judgment. No doubt we should do so with a strong bias in favour of the view that the Lord Ordinary's decision was well exercised, and it would have to be shown to us that the Lord Ordinary had clearly erred in denying the claimant expenses out of the fund.

Now, one of the obvious disadvantages of raising that question in the present case is that the reclaimer, to wit, the Crown, has not thought fit to open the case upon the merits, so that we are denied an opportunity of considering the question of the construction of this settlement. But I think we see enough of the case from the opinion of the Lord Ordinary, which was read to us by Mr Smith Clark, clearly to discern that his Lordship may—not necessarily that he must—he may have considered that the case of *Jack's Executor* v. *Downie*, 1908 S.C. 718, raised and decided the point which was before him, and in that view he may have—again I do not say he must—he may have thought that the question raised by the Crown was so hopeless that it ought never to have been raised. The Lord Ordinary may have come to that conclusion, but I do not think we ought, having the question of expenses merely before us, to interfere with his discretion, and in saying so I for my part have treated the Crown exactly as I would treat one of His Majesty's subjects.

I am therefore for affirming the interlocutor of the Lord Ordinary.

LORD MACKENZIE—I am of the same opinion. It was admitted by the counsel for the Crown, in answer to a question, that the Lord Advocate was in exactly the same position as any ordinary litigant, and that admission could not be withheld in view of the terms of section 24 of the Court of Exchequer (Scotland) Act 1856, which provides that in a question with the Crown, the rules, regulations, and provisions touching expenses of process are to apply just as if the litigation were between subject and subject.

Accordingly we have here a reclaiming note by one who, in the matter in hand, is in exactly the same position as a subject, and for my part I am prepared to accept the rule—the salutary rule—which Lord Shand laid down in the case of *Fleming* v. *North of Scotland Banking Company* (1881) 9 R. 11, at p. 14. His Lordship there says—"It has been frequently said in this Court that a party seeking review of a question of expenses only is in very unfavourable circumstances, and the Court will discourage appeals on reclaiming notes on expenses merely. But I know of no authority for saying that where a case of obvious or gross injustice can be made out a party is precluded from bringing such a question before us."

Now what the Lord Ordinary has done in this case is to negative an argument maintained on behalf of the Crown as *ultimus hæres*—that the words in the will under consideration differ from the words used in *Jack's Executor* v. *Downie*, 1908 S.C. 718.

The Lord Ordinary held that the description of the estate in Mrs Watson's settlement, "my whole means and estate," was not narrower than the words used in *Jack's* case, "all my estate." He therefore held that the claim by the Crown was negatived by an express judgment of this Court, and in those circumstances it appears to me out of the question to say that he was not entitled in the exercise of his discretion to say that the Crown must pay the expenses of the party with whom they had been contesting that question of right, and that is sufficient for the determination of the present question. It is a question solely upon the special circumstances of this case. It raises no question of general principle whatever.

I accordingly agree with your Lordship.

LORD SKERRINGTON—I agree with your Lordship on both points. In the first place I think that the Crown falls to be dealt with in the same way as a private litigant. In the second place, I agree that a person who appeals or reclaims purely on a question of expenses is in an unfavourable position in this respect, that the Court cannot possibly have such an intimate knowledge of the circumstances and merits of the action as if the case had been discussed in the ordinary way. It necessarily follows that the Court will be more slow to interfere with the discretion of the Lord Ordinary on the question of expenses than it would have been if it had heard a full debate and had been disposing of the merits also. On the other hand I demur to any such view as that the Court is entitled for reasons of expediency to discourage appeals purely on the question of expenses. The duty of the Court is to consider any question which comes competently before it.

The Court affirmed the interlocutor of the Lord Ordinary.

Counsel for the Reclaimer—The Lord Advocate (Munro, K.C.)—Smith Clark. Agent—James Ross Smith, S.S.C.

Counsel for the Respondents—M'Lennan, K.C.—Hendry. Agents—J. Miller Thomson & Co., W.S.

Tuesday, October 27.

FIRST DIVISION.

[Lord Anderson, Ordinary.

WALLACE-JAMES *v.* BAIRD AND ANOTHER.

Reparation—Slander—Innuendo—Privilege—Letter by President of Nursing Association to Chairman of Parish Council as to Medical Officer not calling in Nurse.

