was one to be settled when he reached his destination. He had no wish to defraud the company, and therefore should not have been subjected to the treatment reserved for a swindler or a cheat. If the railway company wish to enforce the rule that passengers must be on the platform a certain number of minutes before a train is advertised to start, they ought to close the doors of the station and refuse entry after that time. But to leave the station doors wide open, and to shut down the ticket window, gives rise to difficulties like the present; whereas the closed doors would obviate any misunderstanding. This plan is adopted abroad, and at most large stations in this country also. The train was delayed five minutes by the misunderstanding between the agent and the pursuer, whereas one minute would have sufficed to procure the ticket. At the same time the Sheriff-Substitute is satisfied, from what he knows of the station-agent at Forfar, that had the pursuer civilly asked for a ticket, rather as a favour than as a right, he would have been at once supplied. The result of the case is that the defenders must pay the carriage hire sued for. But as the pursuer was originally to blame in being too late, the Sheriff-Substitute is not inclined to award any sum in name of compensation for loss of time or personal annoyance. Decree for 7s. and ordinary small debt expenses. (Initialed) A. R."

Against this judgment the company appealed to the Circuit Court at Dundee. In the course of the discussion the Court intimated that they would not enter into the merits of the case as disclosed in the Sheriff's notes; and the respondent's counsel was requested to speak to the relevancy of the account annexed to the summons as showing a ground of action. The argument for the company on this point was that the rule requiring a passenger to procure a ticket five minutes before the starting of the train was a reasonable regulation by the company's bye-laws for the management of the company's business. The right of the public to carriage was controlled by the company's bye-laws as to the getting of tickets in due time before entering a train.

The respondent argued—(1) That the action was clearly based on breach of the common law duty of public carriers to carry members of the public for whom there was room on being tendered the amount of their fare. That was in itself clearly a relevant ground of action, and enough was shown in the account to bring out the application of that common law obligation. No doubt this obligation was liable to reasonable regulation, but looking strictly to the terms of the account, nothing appeared to show the existence of special regulations, whether legal or illegal. In order to assail the relevancy of the account, the appellants were forced to assume the existence of bye-laws requiring tickets. Now, not one word appears in the account in recognition of the existence or nature of such bye-laws. Their Lordships could not assume without proof the existence and terms of such bye-laws, and the fact of their violation by the respondent. (2) Besides, any such bye-law was inapplicable to the case. The train it appears, was standing at the station, and the respondent, after going to the ticket office, had entered the carriage without opposition. This amounted to a consent on the part of the carriers, and they could not turn him out, especially as no force or fraud was alleged. Either on breach of the common law obligation or of implied contract to carry, a good ground of action was disclosed by the account.

Lords ARDMILLAN and NEAVES concurred in holding that the account showed no ground of action. The regulation requiring tickets before entering was in itself reasonable, and was matter of notoriety not requiring probation. As the pursuer had not obtained a ticket in time no contract had been made with him by the company, and he was justifiably turned out of the carriage. If the pursuer was right in what he did, then anyone of the public must be so, and it would readily be seen that if crowds without tickets were to be at liberty to rush into any train they found waiting at a station, the management of the traffic would be much impeded. The account here was very defective; it failed even to aver that the acts of the company were wrongous. The Circuit Court could certainly not enter into the merits of a small-debt case; but if the account annexed was so defective as this, the whole proceedings before the Sheriff had been incompetent, and the Circuit Court must have power to give redress.

Reversed, with £5, 5s. of expenses.

Counsel for Appellants—Guthrie Smith.

Counsel for Respondent—R. V. Campbell.

GLASGOW.

(Before Lord Cowan.)

KEANE *v.* LANG.

Appeal to Circuit Court—Competency—Bond of Caution. A bond of caution not having been lodged along with an appeal, appeal dismissed.

This was an appeal against a sentence of the Magistrates of Glasgow.

