still it sufficiently illustrated the nature of his position—and called the next neighbours to come into Court in order to fight the battle with them there—to make up a record, or something like a record, and objections were stated. There was discussion upon them, and ultimately, no doubt, the objections were withdrawn; but that state of matters showed that objections were possible, and therefore the petitioner was not entitled to say that this was a case in which no question of possessory right or disputed boundaries was or might be raised or involved. His course was to have gone on in the usual manner. Knowing that there might possibly be objections by these neighbours, he should have brought them into the field before the Dean of Guild, and have given them an opportunity of being heard. That view was very strongly confirmed by the fact which Lord Benholme had stated, that there were no other means of making people aware of such alterations. They were not advertised; they were not published in any way; they were not even edictally announced when before the Commissioners of Police. That was altogether a private thing, and it was a very proper thing for the purpose for which it was intended; but there being no intimation of any kind, he saw no reason why, in a case where objection was possible—and here it was manifestly possible—the party desiring to make the alterations should not go on in the usual way and obtain the concurrent warrant of the Dean of Guild, which he would have done under the old system, and the effect of which would be, not to dispose of those questions which the Commissioners of Police disposed of, but to dispose of every other question by settling the claims of coterminous proprietors who had objections on the ground of possessory right, and to have his decree of "lining" fixed in a manner that would be satisfactory to the end of time. On these grounds, his Lordship thought this proceeding was competent, and that it had been disposed of in the right way in the Court below.

Lord Mackenzie—I concur in the opinions of your Lordships. I consider that the jurisdiction of the Dean of Guild Court is not excluded by the provisions of the Dundee Police and Improvement Act, and of the Acts incorporated therewith, with reference to the operations of the respondent. By these Acts very extensive powers are committed to the Commissioners of Police for sanitary and police purposes with reference to buildings within the burgh, many of which the Dean of Guild had no right to exercise. And by the 183d section of the Special Act it is provided that "where no question of possessory right or disputed boundaries is or may be raised or involved," it shall not be necessary for any person to obtain any other approval than the approval of the Commissioners mentioned in the 74th section of that Act, before erecting or altering any building within the burgh. There is no express exclusion in the statute of the jurisdiction of the Dean of Guild, but this provision in the 183d section supersedes the necessity of obtaining his warrant in certain cases. Whenever any question of possessory right or disputed boundaries is or may be raised or involved, the jurisdiction of the Dean of Guild remains entire. In every such case it is, I think, incumbent upon the proprietor proposing to erect or alter a building to obtain the approval of the Commissioners, and also the decree o lining and warrant of the Dean of Guild. In the present case it appears to me that the respondent's operations involved a question of disputed boundaries, and that it was necessary for him to apply to the Dean of Guild for his decree and warrant. In all proceedings in the Dean of Guild Court the building plans of the proposed operations are lodged, and the co-terminous proprietors are cited for their interest, so that they may, by inspection of the plans, ascertain whether their boundaries will be encroached upon. In obtaining the approval of the building plans by the Commissioners of Police, the adjoining proprietors are not cited, so that they are in ignorance of the proposed operations. Whenever these operations are of such a nature as to raise or involve no question of possessory right or disputed boundaries—as, for example, where they are entirely within the limits of the applicant's property, and do not extend to his boundaries—it seems reasonable, having regard to the provisions of the statutes, and it is thereby provided, that the Commissioners' warrant shall be sufficient. But where such questions may be raised or involved, as is the case where the operations extend to the boundaries of the applicant's property, the rights of the adjoining proprietors require that they should receive notice of these operations, and, accordingly, the statutes leave the jurisdiction of the Dean of Guild entire in all proceedings before whom such notice requires to be given.

I am therefore of opinion that the respondent should have obtained the decree and warrant of the Dean of Guild before proceeding with his operations—that not having done so, the Procurator-Fiscal of that Court was entitled to present the petition now complained of against him—and that there are no sufficient grounds for sustaining his appeal.

