COURT OF SESSION.

Wednesday, July 16.

FIRST DIVISION.

[Lord Anderson, Ordinary.

MITCHELL *v.* SMITH.

Reparation — Judicial Slander — Malice — Averments of Facts and Circumstances Inferring Malice.

In an action for damages for slander the pursuer, a prominent public man in Glasgow, averred that the defender had made averments in an action in the Sheriff Court which were defamatory. In that action the pursuer sued the defender for breach of contract, and the defender pleaded that there was no concluded bargain, but in any event the agreement had been induced by the fraud and misrepresentation of the pursuer. In the slander action it was averred that the defender had made no inquiry as to the truth of these averments, that he had no precognition on which to base his allegations, that he led no evidence in support of them, that he did not believe in their truth and never intended to prove them, and that they were put on record not by way of defence but to force the pursuer into abandoning his action by the fear of publicity. *Held* (*dis.* Lord Sands) that the pursuer had sufficiently averred facts and circumstances from which malice might be inferred to entitle him to an issue.

Opinion per Lord Mackenzie, concurred in by Lord Cullen, that malice would not have been sufficiently averred by a mere statement that the defender made the defamatory averment knowing it to be untrue.

Robert Mitchell, *pursuer*, brought an action against Edwin G. Smith, *defender*, concluding for £1000 damages for slander.

The parties *averred*—"(Cond. 2) On 28th September 1915 the pursuer raised an action of damages for breach of contract in the Sheriff Court of Lanarkshire at Glasgow against the defender. The action arose out of an alleged agreement by the defender to purchase from the pursuer shares held by the pursuer in a joint-stock company known as the Mercantile and General Insurance Company, Limited. (Cond. 3) The said agreement was alleged to have been entered into on 12th April 1915 between the defender on the one part and Mr Lewis C. Gray, chartered accountant, Glasgow, on the pursuer's behalf on the other part, and to provide that the pursuer should sell and the defender purchase the pursuer's holding of shares in the said company upon, *inter alia*, the following conditions, viz.—(1) That the price should be one shilling per share; (2) that the pursuer should transfer to the defender at least 90 per cent. of the issued capital of the said company, and that the defender should in addition purchase at the same price any additional shares which the pursuer could offer; (3) that pending the execution of transfers in favour of the defender the pursuer should arrange that the current policies of the said company should be cancelled and rebates of premiums paid to the policy-holders for the unexpired period of the insurances, and that the defender should repay the said rebates to an amount not exceeding £250; and (4) that the pursuer should undertake responsibility for all the liabilities of the company and find security for implement of this obligation. Before completion, however, the defender resiled from the transaction and alleged that there had been no concluded bargain, and that the arrangement come to by him with Mr Gray was only tentative. The defender therefore claimed the right to withdraw altogether from the proposed arrangement and did so. The Sheriff-Substitute (Craigie) on 16th July 1917 found that the pursuer had failed to prove the agreement alleged by him, and on appeal the Sheriff-Principal on 5th March 1918 adhered to the judgment of the Sheriff-Substitute. A copy of the closed record in the said action, with the interlocutors and opinions pronounced therein by the Sheriff-Substitute and Sheriff-Principal, are herewith produced and referred to, and are here held as repeated *brevitatis causa.* (*Ans.* 2 and 3) Admitted that the defender was successful in his defence to the action raised against him by the pursuer in the Sheriff Court of Lanarkshire at Glasgow. *Quoad ultra* the summons, defences, closed record, and interlocutors and notes of the Sheriff-Substitute and Sheriff-Principal appended to said interlocutors are referred to for their terms, beyond which no admissions are made. Explained that in the letter of 12th April 1915 from Mr Lewis C. Gray to the defender, being one of the letters which according to the pursuer's averments contains the terms of the alleged agreement, the following passage occurs, viz.—'With reference to Mr Campbell's and my meeting with you to-day, I have to confirm that in consideration of your agreeing to purchase every share in the above company of which Bailie Robert Mitchell is the proprietor, at the first of May next, at the net price of 1s. per share, you paying all stamp duties, transfer fees, &c., Bailie Robert Mitchell will endeavour to be in a position to transfer to you at that date at least 90 per cent. of the 31,881 shares of the company at present in existence.' The letters alleged by the pursuer to embody the terms of the agreement are referred to for their terms. (Cond. 4) In his defences to the said action the defender (answer 4) quoted from a minute of meeting of directors of the said company, held on 7th December 1914, part of a protest made at the meeting. The protest was made by certain dissentient directors, and regarded a circular issued to the shareholders of the company requesting them to sign a transfer form in connection with a proposed sale of the shares of the company. The quotation therefrom was as follows:—'That said circular was never submitted to nor approved by the board; that the terms of the circular are misleading and calculated to deceive the shareholders; that it would appear that a

