loss as light as possible, we charge nothing for cables. As regards the 50 tons white lead you had also engaged to take for us at 10s. and 5 per cent. freight, as per your letter of 9th August, Tyne to Montreal, our friends say this must be shipped at once to them, either *via* London, Glasgow, or Liverpool. It is therefore imperative that this is attended to at once; and seeing the through rate must cost so much more than direct shipment, we must of course look to you for the difference. Probably shipment from Glasgow will be the cheapest route, and we are making inquiry of the Allans for a through rate *via* Boston. You had also, we think, better make inquiry in London, or we will if preferable." Now, what was the plain duty of the defenders on receiving this letter? I think it was to make the best arrangement they could, by finding the cheapest rate for conveyance of the lead. But instead of that they say:—"With regard to white lead, if you send any *via* Boston, it must be at your expense. We had no agreement with you for goods binding ourselves to any definite time of shipment; therefore you cannot expect us to be at expense of sending any goods *via* Boston. It would have been different had we contracted to take goods by a certain ship at a particular date. We are quite ready to carry out any agreements made with you by our next steamer, but of course until we get a steamer we cannot do so." Unfortunately for the defenders they then took up an attitude which on coming into Court they could not maintain—that they were not in breach of contract. What were the pursuers to do but to find out the best mode of carriage, and to look to the defenders to pay the difference between its cost and the cost they had contracted to carry the goods for? If the defenders had seen their own interest they would have tried to get the goods conveyed in the cheapest way they could, but instead of that they left the pursuers without any option. They had to send their goods to those with whom they had contracted in Canada; and they say they did so in the best and cheapest way they could. It was a very expensive way certainly, but it was necessary for the defenders, if they meant to allege that in defence, to prove that it could be done more cheaply. There is no such proof here, for I cannot give weight to the loose statement of their manager as to the cost for which the goods could have been sent. He is their only witness. He says he thinks certain things could have been done, but the defenders were bound to prove as matter of fact that the goods ought to have been sent at a lower cost. I am for affirming the judgment of the Sheriff-Substitute.

Lords Mure and Shand concurred.

Lord Deas was absent.

Counsel for Appellants (Defenders)—Darling. Agents—J. & J. Ross, W.S.

Counsel for Respondents (Pursuers)—R. V. Campbell. Agent—James M'Caul, S.S.C.

Wednesday, June 14.

FIRST DIVISION.

STRAITON OIL COMPANY *v.* SANDERSON, *et e contra.*

Sale—Warranty—Sale of Article for Specific Purpose—Act 19 *and* 20 *Vict. c.* 60 (*Mercantile Law (Scotland) Amendment Act* 1856), *sec.* 5.

At a quarry two kinds of rock were sold, one of which was known as "clean" and the other as "black" rock. The two kinds were similar in appearance, were both adapted for building purposes, and were sold at the same price, but the "black" rock was apt to become discoloured by exposure to weather, and could not therefore be used for the fronts of houses. A customer ordered "clean rock" from the quarry, and used it for building part of the front of a villa. Thereafter he ordered further supplies from the quarry on several occasions without specifying that it should be "clean" rock, and was supplied with the "run of the quarry," including a quantity of "black" rock, with part of which he finished the front of the house, and which became discoloured by exposure to the weather. *Held* that as the stone supplied to him was good building material, and had not been sold to him for any particular or specified purpose, he was not entitled to damages in respect of breach of contract by the owners of the quarry.

This was an appeal by Robert Sanderson against interlocutors of the Sheriff of the Lothians in cross actions between the appellant and the Straiton Oil Co. The appellant was a builder in Portobello, and had recently erected a double villa at Joppa, for which the Straiton Oil Co., the respondents, who were owners of a quarry, had supplied the stone. The respondents' action against the appellant was for the price of this stone; the appellant's action was for damages alleged to have been sustained by him in consequence of the inferior quality of some of the stone supplied to him.

