In my view the pursuer has failed to aver facts and circumstances from which, if proved, malice can be inferred. There is no averment of any personal animus or of any malicious motive. Doubtless it is not in every case necessary to specify such animus or motive. It may be enough to specify certain reckless and inconsiderate actings, and to aver that they disclose the existence of some personal animus or sinister motive the origin and nature of which are unknown. But I cannot so read the averments in this case. Certain actings are specified which might satisfy the requirement of averment of want of probable cause, and then the word "malicious" is thrown in in an attempt to meet the requirements of the law. It is well settled that malice and want of probable cause are separable. Either may be present without the other. In this case the presence of both is required. It may happen that the facts and circumstances averred as showing want of probable cause may be such that the existence of some unknown and malicious motive may be inferred from them. In the present case, however, no facts and circumstances are averred from which the existence of some unknown malicious motive could reasonably be inferred, nor has the pursuer so framed his pleadings. I am accordingly of opinion that the action fails, and that the interlocutor of the Lord Ordinary ought to be affirmed.

The LORD PRESIDENT did not hear the case.

The Court adhered.

Counsel for Pursuer—Gentles, K.C.—Garrett. Agent—John Anderson, Solicitor.

Counsel for Defender—Fenton, K.C.—Hunter. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, November 30.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

RAE *v.* ROYAL SCOTTISH SOCIETY FOR PREVENTION OF CRUELTY TO CHILDREN.

Reparation—Slander—Charge of "Neglecting" Child—Innuendo of Criminal Conduct—Averments—Relevancy—Children Act 1908 (8 *Edw. VII, cap.* 67), *sec.* 12 (1) *and* (2), *sec.* 38 (2).

In an action of damages brought against a Society for Prevention of Cruelty to Children the pursuer averred that defenders' officer called at his house and said to him in the presence of his mother and brother—"I have come to see what provision you are going to make for the child you are neglecting in Glasgow," meaning thereby that the pursuer was guilty of the criminal neglect of his child, that the same charge of "neglect," innuendoed as before, was again repeated in the defenders' office in Glasgow by another of their servants, and that these statements were made falsely, maliciously, and without probable cause. *Held* that the action was irrelevant in respect that an imputation of criminal conduct could not, having regard to the circumstances in which the words were used on the two occasions, be reasonably drawn from the use of the word "neglect."

Reparation — Malicious Prosecution — Wrongous Information to Procurator-Fiscal — Privilege — Sufficiency of Averments of Want of Probable Cause — Relevancy — Children Act 1908 (8 *Edw. VII, cap.* 67), *sec.* 12 (1) *and* (2), *sec.* 38 (2).

Following upon a criminal information lodged by a Society for the Prevention of Cruelty to Children, a father was prosecuted on a charge of neglecting his child, contrary to the Children Act 1908, sec. 12, and found "not guilty." Thereafter in an action of damages at his instance against the society the pursuer averred that at the date when the information was lodged the defender knew or ought to have known (1) that the child was well nourished and cared for, (2) that pursuer had been wrongfully deprived of the child's custody by his wife, and (3) that the pretended necessity for aliment for the child was a pretext on the part of his wife for obtaining money for herself to enable her to continue in resistance to his demand for delivery of the child. *Held* that the pursuer's averments of want of probable cause were insufficient to justify the approval of an issue, and action *dismissed.*

William Rae, wire worker, Musselburgh, brought an action of reparation against the Royal Scottish Society for Prevention of Cruelty to Children, Edinburgh, concluding for £750 damages.

The pursuer made the following averments:—"(Cond. 2) The pursuer is married, the marriage having taken place in Musselburgh on 8th April 1921, and there is one child of the marriage, viz., George Rae, who was born on 25th September 1921. The pursuer's wife left him on or about 25th February 1922 and went to live with her parents at 8 Bellfield Street, Glasgow. When she went to Glasgow as aforesaid she took with her the child of the marriage. On several occasions pursuer endeavoured to induce his wife to return to him but she refused to do so. On his wife's declining to return and live with him the pursuer did his utmost to obtain possession of his child but his wife refused to deliver it to him. Since the month of February 1922 the pursuer's wife has been in desertion, and has refused and still refuses to deliver up the said child to the pursuer. Admitted that on the eve of her desertion the pursuer and his wife had a quarrel. Explained that the quarrel was caused by her violent and jealous temper, and that she assaulted the pursuer and created a disturbance in the house. (Cond. 3) On or about 6th June

