any expenses for investigation conducted prior to an order for proof or issues.

At advising—

LORD MURE—This is undoubtedly a very peculiar case. I have not my papers beside me at this moment, but enough has been stated at the bar to satisfy me that the circumstances are very special indeed. It is not disputed that the inquiries, the expense of which is sought to be recovered, related to matters relevant to the question at issue, and accordingly I think that unless the allowance of these charges is directly struck at by the rule regarding precognition, this is a case in which something should be allowed towards the expense of these inquiries. The investigation related to the conduct of a divorced woman who had presented a petition for access to her child, and it was most pertinent to the disposal of this petition that the Court should know what the petitioner was doing at the time of her application. I should therefore be disposed to remit back to the Auditor to hear the parties, and to make such allowance for these inquiries as he thought suitable.

LORD SHAND—I have some difficulty about this case, and I cannot concur in remitting it to the Auditor. No doubt it turns out from these inquiries that the petitioner has been shown to have lived with her paramour since the divorce, but it is a settled rule of this Court that parties must make these preliminary inquiries at their own expense. This is a most salutary rule, and its observance prevents abuses. I think that the Auditor has acted properly, and that we should not depart in this case from the ordinary rule.

LORD ADAM—I am in this position, that I do not know anything about the early procedure in this case but from what I have heard to-day. I am inclined to agree with Lord Mure that this is an exceptional case, and ought not to fall under the general rule.

When this petition was presented it was undoubtedly the duty of the respondent to make himself aware of his wife's doings that he might be in a position to supply the Court with the necessary information. This is not a case of the usual kind in which a mere patrimonial interest is involved; the respondent here was only doing his duty in making these inquiries, and all reasonable charges ought to be allowed.

LORD PRESIDENT—I am also inclined to make this case an exception to the salutary rule referred to by Lord Shand, that a party is not entitled to take precognitions prior to an order for proof or for issues except at his own expense. The present case does not fall under that rule. It is an application to the discretion of the Court, and in such applications the Court tries to avoid as much as possible all public and formal inquiry. It tries to get its information as much as possible by explanations and admissions of parties, and in order to obtain these expense must be incurred and should be allowed for. It is clear that the present case might not have terminated as it did but for the inquiries made by the respondent, and it is quite obvious from the explanations which were made that the petitioner is not a suitable person to have access to her child.

In such circumstances it would not be fair to the party who has made these inquiries and obtained this result that he should not be relieved to some extent of the expense which he has thus incurred.

There is another consideration which weighs with the Court in cases of this kind, and it is this, that the interests of the child have to be considered. Our duty is sometimes a difficult one, and it is very desirable to avoid as much as possible in the interest of the child anything of the nature of a formal proof.

On the whole matter I think that this is a case in which the ordinary rule does not apply.

The Court remitted back to the Auditor to hear the explanations of parties, and to make such allowance of expenses as he thought fit.

Counsel for Petitioner — Lang. Agents — Paterson, Cameron, & Co., S.S.C.

Counsel for Respondent—Robertson—Dickson. Agent—Alex. Morison, S.S.C.

Thursday, May 28.

FIRST DIVISION.

[Lord Lee, Ordinary.

BRIMS *v.* REID & SON.

Reparation — Slander — Innuendo — Privilege — Issue—Malice.

A newspaper published an anonymous letter containing a libel, and refused to give the writer's name. *Held* that it thereby took on itself the responsibility of the writer, and was not privileged, and therefore that in an action of damages by the person libelled malice ought not to be put in issue.

Issue—Veritas—*Justification.*

A newspaper having published an anonymous letter which supported an innuendo that the person to whom it referred had acted corruptly for his own interest in the pretended exercise of his public position, proposed in an action of damages by him to take a counter issue whether the statements in the letter were true. The Court *refused* the counter issue on the ground that it was not a proper issue in justification.

This was an action of damages for £1000, as raised by William Brims, architect and Dean of Guild, Wick, against Peter Reid & Son, printers and publishers of the *John O'Groat Journal.* The pursuer had been for some years a member of the town council of Wick and Dean of Guild of the burgh.

The *John O'Groat Journal* of date 16th October 1884 contained a letter headed "Our Dean of Guild" and signed "Nemesis," but the publishers refused to disclose the name of the author of this letter. It was in these terms, and the pursuer complained of it as libellous:—

"OUR DEAN OF GUILD."

"To the Editor of the *John O'Groat Journal.*

"Sir—As our Dean of Guild is one of the members of the Town-Council who seeks re-election in November, I think it would not be amiss if a few remarks were made on his past term of office.

