has been made of the case as argued before us. It is plain that this flooring was put in by the tenant himself for his own purposes. He thought he could remove it, and he was in the act of doing so when the defender interfered and handed him over to the police as taking away what did not belong to him—in other words, on a charge of theft. The evidence of the police officers shows this, and the only question is, Had the pursuer good grounds for action of damages under the circumstances? and I think there is no question that he had. Where privilege is pleaded it is necessary for the party aggrieved to show that the act complained of was maliciously done—in other words, with undue disregard to the rights of persons—and I think that we have here a very strong case of that kind. The defender, no doubt, had what he thought his rights, but he ought to have made inquiries before he took the course he did. He was not entitled to risk the pursuer's character by exposing him to the public gaze in the way he did on such grounds, and therefore I think that we have malice here, and that the Sheriff-Substitute is right. I also think that he has not treated the defender harshly, and there can be little doubt that had the case gone to a jury the penalty to be paid would have been considerably greater.

Lord Gifford—I am of the same opinion. There seems to have been considerable difficulty attending the dispute as to whether the flooring was a fixture proper or only a trade-fixture, and therefore removable by the tenant, but the way to settle it was certainly not to give the pursuer into charge of the police. Here, though there may have been privilege, there was undoubted recklessness in making the charge, and I must say I think that the Sheriff-Substitute in the damages awarded has read the defender a very mild lesson indeed.

Lord Young—It is said in the summons that the defender maliciously and without probable cause gave the pursuer into custody as a thief, and it only remains for us to say whether the evidence supports the charge, and I think it does, and I therefore concur with your Lordships in affirming the interlocutor appealed against. The only criticism I desire to offer on the interlocutor is that I wish the finding had been one of malice and want of probable cause alone without the addition of a partial definition of malice. The malice here no doubt arose from a temper of mind unduly exciting the man to act with an ill-feeling which would not probably in other circumstances have appeared; but I wish to offer this remark to the consideration of Sheriffs, that I think it is not desirable that they should put partial definitions into their interlocutor.

The Court accordingly pronounced the following judgment:—

> "Find that on the occasion libelled the appellant (defender) gave the respondent (pursuer) into the custody of a police officer on a charge of stealing wood, and that the respondent was in consequence conducted in custody through the streets of Glasgow to the police office: Find that in so doing the appellant acted maliciously and without probable cause: Therefore dismiss the appeal and affirm the judgment appealed against, and decern," &c.

Counsel for Appellant — Guthrie Smith — M'Kechnie. Agents—Adamson & Gulland, W.S.
Counsel for Respondent — Rhind. Agent—W. Elliot Armstrong, S.S.C.

Saturday, October 23.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MOSCRIP *v.* O'HARA, SPENCE, & COMPANY.

Agent and Client — Notary-Public — Title to Recover.

> Circumstances in which an agreement that a notary-public employed by a firm to recover their debts was not to claim remuneration for the same was *held* to be proved by evidence *prout de jure.*

O'Hara, Spence, & Company, money lenders and bill discounters in Glasgow, employed George Clement Moscrip, a writer and notary-public, in recovering sums due to them by sundry debtors. After some years they sued him for the sum of £53, 10s., which they said he owed them as having served them in the above capacity. Moscrip resisted payment and raised a counter-action for payment of £230 for professional services and disbursements for and on O'Hara & Company's employment. In the latter action the defenders averred in defence that they had made an agreement with Moscrip with a view to the recovery of debts due to them, by which he was to receive nothing for the work done unless he were successful in recovering the whole or part of the debt sued for; and further, he was employed to recover accounts only, and was not to receive any extra-judicial expenses or to be paid anything for giving his knowledge as to the circumstances of debtors. Moscrip, on the other hand, denied all knowledge of the above agreement, and pleaded that in any view it must be proved by writ or oath of the defenders.

In the proof which was led before the Sheriff-Substitute it appeared that Moscrip kept no books. The nature of the above agreement was deponed to by three of the partners of the firm, and further it appeared that on several occasions the debtors had gone direct to their principals and paid the debt due along with the expenses of recovery.

The Sheriff-Substitute (Lees) found that the pursuer was employed by the defenders to carry on their judicial and other legal business for them, but expressly on the footing that he was not to be paid by them for so doing, and was to look to the opposite parties for payment in the event of success; but he allowed him his outlays so far as *bona fide* incurred by him on the defenders' behalf on the other accounts produced by him. He added the following note:—"It appears the defenders' averments as to the footing on which the pursuer was employed by them are established. He was not a procurator of Court, and therefore not entitled to practise before it; but he and they knew that there would be little

difficulty in Glasgow in finding agents to take up the matter on the same footing as himself."

