satisfied, though he may not proceed to remove or sell the goods.

The sheriff officer was then entitled to poind the goods, and the question arises—Was the pursuer entitled to interdict him from selling? That must depend on whether there was any disposition evinced to sell or not. How that would stand between the pursuer and Zive there is no need to determine because Zive has not appealed. But as against the sheriff officer I am of opinion there was no ground for the interdict at all. If it were a case of balancing evidence I should not disturb the Sheriff's judgment. But if the Sheriff were right, then the proposition must be, that because the sheriff officer has done a thing he was entitled to do he will go on to do something he is not entitled to do. It may be that the pursuer was entitled *ob majorem cautelam* to an interdict against the appellant as Zive's agent, but that would not entitle him to expenses against the appellant. If this had been an action of damages against the appellant for executing, on the telling of another, an illegal diligence, the principle would be different. But in an action of interdict against the sheriff officer as an agent, expenses cannot be recovered unless he has shown an intention of doing the illegal diligence.

Lord M'Laren suggested a good illustration in consultation. You can get interdict against a person and his guests from fishing in your waters, but you could not get interdict with expenses against a guest who was to arrive in the following week.

I am of opinion that we should recall the interlocutor appealed against and assoilzie the appellant, with expenses.

Lord M'Laren, Lord Kinnear, and Lord Pearson concurred.

The Court recalled the interlocutors of the Sheriff-Substitute and the Sheriff in so far as the defender and appellant Fisher was concerned, assoilzied him from the conclusions of the action, and found him entitled to expenses in the Court of Session and in the Sheriff Court.

Counsel for the Pursuer (Respondent)—A. M. Anderson—A. A. Fraser. Agent—J. M. Glass, Solicitor.

Counsel for the Defender (Appellant)—Graham Stewart, K.C.—D. P. Fleming. Agents—Clark & Macdonald, S.S.C.

Tuesday, March 12.

FIRST DIVISION.

[Lord Dundas, Ordinary.

KUFNER *v.* BERSTECHER.

Reparation—Slander—Malice and Want of Probable Cause—Lodging Information with Criminal Authorities—Averments by Defender as to Whole Information Lodged—Relevancy.

A and B had been partners in business, but the partnership had been dissolved. A brought an action of damages for slander against B, alleging that B had maliciously and without probable cause lodged an information with the police charging A with embezzlement. B averred that he had discovered a number of suspicious acts on the part of A, in addition to the facts giving rise to the charge of embezzlement, and that he had placed the whole facts before the procurator-fiscal. He denied that he had acted maliciously or without probable cause. *Held* that B was entitled to prove the whole facts he had communicated to the police, in order to show that he had not acted maliciously or without probable cause.

A v. *B*, February 23, 1895, 22 R. 402, 32 S.L.R. 297, *distinguished.*

Charles F. J. Kufner, furrier, 49 Buchanan Street, Glasgow, on 18th July 1906, brought an action of damages for slander against Ernst Berstecher, furrier, 261 Sauchiehall Street, Glasgow. The pursuer and the defender had been partners in a fur business in Glasgow, but the partnership was dissolved on 17th March 1905.

The pursuer averred that in April 1905 the defender had maliciously and without probable cause lodged an information with the criminal authorities charging the pursuer with having embezzled certain sums of money, being wages which had been set aside for a Miss M'Arthur, one of the firm's employees, in respect of certain periods of time during which she was absent from the business. The pursuer also averred that he had been apprehended on said charge, but that on the matter being investigated by the procurator-fiscal the charge was dropped.

The defender in answer 6, after giving his account of the matter of M'Arthur's wages, stated—"In the case of another employee in the Buchanan Street shop, a Miss Thomson, one week's wage was also in May 1904 entered in the wages book as paid to her at a time when owing to slack trade she was absent on holiday and not in receipt of wages. The entry was made by the cashier on the instructions of the pursuer, and the sum entered as wages was paid over to the pursuer but not received by the employee. The defender only became aware of this matter in or about March 1905." And in answer 8 stated—". . . Admitted, further, that in consequence of the actings of the pursuer hereinafter mentioned, and, in particular, the above matter of the girl M'Arthur's wages, the defender laid the facts, so far as then known to him, before the procurator-fiscal at Glasgow for investigation; that the criminal authorities made inquiry into the same; and that in the result no prosecution was instituted against the pursuer. *Quoad ultra* denied under reference to the proceedings mentioned for their terms. The matters referred to related not only to the girl M'Arthur's wages, but also *inter alia* to certain transactions in fur had by the pursuer as an individual with third parties, and in particular with Messrs Miller & Co., Glasgow, Messrs A. & W. Nesbitt, London, and a firm of Muller