"It is not for the Court, it is for the pursuer, to allege the slanderous meaning which he attaches, and says ought to be attached, to a writing or statement, not in itself slanderous, of which he complains." *Dictum* of Lord President Inglis in *Sexton* v. *Ritchie & Company*, March 18, 1890, 17 R. 680, 27 S.L.R. 536, *approved*.

Circumstances in which the Court, looking to previous laxity of practice, introduced an innuendo not on the record; and allowed an issue without malice on a letter written by the president of a district nursing association to the chairman of a parish council which contributed to the association's funds, as to the parish medical officer not calling in the services of the nurse.

John George Wallace-James, M.B., C.M., Tyne House, Haddington, *pursuer*, brought an action of damages for slander in the Court of Session against Susan Georgiana Fergusson or Baird, wife of and residing with John George Alexander Baird, Esquire, of Colstoun, Haddington, and also against the said John George Alexander Baird as curator and administrator-in-law for his said wife, and for his interest, *defenders*, in which the damages were laid at £5000 sterling.

The pursuer was a medical practitioner in Haddington and was also medical officer of the parish of Haddington. The slander complained of was contained in a letter written by the defender the said Mrs Susan Georgiana Fergusson or Baird to the chairman of the Parish Council of Haddington, in the following terms—

"*Colstoun*,
"*Dec. 8th* 1913. "*Haddington, N.B.*

"Dear Sir,—As president of the Haddington District Nursing Association, I am writing to ask your attention to the following:—I am informed that Mrs Haldane, Kelpair Street, an old-age pensioner, sent to Dr James for medical assistance on the 7th of November. He did not come on that day or the next, and another doctor was sent for on the 9th. Dr James called on the 10th, but did not order in the district nurse, or, so far as I understand, call again. The nurse was sent in by the other doctor on the 14th and has been in attendance ever since. Mrs Haldane is quite helpless, by which I mean unable to move in bed at all, and is said to be suffering from a malignant disease. She has very extensive bedsores. Her daughter, who lives above her, does what she can, but it is a typical case requiring a trained nurse. Only a nurse can prevent bedsores occurring, and once established they are very difficult to cure and cause the patient much pain and distress. The Council, besides giving a grant of £2 a year to the Nursing Association, have twice passed resolutions enjoining their medical officer to call in the nurse when required. I beg to enclose one of them, the last was passed in July 1910. Immediately upon the passing of the last, 10 cases on the roll were given us. The following year there were 19. In 1912 *none* were notified as requiring attention, nor have there been any this year. I venture to bring Mrs Haldane's case to your notice as one who should have been given the help which was within reach and to which she was entitled.—Believe me, yours truly, "S. G. BAIRD."

The pursuer, *inter alia*, averred—"(Cond. 3) The statements contained in the said letter are of and concerning the pursuer, and falsely and calumniously represent, and were intended by the defender to represent, that the pursuer had been guilty of gross and wilful neglect of and failure to discharge his duty as a medical man by negligently failing, when sent for, to visit Mrs Haldane, whom he knew to be in most serious illness and great distress, and by omitting to procure for his patient Mrs Haldane 'the help which was within reach and to which she was entitled,' and which 'should have been given' to her by the pursuer. The said letter further represented, and was intended by the defender to represent, that the pursuer as medical officer of the parish had wilfully disobeyed the express instructions of the Parish Council by failing, during the years 1912 and 1913, to call in the district nurse to parish patients who required her services, and in particular to the said Mrs Haldane, and had negligently failed during the said years to call in the said nurse to parish patients who required her services. The statements in the said letter were so understood by those to whom they were communicated. (Cond 4) The said charges against the pursuer are absolutely without foundation in fact, and were made by the defender recklessly and maliciously and without regard to whether they were true or false. The defender was aware that Mrs Haldane was not a parish patient, but a private patient of the pursuer, and that the Parish Council, with whose chairman she communicated, had nothing whatever to do with their medical officer's treatment of his private patients. Had she made the slightest inquiry she would have found that in November 1913 the said Mrs Haldane, who was not a parish patient, was under the care of another doctor, and had been so for at least ten days before the latter thought it desirable to call in the district nurse. At the time when the defender wrote the said letter she had no information before her to justify her suggesting, as she did, that the pursuer had deliberately abstained from calling in the nurse during the years 1912 and 1913 in cases where her services were required. Before writing the said letter the defender made no inquiry to ascertain whether during those years there had been any cases of parish patients to whom the pursuer had wilfully or negligently refrained from sending the district nurse in such circumstances. Had she made such inquiry, as she ought to have done, she would have found that there were no such cases. Further, the defender was aware that Mrs Haldane was not entitled to the services of the medical officer as such. An official list of the registered poor of the parish is issued and circulated from time to time by the Parish Council, and the pursuer believes and avers that the defender was in possession of a copy of the said list at the time when she wrote the letter complained of. Mrs Haldane's name does not appear on the said list, and she never was at any time a parish patient. There was no justification whatever for the suggestion that by not calling in the district nurse in Mrs Haldane's case the pursuer had failed to comply with the