large number of transfers of shares have been obtained by means of said circular taken in name of a member of the board Mr Robert Mitchell;' and the defender averred with reference thereto—'The defender believes that the conduct on the part of the pursuer referred to in the said minute was a gross act of fraud on the part of the pursuer. All information as to said charge was deliberately and fraudulently withheld from defender by pursuer during said negotiations. He also fraudulently concealed from defender that a petition for winding up the said company had been presented to the Court based to a great extent on charges of misconduct on the part of the pursuer.' (Cond. 5) The defender further averred in his defences (answer 5)—'In any event the alleged agreement was illegal and is not enforceable, and could not be carried out without misconduct and fraud by the pursuer towards other shareholders. *Inter alia*, the said agreement stipulated for illegal payments to be received by the pursuer. Further, the proposal therein contained to cancel policies of the company for the purpose stated could only be given effect to by pursuer by an abuse of his powers as a director. The defender believes and avers that for a considerable time past, both prior to and after the date of the alleged agreement, the pursuer has deliberately abused his position of trust and betrayed the interests of other shareholders with a view to his private profit. It is further believed and averred that in view of the proposed sale to defender and his friends, and more than a week after the date of the alleged agreement founded on, the pursuer by a gross abuse of his powers as a director intimated real or fictitious calls of 10s. a share to shareholders of said company. Said intimations were made fraudulently for the purpose of obtaining private profit at the expense of these shareholders. At a subsequent meeting of said directors on 26th April 1915 the pursuer stated that he was negotiating with a view to the sale of his shares. At said meeting said directors were induced by pursuer, illegally and in breach of their duty, to delay making the said calls, and to give the pursuer full power to cancel policies of the company as might suit his plans.' With reference to the answers to condescendences 4 and 5, the said protest, the action in the Sheriff Court, the petition to the Court of Session and the proceedings in both actions, the minute referred to, the circular dated 24th November 1914, and the circular letter of 23rd April 1915, are referred to for their terms. *Quoad ultra* denied. (*Ans.* 4 and 5) Answers 4 and 5 of the defences in the Sheriff Court action, which the pursuer partially quotes, and the circular and protest therein mentioned, are all referred to for their terms, beyond which no admissions are made. Explained as follows:—(*a*) The negotiations relating to the proposed purchase were broken off on 26th April 1915, and the Sheriff Court action which the pursuer raised against the defender on the footing that the negotiations had resulted in a final bargain was not instituted till 28th September 1915. (*b*) On 21st April 1915, shortly before the negotiations were broken off, the defender's law agent had obtained a print of the petition for the winding up of the company, having appended thereto, *inter alia*, a copy of the said protest. (*c*) The petition was presented to the First Division of the Court of Session on 14th December 1914 at the instance of ten shareholders of the company who held amongst them 3200 shares, and it contained, *inter alia*, the following passage:—'The said Robert Mitchell' (the pursuer) 'has for some time back been acquiring shares, and has now somewhere about 8000 shares registered in his own name. The majority of these shares were obtained by him in response to a circular, dated 24th November 1914, issued by him. . . . The said circular is on the company's paper, which bears the names of all the directors, and was signed by "M. Chapman," the junior clerk, upon the instructions of the said Robert Mitchell. The said circular was never submitted to the board, and the secretary himself states that he never knew of its existence or its issue. The said Robert Mitchell was the author of the circular. The terms of the circular are undoubtedly misleading, and in fact did mislead certain of the shareholders, some of whom have written to the company stating that they have been misled, and demanding that the transfers granted by them be cancelled. It was intended to convey to shareholders receiving it that the transfer asked for was required in connection with the proposed sale of the business mentioned in the official circular of 5th October, and in that way a good many transfers were obtained which were filled up in the said Robert Mitchell's name and registered. Further, a large number of other transfers in favour of the said Robert Mitchell have been lodged at the company's office. These have not yet been registered, but the said Robert Mitchell has obtained proxies to vote in respect thereof by means of letters dated 1st December 1914 addressed to the transferors. . . . The said letters, although written on the private notepaper of the said Robert Mitchell, were enclosed in a company's envelope with the name of the company printed on the back. There was also enclosed an envelope addressed to the secretary of the company for a return of the proxies in his favour, the effect of this being to further mislead the transferors. After the above proceedings a meeting of the board was held on 7th December. At this meeting five of the directors protested against the conduct of the said Robert Mitchell, and their protest was entered in the minutes. . . .' (*d*) The protest referred to was taken by five out of the eight directors of the company, and was embodied in a minute of the directors of date 7th December 1914. It is in the following terms:—'That it has come to the knowledge of the following members of the board' (here follow the names of the five directors) 'that a circular has been issued in the following terms:—"*Mercantile and General Insurance Company, Limited. Head Office—Citizen Buildings, 24 St Vincent Place, Glasgow, 24th November* 1914.—Dear Sir or Madam—With reference to circular dated 5th October *re* purchase