1922 a servant of the defenders, whose name is believed to be Murray, called for the pursuer at his house in Musselburgh. The said servant, after stating that he was an officer of the defenders, then in the presence of pursuer's mother Mrs Helen Craig or Rae and his brother John Rae, said to the pursuer—'I have come to see what provision you are going to make for the child you are neglecting in Glasgow,' or did use words of the like import and effect, meaning thereby that the pursuer was guilty of the criminal neglect of his said child. The said statement and accusation was false and calumnious and was made maliciously. The defenders' said servant in making the statement and accusation was acting within the scope of his authority and employment and in the defenders' interest. Pursuer informed said servant of the whole circumstances, and particularly that his wife had left him of her own accord and had taken said child with her, that he had endeavoured to induce his wife to return to him with the child, but she had refused to do so or to give up the child. The said servant of the defenders suggested that pursuer should go to Glasgow and get the child. (Cond. 4) A few days after the interview above mentioned the pursuer wrote to defenders' branch at 98 West George Street, Glasgow, with which he had been told by the said Murray to communicate, informing them of the circumstances and requesting them to arrange for his wife and child being at their said office in Glasgow on Saturday, 17th June, in order that pursuer might take them home with him. (Cond. 5) The pursuer went to Glasgow on said 17th June and called at defenders' offices at 98 West George Street aforesaid. There he was referred to defenders' offices in Montrose Street, Glasgow. At Montrose Street he saw another of the defenders' servants, whose name is believed to be Allan Docherty. The said servant notwithstanding the explanations and contradiction previously given by the pursuer repeated said accusation that the pursuer was neglecting his child. The said accusation was false and calumnious and was made maliciously. The defenders' said servant, who was acting at said interview within the scope of his authority and employment and in the defenders' interest, would hardly listen to pursuer's statements, and insisted in a demand that the pursuer should pay aliment. He took the pursuer into the office of his chief and asked how long the pursuer was to be given. The said chief officer stated that the pursuer had been given sufficient time, and the said Allan Docherty then told the pursuer that he would make him pay for both wife and child. The said statement that the pursuer was neglecting his child and the said threat were made, it is believed and averred, in support of the pursuer's wife and in furthering her policy of remaining in desertion of the pursuer. (Cond. 6) The pursuer thereafter went to see his wife and made one more attempt to obtain possession of the child, but his wife assaulted him and refused to give up the child. (Cond. 7) The defenders, or those for whom they are responsible, knew that the pursuer's child was well nourished and cared for, and further, that the pursuer had done all that he could to induce his wife to return to him and to obtain possession of the child and maintain it. Notwithstanding this knowledge the defenders, or those for whose actings they are responsible, on or about 17th June 1922 sent to the Procurator-Fiscal for the Lower Ward of the County of Lanark at Glasgow a written information to the effect that the pursuer 'did between 25th February 1922 and 17th June 1922, at 8 Bellfield Street, Glasgow, wilfully ill-treat and neglect him' (viz., the said child) 'in a manner likely to cause him unnecessary suffering or injury to his health by failing to provide him with adequate food, clothing, and bedding and lodging, con. Children's Act 1908, sec. 12.' The said information was given to the Procurator-Fiscal as aforesaid with a view to pursuer being apprehended and prosecuted. Further, on or about 22nd June 1922 two other servants of the defenders, whose names are unknown to the pursuer, called for the pursuer at his place of employment in Musselburgh, and repeated to the pursuer said false and calumnious accusation that the pursuer was neglecting his child. The said accusation was made maliciously, and the defenders' said servants in making it were acting within the scope of their employment and in the defenders' interest. The pursuer once more explained the whole situation to them, and they then threatened the pursuer with arrest. In consequence of said written information to the Procurator-Fiscal the pursuer was on 26th June 1922 arrested in Musselburgh by the local police on a warrant by the Sheriff Court of Lanarkshire at Glasgow, dated 20th June 1922, following on a complaint at the instance of the said Procurator-Fiscal which bore 'that being the father and having the custody or care of your child George Rae, aged eight months, you did between 25th February 1922 and 17th June 1922 at 8 Bellfield Street, Glasgow, wilfully ill-treat and neglect him in a manner likely to cause him unnecessary suffering or injury to his health by failing to provide him with adequate food, clothing, bedding, and lodging, contrary to the Children Act 1908, section 12.' Denied that the defenders acted in good faith and with reasonable grounds for believing the facts required police investigation. (Cond. 8) The pursuer was detained in the police cells at Musselburgh that night, and on the following day was taken to Glasgow by a police constable. On 28th June he was brought before the Sheriff-Substitute. The pursuer pleaded not guilty to the charge, and the Court adjourned the diet to 8th July and ordered pursuer to be detained in prison until that date. During these twelve days in prison he was not allowed to see either relatives or friends. (Cond 9) On said 8th July the pursuer was brought before Sheriff-Substitute Lyell. The only witness examined for the prosecution was the pursuer's wife, whose evidence was to the effect that she had been staying in Glasgow with the child

