of malice will depend upon the evidence, and I think the issue adjusted by him is right.

LORD TRAYNER—I think that the issue which the Lord Ordinary has approved is the proper issue for the trial of this case. I do not require to say whether I concur in the views expressed by the Court of Appeal in the case of *Stuart*, or those expressed by our own Court in the case of *Nelson*. It is not necessary to say anything about these cases, because I think the present action can be dealt with on a very simple ground not affected by these decisions. This action is founded upon the averment that the defenders made a false and calumnious statement concerning the pursuer to the pursuer's master. Such a case must be treated as an ordinary case of slander; it is not *prima facie* a case in which privilege can be pleaded, for there is nothing stated on record to show that the defender was entitled or had any duty to make the charge which he did. The Lord Ordinary was right, and acting in accordance with usual practice, to leave the question of privilege open for determination at the trial, so that if a case of privilege is made out in course of the trial the pursuer will not succeed unless malice is proved.

LORD MONCREIFF—I am of the same opinion. I think that the Lord Ordinary has taken the proper course in approving of the issue as it stands. I also agree with him that the question of privilege should be left over for the trial. I am not prepared to say that even if a case of privilege is disclosed at the trial and if it is necessary for the pursuer to prove malice, there are not statements on record which would enable him to do so.

LORD YOUNG was absent.

The Court adhered.

Counsel for Pursuer—Orr. Agents—George Inglis & Orr, S.S.C.

Counsel for Defenders—Kincaid Mackenzie—T. B. Morison. Agent—D. Hill Murray, S.S.C.

Tuesday, January 9.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

POLLOK *v.* WORKMAN.

Title to Sue—Sole Title—Action at Instance of Party not having Sole Title to Sue.

In an action for damages in respect of an injury arising out of a wrongful act it appeared that persons other than the pursuer would also have a title to sue in respect of the same injury. There was no offer by the pursuer on record to prove that these parties had refused to concur in the action, or that they could not be found, and they were not called as defenders for their interest. The Court *dismissed* the action.

Darling v. *Gray & Son*, July 31, 1892, 19 R. (H.L.) 31, *per* Lord Watson, *followed.*

Title to Sue — Reparation — Actionable Wrong.

An action was brought by the daughter of a person deceased for damages and *solatium* in respect that the defenders had without her authority conducted a *post mortem* examination of her father's body.

Held (by Lord Kyllachy) that the pursuer had a title to sue, and that the action was relevant.

Opinion by the Court that this judgment was right.

Mrs Margaret Mitchell or Pollok, residing at Nitshill, raised an action for £250 damages against (1) Charles Workman, M.D., Glasgow, (2) Messrs Anderson & Chisholm, solicitors, Edinburgh, and (3) The Ocean Accident and Guarantee Corporation, Limited, Edinburgh, jointly and severally, or severally.

The pursuer made the following averments — She was the daughter of the late Thomas Mitchell, gardener, Glasgow. Mitchell died on 29th January 1899 at the house of James Allan, 82 Paisley Road, Glasgow, from injuries which he had sustained on 16th December 1898 while working at Wellshot Colliery, Cambuslang, belonging to the United Collieries Company, Limited. He was survived by his wife and the pursuer and three other children. His wife and children, other than the pursuer, were resident in England, and had not for years past had much intercourse with the deceased. On learning of her father's death the pursuer arranged that his body should remain at Allan's house till the funeral on 1st February. On 30th January her agents intimated a claim for compensation on behalf of her mother, herself, and the other members of the family, to Messrs Anderson & Chisholm, agents for the Ocean Accident and Guarantee Corporation, Limited, with whom the United Collieries Company was insured. On 31st January Dr Workman, without permission from the pursuer or her agents, made a *post mortem* examination of the body. The examination thus wrongfully made by Dr Workman was made upon the immediate instructions of Messrs Anderson & Chisholm, acting as servants or agents on behalf of the Ocean Accident and Guarantee Corporation, Limited, in full knowledge that neither legal warrant nor consent from anyone entitled to give it had been obtained or asked. As a consequence of these illegal proceedings the pursuer had suffered severely in her feelings, and the defenders were liable to her in reparation.

The pursuers pleaded—"(1) The defender Dr Workman having wrongfully and illegally made the *post-mortem* dissection libelled, to the loss, injury, and damage of the pursuer, one of the daughters and next-of-kin of the said Thomas Mitchell, is liable to her in reparation for the injury thereby done to her, and this being moderately estimated at the sum sued for, decree

should be pronounced as concluded for against him. (2) The illegal act libelled having been done by Dr Workman on the employment of the defenders The Ocean Accident and Guarantee Corporation, Limited, upon instructions given by the defenders Anderson & Chisholm in the course of their employment as agents for said Corporation, both said defenders are also liable in reparation therefor, and the pursuer is entitled to decree against them as concluded for."

