at the agreed-on usance, but with the name of the defenders' company as drawers, the drawers' subscription being adhibited by himself as a director and by Jonathan Howell, the secretary of the defenders' company; (6) that the bill so completed and endorsed was discounted by the defenders with the Clydesdale Bank, and the proceeds, less discount, applied to the uses of the said John Knox; (7) that the said John Knox having become bankrupt failed to retire the bill when it fell due on 26th October 1896, and called a meeting of his creditors on 29th October 1896, on which day the pursuer retired the bill: Find in law that the pursuer has in these circumstances no claim to recover from the defenders the sum which he has paid to the Clydesdale Bank as onerous endorsees of the bill: Therefore assoilzie the defenders from the conclusions of the action, and find them entitled to expenses in this and in the Inferior Court, and remit," &c.

Counsel for the Pursuer and Respondent J. Wilson — Wilton. Agents — Gray & Handyside, S.S.C.

Counsel for the Defenders and Appellants—Johnston—C. K. Mackenzie. Agent —R. Ainslie Brown, S.S.C.

Thursday, July 1.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

SMYTH *v.* MACKINNON.

Reparation — Slander — Misappropriation of Money—Privilege.

An auctioneer who, acting under the instructions of the owners' law-agent, had removed goods from a house and sold them at his auction rooms, wrote to the law-agent asking him to give him time to pay up the amount received for the goods, and explaining that he had been misled into making advances with the money, and that he was sorry for the irregularity.

The law-agent, after some correspondence in which he pressed for payment, wrote that he was to meet his clients, the owners, early next week, and would "put before them your misappropriation of their money, and take their instructions. The consequences I have little doubt will be of a very serious character to you." Four days after the date of the letter the auctioneer paid up the sum due.

Thereafter he raised an action of damages for slander against the law-agent, averring (1) that in his letter the defender had represented that the pursuer had been guilty of dishonest and fraudulent misappropriation of money belonging to his clients; and (2) that after the pursuer had paid up the money the defender had stated to a bank agent in Aberdeen that the pursuer had shortly before misappropriated moneys belonging to the defender's clients, meaning thereby that the pursuer had dishonestly appropriated to his own uses money belonging to said clients.

The defender averred that the bank agent was his father and partner in his law business, and counsel for the pursuer, in answer to a question by the Court, said he understood that this was the case.

The Court (1)—*rev.* judgment of Lord Kincairney—refused to grant the pursuer an issue in regard to the alleged slander in defender's letter; but (2)—*aff.* judgment of Lord Kincairney—*diss.* Lord Young—in regard to the alleged slanderous statement to the bank agent, allowed the pursuer an issue in which malice was not inserted, the question of privilege being left to the judge at the trial.

By letter dated 16th May 1896 L. Mackinnon Junior & Son, Advocates in Aberdeen, on behalf of the trustees of the late Mr Thompson of Pitmedden, instructed John Francis Smyth, auctioneer, Aberdeen, to remove some furniture from Pitmedden House, and sell it at his auction rooms in Aberdeen. Smyth duly removed the furniture, sold it on 20th May 1896, and rendered an account showing that the amount realised at the sale, less commission and expenses, was £73, 5s. 8d.

On 17th July 1896 Smyth wrote Lauchlan Mackinnon, a partner in the firm of L. Mackinnon Junior & Son — "When I sent in the statement of sale of the remainder of Pitmedden goods I said I would pay the cash to-day. Much to my annoyance the money on which I calculated for this purpose will not reach me, I find, before the beginning of August, and I have to ask you kindly to wait till then, as I cannot well *press* for payment without damage to my business."

