agent of Mr Steel in trying to recover from the pursuer a cutting machine which the latter had taken possession of. The parties, till the writing of the letter complained of, had been entirely engaged in treating the matter as one of civil right, and the instructions which the defender got were to insist on the delivery of the machine. Instead of doing that he wrote the letter in question, which the pursuer avers accuses him of theft. If the pursuer succeeds in proving the innuendo he has placed upon the letter, I am not at present disposed to think that there was any privilege. At the same time, facts may arise at the trial to show that the defender's position was privileged, and I agree with your Lordship that in that case it will be the duty of the Judge who presides at the trial to direct the jury that they cannot return a verdict for the pursuer unless they are convinced that the defender acted maliciously.

LORD M'LAREN—From my experience of this class of cases I am inclined to the view that it is impossible to lay down any absolute rules with regard to the right of the pursuer to have his case sent to a jury on words not necessarily libellous in themselves. In several recent cases we have assoilzied the defender on the ground that the words complained of did not in their reasonable construction entitle the pursuer to reparation. In sending this case to trial I wish to guard against being supposed to hold that every person who thinks a crime has been committed, and gives notice of his intention to give information to the fiscal, is open to an action of defamation of character, because it may very well be that a person who thinks that a case calling for the intervention of the Criminal Courts of the country has arisen may be only doing what he thinks fair and reasonable in giving notice of his intention to lodge information to the party concerned, and if he is only prevented from following up such notice, and giving information by explanations which satisfy him that he was mistaken, I should not hold that any libel had been uttered by him. There may, on the other hand, be other cases where, *prima facie*, the threat of a criminal prosecution is used to get a party to comply with the defender's demands. The case here seems to me to be a proper case to go to a jury.

As to the form of the issue, I do not see that there is here any case of privilege. Such a case would only arise if the notice is followed up. I can quite understand the point of view of the Lord Ordinary, who looks upon the letter as just the initial step in a prosecution, and holds that the defender is entitled to the same privilege as a person who gives information to the fiscal, but I am not satisfied of the fact that the letter is the initial step in a prosecution. It will be for the Judge at the trial to consider whether or not a case of privilege has been made out.

LORD KINNEAR—If all your Lordships are of opinion that the question whether the pursuer can gain a verdict without satisfying the jury that the letter complained of was written maliciously should be left to the Judge who presides at the trial. I do not wish to dissent from that view, but I could not concur in the judgment if it implied that the pursuer would be entitled to a verdict although malice had not been proved. I cannot assent to the view of one of your Lordships that there can be no privilege because of the variation between the written instructions given to the defender by his client, and the terms of the letter which he himself wrote in carrying out these instructions. That may or may not be evidence tending to prove malice. But it appears to me to have no bearing on the question whether it is necessary that malice should be proved.

The Court varied the issue by deleting the word "maliciously" in terms of the motion.

Counsel for the Pursuer—Shaw. Agent—P. Morison, S.S.C.

Counsel for the Defender—M'Kechnie. Agent—William Black, S.S.C.

Friday, November 7.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MOLLESON (WHYTE'S JUDICIAL FACTOR) *v.* WHYTE.

Trust—Administration of Trust—Application for Power to Sell—Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 3.

Section 3 of the Trusts Act 1867 makes it competent for the Court of Session to grant authority to the trustees under any trust-deed to sell the trust-estate or any part of it "on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof." By the Trusts Act 1884 (47 and 48 Vict. cap. 63), sec. 2, it is provided that in construing the Act of 1867 "trustee" shall include tutor, curator, and judicial factor.

A testator conveyed his whole estate, heritable and moveable, to trustees for certain purposes, empowering them to sell the same (with the exception of the lands of B. and M.)

A judicial factor having been appointed on the trust-estate in place of the trustees, presented a petition for power to sell the lands of B. and M. *Held* that the power of sale craved was inconsistent with the intention of the trust, in respect that the testator, in granting a power of sale to his trustees, had specially excepted the lands of B. and M., and petition *refused*.