Lord Moncreiff and Lord Cowan absent.

The appeal was therefore dismissed, with expenses.

Counsel for Appellant (Bradford)—Watson and Keir. Agents—Henry Buchan, S.S.C., and J. D. Grant, Dundee.

Counsel for Respondent (More) — Solicitor-General and M'Laren. Agents — David Milne, S.S.C., and More, Dundee.

Wednesday, November 26.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

DAVID RANKINE *v.* WILLIAM ROBERTS.

Jury Trial—Bill of Exceptions—Act 55 *Geo. III., cap.* 42, *sec.* 6, 7; *Act* 13 *and* 14 *Vict., cap.* 36, *sec.* 45—*Proof in Replication.*

In a case where the presiding judge in a jury trial admitted proof of malice in replication to a defence of privilege, *held* that this was not matter for a bill of exceptions, being within his discretion.

David Rankine, parish schoolmaster and session-clerk, Bathgate, raised an action for slander against William Roberts, auctioneer, Bathgate. Issues were adjusted and sent to a jury, and were tried before Lord Ormidale on July 21st and 22d, 1873. The pursuer and defender led evidence, and on the conclusion of the defender's evidence, in which he

endeavoured to prove privilege, the pursuer's counsel moved for leave to lead evidence in replication with a view of proving malice. The defender's counsel objected, but the presiding Judge repelled the objection, and defender's counsel thereupon excepted to this ruling. In addressing the jury, Lord Ormidale directed them that the defender's statement referred to in the first issue was not a privileged communication, and this direction was excepted to on behalf of the defender; and his counsel asked his Lordship to direct the jury that the said statement was privileged, which direction his Lordship refused to give, and this ruling also was excepted to. The jury returned a verdict in favour of the pursuer, and awarded £100 damages. The case came before the First Division on a Bill of Exceptions, and a rule to show cause why there should not be a new trial on the ground that the verdict was contrary to evidence.

Defender's Authorities—*Macbride* v. *Williams*, Jan. 28, 1869, 7 Macph. 427; *Fenton* v. *Currie*, Feb. 22, 1843, 5 D. 705; Starkie on Libel, 274; *Scarll* v. *Dixon*, 1864, 4 Foster & Finlason, 250; *Gibb* v. *Barron*, July 1, 1859, 21 D. 1099.

Pursuer's Authorities—55 Geo. III. c. 42, § 7; 13 and 14 Vict. c. 36, § 45; *Watson* v. *Burnet*, Feb. 8, 1862, 24 D. 494; *Milne* v. *Bauchope*, July 19, 1867, 5 Macph. 1114; Macfarlane's Practice, pp. 127, 128; *Willox* v. *Farrell*, Feb. 26, 1848, 10 D. 807; *Leslie* v. *Blackwood*, July 22, 1822, 3 Murray, 157.

At advising—

Lord President—In this case there were two issues—one complaining of a slander said to have been uttered by the defender in a shop in Bathgate, and the other complaining of a slander contained in a letter written by the defender to the minister of the parish. There was the possibility of a question of privilege being raised, but it was not very clear from the record, and was likely to come up in the course of the trial, and in circumstances not very easy to foresee. It is not necessary for the pursuer to prove malice unless the defender pleads privilege, and one can easily understand that the question of privilege might come out for the first time in the defender's evidence, so I am not sure that the proper time for leading this evidence of malice was not after the defender's evidence, and I am clear at least that it was not incompetent. Now, the Bill of Exceptions states first:—"That upon the trial of the said issues, the counsel for the parties adduced evidence to maintain and prove their respective contentions under said issues, and on the conclusion of the evidence adduced for the defender in the cause,—Millar, as counsel for the pursuer, moved the Court for leave to adduce evidence in replication of that led on the part of the defender, with the object of showing that the defender acted maliciously in making the charges referred to in the issues against the pursuer.—Fraser, as counsel for the defender, objected to such evidence in replication being adduced on the part of the pursuer.—Lord Ormidale repelled the objection, and allowed evidence in replication to be led.—Whereupon the counsel for the defender excepted to the said ruling."