instructions of the Parish Council. The statements in answer are denied, except that it is believed the Association's nurse at one time paid Mrs Haldane some visits. (Cond. 5) The defender had no right or duty whatever to write the said defamatory letter. As already explained, the said Mrs Haldane was a private patient of the pursuer, and the Parish Council had no concern with or interest in the question of her treatment. The said letter was written by the defender with the deliberate intention of injuring the pursuer's reputation in the estimation of the Parish Council and of the people of Haddington. On two former occasions, in 1909 and 1910, the defender had made complaints to the Parish Council against the pursuer with regard to parish patients who had not received the services of the district nurse, and all of the said complaints were found on inquiry to be groundless. The defender was annoyed because her said complaints had been found to be baseless, and because it had become generally known in Haddington and the surrounding district that she was in the wrong in her allegations against the pursuer. In consequence of the result of the inquiry into the defender's said complaints the defender conceived an ill-will towards him, and the letter complained of was written by her with the object of injuring the pursuer's professional reputation and discrediting him in the eyes of the Parish Council. Before writing the said letter the defender gave the pursuer no opportunity of making an explanation with regard to his conduct in Mrs Haldane's case which he could at once have justified."

On 4th June 1914, the Lord Ordinary (ANDERSON) approved of the following issues proposed by the pursuer:—"1. Whether the said letter, in whole or in part, is of and concerning the pursuer, and falsely, [and] calumniously, *and maliciously* represents that the pursuer had been guilty of neglect of and failure to discharge his duty as a medical man, by negligently failing, when called for, to visit his patient Mrs Haldane referred to in the said letter, and to procure for her the services of the district nurse, to the loss, injury, and damage of the pursuer? 2. Whether the statements in the said letter falsely, [and] calumniously, *and maliciously* represented that the pursuer while medical officer of the parish of Haddington had disobeyed the express instructions of the Parish Council by failing during the years 1912 and 1913 to call in the district nurse to parish patients who required her services, to the loss, injury, and damage of the pursuer? 3. Whether the said letter falsely, [and] calumniously, *and maliciously* represented that the pursuer as medical officer of the parish of Haddington had disobeyed the express instructions of the Parish Council by failing to call in the district nurse to the said Mrs Haldane, to the loss, injury, and damage of the pursuer?"

[The issues were varied on 11th June by the insertion of the words in brackets and the deletion of the words in italics.]

Opinion.—"This is an action of damages for defamation said to be contained in a letter, dated 8th December 1913, written by the defender to the chairman of the Parish Council of Haddington. The pursuer is medical officer of that parish, and the defender is president of the Haddington District Nursing Association, a parochial body which works in conjunction with the County Nursing Association, and which provides the yearly salary of a district nurse appointed by the County Association. By the rules of the defender's Association the services of the nurse are reserved for cases of the sick poor and working classes in their own homes, and the nurse may only attend cases to which she is sent by the order of a medical man, except where there is great emergency, when she may attend without instructions until the arrival of a doctor.

"The Parish Council gives an annual grant of £2 to the funds of the defender's Association, and in 1909 and 1910 passed resolutions instructing the pursuer, as medical officer, to employ the district nurse in cases, and particularly in poor cases, where nursing was required.

"The defender wrote the letter complained of with reference to the case of a Mrs Haldane, alleged by the defender to be an old-age pensioner and a person entitled to have the services of the district nurse. The view of the defender, as expressed in her letter, was that Mrs Haldane was so ill that the district nurse should have been ordered by the pursuer to attend her, and the defender called the attention of the Parish Council, whose medical officer the pursuer is, to the fact that the nurse was not ordered to attend Mrs Haldane.

