LORD DEAS and LORD MURE concurred.

LORD SHAND—In this trust-deed the provisions are certainly not happily expressed, but having applied my mind to the question I have formed a different opinion to that stated by your Lordship as to the effect of these words. The question is one of intention, and I think that, taking the three purposes together as a whole, the evident intention of the truster was to give his wife a third of the gross amount of his estate including the value of her liferent interest, and in addition to give the use of Viewfield House and furniture over and above. If that be so, the widow would be entitled to have the third without any deduction. I do not think it is necessary for me fully to enter upon all the clauses, but I think the scheme was shortly this. Under the first purpose provision was to be made for the payment of feuduties, &c., as the trustees should think fit, and thereafter, and after all debts were paid, under the third purpose the trustees were directed to make a state and valuation of everything that was left. There the important words occur. In directing that this valuation should be made the truster expressly provided that in the estate there shall be included "that part in which my said wife is liferented." In seeking to discover the intention of a testator it is a cardinal rule to give effect to any special words, and the difficulty I feel in concurring here is that I think the judgment pronounced gives no effect to these special words. I think the truster meant that the liferent subject should be valued, and has specially said so, while he has not added "but deducting the widow's liferent." The presence of the special clause that the liferent subject is to be included, and the absence of other deduction, is the determining element in my difference of opinion.

The Court therefore affirmed the first alternative of the question put.

Counsel for First Parties—M'Laren. Agent—David Cook, S.S.C.

Counsel for Second Parties—Rutherfurd. Agent—J. T. Mowbray, W.S.

Tuesday, December 17.

SECOND DIVISION.

[Sheriff of Midlothian.

GREEN *v.* CHALMERS.

Reparation—Slander—Privilege—Necessity of Averment of Malice and Want of Probable Cause.

Held that information given to police constables to the effect that the gardener of the proprietor in the neighbourhood had been connected with a theft from his master's house was privileged.

Circumstances which were *held* (*diss.* Lord Young) insufficient to establish malice and want of probable cause on the part of a defender who had successfully pleaded privilege in an action of damages for slander, and *Opinion per* Lord Young, that in such an action the absence of an averment of malice upon record is not material, the distinction between privileged or unprivileged cases resolving itself into a question of presumption and *onus*.

This was an action of damages for slander at the instance of James Green, gardener to Mr Fraser, Murrayfield, near Edinburgh against Miss Janet Chalmers, who inhabited and occupied the villa next adjoining Mr Fraser's. In December 1877 some articles had been stolen from Mr Fraser's house. The ground of action was that the defender in January following made statements to two police constables, who had called upon her to get their call-book marked, to the effect that the pursuer was concerned in the theft. Malice and want of probable cause were not averred. The defender denied having made the statements complained of and moreover pleaded privilege. She did not attempt to justify the statements as true. The action was brought in the Sheriff Court at Edinburgh.

The Sheriff-Substitute (HALLARD) found the slander proved, and held that there were no grounds for the plea of privilege. In his note the Sheriff-Substitute, *inter alia*, said—"On the record, the case of the defender is not an admission in express terms that the statements complained of were made. Yet there is a plea of privilege of which in the absence of such an admission it is somewhat difficult to trace the legal foundation."

The Sheriff (DAVIDSON) pronounced this interlocutor:—"Finds that on or about the 10th day of January 1878 the defender did state to George Johnston Bain and Andrew Peebles, then constables of the Edinburgh County Police, who had called upon her to have their call-book marked, that the pursuer was a bad lot, and had been caught stealing in a small way, and that he was worth watching; that on or about the 17th of January 1878 the defender did state to the said George Johnston Bain and Andrew Peebles, who had again called on her for the above purpose, that if the said constables would search the pursuer's house she had no doubt they would there find the missing property, meaning some articles that had shortly before been stolen from the house of Mr Fraser, the pursuer's master—meaning thereby that the pursuer had stolen the said articles; that the said statements were made by the defender in her own house, and to the said constables only, no other person being present; that the said statements were calumnious, and calculated to injure, and injurious to the pursuer in his character and feelings: Finds that the defender is liable in damages to the pursuer for the said statements; Fixes the amount of the same at £20, for which sum decerns against the defender."

