culty arises in matter of fact. On the one hand is the circumstance that Major Nisbet was still the inmate of an asylum—no steps having been taken to procure his discharge. This, however, may be considered a mere precautionary measure, not necessarily inferring that he had not been thoroughly cured. Again, his very strange letters, extremely unlike the ordinary productions of a sane man of his social position, continued with no substantial variation down to a period very near that of the deed. At the same time, I think that somewhat too much stress has been laid on these letters. For a great deal of their strangeness is attributable to a bantering, rollicking disposition, which evidently characterised the man, and broke out in effusions hastily dashed off for little better than temporary amusement in the supposed astonishment of those to whom they were addressed. I have a strong impression that Major Nisbet's familiar letters, during his previous period of sanity, would be found not so different from these as might at first sight be expected.

On the other side, there is the strong, and by itself, almost conclusive testimony of those best acquainted with his condition, and fitted both by their experience and skill to form an accurate opinion concerning it. There is the important evidence of Dr Thomas Thomson, in whose asylum he had been continuously from October 1867; who had seen a decided improvement in his condition in October and November 1869, and says without any hesitation, "In January 1870 I came to the decided conclusion that he was perfectly sane." There is similar evidence given by Dr Laurence Murray Thomson, who visited him frequently, and says of him, as in January and February 1870, "In my opinion he had got into a sound state of mind." There is the strong evidence of that eminent physician, Dr Warburton Begbie, who visited Major Nisbet for the express purpose of testing his capacity to make a will, and was present at the execution of the deed; and who says, "I had no doubt that he was at that time of sound mind." Dr Thatcher, who saw him in January 1870, also for the purpose of judging of his mental condition — being asked, "Was he a man that you would describe as of sane mind?" answers "most decidedly." There is the evidence to the same effect of the attendants in the asylum. There is also the evidence, highly important in my view, of the Rev. Mr Thomson, who saw him seven times in March 1870 (his death being on 7th April thereafter); conversed with him on the most important of all subjects, and administered the sacrament to him; and who "thought him perfectly sane." There is nothing in the parole evidence which I consider of any weight to be set off against this.

But there is further the strong confirmation of this evidence afforded by two circumstances distinctly proved. The one is that for some time before his death Major Nisbet was physically prostrated by a malady which proved mortal. It is according to the experience, not merely of scientific men, but of everyday life, that this is a circumstance extremely likely to restore the sanity for the period anterior to dissolution. It is the familiar case of the lamp flashing up into brightness immediately before going out. The other circumstance lies in the extremely rational character of the deed which Major Nisbet executed; and his instructions for which, the evidence warrants us in thinking, were written by him spontaneously, and without assistance. It is true that the rationality of a deed will not support it if proved to flow from a man undoubtedly insane. But the rationality of the deed is a vitally important piece of evidence as to whether the man was sane at the time. Here the whole transaction was so rational as to force even on hostile witnesses the conviction that the man who wrote these instructions, if he wrote them of his own motion and unassisted, could not have at that time been insane.

On the whole matter, I think that the Lord Ordinary has arrived at the only safe and sound conclusion in the case, when sustaining the validity of this deed. It is impossible for us to say whether, if Major Nisbet had recovered from his bodily disorder, and again been exposed to danger from improper stimulants, his insanity would not have revived. But we must judge of the actual, not an imaginary case. And, though not without difficulty, I have reached an opinion satisfactory to my own mind, that the deed which Major Nisbet thus executed during his mortal sickness was the deed of a man who at that time was entirely relieved of his insanity.

The LORD PRESIDENT and LORD DEAS concurred.

The Court adhered.

Agents for Pursuers—J. & F. Anderson, W.S.
Agents for Defender—Morton, Whitehead & Greig, W.S.

Friday, June 30.

CRAIG *v.* JEX-BLAKE.

(*Vide ante*, p. 428.)

Reparation—Slander—Privilege—Proof—Veritas—Mitigation—Expenses. A member of the court of contributors to the Royal Infirmary, in addressing a meeting of that court, and referring to a certain memorial which had been presented to the managers by a large body of students at the University, and which memorial was of considerable importance to the subject under discussion, alluded to the conduct and character of an individual student. *Held* that she was not *privileged* in doing so; but that her privilege only extended to remarks upon the students generally, and their conduct or character as a body.

No counter issue of *veritas* having been taken,—*held* that the defender was not entitled to lead evidence which tended to prove, or was introductory to proving, the *veritas*, with a view of mitigating damages.

Though the jury assessed the damage at one farthing only, pursuer held entitled to his expenses, on the certificate required by 31 and 32 Vict. c. 100, § 40.

The pursuer in this action of damages for slander was Mr Edward Cunningham Craig, student of medicine in the University of Edinburgh, and class-assistant to Dr Christison, Professor of Materia Medica there. The defender, Miss Sophia Jex-Blake, was also a student of the University of Edinburgh, matriculated under a resolution of the University Court admitting women to the privileges of students of medicine. During the session of 1870–71, she was a student under Dr Handyside, Lecturer on Anatomy in the Royal College of Surgeons. She was also a member of

the court of contributors to the Royal Infirmary of Edinburgh, in consequence of a contribution of the statutory amount subscribed by her.