Now, it appears to me important to consider whether this is proper subject matter for exception, and it seems to me that it was a matter wholly in the hands of the presiding Judge, and a matter for his discretion. It must be kept in mind that we are not here dealing with an objection to the competency of a piece of evidence, nor with the admissibility of a particular witness. The objection is only as to the time when the evidence was led. It is no doubt true that an objection to the competency of evidence may form a ground for exception, and that view is justified by the Act of 1815; but then this difficulty arises. There are two modes of asking for a new trial in respect of a miscarriage of justice, and in dealing with these our guide is still the Act of 1815. By sec. 6 of that statute it is enacted "that in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue, for a new trial on the ground of the verdict being contrary to evidence; on the ground of misdirection of the Judge; on the ground of the undue admission or rejection of evidence; on the ground of excess of damages, or of *res noviter veniens ad notitiam*, or for such other cause as is essential to the justice of the case; provided also that such interlocutor granting or refusing a new trial shall not be subject to review by reclaiming petition, or by appeal to the House of Lords." Under this section any kind of objection may be the subject of an application for a new trial, but there are certain specified grounds for exception, which are given in sec. 7. These are as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial, and the judgment of the Court in these cases is subject to appeal to the House of Lords. The distinction is plain. Under sec. 7 the question is to be one of law, and must be one arising out of an objection to the competency of witnesses, the admissibility of evidence, or other matter of law. Now, I think that the true construction of sec. 7 is that nothing but a question of law can be the subject of a bill of exception. In the first place, then, Is this a question of law? I think not. I think it is a question as to the discretion of the presiding Judge. I do not say that the presiding Judge may not exercise his discretion in such a way as to make an appeal to this Court competent, but certainly I do not think that has been the case here.

Though I have thought it right to express my opinion on this question, yet the matter is before us in another way also. We have here a motion for a rule to show cause why there should not be a new trial on the ground that the Judge ought not to have admitted the evidence in replication. As regards that matter, my opinion is, and more particularly after hearing the views of his Lordship who tried the case, that he acted wisely and well in admitting that evidence. In the second place, however, I am of opinion that that evidence was not necessary to prove the pursuer's case, and that he had already proved enough to entitle the jury to find malice proved. So far as the first exception, therefore, is concerned, I do not think that it gives any ground for a new trial. The second exception is on a different ground. The Lord Ordinary directed the jury that the statement by the defender was not privileged, and the defender's counsel thereupon excepted to that direction, and asked for the following ruling:—"That the defender being a member of the congregation of the Parish Church of Bathgate, and the pursuer clerk to the kirk-session of the parish, the communication made by the defender to Mr Smith was a

privileged communication, and that a verdict cannot be returned against the defender on the first issue unless the jury be satisfied on the evidence that the defender was actuated by malice."

To this ruling, also, the defender's counsel excepted, so that the second and third exceptions may be considered together. Now, the first question is, Was the communication in the first issue privileged? Whatever may have been the character of that contained in the letter with which the second issue deals, I cannot have the smallest doubt that the statement in the first issue was not privileged. What is proved is that the defender came into the shop of John Smith in Bathgate, and there, in the presence of another witness, said, "that the pursuer had been drunk and disorderly within the Royal Hotel, Bathgate, late on the night of the 14th, or early on the morning of the 15th November 1872, or about that time, and had been in consequence forcibly ejected or thrown out from said hotel by two of the female servants therein, and left by them outside in a state of drunkenness."