He added this note:—

"*Note.*—. . . It is proved, the Sheriff thinks, that the defender did state what is set forth in the above interlocutor to the two constables. It is not proved she said it, nor is it alleged she did, to any other persons. The fact of her stating it to the constables rests on the evidence of the constables alone. So far as appears if these men had not repeated to the pursuer what had been said this case would not have been heard of. . . .

"The Sheriff has had some hesitation in this case created by the conduct of these constables. There had been and was in the neighbourhood much

and not unreasonable anxiety about certain undetected thefts and attempts at theft. It was not remarkable in such circumstances that a solitary lady should talk on the subject to constables visiting her officially, but it appears to the Sheriff that the defender by interrogation received encouragement from them to communicate her thoughts and gossip. . . . Still, however unsatisfactory the conduct of these men may have been, it is thought their evidence cannot be altogether rejected as unworthy of credit even though the defender herself denies all they say. Therefore it is that judgment is given against the defender. No one is entitled to accuse another of crime, particularly when not committed against himself, without sufficient grounds."

The defender appealed to the Court of Session.

At advising—

Lord Ormidale—[After referring to the question whether the alleged slander was ever uttered at all, on which his Lordship felt some difficulty, but was not prepared to differ from the result arrived at by the Sheriff-Substitute, who had had the advantage of hearing and seeiug the witnesses]—

Assuming, then, that the statement libelled on was made, it must be kept in view that it was made to officers of the law who had gone to the defender for the very purpose of receiving complaints. A burglary had been committed in a neighbour's house, and this lady (the defender) was naturally alarmed. She waited till the policemen came—she did not send for them—and she made her statement to them as to officers of the law entitled to receive and act upon it, if they thought it right to do so. Now, I have always regarded it as a settled rule or principle of law—that where an individual gives information, or makes a statement to an officer of the law whose duty it is to protect and prosecute criminals, whether that officer be a policeman, a procurator-fiscal, or Lord Advocate, to the effect that someone has committed a crime, such information or statement has the protection of privilege. This is so in the best interests of society, and the repression of crime could not otherwise be enforced.

To entitle the pursuer therefore in the present instance to recover damages it was incumbent upon him to establish that the defender acted maliciously and without probable cause. Now, malice is not even averred, and no proposal has been made to amend the record. On the contrary, in answer to a question from the Court, the pursuer's counsel said he did not desire to amend the record. I doubt indeed whether any amendment could be allowed at this late stage of the case. But, at anyrate, I do not think that there is any sufficient proof of malice, and neither of the Sheriffs say that there is.

