It would serve no purpose to express any opinion on the true question in this process, because it would not be *res judicata* in a question between the parties having the real interest. On the ordinary principles of judicial procedure it would be wrong to express an opinion which would not be binding upon the parties or on the Court itself. I therefore express no opinion one way or the other as to the validity of the will, but I think that in the meantime the estate should be administered for the benefit of whatever persons may ultimately turn out to be entitled to it, and that the administration must be committed to the executors who have a good title to administer until it is set aside in some competent process.

For these reasons I think we ought to recal the judgment of the Sheriff and affirm that of the Sheriff-Substitute.

LORD ADAM—The question in this case is, which of two sets of executors are to be preferred to confirmation. Now, it is to be observed that the question is between the executors alone, and that the beneficiaries are not here. Accordingly the inconvenience in the case is that if a mistake is made in the construction of the two deeds appointing the executors the result may be to appoint executors to administer the estate under a trust to which in reality they were not appointed. But though there is this inconvenience it is clear that the rights of the beneficiaries who are not here will not be affected by the mere appointment of executors. At the same time it is clear that the Court should not, if possible, give any opinion as to which of the two deeds should prevail. The course taken by the Sheriff-Substitute avoids this because he does not consider the question of validity. The Sheriff on the other hand has taken the opposite course. My view of the case is that taken by your Lordship. Miss Boath admittedly died in full possession of her estate, and left a will *ex facie* quite valid, by which she appointed executors to administer her estate. Why should that appointment not be valid? The answer is that a certain prior deed deprived her of the power of testing. I do not say that if the meaning of that deed were admittedly so clear as to be indisputable that we might not hold the last will to be beyond doubt invalid. But that is not the case here, because the deed produced is one which may or may not have the effect of barring Miss Boath from appointing other executors. I am not prepared to come to any decision as to its validity. I think if the beneficiaries under the first deed are of opinion that the second is invalid, they must endeavour to get it set aside, and have the question of its validity settled by a competent Court. But standing as it does we have not in my opinion any power to pronounce in favour of the executors appointed under the first deed.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor:—

"Recal the interlocutors of the Sheriff dated respectively 3rd and 5th March 1902: Affirm the interlocutor of the Sheriff-Substitute dated 23rd January 1902, and remit to the Sheriff-Substitute to proceed as may be just: Find the appellants entitled to expenses since said 23rd January 1902, and remit," &c.

Counsel for the Appellants—C. K. Mackenzie, K.C. — Cullen. Agents — Macrae, Flett, & Rennie, W.S.

Counsel for the Respondents — MacLennan — Craigie. Agents — Miller & Murray, S.S.C.

Thursday, March 20.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

PRIMROSE *v.* WATERSTON.

Reparation—Slander—Privilege—Judicial Privilege—Inferior Judge—Magistrate in Police Court.

A judge is not liable in damages in respect of any words which he utters in the course of judicial proceedings with reference to the case before him; and the privilege of an inferior judge and of a superior judge are the same.

Per LORD MONCREIFF—"The only sound rule is to grant the protection of judicial privilege unless it can be demonstrated—that is, shown so clearly that no man of ordinary intelligence and judgment could honestly dispute it—that the words used had no connection with the case in hand."

Allardice v. *Robertson*, April 8, 1830, 4 W. & S. 102 is not a binding authority against the proposition that an inferior judge has the same absolute privilege as a judge of the supreme court.

In an action of slander brought against a magistrate the pursuer averred that his son, a boy of nine, was charged with theft; that the defender being a person who had a strong prejudice against working men's clubs and the use of intoxicants generally, and being aware that the pursuer was the clubmaster of a working man's club, for the purpose of gratifying his feelings of malice against the pursuer and the club of which he was master, and of taking advantage of his magisterial position to vilify him in public, sent for the pursuer, and before the boy had been tried, said to the pursuer—"Well, I have to tell you that not only are you ruining other people, but you are ruining the boy. I know several families who are going straight to the devil from your club. You take their money, then send them out, while

their wives and families are starving, and they are nearly killed when you are done with them, and here your boy comes charged with felony;" that the said observations were made wantonly and maliciously, and were not pertinent to the case before the defender. *Held* that, as the words used were uttered in the course of judicial proceedings, and as the privilege of an inferior judge, being the same as that of a superior judge, in respect of words so uttered was absolute, the defender was entitled to absolvitor.

This was an action of damages for slander at the instance of William Primrose, clubmaster of the New Abbotsford Club, a working man's club in Edinburgh, against James H. Waterston, property and insurance agent, one of the Magistrates of the City of Edinburgh.

