of the will is that the estate shall be realised and divided in cash. And, in the alternative, it is "specially provided and declared that it shall not be imperative upon my trustees for the purposes of this division to convert the residue of my means and estate into cash, but they shall be entitled, and I hereby specially authorise and empower them, should they deem it to be more beneficial for any of my children or grandchildren to have parts or portions of my estate allocated to them, to have such parts or portions of my estate, whether heritable or moveable, as they shall resolve so to allocate, valued by one or more competent neutral persons . . . and to assign and dispone the parts and portions so valued to the child or children, or the issue of such of my children, to whom my trustees shall have allocated the same respectively, *pro tanto* of the share or shares falling to them respectively of my estate." This alternative of "allocation" is the only alternative contemplated by the testator, and, as the facts turned out, it proved to be an impossible alternative. Thus a sale and division of the price was at the date of vesting, and has ever since been, the only possible course open to the trustees, and was indispensable to the execution of the trust.

This view of the case is not affected by varying the date at which the distribution is supposed to take place. I think the true date to be regarded is the date of vesting. The question would have been the same if the testator's widow had predeceased that date. The sale was in fact postponed, with the result that at the date when John Julian Henderson died the subjects remained heritable in the persons of the trustees. But the postponement of the sale, whether by agreement or for convenience, or in the hope of a more favourable realisation, is an incident which cannot affect the decision of the question before us.

I am for answering the second question of law in the affirmative.

LORD KINNEAR concurred, and stated that he was authorised to say that the Lord President concurred in this judgment.

The Court answered the first question in the negative, and the second in the affirmative.

Counsel for the First Parties—Irvine—Wark. Agents—J. & J. Gellatly, S.S.C.

Counsel for the Second Party—Craigie, K.C.—Hamilton. Agents—Clark & Macdonald, S.S.C.

Counsel for the Third Parties—Hunter, K.C.—J. G. Jameson. Agents—A. P. Purves & Aitken, W.S.

JULY SITTINGS, 1906.

FIRST DIVISION.

(Before the Lord President and a Jury.)

MOFFAT *v.* COATS.

Reparation—Slander—Privilege—Malice—Statement by One Relative to Another as to Matter of Family Interest—Statement by Uncle to Mother of Nephew regarding Pursuer, who was One of Nephew's Companions.

In an action of damages for slander the defender admitted in the witness-box that he had said to his nephew's mother that he had had it from a friend that the pursuer "would not be permitted to go on any racecourse in the country," and that he had made the statement because he thought the pursuer was not a good companion for his nephew.

Direction per the Lord President that the statement complained of was privileged, and that proof of malice was necessary.

On 4th November 1905, John Moffat, residing at Barshaw, Paisley, raised an action against George Coats, Belleisle, Ayr, in which he sued for £5000 in name of damages for slander. Two issues were adjusted for the trial of the cause, of which the following was the first, viz.—"(1) Whether on or about 2nd July 1905, on board the steam yacht 'Hebe,' and at or near Hunter's Quay, and in the presence and hearing of Sir Thomas Glen Coats and Lady Glen Coats, or of one or other of them, the defender falsely and calumniously stated that the pursuer when racing his horses did not run them straight, and that he would not be permitted to go on any racecourse in the country, or used words of a similar import, meaning thereby that the pursuer was a dishonourable man, who, while he apparently intended to win a race or races, deliberately attempted to lose the said race or races in order to enrich himself, to the loss, injury and damage of the pursuer."

The pursuer and defender were related, the pursuer being a first cousin once removed of the defender. The defender was a brother of Sir Thomas Glen Coats, and was the guest of Sir Thomas and Lady Glen Coats on board their steam yacht the "Hebe" cruising off Hunter's Quay on the date in question. The Mr T. G. Arthur, Carrick House, Ayr, from whom the defender at the trial stated that he had his information, was an uncle of the pursuer.

The Lord Ordinary (SALVESEN) refused the insertion in the issue of the word "maliciously," leaving it open to the defender to raise that question at the trial, on the ground that a privileged occasion was not disclosed by the pursuer's averments. To this judgment the First Division on a reclaiming note adhered after hearing counsel for the defender (reclaimer), who referred to the following cases—*Bry-*

done v. *Brechin*, May 17, 1881, 8 R. 697, 18 S.L.R. 497, *per* Lord Deas; *Nelson* v. *Irving*, July 10, 1897, 24 R. 1054, 34 S.L.R. 786, *per* Lord Young; *Stuart* v. *Bell*, [1891] 2 Q.B. 341; Odgers on Libel, 4th ed. pp. 244–246.

