adjudging "two parties, and each of them, to pay 10s. of penalty, with £6 of expenses," *sustained.* Opinion that it might be read as containing a several adjudication for penalty, and a joint adjudication for expenses. Objection that warrant to imprison could not issue for 14 days, repelled under sec. 15 of Summary Procedure Act.

In December 1867, a complaint was presented under the Summary Procedure Act, in the Sheriff Court of Elgin, against David Macdonell junior, and John Macleod, charging them with contravention of the first section of the Act 7 & 8 Vict., c. 95, "An Act to amend an Act of the ninth year of King George the Fourth for the Preservation of the Salmon Fisheries in Scotland." "Whereby the said complainers, the said Donald Macdonell junior, and John Macleod, and each of them, were liable on conviction to forfeit and pay a sum or penalty not less than ten shillings, and not exceeding five pounds, together with expenses; to be recovered, failing payment, within fourteen days after conviction, by poinding and imprisonment, for a period, at the said Sheriff's discretion, not exceeding six months, in terms of the said Act 7th and 8th Victoria, and the said Act 9th George Fourth, or otherwise to be recovered by immediate imprisonment for a period, at the said Sheriff's discretion, not exceeding six months, in terms and by virtue of 'The Summary Procedure Act 1864.'"

The complainers appeared, and, after evidence, were convicted, the conviction being in these terms: "The Sheriff, in respect of the evidence adduced, convicts the said Donald Macdonell junior, and John Macleod, of the contravention charged, and therefore adjudges them, and each of them, to forfeit and pay the sum of ten shillings of modified penalty, with the sum of six pounds of modified expenses, and in default of immediate payment thereof, adjudges them, and each of them, to be imprisoned in the prison of Nairn for the period of twenty days from the date of their imprisonment respectively, unless the said sums shall be sooner paid; and grants warrant to officers of Court to apprehend them and convey them, and each of them, to the said prison, and to the keeper thereof to receive and detain them accordingly.

The complainers now suspended on the grounds, *inter alia*, (1) that this conviction inflicted a joint and several penalty on the complainers, and also sentenced them to a joint and several imprisonment, under which either of the complainers is or could be made to suffer punishment for the crime of the other, (2) and that warrant for immediate imprisonment was incompetent.

Scott for complainers.

Gifford for respondent.

Lord Ardmillan—My only difficulty is as to the effect of the decerniture for expenses, and on that point I think the contention of the complainers, though ingenious, was unsound. Expenses are not consequent necessarily on the penalty. They are not part of the penalty. Power is given to the Judge by the Act, to add a decerniture for expenses if he think fit. A question might be raised whether this was an award of £6 of expenses against one party or against two. The prosecutor only claims the sum as against two, and I think the Court would read it in the same way. I cannot say that the way in which the decerniture for expenses is expressed is fatal to the conviction. The award of expenses must be read in the lightest way, As to the other objection, I am clear that the Summary Procedure Act was constructed to remedy this very objection, that under the former Act a party might go off at the end of the 14 days, and defy the law, and it is impossible to say that the same evil now exists, notwithstanding the express of the Statute.

Lord Jerviswoode concurred.

Lord Cowan—As to the first objection, there is undoubtedly considerable difficulty in reading the conviction. We are not, indeed, to give a conjectural meaning to the words which they will not fairly bear, but I think we are to read them in a reasonable way, and looking to the fact that expenses are given under a distinct section of the Act, I think we may fairly read the conviction as containing one adjudication against the parties severally, for a penalty, and another adjudication against them jointly for expenses. As to the other objection, I think that is disposed of by the 19th section of the Act, which provides for immediate imprisonment.

Conviction sustained.

Agents for Complainers—Macgregor & Barclay, S.S.C.

Agents for Respondent—Gibson, Craig, Dalziel, & Brodies, W.S.

COURT OF SESSION.

Tuesday, March 10.

FIRST DIVISION.

BROOMFIELD *v.* GREIG.