since February 1922, and that she had received nothing from pursuer in name of aliment either for herself or the child. In reply to Sheriff Lyell the said witness stated that it was she who had left pursuer and not pursuer who had left her. The pursuer was found not guilty. (Cond. 10) The conduct of the defenders or those for whom they are responsible in giving to the Procurator-Fiscal the information which resulted in the pursuer's arrest and imprisonment was wrongful and illegal. The said information was false and calumnious, and was further given maliciously and without probable cause. In giving it defenders' said servants were acting within the scope of their authority and in the defenders' interest. The defenders, or their representatives for whom they are responsible, knew not only that the said child was well nourished and cared for, and that the pursuer was innocent of any ill-treatment or neglect of his child, but that he had been wrongfully deprived of its possession and custody, and that he had done and was doing all in his power to obtain possession of it and exercise his paternal rights over it and on its behalf. They further knew or ought to have known that the pretended necessity for aliment for the said child was a pretext on the part of the pursuer's wife for obtaining money for herself to enable her to continue in resistance to the pursuer's demand for her return to him and for the delivery of the child into his care and keeping. . . ."

The pursuer pleaded, *inter alia*—"1. The defenders having through their said servants acting in the course of their employment and in the defenders' interest slandered the pursuer as condescended on, the pursuer is entitled to reparation therefor. 2. The pursuer having suffered, loss, injury, and damage by the wrongful and illegal conduct of the defenders or those for whom they are responsible, in giving maliciously and without probable cause false information to the Procurator-Fiscal as condescended on, is entitled to reparation."

The defenders pleaded, *inter alia* — "1. The pursuer's averments being irrelevant, the action should be dismissed. 2. The alleged statement complained of as slanderous having been made on privileged occasions, the defenders ought to be assoilzied. 3. The averments of the pursuer so far as material being unfounded in fact, the defenders ought to be assoilzied. 4. The information given by the defenders to the Procurator-Fiscal having been given in good faith and in a reasonable belief that it was true, and the communication of said information being in the circumstances privileged, the defenders should be assoilzied. 5. The defenders' servants having acted without malice and with probable cause in communicating with the Procurator-Fiscal, the defenders are entitled to absolvitor."

The pursuer proposed the following issues: —"1. Whether on or about 6th June 1922 and in or about the pursuer's house, 36 Market Street, Musselburgh, the defenders by one of their servants, whose name is believed to be Murray, in the presence and hearing of the pursuer's mother Mrs Helen Craig or Rae and his brother John Rae, falsely, calumniously, and maliciously said to and of and concerning the pursuer—'I have come to see what provision you are going to make for the child you are neglecting in Glasgow,' or did use words of the like import and effect, meaning thereby that the pursuer was guilty of the criminal neglect of his said child, which was then in Glasgow, to the loss, injury, and damage of the pursuer. 2. Whether on or about 17th June 1922 and in the defender's office at Montrose Street, Glasgow, the defenders by one of their servants, whose name is believed to be Allan Docherty, falsely, calumniously, and maliciously repeated to the pursuer the said accusation that the pursuer was neglecting his said child. 3. Whether on or about 17th June 1922 the defenders or those for whom they are responsible falsely, maliciously, and without probable cause informed, or caused information to be given to, the Procurator-Fiscal for the Lower Ward of the County of Lanark at Glasgow falsely accusing the pursuer to the following effect, viz., that the pursuer 'did between 25th February 1922 and 17th June 1922 at 8 Bellfield Street, Glasgow, wilfully ill-treat and neglect him' (*i.e.*, the pursuer's said child) 'in a manner likely to cause him unnecessary suffering or injury to his health by failing to provide him with adequate food, clothing and bedding, and lodging, con. Children's Act 1908, sec. 12,' to the loss, injury, and damage of the pursuer. Damages laid at £750."