While, therefore, I am not prepared to hold that the learned Sheriffs were wrong in finding on the proof that the alleged slander was uttered, I have no hesitation in holding, with I understand both your Lordships, that the defender in uttering it had the protection of privilege, which the defender has failed to displace by establishing that she was actuated by malice, and had no probable cause for what she stated. I am not sure that any serious doubt ever existed as to the soundness of this doctrine, but certainly none has existed since the date of the decision in the House of Lords in the well-known cases of *Arbuckle* v. *Taylor and Others*, May 1815, 3 Dow's Apps. 160, and of *Young and Others* v. *Leven*, July 8, 1822, 1 Shaw's Apps. 179. In the latter case Lord Chancellor Eldon, in the course of a very full and elaborate judgment, observed (pp. 209–10)—"You, that is, the pursuer, must not only make out that the charge was malicious, but you must make out that it was without probable cause, and your Lordships know that it has been decided over and over again that if a man's malice is as foul and black as it can be represented, but yet if he has probable cause for the complaint, he cannot be liable to any action for a malicious prosecution; and, on the other hand, if it has been found that he has no probable cause of complaint, but if his mind is devoid of malice, neither can an action be maintained." Nor will it do to say that the Lord Chancellor in this statement had merely in view proper actions for malicious prosecution, for, to use his own words, it has been held and decided "over and over again" to be equally applicable to actions such as the present. Without noticing all the cases to this effect, it is sufficient for me to refer to the very instructive one of *Sheppeard* v. *Fraser*, January 26, 1849, 11 D. 446. With deference, then, to the indication of opinion of the learned Sheriff-Substitute, that the defender's plea of privilege is of little importance, it appears to me to be of itself conclusive of the present case. Neither can I hold that the plea of privilege is so inconsistent with the denial by the pursuer that she uttered the alleged slander as to render the plea inadmissible or ineffectual, for such a mode of alternative pleading is perfectly competent and constantly resorted to. I have only to add, that although it would appear from the proof that the alleged slanderous statement had reached the ears of others than the police-officers Bain and Peebles, it is unnecessary to consider or determine whether that is attributable to the defender or not, because no such ground of action is libelled.

The result is that, in my opinion, and for the reasons I have stated, the appeal in this case ought to be sustained, the interlocutors appealed from recalled, and the defender assoilzied.

Lord Gifford concurred.

Lord Young—I concur in the result that the action is unfounded, and that the defender ought to be assoilzied. But I am, I confess, perplexed about the form and even substance of the judgment by which your Lordships propose to attain that result. The Sheriff-Substitute and the Sheriff have found as matter of fact that the defender slandered the pursuer as alleged—that is, used the expressions imputed to her, and which are undoubtedly of a slanderous character. We must pronounce one way or other upon this fundamental matter of fact, and for my own part I am disposed, differing from the Sheriffs, to negative it. The only evidence of it is that of the two policemen, whose conduct throughout your Lordships concur with the Sheriff in condemning. With this condemnation I agree, and I have it in view in estimating their testimony, the reliability of which is, I think, thereby affected. The defender very distinctly denies its accuracy, and it is, I think, clear that unless her account of what

she said and did not say is wilfully false (as indeed the Sheriff-Substitute thinks it is) the policemen either misrepresent what she said or misapprehended her meaning. I am inclined to think that they misapprehended her meaning, and understood her to say of the pursuer what she said and meant to say of his son, who had in fact been convicted of a small theft. There are at least two passages in the evidence noticed during the argument which countenance the notion of such confusion and misapprehension on their part, and this, if it once existed, would or might colour and affect their understanding of all the defender may have said afterwards. I prefer this view to the only alternative, so far as I can see, viz., that of imputing wilful perjury to the defender. Her language may have been confused and misleading, but we cannot affirm the defamatory expressions alleged unless we are satisfied that they were meant; certainly not, if we think the defender was misunderstood, and that her statement to the effect that she had no intention of charging the pursuer with theft or dishonesty, or speaking of him in that sense, is true. She swears that she did not so speak of him, had no ground for doing so, and never dreamt of doing so. This may be false, but cannot possibly be merely innocent mistake or forgetfulness on her part, and so if false is wilful perjury. I am not prepared to impute perjury to her on the evidence of the policemen, which is open, I think, to observations which I have made upon it, and may to a great extent at least be reconciled with the defender's statement without imputing falsehood to them beyond exaggeration. I should have attached greater weight to the Sheriff-Substitute's view of the evidence taken in his presence but for his note, which I think manifests an erroneous estimate of the conduct of the policemen, on the one hand, and of the defender on the other, and a too vehement view of the case altogether. On the whole, I am not prepared to affirm as a fact that the defender used the expressions alleged, or equivalent expressions, having and intended by her to have a similar meaning, that is, to import a charge of theft against the pursuer. If I thought otherwise, and held with your Lordships that the defender did in fact charge the pursuer with theft, I should concur in holding that the occasion was privileged, so as to repel the inference or presumption of falsehood and malice, and put the pursuer to the proof of them. I should further concur in holding that although the charge was shown to be false and malicious the defender must nevertheless go free if it appeared that there was probable cause for it.

