 pronounced this interlocutor:—"The Lord Ordinary having considered the case, dismisses the action as against the defender Andrew John Robertson, and decerns: Disallows the first and second issues proposed by the pursuer: Approves of the third issue as amended, and appoints the same to be the issue for the trial of the case as between the pursuer and the defender William Hay Umphray, &c.

"*Opinion.*—In this case I propose to disallow the issue as against the defender Robertson. It appears to me that his privilege was absolute. The question has not hitherto been decided in Scotland; but the case of *Munster* v. *Lamb*, 11 Q.B.D. 588, is a judgment of the Court of Appeal in England, and I see no reason to doubt that the law as there laid down is also the law of Scotland. I entirely adopt the reasoning of the learned Judges in that case, and I refer particularly to the elaborate judgment of the present Master of the Rolls.

"With respect to the defender Umphray, I propose to disallow the first issue and to allow the third. The first issue is founded entirely upon the terms of the letter addressed by Umphray to his agent Robertson, and the defender argues that the letter being a private letter from a client to an agent, and its terms being pertinent to the matter in hand, there is here also a case of absolute privilege. The pursuer, on the other hand, contends that if malice is averred a defamatory statement about a third party made by a client to his agent or *vice versa* is in no different position from any other defamatory statement, and that malice being averred it is of no consequence whether the statement is pertinent or impertinent. I am not prepared to hold that in this case there is absolute privilege. It is perhaps remarkable that no case of the kind has ever been tried, but on principle I do not see why privilege in such a case should be absolute. It could only be so on grounds of public policy, and I doubt whether such grounds could be established. But, on the other hand, I think it clear that in such a case malice is not to be presumed, and must be put in issue, and not only so, but it appears to me that the case belongs to the class in which the pursuer must not only aver malice, but aver facts and circumstances from which malice may reasonably be inferred. That is to say, it is not enough in such a case to say that the statement complained of is untrue, or to say in general terms that it was made maliciously. On that ground therefore I disallow this first issue. I am unable to find any specification of facts and circumstances by which the general averment of malice might be supported.

"The third issue is in a different position. It puts in substance the question whether the defender Umphray maliciously instructed the defender Robertson to repeat the defamatory statement in open Court, and the issue is based not only on the general averment of malice but upon the allegation that the subject-matter of the defamatory statement was one which was outwith the cognisance of the Court to which it was instructed to be made. Now, I am not prepared to say that that—if it be the fact—is not a circumstance from which at least possibly malice might be inferred, and therefore this issue must be allowed. I may say that the defender strongly urged that it appeared sufficiently from the letter itself that the defender Robertson was not instructed to make the use of it which he did; but while there is much to say for that view, I am unable to hold that the question is otherwise than a proper question for a jury."

The pursuer reclaimed, and argued—(1) In regard to second issue—The defender Robertson was not absolutely privileged. Up till recent times all the authorities assumed that neither agent nor counsel had an absolute privilege. If he made libellous statements maliciously, then he was liable in damages—Borthwick on Libel, p. 213; Begg on Law-Agents, p. 275; Bell's Prin. 2051; *Marianski* v. *Henderson*, June 17, 1841, 3 D. 1036; *Harvey* v. *Dyce*, December 23, 1876, 4 R. 265; *Beaton* v. *Ivory*, July 19, 1887, 14 R. 1057; *Allardice, &c.* v. *Robertson*, April 8, 1830, 4 W. & S. 102; *Watt* v. *Ligertwood*, April 21, 1874, 2 Sc. App. 361; *Dawkins* v. *Lord Rokeby*, February 1, 1873, L.R., 8 Q.B.D. 255, and June 28, 1875, L.R., 7 Eng. & Ir. App. 744. In any view, the privilege of an agent did not extend to appearances before a Licensing Court, which was not in the proper sense of the word a Court at all. The Public-Houses Acts Amendment Act (25 and 26 Vict. cap. 35) always spoke, not of the Court, but of the "general meeting" of the Justices, who acted in this matter in an administrative capacity. There was no appeal from the Justices save to the Quarter Sessions, and anyone—whether lawyer or not—might take an appeal. Though the Justices could award expenses, they could do so on one side only. It was not a case between a pursuer and a defender in the ordinary sense. The definition of "Inferior Court" in the Procurators (Scotland) Act 1865 (28 and 29 Vict. cap. 85) did not include the meeting of Justices for licensing purposes. Consequently the provisions of the Law-Agents (Scotland) Act 1873 (36 and 37 Vict. cap. 63) with regard to the title of law-agents to practise in any Court of Scotland did not apply, and therefore Robertson