The slander complained of, as averred by the pursuer, was uttered by the defender while sitting as a magistrate in the Police Court, and the defence was judicial privilege.

The pursuer averred that among the objects of the New Abbotsford Club was the supply of refreshments to the members, but denied that its main object was the supply of intoxicating liquors. He further averred as follows:—"(Cond. 4) For some time past an agitation, instigated and supported by teetotalers and other prejudiced persons, has been carried on in Edinburgh against all working men's clubs, and devices have been resorted to to discredit and suppress them. The said New Abbotsford Club is one of those clubs so attacked, although its members are not exclusively or chiefly composed of working men. The defender, who calls himself a temperance reformer, has taken a prominent part in said agitation, and has expressed strong views against the use of intoxicants and in favour of the suppression of the liquor traffic completely, whether carried on in licensed houses, in clubs, or in private houses. The supporters of this agitation, including the defender, have instigated the Edinburgh City Police to make raids on the said New Abbotsford Club, and to institute prosecutions against the officials of said club and the pursuer on charges of alleged shebeening, but in every instance, as regards this club, the charges have failed, and the accused concerned in the charges acquitted of any illegality. The pursuer believes and avers that the slander of which he complains formed a part of a deliberate design on the part of the defender to throw obloquy and discredit upon working men's clubs, and upon the pursuer as one of the officials of said New Abbotsford Club. (Cond. 5) On the 15th day of August 1901 the pursuer's son William Primrose, nine years of age, was in company with Ernest Maclagan and Harry and Brown, when Ernest Maclagan, as a boyish frolic, mounted a lorry and took a lemonade bottle and ran up Chambers Street with it. . . . Witnesses informed a police constable that Ernest Maclagan had taken the bottle, and this officer duly reported the abstraction of the bottle by Maclagan to the Central Police Office. (Cond. 6) It ought to have been quite well known to the police that only against Ernest Maclagan could there be a charge of theft in connection with said abstraction from said lorry of said lemonade bottle; but a charge of theft was wantonly brought against the pursuer's son and the said Ernest Maclagan. The two boys were accordingly brought before the defender at the Police Court, Edinburgh, on 16th August 1901, on a charge of having stolen a bottle of lemonade from a lorry. The pursuer's wife was present in Court. The defender was quite well aware that the father of the boy William Primrose was the clubmaster who had unsuccessfully been prosecuted, as aforesaid, but he needlessly asked the pursuer's wife, who was present, 'What does your husband do?' The pursuer's wife replied that he was clubmaster of the Abbotsford Club. The defender thereupon said that he must continue the case to have the boy's father before him, and he despatched a policeman to bring the pursuer to the Police Court. He did this for the purpose of slandering the pursuer, as after-mentioned. The defender had no right to send for the pursuer as he did, especially seeing that the pursuer, finding it inconvenient for himself to attend, had directed his wife to look after the boy, who, he had satisfied himself, was not guilty of any offence. A policeman having been sent for him, the pursuer appeared, along with his boy, at the bar later in the day. The defender thereupon asked him, 'Are you the boy's father?' The pursuer replied that he was. The defender thereupon said, without any reference whatever to the charge made against his son, 'You are the clubmaster of the Abbotsford Club?' The pursuer replied that he was. The defender thereupon uttered the following words, or words to a like import and effect, 'Well, I have to tell you that not only are you ruining other people but you are ruining the boy. I know several families who are going straight to the devil from your club. You take their money, then send them out, while their wives and families are starving, and they are nearly killed when you are done with them, and here your boy comes charged with felony." Said statements had no bearing upon any business before the defender, and the pursuer was neither accused nor witness. . . . Explained that the defender in asking the pursuer's wife who her husband was merely pretended to ask for information. He was aware, having been informed by the officials of the Court who the boy was, but he sent for the pursuer wantonly to gratify his feelings of malice against the pursuer and the institution of which he was master. The defender had no right to send for and address him as to his son's conduct, even had the case been heard and proved, which it had not, and his only purpose in sending for him was to take advantage, as he thought with impunity, of his magisterial position to vilify him in public. Moreover, the said observations were not pertinent to any case

before the defender. The defender knew the boys were not to be tried, and they were not tried on said day. (Cond. 7) The said statements, made time and place last above libelled, were of and concerning the pursuer, and they are false and calumnious, and were made wantonly, recklessly, maliciously, andw ithout probable cause." The pursuer also averred that the case was continued to another day, and that the case was stopped when it was half heard by the magistrate (Bailie Murray), who observed that the prosecutor had utterly failed to make out the charge against William Primrose, and that the charge was too trivial and ought never to have been brought.