On 5th April 1923 the Lord Ordinary (BLACKBURN) disallowed the issues and dismissed the action.

Opinion.—"The pursuer in this action is a wire worker who resides in Musselburgh, and in this action he sues the Royal Scottish Society for Prevention of Cruelty to Children for damages for alleged slander. Three separate issues are proposed by the pursuer and the defenders plead that they should all be refused on the ground of relevancy. The circumstances which give rise to the action are that the wife of the pursuer had left him on 25th February 1922 and gone to reside in Glasgow taking with her the infant child of the marriage. At this stage of the case I assume that the wife was in the wrong in acting as she did and that the pursuer did his best to persuade her to return. But I also assume that the pursuer declined to make any contribution of money for the support of the child in Glasgow. An averment by the defenders in answer 3 that this was the fact is not denied and the pursuer only avers on record that he was willing to receive the child in his own home at Musselburgh. A complaint was made to the defenders in Glasgow that the pursuer was not providing for his child, and an officer of the name of Murray, employed by the defenders, was sent on 6th June 1922 to make inquiries from the pursuer at his house in Musselburgh. It was on the occasion of this visit that the first slander complained of is alleged to have been uttered. The pursuer avers (condescen-

dence 3) that Murray said to him, 'I have come to see what provision you are going to make for the child you are neglecting in Glasgow,' and he innuendoes this as meaning that he 'was guilty of the criminal neglect of his said child.' This refers to the provisions of the Children's Act 1908, which provides by section 12 (1) that if any person who has the custody of a child wilfully neglects or abandons it he shall be guilty of a misdemeanour punishable by fine or imprisonment, and by section 12 (2) that a person may be convicted of an offence under this section notwithstanding that actual suffering or injury to health has been obviated by the action of another. It is further provided by section 38 (2) that any person who is the parent or legal guardian of a child shall be presumed to have the custody, and that as between father and mother the father shall not be presumed to have ceased to have the custody of the child by reason only that he does not reside with the mother and child.

"I think it is very doubtful whether the words here complained of can fairly bear the innuendo proposed to be put upon them, but it is unnecessary to decide this definitely as I am of opinion that the occasion on which they were uttered was a privilged one. This would appear to have been recognised by the pursuer who has inserted malice in all of his proposed issues although it was stated at the bar that no such admission was intended. I entertain no doubt, however, that inquiries made by the defenders in the discharge of their duties are made under circumstances which preclude the presumption of malice being the actuating motive, and accordingly that the occasion on which such inquiries are made is privileged. It may be that the duties with which the defenders have charged themselves have been undertaken by them voluntarily, but they are discharged in the public interest, and in my opinion are entitled to full recognition (see *Wallace James* v. *Baird*, 1916 S.C. (H.L.) 108). The occasion being privileged, the words here used, even if in excess of what the exigencies of the occasion demanded, are not in themselves evidence of express malice (*Lyal* v. *Henderson*, 1916 S.C. (H.L.) 167, *per* Lord Chancellor Buckmaster, p. 175), and there are no averments on record in connection with this alleged slander of facts and circumstances from which malice might be inferred. I was favoured with an exhaustive review of authorities on the question whether it is in every case necessary to aver facts and circumstances in order to justify an issue of malice, and I was asked to hold that in this case the bare averment that the language was used maliciously was sufficient. It is, I think, enough for me to say that in every case to which I was referred in which it was held necessary to include malice in the issue and in which an issue had been allowed, it was only on averments of facts and circumstances relevant to instruct antecedent malice, and I see nothing in the present case to justify me in departing from this practice. I am accordingly of opinion that the pursuer's averments are irrelevant to support the first issue.