BRAND, for the respondent, objected to the competency of the appeal that a bond of caution had not been lodged in the hands of the Clerk of Court at the same time as the appeal was entered, or at least within the statutory period allowed for lodging an appeal, as provided by section 36 of the Heritable Jurisdictions Act.

MAIR, for the appellant, stated that the bond was now lodged.

Lord COWAN sustained the objection, and dismissed the appeal as incompetent, with expenses.

Agent for Appellant—T. C. Young.

Agent for Respondent—George Paterson.

COURT OF SESSION.

Tuesday, June 5.

SECOND DIVISION.

BELL *v.* BLACK AND MORRISON.

(*Ante*, vol. i., p. 251.)

New Trial. In an action against Procurators-Fiscal for judicial slander in which a jury found for the pursuer—new trial refused.

Mr Bell, farmer at Glenduckie, brought an action against the defenders joint Procurator-Fiscals for Fifeshire, for having procured and executed an illegal warrant to search his house in connection with certain disturbances at Dunbog. This action was compromised. Mr Bell then brought another action against the defenders for judicial slander. In the defence to the first action the defenders had averred that the statements in the petition upon which the warrant was granted "were and are true, and were made by the defenders in good faith, and on probable

grounds." These averments, Mr Bell contended, were not relevant or pertinent to the defence of that action, and were false and calumnious. The defenders pleaded that Bell having accepted a settlement of the action in which these statements were made could not now claim damages therefor. That plea was repelled, and the case was sent to a jury upon issues putting the question whether the said statements "were maliciously inserted" by the defenders? The jury returned a verdict for the pursuer—damages £100.

The defenders having moved for a new trial, obtained a rule upon the pursuer to show cause why it should not take place,

MONRO and GORDON showed cause.

GIFFORD and A. MONCRIEFF were heard in support of the rule.

The LORD JUSTICE-CLERK said that as he had to try the case when the verdict of the jury was returned, it might not be amiss in him to explain the impression which the evidence made upon his mind at the time, and which it still made. The case was a most delicate one, and his duty was one of great responsibility, and not the less so because a serious charge was brought against public officers, and men whom he had occasion to know were most efficient public servants. But, on the other hand, he knew that some of the proceedings were of such an unusual nature as very naturally to involve these gentlemen in embarrassment. He endeavoured to hold the balance justly. If he had thought there was no evidence of malice he would have most probably instructed the jury to that effect, and withdrawn the case from them; but there was undoubtedly some evidence of malice. At the same time, it might be that the evidence was so slender, that although he, as presiding Judge, was not authorised to take it from the jury, the jury were not justified in affirming it to be sufficient. Now, that was the question. Questions of malice were peculiarly jury questions. No doubt, as this was a privileged case, it was indispensable that malice should be proved as substantive matter of fact; but it has been misunderstood what sort of matter of fact it is. It is not a physical but a psychological fact, and can be proved only by facts and circumstances. Now, there are a number of facts and circumstances in this case, and from these taken together he could not say that the jury were far wrong in deducing malice, and unless they were far wrong he could not disturb their verdict. He abstained from saying whether they were wrong at all, because in a case of so delicate a nature it is better to abstain from saying anything more than is necessary for its decision; and all that is necessary to say is that the jury were not far wrong.

