attention was ever called to the fact that there had been a failure to obtain repayment. I draw my own inferences, but this is not a case in which we are entitled to draw inferences, for it appears to me that it is exclusively a question of fact—Did they know or ought they to have known that they were entitled to claim repayment?

Now in order to decide that question in favour of the pursuers I should have desiderated on this record a clear and distinct averment to the effect that it was well known in the profession during the period over which these payments were made that "charity" meant not, as ordinary men in Scotland would believe, "charitable" merely, but "religious purposes," and that according to the common practice and common knowledge amongst professional men the claim was regularly made on the Inland Revenue authorities for repayment of income tax upon allowances paid out, as this was, for a religious purpose. There is no such averment on this record, and the law agents and factors frankly say—one of them—that his attention was never directed to the question, and the other, who appears to have bestowed anxious care upon the trust, that while he was quite aware of the statute and quite aware of the Scottish law on the subject he had no knowledge whatever of the English decision.

I cannot hold that he was guilty of any negligence because of that ignorance in the absence of any averment to the effect that it was common knowledge in the profession at the time.

This case seems to me to stand in marked contrast to the case of *Frame*, (1836) 14 S. 914, and the case of *Simpson*, 1913, 1 S.L.T. 74, which were cited to us. In the former a law agent made a flagrant error in libelling the wrong section of a statute, and the agent in the latter case was guilty, if the averments of the pursuer were true, of gross negligence in not knowing the provisions of the Public Authorities Protection Act. But in this case, aided by the ordinary light of reason, he could not by any possibility have known that there was the right to recover these payments.

Accordingly I hold, in the absence of any averment such as I have suggested, that there was no ground for holding the factors and law agents responsible. I am therefore for adhering, although not exactly on the same ground, to the judgment of the Lord Ordinary.

LORD MACKENZIE—I reach the same conclusion as your Lordship on the ground that there is no relevant case set out by the pursuers here upon the record of bad faith, whether the action be considered as directed against the trustees or the law agents and factors of the trust.

LORD SKERRINGTON—I concur.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Pursuers — Constable, K.C.—Burnet. Agents—Simpson & Marwick, W.S.

Counsel for Hugh Martin and Robert Martin—Chree, K.C.—Mitchell. Agents—Hugh Martin & Wright, S.S.C.

Counsel for William Sutherland M'Kay —Wilson, K.C.—Young. Agents—Sutherland M'Kay & Pattison, W.S.

Saturday, January 15.

FIRST DIVISION.

[Sheriff Court at Perth.

MURRAY *v.* WYLLIE.

Reparation — Slander — Privilege — Malice —Relevancy—Sufficiency of Averment of Malice.

The defender in an action of damages for slander, a parish minister, wrote a letter to the pursuer, who was then a candidate for the office of elder in the parish church, stating that a serious charge had been made against him by a third party; that if the pursuer persisted in his candidature he would have to tell the kirk-session and have proofs; that he could not ordain an elder, in view of his own ordination vows, against whom there was such a charge; that he thought the pursuer should carefully consider the matter and say that he did not see his way to accept office; that that would be the quietest way, and no one would ever hear of the matter, while otherwise the whole thing must be made public. The pursuer stated his case alternatively, averring that he had not been given any opportunity by the defender to deal with the charge made, and denying that any charge had been made. *Held* (1) that the occasion was privileged and that there should have been a relevant averment of malice, and (2) that as the defender was acting in a public capacity in discharge of a public duty, "want of probable cause" would have required to go into any issue.

Process—Relevancy—Alternative Grounds of Action—One Relevant, the Other Irrelevant.

In an action for damages for slander the pursuer's case was stated alternatively, and one of the alternatives, which were mutually exclusive, was irrelevant. *Held* that the action was irrelevant.

William Murray, butcher, Bankfoot, *pursuer*, brought an action in the Sheriff Court at Perth against the Reverend A. M. Wyllie, The Manse, Auchtergaven, Bankfoot, *defender*, for £500 damages for slander.