The stone of the respondents' quarry at Straiton is of two kinds—"clean" rock and "black" rock. The latter rock is sold at the same price as the former, and is as suitable for building purposes in all respects except that in consequence of the presence in it of sulphate of iron it tends to become discoloured on exposure to weather. It is therefore unsuitable for the front of a villa. From the evidence led in these actions it appeared that where "clean" rock was specially ordered the company endeavoured to supply it, but that where there was a general order for building stone it was the practice simply to send the customer the "run of the quarry," so that he might or might not have a large proportion of black rock in what was sent. On 6th January 1881 the appellant ordered from the company, for the villas which he was erecting at Joppa, 30 trucks of rubble and 500 feet ashlar, "all to be clean rock," and on 11th January more clean rock was ordered by him. On 31st January he ordered a number of stones of specified dimensions, "all solid stones," but he

said in his order (which was a written order) nothing about "clean rock." On 15th, 18th, and 24th February, and on 7th, 14th, 15th, and 16th March, other orders were sent for stones by the appellant, in which no mention of "clean" rock being required was made. On 19th April he again ordered "clean rock." On the occasions on which "clean rock" was ordered he received it, but on the other occasions he received only the run of the quarry. Some of the "black" rock received by him on these latter occasions having been built into the front of the villas, became discoloured after a short exposure to the weather, and a complaint was made by the appellant of the quality of the stone supplied to him. The respondents offered to send clean stones in place of those which had become discoloured, leaving the appellant to take out of the front wall of the villas the discoloured stones and put in the new ones, according to a process well known in the building trade. The appellant declined this offer, and intimated that he held the respondents liable for the cost of replacement, and that the balance of his account, £12, 15s., would be retained until the front of the building was put into proper condition. The respondents then raised for this balance an action in the Sheriff Court of the Lothians, and the appellant raised a counter-action concluding for £40 damages for the respondents' alleged breach of contract in sending "black" rock instead of "clean" rock.

The actions were conjoined, and after a proof in the conjoined actions the Sheriff-Substitute (RUTHERFURD) pronounced this interlocutor:—"(1) In the action at the instance of *The Straiton Oil Company (Limited)* v. *Alexander Sanderson*, Finds that on or about the dates, and at the prices specified in the account annexed to the summons, the defender bought from the pursuers, and the pursuers sold and delivered to the defender, the various quantities of stone and lime therein mentioned, to the value in all of £12, 15s, 1d.: Finds that the defender has failed to prove his averment in the defences, to the effect that the stones so delivered were of an inferior description to those ordered by him from the pursuers: Finds that the defender has retained possession of the stones and lime aforesaid, and has not paid the price thereof to the pursuers: Therefore finds the defender liable, in terms of the conclusions of the libel, to make payment to the pursuers of the sum of £12, 15s. 1d., and decerns: And (2) in the action at the instance of *Alexander Sanderson* v. *The Straiton Oil Company (Limited)*, Finds that between the 6th of January and the end of April 1881 the pursuer ordered from the defenders the various quantities and descriptions of stone specified, and that the stones so ordered by the pursuer were intended by him to be (and in fact were) supplied from the defenders' quarry at Straiton: Finds that the said stones were delivered to the pursuer by the defenders conform to invoices: Finds that the said stones were neither defective nor of bad quality, nor unfit for building purposes, although all of them were not suitable for the purpose to which some of them were applied by the pursuer, viz., the facing of a villa which he was building at the the time: Finds, further, that the defenders gave the pursuer no express warranty of the quality or sufficiency of the said stones, and that the same were not expressly sold by the defenders to the pursuer for a specified or particular purpose within the meaning of the Mercantile Law Amendment Act of 1856: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds The Straiton Oil Company (Limited) entitled to expenses in both the separate actions and in the conjoined actions."