On 21st July Mackinnon sent the following answer:—"I have received your letter of 17th inst., but am not disposed to wait longer for the money due to Mr Thompson's trustees. There is no reason why you should not at least make a substantial payment on account, and I await the same in course." On 24th July Smyth wrote in reply—"I did not at once reply to yours of 21st inst., because I thought I might get in some money, and be able to comply with your request to make a substantial payment to a/c., but I find it impossible meantime. I depended for the whole amount at the date I fixed (17th inst.) on a gentleman who has been travelling and has been detained. I am quite certain to have it next month, and early in the month, and shall at once square up. I was misled into making some advances on the assumption that I would have the money referred to above on the 16th inst., and I thought it unnecessary to make any other provision, and I cannot recover my advances yet. I am exceedingly sorry for this irregularity, but have to ask you kindly to extend your indulgence as far as you can,

and shall make payment as early as possible next month." On 31st July Mackinnon answered as follows:—"On returning here after a few days' absence I find your letter of 24th inst., which is very far from satisfactory. You have no excuse for withholding at least a substantial payment, because you have received the money, and my clients have nothing to do with your private difficulties. If you do not settle the balance due in course of next week, I shall advise the trustees to take immediate proceedings against you, and you will get no further notice." On 14th August Smyth again wrote Lauchlan Mackinnon—"I regret I have not yet got possession of the cash, out of which I expected ere now to have settled your a/c. Being very anxious to keep faith with you I applied to my brother, who is home on a visit from Canada, where he carries on a large business in stores and lumber. I enclose his letter in reply, and trust you will accept his offered bill in security, though I shall without doubt discharge the debt myself within a very short time though I am unwilling to fix a *definite* date lest I should again be disappointed and have to ask further time. I enclose my brother's card, and have only to say that he is very well able to meet anything he puts his name to, and if you will let me know your mind in course of Saturday, I shall at once send on a bill for his acceptance so that it may be returned on Tuesday morning."

The following is the letter referred to in the foregoing letter from pursuer to defender:— "Thornroan,

"Tarves, August 13th 1896.

"My dear brother,—In the matter of business about which you have applied to me, I am sorry that I have not brought sufficient cash with me to be able to lend you £75 just at present, but if you can use my note with your creditor I would be pleased to sign one for you at, say, three months, for the amount you require to tide you round the corner. I start for London to-morrow, where you will find me at 56 Albert Street in case you need my assistance in this way. Hoping you will be able to get out of your present difficulty, and that yourself and family are well.—I remain your affect. brother, W. N. SMYTH."

To this letter Mackinnon sent the following reply on 15th August:—"I have received yours of 14th. I know nothing about your brother, and must decline your proposal. If he requires three months to get a remittance from Canada his obligation is presumably no better than your own. I am to convene the trustees early next week, and shall put before them your misappropriation of their money, and take their instructions. The consequences, I have little doubt, will be be of a very serious character to you."

On 18th August Smyth paid Mackinnon the £73, 5s. 8d., realised from the sale, and received his discharge therefor.

On 18th February 1897 Smyth raised an action of damages for slander against Macinnon, concluding for payment of £1000.

The pursuer averred that in the letter of 15th August 1896 "the defender falsely, calumniously, and maliciously, and without probable or any cause, intended to represent, and did represent, that the pursuer had been guilty of the dishonest and fraudulent misappropriation of money belonging to his said clients, and of such a kind as to subject the pursuer in a criminal prosecution therefor. The defender was well aware when he wrote the said letter that the pursuer was only liable to account to his said clients for any balance due by him upon his intromissions with the said furniture, and that he was able, upon obtaining the short delay for which he asked the defender, to meet his said liability, but he unwarrantably, maliciously, and illegally used the threat of criminal proceedings contained in the said letter to obtain payment of such balance." He further averred that after he had paid the £73, 5s. 8d. "(Cond. 7) Notwithstanding that the pursuer had duly accounted for the said balance, the defender, on or about 5th September 1896, and in or near his office at 23 Market Street, Aberdeen, falsely, calumniously, and maliciously, and without probable or any cause stated to Lauchlan Mackinnon junior, advocate, Aberdeen, agent of the branch of the British Linen Company at Market Street, Aberdeen, of and concerning the pursuer, that the pursuer had shortly before misappropriated monies belonging to the trustees of the late Mr Thompson of Pitmedden, or used words of the like import, meaning, and effect, meaning thereby that the pursuer had dishonestly appropriated to his own uses monies belonging to the said trustees. The said Lauchlan Mackinnon junior thereupon communicated the said statement to John Montgomerie, the sub-agent of the said bank at Aberdeen."