The pursuer's allegations in support of his action were as follows:—"A statutory general court of the contributors to the Edinburgh Royal Infirmary was held in the Council Chambers, Edinburgh, and by adjournment in the High Church there, on Monday the 2d day of January 1871. Part of the business of that meeting was the election by the contributors of six managers of the corporation. Two lists of managers were proposed for election—one by the Lord Provost of Edinburgh, and the other by Dr Halliday Douglas. The meeting was very crowded, and was attended by a large number of persons, among whom there were many acquainted with the pursuer. The defender, Miss Sophia Jex-Blake, attended that meeting, and made, or rather read from a manuscript which she held in her hand, a speech professing to be in support of the persons named in the list proposed by the Lord Provost. The pursuer was not present at the meeting. In the course of the defender's said speech she referred to an occurrence which had taken place at or near the gate of the hall of the Royal College of Surgeons in Nicolson Street, on the 18th day of November last, 1870, when a crowd assembled near the gates, and the gates were closed by some one or more of the crowd against the entrance of Miss Sophia Jex-Blake and other female students of medicine, which she described as follows:—'And at last came the day of that disgraceful riot, when the College gates were shut in our face, and our little band bespattered with mud from head to foot.' After having thus characterised that occurrence, the defender, in her said speech, used and uttered the words and sentences following, or words and sentences to the following effect, viz.:—'This I do know, that the riot' (meaning the occurrence above mentioned) 'was not wholly or mainly due to men from Surgeon's Hall. I know that Dr Christison's class-assistant was one of the leaders of the riot, and that the foul language he used could only be explained on the supposition I heard asserted, that he was intoxicated. I do not say that Dr Christison knew of or sanctioned his presence.' Again, after Dr Christison, who was present at the foresaid meeting of contributors to the Royal Infirmary, had protested against the use of such language in reference to a gentleman who was not present, the defender proceeded with her speech, and used and uttered the following words and sentences, or words and sentences of the following import, viz:—'I said before, that the only excuse for the assistant was that he was alleged to be drunk. If he' (meaning Dr Christison) 'prefers me to say that the language was used when the person was sober, I am satisfied.'

"The words and sentences above set forth, used and uttered by the defender, and published as said is, were in whole or in part of and concerning the pursuer, and are false, calumnious, injurious and malicious, and falsely, calumniously, injuriously and maliciously misrepresent the pursuer to have been one of the leaders of a disgraceful riot; to have used foul language, which was due to his intoxication; and to have been intoxicated; and they were calculated to injure the pursuer's character and reputation, and to wound his feelings; and they have injured his character and reputation, and have deeply wounded his feelings. They were at once applied, both by many of the persons present at the meeting, and by the whole medical students of the College, and by the pursuer's friends and acquaintances, to the pursuer; and they were applicable to him, and him only."

The defender set forth that it was necessary that she and the other lady students should be admitted to study at the Royal Infirmary in order to entitle them to a license to practice as medical practitioners. That there was much opposition to their admission to the Infirmary on the part of a large portion of the public of Edinburgh; and that Professor Christison took a prominent part in the opposition. Various meetings of the managers of the Royal Infirmary were held on the subject; and ultimately the managers for the year 1870 came to a resolution refusing to recognise the claim of the lady students to admission. At the statutory annual meeting of the court of contributors to the Royal Infirmary, held in January 1871, as mentioned in the summons, it was part of the business of the said court to elect, for the first time, six managers for the year ensuing, under the provisions of "The Edinburgh Royal Infirmary Act 1870." Two lists were proposed, the one by Dr Halliday Douglas, the other by Mr Law, Lord Provost of Edinburgh. Dr Hallidy Douglas proposed a list of six gentlemen, nominated or suggested by the then board of managers, which was opposed to the admission of lady students into the Infirmary. The Lord Provost proposed a list of gentlemen who were known to be favourable to the admission of lady students. In the speeches of the movers of the respective lists, and of others who followed them, the discussion was made to turn on the propriety of admitting ladies to study in the Infirmary. Amongst other speakers, Mr David Smith, Writer to the Signet, addressed the court of contributors, and argued in favour of the exclusion of ladies, upon the ground, *inter alia*, that such exclusion would accord with the opinions of the male students attending medical classes in the University of Edinburgh; a large number of whom, according to Mr Smith's statement, had petitioned against the admission of ladies to the Infirmary. The defender being at the time a member of the court of contributors, and much interested in the appointment of the new managers, particularly with reference to the question of the admission of lady students, addressed the court of contributors in support of the list of managers proposed by the Lord Provost. In reply to Mr Smith's observations as to the wishes and opinions of the male students, she spoke at some length on the subject of their opinions and conduct, and the weight which should attach to the petition alluded to by Mr Smith. In so doing the defender referred to a riot which had taken place at the entrance of the College of Surgeons, in which she and other lady students had been mobbed and insulted; and she, *inter alia*, referred to Professor Christison's class-assistant, who, as she had been informed and then knew, had been present, and had taken an active part in the disturbance, although he was not personally known to her. The defender had probable cause for all the statements which she made, and in making them was not influenced by malice or personal feeling, but solely by a desire to promote the election of the managers nominated in the Lord Provost's list. After the disturbance alluded to the defender was informed by Dr Handyside of the part taken in it by the pursuer; and she was also informed by that gentle-

man that the pursuer's appearance and behaviour conveyed to him at the time the impression that the pursuer was not sober, but was somewhat the worse of liquor. The defender also heard various others express their belief that the pursuer could not have been sober, otherwise he would not have taken any part in these disgraceful proceedings.