could not plead that he occupied an agent's position on this occasion. Further, Robertson was not employed by Umphray as agent in the proper sense of that word. He merely received instructions to read the letter complained of. It was a jury question to decide whether that letter gave instructions to Robertson or not, and also whether the circumstances justified him in reading it. (2) In regard to the first issue—It was denied by the pursuer that Umphray had employed Robertson to act as his agent, and the first issue could not be refused without settling against the pursuer the question whether he was so employed or not. Assuming that the relation of agent and client existed between the defenders, a defamatory statement made by a party to his agent about a third party was in no different position from any other defamatory statement, and malice being averred it was no matter whether it were pertinent or impertinent to the proceeding before the Court. The communication that was made to Robertson was not one that could competently be repeated in Court without notice, and was accordingly not privileged in the same way as a slander uttered in the course of judicial proceedings—25 and 26 Vict; *Scott* v. *Turnbull*, July 18, 1884, 11 R. 1131; *Innes* v. *Adamson*, October 25, 1889, 17 R. 11. (3) With regard to the third issue, it was not necessary that "maliciously" should be inserted in the issue. There was, however, on record a sufficient averment of facts and circumstances from which malice might be inferred, it being always a question in each case how much a pursuer could be expected to aver as facts and circumstances suggesting malice.

Argued for the defender Robertson—The Court in question was a Court so far as the question of the privilege of an agent appearing before it was concerned. It was a statutory tribunal before which Robertson had a duty to appear as agent—*Dawkins* v. *Lord Rokeby, supra; Goffin* v. *Donnelly*, February 25, 1881, L.R., 6 Q.B.D. 307. Upon grounds of public policy a counsel pleading *in foro* had the same absolute privilege as was extended to judges and witnesses—*Munster* v. *Lamb*, July 5, 1883, 11 Q.B.D. 255; *Leaman* v. *Netherclift*, December 15, 1876, L.R. 2 C.P.D. 53; *Scott* v. *Stansfield*, June 3, 1868, L.R., 3 Exch. 220; *Haggart's Trustees* v. *Hope*, April 1, 1824, 2 S. App. 125. A counsel was not in the same position as the party he represented—*Rex* v. *Skinner*, Lofft's Rep. 55, *per* Lord Mansfield; *Forteith* v. *Earl of Fife*, November 18, 1819; *F. C. Ewing* v. *Cullen*, August 24, 1853, 6 W. & S. 566; *Bayne* v. *M'Gregor*, June 18, 1862, 24 D. 1126, and March 14, 1863, 1 Macph. 615.

Argued for the defender Umphray—In regard to first issue—A party to a proceeding in Court had an absolute privilege in respect of statements made while consulting or writing to his counsel or agent. Communications between agent and client were confidential, and the passing of such was not publication—*Munster* v. *Lamb*, July 5, 1885, L.R., 11 Q.B.D. 588; *Dawkins* v. *Lord Rokeby, supra*; *Leaman* v. *Netherclift*, December 15, 1866, L.R. 2 C.P.D. 53. If not absolutely privileged, a party in communicating with his agent had a position of high privilege, and there was no averment of facts and circumstances on record sufficient to justify the inference that this defender made the communications to his agent maliciously—*M'Murchy* v. *Campbell*, May 21, 1887, 14 R. 725; *Innes* v. *Adamson*, October 25, 1889, 17 R. 11; *Farquhar* v. *Neish*, March 19, 1890, 27 S.L.R. On one or other of these grounds the first issue should be disallowed. In regard to the third issue. The defender Umphray's position was here admitted to be different. But there was no averment on record that he had instructed Robertson to read the letter complained of beyond the terms of the letter itself, from which it clearly appeared that Robertson was not entitled to make the use of it he did. If contrary to instructions the letter was published, Umphray was not responsible—*Thompson* v. *Dashwood*, April 30, 1880, L.R., 11 Q.B.D. 43. Assuming that Umphray instructed Robertson to read the letter, he still occupied a position of high privilege and this issue could only be allowed if "maliciously" were inserted in it.