"The pursuer alleges that the defender in making the communication referred to has slandered him.

"The points debated at the adjustment of issues were these—(1) Are the terms of the letter defamatory? (2) Was the occasion on which it was written privileged; and (3) if the occasion was privileged, Has the pursuer relevantly averred a case of malice?

"I. On the first point I agree with the contention urged by the defender's counsel, that the first thing which the Court ought to do is to endeavour to determine, *prima facie* at all events, the real object which the defender had in view in writing the letter. It was maintained on behalf of the defender that her only object in writing was to direct the attention of the proper authority to the case of Mrs Haldane, and that it was quite legitimate and proper to do so. If this was all that was in the defender's mind it is difficult to account for her reference to the failure of the pursuer to attend when sent for, and to the records of attendance of the nurse in 1910, 1911, 1912, and 1913. The impression I have formed as to the defender's purpose in writing the letter is that she was more intent on making charges against the pursuer than in laying before the Parish Council the facts as to the case of Mrs Haldane.

"I proceed, therefore, to consider whether the language complained of is defamatory. This involves two points, inasmuch as it is not maintained that the language used is

slanderous *per se*—(1) have the terms of the letter been fairly innuendoed? and (2) are these terms, as innuendoed, defamatory?

"The pursuer had tabled three issues, the first complaining that he has been defamed as a medical man, and the second and third that he has been defamed as a medical officer.

"The foundation of the first issue is the first paragraph of the letter which the pursuer has innuendoed as amounting to a charge that he had been guilty of neglect of and failure to discharge his duty as a medical man by negligently failing when called for to visit his patient Mrs Haldane, and to procure for her the services of the district nurse. My duty at this state of the case is to see that the language used is reasonably capable of bearing the innuendo proposed—that the innuendo expressed the natural and reasonable meaning of the terms complained of (*Henty*, 7 A.C. 741; *Russell*, 1913 S.C. (H.L.) 14, 50 S.L.R. 676). I am of opinion that the innuendo proposed is reasonable, and that the pursuer is entitled to have the verdict of a jury as to whether the language complained of was used in the sense suggested.

"It was not disputed that if the innuendo is reasonable the statement is defamatory. It amounts to a charge against a professional man that he was guilty of professional negligence, and this is clearly slanderous.

"The second and third issues are based on the last two paragraphs of the letter, which are innuendoed as representing that the pursuer while medical officer of said parish had disobeyed the express instructions of the Parish Council by failing to call in the district nurse (in the second issue) during the years 1912 and 1913 to parish patients who required her services, and (in the third issue) to the said Mrs Haldane.

"I am of opinion that the innuendo proposed by the pursuer in each of these issues is reasonable. I am further of opinion that the language as innuendoed is defamatory. This last point was disputed by the defender's counsel, who maintained that it is not slanderous to say that a servant disobeyed the instructions of an employer. Where, however, the servant is a medical man, and where there is involved in the charge of disobedience an accusation of professional negligence or misconduct, I am clearly of opinion that there is defamation.

"II. The next point is as to whether the occasion was privileged. The letter bears to be an official communication from the president of the Nursing Association to the chairman of the Parish Council who was interested in the matter communicated. The pursuer avers that the defender had no authority from her Association to write the letter. She, however, is admittedly a member of the said Association and a subscriber to its funds. She thus seems to have occupied a position similar to that in which Lord Balfour of Burleigh was when he wrote the letters complained of in the case of *Couper* v. *Balfour of Burleigh*, 1913 S.C. 492, 50 S.L.R. 320, where it was held that the occasion was privileged. I therefore decide that the defender was privileged in writing the letter complained of.

