to substitute, and did substitute, a new road for that which had previously existed, and that thereupon the trustees resolved that the old road should be shut up, and this, after due advertisement, was done: Find that since that time, and during the last seven years, the respondent has used the *solum* of the road claimed by planting, enclosing, and cultivating the same: Find that during the same period of seven years the public have used the line in question as a public road, obtaining access thereto by climbing over the fences, or forcing a passage through them, and by walking over the cultivated ground: Find that the possession so proved by the appellants is not sufficient to entitle them to the benefit of a possessory judgment: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against, and decern: Find the respondent entitled to expenses, and remit to the Auditor to tax the same and to report."

Counsel for Gordon—Dean of Faculty (Watson) —Asher. Agents—Auld & Macdonald, W.S.

Counsel for M'Kerron and Others—Balfour—Keir. Agents—Webster & Will, S.S.C.

Wednesday, February 16.

SECOND DIVISION.

[Lord Young.

CRAIG *v.* PEEBLES.

Process — Damages — Malice — Want of Probable Cause—Relevancy.

A conviction under the Public Houses Act having been quashed on the merits by the High Court of Justiciary, the party accused brought an action of damages against the Procurator-fiscal, on the ground of malice and want of probable cause. The Court *assoilzied* the defender, in respect that, although malice was sufficiently averred, there was not set forth on record a relevant case of want of probable cause in regard to the facts and circumstances on which the criminal complaint was based, and that so far as the law involved in that complaint was concerned there was a probable cause.

This was an action of damages at the instance of James Craig, spirit-dealer, West Merryston, against John Kidd Peebles, Procurator-fiscal at Airdrie. The pursuer held a license for a public-house at West Merryston, which during the currency of this license was almost entirely destroyed by fire. Soon thereafter the pursuer was served with a complaint at the instance of the defender, charging him with "an offence within the meaning of the 'Public Houses Acts Amendment (Scotland) Act, 1862,' section 17th; in so far as on or about the 8th day of May 1875 the said James Craig, defender, did within the broken walls of an old public-house which was burnt down, situated in West Merryston, in the parish of Old Monkland and county of Lanark, unlawfully traffic in whisky or other exciseable liquors, without having obtained a certificate in that behalf in terms of said Act; and such offence is the first offence, whereby the said James Craig is liable to forfeit and pay the sum of £7, with the expenses of prosecution and conviction, to be ascertained upon conviction, and in default of immediate payments thereof to be imprisoned on his own charges and expenses for a period of six week's."

On this complaint the pursuer was tried on 20th May 1875 at Airdrie before two Justices. He pleaded his license in bar of the complaint, and the Justices took time to consider the case, and adjourned it until the 27th, on which date, having in the interval consulted the Sheriff-Substitute, they convicted the defender, finding him liable in a penalty of £7, with £2 of expenses, or in default six weeks' imprisonment.

On 16th June 1875 the pursuer brought the proceedings before the High Court of Justiciary by suspension, and the conviction was quashed.

Craig accordingly brought this action against Peebles for £500 damages, on the ground that the complaint had been brought maliciously and without probable cause.

The pursuer, while admitting that the house had to a considerable extent been destroyed by the fire, denied that it was destroyed to such an extent as to warrant the defender's proceedings. The pursuer further made full averments of malice, and his averment of want of probable cause, in a condescendence of *res noviter* lodged by him, was as follows:—"The said conviction was procured by the defender when he well knew that there was no just, reasonable, or probable cause therefor, and solely to gratify his malicious feelings against the pursuer, and when he farther well knew, or ought to have known, that, owing to the equal division of opinion which had occurred at first diet, it was his duty as prosecutor not to ask for a conviction of the pursuer, in terms of section 21 of the Summary Procedure Act, under which the proceedings had been taken and carried out."

The defender's first plea in law was that the statements on record were not relevant to support the conclusions of the summons.

The Lord Ordinary pronounced the following interlocutor:—

"26*th November* 1875.—The Lord Ordinary having heard counsel, and considered the record and whole process, sustains the first plea in law for the defender: Assoilzies him from the conclusions of the action, and decerns: Finds the pursuer liable in expenses," &c.

The following opinion was delivered by Lord Young in pronouncing judgment:—

"This case, although the facts are novel, presents a question of general interest and importance.

"The defender prosecuted the pursuer before the Justices on the Public Houses Act, 1861, for selling spirits without a license, and obtained a conviction, which was subsequently set aside by the Court of Justiciary. Neither before the Justices nor in the Court of Justiciary was there any dispute about the facts, and the only controversy regarded the legal question on which the Court of Justiciary, differing from the Justices, set aside the conviction. The accused party (the pursuer) acknowledged the sale within the speci-

fied premises as alleged, and relied in defence upon a current certificate, which undoubtedly applied to the premises at one time. The question was whether, the premises having been burned down to such an extent as to be quite uninhabitable (as they were in fact uninhabited), the certificate remained available to warrant the sale of spirits within the roofless walls. The Justices determined this question in the negative, and imposed the penalty. The Court of Justiciary, having another opinion of the law, quashed the conviction, and ordered the penalty (and expenses) to be repaid.