At advising—

Lord President—I agree with the Lord Ordinary that the first and second issues ought to be disallowed, and that the third in an amended form ought to be allowed and sent to a jury. But as I am not prepared to adopt all the grounds of his Lordship's judgment, I think it right to state in some detail the reasons for the judgment I should advise your Lordships to pronounce.

The defender Robertson is a solicitor in Lerwick, and as such received the letter set out in the schedule appended to the proposed issues from the other defender Umphray. About the same time he was waited on by the Rev. Mr Williamson, an Independent minister at Reawick in Shetland, who was making common cause with Umphray in opposing the granting of a grocer's licence to the pursuer by the Justices at a Licensing Court to be held by them at Lerwick on 29th October 1889. The facts stated on record, and not seriously disputed, seem to establish that Robertson was instructed to attend that Licensing Court as agent both for Umphray and for the Rev. Mr Williamson. In the course of the proceedings before that Court Robertson read to the Justices the letter he had received from Umphray, containing defamatory matter affecting the pursuer's character, and his fitness to be the holder of a licence. The pursuer avers (Cond. 2) that "the defenders both knew that it was incompetent and illegal to make the said statements in Court, and that the statements were untrue, but they made them maliciously for the purpose of defaming the pursuer." And (Cond. 3) the pursuer further avers that "the defender Mr Umphray maliciously, and without probable cause, or any cause, instructed Mr Robertson to make

the said statements in open Court for the purpose of defaming the pursuer's character."

These averments in my opinion entitle the pursuer to an issue against the defender Umphray, but not to an issue against the defender Robertson. The latter appeared in Court entirely in a representative character as agent for the opponents of the pursuer's application, and was thus in a position parallel to that of a counsel conducting a cause in this Court, and so entitled to absolute privilege. But Umphray is in these judicial proceedings a party, and nothing else, and as such, according to the pursuer's averments, he maliciously instructed his agent to make statements affecting the pursuer's character which he knew to be untrue. A party so situated is in my opinion not entitled to the absolute privilege which belongs to judges, jurors, counsel, and witnesses.

In the determination of this question we must be guided by the law of Scotland, and can give no effect to rules of the law of England except in so far as they harmonise or are reconcileable with our own law and settled practice.

The absolute privilege accorded to judges, counsel, and witnesses by the law and practice of both countries is founded on obvious grounds of public policy. It is essential to the ends of justice that persons in such positions should enjoy freedom of speech without fear of consequences in discharging their public duties in the course of a judicial inquiry. But the motive of the law is not to protect corrupt or malevolent judges, malicious advocates, or malignant and lying witnesses, but to prevent persons acting honestly in discharging a public function from being harassed afterwards by actions imputing to them dishonesty and malice, and seeking to make them liable in damages. In the case of *Dawkins* v. *Lord Rokeby* in the House of Lords Lord Penzance states the principle of the rule as applicable to a witness in this very striking passage of his judgment—"If by any process of demonstration free from the defects of human judgment the untruth and malice could be set above or beyond all question or doubt there might be ground for contending that the law of the land should give damages to the injured man. But this is not the state of things under which this question of law has to be determined. Whether the statements were in fact untrue, and whether they were dictated by malice, are and always will be open questions on which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is, whether it is proper on the grounds of public policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice, and may yet in the eyes of a jury be open to that imputation, or, again, the witness may be cleared by the jury of the imputation, and may yet have had to encounter the expenses and distress of a harassing litigation. With such possibilities hanging over his head a witness cannot be expected to speak with that free and open mind which the administration of justice demands."

I need hardly stop to observe how extremely applicable the reasoning of the noble and learned Lord is to the cognate cases of judges and advocates.