"The late George Simpson, who occupied the post of Dean of Guild for many years, was the very antitype of Mr Brims, being late and early, in season and out of season, found at his post attending to the well-being of the town. The erection of buildings in the royal burgh did not entirely engross his attention; he always personally superintended the cleansing, construction, and repair of the roads and drains, and generally by his untiring services materially benefited the town. On the retirement of Mr Simpson, our present Dean, who was being appointed to every public office as a vacancy occurred, thought fit to adorn himself with the order of Dean of Guild, and, as a matter of course, the installation took place. He was possessed of all the necessary qualifications—superfluous time, engineering and architectual abilities of no mean order, and a mind above small things. On entering office he had £300 placed at his disposal—being money paid over to the common good for the county's share in the town hall. To spend this money in an approved fashion great measures were spoken of. Carefully designed plans for a new fish-market were submitted to the Council—and oh! such a beautiful fish-market that fish-market was to be. Its floor was to be of solid concrete, its shelves and counters of polished Caithness pavement, and roof of iron; but alas! like many a 'weel laid scheme,' the fish-shed has ended in thin air. It took six months to admire the beautiful designs, and six months more were spent in carefully sealing them up for depositing among the archives. When the time came for again considering the matter, it was to be like a certain biblical character, part of wood and part of iron. When last seen it was shown as a 'teefa' to a public-house in the market-place. It is now apparently in course of construction. As an object of interest it is unique. 'Come, oh, come and see it!'

"The Dean's attention to our roadways has been very satisfactory from a certain point of view. But with the ratepayers the 'point of view' alters considerably. The approaches to the Gaelic Church, Alexandra Place, and Macleay Lane required the earnest attention of the Dean, and £100 of public funds were spent in making good the access to the various properties in these localities. It was also necessary for the town to acquire the service of a 'handy man,' who would know nothing, and be able to turn his hand to any kind of job. This was well managed. After much fishing from many waters the Dean drew William, a namesake of his own, and one who was apt to learn. This same William is a most wonderful man. He has proved the opposite of the old saying, 'Ye cannot serve two masters.' He could not only do that, but he could serve two masters in different places and at the same time. His accounts abundantly prove that his services were well divided, although the pay possibly came from the one purse. Honour after honour has been heaped upon the Dean in acknowledgment of his great acquaintance with the game of 'how not to do it.' He either moves or seconds every motion in the Council, he is a member of the harbour trust (through his knowledge as an architect), and of the police commission until lately, when he was washed out. He is also convener of several committees, which he manages very well so that their labours may be as fruitless as possible; in fact, he is chief of a ring which has too long been dominant and much too long tolerated in our midst. However, after six years of office we have found him out. We know now what we knew when he entered office. The public treasury is empty, and not one iota of public benefit to show for it. It is time that the systematic throwing of dust in the people's eyes had come to an end. The royalty is tired of it, and the extended area will not be tooled by a clique. The new voters are determined to assist the old voters in having much needed reforms carried, and our present Dean is not the man to whom these reforms should be entrusted. At the end of six years we find the town as filthy as ever, drains lying choked full of sewage, and streets kept like a farmer's yard. Any reforms which have taken place have been wrested by force from the Dean and his party. The young blood which will at November be returned to the Council should at once commence a sweeping reform of all abuses and nuisances at present existing.—Yours, &c NEMESIS."

The pursuer averred that the statements in the letter were false and calumnious; that the defenders published it maliciously; that he was falsely and calumniously represented as a dishonest person, who abused his municipal appointments so as to benefit himself at the expense of the town of Wick; who had dishonestly employed William Waters referred to in the letter to do his private work at the town expense. He averred that the statements were intended to mean, and did mean, that he had been unfaithful to the public trust reposed in him, and had in his municipal position acted corruptly for his personal benefit.

The pursuer also averred that previous letters of an offensive character had appeared in the columns of the *John O'Groat Journal*, and that he had treated them with contempt; but that the present letter rendered it necessary for him to vindicate his character, and to put a stop to the appearance of such letters in future.

The defenders admitted publishing the letter complained of, and also that they declined to divulge its authorship. They averred that at the time when the letter was written a municipal election was about to take place in Wick, and that the pursuer was a candidate for re-election; that the letter in question was not inserted from any malicious motive, but only as a criticism by a member of the public on the conduct of a candidate for office. They maintained that the letter was a fair criticism of a public man in his public capacity, that it was not libellous, and was privileged; and further, that all the statements it contained were currently believed to be true, and were honestly believed by them to be true.

They averred that the pursuer was, as stated, proprietor of property in the places mentioned in the letter, and that William Waters was employed both by the town and privately by the pursuer.

They further averred that upon 2nd January 1885 they wrote to the pursuer's agents expressing their regret that the pursuer should regard as a malicious attack upon his private character what was intended to be only a fair criticism of him in his public capacity.

They pleaded, *inter alia*, that the statements complained of were not defamatory, and, *separatim*, they were privileged, and (4) "the statements contained in the said letter are true."