The defender pleaded—"(3) The statements complained of being alleged to have been made by the defender while sitting in a public court in his capacity as a magistrate and police judge with reference to a charge which he was considering in that capacity are absolutely privileged, and the defender should be assoilzied, with expenses."

The pursuer proposed an issue for the trial of the cause.

On 27th November 1901 the Lord Ordinary (STORMONTH DARLING) sustained the third plea-in-law for the defender, and assoilzied him from the conclusions of the summons.

Opinion.—"On 16th August 1901 the pursuer's son, a boy of nine, was brought before the defender, sitting as one of the police judges of the city of Edinburgh, on a charge of stealing a lemonade bottle from a lorry. The defender continued the case in order that the pursuer, as the boy's father, might attend. This the pursuer did at a later hour of the same day, whereupon the defender addressed him in the words set out in condescendence 6. The case was then adjourned for proof, and at the adjourned diet, when another magistrate was on the bench, the charge against the boy was dismissed.

"The pursuer complains of the language addressed to him by the defender as slanderous, claims damages for its use, and proposes an issue for the trial of the cause.

"The defender's first objection to an issue being granted is that the words complained of are not slanderous. If I found it necessary to decide this question, I should have some difficulty in holding that they are. The pursuer does not seek to put any innuendo upon them, and the words are therefore to be judged of as they stand. They are strong undoubtedly, and not such as any man who thought them undeserved could fail to resent. But they are mainly directed against clubs such as that which the pursuer manages, and, particularly when read in the light of the pursuer's own statements in condescendence 4, they seem to have been directed rather by extreme views on the liquor traffic and everybody connected with it, than by any personal ill-will against the pursuer himself. But I do not decide that question, because there is another plea urged by the defender on which I think he is entitled to succeed.

"That plea is that no action will lie against a judge for language used when sitting in his judicial capacity, or in other words that in an action for defamation his privilege is absolute.

"From a period long before the days of Lord Mansfield this principle has been firmly fixed in the law and practice of England. In *Rex* v. *Skinner* (1772) Lofft 55, which was the case of an indictment against a borough magistrate, that great lawyer expressed it thus:—'Neither party, witness, counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office.' Coming down to later times, in *Scott* v. *Stansfield* (1868), L.R., 3 Exchcq. 220, which was the case of an action of damages against a county court judge, Chief-Baron Kelly in announcing the unanimous judgment of the Court of Exchequer, stated the general proposition, as established by a long series of decisions, that no action will lie against a judge for any words spoken in his judicial capacity in a court of justice, even where the words are 'alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him.' His Lordship explained the rule as founded on public policy, and as essential to the independent administration of the law 'in all courts.' I am not aware that since then the rule, as regards judges of whatever degree, has ever been challenged in England; but there have been cases of the highest authority dealing with the cognate cases of pleaders and witnesses. I need only mention the case of *Dawkins* v. *Lord Rokeby* (in 1875), L.R., 8 Q.B. 255, and 7 English and Irish App. 744, and *Munster* v. *Lamb* (in 1883), L.R., 11 Q.B.D. 588. The first of these was a unanimous judgment of ten judges in the Exchequer Chamber, affirmed by a unanimous judgment of the House of Lords consisting of Lord Cairns, Lord Chelmsford, Lord Hatherley, Lord Penzance, Lord O'Hagan, and Lord Selborne. The effect of it was to extend to a person who gave evidence (not upon oath) before a court of military inquiry the absolute privilege attaching to a witness in a court of justice, and the Lord Chief Baron, in delivering the judgment of the Exchequer Chamber, assimilated the position of a witness in giving evidence 'however false or injurious to the character or interests of a complainer' to that of 'judges upon the bench, whether in the superior courts of law or equity, or in the county courts, or sessions of the peace.' *Munster's* case was an action of damages against a solicitor for highly defamatory words spoken in a court of petty sessions when defending his client against a criminal charge, and Lord Esher, then Master of the Rolls, in delivering the judgment of the Court of Appeal, referred to the cases of judges, witnesses, and advocates as all resting on the same foundation of public policy—'For the purposes of my judgment,' he said, 'I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards

the defence of his client; I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause, and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered; nevertheless, inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been.' And Lord Justice Fry pointed out that the rule had been adopted, not in order to screen persons who acted in the malicious or reckless way thus figured, but to guard against the danger that those who merely wished to do their duty might be harassed and deterred by the fear of actions being brought against them.