The defender pleaded *inter alia*—"The defender is not liable, in respect that the words used by her were spoken at a statutory court of contributors to the Royal Infirmary, of which she was a member, were pertinent to the subject of discussion, and not malicious. The defender's speech being a fair comment on the proceedings of the pursuer, and the other students engaged in the disturbances of 18th November 1870, and the pursuer having given provocation, she is entitled to absolvitor, with expenses."

The case went to trial before Lord MURE and a jury, upon the following issue.—

"Whether the defender, in a speech which she made or read at a meeting of the contributors to the Royal Infirmary, held in Edinburgh on the 2d day of January 1871, did in the presence and hearing of Dr Robert Christison, Professor of *Materia Medica* in the University of Edinburgh; David Smith, Esq., W.S.; Joseph Bell, M.D.; Christopher Douglas, Esq., W.S.; A. Halliday Douglas, M.D., and others, use and utter the words and sentences set forth in the schedule hereto annexed, or part thereof, or words and sentences to that effect; and whether the said words and sentences are, in whole or in part, of and concerning the pursuer, and are false and calumnious, to the loss, injury, and damage of the pursuer?"

SCHEDULE.

"And at last came the day of that disgraceful riot, when the College gates were shut in our face, and our little band bespattered with mud from head to foot." "This I do know, that the riot was not wholly or mainly due to men from Surgeon's Hall. I know that Dr Christison's class assistant was one of the leaders of the riot, and that the foul language he used could only be explained on the supposition I heard asserted that he was intoxicated. I do not say that Dr Christison knew of or sanctioned his presence."

Damages laid at £1000.

The Jury unanimously found for the pursuer, and assessed the damages at one farthing.

The defender, who had made several exceptions to the Judge's ruling on points of evidence, and to the law laid down in his charge, thereafter brought a bill of exceptions containing:—

Exception 1.—"In the course of the cross-examination of Professor Christison, a witness for the pursuer,—the counsel for the defender, to maintain and prove her case under the said issue, proposed to put the following question to the witness:—'Did you ask pursuer if he had been present at the riot?' The counsel for the pursuer objected to the admissibility of the proposed evidence, as proving the *veritas convicii*, in respect that no counter issue had been taken by the defender. Lord Mure sustained the objection, and excluded the evidence as tending to prove *veritas*, to which ruling the counsel for the defender excepted."

Exception 2.—"In the course of the examination in chief of the defender—the counsel for the defender, to prove her case under the issue, proposed to put the following question:—Referring to the day of the riot, 'When you got to the College of Surgeons what did you find there?' Counsel for the pursuer objected. That this was introductory to proving that there was a disgraceful riot, and that pursuer was there, and a ringleader of it, and Lord Advocate stated he intended to endeavour to do this. The Lord Advocate here admitted his readiness to take the discussion of whole question of privilege and defender's right to prove what occurred at Surgeon's Hall in November, and that defender was there and a ringleader of riot. Parties heard.

"Lord Mure ruled—*first*, that the case was not one of privilege on the part of a member of the court of contributors, and that the defender was not entitled to single out individual students not members of the court, and assail them; *second*, that as there was no issue of *veritas* the defender was not entitled to prove that the pursuer was one of the leaders of a disgraceful riot, and used foul language which was due to his intoxication. But reserved to allow proof, if offered, of reports having been made to defender that pursuer was at College of Surgeons on that day, and engaged in the riot. To the first and second parts of which ruling, counsel for the defender excepted."

Exception 3.—"In the course of the examination in chief of Mr Sanderson, a witness for the defender—counsel for the defender, to prove her case under the issue, proposed to put the following question:—'Among the students assembled inside the gate, at the time you are speaking to, did you observe the pursuer?' Counsel for the pursuer objected. This is *veritas*, with no issue, and no allegation of *veritas*. Lord Mure sustained the objection, and disallowed the question; to which ruling counsel for the defender excepted."

Exception 4.—"In the examination-in-chief of the pursuer as a witness for the defender—the counsel for the defender, to prove her case under the issue, proposed to put the following question:—'Did you take any part in the riot?' Pursuer's counsel objected. Lord Mure disallowed the question: to which ruling the counsel for the defender excepted."

Exceptions 5 and 6. "Lord Mure thereafter charged the jury, and *inter alia* directed the jury in point of law: That the case was not one in which the defender was privileged in using the words complained of on the occasion mentioned in the issue, and that it was not therefore necessary for the pursuer to prove that the defender acted maliciously to entitle the pursuer to a verdict. To which direction the counsel for the defender excepted, and requested Lord Mure to direct the jury in point of law to the following effect:—(1) That in order to entitle the pursuer to a verdict it was necessary that he should prove that the words complained of were spoken maliciously. (2) That if the jury were satisfied that malice was not proved the defender was entitled to a verdict in her favour. "Lord Mure refused to give the directions asked, and the defender's counsel excepted to his Lordship's refusal to give the said directions."

Solicitor-General (A. R. CLARK), SHAND, and MACDONALD for the pursuer.

Lord Advocate (YOUNG), WATSON, and M'LAREN for the defender.