& Co., London. The pursuer had the superintendence of the Buchanan Street factory, including the making up of the skins and furs. The number of furs or skins estimated to be required for any particular job were issued by the pursuer from the firm's stock and marked on the order form. If a number less than that issued was required for the job, it was the pursuer's duty to restore the surplus to stock. It was reported to the defender that it was a matter of frequent occurrence that surplus skins so issued, instead of being returned to stock, as also furs and skins taken direct from stock, were taken away from the firm's premises by the pursuer without any booking or entry of the furs or skins being made, and that this practice on the pursuer's part had commenced as early as the year 1899 to 1900. This matter was first reported to the defender in the autumn of 1902 by Miss Cossar (*a cashier and bookkeeper*), who complained to the defender that in the above circumstances it was not possible for her to keep correct accounts of the Buchanan Street business. The defender was at the time extremely reluctant to take any action in the matter, and beyond impressing on the pursuer that it was essential for the proper conduct of the business that all furs and skins taken out should be booked and entered, did not press the matter further with him. . . . . (*The defender gave details of alleged suspicious actings*). . . . . The defender laid the facts so far as then known to him before the procurator-fiscal in March 1905, and it was in knowledge that this had been done by the defender that the pursuer instituted the dissolution proceedings already referred to. It is believed that the pursuer was requested by the authorities to attend at the fiscal's chambers and give a statement explanatory of the matters in question, and that he did so. The pursuer was never arrested or committed on a charge of embezzlement. The defender was in the circumstances fully justified in laying the case before the authorities for investigation, and had reasonable and probable cause for so doing. He was and is actuated by no malice against the pursuer."

The pursuer, *inter alia*, pleaded—"(6) The defender's averments relating to the wages of Miss Thomson mentioned in the 6th article of the defences, and also his averments relating to the matters and transaction mentioned in article 8 of the defences, are irrelevant, and ought not to be remitted to probation."

On 7th February 1907 the Lord Ordinary (DUNDAS) sustained the sixth plea-in-law for the pursuer, appointed the averments in question to be deleted from the record, and appointed the pursuer to lodge issues for the trial of the cause.

Note.—". . . [*After dealing with a question of relevancy not now reported*]—The next question is raised by the sixth plea-in-law for the pursuer, and relates to the relevancy of certain averments made by the defender which the latter desires to use, not as matter of substantive charge or accusation against the pursuer, but for the purpose of establishing probable cause as regards the information given by the defender to the procurator-fiscal. Mr Murray forcibly argued that although the pursuer's action is based only upon the information as to the alleged embezzlement of Miss M'Arthur's wages, the defender is entitled to lead evidence as to the whole information which his client submitted to the procurator-fiscal, with the view of showing that he had probable cause to inform that official about the M'Arthur episode. The pursuer's counsel, on the other hand, urged that, whatever cause the defender might be able to qualify for lodging accusations against the pursuer, other than that now put in issue by him, it could not justify him in lodging the charge in question, assuming it to be false in fact. I have felt some doubt and difficulty about this matter, but I have come to the conclusion that the pursuer's plea is well founded. His counsel referred to the case of *A* v. *B*, 1895, 22 R. 402, which I think is in point. It seems clear from the opinions of the learned Judges who decided that case that they did not (as in the latter case of *H.* v. *P*, 1905, 8 F. 232) proceed wholly upon the regard which ought to be had to the rights and interests of third parties, but also upon general considerations as to the proper limitations of proof in civil actions. The pursuer's counsel also referred to the case of *Powell*, 1896, 23 R. 534, which, though not strictly in point, appears to me to favour his argument. The averments complained of by the pursuer must therefore, in my opinion, be deleted from the record; but that will not, of course, prevent the defender's counsel from cross-examining the pursuer upon any of the matters contained in them. When this deletion is made, there will, I think, be no room for the defender's argument to the effect that the pursuer's own record discloses that the defender had probable cause for informing the procurator-fiscal about M'Arthur's wages. . . ."

The defender reclaimed, and maintained that the averments deleted by the Lord Ordinary were relevant to show that the defender had not acted maliciously. [Counsel was stopped.]