"The second issue refers to a slander alleged to have been uttered by another of the defenders' officers, Allan Docherty, on the 17th June 1922, in the defenders' offices at Montrose Street, Glasgow. In condescendence 4 the pursuer avers that after the interview with Murray he wrote to the defenders at Glasgow explaining the circumstances and requesting them to arrange for his wife and child being at their office in Glasgow on Saturday the 17th in order that he might take them home with him. This averment is denied by the defenders, and at the debate pursuer's counsel referred to and read the letter which it was said had been sent by the pursuer to the defenders. Assuming that this letter may now be dealt with as forming part of the pursuer's case on the relevancy, it appears to me that it only partially supports his averments, and provides ample justification for the defenders going on with their inquiry. In the opening sentence it states—'I am quite prepared to have the child home here as I have a good home for him, as I know he wont be *properly looked after* where he is at present, and if she won't allow him to come here *I will refuse to support him while he is in Glasgow*, because she has told me in front of my people that I am not the father of her child.' The averments of what passed at this meeting are contained in the condescendence, where it is averred that 'The said servant, notwithstanding the explanations and contradiction previously given by the pursuer, repeated said accusation that the pursuer was neglecting his child.' The actual words used by Allan Docherty are not given, there is no innuendo as to their meaning, and it is not averred that the previous explanation and contradiction given by the pursuer to Murray verbally or to the defenders in writing had ever been communicated to him. For these reasons alone I should have held the averments irrelevant to support an issue of slander, but it is sufficient to say that in my opinion this occasion was also privileged and that there are no averments of facts and circumstances from which antecedent malice could be inferred.

"The third issue relates to the fact that on or about the same date the defenders lodged with the Procurator-Fiscal a written information to the effect that the pursuer had been guilty of ill-treating and neglecting his child, &c., contrary to the Children's Act 1908, section 12. The issue sets out that this was done 'falsely, calumniously' (this latter word was inserted in the issue by request of pursuer's counsel at the debate), 'maliciously and without probable cause.' In my opinion the letter founded on by the pursuer in itself provided sufficient probable cause for the action taken by the defenders, and their action in reporting the matter to the Fiscal is also protected by privilege. The only averment of facts and circumstances which suggests antecedent malice is contained in the condescendence, where it is said that the defenders 'knew or ought to have known' that the pretended necessity of aliment for the child was a pretext on

the part of his wife to obtain money for herself. In my opinion the defenders are entitled to have this averment construed as amounting to no more than that they 'ought to have known' of this scheme on the part of the wife, and this does not appear to me to be sufficient to instruct antecedent malice.

"I shall accordingly refuse all three issues."

The pursuer reclaimed, and argued—The defenders were liable for verbal slanders uttered by their servants in the course of their employment — *Finburgh* v. *Moss' Empires, Limited*, 1908 S.C. 928, 45 S.L.R. 792; *Ingram* v. *Russell*, 20 R. 771, *per* Lord President Robertson at p. 776 and Lord M'Laren at p. 777, 30 S.L.R. 699; *Percy* v. *Glasgow Corporation*, 1922 S.C. (H.L.) 144, *per* Lord Haldane, L.C., at p. 151 and Lord Finlay at p. 152, 49 S.L.R. 313. The use of the word "neglect," according to its fair construction, was an imputation of criminal conduct. That being so, all the pursuer had to do was to state distinctly the libellous meaning which he attached to the word—*Sexton* v. *Ritchie*, 17 R. 680, *per* Lord President Inglis at p. 685, 27 S.L.R. 536; *James* v. *Baird*, 1916 S.C. (H.L.) 158, *per* Lord Buckmaster, L.C., at p. 161 and Lord Kinnear at p. 165, 52 S.L.R. 14. The occasions were not privileged. In any event the pursuer had made a sufficient averment of facts and circumstances inferring malice and want of probable cause—*Rae* v. *Linton*, 2 R. 669, 12 S.L.R. 398; *Denholm* v. *Thomson*, 8 R. 31, 18 S.L.R. 11; *Brown* v. *Fraser*, 8 F. 1000; *Macdonald* v. *M'Coll*, 3 F. 1082, *per* Lord President Balfour at p. 1084, 38 S.L.R. 781; *Buchanan* v. *Coporation of Glasgow*, 7 F. 1001; *Suzor* v. *M'Lachlan*, 1914 S.C. 306, *per* Lord President Strathclyde at p. 312, 51 S.L.R. 313; Cooper on Defamation, p. 196.