The pursuer averred—"(Cond. 2) During the autumn of 1914 the defender intimated from the pulpit that four new elders were required to complete the Session of Auchtergaven Church and nomination papers were sent to every member of the congregation in order that they might nominate four elders. When these papers were returned it was found that the pursuer was one of the four highest. (Cond. 3) There-

after, on the 2nd of December 1914, the defender wrote a letter to pursuer as follows:— '*The Manse, Auchtergaven*, 2/12/14.—Dear Mr Murray—When driving some time ago with some friends of mine, who were living in Stanley, Mr Fraser, butcher there, was the driver. I was seated beside him for some time, when he made a serious charge against you. I told him at the time, I remember, he was saying a dangerous thing. It has worried me ever since, and now that you have a desire to be an elder I felt I could do nothing else than ask Mr Fraser to withdraw it or prove it before the Kirk-Session. He will not withdraw, and if you still adhere to your desire I must tell the Kirk-Session and have proofs. The Kirk-Session, you may know, of a parish church is a legal court of the land. We will summon witnesses and have a lawyer to guide the Session. Mr Fraser may have a solicitor also, and you can also be represented. The Kirk-Session knows nothing of the matter as yet, and my tongue shall never utter one word about it to anyone until I am compelled to in the Session. But I cannot ordain an elder, in view of my own ordination vows before Almighty God, with such a charge against his character as Mr Fraser made against yours. On the whole I think you should carefully consider the matter and say that you do not see your way to accept office. This will be the quietest way, and no one shall ever hear of the matter. Otherwise, of course, the whole thing must be made public. You can easily say you have changed your mind with regard to accepting the eldership. With many regrets and apologies for having to write in this way. It is no pleasant task, but duty demands, and to do my duty as a Minister of Christ is sometimes a very difficult matter.—Yours faithfully, A. M. WYLLIE. *P.S.*—Please take plenty of time to consider this and do not act hastily.—A. M. W.' (Cond. 4) In reply to said letter the pursuer asked the defender to state what was the serious charge which Mr Fraser had made against him and which would disqualify him from the eldership, and that he had not done anything which would disqualify him from holding such an office. In reply to that letter the defender referred the pursuer to Mr Fraser for the serious charge which he had made against him, and stated that he had no more to say in the matter. . . . Pursuer was anxious to meet and refute the 'serious charge' against his character, and in writing the letter condescended on he believed that defender in order to help him in the trying situation in which he was placed would give him the information requested so that he might clear his character. Defender, however, curtly refused to give any information. Pursuer tried to discover both from Mr Fraser and Mr Paul [*the session-clerk*] what the serious charge was, but they would not tell him. . . . Pursuer does not know what the alleged serious charge against his character is which defender makes in his letter of 2nd December. . . . (Cond. 5) The pursuer's agents applied to Mr Fraser to let them know what was the serious charge which he had made to defender against the pursuer, but the said Mr Fraser does not admit that he made any serious charge against pursuer to defender. The pursuer accordingly informed defender of Fraser's attitude, and four times applied to defender to let him know what the serious charge was, so that he might clear his character, or to withdraw the false and slanderous statements contained in said letter, but defender refuses to do so. The pursuer has pointed out to defender how serious are the consequences to him of defender's accusation in said letters, and has asked the defender to give him an opportunity of vindicating his character. Defender has taken no notice whatever of pursuer's requests. Despite pursuer's requests defender without any investigation into its truth or without hearing pursuer communicated said charge to the Kirk-Session, with the result that the pursuer was not ordained an elder. . . . The Kirk-Session gave pursuer no opportunity of meeting the false charge which defender had communicated to them. It is believed and averred that defender instigated the session to follow this course. Said letter of 2nd December was not written by defender as moderator of the Kirk-Session. In view of its terms and the serious consequences to pursuer the defender was bound, not only to state to pursuer what the alleged serious charge against his character was, but also to investigate its truth before making and repeating it. His refusal to give information and failure to investigate were due to the ill-will he had conceived against pursuer. . . . (Cond. 6) The defender's said letter was intended to mean and did mean that pursuer had been guilty of dishonourable and discreditable conduct which rendered him unfit to occupy the position of an elder in the Church of Scotland, and that pursuer's moral character was so bad as to prevent defender ordaining him an elder without violating his own ordination vows before Almighty God. (Cond. 7) The statements in said letter were false, malicious, and calumnious. Defender had conceived an ill-will towards pursuer, and did not wish him to become a member of the Kirk-Session. It is believed and averred that no such charge as he alleges was made by Mr Fraser to defender. If any charge was made, which is not admitted, it would only have been natural and proper that defender, considering its gravity, should have taken means to ascertain whether it were true or false before writing to pursuer in the terms condescended on, but he did not do so. Had he done so he would have ascertained that there were no grounds for any serious charge against pursuer, and that there was nothing against his character which would unfit him for the office of elder. For his own ends and purposes he wrote the letter making said untrue accusations against pursuer's character in order to have a plausible reason for inducing the pursuer into voluntarily and untruthfully saying he had changed his mind in regard to the eldership. Defender, without investigation and without probable or any cause, recklessly made the said slanderous accusations against pursuer's char-