At the hearing on the Bill of Exceptions—

Counsel for the defender argued in support of the bill of exceptions, that, as regarded the ques-

tion of privilege, disposed of by the rulings excepted to in the 5th and 6th exceptions, the law was, that wherever a party has interest or duty to make a statement and makes it in *bona fide* to another party or parties having a similar interest or duty to receive it, then that is a privileged statement. The *bona fides* here was perfect; the students' behaviour was fairly the subject of remark, and it strengthened any animadversions on them generally to single out the pursuer, who was not an ordinary student but a class assistant. There was a privilege to speak of him; and if there was that privilege, then it was only for the jury to decide whether the words used were in excess of the licence granted by that privilege. Privilege protected the speaker from the presumption of intention to injure.

With respect to the other exceptions, which had reference to the Judge's rulings as regarded evidence, it was contended that the questions asked were quite competent. They were asked not with a view to justify the libel, but to mitigate the damages. To prove a riot and the pursuer's presence at it was not a justification of the libel. The libel charged being, that he was a ringleader and drunk.

Defender's authorities:—*Fenton* v. *Currie*, 5 D. 705; *Edwards* v. *Begbie*, 12 D. 1134; *Harrison* v. *Bush*, 25 Law Jour., Q. B., 25; *Somerville* v. *Hawkins*, 10 Common Bench Rep. 589; *Harris* v. *Thomson*, 13 Common Bench Rep. 333; *Kershaw*, 17 Law. Jour., Exch. 129; *Whitley* v. *Adams*, 15 Common Bench Rep. N. S. 393.

Counsel for the pursuer replied—Practically the questions raised by the bill of exceptions were reduced to two.

1st, Whether or not the defender is entitled to claim privilege in the language used, in respect that she was present at a meeting of contributors to the Infirmary, and, as herself a contributor, was addressing the meeting?

On this head they said that they did not deny the right of the defender or any other person present to discuss any subject pertinent to the question before the meeting. It was quite true that in discussing a subject pertinent to the question at issue the speaker had an amount of licence which could not be otherwise accorded, and which, when looked on from the present point of view, might establish a case of privilege. But this depended entirely upon the pertinency of the remarks. Now, the object of the meeting was the election of managers of the Infirmary, and the question under discussion was,—whether lady students should or should not be admitted to study in the wards of the Infirmary? On this question there was very great difference of opinion. One party proposed to elect managers favourable to the claims of the lady students, and another party proposed to elect managers who were mostly unfavourable to their admission. And upon this question the election of managers mainly depended. Now, it appears that there had been presented to the existing managers a petition of students at the University and Surgeon's Hall, seeking to prevent what they thought illegal, viz., the admission of ladies to study at the Infirmary. Accordingly, at the meeting of contributors one of the then managers, Mr David Smith, brought up the subject of this petition, and used it in support of the views which he himself held. He brought up this matter in the interest of the students, but without particularizing any of them. He merely expressed, as he thought, the wishes of them all. What was laid before the meeting was merely the fact that a memorial had been presented. The memorial itself was never before the meeting—was not in fact addressed to the meeting, and not one of the names attached to it was disclosed in any way. At this stage of the proceedings the defender rose to address the meeting in favour of her own views as to the admission of lady students, of whom she was one. What was properly relevant and pertinent to that question she was entitled to introduce. She was entitled to offer any argument against giving weight to that petition or memorial of the students. Any general representations as to their conduct, as affecting the value of that declaration of their views and wishes, she was entitled to. But that is a very long way from giving her the right to speak of any individual student. She could only have had such right to speak of an individual student as she did if his character had been properly brought before the meeting for discussion. But that was not the case here, where the only thing before the meeting was the value of a certain document, as testifying the opinions of a general body of students. How then could the speaking of any individual of that general body advance the cause she was advocating? Was the individual character and conduct of Mr Craig on a particular occasion pertinent to the great educational question under discussion? That is the question which determines this point of privilege. The law is settled that unless she can shew that she was entitled to discuss this gentleman's character and conduct, either generally or in relation to the particular question, she had no right to use the language she did.

2d, The question of the admission or rejection of evidence.

It was exceedingly expedient for the defender to deal separately, as she had done, with the 3d and 4th exceptions, from the 1st and 2d. But the whole four really hang together. Had the Lord Advocate once been allowed to break ground with any one of the questions objected to, there would have been no possibility of preventing the insertion of much more than the defender was entitled to. It would have been impossible with anything like safety to a pursuer's case, to permit the introduction of anything that is evidence of *veritas* on the mere allegation that it is not done for the purpose of proving the *veritas*, but for something else.

Pursuer's authorities—*Adam* v. *Allan*, 3 D. 1072; *Fraser* v. *Wilson*, 13 D. 289; *Milne* v. *Bauchope*, 5 Macph. 1114; *Brodie* v. *Blair*, 12 S. 941; *Mackellar* v. *D. of Sutherland*, 21 D. 226, and 24 D. 1124; Starkie on Evid., 3d edit., pp. 59, 516, and 526; *Cook* v. *Wildes*, 24 Law Jour., Q. B., 367; *Fryer* v. *Kinnersley*, 33 Law Jour., C. P., 96; *Rae* v. *M'Lay*, 14 D. 988; *Torrance* v. *Weddel*, 7 Macph. 243; *M'Neill* v. *Rorison*, 10 D. 15; *Macleod* v. *Wakley*, 3 Carrington and Payne, 311; *Underwood* v. *Parks*, 2 Strange, 1200.

