money to his mother, give him all credit for these advances, but they will never found a discharge.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

"Adhere to the said interlocutor, but under reservation of the claim of Hugh Mackenzie's trustee to set off against the amount of the *jus relictæ* any sums which he can show that Hugh Mackenzie expended on the maintenance of the widow during her viduity. . . . ."

Counsel for Pursuers—Millar Q.C. and Hunter. Agents—Skene, Webster, & Peacock, W.S.

Counsel for Defenders—Fraser and Duncan. Agents—Murray, Beith, & Murray, W.S.

B., Clerk.

Friday, June 13.

FIRST DIVISION.

[Lord Gifford, Ordinary.

ARKLEY AND OTHERS (HAY'S TRUSTEES).

PETITIONERS.

Trusts Act 1867, § 3—*Intention.*

A truster left his estates to trustees with directions to pay his debts and an annuity to a nephew out of the rents of his landed estates and the proceeds of his other property, and he also expressly prohibited the trustees from selling any part of the landed estate, which they were directed to entail. On his death it was found that his entire income was not sufficient to meet the burdens on his estate exclusive of the annuity. The trustees applied to the Court for authority to sell a portion of the landed estate, entailing the remainder; *held*, that in the face of the truster's prohibition of sale the Trusts Act 1867, sec. 3, did not apply, and that the Court could not assume an intention on the part of the truster at variance with the express words of his trust deed.

This was a petition under the Trusts Act by the trustees of the late Mr Hay, of Letham, for authority to sell a portion of the trust-estate. The directions of his settlement were to realise his estate other than landed estate, and to apply the proceeds, together with the rents of his landed estate, in payment of his debts, including an annuity of £750 created by a separate bond of annuity in favour of his nephew Alexander Hay Miln, of Woodhill; but the trustees were expressly forbidden to sell any part of his landed estates in the counties of Forfar and Perth, which they were to hold till the debts were paid off, and in any event for twenty-one years, during which Mr Miln's annuity was never to exceed one-third of the free rental of the estates. By a codicil there was a provision for extinguishing the debt by an annuity arrangement with an insurance company, to expire in not more than fifty or less than forty years; and when the debt was all paid the trustees were to hold the trust for behoof of Mr Miln if alive, and if he was dead, they were to execute an entail in favour of his son and a series of heirs. Mr Hay hoped that thus his personal property and the rents of his landed estates would suffice in time to pay off his debts, but in this he was mistaken, for the trustees found themselves in possession of an estate yielding a gross rental of £5035, while the interest on debt and other burdens amounted to £5141, leaving a deficiency of £106 per annum, and this without any payment of annuity to Mr Miln.

In these circumstances, they craved authority to sell lands to the extent of about £2000 or £2500 of rental, the full proceeds to be applied in extinction *pro tanto* of the heritable debt. The petition was served on Mr Miln and on the three next having interest in the annuity and the estates. He lodged answers, in which, while concurring in the general object of the petition, he asked that a larger portion of the trust-estate should be sold, so as to provide to some extent for the payment of his annuity. The Lord Ordinary, after a remit to Mr T. G. Murray, W.S., granted the prayer of the petition.

Mr Hay Miln reclaimed.

At advising—

LORD PRESIDENT—This is an application by the trustees of the late Mr Hay, of Letham, for authority to sell part of his heritable estate, and the petition is based on sec. 3 of the Trusts Act of 1867. The circumstances of the case are peculiar. Mr Hay left a trust-disposition with two codicils, the effect of which was that he directed his trustees to pay his debts out of his estates other than the landed estates in Forfarshire, which they were expressly prohibited from selling. The prohibition is thus expressed:—"My trustees shall with all convenient speed apply the trust property, excepting my landed estates particularly above named, no part whereof they shall have liberty to sell," &c. Now he further provided that his nephew, the respondent, who appears to have been his nearest relation, should receive an annuity of £750, secured by a bond of annuity. The trust was to endure for twenty-one years, and the truster apparently hoped that in that time his property, other than the estate of Letham and the rents of that estate, would be sufficient to pay off his debts, but in this expectation he was mistaken, for the income of the estate was not sufficient to pay off the annual burdens, even after applying to that purpose all the rest of the available property. There was a deficiency of £106 a year. Now the expediency of granting the prayer of this petition is clear—indeed the trust is unworkable otherwise; but the first question is whether its object can be attained under sec. 3, or whether the trustees must not go to Parliament for a private Act. It is true that the Act of 1867 was intended to save the necessity of doing so, and I should be prepared, generally speaking, to give it as wide an interpretation as possible, but the words of sec. 3, clause 1, are those on which the difficulty arises, for I do not think, with the Lord Ordinary, that sec. 19 creates any difficulty. Section 3, however, authorises the Court to grant powers of selling, on condition of "being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof." It may be expedient that the trustees should have power to sell, but we must look whether that be not inconsistent with the intention of the truster. Now the truster's intention is clear; the estate was not to be sold. The