of shares in the Mercantile and General Insurance Company, Limited, you will be good enough to sign the enclosed transfer form and return to this office at once. Please fill up and sign where pencilled.—Yours faithfully, M. CHAPMAN." That the said circular was never submitted to nor approved by the board; that the terms of the circular are misleading and calculated to deceive the shareholders; that it would appear that a large number of transfers of shares have been obtained by means of said circular, taken in name of a member of the board, Mr Robert Mitchell, and the said directors' (here follow the names of the five directors protesting) 'hereby enter their protest against the issue of the said circular and all that has followed thereon, and reserve their right to question said transfers; further, this meeting hereby resolves that no further transfers be registered pending an inquiry into the whole matter.' (*e*) On 11th December 1914 the said five directors issued a circular to all the shareholders informing them of what had occurred, and stating that they considered it to be their duty to give this explanation so that their position as directors might be made quite clear should any question arise in future out of the transfers referred to. A copy of this circular is printed in the minute and appendix, print D of the liquidation proceedings. On 17th December 1914 the said five directors issued another circular to the shareholders of the company in which they, *inter alia*, intimated to the shareholders that they associated themselves with the petitioning shareholders in the said petition, and advised all the shareholders of the company to support the petition. A copy of this circular is produced herewith and referred to. The defender had these circulars before him when he lodged his defences to the Sheriff Court action as after mentioned. (*f*) The fact that the said petition for winding up had been presented and that the said protest had been taken had not been disclosed by the pursuer to the defender in the course of the negotiations for the purchase, and was unknown to the defender until his law agent shortly before 26th April 1915 obtained information thereanent. The defender thereupon made inquiries through his law agent, and was reasonably satisfied that the statements contained in the passage above quoted from the petition for winding up and the grounds of the protest by the five directors were substantially well founded. In these circumstances he, on 26th April 1915, by letter from his law agents to the pursuer's law agent, intimated that he (the defender) 'was not prepared to go any further in the matter of the acquisition of shares in the company.' (*g*) Some months later, viz., in September 1915, the pursuer raised the Sheriff Court action before mentioned in which he claimed £1850 as damages against the defender on the allegation that the defender had purchased the pursuer's shares and had declined to carry out the purchase. The pursuer averred that it was 'on or about 12th April 1915' that the alleged purchase was made, and further averred that the price to be paid by the defender was 1s. per share, and that it was part of the bargain that the pursuer should transfer to the defender at least 90 per cent. of the issued capital, and that the defender should acquire any additional shares which the pursuer could offer at the same price. At the date of the alleged agreement the pursuer did not hold 90 per cent. of the issued capital. (*h*) On the Sheriff Court action being served on the defender he caused further inquiries to be made, which confirmed his belief that the statements made in the said petition for liquidation and in the said protest were substantially correct; moreover, in October 1915 he also learned for the first time that on 23rd April 1915 (before the date of his breaking off his negotiations for the purchase of the shares) a circular letter had been sent by the pursuer to Mr John C. Black, a shareholder of the company, in the following terms:—'Dear Sir—*The Mercantile and General Insurance Company, Limited*—The directors of the above company have decided to make a call of 10s. on your shares, 5s. payable in May and 5s. payable in June—in all £500. I am prepared to relieve you of this call on receiving from you transfer duly signed at a discount of 1s. per share. On receiving same I will send you my guarantee relieving you of the further liability of £450. For your information I may mention that Messrs . . . , late directors, have accepted a similar offer. This offer to remain open till 28th April. — Yours faithfully, ROBERT MITCHELL.' (*i*) When the defender broke off his negotiations for purchasing the shares on 26th April 1915 the pursuer had not disclosed to the defender that he had issued the said circular letter on 23rd of that month, and had not informed the defender that the directors had made or decided to make a call of 10s. per share, payable in May and June, or that the pursuer had offered to relieve Mr Black of the call on his shares on receiving from him a transfer of his shares at a discount of 1s. per share. The directors at the meeting held on 8th April 1915 had resolved that the liability on the shares should be called up in two instalments of 5s. each, but did not then fix the dates at which such calls were to be made, leaving these dates to be fixed at a subsequent meeting. In point of fact the dates for payment were never subsequently fixed by the directors. On the contrary, the directors at their meetings of 20th and 26th April 1915, in view of the pursuer's negotiations for the realisation of his shares, resolved in the meantime not to make the calls. The defender, in these circumstances, on obtaining information regarding the pursuer's said letter to Mr Black, had reason to believe, as he did, that the pursuer's statement in that letter that the directors had decided to make calls payable in May and June was untrue, and that the pursuer by that statement was endeavouring to get Mr Black to transfer his shares to the pursuer with the view of the pursuer realising the shares so acquired for his own personal advantage by re-selling them to the defender at 1s. per share. The defender was satisfied