At advising—

LORD PRESIDENT—In this case the bill of exceptions before us has been framed in the form introduced by the Court of Session Act and Act of Sederunt of 1868. It is important to keep this in view, for otherwise we should hardly have sufficient materials before us for the determination of the different questions raised. The section of the Act referred to provides (*his Lordship here read the terms of section* 35 *of the Court of Session Act*, 1868).

We are therefore at liberty in this case—and especially seeing that the parties have printed and laid before us the whole of the judge's notes of evidence—we are at liberty, I say, in forming our judgment to look both to the record in the case and to the documentary evidence, and to the judge's notes of the parole evidence. And with the assistance we get from these sources we are enabled to see precisely the circumstances in which each exception was taken.

All the exceptions before us refer substantially to two questions:—

First, as to the admissability of certain evidence.

Second, as to whether the defender was privileged in making the statements libelled on.

I shall consider the second of these points first. The meeting at which the words objected to were spoken was a meeting of the court of contributors of the Royal Infirmary of Edinburgh. That is a collective body authorised by Royal Charter and Act of Parliament to meet and transact business connected with the Infirmary. The members of the court of contributors have certain duties to perform, and certain functions to fulfil, and in the exercise of these functions each member is entitled to some privilege in the way of freedom of speech in addressing the Court. But that privilege must be measured by the nature of the duties which the collective body have to perform, and must correspond to the functions in the exercise of which the court is met.

Now this court of contributors were entrusted by the late Act of Parliament with the power of electing a certain number of the managers of the Infirmary. Six, I think, was the number out of the whole body. At the meeting held for this purpose there were two lists proposed,—one by the Lord Provost, and one by Dr Halliday Douglas. The list of candidates proposed by the Lord Provost was understood to consist of gentlemen favourable to the admission of ladies to participate in the courses of instruction given at the Infirmary at the same hours as the ordinary students. The gentlemen on Dr Douglas' list, on the other hand, were understood to be—if not all, at least mostly—unfavourable to this proposal. It was therefore quite natural and legitimate that the propriety of admitting lady students to the ordinary privileges of the Infirmary courses should form the subject of discussion at this meeting. For according to the views held on this subject by the contributors present would their votes in all probability be given for or against the different lists. In fact it was the prevailing question of the hour, and as such was dealt with at the meeting. It was quite within the province of members addressing the meeting to discuss it, and to adduce all facts and arguments for or against which could fairly influence the meeting. In connection with this subject, a petition or memorial addressed to the managers of the Infirmary, and signed by a considerable number of the medical students of the University, strongly objecting to the admission of female students to the ordinary course of instruction at the Infirmary, had been alluded to by several speakers, and naturally enough formed a prominent topic in the discussion of the whole subject. The defender, in advocating her side of the question, was quite entitled to allude to this memorial, and to speak of the weight which should be attached to it. Accordingly, she did discuss this matter, and properly enough endeavoured to show how little qualified students were to be judges of this question who could be guilty of conduct such as theirs on a certain occasion. She was quite entitled to advert to any conduct of theirs, and it appears to me that up to this point all we have said on her part was perfectly legitimate, and entirely covered by her privilege as a member addressing the court of contributors.

But then that is not what is complained of in this action. The pursuer complains that the defender, instead of limiting her remarks to the conduct or character of the students generally, or of the students signing this petition, proceeded to speak of the pursuer individually, and—alluding to him in a way which could not possibly be mistaken by those present—said that he was one of the leaders of the riot, and had used foul language on the occasion, and that the only explanation that could be given of his conduct was that he was intoxicated. Now the question is, Whether those expressions of the defender's are covered by the privilege which she undoubtedly had? And that again resolves itself into the question, Whether in the exercise of their duties and functions as members of that body any one contributor had right to speak of the pursuer individually? I am of opinion that they had no such right, and no legitimate occasion for making any such allusion to the pursuer. The right to speak of the students collectively, and of their conduct and character, is a perfectly different thing—that I have intimated my opinion that the defender was entitled to do. But to speak of any individual student, and more particularly one who was not proved to have signed the memorial in question, was, I think, beyond any privilege which could be accorded to the defender. It is necessary in determining this question to consider whether it is allowable in the performance of the particular duty or exercise of the particular function to make any allusion to an individual which, were there no privilege, would be libellous. That is the measure of the defender's privilege, and without any hesitation whatever I give my opinion that she over-stepped any privilege which she then enjoyed.