very reason for creating the trust at all was that the trustees might redeem the estate and entail it as directed, and it is hard to say now that he intended that any part of it should be sold; and further, the words which I have already quoted appear to me to be an express prohibition. The Lord Ordinary supposes that the truster had two purposes, to pay his debts and to entail his estate; and he suggests that as his object cannot be carried out completely as he wished it, the next best thing to do is to sell one half of the estate and entail the other; but that is simply a guess as to what would have been the truster's intention, and I do not think we can substitute a mere conjecture for the clear expression in the trust-deed. I am of opinion that we ought to refuse the petition.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Recall the said interlocutor, and refuse the petition, and decern; and authorise the petitioners to pay out of the trust-funds the expenses of both parties as the same may be taxed: Appoint accounts of said expenses to be given in, and remit the same, when lodged, to the Auditor to tax."

Counsel for the Reclaimer—Solicitor-General (Clark). Agents—Dundas & Wilson, C.S.

Counsel for the Respondents—Watson and Mackay. Agent—Alexander Howe, W.S.

M. Clerk.

Friday, June 13.

FIRST DIVISION.

[Sheriff of Fifeshire.

JAMESON *v.* BONTHRONE.

Damages for Slander—Actionable expressions.

Held (dub. Lord Deas) that the epithet "d——d puppy" is not actionable.

This was an appeal from the Sheriff-court of Fifeshire in an action of damages for slander raised in the Sheriff-court at the instance of the Procurator-Fiscal of Auchtermuchty against Alexander Bonthrone, brewer and malster, at one time a Bailie and now Provost of the same burgh. The damages said to be sustained by the pursuer were explained to be "in consequence of the defender having slandered him by stating within the Burgh Court-room, at an adjourned meeting of the Licensing Magistrates on the 23d April 1872, that he (the pursuer), who was in attendance in the Court as Procurator-Fiscal to give information to the presiding Justices in regard to the applicants for licenses and the premises sought to be licensed, was a 'damned puppy and a low blackguard,' or by having falsely, maliciously, injuriously, and calumniously used and uttered words to that effect, whereby the defender represented the pursuer as a degraded, impertinent, base, vile, scurrilous, vicious, *ill*-conducted fellow, and utterly unworthy and incapable of holding the honourable and exalted office of Procurator-Fiscal for the burgh of Auchtermuchty, and the pursuer has not only been rendered contemptible and disreputable in the eyes of his fellow townsmen, but has suffered greatly in his feelings and character, and his integrity and usefulness as a public official has been greatly injured." A minute of defence was lodged, to the effect that on the occasion in question the defender was offering some pertinent observations to the Bench when the pursuer improperly interfered and called out, "Sit down, Sir: You have no right to speak here;" that he thought the pursuer was rude in thus interrupting him, and he retorted the words "damned puppy;" that he regretted using these words; but did not remember having used the other words complained of—"low blackguard." Proof was led; and the Sheriff-Substitute (Beatson Bell) found that it was not proved that the defender used to the pursuer the words "low blackguard;" and that, in point of law, the words admitted to have been used by the defender in the circumstances were not actionable.

The Sheriff (Crichton) adhered.

The pursuer appealed to the First Division of the Court of Session.

Authorities relied on—Ersk. Inst. iv. 4, 80; *Graham*, 13 D. 634; *Brownlie*, 21 D. 480; *Denholme*, 4 Murray's Jury Rep. 195: *Sheriff* v. *Wilson*, 7 D. 528.

The defender was not called upon.

At advising—

Lord President—Two epithets are alleged to have been applied by the defender to the pursuer, viz., "low blackguard" and "d——d puppy." There is no doubt that the first of these expressions is actionable. That was decided by the case of *Brownlie*. As to the other expression, I am not aware that it has ever been proposed before to try the question as to the use of the epithet "puppy," and I do not think that the word d——d adds anything to its significance. The question therefore comes to be, Is the expression "puppy" actionable? I think not. No doubt it is an epithet of contempt, but it is not every expression of contempt that is actionable. The only other question is, whether it is proved that the actionable words were used. I agree with the Sheriff that it is not.

Lord Deas—I agree with your Lordship. I am not prepared to say that the epithet "puppy" never can be actionable. A great deal depends upon the circumstances where and when it is used. If actionable at all, it must inuendo something; but anything it is said to inuendo in this case is certainly not proved, and "puppy" by no means necessarily implies all here alleged to have been meant by it. Sometimes it may be used in an almost approbatory sense.

Lord Ardmillan and Lord Jerviswoode concurred.

The Court pronounced the following interlocutor:—

"Find, in fact, that at an adjourned licensing Court held by the Magistrates of Auchtermuchty on the 23d April 1872, the defender (respondent) said in the presence and hearing of the said Magistrates and others, that the pursuer (appellant) was a damned puppy: Find it not proved that he did then and there say that the pursuer was a low blackguard: Find, in law, that the words damned puppy are not actionable; Therefore refuse the appeal, and decern: Find the appellant liable in ex-