"I have dwelt upon these English cases for two reasons. The first is that where a rule of law is founded upon considerations of public policy, there is a strong presumption, to say the least of it, that the same considerations ought to be applied to two countries living under the same constitution. The second and more immediate reason is that these English decisions have been approved of and followed by our own courts. It is true that in the single case of defamatory words used by a litigant in the course of his pleadings there is a distinction between the laws of the two countries. In England his privilege is as absolute as that of judges, counsel, and witnesses. In Scotland, on the other hand, as pointed out by Lord President Inglis in *Williamson & Umphray* v. *Robertson*, 17 R. 905, his privilege is only qualified, and an issue will be allowed against him if the pursuer undertakes to prove malice. This difference rests not merely on a series of cases in Scotland which draw a distinction between the privilege of a litigant and his counsel, but also on the view that public policy does not require the same absolute freedom of speech in the case of one who comes into court in order merely to advance his own private interests as in the case of those who to a greater or less extent are discharging a public function. But *Williamson's* case is a strong illustration of the absolute privilege accorded to one in the position of an advocate, even where the Court is of no higher position than a meeting of justices for the granting of licences. And the late Lord President, while drawing the distinction to which I have referred, quotes a passage from the opinion of Lord Penzance in *Dawkins* v. *Rokeby* with regard to a witness, applies it to the cognate cases of judges and advocates, and says broadly that 'the absolute privilege accorded to judges, counsel, and witnesses by the law and practice of both countries is founded on obvious grounds of public policy.' In the case of *Harvey* v. *Dyce*, 4 R. 265, which was an action of damages against a Sheriff-Substitute for defamatory words spoken of a litigant in the course of a debate before him, the same eminent Judge, with the concurrence of his brethren, expressly adopted the judgment of Chief-Baron Kelly in *Scott* v. *Stansfield*, and said that it had been "settled by a series of judgments in this Court and in England that against an action of this kind the privilege of a judge is absolute.' It is plain, therefore, that as regards the privilege of judges his Lordship made no distinction either between the law of England and Scotland or between one kind of judge and another.

"But then it is said by the pursuer that there is a judgment of the House of Lords in 1830 which ruled that a justice of the peace is not protected against an action of damages for defamation if it be averred that the words were used maliciously and if facts be stated from which malice can be inferred apart from the mere use of the words themselves. That is undoubtedly the effect of Lord Wynford's judgment in *Robertson* v. *Allardice*, 4 W. & S. 102. Plainly his Lordship proceeded on the ground that there was a distinction in this matter between supreme and subordinate judges. If he had done otherwise he would have run counter to a judgment of the House only six years before in the case of *Hagart* v. *Lord President Hope*, 2 Sh. App. 125, in which it was held that no averment of malice could sustain an action of damages against a judge of the Court of Session. Lord Wynford admits that in that case Lord Gifford, in delivering the judgment of the House, did not make any distinction between supreme and subordinate courts, and it is impossible to read the judgment without seeing that it was based on general grounds applicable to all judges. How, then, did Lord Wynford reach the conclusion that justices of the peace had only a qualified privilege? He had not much guidance from the Court below, for their Lordships had proceeded, not upon what Lord Pitmilly called 'the supposed distinction between supreme and inferior judges,' but on a ground which Lord Wynford entirely rejected, viz., that the defenders had gone out of the case before them, and had thereby rendered themselves liable in damages. He based his judgment mainly, I think, upon certain old Scots cases decided at a time when constitutional questions were but little regarded in Scotland, and when inferior courts were much less strictly regulated than they are now. It is remarkable, also, that Lord Wynford announced his intention to endeavour to forget for the moment all the English law he had ever known, although the question was essentially a constitutional one, in which English decisions were entirely to the point, unless it can be contended that there ought to be a difference between the two countries as to the importance of maintaining the independence of the whole judiciary. I suggest these considerations with all the respect which every judgment of the House of Lords must command, as tending to explain why this particular judgment stands in marked contrast to the whole train of decision both in England and Scotland. Undoubtedly, if it had the effect of laying down the rule for which the pursuer con-

tends, the cases of *Harvey* v. *Dyce* and *Williamson* v. *Robertson*, forty-six and sixty years later, were wrongly decided, and there has been created an unfortunate cleavage in one of the minor branches of constitutional law. Nor can these results be avoided by suggesting, as regards *Harvey* v. *Dyce*, that there is any real distinction in this matter between the position of a sheriff and a police magistrate. We know that the jurisdiction of the Police Court of Edinburgh is regulated by special statute, and that the presiding judge may be either one of the City Magistrates or one of the Sheriffs of Midlothian. It would be fantastic to suggest that the privilege of the 'Judge of Police,' for that is the statutory phrase, varies according as he happens to be the one or the other. I observe that Lord Shand, in *Williamson's* case, said with reference to Lord Wynford's judgment in *Allardyce*, that 'he put the case of a judge on exactly the same footing as that of a party, while undoubtedly in later times the judicial privilege has been found to be absolute.'