Lord COWAN—It seems to me there was evidence enough to leave to the jury. I will not express any opinion as to whether I would have concurred in their verdict. It has been said that this is a peculiar case, because there are two defenders; but that peculiarity shrinks into nothing when it is remembered that the calumny complained of was the joint statement of these parties. It has been farther said that the defenders are public officers, discharging their duties to the best of their ability; but the action here was not brought against them for malice in the conducting of their professional business. It is an action of damages for judicial slander, after the proceedings which had been conducted by them in their professional position were nearly at an end. I believe these gentlemen did conduct their professional duties with discretion and anxiety, but that will not protect them in this action. I think Procurators-Fiscal are entitled to great protection in the performance of their professional duties, but if they travel beyond these they must be responsible. Now, was there sufficient evidence here to entitle the jury to return the verdict which they did? Among the circumstances which have impressed themselves on my mind, I give no weight to that miserable affair about the defenders not touching their hats nor making a bow to the pursuer on the street. I agree with Lord Neaves that if they had raised their hats a foot higher or made their bows a foot lower, it might equally well have been presented as a symptom of malice. But the statement complained of is this—that certain averments contained in a petition presented by the defenders against the pursuer "were and are true." And what are these statements? That during 1863 and 1864 the pursuer was engaged in a conspiracy to murder the Rev. Mr Edgar and others; and it is averred with regard to these that they "were and are true." More than this, that averment was made on the 22d March 1865, and at that time the precognition was far advanced, and the pursuer had been apprehended and committed to trial the very day before, not on the charge of being concerned in a conspiracy, but simply on the charge of sending threatening letters. It is said that the statement was inserted by senior counsel. That would have been worthy of much consideration if there had been an abandonment on the part of the defenders, but there was no such abandonment, and having committed themselves to their Edinburgh advisers, they must be held to have instructed them. We cannot hold that gentlemen's characters are to be left to such risks. It is a matter of some moment that Mr Morrison at the trial, when examined as a witness, still persevered in his opinion that the averment was correct. The only other point is that a letter containing matter for an action of damages by Ballingall against the pursuer, was shown by the defenders to Ballingall's agent. I don't say that was done with any bad intentions. But on the whole I cannot but agree that the verdict must stand.

Lord BENHOLME—This is a delicate case. I am deeply impressed by the fact that this statement did not proceed from the pen of the defenders. Had there not been previous circumstances in this case, I hardly think the jury would have given a verdict against the defenders. But we see clearly that very angry passages had occurred during this ecclesiastical fight, and I cannot help thinking that the jury looked to that, and were prepared to scan with extreme delicacy any hostile expression on the one side or the other. Several things appear in the evidence that the jury were entitled to look to; and above all, the showing that letter of Bell's, which was a letter written just in the heat of that contest. Now, this letter comes into the hands of the defenders as Procurators-Fiscal, and we find that they communicated it to the agents of the parties spoken about. The circumstances of the parties on each side were not to be thrown out of view in considering the conduct of these parties, and after what your Lordship has said, that you were satisfied there was no reason to interfere, I cannot do so. Malice is eminently for a jury. It is derived from slight circumstances concurring in one direction, and often more calculated to convince than one very strong circumstance, and in the present instance I am not inclined to interfere.

Lord NEAVES—I arrive at the same opinion, not with doubt, but with great reluctance, for I feel great sympathy with the defenders, and have a

perfect knowledge, and feel at this moment, that they are most excellent men of business. But from what we know of the circumstances, there seems to have arisen an irritation which overcame a little that impartiality and high position which public prosecutors must have. It is out of our power to take the case from the hands of the jury. I don't say that I would have concurred in their verdict, but we are not entitled to withdraw it from them. I think a little animus did come out a little in the adherence by Mr Morrison to his belief in Bell's guilt, after another person had been convicted. Without going into the cutting upon the street, which is like the biting of the thumb in "Romeo and Juliet," there are indications that when they lodged their defences there was great temper. I cannot look on the defences except as their defences. They did not repudiate them at the time, nor in this record, and it was only at the trial in this case that they tried to make out that they were not their defences. The record was closed with these statements in the defences, and they are now interpreted by the jury as accusing Bell of that most serious conspiracy. Now, as Lord Cowan has said, Mr Bell was committed on nothing but sending threatening letters, when these defences were lodged. When the record was closed, besides the confession of Edmiston, the Crown had not taken a step to follow up the other charge, and the Procurators-Fiscal, whose duty was as much to prosecute as to put these statements on record, had not taken one step. They could not have put them on record without the intention of proving them, or without a blindness to the course they were to follow, and no evidence would have been sufficient to prove them except what would have been sufficient in a criminal charge. That is the rule whenever the *veritas* has to be proved. To some extent the feelings of the defenders seem to have lost their balance, and the jury were entitled to consider that there was some evidence of malice. Then there was the letter shown to Nicholson. I don't say whether there was any bad intention, but it is unexplained; and nothing can illustrate the danger of such warrants which set Procurators-Fiscal loose on all correspondence, than that letters slumbering in a private desk should be got out, promulgated, or shown to the agent of the injured parties, who before were quite uninjured, for I doubt whether anything said by Bell about Mr Hungerjaw, to the poet, could injure these parties. The injury was in promulgating what was said. Now the defenders injudiciously showed these letters to Mr Nicholson, the agent of the Ballingalls—and that gave rise to all the actions of damages at their instance. I cannot but say that that was most injudicious.