With regard to the letter of 15th August the defender denied the pursuer's averments. With regard to the alleged slander mentioned in cond. 7 he answered—"Explained that the said Lauchlan Mackinnon junior is the father and partner in business of the defender, and as such partner had access to and knowledge of the correspondence passing between the pursuer and defender in the months of July and August 1896. At that time the said Lauchlan Mackinnon junior was agent of the Market Street branch of the British Linen Bank in Aberdeen."

The defender pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant and insufficient in law to support the conclusions of the summons. (2) The averments of the pursuer, so far as material, being unfounded in fact, the defender ought to be assoilzied with expenses. (3) The letter of 15th August 1896 not being libellous or calumnious in its terms, and containing no false, malicious, or calumnious representations regarding the pursuer, the defender ought to be assoilzied. (4) Privilege. (5) *Veritas*."

The pursuer proposed the following issue for the trial of the cause:—"(1) Whether the defender wrote and sent, or caused to be written and sent, to the pursuer a letter

in the terms contained in the schedule hereto annexed, and whether the said letter is of and concerning the pursuer, and falsely and calumniously represents that the pursuer had dishonestly appropriated moneys belonging to the clients of the defender, being the trustees of the late Mr Thompson of Pitmedden, to the loss, injury, and damage of the pursuer? (2) Whether on or about 5th September 1896, and in or near his office at 23 Market Street, Aberdeen, the defender falsely and calumniously stated to Lauchlan M'Kinnon, advocate, Aberdeen, of and concerning the pursuer, that the pursuer had shortly before misappropriated moneys belonging to the said trustees, or used words of the like import, meaning, and effect, meaning thereby that the pursuer had dishonestly misappropriated said moneys, to the loss, injury, and damage of the pursuer?" The schedule annexed to the issues set out the letter of 15th August 1896.

The defender, while contending that no issue should be allowed, proposed, in the event of the pursuer's issues being allowed, the following counter issue:—"Whether, between 20th May and 21st July 1896, the pursuer wrongfully appropriated to his own purposes the money or part thereof realised by him from the sale of furniture on 20th May, and payable by him to the defender?"

On 21st May 1897 the Lord Ordinary (KINCAIRNEY) approved of the issues of the pursuer and appointed them to be the issues for the trial of the cause, and disallowed the defender's counter issue.

"*Note.*—The first question is, whether the charge of misappropriation warrants the innuendo of dishonest misappropriation or dishonest appropriation, and I think that it does. That is to say, that it may be put as a question to the jury whether the charge was an accusation of dishonesty or not. The pursuer desired that the issue should be whether the defender had charged him with dishonest appropriation; and I think the issue may be allowed in that respect as he suggests. I should have preferred the words dishonest misappropriation, as more nearly approaching the words actually used, and I do not think such words would be objectionable as redundant, because there may no doubt be misappropriation which is not dishonest as well as appropriation which is not dishonest. But there is not much to choose between the two phrases, and I am prepared to adjust the issue in the words which the pursuer prefers.

"The defender maintained that the first issue should be disallowed, because the occasion averred was privileged, and that the averments of malice on record were irrelevant for want of specification. I think it is a narrow question whether privilege is disclosed on the pursuer's record. Several recent decisions were referred to, but I think that the case of *Wilson* v. *Purvis*, November 1, 1890, 18 R. 72, comes nearest to the present case, and that I ought to follow it and adjust the issue without inserting malice. It was not contended that malice should be put in the second issue. It was indeed maintained that the pursuer could not get a verdict without proof of malice; but it was admitted that it could not be determined until the facts were proved whether the occasion were privileged or not. I think that, with reference to all the issues, the question whether it is necessary to prove malice must be left for decision at the trial. The further question will then also arise—whether the averments are such as to admit of proof of malice, or whether the averment of malice is irrelevant. That cannot be determined at present." . . . .