Now the privilege with which the defender is supposed to be invested is, that he made this statement as an elder of the church. I do not stop to inquire whether that could ever have been privileged, but certainly it never could have been so here. If he had been privileged on that ground he should have proceeded cautiously and carefully, and avoided all publicity, but this was just what he did not do, and so I have no doubt as to the second and third exceptions, that they can never stand. The only question which remains is as to the rule for a new trial, whether the verdict is contrary to evidence. It is said on behalf of the defender that it is so in these particulars. It is not said that the words contained in the first issue were not uttered, or that the letter contained in the second issue was not sent and received, but then it is said that the jury went against the evidence in finding malice proved, and also in respect of their finding that the negative of the counter-issue of *veritas* was proved. All I can say as to that is, that, in the first place, there was good evidence of malice if the jury believed the witnesses; and, secondly, that not only was there no evidence, but there was a complete disproof, of *veritas*. The question is, Were the jury right or wrong in believing the witnesses? and that is a question solely for the jury to consider. They had before them the evidence for the pursuer, and they had the contradictory evidence for the defender, and they have found for the pursuer on both issues, and we cannot meddle with their verdict. In regard to the first exception, I forgot to say that there is a case directly in point, I mean the case of *Christie* v. *Thomson*, Jan. 28, 1859, 21 D. 337. In that case the pursuer was bound to prove that he had given notice of action, but omitted to do so till he and the defender had both closed their cases. The presiding Judge allowed evidence of notice to be then led, and a bill of exceptions was refused on the ground that the Act of Sederunt of Feb. 16, 1841, was merely directory, and that it was within the discretion of the presiding Judge to admit evidence out of order.

Lord Deas—The first exception is that the presiding Judge admitted proof of malice in replication. I am clear that that is not a matter for a bill of exceptions at all. It is impossible to say that in some circumstances it is not competent to lead proof in replication. It is also impossible to doubt that there is a discretion in the presiding Judge, and that his opinion is entitled to great weight. We must look to the matter of law, and not merely to a point of procedure. I do not see how under a bill of exceptions we can inquire whether or not the Judge has exercised his discretion aright. I have no doubt therefore on that point. The next exception is, that the Judge at the trial told the jury, in reference to the first issue, that the case was not one of privilege, and refused to give them a direction that it was. I am clearly of opinion that he was right. The short account of the matter is that the pursuer and defender were both members of the congregation of the Parish Church of Bathgate, and that the pursuer was session-clerk. What the defender did was, in that shop to state to Smith that the pursuer had been drunk and disorderly, and had been ejected from the hotel by the female servants. The issue is, not that he said he had been told so, but that he stated it as matter of fact, and the jury found that he did so. He justifies himself by saying that Smith is an elder, and that he went to him in order that the matter might come before the kirk-session. Now, in a question of privilege it is always important to see what is the connection between the parties. Here it was that they were both members of the same congregation, the pursuer being also session-clerk; it is not said whether he was an elder or not. Now, I am clearly of opinion that, assuming the object of the defender to have been what he says it was, that is not a sort of connection which confers any privilege. The circumstance of the pursuer being session-clerk does not enter into the matter at all. It is not essential that in order to be session-clerk his moral conduct should be all that the defender thinks it should be, and unless it be held that any member of a congregation may go to any other member and say what he likes about a third member, and perhaps bring him before the kirk-session, I cannot see that this is a case of privilege. I think that would be a very serious doctrine, and one for which I know no authority. This was not a matter of public duty or of any duty. It was not like a man giving information to the public prosecutor, which is a public duty and a public right. The jurisdiction of the kirk-session is only to inquire into a man's moral conduct with a view to moral discipline and censure; and I think the presiding Judge was quite right. There may be a little more difficulty as to the letter in the second issue, but that is not before us, and it is not incumbent on us to say whether or not there is any inconsistency in the matter. I am clearly of opinion that this is not a case of privilege. As to the case itself, the defender undertook to prove *veritas*; not that the women told him what he said, but that what he said was true. It is impossible to hold that he did prove it. The women swear that they never even told him, but it does appear that they said so to other people, whatever they may have done to the defender; so that it may be matter of opinion whether they really did tell him. That, however, is of no moment to the result. He had to prove the fact, and he took on him to judge of the fact by going to Smith, and not only did he go to Smith, but after the lapse of some months he persisted in his accusation, and wrote the letter to the moderator of the kirk-session. Apart from any ques-

tion as to the amount, I see no reason why he should not be found liable to some amount of damages. I can see no ground for holding that he acted in *bona fide;* and I think that in no point of view can the verdict be interfered with.

