the individual case, and the facts which have been here instructed do not bring home malice to the defender, considering, 1st, that the insertion of the injurious matter in the note of objections was not done by him or by his instructions or with his knowledge; 2d, that he is not proved to have on any occasion adopted or repeated the statement, but, on the contrary, seems to have taken an early opportunity of intimating to his agent that he did not wish it to be insisted in; 3d, that the said statement was pertinent to the issue of the competition between the defender and M'Lachlan, and although the defender did not formally withdraw it when it first came to his knowledge, this may have been because he supposed that his agent had not made it without probable cause; and 4th, that nothing has transpired to show that the defender was in point of fact actuated by malice to the pursuer; Therefore sustains the defences, and assoilzies thed efender from the conclusions of the action; but, in respect the defender has alleged in the closed record, certain actings by the pursuer in Mitchell's sequestration which he maintains went to justify the statement complained of, and yet failed to prove any such actings, finds no expenses due, and decerns."

The pursuer appealed, and argued that the privilege attached to such a statement only so long as the party founded on it as relevant and intended to prove it, that here, as no attempt had been made to prove it, and as it still remained in process, the privilege had ceased.

Cases cited—*Smith*, 15 D. 549; *Bell* v. *Black*, 2 Scot. Law Rep. 58; *Logan*, October 26, 1872.

At advising—

Lord Justice-Clerk—I think the pursuer has failed to make out that the statement was made maliciously. It was a statement made in a judicial process and was pertinent to the issue and therefore privileged, and if privileged when put on record it does not cease to be so when the party who makes it finds himself wrong. The defence is the utter want of justification, but I see no evidence of a real desire to injure the defender by making a false statement. I do not doubt the defender is responsible for those statements and he did not take any vigorous steps to withdraw them. But I think it is important that parties should be quite free to make relevant statements, and very inexpedient that they should be hampered by fear of a prosecution so long as these statements are honestly made.

The other Judges concurred.

Appeal dismissed.

Counsel for Pursuer—Rhind and Scott. Agent—W. Officer, S.S.C.

Counsel for Defender—H. Moncreiff. Agent—A. A. Hastie, S.S.C.

Thursday, December 12.

SECOND DIVISION.

SPECIAL CASE—ALLAN'S TRUSTEES.

Settlement—Construction—Vesting.

A died leaving a trust-disposition and settlement of the entirety of his estate for certain purposes. *Inter alia*, he directed his trustee on the death of his widow (who life-rented the residue) to denude and pay over the fee of the said residue among the whole of his children who might survive him, and the issue of such as might predecease him; and declaring that the provisions hereby made in favour of females shall be purely alimentary to them, not alienable or assignable, and shall be exclusive of the *jus mariti* and right of administration of any husband they or either of them have or may have, and shall not be affectable by their own, or such husband's debts or deeds, or the diligence of their own or his creditors, all which are hereby excluded and debarred.

On the death of truster's widow, in a question between the trustees and the daughters of the truster—*Held* (1) that the trustees were bound to make payment to the daughters of their shares of the residue; (2) that the exclusion of the *jus mariti* and right of administration must be inserted in the receipts by the daughters; (3) that the clause declaring the shares alimentary and not alienable was to be held *pro non scripto*.

In a question between the issue of a son who predeceased the truster and the surviving children—*held* that the share of the son vested *a morte testatoris*.

Thursday, December 12.

FIRST DIVISION.

SPECIAL CASE—MORICE'S TRUSTEES AND OTHERS.

Succession—Fee and Liferent—Power of Apportionment.

A testator provided in his trust-disposition that the free residue of his estate should be divided amongst his children in just and equal proportions, and declared with respect to his daughter's portion, that the same, with the exception of £500 to be at her absolute disposal upon attaining twenty-one years of age, should be laid out on heritable security, and so remain until her marriage, when the same should be secured in the same way for her proper liferent use, and afterwards to her children in fee. At the date of this trust-disposition only one daughter had been born to the testator, but subsequently he had a large family, and was survived by four daughters, besides sons. By a codicil the testator provided that the division of his property should take effect among all his sons and daughters, share and share alike, and, excepting £500 payable on marriage to each of the daughters, and £500 more which each was permitted to bequeath, the entire residue of the shares of daughters dying unmarried or childless, was to revert to the surviving sons and daughters. On the marriage of one of the testator's daughters, a clause was inserted in her marriage-contract reserving to her the right to apportion the shares which her children were to have of the estate bequeathed to her by her father, at her death. In virtue of the power thus conferred upon her, the daughter executed a deed of apportionment. *Held* that she had only a liferent under her father's trust-disposition of the capital of the original share