Reparation — Slander — Inuendo — Issue. Issues founded on statements by the defender, to the effect that the bread baked by the pursuer was unwholesome, *disallowed.* Issues containing inuendo that the pursuer kept adulterated flour on his premises, *allowed.* (*diss* Lord Deas).

This was an action of damages for slander, at the instance of Robert Broomfield, baker, South Queensferry, and member of the town council of the burgh, against David Greig, surgeon, and provost of the said burgh.

The following issues were proposed by the pursuer:—

"1. Whether, on or about 1st August 1867, within or near the Council Chambers of the burgh of South Queensferry, the defender did, in the presence and hearing of David Hill, provision merchant, South Queensferry, Charles Moir, residing there, and William Russell, builder there, or of one or more of them, falsely and calumniously say, that the bread baked by the pursuer was injurious to the health of those who consumed it, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

"2. Whether, on or about 2d August 1867, in or near the High Street of said burgh, and at or near the part thereof opposite the house occupied by the said David Hill, the defender did, in the presence and hearing of the said David Hill, and of William M'Arthur, carpenter, South Queensferry, or of one or other of them, falsely and calumniously say, that the bread baked by the pursuer was poisonous and unfit

for human food, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

"3. Whether, on or about 9th September 1867, and within or near the Council Chambers aforesaid, the defender did, in the presence and hearing of the said David Hill, William Russell, and Charles Moir, or of one or more of them, falsely and calumniously say, that the bread baked by the pursuer was injurious to the health of those who consumed it, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

"4. Whether, on or about 3d October 1867, and within or near the Council Chambers foresaid, the defender did, in the presence and hearing of the said Charles Moir and others, falsely and calumniously say, that it would be very much in favour of the defender's business, as a surgeon, if the pursuer were allowed to continue baking such bread as the pursuer had been in use to bake, (meaning thereby, that the pursuer's customers would contract disease by consuming the bread baked by the pursuer,) or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

"5. Whether, on or about 3d October 1867, and within or near the Council Chambers foresaid, the defender did, in the presence and hearing of the said Charles Moir and others, falsely and calumniously say, that the defender would probably have the pursuer's premises examined, as, according to the law, peace-officers might by warrant search bakers' premises, and if any adulterated bread or flour was found, the same might be seized and disposed of (meaning thereby that the pursuer kept, in violation of the law, adulterated bread or flour in his premises), or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?

Damages laid at £500 sterling.

The Lord Ordinary reported the case on the issues.

Gifford and Black for pursuer.

Clark and Johnston for defender.

At advising—

Lord President—As regards the first, third, and fourth issues, I am very clearly of opinion that they do not embody any actionable matter at all. What the pursuer undertakes to prove in the first and third, is, that the defender said that the bread baked by the pursuer was injurious to those who consumed it; and, in the fourth issue, that the defender said that it would be very much in favour of the defender's business if the pursuer were allowed to continue baking such bread. That is the same as the other two issues, and means that the bread was injurious to the health of those who consumed it. It would be a very serious doctrine for society if that were held to be defamatory, so as to found an action of damages. I think it is a perfectly fair statement to make. If a man is of opinion that the bread baked by a particular baker is bad, he is not only entitled to leave off taking it himself, but he may recommend his friends to do the same; and he has no better way of doing that than by saying that he thinks the bread is unwholesome. As to the second issue, that only differs from the others in this respect, that the words in it are "poisonous and unfit for human food." Now, if the pursuer had been prepared to say that these words were used as meaning that the bread was calculated instantly to destroy human life, that would have been an allegation of a different kind from the others; but it was conceded in argument that nothing more was intended than to convey, by a strong form of expression, the idea that the bread was unwholesome. I think therefore that we must disallow all four issues.