All the defenders pleaded, *inter alia*—"(1) The action is irrelevant, *et separatim* incompetent. (2) No title to sue."

The pursuer proposed the following issues —"Whether on or about the 1st February 1899, and at No. 82 Paisley Road, Glasgow, the defender Charles Workman, M.D., did wrongfully make a *post-mortem* dissection of the body of Thomas Mitchell, the father of the pursuer, to the loss, injury, and damage of the pursuer? Damages laid at £250. (2) Whether on or about the 1st day of February 1899 the defenders Anderson & Chisholm, and the Ocean Accident and Guarantee Corporation, Limited, or one or other and which of them, did wrongfully cause the defender Charles Workman, M.D., to make, at No. 82 Paisley Road, Glasgow, a *post-mortem* dissection of the body of Thomas Mitchell, the father of the pursuer, to the loss, injury, and damage of the pursuer? Damages laid at £250."

On 9th December 1899 the Lord Ordinary (KYLLACHY) approved of the issues.

Opinion.—"I decided nothing in this case when I ordered issues, but I had very little doubt, and have none now, that the pursuer here has set out facts which involve a legal wrong, or, at all events, which upon proof may be found to involve a legal wrong. Moreover, I have no doubt that the cutting up or dissecting, or other unauthorised mutilation of a near relative's body constitutes a wrong of which a near relative has a title to complain. Further, without deciding anything beyond what I require to decide, I am not prepared to hold that the daughter of a person whose body has been treated in the manner alleged may not be entitled to *solatium*—that is to say, to damage in respect solely of injury to feelings.

"What the amount of the *solatium* may be is a question affecting the *quantum* of damage. I think it is very likely that a relative who had nothing to do with the deceased for many years, and was not living with or near him, may have little chance of obtaining any substantial award of damages. But that is not a question which arises at this stage.

"I must therefore repel the defender's pleas as to title and relevancy; and as to the mode of proof, I confess if it were left to my own judgment I should have preferred to have the case tried before myself. But the statute requires that cases of this kind shall go to a jury unless both parties consent to a proof before a judge, or unless special cause is shown for taking the cause out of the general rule. I do not think that special cause has been shown here, and accordingly I must approve of these issues, to the terms of which no objection is taken."

The defenders reclaimed, and argued—The action was irrelevant. Here access had been got to the dead body without any trespass on the pursuer's property, and no one had any right of property in a dead body—[LORD JUSTICE-CLERK—A dead body can be stolen any time before it is consigned to the grave. Now, if a dead body can be stolen, it must surely be the property of some-one.] Under the Anatomy Acts such an act could be punished as a crime, and the theft of a corpse out of a house had been sustained as relevant to infer an arbitrary punishment (*Mackenzie*, Burnett's Criminal Law, p. 124, footnote), but there was no principle of the law of Scotland entitling a relative to a civil action for damages. [LORD TRAYNER—If a doctor dissects a dead body without the permission of the relatives of the deceased, and without an order from the proper authorities, it is plain that he commits an actionable wrong.] He might be liable to a criminal prosecution under the Anatomy Acts, but there was no civil remedy. (2) The pursuer had no title to sue. If a title were in anybody it was in the widow, who under the Anatomy Act 1832 (2 & 3 Will. IV. c. 75), secs. 7 and 8, had a right to direct how the body was to be disposed of. In any view the pursuer was not entitled to sue alone. She was one of four children, and the widow was also alive. This was a claim arising out of an alleged wrongful act, and all the persons who had an interest in that claim must be parties to the one action—*Darling* v. *Gray & Sons*, May 31, 1892, 19 R. (H.L.), *per* Lord Watson, 31.

Argument by the pursuer was called for only on this last point. She argued—There was no plea on record of "all parties not called," and it was incompetent for the defenders to prove this plea unless they amended their defences and paid expenses. Besides, the pursuer averred a special claim for damages, as she stated on record that the widow and other children were resident in England, and had not for years had much intercourse with the deceased. The damage suffered by her was therefore of peculiar magnitude. Even if she had no special claim she was entitled to bring this action alone. Under secs. 7 and 8 of the Anatomy Act 1832 (*supra*) any nearest relative was entitled to object to the dissection of a body. The act was of the nature of a crime, and the present action was of the nature of an action of assythment. The action therefore did not fall within the rule laid down by Lord Watson in *Darling* (*supra*).