Argued for defenders—There was nothing on the face of the record to show that the defenders' servants when they made the statement attributed to them were acting within the scope of their employment, and the action therefore was irrelevant—*Riddell* v. *Glasgow Corporation*, 1911 S.C. (H.L.) 35, 48 S.L.R. 399; *Cameron* v. *Yeats*, 1 F. 456, *per* Lord Justice-Clerk Macdonald at p. 463, 36 S.L.R. 330; *Eprile* v. *Caledonian Railway Company*, 1898, 6 S.L.T. 65. If the third issue were disallowed the refusal should extend also to the first and second issues, as these merely led up to the third — *Chalmers* v. *Barclay, Perkins, & Company*, 1912 S.C. 521, 49 S.L.R. 465; *Hassan* v. *Paterson*, 12 R. 1164, 22 S.L.R. 775; *Ferguson* v. *Colquhoun*, 1862, 24 D. 1428. Further, the occasions were privileged, and the pursuer had not averred facts and circumstances sufficient to infer malice — *James* v. *Baird* (*cit.*); *Lightbody* v. *Gordon*, 9 R. 934, 19 S.L.R. 703; *Ingram* v. *Russell* (*cit.*), *per* Lord President Robertson at p. 777; *Lyal* v. *Henderson*, 1916 S.C. (H.L.) 167; *Mills* v. *Kelvin and James White, Limited*, 1913 S.C. 521, *per* Lord President Dunedin at 532, 49 S.L.R. 725; *Jenoura* v. *Delmege*, [1891] A.C. 73.

LORD PRESIDENT (CLYDE) — The questions presented by this reclaiming note are examples of the difficulty which besets the prosecution of philanthropic objects, such as those to which the defenders' Society is devoted, when the means adopted involve the interference of its officials in the private affairs of third parties.

The pursuer proposes three issues—two of slander and one of wrongous complaint to the Procurator-Fiscal — based on condescendences 3, 5, and 7 respectively.

According to the pursuer, his wife had left him early in 1922, and was living with her mother in Glasgow along with the only child of their marriage, and persistently refused either to return to him or to deliver the child to his care. While this state of matters continued one of the defenders' servants called upon him at his house in Musselburgh and said to him in the presence of his mother and brother—"I have come to see what provision you are going to make for the child you are neglecting in Glasgow." Taking the pursuer's account of the interview as correct—which of course we are bound to do at this stage of the case —this does not strike one as a tactful introduction to the discussion of a delicate subject. But the pursuer goes on to aver that he explained the position in which he and his wife and child were at the time, and that the interview ended by a suggestion on the part of the defenders' servant that the pursuer should go to Glasgow and get the child. Now the pursuer does not maintain that the statement made by the defenders' servant to the effect that he was neglecting his child in Glasgow was in itself slanderous. But he seeks to put upon it this innuendo—"Meaning thereby that the pursuer was guilty of the criminal neglect of his child." So far as the words actually used go, I do not think any reasonable person could draw any imputation of criminal conduct from them, and this view is strongly supported by the circumstances of the interview in the course of which they were used, as those circumstances are averred by the pursuer. For the whole outcome of the interview was a suggestion that the pursuer should see his wife in Glasgow and get the child from her, and while no doubt the implication was that in allowing the child to be kept away from him the pursuer was failing to perform his parental duty as the child's proper custodier, this seems to me to be remote from any suggestion that the pursuer had rendered himself amenable to the criminal law.

I confess that I was at first moved by the view Mr Garrett presented, that the incidents which form the subject of the second and third issues might be used to throw light upon the true character of the incident which forms the subject of the first. I think this view might have been taken but for the circumstance that the pursuer's own account of the first incident cuts it so completely off from what occurred eleven days later. As I have said, an accusation of neglect of parental duty, the outcome of which is a suggestion that the pursuer should go to Glasgow and see his wife and

in that way try to mend the breach in his domestic life and bring the child home with him, is far from any idea of a charge of conduct inferring crime. The Lord Ordinary rested his refusal of the first issue on privilege. I prefer to base mine on the absence of any relevant averment of slander, and it is not therefore necessary for me to consider the question of privilege.