"III. The last point is whether malice has been relevantly averred. The latest authority on this point, and therefore the case which I am bound to follow, is the decision of the First Division in *Suzor* v. *M'Lachlan*, 1914 S.C. 308, 51 S.L.R. 313. The result of that judgment, as I understand it, is that in cases like the present, of what I may call ordinary privilege, the elaborate specification of facts and circumstances which certain of the earlier authorities seemed to consider essential is no longer necessary in order to make a relevant case of malice. Lord Skerrington's opinion is that a general averment of malice may be sufficient if no special intrinsic facts are to be relied on as proof of malicious motive. If, however, such special facts are to be proved, I understand that Lord Skerrington's view is that, on the principle of giving fair notice, these facts should be averred. Lord Skerrington suggests in the opening sentence of his opinion that the legal views which he was about to state would be found to be at variance with those contained in the opinion of the Lord President. I do not gather, however, from a perusal of the judgments that there is much difference between these two distinguished judges, because I find that on p. 313 the Lord President says this—'I may add, speaking for myself, that a distinct averment in a case such as we have before us that the defender deliberately refused to make any inquiry into the truth of the accusations which he was levelling at the pursuer, or a distinct averment to the effect that he knew when he made them that the allegations were false, were destitute of all foundation, would be sufficient averment of malice to displace any case of privilege.'

"I assume that the Lord President meant that it would be enough to have such averments in addition to a general averment of malice, which I have always understood to be an essential averment in a privileged case.

"Testing the relevancy of the pursuer's record by what was laid down in the above-mentioned judgments, I am of opinion that malice has been relevantly averred. In addition to a general averment of malice the pursuer founds upon these special facts as inferring malice—(1) that the defender was aware that Mrs Haldane was not a parish patient, but one of the pursuer's private patients; (2) that in November 1913 Mrs Haldane was for the time under the care of another doctor, and this would have been ascertained by the defender had she made the slightest inquiry; (3) that the charges of professional negligence as to the years 1912 and 1913 were made without any inquiry, and that inquiry would have shown that in those years there were no cases requiring the services of the district nurse; (4) that the defender knew that Mrs Haldane's name was not on the official list of poor persons entitled to the services of the nurse; and (5) that in 1909 and 1910 the defender had made to the Parish Council similar complaints regarding the pursuer which on inquiry were found to be ground-

less. In consequence of the non-success of these previous attacks upon him the pursuer avers that the defender conceived an ill-will towards him which she endeavoured to gratify by writing the letter complained of. "I shall accordingly approve of the issues."

The defenders reclaimed, and argued—The pursuer had not stated a clear case of slander on record. Taken in its fair ordinary meaning the language of the letter did not support the slanderous meaning alleged. The communication here construed was a privileged one, and as such did not stand to be scrutinised as closely as a private letter —*Laughton* v. *Bishop of Sodor and Man*, [1872] L.R., 4 P.C. 495 (Sir Robert Collier at 508). Privilege was wide enough to cover even incidental slander unless malice was averred, which was not here the case—*Waller* v. *Loch*, [1881] 7 Q.B.D. 619. Such a statement was not necessarily slanderous because a possibly injurious inference might be drawn from it—*Russell* v. *Stubbs Limited*, 1913 S.C. (H.L.) 14 (Lord Kinnear at 19, Lord Shaw at 23-24), 50 S.L.R. 676. The letter being written in an official capacity to the chairman of the Parish Council was merely a request for investigation. There could be no slander in giving a public body information which it should have—Public Health (Scotland) Act 1897 (60 and 61 Vict. cap. 38), secs. 12, 45. In the absence of averments of falsehood the innuendo sought to be read into the letter was extravagant—*Campbell* v. *Ferguson*, January 28, 1882, 9 R. 467, 19 S.L.R. 404. Malice could not be inferred from failure to make inquiry as to the truth of a statement—*Couper* v. *Lord Balfour of Burleigh*, 1913 S.C. 492 (Lord Dundas at 500, Lord Salvesen at 504), 50 S.L.R. 320. Averments of malice must be specific—*Suzor* v. *M'Lachlan*, 1914 S.C. 306 (Lord President (Strathclyde) at 312), 51 S.L.R. 313; *Chalmers* v. *Barclay, Perkins, & Company, Limited*, 1912 S.C. 521 (Lord Justice-Clerk (Kingsburgh) at 529), 49 S.L.R. 465.