Argued for pursuer—The averments in question were irrelevant. They did not tend to show that pursuer was guilty of the alleged embezzlement and could not justify the alleged slander—*A* v. *B*, February 23, 1895, 22 R. 402, 32 S.L.R. 297; *Powell* v. *Long*, February 25, 1896, 23 R. 534, 33 S.L.R. 380.

LORD PRESIDENT—I have no doubt that the defender should be allowed a proof of his averments. The case is one in which an action is brought to obtain damages for slander in respect of information given to the police, in which case the pursuer must prove not only that the information was given to the police but also that it was given maliciously and without probable cause. The procurator-fiscal, on considering the information which was laid before him, did not propose to prosecute in respect

of the whole charges, but selected one of them on which to found a prosecution. The pursuer now proposes to prevent the defender from proving what were the grounds and circumstances on which he sent his total communication to the police, and maintains that the defender must confine himself to the particular charge which was the subject of the prosecution. I think that such a course would be a denial of justice to the defender in this matter. If a person finds something suspicious in the behaviour of another person pointing to the possibility of a criminal charge, it is ordinary common sense that he will be influenced if he finds other things of the same sort. One isolated incident he might not report, whereas if there were a succession of such incidents he probably would report.

A case of *A* v. *B*, 22 R. 402, was quoted to us, but I do not think it has any application. That was an action of damages for rape, and the pursuer was not allowed to attempt to prove that the defender had previously attempted to ravish two other women. That decision rests on considerations which would commend themselves to everyone. But the pursuer quoted certain general observations by the Lord President on the matter of limiting proof, in all of which I concur. The true limitation in this case is very clear. If the defender were proposing to put in a whole set of averments connected with the pursuer's character, which he never communicated to the police, the case would fall under the case of *A* v. *B*. He does no such thing. He admits on record that he laid certain matters before the procurator-fiscal for investigation, and the defender must understand that his proof will be limited to these communications, and that he will not be entitled to prove facts and circumstances which are not connected with the communications to the police.

I am therefore of opinion that we should recall the Lord Ordinary's interlocutor, find that the defender is entitled to a proof of the averments which the Lord Ordinary has disallowed, and remit to the Lord Ordinary to proceed.

LORD M'LAREN—I concur. We are not proposing to allow the defender to lead evidence ranging over the whole life of the pursuer to show that he is a dishonest man. The inquiry will be confined to the information lodged with the public authority by the defender. While the pursuer may select one item out of the information given on which to base his action, he cannot prove his case except by producing the information or proving its tenor. When an information is laid before a jury which includes several charges it must be open to the defender to show the grounds on which he gave the information as a whole. It would be unfair to the defender that the case should go to the jury on the footing that he made several charges and only tried to substantiate one of them. But that might possibly be the result if we were to sustain the Lord Ordinary's finding.

LORD KINNEAR and LORD PEARSON concurred.

The Court recalled the Lord Ordinary's interlocutor except in so far as it appointed the pursuer to lodge issues for the trial of the cause, and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuer (Respondent)—M'Lennan, K.C.—D. P. Fleming. Agent—George Stewart, S.S.C.

Counsel for the Defender (Reclaimer)—Graham Stewart, K.C.—Constable. Agents—Davidson & Syme, W.S.

Tuesday, March 12.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

KERR'S TRUSTEES *v.* KERR'S CURATOR.

Trust—Petition to Borrow on the Heritage—"Not Inconsistent with the Intention"—Trustees having Power to Borrow to Pay Bonds and Mortgages—Equitable Mortgage—Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 3

Section 3 of the Trusts (Scotland) Act 1867 provides—"It shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof; . . . (3) To borrow money on the security of the trust estate or any part of it. . . ."

A testator by his settlement conferred upon his trustees "express power to borrow money from time to time for repaying bonds or mortgages on any heritable property which may be called up, and to grant . . . bonds or mortgages over said heritable property for that purpose." He died possessing certain heritable estate in Scotland subject to a loan by an English bank, in security of which he had granted an "equitable mortgage," that is, he had deposited with the bank the title-deeds to the estate, and had given an undertaking to grant a formal mortgage if required. He was possessed also of certain real estate in England similarly burdened by two equitable mortgages, but nothing else in the nature of a bond or mortgage affected his estates. The bank, without demanding the execution of a formal mortgage, having called up the loan on the Scottish estate, the trustees presented a petition to obtain the authority of the Court to borrow money on it. The curator of the son succeeding to that estate opposed.

The Court *held* that the testator intended to include "equitable mortgages" in the expression "bonds and