The next incident on which the second issue is founded occurred eleven days later, and took place in the defenders' Glasgow office. The pursuer alleges that he had written to the defenders requesting them to arrange for his wife and child being at the office on the day in question, with a view to his taking them both home to Musselburgh. This was in pursuance of the suggestion made by the defenders' servant at the first interview. It is necessary to explain—anticipating for a moment—that this interview took place on the same day as the third incident of which the pursuer complains, namely, the lodging with the Procurator-Fiscal of a criminal information against him. The pursuer's case about this interview is that the same charge of neglect—which is innuendoed as before—was repeated. The innuendo—supposing it to be a reasonable one in the circumstances averred by the pursuer with regard to this second interview—infers the imputation to the pursuer of a crime, and this imputation the pursuer describes as "a threat"—a threat, that is to say, that steps would be taken to bring the pursuer's conduct to the notice of the criminal authorities. The pursuer is entitled to have all this assumed in his favour. But his case is that information was lodged by the defenders with the Procurator-Fiscal on the same day charging him with an offence under section 12 of the Children Act 1908 (8 Edw. VII, cap. 67). That being so, it would be impossible to approve of both the second and the third issues. A charge of crime (including a threat of criminal information), followed by the actual lodging of the criminal information (which I assume to be wrongous), do not constitute two separate wrongs. They are only two stages in the commission of one wrong. In this view the case is indistinguishable from a number of decided cases of which *Chalmers* v. *Barclay, Perkins, & Company* (1912 S.C. 521) is the most recent. In that case an interval of a couple of months intervened between the threat and the information. This case is so far *a fortiori* that an interval of only an hour or two intervened. In this view the second issue must stand or fall with the third. But it may still be that article 5 of the pursuer's condescendence contains some independent matter of complaint—independent, that is, of an intimation or threat of intention to lodge a criminal information with the Procurator-Fiscal. When article 5 is examined it is found to contain a very distinct statement on the pursuer's part of what the defenders' servants said and did. The pursuer says that "they insisted in a demand that the pursuer should pay aliment," that they told him he "had been given sufficient time," and that they "would make him pay for both wife and child." Finally, the pursuer says that this was done by the defenders "in support of the pursuer's wife and in furthering her policy of remaining in desertion of the pursuer." It was matter of admission by the pursuer at the bar that he was not in fact contributing anything to the support of either wife or child. This admission was properly made, for although the pursuer does not expressly make it on record, it is implied in his statement in article 10 that the necessity for aliment was only a "pretended" one. Apart from the alleged threat of criminal information, there is no issuable matter in all this, however wrong or imprudent it may have been for the Society's servants to take sides with the wife—if they did take sides with her—in the domestic differences which had arisen between the pursuer and her.

On the third issue (the most serious of the three) I have felt the case to present some difficulty. The defenders' Society lodged a criminal information, and in the prosecution which followed the pursuer was found not guilty. The pursuer says in article 9 of his condescendence that "in reply to Sheriff Lyell the said witness [namely the pursuer's wife] stated that it was she who had left pursuer and not pursuer who had left her. The pursuer was found not guilty." Now there is no doubt that in lodging the information the defenders were protected by the privilege enjoyed by persons who act in accordance with a sense of duty in informing the criminal authority of a matter proper for its cognisance. But the pursuer pleads malice and want of probable cause, and founds on two averments, one at the beginning of article 7, and the other in article 10. No point was made on the averments regarding a final interview between the pursuer and two other servants of the defenders (five days after the criminal information was lodged, and two days after the issue of a warrant for the pursuer's arrest by the Sheriff Court of Lanarkshire), at which the pursuer says the servants in question threatened him with arrest. I mention this not because I think any useful point could have been made on it, but lest it should be supposed that it had been overlooked. The statement in article 7 is in these terms—"The defenders . . . knew that the pursuer's child was well nourished and cared for, and further, that the pursuer had done all that he could to induce his wife to return to him and to obtain possession of the child and maintain it." The statement in article 10, so far as not consisting in a repetition of what has been quoted from article 7, is as follows:—"The defenders . . . knew . . . that the pursuer was innocent of any ill-treatment or neglect of his child, but that he had been wrongfully deprived of its possession and custody. . . . They further knew or ought to have known that the pretended necessity for aliment for the said child was a pretext on the part of the pursuer's wife for obtaining money for herself to enable her to continue in resistance to the pursuer's demand for her return to him and for delivery of

the child into his care and keeping." These are averments of want of probable cause, but it is well settled that absence of probable cause may in itself be proof of malice. The question is, are they sufficient to justify the approval of an issue?