The defender reclaimed, and argued—(1) *On first issue*—No issue should be allowed. There were no statements on record to support the innuendo in the issue. The defender's letter was sent in the course of a business correspondence. The statement about "misappropriation" was made in answer to a letter written by the pursuer, and was founded on facts supplied by the pursuer. The alleged slander was not made to third parties, but was a comment made by the defender on an irregularity admitted by the pursuer—a comment which the defender was bound to make in reply to the pursuer's own letter. *On second issue*—The second issue should be disallowed. There was nothing *ex facie* slanderous in the alleged statement, and there were no facts and circumstances stated by pursuer to give colour to the innuendo put upon it. Besides, Lauchlan Mackinnon junior was the father and partner of the defender. This latter fact appeared from the letter of 16th May. [LORD YOUNG, to pursuer's counsel — Do you admit that Lauchlan Mackinnon junior is the father and partner in the business of the defender? Mr WATT—I understand that is the case, but it does not appear on record.] In these circumstances no issue should be allowed. (3) *On both issues*—In any event, neither of the issues should be allowed without the insertion of malice, and as it was impossible in this case to insert malice, as there were no facts stated on record showing ill-will or implying malice on the part of the defender, that was another reason why both issues should be rejected.

Argued for pursuer — (1) *On first issue* — There was no doubt that there was an imputation of dishonesty in the word "misappropriation" as used by the defender. The innuendo could fairly be put as an interpretation of the language of the letter; it was not an unnatural meaning. The question whether the letter bore the construction put upon it was a question for the jury—*Sexton* v. *Ritchie*, March 18, 1890, 17 R. 680, *aff.* March 19, 1891, 18 R. (H.L.) 20; *Ramsay* v. *MacLay & Company*, Nov. 18, 1890, 18 R. 130. A "misappropriation" was a very different thing from an "irregularity" — opinion of Lord Young in *H.M. Advocate* v. *Lee*, October 20, 1884, 12 R. (J.C.) 4. (2) *On second issue* — The arguments stated in connection with the first issue applied to this, but they applied more strongly. Here they had a gratuitous slander made after the money had been

accounted for in a statement to a third party, who was the agent of the bank with which the pursuer dealt. (3) Malice should not be inserted in either of these issues. Unless the defender's statement was clearly privileged, on the pursuer's own showing it was the practice of the Court to leave the question of malice to be decided at the trial.

At advising—

LORD JUSTICE-CLERK — On consideration I have come to the conclusion that the first issue ought not to be allowed. The whole basis of that issue is a letter in answer to a letter of pursuer's own, and the basis for an innuendo there does not seem to me to be sound. Therefore I do not think the first issue should be allowed.

As regards the second issue, it is in a different position, because it relates to a statement made verbally to another person, and that issue, I think, should be allowed. That issue, therefore, will go to trial if your Lordships are of the same opinion.

LORD YOUNG—I am of the same opinion with respect to the first issue, but I differ from your Lordship and also from the Lord Ordinary with respect to the second.

With regard to the first issue, I only think it necessary to say—but I think it is necessary and important to say—with reference to the judgment of the Lord Ordinary and to the argument before us, that the slander or alleged slander founded on being in a letter, which, on the face of it, bears to be part of a correspondence, we must look at the correspondence of which it is part. If that correspondence had not been produced and admitted, I think we would have required that it should be produced, and that we would have required to see whether it was genuine or not.