The following issue was proposed by the pursuer, and by interlocutor of 19th March adjusted and approved by the Lord Ordinary—"Whether, on or about 16th October 1884, the defenders printed and published in the *John O'Groat Journal* the letter printed in the schedule hereto annexed? And whether the said letter is in whole or in part of and concerning the pursuer, and falsely and calumniously represents the pursuer as a person who had been unfaithful to the public trust reposed in him as Dean of Guild of the royal burgh of Wick, and had in his municipal position acted corruptly for his personal benefit, to the pursuer's loss, injury, and damage? Damages laid at £1000."

The schedule contained the letter printed above.

The Lord Ordinary disallowed a counter-issue proposed by the defenders, and putting the question "Whether the statements in the said letter are true?"

"*Opinion.*—I was of opinion that the letter complained of, and particularly that part of it which relates to the pursuer's actiugs as Dean of Guild in regard to the roadways forming approaches to the Gaelic Church, Alexandra Place, and Macleay Lane, support an innuendo that he had been unfaithful to the public trust reposed in him, and had acted corruptly for his own personal benefit. I therefore held that an issue must be allowed.

"(2) On the question whether the pursuer was bound to take an issue averring malice, I was of opinion that a newspaper is not privileged in such comments, as a ratepayer is in discussing the claims of a candidate for public office at a public meeting held for the purpose of considering the claims of candidates. A newspaper in publishing such a letter acts purely as a volunteer, and takes the responsibility of one who publishes a statement without any call to speak on the subject. It was admitted that in no instance has a pursuer of such an action been compelled to take an issue of malice, and it appeared to me that there is no principle for the contention that malice must be put in issue. In giving this opinion I do not question the right of newspapers to comment upon the public acts of public men. But that right, in my opinion, does not extend to uncalled-for attacks upon character.

"As to the counter-issue, I had no hesitation in disallowing it. No example of a counter-issue in which it is not proposed to justify the alleged libel was alleged to exist. The defenders admitted that they did not by their proposed counter-issue offer to prove that the pursuer had applied public moneys to roadways which did not require attention, or required attention only because his properties in that neighbourhood gave him an interest in making good the access thereto."

The defenders moved the Court to vary the issue by the insertion of the word "maliciously" so that the issue would run, that the letter "falsely, calumniously, and maliciously represented the pursuer," &c. They also reclaimed against the interlocutor disallowing their issue.

Argued for them—This was a case of privilege. It was the case of the newspaper comment upon the public character of a public man who was offering himself for re-election to a public office; the letter complained of did not exceed the limits of fair criticism; the pursuer was bound in such a case to prove malice, and it should be put in issue.

Authorities—*Drew* v. *M'Kenzie*, February 28, 1862, 24 D. 649; *Sharp* v. *Auld*, July 14, 1875, 2 R. 940; *Docharty* v. *Coghill*, October 18, 1881, 19 S.L.R. 96; *Odger* v. *Mortimer*, 28 Law Times, 472; *Weyson* v. *Walter*, L.R. 4 Q.B. 73.

Argued for respondent—There was no privilege in the case of anonymous writings, nor was there any privilege which allowed a newspaper to attack the private character of an individual. There was no case in which, when a newspaper was brought into Court the pursuer had to insert the word "maliciously" in the issue—*Dun* v. *Bain*, 4 R. 317. Public character might be attacked but not private moral character. The editor took the place of the anonymous writer in refusing to disclose his name. If the writer of the letter was known, and the action was directed against him, malice would not require to be put in issue. So in an action against the publisher of the anonymous letter who takes all the author's responsibilities, the pursuer should not be called on to aver malice.

Authorities—*Miller* v. *Robertson*, December 2, 1852, 15 D. 170; *Macdowall* v. *Guthrie*, June 25, 1853, 15 D. 778; *Spotiswood* v. *Campbell*, 32 L.J. Q.B. 185.; *Alexander* v *Macdonald*, 4 Murray, Jury Reports, 94.

At advising—

Lord President—There are two questions raised by this reclaiming-note; one is with regard to innuendo put by the pursuer on this letter, and as to that I do not think any of your Lordships have any doubt that the innuendo was justified, looking to the terms of the libel complained of and the circumstances alleged. The proposal as to a counter-issue is really absurd, and I need say no more about it. The point mainly urged by the defenders is that this issue should put the question to the jury not only whether this letter falsely represented the pursuer to be a person unfaithful to the public trust, but that he should also undertake to prove that the letter was malicious—that the making of the statement contained in that letter was maliciously done. Now, it appears to me that whatever might have been the question had this been a statement made in an editorial article, the fact that it was made in an anonymous letter is quite sufficient decision of the point. There may be a certain protection to a newspaper in criticising the acts of public men, but there is a great deal of delicacy in defining what that privilege is, and perhaps also in defining the class of public men, and perhaps further still in defining the kind of accusation that may be brought against the conduct of public men, distinguishing, of course, between what they do as public men and what they do as private individuals. The Court is relieved, however, from all these difficulties in the present case. The libel complained of was contained in an anonymous letter addressed to this *John O'Groat Journal*. Now, the editor of the newspaper declines to disclose the author of the letter, and the effect of that in point of law is in my opinion, not that we are entitled to deal with that letter in the same way as if it had appeared in a leading article of the paper, or in any part of the paper