But there remains the fifth issue, and that stands in a different position. The allegation of the pursuer is, that the defender said he would probably have the pursuer's premises examined, as, according to the law, peace-officers might, by warrant, search bakers' premises; and if any adulterated bread or flour was found, the same might be seized and disposed of. These words standing alone, are not actionable. In their ordinary meaning they convey no imputation at all. The defender being in the position of chief magistrate of this burgh, was entitled to say that he would have any such premises examined, being, according to law, entitled to do so. But the pursuer affixes a special and non-natural meaning to these words by the inuendo, ('meaning thereby that the pursuer kept, in violation of the law, adulterated bread or flour in his premises.') An allegation that a baker kept adulterated bread or flour in his premises is, I think, actionable. Why I distinguish this from the other issues is, that to say that a baker keeps adulterated bread, is to impute dishonesty to him; and that is plainly actionable. The only question is, whether this inuendo, in the circumstances, and in the state of the record, is admissible, for some inuendos are so unreasonable and forced that it would not do to allow them to go to a jury. It is necessary that the inuendo should not be glaringly inconsistent with the words uttered. Now, there is nothing here violently repugnant to the words used: the words are only something short of the meaning intended to be put on them at the trial, and it is easy to suppose that the surrounding circumstances, things said by others at the meeting, things said by the speaker himself in other parts of his speech, and even the tone of voice of the speaker, may all contribute to give a meaning to the words. This inuendo, I think, makes the matter actionable. Whether the pursuer will succeed in his action or not, is a question which it will be for the jury, and not for the Court, to consider.

Lord Curriehill—I am of the same opinion.

Lord Deas—I agree with your Lordship as to the first four issues. There is some difficulty as to the word "poisonous," in the 2nd issue, but it is not alleged by the pursuer that these words were used as meaning anything more than that the bread was unwholesome, and that issue, therefore, comes under the same category as the other three. The case simply comes to this, that the pursuer used a strong expression in saying that the bread was unwholesome. He is not said to have had any particular motive for saying that, on the contrary he is reported to have said that his business would be promoted by the sale of unwholesome bread. Taking these allegations together, they come to this, that the baking of that bread was bungled. I agree with your Lordship that, looking to a reasonable freedom of speech on such matters, it would be a very strong thing to say that an action of damages would lie for words like these. And that rather leads me to think that the 5th issue should be refused also. I cannot well see how we can admit it, consistently with our rejection of the others. I agree with your Lordship that the in-

uendo must be reasonable. The pursuer is not entitled to go to the jury with an unreasonable construction of language. I do not think the pursuer puts a reasonable construction on the words here. It is alleged that the defender said he would probably have the pursuer's premises searched. Nothing more than that. I don't think that can reasonably be held to amount to an allegation that in point of fact he had adultered bread or flour in his premises. There was some probability that he might have; but that was all. Another difficulty I have is, that suppose he said that the flour was adulterated, that is nothing more than he had said already. If the bread was unwholesome, it was adulterated. If it is injurious bread, it must be adulterated. and that not in an innocent way, so far as the effects are concerned. There is nothing worse than that added in the inuendo. The inuendo contains nothing more about the knowledge or intention of the pursuer, or that he knowingly kept adulterated flour in his premises.

Lord Ardmillan—I agree with your Lordship in the chair; and in agreeing as to the 2d issue, I do so because the pursuer has stated that he reads the words *in mitiori sensu*, and not as meaning that the bread would actually cause the death of the consumer. None of these statements necessarily impute any dishonest act to the pursuer, they only imply that the bread was not wholesome, and it would be a strong thing to say that people were not entitled to express an opinion of that kind.

As to the 5th issue, if it had been in direct terms a charge of adulterating the bread. I think that would have been slander. The act of adulterating implies the introduction of some adulterating mater. In the other case, the cause of unwholesomeness might have been innocent on the part of the pursuer, but not so in the case of the adulteration. Now that charge is not made directly, but there is an inuendo which I think is sufficient to found the issue. The construction may not be altogether a reasonable one, but it is not so unreasonable as to make us reject it. The statement is made to imply a charge against the pursuer of having adulterated flour on his premises, and that is a relevant ground for damages.