acter. Defender knew that Fraser did not admit that he had made any serious charge against pursuer, and that pursuer could not clear his character of the allegations contained in defender's letter of 2nd December without knowing what the serious charge was and when it was made. Yet although requested he did not withdraw the false and slanderous accusations contained in his letter of 2nd December, or state what the serious charge was, nor has he yet done so, in order that pursuer should have no opportunity of clearing his character if any such charge was made, but should suffer the serious consequences of said groundless and slanderous accusations. After he had written said letter defender acted maliciously in refusing to give pursuer said information in regard to said alleged 'serious charge' or an opportunity of meeting and refuting it. Defender knew that there was no such ground as he alleged for refusing to ordain pursuer as an elder, and that if given an opportunity pursuer could clear his character. Accordingly he refused to avail himself of pursuer's offer to meet said charge if its nature were communicated to him, and defender wrote the letter solely for the purpose of having a plausible ground to gratify his ill-will, and so to prevent the pursuer becoming an elder although he had received a majority of the votes of the congregation. Had defender stated what said alleged serious charge was and given pursuer an opportunity of meeting same, pursuer would have shown conclusively that there was no truth in the alleged serious charge, and that there was nothing against his character which unfitted him for the eldership. This defender well knew, and although pursuer pointed out to defender how unjust was his conduct and how serious its consequences to pursuer, defender refused to give pursuer a chance to vindicate his character, and notwithstanding pursuer's requests recklessly and without any investigation maliciously communicated to the Kirk-Session that a serious charge had been made against pursuer's moral character which unfitted him for the office of elder."

The defender pleaded, *inter alia*—"1. The defender having acted solely as moderator of the Kirk-Session is privileged in his communications to the Kirk-Session and in reporting the Kirk-Session's decision to the pursuer, and the action is accordingly irrelevant. . . . 5. The defender (1) not having slandered the pursuer, (2) the ground of action being that the defender refuses to slander the pursuer, and (3) his whole actings, even according to the pursuer's own averments, being privileged as moderator of the Kirk-Session, is entitled to absolvitor with expenses."

On 6th July 1915 the Sheriff-Substitute (SYM) pronounced the following interlocutor:—"The Sheriff-Substitute, the pursuer having on 2nd July intimated that he does not desire to amend his pleadings, finds it admitted (1) that in 1914 the election of the pursuer to the office of elder in the parish church at Auchtergaven was under consideration; (2) that the defender, the minister of the parish, wrote and despatched to the pursuer, and the pursuer received in due course, the letter which is referred to in the condescendence . . .: Allows to the pursuer a proof of his averments that the defender never had any charge made to him by Mr Fraser mentioned in that letter against the pursuer; that the defender by the said letter falsely, maliciously, and calumniously and out of ill will to the pursuer and for a purpose of his own wrote and sent said letter to the pursuer, and also falsely informed his elders that a serious charge had been made against the character of the pursuer whereby the pursuer has suffered loss and damage in character and feelings: Allows the defender a proof of his answers thereto: *Quoad ultra* refuses proof of the pursuer's averments: Appoints the proof to proceed within the Court House, Perth, on the day of , and grants diligence for citing witnesses and havers: Appoints the pursuer to enrol the cause that a diet may be assigned."