in which the editor speaks for himself, but that the position is that the editor accepts the whole liability of the anonymous author—every liability that can be brought against him if he had been disclosed. Therefore the real question is, whether there is any necessity for the pursuer putting malice into his issue, the action being one against a person occupying the same position as the anonymous author himself. Suppose this letter had been signed, there might then have been a question whether the person who wrote the letter had any right to deal with this subject at all, or to concern himself about it, or speak or write about it. All that could have been open for inquiry, but we are precluded from all inquiry into that because the name of the writer is suppressed. We cannot ascertain what interest the writer of the letter had in the matter he was discussing, nor can we say whether he was a ratepayer in Wick, was ever in Wick, or was even a British subject—indeed, he is a mere *umbra*. But he was somebody, and that somebody has libelled the pursuer, and is not in a position to justify that libel, and is not in a position to say that he has individually any sort of protection or privilege in the matter. That seems to me to be the conclusion of the whole question. If it is pleaded in point of law that when the editor of a newspaper rather than disclose the name of an anonymous contributor chooses to defend him in his own person, he is thereby entitled to maintain that what has been done is the same thing as if the attack had been contained in a leading article, then, I say, that is an entire mistake in point of law. When a newspaper editor or publisher declines to disclose the name of an anonymous contributor he puts himself in the position of saying, "We must submit to everything you can possibly bring against us in the way of liability, as if this had been a letter written, not in the newspaper at all, but written by one of ourselves, and printed in a separate form, and posted on the walls of the town." That is to say, the proprietor and the editor can be in no better position in this question than the anonymous author. The anonymous author is the person who is primarily liable, and if this article which was written by him was written by him maliciously, it is conceded on the part of the defenders that would subject the newspaper in damages; but how is it possible to prove malice on the part of a person one does not know? How can it be proved that the person who signed the letter was actuated by malice, or how can anybody prove the reverse? Yet that is one of the questions proposed to be put before a jury. On the whole matter, I have come to the conclusion that in the case of an anonymous letter there is no necessity for the pursuer proving malice.

Lord Mure concurred.

Lord Shand—If this question had arisen out of an editorial article, or out of an article or letter commenting upon the public life and character of the pursuer, I should have had more difficulty with the case, but in the special circumstances I think with your Lordship that malice should not be inserted in this issue.

We know nothing about the writer of this letter, whether he has any real interest in the burgh, or indeed whether he is even a resident in it. The editor of the paper refuses to surrender the name, and in these circumstances he must undertake all the responsibility.

We must take it, therefore, that this letter is not written by one who is a ratepayer, or who has any interest whatever in the prosperity of the burgh. In such a case malice does not require to be inserted in the issue.

Lord Adam concurred.

The Court refused the reclaiming-note and the motion to vary the issue.

Counsel for Pursuer—Rhind—Young. Agent—William Gunn, S.S.C.

Counsel for Defender—R. Johnstone—M'Lennan. Agent—John Macpherson, W.S.

Saturday, May 30.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

STIVEN *v.* FLEMING.

Process—Expenses—Bankrupt—Caution for Expenses where Fraud Alleged—Reduction.

In an action of reduction of a disposision on the ground of fraud, the Lord Ordinary, in respect of the bankrupt defender's failure to find caution for expenses, decerned against him conform to the reductive conclusions of the libel. His trustee did not appear in the action. On a reclaiming-note for the defender the Court *recalled* this interlocutor, and found (following *Buchanan* v. *Stevenson*, Dec. 7, 1880, 8 R. 220) that the general rule in such cases was that a defender was not obliged to find caution for expenses of process, and that here the bankrupt's character being assailed, the rule should be applied.

Counsel for Pursuer—J. P. B. Robertson—Law. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Defender—Nevay. Agent—R. Broatch, L.A.

Tuesday, May 26.

OUTER HOUSE.

[Lord M'Laren, Ordinary.

ROGERSON AND OTHERS *v.* CROSBIE (ROGERSON'S TRUSTEE).

Process — Expenses — Caution for Expenses — Bankrupt— Voluntary Assignation—Reduction.

A bankrupt who had granted a voluntary assignation in favour of his trustee of the rents of certain lands which he was entitled to receive under his father's trust-disposition and settlement, sued his trustee for reduction of the said assignation, on the ground