"The pursuer now sues the Fiscal for damages, averring malice and want of probable cause in general terms. It is not alleged that the Fiscal misrepresented or withheld any fact from the Justices; that he practised any artifice to mislead or prejudice them; or, in short, that he misconducted himself in any way, or presented the case otherwise than fairly to the consideration of the Justices, on the proved and indeed undisputed facts of it. Nothing capable of being characterised as malicious or without probable cause is imputed to the Fiscal, except only the fact of instituting and prosecuting the complaint before a court of competent jurisdiction. But the only objection to the prosecution is on the legal question which I have noticed, and this question was presented to the Justices upon the true and undisputed facts which raised it, and was decided by them to the best of their judgment. According to this judgment the pursuer had no defence on the facts, and was undoubtedly subject to the penalty which the Justices imposed. The prosecutor was competent, the complaint was relevant, the Court had jurisdiction, the procedure was regular, and the facts were fully and fairly presented by unobjectionable evidence. But the facts raised a novel question of law which it was the province of the Justices to decide. After the judgment of the Court of Justiciary it must of course be assumed that they decided it erroneously; but having taken part in the judgment of the Court of Justiciary and concurred in it, I must say for myself that I did not and do not regard the judgment of the Justices as of a character to warrant any strong expressions of disapprobation or surprise. I think the Judges all felt that it was a novel and important question, and we certainly heard a full argument before deciding it. The expression 'probable cause' is not a happy one to use with respect to an opinion or judgment on a question of law, but using it here to signify that the view of the law which the Fiscal maintained and the Justices upheld was not irrational, and was such as reasonable men in their position (or indeed in any position) might excusably entertain and act upon, I cannot hesitate to say that there was probable cause. It was certainly unusual, if not unprecedented, to sell spirits within the bare and roofless walls of a burned-down house, and I cannot say it was unreasonable to take the opinion of the Justices on the question, whether the certificate continued available notwitstanding of the change on the character of the premises for which it had been granted.

"I am therefore of opinion that this record presents no relevant case against the defender. I have already observed that no misconduct or unfairness in the management of the case is imputed to him; and notwithstanding the averment of malice, I must decline to entertain the action, in respect there was probable cause for prosecution. The question of probable cause regards, and can only regard, the matter of law on which the guilt or innocence of the pursuer turned; and this it is, I think, for the Court to decide.

"I attach no significance to the averment that the defender 'knew' the law when he instituted the prosecution; and could not for a moment entertain the proposal to send it for trial by a jury as a question of fact. The Justices decided the point of law in one way, and the High Court in another; and although the Judges of the High Court were unanimous, no one, I suppose, would have greatly wondered had they differed in opinion. It must come to the question of probable cause in the sense which I have explained, and which itself is a question of law for the Court. Assuming the law to be as decided by the Justices, there was undoubtedly probable cause for the prosecution, for on that assumption the accused was confessedly guilty. I cannot of course make that assumption except for the argument leading to the result which I have reached and dealt with, viz., that want of probable cause can only be alleged and maintained upon the character of the legal error.

"Had the question of probable cause depended on any disputed matter of fact, it would have been improper to decide it without taking the opinion of a jury on the fact, or without inquiry in some form; but it being clear that it entirely depends on the character of the legal error which was committed, I see no room for inquiry, or good reason for sending the case to trial.

"I regard the case as important because of its bearing on the liability of prosecutors to actions of damages for mistaking the law. Regularity of procedure is exacted of them under pain of damages, but a mistake on a point of law, as to which Judges may not unreasonably differ in opinion, is another matter, and to extend their liability to this extent would, I think, prejudicially interfere with the administration of justice.

"I have only further to observe that sec. 30 of the Summary Procedure Act is in my opinion inapplicable. It relates only to the *amount* of damages recoverable in cases where malice and want of probable cause are not, as here, essential to liability. In such cases the clause provides that the damages *shall not exceed* £5 unless the pursuer shall aver and prove that the proceeding inferring liability was taken or done maliciously and without probable cause."

The pursuer reclaimed, and argued—The averment of want of probable cause was sufficient, and did not require to be more specific. The question of probable cause must be tested by the facts as to the actual state of the building when the complaint was brought.

Authorities—*Baines* v. *M'Lelich*, 23 D. 12,858; *Urquhart* v. *Dick*, 3 Macph. 932; *Rae* v. *Linton*, 12 Scot. Law Rep. 399, 2 R. 669.