This determines the questions raised by the two last exceptions. The first four refer to a different subject, but all practically bring up the same thing, and may therefore be disposed of together. In order to see in what circumstances these exceptions were taken, we must refer to the judge's notes of evidence, which have been laid before us. The first exception is taken in the course of Dr Christison's evidence. Dr Christison says,—"I had before heard of the riot at Surgeons' Hall. I did so on the morning after it occurred. I thought it a disgraceful riot from what I heard of it. . . . . It was that riot which I knew Miss Blake to refer to when she spoke of the pursuer being a ringleader. And it was my opinion of the nature of the riot which led me to think it was an injurious imputation against any one to say that he was a ringleader." Counsel for the defender then asked Dr Christison—"Did you ask the pursuer if he had been at it"—viz., at the riot? The counsel for the pursuer, Mr Shand, objected to this question as tending to prove the *veritas convicii* or truth of the libel charged. The presiding Judge sustained the objection, and disallowed the question." Then in the examination of the defender herself she is asked, "When you got to the College of Surgeons (on the occasion of the riot), what did you find there?" Mr Shand, for the

pursuer, again objected that this was merely introductory to proving that there was a disgraceful riot, and that the pursuer was there, and a ringleader in it. This evidence was also rejected by the presiding judge, and for the same reason. Again, in the examination of Mr Sanderson, one of the witnesses for the defender, and a student of medicine in the University, the defender's counsel put the question—"Among the students assembled inside the gate at the time you are speaking to (viz., at the time of the riot), did you observe the pursuer?" Mr Shand, for the pursuer, again objected to the introduction of this evidence as an attempt to prove the truth of the charge without having taken an issue that the charge was true. Here the Lord Advocate, for the defender, took rather a different course, and contended that he was entitled to get in evidence that the pursuer was present at the riot, and what he did there, with a view of mitigating the damages. Lastly, in the examination of the pursuer by the defender's counsel, he was asked, "Did you take any part in the riot?" Here Mr Shand again objected, and his objection was sustained.

On all these four points the defender has taken exceptions to the ruling of the presiding judge. Now, it has been contended in support of these exceptions that the evidence was competent in itself; and farther, that though to a certain extent, and incidentally tending to establish the *veritas* of the charge, its direct object was to mitigate the possible damages, and that, therefore, the defender was quite entitled to lead it, even though it had the incidental effect above alluded to.

Both these contentions are, I think, ill founded, and inconsistent both with authority and the practice of the Court. The rule is, that when a defender undertakes to prove the truth of what he has said, he must lay the foundation for such a course upon his record. He must aver the truth there in distinct and articulate terms; and not only that, but he must take a counter issue, to establish his averment. If he only avers that what he says was partially true, and pleads this in mitigation of damages, then his record and counter issue must specify distinctly what part he avers to be true. If a counter issue is not taken, it is not competent to prove the truth of what was said, either as a bar to the action altogether, or in mitigation of damages. All that is so well settled that it is not necessary to cite cases on the subject. I have merely to add, that I see nothing in this case as a whole, or in the stage of the trial at which the questions were put, or in the manner in which they were put and their competency supported, which ought or could have led the presiding judge to any other ruling than that which he gave. I am therefore for disallowing this bill of exceptions.

Lord Deas—My Lord, I shall notice these exceptions in the order observed by your Lordship. First, with regard to the plea of privilege. I entirely agree with your Lordship that, looking to the purpose of the meeting at which the words were spoken, and to the fact of a petition against the admission of lady students having been presented to the managers of the Royal Infirmary, the defender was quite entitled to speak on that occasion, and to mention anything which naturally tended to diminish the weight and effect of that petition. In all that was said by your Lordship on that point I quite concur. The delicate question still remains, whether she had any privilege to select the name of the pursuer as the subject of special remark, when all that she required to make out was that there had been a disturbance and a riot, and that the students were in an excited state. The question of privilege depends upon whether the fact of the pursuer individually being engaged in that riot had any proper bearing upon the question of what weight should be given to the students' petition. Now, I am not able to perceive what additional weight could be given to the defender's observations by mentioning the pursuer's name; as I have already said, what she desired was to weaken the effect of the students' petition by showing that it was got up when they were in an excited and unreasonable frame of mind, and by persons who had been guilty of such a disgraceful riot as is here mentioned. Now that purpose was fully served by the general remarks which she had already made, and I do not see that these remarks could be in any degree strengthened by the introduction of the pursuer's name. It is upon that narrow ground that I am of opinion with your Lordship that the defender had no privilege to select this pursuer as the object of her accusation and remarks. I am not disposed to go upon the footing that the pursuer may not have signed the petition. We have the petition in process, and can look at it for ourselves, and though the signature may not have been proved regularly, I think that we may almost hold that it is admitted. But if it had been proved, I would still come to the same result.

The next point is, whether certain questions in connection with a particular line of examination were rightly disallowed by the judge who tried the case. This I take to be a far more difficult matter, and I am disposed to think that if some of those questions had been put without an avowed object it would have been very difficult to have put a stop to them. In order to decide this we must look at the issue, which runs as follows—(*reads issue.*) Now that is not a very satisfactory issue; the question put to the jury is, first, did she use these words? There is not much in the issue which, according to my view of it, can be said to be slander. I am not prepared to say that the words there amount to slander without an *inuendo;* still less am I disposed to say that it is slander to say that the pursuer used "foul language" without an *inuendo.* Many things can be called "foul language," and still not be slanderous. I observe that at the meeting at which these words were used Dr Christison interfered to protect the character of his class-assistant, who was not present, and in so doing remarked, "I wish nothing but that this 'foul language' shall be put an end to." That cannot be said to be slanderous, and I am not disposed to hold that the words "foul language" are slanderous, and do not require an *inuendo.*

It is the presence of the accusation of intoxication which is the sole thing which creates the slander here. The three charges must be taken together, but if there had been no mention of intoxication, without an *inuendo* there would have been no slander.