LORD JUSTICE-CLERK—I think this action has been brought into a very unfortunate position. The defenders, after arguing against the relevancy of the case and the title of the pursuer, brought forward an argument preliminary to both these pleas, on which I am of opinion that the case falls to be decided. I therefore do not need

to go into the questions of relevancy or title at all, but I only express the opinion generally that so far as the argument has gone I think the case is relevant and that the pursuer has a good title.

But the pursuer having admitted that this action has been brought by one only of the parties entitled to bring it, it seems to me that there is authority practically deciding that claims of this sort must be disposed of finally in one case, and that if there are several persons who have stateable claims, one action, and one only, must be brought by them. There ought to be no difficulty in finding out what persons are entitled to put forward a claim of this sort, and either getting them to join as parties to the cause, or if they refuse to join—thinking the action untenable or for some other reason—proving their having done so, so that their claims may be excluded ever after. That has not been done in this case. If the pursuer had brought this action, and had stated on record and had undertaken to prove that all the others who were entitled to claim had given up their claims, or had refused to press them or could not be found, I do not think there would have been any objection to her having gone on with the action alone. But this not having been done, I think we must dismiss the case in accordance with the principle laid down by Lord Watson in the case of *Darling*.

LORD TRAYNER—I am of the same opinion. I think we should follow the rule to which Lord Watson refers in the case cited to us, that where there is a claim for damages arising out of a wrong done, all the persons interested in that claim should sue in one action. It would impose unjustifiable expense on the defenders to have to fight the claim separately against different persons.

LORD MONCREIFF—I am entirely of the same opinion. I think the pursuer has a title to sue, but not the sole title, and that therefore we must dismiss the action. I quite agree that requiring all possible claimants to be dealt with in one action will give rise to no practical difficulty. If the other relations cannot be got to concur, the pursuer could offer on record to prove this, or at least could state that they had declined to concur, or could call them for their interest as defenders.

LORD YOUNG was absent.

The Court recalled the interlocutor appealed against, dismissed the action, and decerned.

Counsel for Pursuer — George Watt — Christie. Agent—Andrew Whyte, W.S.

Counsel for Defender—Salvesen, Q.C.—Chisholm. Agents—Anderson & Chisholm, Solicitors.

Tuesday, January 9.

FIRST DIVISION.

[Sheriff Court of Edinburgh.

STEEL *v.* FINDLAY AND OTHERS.

Lease — Obligation of Landlord to Keep Subjects Wind and Water-Tight—Stipulation contra in Lease—Retention of Rent by Tenant.

A lease of urban subjects for five years contained a condition under which the tenant "accepts of the premises hereby set as in proper tenantable condition and repair, . . . and binds and obliges herself and her foresaids to keep all internal fittings in good order and repair, and to leave the said premises in good tenantable condition and repair at the expiry of this tack."

The landlord having petitioned for sequestration of the tenant's goods for payment of arrears of rent, the latter contended that she had been deprived of the occupancy of the attic part of the house through the roof being in a state of disrepair, and that having suffered damage through the neglect of the pursuer to repair the roof she was entitled to an abatement of her rent equivalent to her loss, which she assessed at the amount she would have made by sub-letting the attic. The Court *held* that by the terms of the lease the tenant was bound to execute all ordinary repairs, that the necessary repairs to the roof fell under that category, and that accordingly there was no liability attaching to the landlord.

Opinion (*per* Lord M'Laren) that in any event the tenant would not have been entitled, after allowing the attic to remain vacant, to make a claim for the amount of rent lost thereby, but that her true remedy was to repair the damage herself and sue the landlord for the outlay.

A petition was presented in the Sheriff Court of Edinburgh by the trustees of the late James Turner, proprietors of the premises No. 61 High Street, Edinburgh, craving for an order to sequestrate and sell the goods, &c., of Mary Scott Steel, tenant of these premises, in security for and payment of the rent of the premises for the past two quarters, and in security for its payment for the coming year.

The parties in 1894 had entered into a lease of the premises for five years, which contained the following obligation—"And further, the said first parties having thoroughly repaired the stairs, water-closets, sinks, and cisterns, the said Mary Scott Steel accepts of the premises hereby set as in proper tenantable condition and repair, and binds and obliges herself and her foresaids not to make any structural alterations on the said premises without the consent in writing of the said first parties or their successors; and she undertakes and binds and obliges herself and her foresaids to keep all internal fittings in