This letter containing the alleged slander, which is the subject of the first issue, is dated 15th August 1896, and is a letter addressed by the defender as a man of business acting for clients to the pursuer, with whom he had been in correspondence about the clients' business as to which he had employed the pursuer—[*his Lordship read the letter.*] Now, in that letter of 14th August, which is referred to, the pursuer wrote to the defender asking for delay to allow him to get money to pay what he was bound to pay, and offering his brother's security; and the letter containing the alleged slander is in answer to that. But that letter is only a part of the correspondence in which the pursuer was pressed on the one hand to remit the money belonging to the defender's clients which he had in his hands, and in which, on the other hand, he was pleading for delay. And the important letter is dated 24th July, written by pursuer—[*his Lordship read the letter.*]

Now, it appears from the statement on record, and from the whole of this correspondence that the history of the matter is that the defender as a man of business had employed the pursuer as an auctioneer to sell the property of his clients, that the pursuer sold it, and irregularly made advances out of the money to somebody who could not return them. He calls that an irregularity. I think no one would doubt that it was an irregularity, that an auctioneer who has sold the property of an employer and got the cash for it should advance it to anybody—a friend or anybody else—and put it out of his power to pay it up to his employer. It is for that money, to which the whole of this correspondence relates, that he is being pressed, and in the letter of 15th August, which is proposed to be the subject of the first issue, the defender avers nothing except what the pursuer had stated that he had done and irregularly done. He calls that irregularity, of which the pursuer himself informed him, a misappropriation of money, which he finds it to be his duty to bring before his client unless the money is paid. Now, there is here no imputation of any fact or of any conduct. I put the question more than once in the course of the argument, Was the irregularity that the defender himself admits, not misappropriation, and if it was, was it libellous to call it by that name? The answer was—"But it would be actionable if he thought it was dishonest, and we wish to put the defender into the box and ask him—"Was it dishonest misappropriation which you meant when you used that word in the letter?" Well, I should have thought that a very singular question for anybody to put, as singular as for us to give the opportunity by allowing an issue on such a matter. For it would come to this—"Your letter is actionable if you thought that the pursuer to whom you addressed it had acted improperly in committing an irregularity which he himself told you he had done." I think that is extravagant on the statement of it. Slander is imputing some transgression to a man—saying or suggesting that he did something which he never did. There is nothing imputed to the pursuer here which he does not say he did, and as to having an opinion on the matter as to whether it was a more or less dishonest misappropriation — for misappropriation it certainly was—I am very clearly and distinctly of opinion that that is not a subject for an action for libel at all. With regard to the first issue I therefore agree with your Lordship, but I have thought it necessary to make these observations in consequence of the judgment of the Lord Ordinary and the argument that was maintained before us for the pursuer.

Now, with regard to the second issue, I think I must take the fact to be this. It is not stated by the pursuer, but it is stated by the defender—and the statement is admitted at the bar to be the truth, so that if we proceed upon any other view we would be proceeding on a view that was not true—that Lauchlan Mackinnon junior is the father and partner in business of the defender. As such partner he would have access to and knowledge of the correspondence passing between the pursuer and defender in July and August 1896. Well,

then, the communication alleged in condescendence 7 is a communication between two parties in business and in relation to the business. Both parties were equally entitled to know of this correspondence, and it was certainly the right of either party to bring it under the notice of the other. Now, what is proposed here—and the case, so far as I know, is unique in that respect—is to make the subject of an issue a communication made by one partner in the business to another—a son to his father, who is his partner in the business—on a matter relating to that business. The averment is this—[*his Lordship read Cond.* 7]. It could not fail to occur to anybody reading the record and correspondence that the communication here referred to was in respect to the irregularity admitted by the pursuer in the letter which I have already mentioned. The pursuer's counsel admitted that he had no reason to think that there was anything else. Then it comes to this—that the junior partner of the business calls the attention of his father, the senior partner, to this irregularity, which the pursuer stated in his letter he had committed, and we are asked to decide that a communication of that sort may be the subject of an action of damages for slander. It was pressed on us—and I thoroughly understand and appreciate the argument—that the father was not only a partner of that business but also agent for the British Linen Company. But I cannot see that that makes any difference. I cannot assent to the idea that one partner is to be restrained by the law of defamation and slander from making a communication to another partner—a son to his father—because the father happens to be also agent for a bank. I must therefore deal with this as a communication made by one partner to another in regard to the business of the firm in transacting the business of a client. Now, I cannot think that is a subject of action for defamation at all. And therefore, with respect to the second issue as well as with respect to the first, I am very clearly of opinion that it ought to be disallowed.