The Court discharged the rule formerly granted, with the expenses of discussing it.

Agents for Pursuer—Murdoch, Boyd, & Henderson, W.S.

Agents for Defenders—Murray & Beith, W.S.

OUTER HOUSE.

(Before Lord Ormidale.)

SIMS *v.* HAWES.

Expenses—Tender. A tender of a sum with expenses up to the date of it, includes the expenses of consulting counsel as to whether it should be accepted and of taking decree.

In this case the defender lodged a minute, tendering a sum of thirty guineas of damages, "with expenses up to the date thereof." The pursuer in his account made various charges for consulting counsel as to the propriety of accepting this tender, and also charges for obtaining decree. These charges were sustained by the Auditor; and to-day the Lord Ordinary repelled the objections stated to them by the defender. It was maintained by the defender that although in the general case a tender with expenses of process carried such charges as these, still that, as the minute here was limited to its expenses up to its date, such charges could not be allowed.

Counsel for Pursuer—Millar. Agents—Morton, Whitehead, & Greig, W.S.

Counsel for Defender—Rutherfurd. Agents—W. H. & W. J. Sands, W.S.

Wednesday, June 6.

FIRST DIVISION.

A, *v.* B.

Act of Sederunt 15*th July* 1865—*Time for Lodging Issues.* A party having, in consequence of a miscalculation, failed to lodge issues till the day after they were due, the Court, of consent, on the report of the Lord Ordinary, allowed them to be received.

Lord BARCAPLE reported a point which had arisen in this case for instructions from the Court. By the 12th section of the Act of Sederunt of 15th July 1865, it is provided that—"All appointments for the lodging or adjusting of issues shall be held to be peremptory; and if the issue or issues be not lodged within the time appointed it shall be competent to the opposite party to enrol the cause, and to take decree by default—which decree by default shall not be opened up by consent of parties, but only on a reclaiming-note." In this case the pursuer had, by a miscalculation of the day upon which the period for lodging issues expired, failed to present them to the clerk to the process till the day following—when the clerk refused to receive them—but marked them as too late. The defender did not desire to take advantage of the mistake on the part of the pursuer's agent, and did not move for decree, but concurred with the pursuer in requesting the Lord Ordinary to report the matter to the Court for the purpose of obtaining leave to have the issues received.

The Court, in the circumstances, granted leave.

BREADALBANE'S TRUSTEES *v.* CAMPBELL.

Entail—Improvement Expenditure—10 *Geo. III. c.* 51—11 *and* 12 *Vict. c.* 36. An entailed proprietor having expended certain sums of money in improvements, and having taken proceedings under the Entail Amendment Act, whereby he obtained authority to grant a bond of annualrent over the lands to the extent of £25,000, which power he exercised to the extent of £20,000, after which he lived for four years, and died without exhausting the power, *held* (*diss.* Lord Deas) that his executors were not precluded from exercising the rights which they had under the Montgomery Act, in order to recover the remaining £5000 from the succeeding heir of entail.

Entail—Decree of Declarator—10 *Geo. III. c.* 6. Objections to decrees of declarator of improvement expenditure which repelled.

This was an action at the instance of the surviving accepting and acting trustees and executors