But are these considerations of public policy and expediency applicable to the case of a party litigant? It is no doubt the privilege of every member of the community to submit his claims or supposed claims to judicial decision, and to support them by all available allegations and arguments, and if he fail he will be subject to no greater penalty than the ordinary *pœna temere litigantium*. But he does not come into Court in the discharge of any public function, or for any other purpose than to advance his own private interests. He is entitled to a certain freedom of speech, and may with impunity say many things which may be painful and injurious to his opponent or to third parties. But if he descends to false statements, known to himself to be false, and makes these, not for the legitimate purpose of maintaining his suit, but for the gratification of his own spite and malice, I am quite unable to see how any useful end of public policy can be promoted by a rule protecting him from an action for defamation. On the contrary, such a rule would, in my opinion, operate against sound public policy by encouraging evil-minded persons to raise or defend actions on which they were hopelessly wrong on the merits for the mere purpose of gratifying their own malice without fear of consequences.

In accordance with this view of public policy and expediency there is a series of cases decided in this Court where for false statements, known to the litigant to be false, and maliciously made, the litigant has been made answerable in an action of defamation, while his counsel, who repeated and relied on these statements in maintaining his client's case, has not been sought to be made liable.

In the leading case of *Forteith* v. *The Earl of Fife*, which was an action of defamation for statements made in a prior suit by a party litigant, the first action raised by Forteith was dismissed as irrelevant, because the pursuer failed to aver malice. The ground of action was that the defender the Earl of Fife in a previous litigation in which the pursuer was called as a witness, had instructed his counsel to object to his admissibility on grounds affecting his moral character in a very serious way, and the Court held that the defender was entitled to a qualified privilege, and could not be sued unless in addition to the allegation of "false, calumnious, and injurious," he also averred that the statement was made from a malicious motive (reported November 18, 1819, F.C). But a second action was raised by Forteith against the Earl of Fife, and issues were adjusted and tried in that case (see 2 Mur. 463). The first issue was whether in a cause in which the Earl of Fife was pursuer and . . . were defenders, the fol-

lowing words in a petition to the said cause presented to the Second Division of the Court . . . are false, calumnious, and injurious to the character of the pursuer? "and whether the Earl of Fife, defender, did himself or by his agents maliciously authorise the insertion of the said words in the said petition?" The second issue was whether at a trial before the Jury Court, &c., &c., in the said action, Francis Jeffrey, Esq., as counsel for the present Earl, did, in addressing the said Jury Court, use and utter the following words . . . and "whether the words alleged to have been spoken as aforesaid are false, calumnious, and injurious to the pursuer? and whether the defender did himself or by his agents maliciously authorise the said Francis Jeffrey to use and utter the words aforesaid?"

It was in that case assumed as a well-settled point of practice that the counsel who uttered the words complained of in the second issue enjoyed an absolute privilege. But it was also held in the adjustment of the issues that the litigant had no such protection.

In *Cullen* v. *Ewing* (9 S. 31), which was also a case of judicial slander, malice was averred and put in all the issues. But at the trial the presiding Judge directed the jury that the words complained of were "totally irrelevant," and "were not in any way privileged though used in a judicial discussion." To this direction exception was taken by the defender, but the Court disallowed the bill of exceptions. The defender appealed to the House of Lords, and their judgment on appeal was that the words complained of "were privileged as used in a judicial discussion, unless it could be shown that the party so using them did in fact use them from motives of malice towards the pursuer, and did not himself believe them to be true." The House therefore reversed the judgment of the Court, disallowing the exceptions, and directed a new trial. In advising the House on that occasion Lord Wynford said (6 W. & S. 578), "The principle of the law of Scotland and that of the law of England appears to me to be precisely the same with respect to anything stated in the course of judicature, and though it is false, though it is slander, yet if the party who offers it in evidence believes it to be true, and therefore does not offer it from motives of malice, it cannot be made the subject of an action. That doctrine of law, I am sure, your Lordships will perceive is founded on good sense. In ordinary cases, if I speak ill of another man it is presumed I do that from malice unless I show the contrary; but if I speak ill of a man in a course of judicature it is not presumed I do it from malice if it be pertinent to the cause, and if I tender it in evidence in my own defence; and therefore in those cases the law of England and the law of Scotland—for there are many authorities in the law of both countries—all concur in providing that in these cases you must prove the falsehood of the words, and that when they were spoken the person speaking knew the falsehoods, and so bringing home to the party using the words that he did not make use of them merely for the purpose of defending himself against the action brought against him, but that he made use of these words from a malicious desire to asperse the character of the person of whom they were spoken."