Lord Ardmillan—On the question raised by the first exception for the defender, relating to the admission of evidence for the pursuer in replication in order to instruct malice on the part of the defender, I have had some difficulty—a difficulty apart from the merits of the decision or ruling by the judge who tried the cause. The difficulty arises on the objection to the competency or the regularity of our disposing of the point on the Bill of Exceptions.

After some hesitation, and on consideration of such precedents as can be found, including the case of *Christie* v. *Thomson*, I have come to the conclusion that the point is not a proper subject for an exception. It is rather a matter of procedure during trial, to be disposed of according to the judgment and discretion of the presiding Judge. It is not a direction in point of law, to be brought up by an exception. It is, however, not beyond the reach of remedy. If the exercise of the discretion of the Judge has led to injustice, the matter can be considered, and redress given in disposing of the motion for a new trial. I do not think there has been such injustice in this case. The evidence offered was not incompetent. The time for adducing the evidence was within the discretion of the Judge; and his decision on the question of procedure has not led to injustice. On the merits of the disposal of the matter by the Judge who tried the cause, I see no reason to doubt that his decision was just and right.

In regard to the second exception—that taken to the ruling that the statement referred to in the first issue was not privileged, and in regard to the third and relative exception, I really have no difficulty. I think the ruling right. The privilege is recognised in the second issue, and with that we have at present nothing to do; but the defender pleads privilege. In accordance with that Presbyterian polity which is recognised and accepted by all the branches of the Presbyterian Church, the moral character and conduct of a member, and more especially if he was an elder of a Presbyterian Church, may fairly be brought under the notice of the kirk-session of which the minister is moderator, with a view to the dealing with those who offend—that is, exhorting them, reclaiming them if possible, rebuking them if necessary. Of course such discipline ought to be exercised with discretion, and in a Christian and charitable spirit, but its existence and recognition in the Presbyterian Churches of Scotland is beyond doubt.

If therefore a member of a Presbyterian congregation does in *bona fide* bring under the notice of the minister and kirk-session the conduct of a member of the congregation, and does so in the regular and becoming manner prescribed by the law and custom of the Church, I think he has some degree of privilege. He is considered as exercising a right and, it may be, fulfilling a duty. Therefore, even though the charge which he makes turns out on inquiry to be unfounded, he is not necessarily liable in damages. His privilege protects him unless malice is proved.

This remark is especially applicable and important when the person whose conduct is called in question is not only a member of the congregation and of the church, but is also session-clerk and parochial schoolmaster, a position in which his conduct and character is of unusual importance.

We have nothing to do at present with the second issue, in regard to the letter sent by the defender to the parish minister as moderator of the kirk-session. No question is now raised about it. But it serves to show the difference between a privileged statement and a statement without privilege. The slander referred to in the first issue was uttered by the defender in a shop, and in presence of a stranger, and it is manifest that it was uttered, not as a communication with a view to discipline, or as a step in procedure towards a complaint to the kirk-session—the competent Court to be approached with a view to church discipline—but, either with intent to injure, or perhaps from mere recklessness and foolish gossip, but with the necessary result of injury. The defender was in the discharge of no duty in making the statement in Mr Smith's shop, and in presence of Mr Young, that "the pursuer was thrown out of Stewart's Hotel, drunk, on the pavement." The defender did not then request that his statement should be laid before the session. He did not say he was going to complain to the session. He made the statement on the 16th of November 1872, and after starting the slander he took no further step. In point of fact he did not complain to the minister or the kirk-session till the 12th of February 1873. The jury have found that the statement made by the defender on the 16th November was false. Now, as the defender was on that occasion not bound or called on to speak to Mr Smith or Mr Young of the pursuer's conduct, and was, in so speaking, not in the discharge of any duty, it follows that he spoke on his own responsibility and at his peril, and if his statement was false and injurious he had no privilege.