"I come to the conclusion, then, that 'the law and practice of Scotland,' to use the words of Lord President Inglis—and if it be a matter of practice as well as law, practice must necessarily suffer modification with the lapse of time—is the same as the law and practice of England with regard to the immunity of all judges, supreme and subordinate, when sitting in their judicial capacity, from actions of damages for defamation.

"For my own part I see no reason why a subordinate judge should not have the same measure of protection as that which is accorded to the Supreme Courts. The true responsibility of all judges depends on the constitutional checks which are provided against the abuse of their office, and it is certainly true that these checks are more simple and more easily applied the lower you descend in the scale of judicature.

"It only remains that I should notice the argument that the defender was going beyond the case when he sent for the pursuer and addressed him in the language complained of. It is no part of my duty to criticise that language, but I cannot say that a magistrate who had to deal with a child of nine years old was acting unduly in suggesting the attendance of the child's natural guardian, or that in saying what he said, whether it was relevant or irrelevant, he was not sitting in his judicial capacity. If Lord Esher's test in *Munster's* case was correct, it is enough that 'the words were uttered with reference to and in the course of the judicial inquiry which was going on.' That being my view it is unnecessary to consider whether, if the defender's privilege is only qualified, the pursuer has sufficiently averred facts from which malice can be inferred. My apology for the length of this opinion must be that the question is one of some general importance.

"I shall sustain the defender's third plea-in-law, disallow the issue, and grant absolvitor."

The pursuer reclaimed, and argued—1. When he uttered the words complained of the respondent was not acting in his judicial capacity. It was clear from the words used and the circumstances as averred that they were not uttered in the course of the judicial proceedings. If a judge went out of his judicial capacity he was in the same position as a private individual. Assuming that the respondent was entitled to send for the accused boy's father though his mother was in Court, he was not entitled to make a personal attack upon the father in terms which were slanderous and totally unconnected with the case which was proceeding. In this view the pursuer was entitled to an issue without the insertion of the word "maliciously." 2. The reclaimer's averment was that the respondent had attacked him maliciously, and by the law of Scotland an inferior judge was not protected by any privilege against an action of damages for a slander averred to have been uttered maliciously—*Allardice* v. *Robertson*, April 8, 1830, 4 W. & S. 102. The present case was *a fortiori* of *Allardice* v. *Robertson*, because in that case the man slandered was himself charged with a crime, and his agent had pleaded his character in mitigation of penalty; in the present case there was no such circumstance to connect the language used with the proceedings. 3. The English cases relied on by the respondent in support of his absolute privilege did not apply here, even assuming the privilege of a superior and inferior judge to be identical, because there the words uttered were held to have been uttered with reference to judicial proceedings and against a party to the proceedings; moreover, the English cases could not be relied on as authorities in Scotland—*Allardice* v. *Robertson*, Lord Wynford, pp. 111 and 115. If the defender was privileged but was liable under the case of *Allardice* for defamatory language uttered maliciously, then the pursuer was entitled to an issue if he undertook to prove malice and had averred facts and circumstances from which malice might be inferred—*Macdonald* v. *M'Coll*, July 18, 1901, 3 F. 1082, 38 S.L.R. 781. The issue should be allowed.

Argued for the respondent—When he uttered the words complained of the respondent was speaking *in judicio*. The connection between the words uttered and the case proceeding was the suggestion that the business carried on by the reclaimer was not conducive to good moral influence on his boy. The judicial privilege was absolute with regard to words uttered *in judicio*, and it had been held in England that there was no difference between the privilege of a judge of the Supreme Court and that of an inferior judge—*Rex.* v. *Skinner* (1772), Lofft 55; *Scott* v. *Stansfield*, (1868), L.R., 3 Exchcq. 220; *Dawkins* v. *Lord Rokeby* (1873), L.R., 8 Q.B. 255, Kelly, C.B., p. 268; *Munster* v. *Lamb* (1883), L.R., 11 Q.B.D. 588; *Royal Aquarium* v. *Parkinson* (1892), 1 Q.B. 431, Lopes, L.J., 451. The Scotch cases were to the same effect, and