In *Bayne* v. *M'Gregor*, 24 D. 1126, the issues were adjusted on precisely the same principle of distinguishing between the privilege of counsel as absolute and the privilege of the litigant as qualified as was observed in *Forteith* v. *The Earl of Fife*.

In *M'Kellar* v. *The Duke of Sutherland*, 21 D. 222, and 24 D. 1125, the ground of judgment was that in such a case the law does not presume a malicious motive in the defender, because there is another obvious and innocent motive, namely, to promote his rights and interests in the cause in which the statement is made, and therefore no action will lie for such a statement unless the pursuer undertake to prove as matter of fact that the motive was malicious.

In *Scott* v. *Turnbull*, 11 R. 1131, we held in this Division of the Court that when the judicial statement complained of was relevant to the action in which it was made, the pursuer of the action of defamation must displace the obvious and innocent motive for making it, by averring facts and circumstances from which a malicious motive may be inferred, as by averring, as is done in the present case, that the defender made the statement knowing it to be altogether false. And a similar judgment was given still later by the Second Division in the case of *Gordon* v. *The Metaline Company*, 14 R. 75.

I owe your Lordships an apology for dwelling so long on a matter well settled in the practice of this Court. My reason, and my only reason, for dealing with the question seriously is that the Lord Ordinary, referring to the case of *Munster* v. *Lamb*, decided in the Court of Appeal in England, says he sees no reason to doubt that the law there laid down is also the law of Scotland. Now, part of the law there laid down by the Master of the Rolls (whose reasoning the Lord Ordinary "entirely adopts") is, "that no action of libel or slander lies against parties for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law." In so far as this rule is thus made applicable to parties, *i.e.*, litigants, I cannot adopt the rule stated by the learned Judge and his colleagues in the English Court of Appeal. I entertain, in common, I am sure, with all your Lordships, the highest respect for the learned Judges who concurred in pronouncing that judgment. But I am not at liberty to adopt the rule which they have enunciated (even if I thought it good law, which I do not), because it is inconsistent with the law and settled practice of the Courts of this country, and with the considerations of public policy on which the whole of this branch of law in both countries is professedly founded.

The first issue cannot, in my opinion, be allowed as a separate issue, because the

letter of the defender Umphray being a confidential communication to his agent Robertson would never have come to the knowledge of the pursuer or anyone else beyond the writer and receiver of the letter in ordinary circumstances, unless either the agent had violated the confidentiality by publishing it without the authority of the client, or the client had authorised its publication. In the former case the agent would have been responsible to the pursuer and to his client. In the latter case (which on the averments of the pursuer is the case actually before us), the client alone is responsible for the publication. There is, no doubt, a third possible case in which the letter might become public by accident or by misfeasance of some subordinate person, *e.g.*, a clerk of the agent. In such a case the liability would of course depend on the circumstances which led to the publication.

It appears to me that full justice will be done to the pursuer's case as stated on record by allowing one issue combining the substance of the first and third issues proposed by the pursuer, which may be in the following terms:—"Whether the defender wrote or caused to be written and delivered to Andrew John Robertson, solicitor before the Supreme Courts of Scotland, Lerwick, the letter set out in the schedule hereto appended, and maliciously instructed the said Andrew John Robertson to read the said letter in a Licensing Court about to be held at Lerwick on the 29th of October 1889; and whether the said Andrew John Robertson, acting on the instructions so maliciously given, did in the Court House at Lerwick, in the presence and hearing of . . . or one or more of them, on the said 29th October 1889, read the said letter; and whether the said letter is of and concerning the pursuer, and falsely, calumniously, and maliciously represents that the pursuer was so addicted to drink as to make him an unfit person to hold a grocer's licence, to the loss, injury, and damage of the pursuer?"