This brings me to the second part of the case—the motion for a new trial on the ground that the verdict is contrary to evidence.

I do not mean to dwell on this question, or to enter on the details of the proof, though I have read it carefully, and have heard much comment upon it. There is conflicting testimony. In regard to several of the witnesses—including, among others, both the pursuer and the defender, and the two girls, and Baxter—a question of credibility and of the degree of credibility is raised. But such questions are appropriately and peculiarly for the consideration of the jury, who, on weighing the conflicting evidence, have decided for the pursuer. It is on no light ground that the Court can interfere with the verdict of a jury where so much necessarily depends on the personal credibility of witnesses whom the jury saw and heard, and in regard to whom they were entitled and bound to form their own opinion. I am satisfied that we ought not to disturb this verdict.

Lord Ormidale—We have now before us, on the part of the defender, a bill of exceptions and a motion for a new trial, raising some questions of considerable importance in the administration of justice in jury causes.

There are nominally three, although practically only two, exceptions—*First*, An exception to the ruling of the Judge who presided at the trial, allowing the pursuer to lead some evidence in replication after he had closed his own case, and after the defender had closed his; and *Secondly*, An exception to the

direction of the Judge in charging the jury that the statement made by the defender of and concerning the pursuer, referred to in the first issue, was not to be held in this case to be a privileged statement.

In regard to the first of these exceptions, I am of opinion that the subject matter of it cannot be competently entertained by the Court under a bill of exceptions, and can only be considered in a motion for a new trial. It is true that by the 7th section of the statute 55 Geo. III. cap. 42, establishing jury trial in civil causes in Scotland, it is made competent to except to the opinion and direction of the Judge presiding at a trial, "either as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial." But although this language in its ordinary sense may be said to cover, as the defender's counsel maintained it did, their objection to the ruling of the presiding Judge admitting the pursuer's evidence in replication, I do not think that it can be held to do so in the statutory sense. What, I think, the statute refers to is the receiving or allowing to be adduced evidence inadmissible in itself, in respect of some well founded legal objection. In the present instance, however, the evidence which was allowed in replication is not said to have been in itself exposed to any objection whatever. On the contrary, it was conceded that if it had been adduced by the pursuer at the proper stage, viz., before he had in the first instance closed his case, it would have been clearly admissible. The defender's objection to the evidence is merely that it was offered by the pursuer, and allowed by the presiding Judge, out of time, or, in other words, at an unusual and improper stage of the trial. He maintained that the pursuer having closed his case he was too late in tendering it, and that the presiding Judge was wrong in allowing it after the defender had closed his case. In this view, the defender's objection appears to me to amount to nothing more than that there was an irregularity in the form of process or mode of proceeding observed at the trial; and there can, indeed, be no question that there was a departure from the usual mode or order in point of time observed in leading the evidence as prescribed by the 27th section of the Act of Sederunt of 16th February 1841, passed for the purpose of regulating proceedings in jury causes. But that Act of Sederunt has no connection whatever with the 7th section of the Act 55 Geo. III., cap. 42. It was passed in terms of another section of that Act altogether, viz., the 40th section, which authorises the Court to frame "such rules and regulations as may be necessary for ordering the form of process, and regulating the manner of proceeding at the trial of jury causes."