Moscrip having appealed, the Sheriff-Principal (CLARK) adhered to the judgment appealed against, adding this note:—"The result at which the Sheriff-Substitute has arrived appears to be substantially in accordance with the facts as brought out in evidence, and the law applicable to them. If either of the parties are not satisfied with the result, they have themselves to blame for not making the contract more specific. When parties choose to employ a gentleman who does not possess the legal qualifications of a law-agent, and if he chooses to accept employment involving the necessity of his employing a person duly qualified, there is great risk that the real intention of parties may be misunderstood on one side or the other—perhaps on both sides—and therefore their contract requires to be made so very specific as to exclude the necessity of interpretation or construction."

Moscrip appealed to the Second Division of the Court of Session, and argued—(1) The agreement could only be proved by writ or oath.—*Taylor* v. *Forbes*, Jan. 13, 1853, 24 D. 19. (2) He was entitled to charge his principals in his capacity of notary-public.—*Aitken* v. *Kirk*, Mar. 15, 1876, 3 R. 595; *Winton* v. *Airth*, July 17, 1868, 6 Macph. 1095.

At advising—

LORD JUSTICE-CLERK—In this case we have thought it right to read the evidence, and the result at which we have arrived is that we see no reason to differ from the Sheriffs in the Court below.

The case, however, is not without difficulty and delicacy. There are two actions—the one at the instance of this money-lending firm against their collector—because that is truly the position in which Moscrip put himself—for certain sums of money which they say he collected on their behalf; the other action is at the instance of the collector against his employers for payment of professional services alleged to have been rendered by him to them in the course of recovering or of endeavouring to recover various sums of money due to them.

In regard to the first action I need say nothing, but with respect to the second the defenders plead that it was agreed between them and Moscrip that he was to give his professional and personal services for nothing, except what he might manage to extract from the debtors while collecting the debts. The collector denies this agreement, and pleads in addition that any such qualification of the contract of employment can only be proved by writ or oath.

Moscrip is not a law-agent, but only a notary-public; the business, however, in which he was principally engaged was not a notary-public's work, although I am not to be understood as saying that a notary-public who pays attorney-tax is not entitled to recover remuneration for his services, *quantum meruit*. Then I think the nature of the services rendered makes a difference in the strength of his claim for remuneration.

Although I am not disposed to interfere with or differ from Lord Rutherfurd's dictum in the case of *Taylor* v. *Forbes*, which has been referred to, still I am not inclined to follow it in this case. That was the case of a duly qualified practitioner suing for payment for professional services rendered in the ordinary course of his business. This is not a case of that kind at all. It is the case of an ordinary individual without any peculiar qualification undertaking certain business under a certain contract. The next question which arises is, whether the contract is proved, and what it was? I think it is proved that Moscrip was to carry on the legal and other business of these money-lenders on the footing that he was to look for his remuneration solely to the persons opposed to him, and that, of course, only in the event of success. From the evidence I hold that to be the contract. Three partners of the firm speak to that as being the arrangement. True, Moscrip denies that that was the agreement, and that is not the least unpleasant part of this case, because the case turns on simple averment and denial. The real evidence of the case shows, however, that that was the real nature of the contract. The exceptions from the ordinary course of dealing which were so strongly pressed upon us are the very cases which prove the defenders' case. They are all cases where the debtor paid the debt and expenses direct to the lenders, and the lenders then at once paid over the sum recovered in name of expenses to Moscrip. There is also the suspicious fact that the collector kept no books in which to enter his various transactions and services rendered to his employers.

On the whole, no case has been made out to us to show that the Sheriffs have been in error.

LORDS GIFFORD and YOUNG concurred.

Their Lordships therefore adhered.

Counsel for Appellant—Kennedy. Agent—Thomas Carmichael, S.S.C.

Counsel for Respondent—Brand. Agent—John Gill, S.S.C.

Tuesday, October 26.

SECOND DIVISION.

LENNOX *v.* ALLAN & SON.

Master and Servant—Contract for Definite Period—Usage of Trade.

A contract of service, written or verbal, for a year, does not, in the absence of usage in the particular employment, to the effect that such engagements are yearly in their nature, undergo tacit relocation if notice of its termination be not given within forty days of the expiration of the year, and reasonable notice is in such a case all that need be given.

A strike in the shoemaking trade having occurred in the beginning of 1879, the defenders James Allan & Son, in order to induce the pursuer, a journeyman shoemaker, to work for them instead of coming out on strike with his fellow-workmen, offered him constant work for a year at 28s. a-week, and on 24th February engaged him for one year at that rate of wages. The engagement was in writing, and was to the following effect:—