Lord Shand—I agree in thinking that the pursuer should only be allowed to have an issue in the terms expressed by your Lordship, that is, an issue directed against Mr Umphray, who was the client in the proceedings complained of, and in terms clearly expressing that it is not sufficient for the pursuer to prove that the statement complained of was false and calumnious, but that he must also prove that the agent was maliciously instructed to make it in Court.

Your Lordship is of opinion with the Lord Ordinary that there is no relevant action here against the defender Robertson for what he is alleged to have said. He was acting in a representative capacity in the Licensing Court. Whether in the ordinary sense of the word a meeting of the justices to dispose of applications for licensing can or can not be called a court need not be considered. They were exercising a public duty imposed on them by the Legislature, and it is important that they should have the assistance of agents in such a matter, and it may in many cases be necessary that the character of the applicant should become the subject of observation. It is argued that in proceedings of that kind an agent is not in the position of a counsel appearing in the Court of Session or other court, but although the proceedings are not of the same importance as judicial proceedings, in substance we have there what is equivalent to a court, and the same protection must be accorded to a person acting as counsel in such a proceeding as is accorded to counsel in judicial proceedings. In the case of *Munster* v. *Lamb* in England it was held that the privilege of a counsel was absolute. That case was, there can be no doubt, rightly decided on grounds of public policy, for a counsel ought to be perfectly free to make use of statements, of the truth of which he cannot judge, and he must be protected, and protected absolutely against the fear of laying himself open to an action for libel. When an agent is performing the duties of a counsel he must, I think, have the same privilege, and accordingly in this case an absolute protection must be given to the defender Robertson for what the pursuer complains was said by him in the course of pleading.

The next question is, whether a party litigant is entitled to the same protection, and were that question raised here for the first time, it would, I think, be a question of some delicacy and difficulty. I am quite aware—indeed I think no one can fail to see that it is so—that a party is not in the same position as a witness, a judge, jury, or counsel. A judge and jury must have an absolute privilege because it is clear that they must be allowed to act fearlessly. A witness must have the same protection, because, if not, he might shrink from giving the evidence he ought to give. A counsel also must be absolutely privileged for the reasons already touched on. The question is whether this privilege is to be extended to the party litigating, and if the question were raised here for the first time I have not made up my mind how it ought to be answered. It is clearly an open question in England. There are a great many *dicta* to the effect that a party should have the same privilege as a counsel, and indeed the counsel's privilege is traced to the privilege of the party. I am not prepared to say that these *dicta* are sound, but at the same time I think that this consideration would require to be weighed if the case were before us for the first time, that it is important that a party making statements in the course of a litigation should be able to do so without the dread if he goes beyond the bounds of discretion of suffering for it pecuniarily. It may be said that a party coming into Court making reckless statements must suffer for it, but the question is this, Is the question of falseness to be tried before a jury? In the case of *The King* v. *Skinner*, Lofft, 55, Lord Mansfield used these words—"Neither party, witness, counsel, judge, or jury can be put to answer civilly or criminally for words spoken in office." In the case of *Hodgson* v. *Scarlett*, in 1818, 1 B. & Ald. 244, Justice Holroyd delivered an elaborate opinion examining the previous authorities and ex-

pressing the view that a party ought to have the privilege of a counsel, and perhaps the opinion of Chief Baron Pigott in the case of *Kennedy* v. *Hilliard*, 10 Irish C.L. Rep. (N.S). 195, is even stronger to the same effect. Again, in *Munster* v. *Lamb* there is an indication of the same view, and in *Dawkins* v. *Lord Rokeby*, Baron Kelly puts party and counsel on the same footing. So I think I am justified in saying that if the question were here for the first time it would have to be gravely considered. I agree, however, that it is put beyond question by the various cases to which your Lordship has referred that an action will lie against a party litigant provided malice be properly averred.

With regard to the case of *Cullen* v. *Ewing*, it is to be noticed that the same learned Judge who decided that case also decided the case of *Allardice* v. *Robertson*, which was an action against a Judge, and in *Robertson's* case Lord Wynford put the case of an action against a Judge on exactly the same footing as an action against a party. That observation perhaps detracts a little from the authority of the learned Judge who decided these cases if the question comes to be considered hereafter by a Court which has power to deal with it on its merits. As I have said, it is an important question, and I have not made up my mind which way it ought to be decided if it arose for the first time. My opinion, however, on the authorities in our law is that a party making statements in the course of litigation has no absolute privilege but only a modified privilege, and if the pursuer undertakes to show that the defender Umphray acted from malicious motives he is entitled to have an issue against him.