no distinction had been made between the laws of the two countries—*Haggart's Trustees* v. *Lord President Hope*, April 1, 1824, 2 Sh. App. 125, Lord Craigie. p. 133, Lord Robertson, p. 134, at foot, Lord Gifford, p. 143; *Williamson* v. *Umphray & Robertson*, June 11, 1890, 17 R. 905, Lord Shand, p. 915, 27 S.L.R. 742; *Harvey* v. *Dyce*, December 23, 1876, 4 R. 265, Lord President 266, 14 S.L.R. 178. The case of *Allardice* v. *Robertson, ut sup.*, was decided on the ground that the justices of the peace had gone *extra judicium*. That case had been doubted by Lord Shand in *Williamson* v. *Umphray*, and Lord Coleridge in *Seaman* v. *Netherclift*, 1876, 1 C.P.D. 540, had held himself bound on the authorities to disregard it. If there was to be inquiry it should be by proof, not jury trial, privilege being a question for the Court.

At advising—

LORD JUSTICE-CLERK — The Court had the advantage in this case of a very full and able debate, and after considering the case I have come to the conclusion that the decision of the Lord Ordinary is right. Great stress was laid by the reclaimer upon the decision of Lord Wynford in the House of Lords in an early case, as indicating that there was a difference between the law of England and the law of Scotland in this matter. But I am satisfied that it has been decided in this country in several cases since then that the privilege of a judge in any court of law is absolute. If there was any difference of opinion on that matter expressed in the decisions, I should myself adopt the opinion which held it absolute. But I think that in the cases of *Harvey* v. *Dyce* and *Williamson* v. *Umphray and Robertson* we have distinct and clear expression regarding the law of Scotland on this matter. Nothing could be more complete than the opinion of the late Lord President, concurred in by the rest of the Division. He speaks of the absolute privilege accorded to judges, counsel, and witnesses by the law and practice of both countries.

The policy of the law is obvious, and there seems to me to be no conceivable ground for holding that the policy does not apply with as great force to a judge in an inferior court as to a judge in a superior court.

It only remains to consider whether the circumstances of this case fall within the rule that the words complained of must be uttered with reference to and in the course of a judicial inquiry. Of that in this case I have no doubt. The Judge, when the case came before him, desired to see the accused child's father, and it was when the father appeared that he is said to have made the statements complained of from the bench. Had he said nothing offensive, but spoken to the father about his son's upbringing or similar matters, it could hardly have been suggested that this did not take place in reference to and in the course of a judicial inquiry. That the words used were offensive and grossly slanderous if untrue cannot make any difference on the answer to be given to the question whether they were uttered in the judicial proceeding. I express no opinion upon the Bailie's conduct as regards propriety. The only question before the Court is, whether he had absolute privilege, and holding as I do that such privilege applies to all judges, and that he was acting in his capacity as a judge at the time, I am of opinion that the Lord Ordinary has acted rightly in granting absolvitor.

The LORD JUSTICE-CLERK read the following opinion of LORD MONCREIFF, who was absent at advising—In this case the Lord Ordinary has sustained the third plea-in-law for the defender and assoilzied him. The plea in question is to the effect that the words complained of by the pursuer being alleged to have been used by the defender while sitting as a magistrate and police judge with reference to the charge he was considering in that capacity are absolutely privileged.

The words in question are said to have been used by the defender in these circumstances:—On 16th August 1901 the pursuer's son, a boy of nine years of age, and another boy were brought before the defender at the Police Court, Edinburgh, charged with having stolen a bottle of lemonade from a lorry. The pursuer's wife, the boy's mother, was present, but the defender having ascertained that the pursuer was the boy's father, postponed the case and sent for him. I assume that at that stage no plea had been given or taken. On the pursuer appearing in Court the defender, after asking him whether he was the clubmaster of the Abbotsford Club, which is a working men's club, immediately addressed him in the words which are complained of:—"Well I have to tell you that not only are you ruining other people but you are ruining the boy. I know several families who are going straight to the devil from your club. You take their money, then send them out, while their wives and families are starving, and they are nearly killed when you are done with them."

It is in respect of these words that the present action of damages is raised. I may say at this point that in any remarks which I may make on the only question now before us I shall assume, as I am bound to do, the accuracy of the pursuer's statements, and, *inter alia*, the accuracy of his version of the words used by the defender.

The Lord Ordinary has made a most able analysis of the authorities bearing upon the nature and limits of the absolute privilege which attaches to a judge in this country and in England. In that analysis I entirely concur, and shall presently add only a very few observations on the authorities.