Argued for the respondent—The question whether the letter would bear the innuendo suggested or not must be considered from the point of view not of the sender but of the recipient or a third party. In this view it was clearly slanderous. No case of privilege had been disclosed on the defender's record. The defender had no authority or duty as president of the Nursing Association to write the letter, nor had the chairman of Parish Council any official interest in Mrs Haldane's case. A definition of privilege was to be found in the case of *Auld* v. *Shairp*, July 14, 1875, 2 R. 940, 12 S.L.R. 611. In any event the circumstances were such that failure to inquire inferred malice—*Stuart* v. *Moss*, December 5, 1885, 13 R. 299, 23 S.L.R. 231. Malice might be inferred from persistence in repeating a charge. In every case of slander the law implied a charge of malice which might be proved, whether averred or not, to rebut a defence of privilege—*M'Bride* v. *Williams & Dalzell*, January 28, 1869, 7 Macph. 427, 6 S.L.R. 273; *Milne* v. *Smiths*, November 23, 1892, 20 R. 95 (Lord M'Laren at 100), 30 S.L.R. 105.

At advising—

LORD PRESIDENT—This is an action of damages for slander alleged to be contained in a letter addressed by the defender to the chairman of the Parish Council of Haddington. The language in which the letter is couched is singularly moderate and restrained. To the actual words used no exception could be or was taken. If, therefore, a slanderous meaning is to be attached to the letter, it is necessary that it should be innuendoed. In the third article of the condescendence will be found the innuendo which the pursuer contends the letter is susceptible of bearing, and on which the three issues adjusted by the Lord Ordinary rest.

I am of opinion that, fairly read, the letter is not susceptible of bearing the meaning attributed to it by the pursuer and embodied in the issues before us, and that consequently these issues must be disallowed. When regard is had to the fact that the defender professes to write in her capacity as president of the Haddington District Nursing Association, that she addresses her communication to the chairman of the Parish Council of Haddington, and that she calls his attention as chairman of the Parish Council to a certain case referred to in the letter, I think it is impossible to say that the communication is susceptible of bearing the meaning that it attributes misconduct to the pursuer as a private medical gentleman in connection with his attendance on a private patient. It is equally out of the question, in my opinion, to say that the letter is susceptible of bearing the meaning that she charges the pursuer with wilful disobedience to express instructions given by the Parish Council to the pursuer as their medical officer.

But, in my opinion, the letter, when fairly read, is susceptible of bearing the innuendo that it conveys a charge of breach of duty committed by the pursuer, as medical officer of the parish of Haddington, by his failure to call in the services of a nurse to a parish patient who required the nurse's services. And accordingly I shall, by-and-by, propose to your Lordships an issue embodying that innuendo.

It is possible—barely possible, but possible—I think, to extract this innuendo from the averments made in the third article of the condescendence; but I must freely allow that there is to be found in that article no satisfactory averment of the innuendo which I am going to propose should be introduced into the issue. We were informed, however, that a certain laxity of practice had crept in relative to the adjustment of issues within recent years, and that occasionally innuendoes were introduced which were not to be found in the record. If such a practice has crept in, I regret it, and I am very clearly of opinion that we ought not to sanction it. It is not for the Court, it is for the pursuer, to allege the slanderous meaning which he attaches, and says ought to be attached, to a writing or statement, not in itself slanderous, of which he complains. The rule was never more clearly stated than in the opinion of the Lord Pre-

sident (Inglis) in the case of *Sexton* v. *Ritchie & Company*, (1890) 17 R. 680, at p. 685, 27 S.L.R. 536, where he says—"In all actions for libel, whether the writing complained of does or does not contain words or expressions clearly actionable, it is the duty of the pursuer to state on record what he understands, and undertakes to show, is the true meaning of the writing taken as a whole. . . . Where a non-natural meaning is not sought to be ascribed"—as in the case before us—"and the pursuer merely alleges that the writing . . . is . . . according to its fair construction a libel on his conduct and reputation, he is not necessarily required to state extrinsic facts from which to infer the construction for which he contends. All that is required of him in such cases is to state distinctly the libellous meaning which he attaches to the writing." Nothing could be clearer than that; in my opinion the rule is inflexible. I am aware that the case of *Wright & Greig* v. *Outram & Company*, (1889) 16 R. 1004, 26 S.L.R. 707, has sometimes been quoted in support of the looser practice, as I venture to call it. I cannot think that, when closely examined, that case supports the proposition that innuendoes will be embodied in issues although not found upon the record. The case of *Wright & Greig* was an action for damages for slander alleged to be contained in a newspaper report of certain bankruptcy proceedings in the English Courts. The defence was that it was a fair and accurate report. And undoubtedly in the Outer House an issue was allowed which contained what I may call a sort of innuendo not to be found upon the record, and Lord Kyllachy observed, in adjusting the issue, with respect to the defenders' criticism upon the pursuers' record—"It may be true that the record should, as a matter of pleading, have not only set out the report complained of, but should also have set out in terms the proposed innuendo. But I do not consider that that is a matter of substance. The record might easily be amended to make it square with the issue, but I cannot see that that is necessary."