George Whyte of Meethill, Aberdeenshire, died in 1869. He left a trust-disposition and settlement by which he provided the liferent of his estates to his widow, legacies of

£1000 to each of his daughters, and the residue of his estate to his son George Whyte. He directed that on his wife's death the legacies should be paid, or, at the option of his trustees, secured over the heritable estate, and he recommended his trustees (if there should not be personal estate sufficient to pay the legacies) to secure them rather than sell the heritage. He conferred on his trustees a power of sale in these terms—"I hereby empower my said trustees . . . to intromit with the whole trust-estate and effects hereby conveyed, heritable and moveable, real or personal, or any part thereof, . . . and to sell and dispose of the same (with the exception of the said lands of Meethill and Burnhaven) by public roup or private bargain, in any manner and subject to any conditions they may think fit." . . .

The truster was survived by his widow, who died in 1887, his son George Whyte, and three daughters, Phillis, Mary Logan, and Fanny.

On 16th July 1885, on the petition of Phillis Whyte, with consent of George Whyte, the trust-estate was sequestrated, and Mr Molleson, C.A., was appointed judicial factor thereon.

The present petition was presented in July 1889 by Mr Molleson, with consent of the truster's three daughters, and also of certain heritable creditors on the trust-estate, for authority to make up a title to and sell the lands of Meethill and Burnhaven. He averred that the rental was insufficient to pay the interest of the debt, that many of the houses were going to decay, that he had no funds to pay for the necessary repairs, and that the heritable creditors were pressing for payment of their debts.

George Whyte lodged answers in which he objected to the power craved being granted, on the ground, *inter alia*, that it was inconsistent with the purposes of the trust. He also lodged a minute for recal of the factory, but a consideration of the questions raised under that minute is not material to the present case.

Section 3 of the Trusts Act 1867 (30 and 31 Vict. cap. 97), provides—"It shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof—1. To sell the trust-estate or any part of it."

On 29th May 1890 the Lord Ordinary (KINCAIRNEY) in the petition for special powers, remitted to Mr Beattie to inquire into the value of the properties of Meethill and Burnhaven, and to report *quam primum*.

"With regard to the petition of the factor for warrant to make up a title, and authority to sell, I have felt great difficulty. It seems difficult to affirm that a sale of Meethill and Burnhaven is consistent with the intention of the truster; and I would have thought it very doubtful whether such a power could be granted were it not for the fact that a power to sell part of Burnhaven has been granted already under the authority of the Inner House, and as the judicial factor is of opinion that a sale is necessary, and as the judgment of the Inner House absolutely precludes the view that the terms of the trust prevent such a sale, I think I have no course but to direct inquiries by a remit to a practical man with a view to consider as to the expediency of a sale. I may add that if it were quite clear that a sale would effect no more than payment of the heritable creditors I would be very much indisposed to interfere. But there seems reason to hope that there may be some balance for the beneficiaries.

"Having in view what is said as to the present dilapidated condition of the property, I have made the remit in terms more specific than usual, my object being to ascertain whether a sale of the property in its present condition might not lead to loss which could be avoided. Mr Whyte will have the opportunity of assisting the reporter in his inquiries, and submitting to him any views about the property which he may think of consequence."

George Whyte reclaimed, and argued—The power of sale craved was inconsistent with the intention of the trust, as the lands of Meethill and Burnhaven were expressly excepted when the power of sale was given in the trust-deed. The petition should therefore be refused — Trusts Act 1867, sec. 3.

Argued for the truster's three daughters and the heritable creditors—To discover the "intention of the trust" it was necessary to look at the whole scope of the trust-deed. The main purpose of the truster was that the provisions made by him in favour of his children should be paid. That could not be done unless the power of sale asked for was granted. The granting of that power of sale was, therefore, not inconsistent with the intention of the trust—Trusts Act 1867, sec. 3; *Weir's Trustees*, June 13, 1877, 4 R. 876; *Downie, &c.*, June 10, 1879, 6 R. 1013.

At advising—

LORD PRESIDENT—The objection to this application is that the powers craved are against the intention of the trust-deed. The judicial factor comes in place of a body of trustees who have special powers given them in the trust-deed, and of course the factor has no larger powers than the trustees had, or we can confer upon him under the Trusts Acts.