Taking the principle of law to be established, the question arises whether the pursuer is entitled to the two issues contended for. The first issue puts the question, Whether the pursuer is entitled to damages as against Umphray because he wrote and sent the letter complained of as a libel here. The second issue is, Whether Robertson, having read the letter by the instructions of Umphray, the pursuer is entitled to damages as against the latter.

Now, with regard to the first issue, it is quite true that in the ordinary case a letter sent to an agent or a statement made to a counsel at a consultation is not heard of afterwards, and a party who tries to extract from an agent the particulars of a statement made to him is met with the objection that it is confidential, and probably he is not entitled to examine the agent on the subject, but when an agent or counsel have thought fit to repeat the statement, it is, I think, a question of extreme delicacy whether the mere fact of the party having made the statement to the counsel or agent is not a good ground for an issue against him, and I have some little difficulty in concurring with your Lordship that the pursuer is not entitled to his first issue. But probably it does not make much difference, because there is a great deal to be said for the consideration that the letter was meant to be made use of in public, and the real ground of the pursuer's complaint is the use of the letter in public.

The next question is in regard to the issue on the fact of the letter having been read. Here a difficulty occurs to me which I see the Lord Ordinary also felt, as to whether it is properly averred that the letter was read by the instructions of the defender Umphray. The letter was sent by post or messenger. There is no averment as to how the instructions were given. If parties had met I should have been quite content with the general statement made, but the mere sending of the letter is to my mind something short of an instruction to read it in public. The pursuer, however, may be able to prove something more, and so I do not differ from your Lordship as to allowing this issue.

In the next place, Umphray's privilege though qualified is still a strong privilege. A client communicating to an agent a matter connected with a subsisting litigation is certainly in a privileged position, and unless there were on record not merely a general statement of malice, but an allegation of facts and circumstances to support it I should not agree in granting this issue. The only ground on which I concur in doing so is that the pursuer at the end of Cond. 2 has stated—"The defenders both knew that it was incompetent and illegal to make the statements in Court, and that the statements were untrue, but they made them maliciously for the purpose of defaming pursuer and thus succeeding in opposing his application." If it were true that the defender, Umphray, gave instructions that the document should be read, knowing that it was incompetent and illegal that it should be read in Court, and that the statements in it were untrue, and the pursuer succeeded in making either of those two things out, the jury might reasonably infer malice. Unless one of these two statements were made on record, the pursuer would not be entitled to go before a jury. I think, therefore, that the issue should be allowed only because of the particular allegations of malice made on record.

To some extent the issue puts the pursuer's character in issue, but I should add that as I read the first part of the Lord Ordinary's note I do not think that the Lord Ordinary meant to adopt everything said in the case of *Munster* v. *Lamb*, as to parties. His Lordship in that part of his note was dealing only with the case against the agent, and takes the case of *Munster* v. *Lamb*, as an authority upon that question.

Lord Adam concurred.

Lord M'Laren—I have only to say that I think the profession is indebted to your Lordship for the very luminous exposition of the principles of the law of Scotland on this subject which your Lordship has given. I entirely concur in your Lordship's opinion.

The Court adhered to the interlocutor reclaimed against so far as it dismissed

the action as against the defender Robertson, and as between the pursuer and defender Umphray, appointed the following issue to be the issue at the trial of the cause:—"Whether the defender wrote or caused to be written and delivered to Andrew John Robertson, solicitor before the Supreme Courts of Scotland, Lerwick, the letter set out in the schedule hereto appended, and maliciously instructed the said Andrew John Robertson to read the said letter in a Licensing Court about to be held at Lerwick on the 29th of October 1889; and Whether the said Andrew John Robertson, acting on the instructions so maliciously given, did in the Court House at Lerwick in the presence and hearing of . . . or one or more of them, on the said 27th October 1889 read the said letter; and Whether the said letter is of and concerning the pursuer, and falsely, calumniously, and maliciously represents that the pursuer was so addicted to drink as to make him an unfit person to hold a grocer's license, to the loss, injury, and damage of the pursuer?"