It is to be observed that the innuendo in the case to which I am now referring was not, in the proper sense of the word, an innuendo. It was, as Lord Kyllachy himself pointed out, almost a literal echo of certain expressions in the report, and the course taken by his Lordship might fairly be justified by the rule which is observed, in practice at all events, of extracting certain expressions from a long letter or a long article and inserting them in the issue for the purpose of concentrating the attention of the jury upon the essence of the charge made. I must further observe, however, that when the case of *Wright & Greig*, reached the Inner House, the pursuer proposed, and was allowed, to amend his record so as to make it—to use Lord Kyllachy's expression—"exactly square with the issue." And it will be found from the report that this amendment was embodied in the record before judgment was given in the case. I therefore repeat that the rule appears to me to be not only wholesome but inflexible, and that we ought not to sanction any departure from it.

Differing from the Lord Ordinary, I consider that on the pursuer's own averments here a case of privilege is not disclosed. The pursuer distinctly avers that the defender knew, or ought to have known, that the particular patient with regard to whom his conduct was complained of was a private patient and not a parish patient, if I may use that expression. Of course, if, when evidence comes to be given, a case of privilege is disclosed, it will then be the duty of the Lord Ordinary to direct the jury that they cannot return a verdict for the pursuer unless malice is proved. In my opinion the averments set out in the fifth article of the condescendence are relevant and sufficient to infer malice, and the Lord Ordinary, who has already expressed an opinion upon that question, may so direct the jury.

I propose, therefore, that the following should be the issue in the case— . . . *v. infra* . . .

I propose, then, that we should disallow the three issues adjusted by the Lord Ordinary; that we should approve of the issue which I have just read as the issue for the trial of the cause; and that we should remit to the Lord Ordinary to proceed.

LORD JOHNSTON—The case comes before the Court in a very unsatisfactory condition. The words complained of are contained in a letter and are not of themselves slanderous. A slanderous meaning has therefore to be attributed to them by innuendo. Two such innuendoes are set forth on record, in cond. 3—one that the pursuer was guilty of breach of his duty as a medical man—not as the parochial medical officer but as a medical man generally; the other that he wilfully disobeyed express instructions in failing to take certain steps. Now on the averments contained in that article the three issues sanctioned by the Lord Ordinary would, I think, be justified. But then the averments upon which those issues are drawn are in themselves not justified by the letter. And accordingly there is not stated on record any case which would justify the granting of these issues. Were we to deal strictly with the case, it seems to me that our duty would be to refuse any issue at all. But I am quite aware that, as your Lordship has said, there has been a certain amount of laxity of practice for some years past which I am afraid it may be said that this Division has itself more than once allowed to pass. And accordingly I quite readily accede to your Lordship's proposal though it amounts in fact to the Court framing the innuendo and the issue for the parties; but I associate myself with what your Lordship has said, that if we do so on this occasion it is with the warning that the Court will not lend itself to such a course of practice for the future.

On the remaining point, the question of privilege, I think it unnecessary to add anything to what your Lordship has said.

LORD MACKENZIE—I agree with your Lordship in the chair.

LORD SKERRINGTON—I concur with your Lordship. I desire merely to add, that although we are allowing only a single issue which has reference to only one of the charges innuendoed in the three original issues, it will, of course, be competent for the defender to prove the whole circumstances under which she wrote this letter, for the purpose, in the first place, of proving that the occasion was a privileged one, and, in the second place, of rebutting, if she requires to rebut, the suggestion that she wrote the letter under the influence of some improper motive.

The Court allowed this issue—"It being admitted that the letter, No. of process, which is printed in the schedule annexed hereto, was written and sent by the defender to the chairman of the Parish Council of Haddington on or about the date it bears, Whether the said letter is of and concerning the pursuer and falsely and calumniously represents that the pursuer, while medical officer of the parish of Haddington, failed, in breach of his duty as such medical officer, to call in the district nurse to Mrs Haldane mentioned in the said letter, to the loss, injury, and damage of the pursuer."