The case was tried before the Lord President and a jury at the July Sittings 1906. At the trial the pursuer conducted his own case and was not represented by counsel.

His Lordship in his charge said—" . . . Now, come to the first issue. First of all, will you kindly take pencils, and in the fourth line, after the word 'falsely,' insert the word 'maliciously'—I will tell you why in a minute. The issue will therefore run—'Whether on that occasion, and in the presence of Sir Thomas Glen Coats and Lady Glen Coats, or one or other of them, the defender falsely, maliciously, and calumniously said that the pursuer, when racing his horses, did not run them straight, and that he would not be permitted to go on any racecourse in the country, or used words of a similar import, meaning thereby that the pursuer was a dishonourable man, who, while he apparently intended to win a race or races, deliberately attempted to lose the said race or races in order to enrich himself.' Now, the Lord Advocate again was right in saying that the pursuer must prove either the words actually in the issue, or something that is substantially the same. You will have to consider whether, as matter of fact, these words have been proved. That Mr George Coats said upon this occasion that he had had it from Mr Arthur that the pursuer Moffat would not be permitted to go on any racecourse in the country, or would not be permitted to go on a racecourse, is, I think, undoubted, because Mr George Coats said it quite plainly in the box; but he did not admit having said anything about pursuer not running straight when he ran his horses. Now the pursuer, I think, has tied himself down to that view. I am not meaning that a statement that a man may not go on any racecourse in the country may not be a slanderous statement in itself, because I think it would. If I said about some one of you that I knew you would not be permitted to go on a single racecourse in the country, it would obviously create an impression amongst the rest of you that there was something bad against that one, because ordinary people are allowed to go on racecourses, and it is part of the common knowledge that ordinary men of the world must be credited to possess, that you are not warned off racecourses unless you have been guilty of shady transactions. Accordingly, a person might gather from such an expression—and, I think, might naturally gather—that there was something wrong. But at the same time, if you come to the conclusion, having heard the evidence—and, after all, there was only the evidence of Mr Coats and Lady Glen Coats—if you come to the conclusion that there was not a word said about running straight, it is rather difficult to come to the conclusion that the issue is proved. Because I think the pursuer has most undoubtedly tied himself up by taking the issue he has chosen to take before you—he has tied himself up to showing that the sting of the slander upon that occasion was that he was a man who did not run his horses straight, that he apparently intended to win and deliberately did not win—in other words, in racing slang, that he was a man who pulled his horses. Unless it came to that, I do not think there was anything said at all, and it is for you to consider, having heard the evidence, whether as matter of fact these slanderous words have really been made out.

"But then the case does not end there. I told you to put in the word 'maliciously.' Now, some reference was made to a former decision of Lord Salvesen, and about coming to the Inner House. That was on the question of whether 'malicious' should be put into the issue at once; and it was not put in, because it was considered by their Lordships who heard the case that whether malice was of the essence of the case depended upon what came out at the trial. Now, it is for the Judge, and not for the jury, to decide, upon the facts as they come out at the trial, whether the occasion is what is called a privileged one or not, and therefore I tell you, and you are bound to take this from me, that this was a privileged occasion. Well, as I say, you cannot go beyond my telling; you are bound, as part of your duty, to take the instruction from me that this was a privileged occasion; but at the same time I am very glad indeed to tell you why I hold that, because, after all, it is common-sense, and I think you will always be glad to hear that our law has as much common-sense in it as law will permit of. The reason is this. Life would be hideous if you always had actions of damages hanging round your neck even though there was a duty upon you to speak. The most familiar instance that will occur to any one of you in your own life is when a person asks you for your servant's character, and you tell them to the best of your belief. If you do that honestly, even though you may say things that are undoubtedly slanderous, yet they are not held actionable, because you have not made the statement maliciously; and that is quite right, because you may often have to say a thing which as matter of fact you cannot altogether prove. If you are asked about a servant who has been with you and whom you sent away—if a friend comes and says, 'What do you say about her?' suppose you say, 'I was not satisfied; the coals, or the marmalade, or whatever it was, always disappeared rapidly when she was there'—it would be very hard to prove that she was taking the coals or the marmalade. It would be quite abominable if you were not entitled to give your friend quite honestly your opinion about the matter. Now, that is just like the case we have here. Here we have a youth, T. C. Glen Coats, and I hold that it was a perfectly privileged occasion for Mr George Coats, his uncle, to tell the mother about anybody who he thought was to be the boy's companion. He was perfectly entitled to say, 'The less he sees of So-and-