I do not, however, agree in the opinion which the Lord Ordinary indicates on one point of the case. I take a more serious view than his Lordship appears to do of the words which the defender is said to have used. In my opinion they are (as stated by the pursuer) not merely extravagant but defamatory to the pursuer (who

was not a party to the case before him), and utterly indefensible. It is said that the defender was speaking not against the pursuer as an individual but against a system of which he strongly disapproved. This explanation is not open to him. His one ground of appealing to the protection of absolute privilege as a judge is that his remarks had reference to the case before him, that is, the case of the pursuer's son. And when he said, "And not only are *you* ruining other people but *you* are ruining the boy," it cannot, I think, be said that he was speaking of the club or the system and not of the man.

Further, the pursuer avers that the defender sent for him and addressed him in these terms, not for the purpose of dealing with the case before him, but in order that he might have an opportunity of ventilating his views in regard to such clubs, and with the malicious motive of abusing the pursuer, against whom the pursuer alleges the defender and others had unsuccessfully tried to obtain a conviction on the charge of shebeening. If this had been an unprivileged case, or even a case of qualified privilege, I should have had no hesitation in sending it to trial. As it is, it is with great hesitation that I have come to the conclusion that this is a case to which absolute privilege applies, and that whatever other redress or punishment may attach to such an outburst—and it must not be assumed that there is none—the defender is not liable to an action of damages at the instance of the pursuer.

As I have said, the Lord Ordinary has not only analysed the authorities but has quoted material passages from the opinions of the judges. I adopt that analysis, and it is unnecessary for me to add much to what he has said. The absolute privilege of judges is founded on the public policy that it is essential to the ends of justice that persons in such positions should enjoy freedom of speech without fear of consequences in discharging their public duties in the course of the judicial inquiry. The difficulty is to determine the limits of this protection and to decide at what point a judge who is dealing with a case before him can be held to exceed and go beyond his proper province and jurisdiction. I do not know that there is any complete and exhaustive definition to be found on this point in the opinions of the judges; but the following passage from the opinion of Lord Penzance in the case of *Dawkins* v. *Lord Rokeby* contains the gist of it—"If by any process of demonstration free from the defects of human judgment, the untruth and malice could be set above or beyond all question or doubt, there might be ground for contending that the law of the land should give damages to the injured man. But this is not the state of things under which this question of law has to be determined. Whether the statements were in fact untrue, and whether they were dictated by malice, are and always will be open questions on which opinions may differ and which can only be resolved by the exercise of human judgment. And the real question is whether it is proper on grounds of public policy to remit such questions to the judgment of a jury."

The reason for the wideness of the protection is simply this. If a judge were liable to be sued in respect of words uttered in his judicial capacity on the averment that what he said was irrelevant or not pertinent to the case or in excess of the occasion, or even that he uttered the words maliciously, experience tells us that although he might after trial succeed in clearing himself of the imputation he would be exposed to being called on to answer what *ex facie* of the summons was apparently a relevant charge. Now, if that were once permitted the protection of absolute privilege would disappear; and therefore the only sound rule is to grant that protection unless it can be demonstrated—that is, shown so clearly that no man of ordinary intelligence and judgment could honestly dispute it—that the words used had no connection with the case in hand. The result of this, no doubt, is that in an exceptional case like that which we have before us, of a judge who is unable to restrain himself, hardship is inflicted on the person to whom the remarks are addressed. But on the other hand it is to be remembered that, thanks to the protection afforded by the privilege, ninety-nine out of a hundred judges are enabled to discharge their duties without fear or favour and without the dread of an impending action.

As showing the amount of licence, if I may use the word, that is allowed to a judge or other privileged person who is speaking to the case in hand, I may refer to the opinion of Lord Esher, Master of the Rolls, in the case of *Munster* v. *Lamb*, L.R., 11 Q.B.D. 588.

On the authorities I have only a few more words to say. I am quite satisfied that under the requisite conditions an inferior judge has absolute privilege as well as a judge of the Supreme Court—*Harvey* v. *Dyce*, 4 R. 265. On that point I cannot regard *Robertson* v. *Allardice*, 4 W. & S. 102, as now a binding authority. I have re-read the whole of that case, and although a perusal of its different stages discloses sufficiently some of the reasons why it has been disregarded as an authority, I do not think it would serve any good purpose to analyse it more than the Lord Ordinary has done. I can find no trace in later cases of it being regarded as an authority to any effect, either in this country or in England.