The clause in the trust-deed conferring a power of sale on the trustees is as follows:—"To sell and dispose of the same (with the exception of the said lands of Meethill and Burnhaven) by public roup or private bargain in any manner or subject to any conditions they may think fit." The answer of Mr Whyte to the application is, that this clause of the trust-deed amounts to an express prohibition of selling the lands of Meethill and Burnhaven, and as the clause stands I am disposed to agree to that construction. When a power is given with an exception, it appears to me that the exception amounts to a prohibition of the exercise of the power otherwise given, and if

we turn to the Act of 1867, section 3, we find the enactment to be in these terms—"It shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof." One of the acts which the Court may authorise is "to sell the trust-estate or any part of it," but they are not entitled to authorise that unless the same is not inconsistent with the intention of the trust. The conclusion I have come to is, that we cannot grant a power of sale as regards the lands of Meethill and Burnhaven, because it is the intention of the trust that these lands should not be sold. What the Lord Ordinary has done is to remit to Mr Beattie to inquire into the value of the lands of Meethill and Burnhaven, and to report *quam primum*. The purpose of that inquiry is to enable the Lord Ordinary to determine whether it is expedient to grant a power of sale or not. It is obvious that that is an idle inquiry if the factor has no power to sell these lands under the deed, and we cannot grant him such power, because it is inconsistent with the intention of the trust. I think therefore we should recal that part of the Lord Ordinary's interlocutor.

LORD ADAM—When trustees or a factor who has come in their place have no power of sale, and desire to obtain such a power, they must apply to the Court under section 3 of the Trusts Act of 1867, and they have to satisfy the Court of two things—(1) That the sale proposed is "expedient for the execution of the trust;" and (2) that it is "not inconsistent with the intention thereof." In order to satisfy himself on the first of these points the Lord Ordinary has remitted to Mr Beattie to inquire and report. For myself I may say, from the information already before us, it would require very little to satisfy me that it is expedient that the proposed sale should take place.

On the second point, I entirely agree with your Lordship that where, as here, trustees are given a power to sell the whole heritable estate falling under the trust, with the exception of certain lands, it is the same as if they were expressly prohibited from selling the lands to which the exception applies, and in face of the provision of the trust-deed with which we have to do giving the trustees power to sell the whole heritable estate with the exception of the lands of Meethill and Burnhaven, I cannot come to the conclusion that it is not against the intention of the trust that a sale of these lands should take place.

I would only like to add with respect to the fact that a sale of part of these lands has already been authorised, that that was quite a different matter from the present, because that part of the lands was purchased by the Admiralty Commissioners, who had compulsory powers under the Land Clauses Act, which entitles parties otherwise disqualified to part with their lands where the purchaser has such powers.

LORD M'LAREN—I concur in regarding the directions contained in this deed as inconsistent with our granting the power of sale which is asked for.

LORD KINNEAR—I am of the same opinion. I think the truster expressly forbade the sale of this part of the trust estate. It may nevertheless be expedient that the sale should take place in the interests of parties having claims on the property; but I do not see how a sale which is forbidden by the truster can be said to be expedient for the execution of the trust, or anything but contrary to the intentions of the truster.

I think also that the distinction pointed out by Lord Adam between the sale here proposed and the sale to the Admiralty Commissioners is very material, because the Lord Ordinary appears to have supposed that where your Lordships authorised a sale on the previous occasion you construed the trust-deed in a different sense from that in which you have now construed it, and which the Lord Ordinary himself would be inclined to adopt. I think his Lordship has failed to observe that the sale to the Admiralty Commissioners was a sale in the exercise of compulsory powers, and therefore not a sale presented to the Court as a sale in the execution of the trust or depending upon the intention of the truster, but a sale forced upon the factor. It was therefore quite unnecessary and irrelevant to consider whether on a sound construction of the trust-deed the sale to the Admiralty was a course which the Court would have recognised. The only question before the Court was, whether in carrying out the sale the price should be fixed by private agreement, arbitration, or jury trial.

The Court recalled the Lord Ordinary's interlocutor, so far as the remit to Mr Beattie was concerned, and refused the petition for special powers.

Counsel for the Petitioner and Reclaimer—Sym. Agents — Mackenzie, Innes, & Logan, W.S.

Counsel for Misses Phillis, Mary Logan, and Fanny Whyte—Younger. Agents—J. & J. Ross, W.S.

Counsel for the Heritable Creditors—Macfarlane. Agents—Welsh & Forbes, S.S.C.

Counsel for George Whyte — Party. Agent—Party.