tor, to which we should substantially revert, recalling the interlocutor of the Sheriff.

The other Judges concurred.

Agents for Appellants—W. & J. Burness, W.S.
Agent for Respondent—A. Gifford, S.S.C.

Tuesday, June 28.

MELDRUM *v.* HORSBURGH.

Road—General Turnpike Act—1 and 2 Will. IV., c. 43—Avenue. A proprietor *held* not entitled at his own hand to shut up a road which Road Trustees had used for four or five years immediately preceding (and also at a former period within forty years), under the General Turnpike Act (1 and 2 Will. IV., c. 43, sec. 80), on the ground of a change of circumstances having brought the road within the statutory exemption of avenues, without having first obtained a judicial recognition of the change of circumstances.

This case related to the right of Turnpike Road Trustees to use a private road for carting materials to repair the roads under their trust.

The action originated in a petition presented in May 1869 to the Sheriff of Fife by Mr Horsburgh, Clerk to the Trustees of the Turnpike Roads in the district of Cupar, and acting on their behalf, against Mr Meldrum the proprietor of Easter Craigfoodie. The petition set forth that in virtue of the powers given by the 80th section of the General Turnpike Act (1 and 2 Will. IV., c. 43), the Road Trustees had for years past been in use to obtain materials from quarries on the estate of Wester Craigfoodie, and to convey the same by a road which leaves the Cupar and Dundee road at the west end of the village of Daisie Muir, and passes between the houses of Easter and Wester Craigfoodie to the quarries; that in the autumn of 1868 Mr Meldrum had obstructed the road by building two walls across it. Warrant was sought to have the obstructions removed, and interdict craved against Mr Meldrum preventing the ingress and egress of the trustees.

The circumstances were as follows:—It appears that the Road Trustees had formerly worked Wester Craigfoodie quarry, but had left it about thirty years ago. In 1864 they resumed their use of the quarry and road, and continued this use till August 1868. Till 1867 Wester Craigfoodie was the property of Mr Fortune. Part of the road went through his property, and the remainder was used by him as an access to his house and steading. Mr Meldrum averred that the solum of this part of the road was in his property, and that Mr Fortune's use was in virtue of a servitude over it in favour of Wester Craigfoodie. It also appears that certain feuars have right by their charters to take stones from the quarry. In 1867 Mr Fortune sold his estate to Mr Cheape, the proprietor of the neighbouring lands of Fingask, who soon after sold a small portion, including the house and steading of Wester Craigfoodie, to Mr Meldrum. At the same time the former renounced all right of property, servitude, or other right over the road. Soon after Mr Cheape completed a new road for the use of his own lands. In May 1868 Mr Meldrum intimated to Mr Horsburgh, as clerk to the trustees, his intention of shutting up the road. In August of that year he proceeded to build two walls across the road, and to plant the intervening space. The subject was laid before the trustees in September 1868. Some communication followed with Meldrum, in which they made an ineffectual attempt to induce him to allow their accustomed access. Accordingly, in May 1869 they presented the petition before mentioned, in name of their clerk.

The Sheriff-Substitute (BEATSON BELL) repelled the defences, and ordered Mr Meldrum to remove the obstructions under certification. His Lordship added the following note to his judgment:—

"*Note.*—The section of the Act of Parliament under which road trustees have power to enter enclosed lands (1 and 2 Will. IV., c. 43, section 80), is a very stringent one. There is no doubt, however, that the trustees, in the exercise of these powers, are subject to the control of a court of equity (*per* Lord President in *Yeats* v. *Taylor*, 9th January 1863, 3 Macph. 224). It might, therefore, very well be that, upon a proper application to a competent Court, the trustees might have been restrained in their use of the respondent's avenue in consideration of the change of circumstances arising out of the transaction with Mr Cheape, provided it could be shown that another convenient access to the quarry was available. But the Sheriff-Substitute thinks that the respondent was in error in supposing that the trustees' right was put an end to in the termination of the servitude in favour of Mr Cheape; and if so, it seems clear that the respondent could not, at his own hand, and by physical obstructions, prevent the trustees from continuing their former use of the road. The act of the respondent was an attempt violently to invert the possession, and whatever remedy may be open to him, it is thought that matters must at once be restored to their former state."

The Sheriff (MACKENZIE) adhered.

Mr Meldrum appealed to the Court of Session.

SOLICITOR-GENERAL and BALFOUR, for him, argued, that the road was an avenue, and therefore protected by statute from the operations of the trustees. They contended that the 80th section of the General Turnpike Act gave no right to the trustees to convey materials over an avenue, even though they had previously been in use of it. The demand of the trustees was unreasonable, as they could get access to the quarry by Mr Cheape's new road.

MONRO and GILLESPIE, for respondent, answered, that the trustees were entitled to be continued in the use of the road which they had enjoyed for some years: that by the 96th section of the Act the appellant had no right to close the road without explicit consent from them, and without judicial authority, that the road was not an avenue in the sense of the statute; and that, even if it was, the limitation to the exemption applied, "unless where materials have previously been in use to be taken by the said trustees."

The Court did not consider it necessary to go very narrowly into the construction of the Act. The evidence showed that up to 1867 the road could not be considered an avenue in the sense of the statute. It was an access common to two properties, whatever may have been the exact legal rights of the parties. Admittedly the proprietor of Wester Craigfoodie had a right to use it as an access to his house and steading. The privacy of the road was clearly not such as to exclude the trustees on the ground of its being an avenue in the sense of the statute. In 1868 the trustees were in lawful possession of the road, and the appellant should have obtained a judicial recognition of the

change of circumstances before he took upon himself to close the road without consent of the trustees.