Counsel for the Pursuer and Reclaimer—Sir Chas. Pearson—Watt. Agent—James Purves, S.S.C.

Counsel for the Defender and Respondent Umphray—H. Johnston—Gillespie. Agents—Mackenzie & Kermack, W.S.

Counsel for the Defender and Respondent Robertson — Guthrie — C. N. Johnstone. Agents—Hagart & Burn Murdoch, W.S.

HIGH COURT OF JUSTICIARY.

Monday, June 2.

(Before the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Kyllachy).

WOOD *v.* COLLINS AND OTHERS.

Justiciary Cases—Day Trespass—2 and 3 Will. IV. cap. 68, *sec.* 1—*Actor or Art and Part—Persons on Public Road Acting in Concert with Trespassers.*

Held (following *Stoddart* v. *Stevenson*, 4 Coup. 334) that four persons acting in concert with two other persons, by running up and down on a public road for the purpose of preventing the escape of hares, for the pursuit of which upon the adjoining lands the two other persons were convicted of a trespass in terms of said section, were guilty of such a trespass although none of them had ever actually been upon the land.

Colquhoun v. *Liddell & Baillie*, 3 Coup. 342, *commented on.*

This was an appeal upon a case stated at the instance of Collingwood Lindsay Wood, Esquire of Freeland, against a judgment of the Sheriff-Substitute of Perthshire assoilzieing Edward Collins, Robert Robertson, David Stewart, and James Smith, labourers in Perth, from a complaint charging them with having been guilty of the offence first specified in the 1st section of the Act 2 and 3 Will. IV. cap. 68, in so far as on Sunday the 13th day of April 1890 they committed a trespass by entering or being in the daytime, as defined by the 3rd section of the said Act, upon the appellant's lands of Kirkton of Mailler, in the parish of Forteviot and county of Perth, without leave of the appellant, in search or pursuit of game.

Two other persons, Andrew Sidey and Charles Livingstone, labourers in Perth, were charged along with the respondents. Sidey appeared in answer to the charge and pleaded guilty. The others failed to appear. Evidence was led and Livingstone alone was convicted, the respondents being assoilzied.

The case set forth—"The facts of the case as proved were that on Sunday the 13th day of April 1890 the respondents, Edward Collins, Robert Robertson, David Stewart, and James Smith were, along with Sidey and Livingstone before named and four other men, seen on the road from Craigend, Perth, to Aberdalgie, and at a part thereof on the west side of Kirkton farm, belonging to the appellant, and that whilst opposite certain fields on that farm two of the men, viz., Andrew Sidey and Charles Livingstone, went into these fields with two dogs, one being a greyhound and the other a collie, and with their assistance raised and hunted several hares, the other men meanwhile running backwards and forwards along the road bounding the fields, and with sticks and stones endeavouring to prevent the hares getting out of the fields. It was not proved that any of the respondents were themselves in any of the said fields or that they in any way interfered with or directed the dogs which were hunted by Sidey and Livingstone, who were the only parties in the fields with the dogs."

The question of law stated for the opinion of the Court was—"Whether the facts hereinbefore set forth imply a contravention by the respondents of the section of the statute recited in the complaint."

The appellant argued that the case was ruled by *Stoddart* v. *Stevenson*, 4 Coup. 334.

The respondents argued that the case was ruled by *Colquhoun* v. *Liddell & Baillie*, 3 Coup. 342.

At advising—

LORD JUSTICE-CLERK—But for the fact that there have been conflicting decisions upon this question I should have had no difficulty. The greatest difficulty is that while the decision in *Colquhoun's* case is based upon the principle that where an offence is created by statute the offender must be directly engaged in the perpetration of it, and if it depends upon place he must be upon the place and not constructively there; in the case of *Stoddart* there was no personal presence, but only constructive presence, upon the part of the persons convicted. I entirely concur with the decision in *Stoddart*, and I think it is absolutely irreconcileable with that of *Colquhoun;* and I may say that I do not