In this view of the case—that is, if the Court should hold that the defamatory charge was in fact made by the defender although on a privileged occasion—the next question is, was it a false charge, that is, false in fact, and on this question, the evidence being all one way, with not even an averment or suggestion to the contrary, the conclusion must be that the charge was false in fact, and so accordingly *ex debito justitiæ* the Court must find. This is the first step—and a great one—towards overcoming the plea of privilege. The pursuer must, however, give evidence of malice which, by reason of the privilege attaching to the occasion, the law does not infer from the fact of the defamation, as it would had the occasion not been privileged. And here the pursuer relies not merely on the fact that the charge was made and that it was false, but on the further, and I should have thought conclusive, fact that the defender has not shown or even alleged any reasonable or probable excuse for making it, but has tried to shield herself by a denial which, *ex hypothesi*, the Court rejects as false. I do not concur in thus rejecting the defender's denial that she made the charge, but if I did I could not acquit her of malice any more than of falsehood. It is true that the existence of malice and the absence of probable cause must concur. It does not, however, follow that these can always or generally, although they may sometimes, be separated sharply and dealt with as distinct matters. The common-sense of mankind attributes malice to anyone who makes a false and calumnious charge against another without reasonable excuse, and the law of evidence is not, in this matter at least, in conflict with common-sense. Evidence of an injurious falsehood without reasonable excuse is evidence of malice. Here your Lordships propose to affirm the injurious falsehood, and I venture respectfully to ask whether you mean also to affirm that there was reasonable excuse for it. The author of it alleges none, and indeed says positively that she has none, making no other defence than that which your Lordships reject as false, viz., that she is not the author. To reject her denial of the calumny imputed to her, and at the same time to credit her with probable cause or reasonable excuse for it, which she utterly repudiates, is a result so amazing to my mind that I must express my dissent quite distinctly. It is a common and indeed familiar case that the facts relied on by a defender to show probable cause fail on the evidence, or are ruled to be insufficient, but here it is proposed to affirm probable cause, not only without an atom of evidence to support it, but against the repudiation of it by the party to whom it is attributed and who relies not in mere pleading but in her testimony on oath on a defence inconsistent with its existence. It would be idle to point out that in this case at least there is no distinction between negativing the absence (or want) of probable cause and affirming its existence. A jury or any other tribunal judging of evidence must negative probable cause in the absence of any evidence of it, or, as in this case, any allegation of it by the party to whom it might afford a defence.

Therefore, while I agree with your Lordships in holding that the alleged occasion of the alleged defamation was privileged, I am unable to see how the defender can thereby be benefitted. If she did not make the alleged charge, against the pursuer, she has no occasion for the protection of privilege. If she did, I think it is clearly proved that it was a false charge, made maliciously and without probable cause, which overcomes the protection.

I have thought it unnecessary to notice the defender's anger with the pursuer's children for throwing stones, and with him for incivility and not checking them, as evidence of malice. It is evidence perhaps, but very weak evidence, and absolutely invisible in presence of that which I have noticed, viz., that she made a false charge of a serious nature against her neighbour without any excuse whatever and without, as she confesses, having any reason to think it true. If she did, as your Lordships think she did, the natural

account of it is malice (*malus animus*), whether general or particular, and whether we can connect it with an intelligible motive or not. No other is suggested. The defender suggests no other, but seeks refuge in denial as others have done when brought to task for misconduct for which they could offer no excuse.

The case is of the pettiest, but I must nevertheless respectfully offer my protest against your Lordships' view of the law applicable to it. I say of the law—because, assuming the defamatory charge to have been made, it was undoubtedly false, and not only without probable cause, but without any cause at all, and so malicious; and the conclusion to the contrary I must attribute to what I think legal error regarding the evidence by which malice may be established.