He added this note—"Between the beginning of January and the end of April 1881 Mr Sanderson, the defender in the first, and the pursuer in the second, of the conjoined actions, procured from The Straiton Oil Company's quarry, near Loanhead, various quantities of stone, which he used in the construction of a double villa he was then building near Joppa. Mr Sanderson, who is a builder, is well acquainted with the character of the stone in the company's quarry, having used it on previous occasions in erecting other houses. . . . . In his deposition as a witness the pursuer states that he ordered the stones by letter, addressed to the secretary at the defenders' office in Edinburgh. There is no evidence, however, to show that any such letter was received by the defenders. Grant, their bookkeeper, says that the first order was given by the pursuer himself verbally on 6th January 1881, when he called at the company's office, and the witness wrote it down just as he gave it, and sent it on to the works. This witness also states that when he received verbal orders from the pursuer he was careful to transmit memoranda to the works containing the orders exactly. The memorandum expressly specified 'clean rock,' and it is also expressly mentioned in No. 11 of process, which is a repetition of the order contained in No. 10. None of the other memoranda, however, nor the letter or post cards containing orders for stone, make any mention of clean stone, with one exception, dated 19th April, which contains an order, *inter alia* for 'three trucks of clean rubble.' The pursuer, however, contends that as the first order was for 'clean' stone, he was entitled to rely upon the defenders continuing to supply it whenever he had occasion to order more stone during the building of the villa. The Sheriff-Substitute cannot assent to this proposition. It appears to him that each order embodied a separate transaction, and that there was no obligation on the defenders to supply 'clean' rock unless it were mentioned in the order.

"The pursuer also maintains that the defenders are liable under the 5th section of the Mercantile Law Amendment Act, in respect that the stone in question was of inferior quality, and unfitted for the particular purpose for which it was sold. The Sheriff-Substitute is of opinion that the section of the statute referred to has no application in the present instance. It provides for the case of goods sold which at the time of the sale were 'defective or of bad quality.' But the stones delivered to the pursuer are not proved to have been defective or of bad quality; although some of them, being of black rock, were not well suited to the purpose for which the pursuer used them, they were quite suitable for the construction of other parts of the building.

"Moreover, even if the stones in question could be held to have been defective or of bad quality, they were not expressly sold for the particular purpose of facing the villa, and no warranty was

given. On the whole matter, it appears to the Sheriff-Substitute that the claim for damages is untenable.

"In the action at the instance of The Straiton Oil Company it was admitted by the defender's agent at the proof that the defender had purchased and obtained delivery of the stones and lime mentioned in the account libelled at the prices therein set forth, and that they had not been paid for."

On appeal the Sheriff (DAVIDSON) adhered.

Sanderson appealed to the First Division of the Court of Session.

The arguments sufficiently appear from the judgment.

At advising—

LORD PRESIDENT—There is one peculiarity in this case, if it can indeed be called a peculiarity, which is of great importance, and that is that the parties here had no contract for the supply of stones of any particular kind. If there had been a written contract specifying the kind of stones required this difficulty would probably never have been heard of. The dealing between the parties commences simply with an order for stones. There is no more a contract implied in that than there is between a shopkeeper and his customer when the customer comes into his shop and buys an article and takes delivery of it at once. The order given was for 500 feet ashlar and 30 rubble. Knowing as we do the total amount of stone which was required for the building, we see that that was one-half of the whole stone required. The order distinctly specified that the rock ordered was all to be clean rock, meaning that the order would be fulfilled by sending clean rock in contradistinction to that of the lower stratum, which is apt on being exposed to the air to become discoloured. No stone was sent in answer to that order that was not of the clean description, and it is indeed admitted that the whole of that rock was according to the order sent.