The pursuer required the case to be remitted to the First Division of the Court of Session, and on 15th October the First Division ordered issues to be lodged. Two issues were lodged, the first of which was abandoned at the hearing. The second was in the following terms—". . . . 2. Whether on or about 2nd December 1914 the defender in a letter written and sent by him to the pursuer, falsely, calumniously, and maliciously stated of and concerning the pursuer, 'I cannot ordain an elder, in view of my own ordination vows before Almighty God, with such a charge against his character as Mr Fraser made against yours. On the whole I think you should carefully consider the matter and say that you do not see your way to accept office. This will be the quietest way, and no one shall ever hear of the matter. Otherwise, of course, the whole thing must be made public. You can easily say you have changed your mind with regard to accepting the eldership'; meaning thereby that pursuer had been guilty of dishonourable and discreditable conduct which rendered him unfit to occupy the position of an elder in the Church of Scotland, and that pursuer's moral character was so bad as to prevent defender ordaining him an elder without violating his own ordination vows before Almighty God, to the loss, injury, and damage of pursuer. Damages laid at £500."

Argued for the defender—The pursuer's case was stated alternatively; the alternatives, which were mutually contradictory, were either that in point of fact a charge against the pursuer was made to the defender, or that no such charge was made, but the defender falsely stated such a charge had been made. If the second alternative was the case against the defender, it no doubt contained a sufficient averment of malice, but the defender was entitled to say that the weaker and first alternative was the case against him, and if so the pursuer's case was irrelevant. The letter was not reasonably susceptible of the innuendo placed upon it; it merely stated that information had been given, and the nature of the information, and that was not

slander. But even if the letter was open to the innuendo, the occasion was privileged in the highest degree, as the defender acted in the discharge of his duty, and there was no relevant averment of malice—*Susor* v. *M'Lachlan*, 1914 S.C. 306, 51 S.L.R. 309; *Macdonald* v. *M'Coll*, 1901, 3 F. 1082, 38 S.L.R. 781. Further, want of probable cause was not averred, yet it must go in the issue, as this was the case of a public official discharging a public duty—*Croucher* v. *Inglis*, 1889, 16 R. 774, 26 S.L.R. 587; *Milne* v. *Smith*, 1892, 20 R. 95, 30 S.L.R. 105. The case being stated alternatively, and one of the alternatives being irrelevant, the action must be dismissed—*Finnie* v. *Logie*, 1859, 21 D. 825.

Argued for the pursuer—The action was relevant; it was admitted that the second alternative ground of action was relevant. The first alternative was relevant also. The letter was not a mere transmission of information received to the person interested, but it clearly though impliedly showed that the writer believed the truth of the information given. Malice should not go in the issue, but even if it was inserted, the defender's endorsation of the information he conveyed was clearly malicious, and so also was his refusal to give an opportunity for inquiry. Without probable cause should not go in the issue, for that was limited to cases where the alleged slander was contained in a statement to the police—*Webster* v. *Paterson & Sons*, 1910 S.C. 459, 47 S.L.R. 307; *Croucher* v. *Inglis* (*cit.*); *Milne* v. *Smith* (*cit.*); *A* v. *B*, 1895, 22 R. 984, 32 S.L.R. 514.

At advising—

LORD PRESIDENT—I am unable to discover issuable matter in this record. [*After summarising the facts of the case and quoting the innuendo which it was sought to put upon the terms of the letter complained of, his Lordship proceeded*]—Now, for my own part, I do not think that the letter is susceptible of bearing that meaning; but, assuming that it does, it is obvious, having regard to the relationship between the parties and the nature of the communication, that the occasion was privileged. And so high was the privilege in my opinion that if the pursuer was to succeed in this action it would be necessary for him to aver and prove not only that the defender was actuated by malice when he wrote the letter but also that he wrote it without any probable cause. This, in short, seems to me to be a case to which the principle enunciated by this Division of the Court in the case of *Croucher* v. *Inglis*, 1889, 16 R. 774, 26 S.L.R. 587, is very clearly applicable.

Now on this record there is no averment either of malice or of lack of probable cause, because to say that the defender refused to specify the charge, or to investigate it before laying it before the Kirk-Session, is to aver the absence rather than the presence of malice. That there was probable cause is plain, for the pursuer himself distinctly avers that the charge was made and was communicated by the defender to the Kirk-Session.