It is, in these circumstances, clear to me that the defender's objection, referred to in his first exception, must be held to relate "to the form of process," or "manner of proceeding" at the trial, and not to the admissibility of evidence in the sense of the 7th section of the 55th Geo. III. cap. 42, as contended for on the part of the defender, and as no such objection can be dealt with by way of exception, it follows that the present bill of exceptions, so far as the first exception is concerned, is incompetent.

It by no means follows, however, that supposing the irregularity complained of by the defender in his first exception can be shown to have operated injustice to him, that he is without a remedy, for by section 6th of 55 Geo. III. cap. 42, he is entitled to redress, not by bill of exceptions, but by motion for a new trial—that section providing that a party may apply by motion for a new trial upon a variety of specified grounds, "or for such other cause as is essential to the justice of the case." The question then arises Whether, in respect of the alleged irregularity, the defender is entitled to a new trial under his motion to that effect? I am very clearly of opinion that he is not. It was not said on the part of the defender that any injustice was done to him by the course which was followed; and that obviously could not have been said with any truth for it does not appear that any additional evidence had been tendered for him after that in replication for the pursuer was closed, or that he even desired time to bring forward any such additional evidence. This being so, and as it was shown at the discussion that if the presiding Judge had not adopted the course he did there would have been some risk of injustice being done to the pursuer, the defender's motion for a new trial, so far as it can be held to be grounded on the alleged irregularity, is on its merits untenable. Nor will it do to say that a new trial must be allowed merely because the usual order of proceeding was departed from, and the rule of the Act of Sederunt was not observed, for it has been authoritatively settled that it is in the discretion of the presiding Judge at a trial to allow proof, although not tendered at the usual stage, and that the Court will not, either under a bill of exceptions or a motion for a new trial, interfere with the exercise of such discretion on the part of the presiding Judge, unless in circumstances very loudly calling for such interference. It was so settled in the case of *Christie* v. *Thomson*, 28th January 1859 (21 D. 337), although there the circumstances appear to have been more favourable for the party complaining than those of the present case. In that case, also, it was ruled that the 27th clause of the Act of Sederunt of 1841 is merely directory and not imperative. And although the point was in that case taken up under a bill of exceptions—no objection to that form of proceeding having apparently been taken—Lord Colonsay, then the Lord President, very plainly indicates his opinion that a bill of exceptions was incompetent, and that the remedy of the parties complaining was by motion for a new trial.

With regard to the defender's second exception to the presiding Judge's direction to the jury—that the statement referred to in the first issue was not to be dealt with as a privileged one—I am also of opinion that it is ill-founded. The defender may have been privileged in making a regular charge against the pursuer to the kirk-session, and so the presiding Judge held with reference to the second issue, but he certainly was not privileged in making such a charge to Mr Smith openly in that individual's shop, and in the presence and hearing of another person, who it is not pretended held any official position, or had anything whatever to do with the matter. And here I may remark that I participate very much in the views which have been expressed by Lord Deas in regard to the question of privilege as it arises in this case.

Then as to whether there was evidence for the jury entitling them to find as they did, that the defender was actuated by malice in making the charge against the pursuer referred to in the

second issue, I can see no reasonable ground for doubting that there was; and that being so, it is not for the Court to disturb the verdict they have returned on that point.

With regard to the defender's counter issue of *veritas*, I need say no more than that I entirely concur in what has been already stated by your Lordships.

The result, therefore, is, that in my opinion, not only the bill of exceptions ought to be disallowed, but also that the motion for a new trial should be refused.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

"The Lords apply the verdict found by the jury in this cause, and in respect thereof decern against the defender for payment to the pursuer of One hundred pounds in name of damages; find the defender liable to the pursuer in the expenses of process, in so far as not hitherto awarded, allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Defender—Fraser and Strachan. Agent—David Milne, S.S.C.

Counsel for Pursuer—Millar, Q.C., and Asher. Agent—Laurence M. Macara, W.S.