There remains the question which from an early stage in the argument appeared to me to be the only question of difficulty in the case, and that is whether upon the pursuer's showing the defender by the excess of his language did not forfeit the privilege which he otherwise would have possessed. At one time I thought it might have been practicable to send the case for trial, leaving the question of privilege to arise at the trial. That is done every day in cases where qualified privilege is pleaded by the defender but not disclosed on the face of the pursuer's statements; and I see no radical incompetency in adopting the

same course in regard to absolute privilege (although I am not aware that it has ever been done in this country unless it be in *Robertson* v. *Allardice*) where there is a dispute as to facts which might on proof be conclusive one way or another on the question.

But in the present case, taking the most favourable view for the pursuer, I have come to be of opinion that absolute privilege is disclosed. The boy being only nine years of age, the judge would, in the event of the boy either pleading or being found guilty, have to decide how he was to deal with him—whether he should be sent to a reformatory or given back to his parents to chastise and look after. The defender was therefore entitled to send for the boy's father and to address him in connection with the charge against the boy. But unfortunately instead of doing so in temperate language, when the pursuer appeared in answer to the summons, and the defender recognised him as the keeper of one of the clubs of which the defender disapproved, the strong views which the defender entertained on the temperance question and in regard to those clubs predominated and got the better of him, and he used language defamatory to the pursuer which was utterly uncalled for and indefensible. Still he was speaking in connection with the case before him, that is, the charge against the boy. What seems to have been passing through his mind was that the father's avocations were in some way answerable for the boy's criminal instincts, or that the pursuer was not a person in whose custody the boy should be left.

I do not excuse the language which the defender used; it cannot be excused; and I wish that I saw in the defences some expression or sign of regret for its use. But I am unable to say that the words complained of were not uttered in connection with the case depending before the defender. I am therefore for affirming the Lord Ordinary's interlocutor.

LORD PEARSON concurred.

LORD KINCAIRNEY, who was present at the advising to make a quorum, but had not been present at the hearing, gave no opinion.

LORD YOUNG and LORD TRAYNER were absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—J. C. Watt—J. W. Forbes. Agent—J. S. Saunders, Solicitor.

Counsel for the Defender and Respondent — Dundas, K.C. — C. D. Murray. Agent—Peter Macnaughton, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, February 18.

(Before the Lord Justice-Clerk, Lord Young, and Lord Kyllachy.)

MACLEMAN *v.* DUNCAN.

Justiciary Cases—Review—Conviction and Sentence—Conviction and Sentence not Signed by the Sheriff till Two Days after Trial, and on a Date on which there was no Diet.

Certain persons were tried on a summary complaint before the Sheriff on October 1. After evidence had been led the Sheriff intimated that he found them guilty of the offence charged, but no record of the conviction was signed on that date, and the accused were dismissed from the bar. The conviction and sentence were signed by the Sheriff on October 3rd, although they were dated October 1st. *Held*, in a suspension, that the conviction and sentence were invalid, in respect that they were not signed by the Sheriff on a date on which there was a diet in the criminal proceeding, and conviction *quashed*.

Hugh Macleman and certain other persons, all fishermen residing at Cromarty, in the county of Ross and Cromarty, were charged on a summary complaint in the Sheriff Court of Ross and Cromarty at Tain at the instance of Arthur H. Duncan, solicitor, Dingwall, Clerk to the Alness District Fishery Board, with an offence within the meaning of sections 20 and 2 of the Salmon Fisheries (Scotland) Act 1868 (31 and 32 Vict. c. 123), and of section 2 of the Salmon Fisheries (Scotland) Act 1862 (25 and 26 Vict. c. 97), in so far as on March 9th 1901 they had in their possession unclean or unseasonable salmon.

On October 1st, the diet fixed for the trial, certain objections were stated on behalf of the accused to the competency of the proceedings and to the title of the prosecutor. The Sheriff (GUTHRIE) repelled these objections. The accused pleaded not guilty, but after evidence had been led the Sheriff found all the accused guilty of the offence charged, and adjudged each of them to pay the modified penalty of one pound sterling.

The accused brought a bill of suspension. In the statement of facts the complainers stated, *inter alia*, as follows:—"No sentence upon the complainers was written out and subscribed by the Sheriff before the complainers were dismissed from the bar. On applying for an inspection of the conviction and sentence against them the complainers learned that it was not obtainable, because it had been sent to be signed by the Sheriff at another place. In point of fact although the trial took place on 1st October, no conviction or sentence was signed by the Sheriff until 3rd October, when it was incompetently signed by him in absence of the complainers, and the complainers were