The argument for the pursuer was that, seeing the defenders were fully aware of the separation between the pursuer and his wife, and that the prosecution failed as soon as it was proved that the separation was caused by the wife's refusal to live with him, the defenders had—and knew that they had—no probable cause for informing the Procurator-Fiscal of any alleged neglect on the pursuer's part under section 12 of the Children Act 1908 (8 Edw. VII, cap. 67). But, assuming the truth of all the pursuer's statements, it by no means follows that the defenders had no probable cause for the information laid by them. I have not the slightest intention of expressing any opinion with regard to the precise meaning of the involved provisions of section 12 (1) of the Act (particularly the latter part thereof), and of the relative interpretation clause, section 38 (2) (particularly the latter half of the first paragraph). But it is impossible to read these sweeping enactments without perceiving that the defenders had at any rate a probable cause—whether it should turn out to be successful or not—for charging the pursuer with neglect likely to cause unnecessary suffering or injury by failing to provide food and lodging, even though no actual but only constructive injury was a likely result of such failure, and even though the child was actually in the custody of a wife who was residing apart from him. There is nothing that I know of to prevent the probability of a cause from being dependent, wholly or partly, upon a difficult question of statutory construction. As I have said already, it was matter of admission at the bar that the pursuer was not in fact supporting the child or in any way contributing to its support.

In these circumstances, although I am disposed to feel some sympathy with the pursuer's case—for on his own showing at least he has been hardly used—I think we should affirm the Lord Ordinary's interlocutor refusing the issues proposed.

LORD SKERRINGTON—Your Lordship has so clearly and so fully expressed my views in regard to each of the three issues proposed by the pursuer as to make any further statement by me unnecessary. I do not, however, think that the case is one of difficulty in spite of the able argument addressed to us by Mr Garrett. As regards the innuendo suggested by the pursuer in his first issue, the Court ought in my opinion to resist the attempts of litigants in slander actions to seize possession of ordinary and innocent words of the English language in order to impose upon them a sinister meaning in the absence of an averment of special circumstances which might entitle a jury to adopt such a construction.

LORD CULLEN—I concur.

LORD SANDS—I agree. This case turns on the word "neglect." Now to use such a word in the presence of strangers to the facts of the case might be one thing, to use it in the presence of those who presumably know all the facts is another. In the former case it might suggest an allegation of something sinister, but in the latter it is the mere expression of the opinion of the party uttering the words upon the facts which are known to both parties. I can quite conceive that a word might be so odious that even if applied to known facts, such as the word "steal" or "thief," it might be regarded as slanderous. But I should have great difficulty in holding that the use of the word "neglect" as applied to facts known to both parties is a slander. I am of opinion that the first issue fails.

For the reasons that your Lordship has indicated I think the second issue also falls to be disallowed.

In regard to the third issue, these cases are sometimes argued as if the person who gives information to the proper authority in regard to a suspected offence was in the position of the English prosecutor who follows the matter out and insists on a conviction. I take the giving of the information to be no more than the lodging of the information with the person who is the proper authority with a suggestion that he should investigate the matter, and if he finds that there are sufficient grounds, that he on his own responsibility should prosecute. In the present case the slander is said to consist in the statement that the pursuer failed to provide his child with adequate food, clothing, and bedding. As a matter of fact he was not providing his child with food, clothing, and bedding. There might be an explanation of this, and when that explanation was given there might be a difference of opinion with regard to the legal effect under statutory law. I do not think absence of probable cause can be pleaded when what occurred was really that information such as is here in question was put before the proper authority with the remark—"We think you should look into this." I accordingly think this issue ought also to be disallowed.

The Court adhered.

Counsel for Pursuer — Gentles, K.C. — Garrett. Agent—John Anderson, Solicitor.

Counsel for Defenders — Watt, K.C. — Hunter. Agent—Harold Alexander, W.S.