Wednesday, November 26.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

J. A. ROBERTSON (WRIGHT'S TRUSTEE) *v.* WRIGHT AND OTHERS.

Cessio Bonorum—*Assignation—Alimentary Allowance—Discharge.*

In a case where a bankrupt assigned under a *cessio* "one-third of his income," and continued to pay one-third of his salary, though in receipt of a much larger sum, which was gratuitously given to him by way of alimentary allowance,—*held* that he was bound to account to the trustee for one-third of the whole sum, but that the trustee's discharges for the smaller payments excluded his claim for arrears. *Held* that the bankrupt's employers, by whom the alimentary allowance was given, were not liable to the trustee in an action of accounting.

The estates of the defender Mr Wright were sequestrated on March 19, 1870, and the pursuer was appointed trustee in the sequestration. The bankrupt did not succeed in obtaining personal protection, and in June of the same year he raised a process of *cessio bonorum* against his creditors, in which the Court found him entitled to the benefit of *cessio* on his assigning to the trustee in the sequestration "one third of his income." The assignation was accordingly made and intimated to Messrs Blyth & Cunningham, the bankrupt's employers. At the date of his sequestration, the bankrupt, who was a relative of one of the partners of the firm, was employed by Messrs Blyth & Cunningham as cashier and book-keeper at a salary of £200 a-year. In April, after the sequestration but before the *cessio*, Mr Wright was informed by the firm that they proposed to reduce his salary to a sum more in conformity with the amount of his services to them, and that his salary for the future would be 30s. a week, anything further which he received being a gratuity. They continued to pay him the sum of £200. From the date of the *cessio* down to October 15, 1872, Mr Wright continued to pay to the trustee the sum of 10s. per week, being one third of 30s. per week, which was regularly discharged by the trustee. At the latter date the trustee raised a question as to the amount which he was entitled to receive, and the payments were for the time suspended. In March 1873 the trustee raised an action of count, reckoning, and payment against Mr Wright, and also against Messrs Blyth & Cunningham, concluding for the "amount of the balance of the one-third part of the whole annual income of the defender Robert Pringle Wright, as cashier and book-keeper."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 25th June* 1873.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof—Finds that, according to the true nature of the present action, and of the pursuer's allegations in support of it, he is only entitled to a third of the salary payable by the defenders Messrs Blyth & Cunningham to the other defender, Mr Wright, as their cashier and book-keeper, subsequent to the 18th of June 1870 till the date of citation, being 12th March 1873: Finds it proved that said salary amounted only to £1, 10s. per week: Finds it admitted in the record (Condescendence 6) by the pursuer that one-third of said salary has been duly accounted for and paid to him down till the 15th October last, 1872: Finds therefore that the only further claim the pursuer has is to the defender's said salary at the rate of £1, 10s. per week from the said 15th October last, and that to that extent the defenders have been always ready and willing, as they still are, to pay and satisfy the pursuer's claim: With these findings, and under a reservation of the pursuer's claims on the principles of the present interlocutor, dismisses the action as having been unnecessarily brought, and decerns: Finds the defenders entitled to expenses; allows accounts thereof to be lodged, and remits them when lodged to the auditor to tax and report.

"*Note.*—The Lord Ordinary holds the proof to be quite clear to the effect that the defender Mr Wright neither had nor has for the period in question any claim against the other defenders for salary as their cashier and book-keeper, except at the rate of £1, 10s. per week; and he thinks it is equally clear in the proof that no action was necessary by the pursuer for a third of this salary, as it was paid to him down to the 15th of October last, and as there was no refusal to account for it to him at the same rate subsequently.

"But at the debate the pursuer's counsel maintained that he was not only entitled to a third of Mr Wright's salary payable to him by Messrs Blyth & Cunningham, as their cashier and book-keeper, but also to one-third of an additional allowance, which it appears from the proof was made by these gentlemen to Mr Wright as a gratuitous act of kindness and benevolence merely, and not as salary at all, and for payment of which they are not now, and had not been for the period libelled, under any obligation whatever. The