The next order is on 15th February, when Mr Sanderson writes—"Would you forward four trucks of ashlar and fifteen rybets, and also the large stones that were ordered, as soon as you possibly can." There is nothing said there about the stone being clean rock, and nothing equivalent to that. It is an order in general terms for 4 trucks ashlar and 15 rybets. Mr Sanderson contends that the company were to understand that this was an order for clean rock though it was not so specified, because the first order was an order for clean rock. I cannot adopt that contention. When in the course of building a house Sanderson applied for stone to The Straiton Oil Company, he did so, I have no doubt, in the knowledge of the existence of the two qualities of rock in their quarry. In that knowledge he gives his order, and the company very naturally say—"We do not furnish stone of one kind only, and we will not do so except for certain purposes. If we did so, we should soon exhaust all the stone, and that we cannot do. If you tell us when you wish clean rock for a specified purpose we will endeavour to give it, but not otherwise. When we are asked for clean rock, we do our best to give it, but when we receive an order for stone we simply send the run of the quarry." That seems to me to be the true construction of the dealing between the parties on 15th February, and on 24th February, and on 7th March, and on several other occasions. At a subsequent period there is an order, dated 19th April, in which Sanderson specifies "clean rubble," thus reverting to the terms of the first order, and it is not disputed that the stone sent in execution of this order was conform to contract. It turned out after the house was built that some of the stones which had been used in the front of the building became discoloured, and Mr Sanderson was disappointed and complained to the company. They said—"We cannot warrant that you get stone which will not become discoloured, but we will be happy to replace those which have become so, so far as is necessary to make the front of the house clean. That offer was not accepted. Therein I think that Sanderson was in the wrong, for it seems to me that it was a reasonable offer. There was something said at the debate about the impossibility of replacing the discoloured stones with other stones, but everyone knows that nothing is easier than to take out a bad stone and put in a good one after a house is built, and it is also common to cut out a few inches of a discoloured stone and face it with clean stone, fixing in this veneer (as it may be called) of stone with cement, which makes it as hard as the stone originally was. Sanderson admits that he knew this quite well, and that he sometimes does it himself. That is probably what ought to have been done in this instance, instead of the remedy which was employed, of covering the discoloured stone over with Portland cement, and colouring it like the stonework of the front of house. That may be a good enough remedy, but at all events Mr Sanderson did that, and sold the house. I think that for him now to come to the Court and say that he is entitled to damages because a few of the stones supplied to him became discoloured is a contention which it is impossible to sustain.

LORD MURE—I concur. I think the Sheriff-Substitute has taken the right view of the evidence. The whole difficulty arises from the want of a written contract between the parties. When the question turns on the construction of certain orders and memoranda, I think that the view of the Sheriff-Substitute is correct when he says—"It appears to him that each order embodied a separate transaction, and that there was no obligation on the defenders to supply 'clean' rock unless it were mentioned in the order." Applying that rule, we have under the first memorandum a quantity of clean rock sent, sufficient, if applied to that purpose, to have enabled the pursuer to build the whole front with clean rock. It has been said to-day that that clean rock was not for the front only, but for the back of the house also, but it would be very strange if the back of the house were built of the clean rock. That being so, it seems to me to account for the absence of the word "clean" in the subsequent orders. The pursuer does not specify "clean" rock except in the first memorandum. I do not see on what ground in law he can throw on the defender the loss he suffered by the discoloured stones. In any view, the offer made by them was quite sufficient.

LORD SHAND—I concur. The Sheriff-Substi-

tute has stated the facts and the law in a very clear manner, and I am content to adopt the reasons he gives for his judgment.

Lord Deas was absent.

The Lords affirmed the judgment of the Sheriff.

Counsel for Appellant (Pursuer)—J. C. Smith—Nevay. Agent—R. Broatch, L.A.

Counsel for Respondents (Defenders)—D.-F. Macdonald, Q.C.—Scott. Agent—P. Morison, S.S.C.

Thursday, June 15.

FIRST DIVISION.

LIGHTBODY *v.* GORDON.

Reparation—Slander—Making False Accusation of Crime—Privilege—Malice and Want of Probable Cause—Evidence of Malice.

When it comes to the knowledge of any person that a crime has been committed, it is his duty to state to the authorities what he knows of the matter, and if he states only what he knows and honestly believes, he cannot be subjected to liability in damages for such statement if it afterwards turns out that he was in error.