Accordingly it appears to me that if this were the only case made for the pursuer, plainly the issue must be refused. But then it is said that there is an alternative case stated in this record, and in the 7th article of the condescendence, in one short sentence, we find it set out thus—"It is believed and averred that no such charge as he alleges was made by Mr Fraser to the defender." That is very clear and distinct, although sufficiently brief, and it appears that in the Sheriff Court the pursuer took his stand firmly upon this alternative. He said it was his only case. That was not the attitude adopted by the pursuer in the argument before us. He refuses now to commit himself to either alternative. He declines to say whether the charge was made or was not made, and he proposes to stand on both alternatives—to submit his case to the jury on both alternatives. He made no proposal to be allowed to amend his record.

Now, on the assumption that this is an alternative case, well averred, and that it is sound and relevant, inasmuch as the other limb of the alternative is palpably unsound and irrelevant, this is a plain case for the application of the familiar rule laid down by Lord President M'Neill in the case of *Finnie* v. *Logan*, 1859, 21 D. 825, where he says—"When the alternative consists in this, that one branch of the statement is relevant and the other not—one branch of it a good ground of action and the other not—then to say that one or other of the things so alternatively averred is true is not a relevant statement at all. It is nothing more than to say that either there is a ground of action or there is not, and that therefore the defender is liable." The whole question is put with great clearness and succinctness by Lord Curriehill when he says—"When there are alternatives, one of which is relevant and one of which is not relevant, the action before the Court comes to be an action on no allegation at all, because the relevant averment cannot be adopted when the party himself does not stand upon it." That is exactly the pursuer's case here, and accordingly I see no alternative to dismissal of this action.

LORD SKERRINGTON—The first question which we have to decide is whether the letter scheduled to the issue is reasonably susceptible of the defamatory meaning that the pursuer's moral conduct had been such as to render him unfit to be an elder in the Church of Scotland. Having regard in particular to the terms of the second-last paragraph of the letter, I am of opinion that this question must be answered in the affirmative. The next question is, whether the occasion as described by the pursuer was one on which the defender was privileged to write a letter which I shall henceforth assume to have actually conveyed this defamatory meaning. The Kirk-Session was about to appoint four new elders—a matter entirely within its power and discretion, but in regard to which it would consider the recommendations and objections of the members of the congregation. The pursuer had been recommended as a

suitable person to be appointed, and he was willing to act, and might correctly be described as a candidate for the office. The defender was moderator of the Kirk-Session, and it was his plain duty as such to do what was reasonably necessary in order to secure that no candidate against whose moral character a credible and serious charge had been made should be appointed by the Kirk-Session in ignorance of the existence of such a charge. One method of performing this duty was for the defender, without any previous notice to the candidate, to lay before the Kirk-Session at the meeting for the election of elders any information which he had received, together with his opinion and advice thereon. The Kirk-Session would then either proceed to investigate the charge, or, if it preferred not to undertake this duty, it would appoint some person against whose character no charge had been made. By adopting this course the defender would probably have been absolutely privileged against any action of damages, but, as Lord Deas pointed out in his opinion in *Rankine* v. *Roberts*, (1873) 1 R. 225, at p. 232, 11 S.L.R. 89, the consequences might have been ruinous for the candidate. He there said—"The Kirk-Session is a body popularly constituted, sometimes very numerous, and with very little of judicial restraint among its members. The very fact of the question being rashly propounded to such a body whether they would take up and inquire into certain specified accusations or not, might be ruinous to the party concerned, although the inquiry were negatived, and still more so if it were gone into, although the charges should be held in the end not to have been established." On the other hand, if the defender had the courage to subject himself to the chance of an action of damages, a more humane method of performing his public duty would be to write a preliminary and private letter to the candidate intimating the course which the defender intended to take in the Kirk-Session. By writing such a letter the defender would in no way aggravate the painful consequences that would ensue if in the end the matter came before the Kirk-Session, but on the contrary might, whether the charge was well founded or ill-founded, enable the candidate to avoid a very painful situation. Having regard to the fact that the letter was written by the moderator of the Kirk-Session to a candidate for the office of elder and stated the advice which the writer proposed to give to the Kirk-Session with regard to the candidature of the person to whom the letter was addressed, I am of opinion that the occasion was one on which the defender was privileged to write such a letter. It is immaterial that the pursuer denies that any charge against his character had been made to the defender. That fact, if established by evidence, would not show that the occasion was not one of privilege, but would go to prove malice and abuse of office on the part of the defender. As regards the quality and degree of the defender's privilege, it is, I consider, that which ordinarily protects public officers from claims of damages in respect of acts done in the course of the execution of their public duties, viz., that the pursuer must prove both malice and want of probable cause. In form the issue which we should allow the pursuer would be one of defamation just as issues in respect of information given to the police often take the same shape—see *Shaw* v. *Burns*, 1911 S.C. 537, 48 S.L.R. 432—but in reality the claim is made in respect of alleged abuse of a public office. Accordingly the dictum of the Lord President (Dunedin) in *Webster* v. *Paterson & Sons*, 1910 S.C. 459, at p. 468, 47 S.L.R. 307, to which we were referred, as to the impropriety of inserting the words "want of probable cause" in issues for defamation has no application. For these reasons, if the pursuer is to have an issue at all, he must relevantly aver malice and want of probable cause. It was decided by Lord Stormonth Darling as Lord Ordinary that malice and want of probable cause were essential in an action against a person who had written to a kirk-session objecting to the suitability of a candidate for the office of elder (*Jack* v. *Fleming*, (1891) 19 R. 1, 29 S.L.R. 5), and this judgment seems to follow from the decision in the case of *Croucher* v. *Inglis*, (1889) 16 R. 774, 26 S.L.R. 587. It would, however, be rash to affirm, on the analogy of the decision in *Campbell* v. *Cochrane*, (1905) 8 F. 205, 43 S.L.R. 221, that a letter which threatens to denounce a person to the police or to the Kirk-Session necessarily enjoys the same privilege as such a denunciation, if actually made, would have enjoyed. I base my judgment upon the other ground already explained.