At advising—

Lord Justice-Clerk—In the present case a public officer, the procurator-fiscal, presented a petition and complaint against Craig, the pursuer, on the ground of contravention of the

licensing statute, in so far as he sold spirits within premises for which he had not obtained the requisite certificate from the licensing magistrates. The complaint was founded on the allegation that, owing to a fire the premises for which the certificate had been granted had been substantially destroyed, and no longer existed. When the complaint came before the Justices they upheld this view as sufficient to prevent the pursuer from selling spirits within the ruined walls of the house occupied by him prior to the fire as licensed premises. Craig presented a bill of suspension to the High Court of Justiciary, and looking to the fact that the sale of spirits complained of took place within a week of the fire; that the pursuer held a certificate for the house up to that date; and that there was nothing to indicate any absence of intention to repair the house; their Lordships quashed the conviction, and held that the license did not come to an end merely because the premises had been injured by fire.

The present action is raised by Craig against the procurator-fiscal for damages, with, no doubt, a verbal allegation of malice and want of probable cause, and the case has come before your Lordships on the question whether or not the pursuer should be allowed an issue. The Lord Ordinary has refused this, on the ground that, even supposing the defender to have been actuated by malicious motives, which are sufficiently alleged, yet there is not that allegation of want of probable cause which is an essential element in such cases.

In ordinary circumstances I should be very reluctant to say that a general allegation of want of probable cause is not sufficient where such allegation is requisite, but where there is really no substance in the pursuer's statements the mere use of words cannot be permitted to entitle him to an issue, just as though there is an ample use of such expressions as "fraud" and "fraudulently" in the record, an issue will not be allowed unless a clear statement of fact is made such as would, if proved, amount to "fraud." Here I do not think the pursuer has made such allegations as, if proved, would amount to want of probable cause. Whether the defender had probable cause for presenting the petition and complaint depended partly upon the legal question arising out of the construction of the licensing statutes, and partly upon facts, together with the legal inferences therefrom. On these matters there might fairly be supposed to be a difference of opinion both in the case of persons skilled and unskilled in legal matters.

In the Court of Justiciary I was one of the Judges who tried the question, and I did not by any means regard it as one free from doubt; and the judgment of the Court was largely influenced by the briefness of the period which had intervened between the occurrence of the fire and the complaint by the Fiscal. It is not necessary to go into the question of how far want of probable cause is a matter for judicial decision, and how far for the jury, as I proceed upon the broad ground, that although the pursuer avers "want of probable cause," it is clear from his whole statements that this averment has no real substance. Accordingly, upon that ground I am for adhering to the interlocutor of the Lord Ordinary.

LORD NEAVES—I am of the same opinion. In the Court of Justiciary the suspension came before your Lordship in the chair, Lord Young, and myself, and though we set aside the conviction no opinion was indicated that the question raised by the complaint presented by the Fiscal was not a proper and fair one for trial. The question when tried involved a good deal of public interest. Now, we have this action of damages brought against the procurator-fiscal for raising a judicial question before a competent court who came to one decision, founded on the fact that another and a higher tribunal reversed this decision. For an action such as this that is no ground, as it is a rule essential for the protection of public officers, indeed of all litigants, that the act complained of must have been done without probable cause. A person instituting regular judicial proceedings, as in this case, cannot be liable in damages unless his action is shown to have been malicious and without probable cause. Now, upon the case as disclosed by the pursuer on record it is utterly impossible that he can make out a case of want of probable cause. The case came to this, that the pursuer obtained a license for premises in a certain parish; afterwards, a fire broke out and destroyed, to say the least of it, a portion of those premises. The pursuer himself admits that very material circumstances had occurred between the time when he obtained his certificate and the date of the defender's petition and complaint. The house was so far damaged (how much or how little it is not necessary to inquire) that Craig deemed it had become necessary for him to go to the excise authorities and make with them an arrangement, so as to be sure that he would be allowed in any question with that department to use the building for the sale of spirits. This sale of spirits, however, is under a twofold jurisdiction, firstly, the excise, and secondly, the licensing magistrates. Now, after Craig had gone to the excise and made with them a special arrangement, the Justices took a different view, and considered that a change such as the fire had caused in the character of the premises was enough to prevent the pursuer selling spirits under his certificate until he had restored his house to its original condition when the certificate was granted, or, at least, one approaching thereto. This all involved matter of fact and matter of law—matter of fact, whether there was a real material change and destruction of the house; matter of law, whether in consequence of the fire and its effects the premises were no longer legally qualified as a place for the sale of exciseable liquors. Now, though there may be an allegation of want of probable cause, yet this may have two meanings, for there is want of probable cause *in fact*, and there is want of probable cause *in law*. Here it is sufficiently clear that the doubt arises on the latter of these meanings. No averment is made in the complaint that the house was levelled to the ground; rather we have it implied that the walls were still standing. If, then, the procurator-fiscal thought that this was a good ground in law for stopping the sale of spirits in these premises, that surely was a probable cause. It cannot be wrong in a procurator-fiscal, a public officer, to wish to punish one whom he deems an evil-doer;—that is his official duty.