A cheque bearing a forged endorsation was presented at a bank. The agent of the bank recognising, or believing that he recognised, the person who presented it as A B, the servant of a customer, whose name was that in the forged endorsation, paid the cheque. On it thereafter being discovered that a fraud had been committed, he called upon the customer whose name had been forged, and stated to him that the cheque had been presented by A B, and gave him a particular description of the person who presented it, which the master recognised as that of his servant A B. Thereafter he charged A B himself with the crime, and informed the police that the crime had been committed, and that the person who presented the cheque was A B, and the authorities having put A B upon his trial, he deponed that A B was the person who presented the cheque. A B having been acquitted of the criminal charge, raised an action of damages against the bank-agent for having falsely accused him of a crime to his master and to the police. *Held* that the statement being privileged, and having been made in the discharge of the defender's public duty, and in the belief of its truth, founded on what the defender believed that he had seen—there was no evidence of malice or want of probable cause to go to the jury, and a verdict which the pursuer had obtained should be set aside as contrary to evidence.

This was an action of damages for alleged slander, and for falsely accusing the pursuer of a crime to the criminal authorities. The pursuer Alexander Lightbody was a boy about 16 years of age, and was at the time of the events which led to this action in the employment of James Smith, a tailor and clothier in Dalry Road, Edinburgh. The defender was agent of the branch of the Commercial Bank at Grosvenor Street, Edinburgh, and he acted also as teller at that branch. For some months before the month of August 1881 the pursuer had been frequently sent by his master Mr Smith to the defender's branch of the Union Bank. There was a copy of Mr Smith's ordinary signature in the bank books.

On 4th August 1881 there was presented to the defender in the bank at Grosvenor Street (hereinafter called the "bank") a cheque on the Union Bank of Perth for £5 drawn by Mr John Ingram of Perth, dated at Perth August 3, 1881. This cheque was in favour of Holtum & Welsh, clothiers, Edinburgh, or bearer. It was crossed "generally" with the words "& Co." It was not endorsed by Holtum & Welsh, but on the back of it were the words "J. Smith." This cheque was cashed by the defender, and it was admitted that he afterwards, on it turning out that the endorsation was fraudulent and that the cheque had been stolen from Holtum & Welsh, stated to Mr Smith, the pursuer's master, that in his opinion the person who presented it and received the money was the pursuer, and that he made a similar statement to the police. It was also admitted that the pursuer had been apprehended and tried at the Sheriff Summary Court in Edinburgh on a charge of falsehood, fraud, and wilful imposition, and that he had been acquitted, the verdict being one of not proven. It was to recover damages for alleged injury to his character and reputation in consequence of these proceedings that the present action was raised. The cheque, as was ultimately admitted by both parties, had been stolen by a boy named Farquharson from a letter in which it was enclosed to Holtum & Welsh.

He pleaded *inter alia*—"(2) The actings complained of having been under privilege and *bona fide*, the defender should be assoilzied."

The Lord Ordinary (Adam) adjusted the following issues for the trial of the cause—"(1) Whether on or about the 11th day of August 1881, in the shop occupied by James Smith, tailor and clothier, Dalry Road, Edinburgh, the defender, in the presence and hearing of the said James Smith, falsely, calumniously, maliciously, and without probable cause, said of and concerning the pursuer that he presented to the defender a crossed cheque for £5, dated 3d August 1881, drawn by John Ingram upon the Union Bank of Scotland, Perth, payable to Messrs Holtum & Welsh, or bearer, with the writing 'J. Smith' across the back thereof, and obtained payment from the defender of the sum of £4, 19s. 6d. therefor; or did falsely, calumniously, maliciously, and without probable cause, use or utter words of the like import or effect of and concerning the pursuer, meaning thereby to represent that the pursuer was guilty of uttering a cheque which he knew to be forged, to the loss, injury, and damage of the pursuer? (2) Whether on or about the 15th day of August 1881 the defender falsely, calumniously, maliciously, and without probable cause informed, or caused information to be given to Robert Bruce Johnstone, Procurator-Fiscal of the City of Edinburgh, falsely accusing the pursuer of having uttered the foresaid cheque, in consequence of which the pursuer was apprehended, detained in the prison of Edinburgh for eleven days or