If the pursuer had confined his cause of action to that which he sets forth in the first five lines of condescendence 7, I should have had no hesitation in holding him entitled to an issue containing the words "maliciously and without probable cause." It would then have been open to him to establish by evidence either that no charge whatsoever against his character had been made to the defender by Mr Fraser, or alternatively that if some charge had been made it was one which no reasonable man would have regarded as a justification for writing the letter complained of. In the former case it would have been obvious that the defender acted maliciously and without probable cause when he wrote a letter falsely pretending that a serious charge had been made. On the other hand, if it appeared on the evidence that some charge had been made, but that it afforded no reasonable ground for writing the letter, the pursuer would have established want of probable cause. It would still, however, have been necessary for him to prove affirmatively that the defender had acted maliciously, *i.e.*, from a wrong motive, and to negative the suggestion that the defender had acted innocently, though possibly foolishly or thoughtlessly, or had failed because he was greatly "worried" to make his real meaning clear. In my view the general averment of malice in the beginning of condescendence 7 would have been sufficient to entitle the pursuer to an issue.

The difficulty in the pursuer's way is that he has chosen to state his case alternatively and upon the assumption that Mr Fraser did in fact make to the defender a grave charge against the pursuer's character. Upon that assumption the defender had *prima facie* good and probable cause for writing the letter. The pursuer might have negatived this *prima facie* view in various ways, *e.g.*, by alleging that on the occasion in question the defender's informant was obviously intoxicated, but in my opinion he has averred nothing which displaces the *prima facie* view. The pursuer complains in condescendence 7 that the defender did not investigate the truth of the charge made by Fraser, but he had no duty to make any such investigation, and his failure to do so affords no evidence that he acted without probable cause. Upon the same hypothesis, viz., that Mr Fraser made to the defender a grave charge against the pursuer's character, the averments of malice are equally defective, not in respect of their generality, but in respect of their particularity, because the pursuer states that he proposes to ask the jury to infer malice from certain circumstances which do not justify any such inference. The pursuer has undoubtedly suffered some hardship from the refusal of the Kirk-Session to inform him of the nature of the charge made against him; but the Kirk-Session was within its legal rights in declining either to state or to investigate the charge, and the same is still more clearly true of the defender. Their conduct in this matter affords no evidence of malice on the part of the defender. It is well established that where there is an alternative averment of fact, relevancy must depend on the weaker alternative—*per* Lord Watson in *Hope* v. *Hope's Trustees*, 1898, 1 F. (H.L.), at p. 3, 35 S.L.R. 971. The attention of the pursuer's legal advisers was pointedly directed by the Sheriff-Substitute to this legal difficulty, and his solicitor then "quite definitely said that his case was not alternative but single—that his case was that no charge had ever been made by Fraser." Notwithstanding this disclaimer the pursuer's counsel in his argument before us reverted to the alternative charge. In these circumstances we must sustain the defender's first plea-in-law and dismiss the action.