The appeal was accordingly dismissed, with expenses.

Agents for Appellant — Jardine, Stodart & Frasers, W.S.

Agents for Respondent—Melville & Lindesay, W.S.

Tuesday, June 28.

FIRST DIVISION.

STEWART *v.* KYD.

Malice—Slander—Privilege—Procurator—Trial. In an action of damages for slander, uttered by the defender while acting as procurator during the course of the trial of a cause before the Sheriff-court of Perthshire, *held* that malice must be put in issue.

This was an action of damages for slander at the instance of Alexander Stewart, farmer, Moulinarn, Perthshire, against George Kyd, solicitor, Perth. The defender acted as agent for the pursuer in an action of breach of promise against the defender's son John Stewart. The pursuer alleged that the proof in said action was taken before Sheriff Barclay at Perth, on Wednesday the 22d of December 1869. After some evidence had been led, the defender, acting as Miss Scott's agent, adduced the pursuer as a witness. The pursuer was put upon oath, and his examination had just commenced when the following question was put to him by the defender, "Did not the minister or any of the office-bearers tell your son, in your presence, that he had behaved to Miss Scott like a scoundrel?" The pursuer answered "No" to this question; and Mr M'Leish, the agent on the other side, having observed upon it, "That's quite unnecessary, my Lord—just a little newspaper sensation," the defender then made the following statement, or used words to a similar effect:—"I want the truth, and I don't expect it from this man, or from any of his clan." The following issue was proposed by the pursuer:—

"Whether the defender, in open court, at Perth, on 22d December 1869, when the pursuer was adduced and put on oath as a witness for Miss Catherine Scott, in an action at her instance against John Stewart, did falsely and calumniously say of and concerning the pursuer, 'I want the truth, and I don't expect it from this man, or any of his clan,' meaning that the pursuer was not speaking the truth as a witness, and was an untruthful person, to the loss, injury, and damage of the pursuer?"

Damages laid at £500.

The Lord Ordinary (ORMIDALE) approved of this issue. In a note his Lordship said—"The defender objected to the pursuer's issue as now approved of, on the ground that it ought to contain a charge of malice, in respect that, on the pursuer's own showing, the case belongs to the privileged class. It may turn out, when the facts are fully expiscated at the trial, that the defender, when he uttered the slanderous expressions in question, was protected by privilege; but at present, and looking at the case as it is stated by the pursuer, the Lord Ordinary is not satisfied that the defender is entitled to any privilege. It does not appear from the pursuer's statements that the defender, when he uttered the expressions complained of, was in the course of addressing the Sheriff on the import of the proof,—that indeed could not be, for the proof was not concluded; or that he was in the course of objecting to the admissibility of the pursuer as a witness,—that indeed could not be, as the pursuer was adduced as a witness by the defender himself; or that he was in the course of objecting to or supporting the admissibility of any question,—and that could not be, as the only question to which the expressions complained of can be said to have had any relation had been put and answered without objection. In short, the Lord Ordinary cannot see, from the statements of the pursuer—which, of course, he undertakes to prove—that the defender was, when he uttered the expressions complained of, in the exercise of any right, or discharge of any duty, professional or otherwise. On the contrary, it rather appears to the Lord Ordinary at present, and judging solely, as he is bound to do, from the pursuer's own statement, that the defender, in uttering these expressions, went beyond his right and duty, and rashly and publicly made a slanderous observation regarding the pursuer, which neither had, or could have had, any bearing or effect on the cause in which he was at the time engaged as agent for one of the litigants. It may be that the defender acted at the moment on some provocation given him by an irregular remark of the opposite agent, but that cannot be held to excuse him in making an unjustifiable attack in open court upon the pursuer, whom he had just commenced examining as a witness for his own client. The Lord Ordinary thinks, therefore, that the pursuer is entitled to an issue in the form of that now approved of. It may, however, as the Lord Ordinary has already remarked, turn out at the trial that the defender was privileged in what he said,—and the Lord Ordinary is not to be understood as prejudging that view of the matter in the slightest,—in which event he will be entitled to the benefit of his plea of privilege, just as if the pursuer expressly charged malice against him in the issue. (See *M'Bride* v. *Williams & Dalziel*, 28th January 1869; 7 Macph. 427.) The defender therefore cannot, in the end, suffer any injury by the course which has now been taken should it appear at the trial that, in uttering the expressions complained of, he was in the exercise of his right, or discharge of his duty, as a professional man, acting on behalf of a litigant.

"No objection was taken to the terms of the pursuer's issue, assuming that he is not bound to insert in it a charge of malice against the defender."

The defender reclaimed.

STRACHAN for him.

SOLICITOR-GENERAL and LANCASTER in answer.

At advising—

LORD PRESIDENT—The scene of this slander was the Sheriff-court of Perthshire, and the occasion the trial of an action of breach of promise at the instance of Catherine Scott against John Stewart. The cause was in course of trial, and the defender in this action was acting as procurator for Miss Scott, when the words which are the cause of this action were used. It is quite clear, therefore, that the defender was acting professionally, and was invested with a character which gave him privilege. It remains to be seen when evidence is led whether the expressions used will be justified by profes-