That malice is not averred on record is, I think, immaterial. It may be, and habitually is, implied when a false and calumnious slander is imputed. Malice is indeed of the essence of all slander, whether privileged or not. The only distinction is, that while it is implied in the one class of cases, and is only displaced by proof of the *veritas*—it must be proved in the other when the implication is repelled in the first instance by the privilege. This was indeed the principle on which it was held that malice though not in issue might be proved to displace privilege raised by the facts as they appeared at the trial. The distinction between privileged and unprivileged cases truly resolves into a question of presumption and *onus*.

The Court pronounced this interlocutor:—

"Find, as matter of fact, that the statement alleged by the respondent (pursuer) to have been made regarding him by the appellant (defender) was made to the police-officers Bain and Peebles, and that in the circumstances the appellant in making that statement had the protection of privilege: Find, consequently that, in law, it was incumbent upon the respondent to establish that the appellant made said statement maliciously and without probable cause, but that he has failed to do so: Therefore sustain the appeal, recal the judgment appealed against, assoilzie the appellant (defender) from the conclusions of the action, and decern: Find her entitled to expenses both in this Court and the Sheriff Court."

Counsel for Pursuer (Respondent) — Brand. Agent—A. Nivison, S.S.C.

Counsel for Defender (Appellant)—Lee—Moncreiff. Agents—Maconochie & Hare, W.S.

Wednesday, December 18.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MARTINI & CO. *v.* STEEL & CRAIG.

Bill of Exchange—Retaining Custody of Bill when presented for Acceptance—Conditional Delivery of Bill.

A drew a bill on B and endorsed it to C, on the express condition that B was not to deliver it to C except in exchange "for an equal number of free bills in course of maturing." B gave the bill to C for his inspection, with leave to keep it if he complied with the condition. C refused to give it back, and endorsed it to D, acquainting him at the same time with the circumstances under which it had come into his possession. D then presented it to B for acceptance. B refused to accept it, and retained it in his own possession. *Held* that in the circumstances B was entitled to act as he did, the document having been originally undelivered in the hands of C.

Messrs Steel & Craig, corn factors and merchants in Glasgow, were agents and correspondents of Messrs Butters & Company of Montreal. On July 4th 1876 Messrs Steel & Craig received from Butters & Company a letter, and subsequently on the same day a telegram, with reference to a bill for £1000 which they had drawn upon Steel & Craig, and endorsed to Messrs Athya & Company, grain merchants, Glasgow. The telegram was in the following terms—"Exchange thousand for equal amount free bills maturing," the exchange being to be made with the Messrs Athya. During the course of the same day Mr John Athya called at Messrs Steel & Craig's counting-house, and asked whether they had received the bill in question. It was then explained to him that the instructions were not to part with the bill except in exchange for an equal amount of free bills then maturing. Mr Athya then asked Mr Steel to give him a copy of these instructions in writing, which he did, handing him at the same time the bill. "He asked me, 'May I take the bill over to my office?' and I said, 'you may.' I did not deliver the bill to him, I merely lent it to him that he might take it to his office and think over the matter, and he was to let me know how he was going to do."

After having got possession of the bill in this way, Mr Athya refused to return it to Steel & Craig or to hand them an equal amount of free bills as required. He then endorsed the bill to Messrs Martini & Co., and in the letter transmitting the bill he informed Messrs Martini of the conditions under which he had got it. Messrs Martini then presented the bill to Steel & Craig for acceptance, but they, in pursuance of the course which they had before adopted with Athya, refused to do so, and further said that they intended to keep it, which they did.

In these circumstances, which appeared from a proof which was taken in the cause, and which are further set forth in the Sheriff's interlocutor and in the opinions of the Court, Messrs Martini & Co. presented a petition in the Sheriff Court of Lanarkshire praying for an order against Steel