We must keep in mind that though there are various exceptions here, the third and fourth were the only ones argued to us, and on them the defender took her stand and rested her case. The first of these exceptions is—(*reads third exception.*)

If that question had been put without an avowed object, and independently of the matter of *veritas*, I could see no objection to it at all. In the same way, with respect to the next question—(*reads fourth exception.*) It is always a narrow question what you can prove in mitigation of damages, and what amounts to an attempt to justify. If these two questions had been put without an avowed object, and still more with the explanation that they were put in mitigation of damages, and not to prove *veritas*, I am strongly of opinion that it would have been very difficult to have stopped them. The important thing to my mind, however, is contained under the first exception—(*reads.*) The objection there is that the question is introductory to proving the *veritas*, and the Lord Advocate, for the defender, states plainly that he intends to try to prove the whole *veritas*. If there were any doubt about that, it is cleared up by Lord Mure's explanation of what he understood to be the Lord Advocate's intention; and the Lord Advocate takes no objection to that explanation. Now, my Lord, taking that view, it is impossible to come to any other conclusion than that the Lord Advocate maintained that he was entitled to prove the whole *veritas*, and that that contention was repelled by Lord Mure. On that ground I am of opinion that the judge who tried the case quite rightly disallowed these questions.

Lord Ardmillan—This case was tried on the issue which is before us; and we must now hold that the issue was well and suitably framed. It is too late to object to the terms of the issue. On the first question raised by this bill of exceptions, viz., the question of privilege on the part of the defender on the occasion in question, and in the use of the language complained of, I do not entertain any serious doubt. I think that the ruling of Lord Mure was right.

The defender was entitled to speak fully and freely on any of the points competently and legitimately under consideration of the court of contributors; and, the subject of the students' petition having been introduced into the discussion by a preceding speaker, it was her right to speak generally of those who had petitioned. I do not rely on the omission to prove the signature of the pursuer to the petition. I therefore think that she was entitled to allude to the riot at the College of Surgeons, and to speak strongly, and even severely, of the treatment which she and her friends there received. That treatment must be matter of regret to every one, including the students who took part in it, but who on reflection must have felt that they were wrong. The defender was not however entitled to pass from general observation or censure into particular attack on the conduct and character of individuals named, or, as the pursuer has been, so designated as to be plainly pointed out—as plainly as if he had been named. In making such an attack she passed out of the region of privilege; and against a demand for redress or reparation she was protected by no privilege. There was no lawful call, no obligation of duty, no recognised right, by which an attack on the character of any particular individual, named or clearly pointed at, could be supported. It is not the rule that a person *may* speak injuriously of his neighbour unless something is proved to restrain his speech. It is rather the rule that a person shall *not* speak injuriously of his neighbour unless the speaker can prove duty to sustain, or privilege to protect, injurious words.

I am disposed to make every allowance for the defender, but I am quite unable to perceive any sufficient legal ground for sustaining the plea of privilege in this case.

On the other exceptions I have nothing to add to what your Lordships have already stated. The questions might perhaps have been put so as to raise a more difficult point. The presiding judge admitted proof, and I think rightly, of the presence of the pursuer at the College of Surgeons at the time of the riot, but not proof of the pursuer's participation in the riot. The further questions proposed to be put by the defender, and disallowed by the judge, were put upon the footing, boldly and clearly avowed, of proving facts tending to support the allegation of the truth of the libel—at least in so far as regards the charge of leading a disgraceful riot. That questions proposed on that footing, and for that purpose, should have been disallowed, is according to the well-settled and understood rule and practice of the Court. The defender might have alleged the truth of the charge which she had made, and might have undertaken to prove it. She did not do so. It was not her case—not put as her case—that what she had stated in regard to the pursuer was true. The questions which she proposed to put in order to establish, or tending to establish, that which she did not allege, and of which she had declined to undertake the proof, were rightly rejected. I concur with your Lordship in holding that there is no precedent or authority to support such questions in such circumstances.

Lord Kinloch—I am of opinion that the rulings of the judge are correct, and that the bill of exceptions should be disallowed.

I conceive that the defender had no privilege to utter the words concerning the pursuer complained of. The only subject of discussion at the meeting was the election of directors. But as the eligibility of these was supposed to depend on the side they took in regard to the admission of ladies to medical education in the wards of the Infirmary, the general subject of the propriety of female medical education may be held to have been not unfairly introduced. And with reference to the weight to be given to a petition or memorial emanating from the students unfavourable to the claims of the ladies, it might reasonably be permitted to the defender to argue that this petition was much deprived of force by the prejudiced and riotous behaviour of the students connected with it. But only to this extent did her privilege go. When, departing from a general statement, she singled out an individual student as the object of remarks directly affecting his character, she clearly went beyond her bounds. She did so as undoubtedly as does a minister who, when censuring from the pulpit vices prevalent in the age or neighbourhood, proceeds to give illustrations from individual cases. This distinction between general statements which are privileged, and individual animadversions, which are not so, runs through the whole law; and it is a distinction which it is vitally important to the peace and welfare of the community to preserve unimpaired.

