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-

ing to its own terms alone. I do not think it follows that the defender can be said to have failed. He has been successful on the whole case, and has got *absolvitor*, and whether that result proceeded upon one ground or another does not affect the present question. There is no one part or branch in which he has been unsuccessful.

I do not understand that the Auditor has power to interfere in such a case. It is not a general audit, nor is it a disallowance of overcharges. This part of the expense is said not to have been of any use, but that is a totally different matter. The defender must be allowed his expenses in this part of the case as in the other.

Lord Deas — There has been some misunderstanding on the part of the Auditor of the Act of Sederunt of 15th December 1835. It does not apply to a point of this kind. The Lord Ordinary is quite entitled to order a statement of this nature for the sake of getting an explanation, and the fact that he did so cannot be held to affect the question of expenses. I should have been of that opinion even if I had thought that what the Lord Ordinary ordered was unnecessary, but so far from that, I think he was quite right in the course he followed. There have been previous cases of this kind where we have held that the erection of buildings was of great importance in the consideration of the rights of parties, and we did not hold in this case that it was incompetent to have regard to them.

So far as regards the question of the propriety of procedure, the Lord Ordinary was quite right. If a party gains his case on a different plea from that to which the Lord Ordinary has given effect, that may be a ground for a modification of expenses, but not for disallowing them. In this case it was necessary to have all these facts before us, and although we found the terms of the deed sufficient for the decision of the case, we did not determine that we were excluded from inquiry into the matters brought out in this minute under direction of the Lord Ordinary.

Lords Ardmillan and Mure concurred.

The Court sustained the objection.

Counsel for Pursuers (Reclaimers) — Keir. Agents—Webster & Will, S.S.C.

Counsel for Defenders (Respondents)—Rutherfurd. Agents—Leburn, Henderson, & Wilson, S.S.C.

Thursday, February 17.

FIRST DIVISION.

Sheriff of Edinburghshire.

DICK *v.* HUTTON.

Process—Reference to Oath—Minute of Retractation—Bill—Proof.

In an action upon a bill, in which the defence was that the pursuer was not an onerous *bona fide* holder, proof was found by the Sheriff-Substitute to be limited to the pursuer's writ or oath. A minute of reference was lodged and sustained, and a diet fixed, at which, the pursuer being present, an adjournment was allowed on the defender's motion. At the adjourned diet a minute of retractation of the minute of reference was lodged.—*Held* that in the circumstances of the case the minute of reference could not be withdrawn.

This was an appeal from the Sheriff-court of Edinburghshire in an action at the instance of Matthew Watt Dick against John Hutton, for payment of £33, being the sum advanced by the pursuer on the security and in part discount of a bill accepted by the defender for £100, and placed in the pursuer's hands to be discounted.

The defence was that of non-onerosity. The other circumstances of the case, so far as material, sufficiently appear from the interlocutors quoted below.

On 16th April 1875 the Sheriff-Substitute (Gebbie) pronounced the following interlocutor:—"The Sheriff-Substitute, having heard parties' solicitors, and considered the closed record and productions, Finds that the defender can prove only by the writ or oath of the pursuer that he is not an onerous *bona fide* holder of the bill sued on, and allows the defender a proof accordingly.

"*Note.*—The pursuer is not an original party to the bill. The averment that the bill was granted for the drawer's accommodation is one which usually has no effect as against a third party. In the Sheriff-Substitute's opinion there is nothing in the averments which should take the case out of the ordinary rule as regards the mode of process. The allegation that the pursuer obtained the bill from a person who had no right to deliver it is very similar to what was dealt with in *Wilson*, 12th June 1874, 11 Macph. p. 1003. See also *Law* v. *Humphrey*, Scottish Law Reporter, p. 116, 21st Nov. 1874."

The defender then lodged a minute of reference of the whole cause to the pursuer's oath, which was sustained by the Sheriff-Substitute upon the 4th May 1875; at the same time the pursuer was appointed to appear and depone upon the 21st May. On that day, on the defender's motion, the pursuer being present, the diet was adjourned to the 28th May, of which date the Sheriff-Substitute pronounced an interlocutor allowing the defender to lodge a minute of retractation of the minute of reference to oath.

On the 2d June the following further interlocutor was pronounced:—"The Sheriff-Substitute, having heard parties' solicitors upon the defender's minute withdrawing the reference to the oath of the pursuer, No. 16 of process, Finds it in the circumstances incompetent to withdraw the said reference, and in respect the defender did not desire any other or further opportunity for taking the deposition of the pursuer, holds him as confessed, and decerns against the defender in terms of the conclusions of the libel: Finds the defender liable in expenses, &c.

"*Note.*—A reference to oath, once accepted, becomes a judicial contract, from which neither party can resile except under very favourable circumstances. Here the circumstances are not favourable for the defender, notwithstanding the reference; it was not a voluntary reference on his part, but one forced upon him by the compulsitor of a judgment fixing the mode of proof,