There is then a sufficiency of undisputed fact to enable the Court to arrive at a conclusion, and negative the pursuer's position as to want of probable cause. On the question of malice, the Lord Ordinary says he would have allowed an issue had it stood alone, and I may add, that although not prepared to dissent from this view, I should have had considerable doubt had we been called on to decide the point.

Lord Ormidale—I quite agree. The pursuer must establish both malice and want of probable cause. His counsel, in a very able argument, endeavoured to point out on the record allegations sufficient to support both these branches of the case. No doubt the record contains abundant allegations of malice whatever the pursuer might succeed in proving were a trial to occur. But, under the branch of want of probable cause Mr Lang was unable to indicate anything specific, or to point out any substantial fact requiring investigation. This being so, why should the case proceed any further? In one of the cases cited (*Urquhart* v. *Dick*, 2 Macph. 932) it was established that the question of what constitutes want of probable cause is one for the Judge and not for the jury.

Where the want of probable cause turns upon the salient facts of the case, then it may be left for the determination of the jury, subject to the direction of the Court as to the law. But this is not a question of salient facts as to want of probable cause; it is a question really of law. In that view I entirely concur in the opinion of the Lord Ordinary as contained in a single sentence of his judgment:—"The question of probable cause regards, and can only regard, the matter of law on which the guilt or innocence of the pursuer turned, and this it is, I think, for the Court to decide."

Lord Gifford—I am entirely of the same opinion. As I understand there is no dispute as to what the Lord Ordinary says in his opinion, viz., that "neither before the Justices nor in the Court of Justiciary was there any dispute about the facts, and the only controversy regarded the legal question on which the Court of Justiciary, differing from the Justices, set aside the conviction." I can see no reason for sending this case to a jury in order to get at facts about which there is not any doubt, and on that short ground alone I am for adhering to the interlocutor reclaimed against.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Dean of Faculty (Watson)—Lang. Agent—R. A. Veitch, S.S.C.

Counsel for Defender (Respondent)—Balfour—Robertson. Agent—C. S. Taylor, S.S.C.

Wednesday, February 16.

FIRST DIVISION.

[Lord Shand.

SMITH, LAING, & CO. *v.* MAITLAND.

(*Ante*, p. 177.)

Process — Expenses — Auditor's Report — Act of Sederunt of 19th December 1835.

In the taxation of the account of defenders, who had been assoilzed with expenses, the expense of a minute lodged by them, supplying information which was not founded upon in the ultimate decision of the case, was disallowed.—*Held* that the Auditor had no power, either under the Act of Sederunt of 19th December 1835 or otherwise, to interfere in such a case.

This case came up upon an objection to the Auditor's report.

The question in the case was whether the defender was bound to relieve the pursuers of the public burdens imposed upon certain subjects which they held from him under feu-charter, and the defenders were assoilzied from the conclusions of the action, and found entitled to expenses. The Auditor disallowed these so far as regarded a minute which the defender had put in process, explaining the nature of the subjects as originally conveyed by the feu-charter, and of the buildings erected upon them, and the relation in which the pursuer's author and the defenders stood to each other at the date of the charter. This information the Lord Ordinary had *ex proprio motu* directed the defenders to furnish. The case was ultimately decided upon the terms of the feu-charter alone, without regard to the minute. The Auditor, in these circumstances, declined to allow the defenders expenses in connection with it, in reliance on the Act of Sederunt of 19th December 1835.

At advising—

Lord President—It seems to me that in this matter the Auditor has been under a misapprehension in proposing to disallow expenses incurred in lodging a minute which we are told was ordered by the Lord Ordinary *ex proprio motu*. The object of the minute was to clear up the nature of certain changes which had taken place through the erection of expensive buildings upon the subjects which the defender's predecessors disposed of to the pursuers or their authors. During the inquiry another matter emerged which was not anticipated and not mentioned on record, viz., that previously to the sale the parties who were afterwards superior and vassal had occupied the position of landlord and tenant to one another under a tack for 999 years. This fact, and the other question as to how far the erection of buildings might operate in giving effect to a clause of relief, were both proper for consideration, and had a bearing on the question at issue. The Lord Ordinary gave effect in his judgment to the view founded upon the previous relation of the parties as landlord and tenant. He did not deal with the circumstance of the erection of new buildings, and when the question was brought before us, we thought the safest course was to construe the charter accord-