I further consider that the Judge was right in refusing to admit evidence of the alleged part which the pursuer took in the riot of the students. I think the statements of the bill of exceptions

clearly establish that the proposed evidence was intended to prove this against him; and the discussion on any isolated questions was taken on this footing. Such was simply evidence of the *veritas convicii*, which in our law is inadmissible without an issue in justification, which was not taken here. What was sought to be proved was not mitigatory circumstances, such as that the defender had heard from credible persons what she had alleged, and the like. It was direct evidence of the facts forming the slander. There was nothing to prevent the defender from taking an issue on these facts. They were such as from their nature were capable of direct proof. As the defender took no issue in justification, and so did not give the pursuer any warning to protect himself against the effect of the evidence, she was not entitled to lead the evidence; and it would have been gross injustice to the pursuer to have allowed her to do so.

Lord Mure—Upon the question of privilege, I adopted at the trial very much the views which your Lordship has expressed; and I should not think it necessary to add anything to what has been already said, were it not for the difficulties raised by Lord Deas. I agree with his Lordship that it was a somewhat difficult matter to determine the issue on which the case was to be tried. In the issue proposed, and ultimately approved of by my interlocutor of the 7th March, the difficulty was to see what in point of fact was the slander—wherein the slander which was charged consisted. But upon the best consideration I could give to the case I came to the conclusion that there was no necessity of inserting any inuendo, such as that contained in the 8th article of the condescendence, in order that the precise nature of the alleged slander might be put distinctly in issue before the jury. On the contrary, as stated in my note, I was satisfied that the words used were in themselves sufficiently distinct and direct to render it unnecessary to insert any interpretation of them in the issue.

If the defender had thought it advisable to justify her expressions, she must have taken a counter issue in the same terms. Such counter issue was not taken; and therefore, assuming that the words were used by the defender, a proof of their truth when applied to the pursuer was no part of her case. That being so, the first question objected to, which was put to Dr Christison, went at once to prove the *veritas*, or at least to mitigate damages. Both were, under the circumstances, incompetent. Then later in the case a similar question was put to the defender herself, and objected to, as introductory to proving the *veritas*. It was here arranged that the whole discussion should take place upon the question of privilege, and as to the admission of this evidence. This discussion did take place, and I gave my ruling on both points. But your Lordship will observe from my notes of the evidence that I did not stop the defender from leading this evidence up to a certain point. I allowed proof to show under what belief or impression the defender had acted, so long as it stopped short of proving the *veritas*, either as a bar or as in mitigation of damages. The result was that I allowed the defender to prove generally the existence of the riot, and all the circumstances connected with it, except that the pursuer was taking part and was a ringleader in it. I even allowed proof that the pursuer was at Surgeons' Hall at the time, and that the defender had heard certain reports connected with the matter. I considered I was bound to do so after the decision in the case of *Scott* v. *M'Gavin*. But beyond that I did not think myself authorised to go, for anything farther must have been proof of the *veritas*.

Exceptions disallowed.

On a subsequent motion to apply the verdict, a discussion took place upon the subject of expenses. The Lord Ordinary had, in accordance with section 40 of the Court of Session Act, 1868, certified the case as one brought for the vindication of character, and, in his opinion, fit to be tried in the Court of Session. The defender maintained that this was not a case in which the pursuer should get his costs, and referred to *Duncan* v. *Balbirnie*, 22 D. 944; *Ross* v. *M'Vey*, 22 D. 1144; *Borthwick*, 2 Macph. 125; *Rogers* v. *Dick*, 2 Macph. 591; *Craig* v. *Taylor*, 5 Macph. 203, etc.

The Court, after consideration (diss. Lord Deas) held that the pursuer was entitled to his costs.

Agents for Pursuer—Pattison & Rhind, W.S.

Agents for Defender—Millar, Allardice & Robson, W.S.

Saturday, July 1.

ANN THOMSON AND OTHERS.

Judicial Factor — Executor. Circumstances in which the Court *appointed* a judicial factor on the estate of a deceased, one of two executors-nominate being absent from the country, and the other having a large claim as a creditor on the estate.

This was a petition for the appointment of a judicial factor on the estate of the deceased John Thomson, farmer at Finlaggan, Islay. Mr Thomson died on the 21st February 1869, leaving a holograph testament, by which he appointed his sister, Ann Thomson, and his cousin, Dr M'Nicol, his joint executors, along with a natural son (then fourteen years of age), when he should attain majority. The value of the estate was said to be about £1900, of which the greater part was to be liferented by the testator's mother, and at her death to be paid to the said son. Miss Thomson, and her sister Mrs Pragnell, had large claims on the estate as creditors. Dr M'Nicol was acting as a ship surgeon. He was home for a short time in March 1871, and then sailed for South America.

Miss Thomson and Mrs Pragnell accordingly presented the present petition. There were no allegations of mismanagement against Dr M'Nicol. On the contrary, it was admitted that the estate was being wound up by a local agent in a satisfactory manner. But from the absence of Dr M'Nicol, Miss Thomson was practically the sole executor on an estate against which she had a large if not exhaustive claim. In these circumstances, the petitioners submitted that it would be for the advantage of all parties if the estate were placed in neutral management.

Answers were lodged for Dr M'Nicol in his absence. It was stated that Dr M'Nicol was only taking a few voyages for the sake of professional experience, and that he intended to settle permanently at Dunoon, where he was expected about Whitsunday of the present year. It was further stated that, although the petitioners had alleged in vague terms that they had claims against the estate, they had failed to lodge any specific claims,