Counsel for Reclaimers—Clyde, K.C.—Guild. Agents—Guild & Guild, W.S.

Counsel for Respondent—Watt, K.C.—King Murray. Agents—Patrick & James, S.S.C.

HIGH COURT OF JUSTICIARY.

Thursday, October 22.

(Before the Lord Justice-General, Lord Ormidale, and Lord Anderson.)

TENNANT *v.* ALLARDICE.

Justiciary Cases—Statutory Offence—Coal Mines Act 1911 (1 *and* 2 *Geo. V, cap.* 50)—*Explosives in Coal Mines Order* 1913, *sec.* 1 (*e*) (*i*) *and* (*ii*)—*Observance of Rules as to Control, and Issue to Miners, of Detonators.*

The Explosives in Coal Mines Order 1913 provides—"1. (*e*) Detonators shall not be used in or taken for the purpose of use into any mine unless the following conditions are observed:—(i) Detonators shall be under the control of the manager of the mine, or some person or persons specially appointed in writing by the manager for the purpose, and shall be issued only to shot-firers appointed in pursuance of clause 6 of this Order, or (in mines to which Part II of this Order does not apply) to officials specially authorised in writing by the manager. (ii) Shot-firers and other authorised persons shall keep all detonators issued to them, until about to be used for the charging of a shot-hole, in a suitable case or box, securely locked, separate from any other explosive."

The manager of a coal mine, to which Part II of the Order did not apply, was charged with a contravention, in respect that a fireman, having written authority from him to have charge of detonators, but only verbal instructions to enter the store where they were kept, took from the store a locked box of detonators, which he delivered to another fireman who had similar written authority, and who, in turn, distributed the detonators an hour or two before they were required for use to working miners proceeding to their work, each of these miners being a person authorised in writing to fire shots, and each being provided with a locked case in which the detonators were kept until required for use at the working face.

Held (*diss.* Lord Ormidale) that there had been no contravention of the Order, and that the accused had been rightly acquitted.

James Allardice, colliery manager, Nethanview, Lanarkshire, *respondent*, was charged in the Sheriff Court at Lanark at the instance of Thomas Tennant, Procurator-Fiscal, with consent of the Right Honourable Reginald M'Kenna, one of His Majesty's Secretaries of State, *appellant*, on a summary complaint stated thus—"You are charged at the instance of the complainer, with consent foresaid, (*first*) that you, the manager of Auchenbegg Colliery, Lesmahagow Parish, Lanarkshire, occupied by Waddell & Sons, coalmasters, 81 St Vincent Street, Glasgow, did, on 29th October 1913, at Number One Pit of said colliery, being a mine to which the Coal Mines Act 1911 applies, fail, at or about 4·50 a.m., to have detonators under the control of yourself or some person or persons specially appointed in writing by you for the purpose, and did fail to issue detonators to an official or officials specially authorised in writing by you at the said pit in the said mine, and did permit George Mair, fireman, Bellview, Lesmahagow Parish aforesaid, on said date and at or about said time, to remove from the magazine at said pit a box containing 100 detonators without the same being issued to him, contrary to section 1 (*e*) (i) of the Explosives in Coal Mines Order of 1st September 1913, whereby you are liable to a fine of £20, in virtue of section 101 (3) of the said Coal Mines Act 1911; and (*second*) that you, being manager of the said mine, to which the Coal Mines Act 1911 applies, are guilty of an offence against the said Act under and in virtue of the terms of section 75 thereof, in respect that Samuel Wilson, fireman, Heatherview, Lesmahagow Parish aforesaid, now deceased, being a fireman employed in the said mine, did, near the pit-bottom of the six-feet seam of the said Number One Pit, at or about 7 a.m. of said date, distribute 70 detonators or thereby to miners in the said pit, including Thomas Whyte, Auchenbegg; John Aitken, Middlemuir, Coalburn; Gavin Ritchie junior, Milton Terrace, Lesmahagow; George Good, 7 Thornton Row, Kirkmuirhill; and John Craig, Annabella Cottage, Crossford, all Lesmahagow Parish