LORD ANDERSON—This case was argued by both sides on the footing that the pursuer had averred alternative grounds of action, the first alternative being that Fraser had made to the defender a statement regarding the pursuer, the second alternative being that no statement whatever had been made by Fraser.

I am doubtful whether this second ground of action has been relevantly averred. The averment of it consists of a single sentence in condescendence 7—"It is believed and averred that no such charge as he alleges was made by Mr Fraser to the defender." If the pursuer seriously meant to make so grave a case against the defender as that he deliberately fabricated or invented the statements about Fraser, this should have been pointedly and unambiguously averred.

Taking the case, however, on the footing on which it was argued, the defender's contention was that the first alternative ground of action was irrelevant, and therefore, on the principles laid down by Lord President M'Neill in the case of *Finnie* v. *Logie*, 1859, 21 D. 825, the whole action was bad. The defender's counsel conceded that the second ground of action was relevant, but he maintained that this would not avail the pursuer if his first ground of action failed.

The defender attacked the first alternative case of the pursuer on two grounds. He argued, in the first place, that as the defender did nothing more in his letter than transmit or report to the pursuer what Fraser had said, that as he had neither invented nor adopted the charge which had been made, that as he had, in short, done nothing more than tell the truth, he had committed no actionable wrong. It was conceded by the pursuer's counsel that if the import of the defender's letter had been nothing more than this no action would lie. The pursuer maintained, however, that the reasonable meaning of the penultimate paragraph of the letter was that the defender had adopted the slander by impliedly expressing the opinion that it was true.

Assuming that this is a reasonable construction to place upon that paragraph of the letter, it follows that the first of the defender's contentions fails.

The defender contended, in the second place, that as the occasion was on the pursuer's averments privileged, and as there was no relevant averment of malice, the first ground of action failed. I am of opinion that this contention is well founded. The pursuer's averments disclose a case of privilege. The defender as a minister of the Gospel had a clear duty to make the communication in question to one who was a candidate for eldership. The pursuer had a clear interest to receive the communication. These are the conditions which create an occasion of privilege—*Hebditch*, L.R., [1894] 2 Q.B. 54.

I am further of opinion that this is a case in which the privilege of the defender was so high that special averments of facts and circumstances indicative of malice are necessary.

I am unable to find in connection with this first ground of action any relevant averments of malice. The pursuer makes two averments as indicating malice on the part of the defender—(1) that he did not disclose to the pursuer what was the charge which Fraser had made, and (2) that before writing the letter he did not make investigations to ascertain whether or not the charge was true. I am unable to hold that either of these averments is indicative of malice. I think the defender's line of conduct as disclosed in the correspondence was absolutely correct. He referred the pursuer to Fraser for the particulars of the charge, and he rightly refused to undertake as an individual any investigation with reference to the truth or falsity of the charge.

This is sufficient for the decision of the

case in favour of the defender, but it was also maintained on his behalf that the case is one to which the principle of want of probable cause applies, and that the averments of the pursuer show that the defender had probable cause for making the communication complained of. The Court has frequently considered the question as to the kind of case in which the defence of probable cause is appropriate, *e.g.*, in *Lightbody* v. *Gordon*, 1882, 9 R. 934, 19 S.L.R. 703; *Croucher* v. *Inglis*, 1889, 16 R. 774, 26 S.L.R. 587; *Milne* v. *Smith*, 1892, 20 R. 95, 30 S.L.R, 105; *A* v. *B*, 1895, 22 R. 984, 32 S.L.R. 514; *Webster*, 1910 S.C. 459, 47 S.L.R. 307. These authorities appear to establish this proposition that the defence of probable cause may be pleaded where the defender has made a communication to some public authority in the discharge of a duty or in the exercise of a right. Thus in the present case, if the defender without communicating with the pursuer had reported to the kirk-session what had been said by Fraser, the defence of probable cause would on the authorities have been open to him. It was argued that it was a legitimate extension of the said principle to apply it to what had been done by the defender in the present case, on the ground that he had as minister of the parish been discharging a public or quasi-public duty.