Agent for Pursuer—D. Curror, S.S.C.

Agents for Defender—Hill, Reid, and Drummond, W.S.

Tuesday, March 10.

SECOND DIVISION.

NISBET'S TRUSTEES *v.* NISBET AND OTHERS.

Legitim — Advances to Son — Executry. Circumstances in which *held* that advances made by a father to his son to purchase his commission and steps in the army were not debts due by the son to his father's executry estate, but were imputable to legitim.

This was a process of multiplepoinding brought by the trustees of the late Lieutenant-Colonel Nisbet of Mersington, in the county of Berwick, and the claimants were—(1) The *curator bonis* of Major Thomas Nisbet, the eldest son of the testator; (2) certain parties claiming as assignees of Major Thomas Nisbet, under an English deed of indenture; and (3) Miss Hannah Nisbet, the daughter of the testator, and sister of Major Thomas Nisbet. The questions raised were two—(1) Whether the *curator bonis* of Major Nisbet, on the one hand, or the English assignees, on the other, were entitled to the sums due to Major Thomas Nisbet under his father's settlement; (2) Whether certain sums advanced to Major Thomas Nisbet by his father for the purchase of his commission, and his various steps in the army afterwards, were to be dealt with as donations, or as debts, or as advances on account of legitim. The second of these two questions was that at present before the Court, and it arose between Miss Hannah Nisbet, on the one hand, and the two other claimants, on the other. It was maintained for Miss Hannah Nisbet that the advances in question, amounting in all, exclusive of interest, to £5940, 5s. 6d., were truly in the position of debts due to the executry. It was, on the contrary, maintained by those in right of Major Thomas Nisbet that the advances were donations, or, at least, were advances to account of legitim, which could not be demanded back except in a question amongst those entitled to legitim, and which, in the present case, could not be demanded back at all, because Major Thomas Nisbet was himself the only child of Colonel Nisbet claiming legitim.

The Lord Ordinary (Kinloch) pronounced the following interlocutor:—

"*Edinburgh, 19th June* 1867.—The Lord Ordinary having heard parties' procurators, and made avizandum, and considered the process,—Finds that the right of Major Thomas Nisbet, as a child of Lieutenant-Colonel Robert Nisbet, to legitim out of his said father's moveable estate has never been discharged or lost, and remains in subsistence and validity: Finds that the said Thomas Nisbet received, during his father's lifetime, from his said father, the various sums of money set forth in the third article of the revised condescendence and claim for Miss Hannah Nisbet, No. 26 of Process: Finds that the said sums, with legal interest, constitute debts due to his father's moveable estate by the said Thomas Nisbet, to be comprehended in the amount of the fund divisible into legitim and dead's part; and, so far as they remain unpaid to the said estate by the said Thomas Nisbet, are imputable in payment of the legitim due to the said Thomas Nisbet from the same; and appoints the cause to be enrolled, in order to the application of these findings."

"*Note.*—Thomas Nisbet is by law entitled to legitim from his father's moveable estate. It is not contended that he has ever discharged the claim. He receives nothing by his father's *mortis causa* settlement, the acceptance of which might infer a discharge of legitim; and this being so, no declaration by the father, contained in that settlement, is effectual to disappoint the right.

"But it now stands admitted by the contending parties, that Thomas Nisbet received from his father during his lifetime, or had expended by his father on his behalf, certain sums, amounting, exclusive of interest, to £5940, 5s. 6d. Of these, £1081, 1s. 7d. were expended in the purchase of a cornetcy and outfit. An after sum of £650 was paid for the purpose of purchasing a lieutenancy. An additional sum of £4209, 3s. 11d. was advanced in connection with the purchase of a troop. Of this last-mentioned sum, £2000 were borrowed from Messrs George and John Humble of Kelso, on a joint bond by Thomas Nisbet and his father, and ultimately repaid by the latter.

"The question now raised is how these sums are to be dealt with in the question as to Thomas Nis-