So the better,' and he was entitled to say anything he liked to say, provided he did it honestly—and that is the meaning of the word 'maliciously.' Even though the words in themselves may be slanderous—and in a case like this you must consider whether it is a slander, supposing they are proved to have been used at all, because the defender does not take the position of saying, 'I will prove these things were true'—if the words were slanderous, provided they were used honestly, you cannot find for the pursuer, because you cannot find that the words were spoken maliciously. You can only find for the pursuer if you hold that the defender here did not make the statement honestly at all—not with any view of helping the mother to choose a companion for her son, but simply taking an opportunity of stabbing the other man in the back. If you really think he did it to gratify spite, then you would be entitled to hold the words were spoken maliciously; but I am bound to say that, so far as I can see, there is very little evidence to hold that, because the pursuer brought the real fact out of Mr Coats. He asked why he made the statement he did, and Mr Coats said, 'I made it honestly enough, because I thought you were not a good companion for the boy, and I thought the mother should know what I think about you.' Well, gentlemen, that is the case. You have, in order to find for the pursuer, to come to the conclusion, first of all, that the words were practically spoken; and secondly, that these words were spoken maliciously by the defender. If you cannot hold that, you are bound to return a verdict for the defender. If you can hold that, you will find for the pursuer, and, as I said, the amount of damages, though not illusory like a farthing, would not be a large sum, but would still be a sum to mark the gravity of the offence if the words were maliciously used."

The Jury, after an absence of forty-five minutes, returned the following unanimous verdict:—"That the pursuer has failed to prove that the statement made by Mr George Coats to Lady Glen Coats was made maliciously, and that it was the duty of Mr George Coats to inform Lady Glen Coats of what Mr Arthur had told him, and that his doing so was no disparagement to Mr Moffat; therefore they find for the defender on both the issues."

Counsel for Pursuer—Party. Agent—A. Laurie Kennaway, W.S.

Counsel for Defender — Lord Advocate (Shaw, K.C.) — Spens. Agents — J. & J. Ross, W.S.

Tuesday, July **24.**

OUTER HOUSE.

[Lord Ardwall.

WODDROP *v.* SPEIRS.

Proof — Writ or Oath — Admissibility of Parole—Agreement to Pay All Expenses Connected with Granting a Feu whether it Proceeds or not—Innominate Contract —Obligation of Relief.

A, a landowner, brought an action against B, to recover the expenses incurred by A to his law agents in connection with a proposed feu, which B after negotiations had declined to accept. His ground of action was that B had agreed to pay all the expenses connected with the transaction whether it was carried through or not.

Held (*per* Lord Ardwall, Ordinary) that the proof of the agreement must be by writ or oath, on the grounds that the alleged agreement was (1) an innominate contract of an unusual character, and (2) an obligation of relief in connection with a contract which was not itself provable by parole, being a contract dealing with heritage.

On 19th March 1906 William Allan Woddrop of Dalmarnock and Elsrickle brought an action against William Speirs, wright and builder in Glasgow.

The summons concluded for relief from an account amounting to £308, 17s. 6d. incurred by the pursuer to Messrs T. & R. B. Ranken, W.S., Edinburgh, in connection with negotiations for a proposed feu to the defender of certain lands belonging to the pursuer, or alternatively for payment to the pursuer of the above-mentioned sum in order that he might himself pay the account.

The pursuer averred—"(Cond. 3) That the defender and his law agents had a meeting on or about 27th October 1903 with the pursuer's law agents in Edinburgh. At said meeting the defender and his law agents were informed by the pursuer's law agents that negotiations for said feu would only proceed if the defender agreed to pay the whole expense incurred both to surveyors and to the pursuer's law agents in connection with the granting of said feu, and that whether said feu was ever completed or not. The defender agreed to pay the whole of said expenses."

The defender admitted that the said meeting took place, but denied the alleged agreement, and averred—"The pursuer's agents stipulated at their said meeting that in the event of a contract of feu being entered into, the whole expense in connection therewith should be paid by the defender, instead of that expense being borne mutually by both parties, according to the usual professional rule. The defender consented."

The defender pleaded—"(3) The agreement alleged in the pursuer's condescendence being innominate, having relation to heritage and being of an unusual and