I have said enough to show, I think, that there is here no room for the idea of innuendo—there is no innuendo here at all. To innuendo is to suggest by some indirect words—by nodding, grimacing, making faces, or otherwise (nodding is the real meaning of the word)—that a man did suggest something which you are going to put into distinct words. There is no suggestion here that he did anything more than merely make reference to the pursuer's letter in which the pursuer states what he did. And therefore I think there is no room for innuendo.

The only other remark I have to make is on what is comparatively of little importance—on the form of the issue, as to which we had some discussion—the insertion of "malice." Dealing with the case as *prima facie* one of privilege, I should like to make this general observation—that I think our practice ought to be, and I think generally has been, where the case is one of privilege, upon the statement of the pursuer, to insert "malice." In cases where there may be privilege or not, according to circumstances which are in dispute, then it is left to be determined at the trial—to the direction of the judge; but where the question of privilege does not depend on circumstances—matters of fact in dispute between the parties—then I think, in the interests of the parties themselves and for the guidance of the Judge at the trial, it ought to be dealt with as a case of privilege and malice put into the issue. I repeat it, for I think it is a safe general rule for adoption. I have been under the impression that it was generally adopted—that unless the question of privilege or malice depends on matter of disputed fact it ought to be determined in adjusting the issues. If it depends on matter of disputed fact then it may—indeed must—be left for consideration at the trial. Now, I do not think here with respect to this communication by one partner to another that it depends upon disputed fact at all. I think I put the question more than once—what is the fact in dispute on which it depends whether this will be privileged or not? None occurs to me. The statement is that the misappropriation was of moneys belonging to the trustees of the late Mr Thompson of Pitmedden. Now, it is the pursuer's case that the trustees of the late Mr Thompson of Pitmedden were clients of the defender. It is also admitted by the pursuer's counsel that the defender and his father, Lauchlan Mackinnon junior, were in partnership. I cannot avoid repeating that. If it turns out that they were partners—that is to say, if it turns out that the fact on which parties are agreed (although the pleading is not correct) is true, then it was a statement by one partner to another in regard to the business of a client of the partnership. Now, is that not *prima facie* a case of privilege? I cannot make it an actionable slander at all; but assuming that it is, then the case is one of privilege in which malice is not to be presumed from the mere statement but must be proved, and it would be right enough to put it into the issue.

LORD TRAYNER—I would not have been sorry if I could have come to the same conclusion as Lord Young, because I cannot help thinking and saying that I regard this as a very ill-advised action on the part of the pursuer, but as the pursuer insists in his right to go to trial on the issues which he has proposed, these must of course be considered.

I agree with both your Lordships that the first issue cannot be allowed, for the reasons which Lord Young has assigned are unanswerable, and I concur with his Lordship's view.

But I take a very different view of the second issue from my learned brother who last spoke. An issue when granted and put before a jury is controlled by the record, and in making or granting an issue I think the Court is controlled by the record. Now, in cond. 7 there is no averment made by the pursuer that the defender and Lauchlan Mackinnon junior are partners in

business. It was no doubt stated at the bar, but it was stated in answer to questions put from the bench, and which the bar could not with any propriety decline to answer. But it is not part of the pursuer's case. The pursuer's case is that the defender stated to Lauchlan Mackinnon junior, advocate, Aberdeen, and agent for the British Linen Company there, that he, the pursuer, had been guilty of misappropriation of money. Now, I think the word "misappropriation" may fairly enough, without any straining of its natural meaning, be read as the pursuer proposes to read it, namely, as dishonest misappropriation, and therefore, according to the practice of the Court, I am not prepared to refuse the pursuer an issue under which he proposes to prove that the misappropriation which the defender said he had been guilty of was dishonestly appropriating to his own use moneys belonging to other persons.