As I do not find it necessary for the determination of the action to decide this point, I desire to reserve my opinion upon it.

The Court dismissed the action.

Counsel for the Pursuer—Macmillan, K.C. —R. Macgregor Mitchell. Agents—J. Miller Thomson & Company, W.S.

Counsel for the Defender—Moncrieff, K.C. —Macdonald. Agents—Rainy & Cameron, W.S.

HIGH COURT OF JUSTICIARY.

Monday, January 24.

(Before the Lord Justice-Clerk, Lord Guthrie, and Lord Hunter.)

MACKINNON *v.* NICOLSON AND OTHERS.

Justiciary Cases—Fishing—Statute—Salmon Fisheries (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 97), *sec.* 27—*Night Poaching* —"*The First Hour after Sunset.*"

The Salmon Fisheries (Scotland) Act 1862, sec. 27, enacts that if three or more persons ". . . shall at any time between the expiration of the first hour after sunset on any day and the beginning of the last hour before sunrise on the following morning enter or be found on any ground adjacent . . . to any river . . . with intent illegally to take or kill salmon, or having in his or their possession any net, rod . . . or other instrument used for taking salmon with such intent aforesaid, or shall illegally take or kill, or attempt to take or kill, or aid or assist in killing or taking, salmon, every such person shall be guilty in Scotland of a criminal offence."

In a summary complaint founded on the above section the time according to Greenwich time when the sun set at the *locus* was not proved; the hour of sunset at Greenwich was proved; and it was proved that accused were fishing after the expiration of the first hour after sunset at Greenwich. *Held* that the Sheriff was right in holding the complaint not proven, and that the time of sunset was the time at which the sun set at the *locus* according to Greenwich time.

The Salmon Fisheries (Scotland) Act 1862 (25 and 26 Vict. cap. 97), sec. 27, is quoted *supra in rubric.*

Alexander Dugald MacKinnon, Clerk to the Skye District Fishery Combined Boards, *complainer*, brought a complaint in the Sheriff Court at Portree against Roderick and Alexander Nicolson, John MacRae, and Donald Cumming, *respondents.*

The *complaint* was in the following terms —"You are charged at the instance of the complainer, that you, acting in concert, or being together or in company, did, between the expiration of the first hour after sunset on the 18th day of August 1915 and the beginning of the last hour before sunrise on the following morning, enter upon ground forming part of the estate of Skeabost, at Glenbeg, adjacent or near to the river Snizort, in the said parish, and particularly adjacent or near to that part or locality of said river known as the Upper Flats thereof, all situated within the jurisdiction of the said Boards, with intent illegally to take or kill salmon, or having in your possession a net, rods, or other instruments used for taking salmon with such intent as aforesaid, or did illegally take or kill or attempt to take or kill, or aid or assist in killing or taking, salmon from the said river, contrary to the Salmon Fisheries (Scotland) Act 1862, section 27; whereby you are liable to the penalties set forth in said section of said Act."

The respondents pleaded not guilty and evidence was led, and on 21st October 1915 the Sheriff-Substitute (BOSWELL) found the charge not proven. At the request of the complainer he stated a Case for the opinion of the High Court of Justiciary.

The Case stated—"The accused was tried before me on summary complaint on 21st October 1915. They admitted that they were at the *locus* on the date libelled, and that they were attempting to take fish. They did not admit that the offence charged was committed 'between the expiration of the first hour after sunset and the beginning of the last hour before sunrise on the following morning.' The times of sunrise and sunset at the *locus* were not proved. It was proved that the sun set at Greenwich on the day libelled at 7·17. It was further proved that 'Inverness-shire lighting-up time' was 8·53, and that this 'lighting-up time' was a general time which the police enforce on motor cars and cycles, and that