But just assume for a moment that the defender and Lauchlan Mackinnon junior are partners, it does not in the least appear that one partner may speak to another in libellous terms of a third party without being responsible for it. The mere fact that they are partners does not excuse or warrant a slanderous statement. It may very well introduce the element of whether or not a statement, which is in itself slanderous, is privileged, but that is a totally different matter. But if one partner states to another that a third party, whom he names, has been guilty of dishonestly appropriating to his own uses moneys belonging to another person, I take that to be a slander just as much as if the parties had not been partners at all.

Now, with regard to the question of malice, I think if it had been stated on record that the one partner laid before the other the correspondence that had passed between him (the speaker) and a third person charged with misappropriation, as part of the communications by one partner to another in relation to the company's business, it would have been privileged. But again, I say that is not the pursuer's record, and we cannot force the pursuer, I should think, by questions from the bench or otherwise, to alter his record or make his record other than he proposes to make it himself. Now, taking that view of the statement in cond. 7, I am of opinion that the pursuer is clearly entitled to this second issue. If it had appeared, as I have already said, that the parties were partners, and that the only thing the defender had done was to lay before his partner the correspondence that had taken place in the course of the firm's business with the pursuer, I should have held that that was a case for putting "malice" into the issue. But cond. 7 bears no reference to the correspondence, but states that notwithstanding that the pursuer had duly accounted for the balance, and that is after the correspondence had ceased, the defender made this false and slanderous statement to Lauchlan Mackinnon junior, which he proposes to make the subject of this issue. In these circumstances I think the pursuer is entitled to the second issue, and with respect to the statements on record I think it is not *prima facie* a case of privilege although privilege may appear at the trial. The defender's interest will be amply protected by the judge who tries the case, for if privilege does appear he will direct the jury that malice must be proved.

LORD MONCREIFF—I think the first issue should be disallowed. The question turns entirely upon the correspondence, and on the correspondence I do not think that there is room or that there are materials for the innuendo which the pursuer seeks to put upon the terms of the defender's letter of 15th August 1896. I do not see how the defender could have used a milder or more appropriate term to describe the irregular application of the money which the pursuer himself deplores in the most deprecatory language in his letter of 24th July 1896. The word "misappropriation" or the word "misuse" would, according to the pursuer's argument, have been equally open to this innuendo.

The second issue does not stand in exactly the same position. The slander alleged in cond. 7 is a verbal slander said to have been uttered on 5th September 1896 after the money had been replaced. If, as there is no reason to doubt, the communication, if made, was made to the defender's father and partner, there is a strong probability that it will be shown to have been not only privileged but unavoidable. At the same time we have not, as in the case of the first issue, the whole materials for forming an opinion as to the meaning intended to be conveyed by the words used, and the circumstances in which they were uttered; and therefore with some reluctance I agree that this issue should be granted.

I entirely agree with the observations made by Lord Trayner as to the character of the case. I do not think we can avoid granting the second issue, but I am certainly most reluctant to do so.

The Court recalled the interlocutor appealed against, disallowed the first issue proposed for the pursuer, approved of the second issue proposed for the pursuer to be the issue for the trial of the cause, and remitted the cause to the Lord Ordinary to be tried before him on a day to be afterwards fixed.

Counsel for the Pursuer—Watt—Wilton. Agent—Alexander Bowie, Solicitor.

Counsel for the Defender—Balfour, Q.C. —W. Brown. Agents—Morton, Smart, & Macdonald, W.S.