that letters similar or substantially similar to that sent by the pursuer to Mr Black had also been sent to other shareholders. He considered that the pursuer's conduct as disclosed in his letter to Mr Black was in breach of the duty which the pursuer as a director owed to the shareholders. He considered that even if it could be held that the negotiations between the pursuer and him had been concluded on or about 12th April 1915, as the pursuer averred, yet he (the defender) was not bound to implement and carry out such a contract, involving as it would the purchase by the defender of shares which had been or might be improperly acquired by the pursuer in the manner described. In view of all the circumstances referred to the defender resolved to defend the action. He accordingly instructed his law agents to submit, and they duly submitted to counsel, *inter alia*, the information above set forth and the various papers above referred to. Defences were prepared by counsel proceeding solely on said information and papers and in his uncontrolled discretion. These defences as so prepared were thereafter lodged in the action. Having regard to the information with reference to the pursuer's actings and conduct as above set forth, the defender considered that the averments made on his behalf in the said defences were reasonable and were relevant and pertinent and that there was probable cause for making them. The pursuer is expressly called upon to admit or deny explicitly the statements above set forth, including the statements contained in the passage from the petition quoted under sub-head (*c*), *supra*, the statements which form the grounds of the protest quoted under sub-head (*d*), *supra*, and the averments regarding the sending to shareholders of the letter quoted under sub-head (*h*), *supra*, and similar letters to other shareholders. (Cond. 6) The said averments of the defender in the said action were of and concerning the pursuer, and were and are false and calumnious, and were made maliciously and without any or probable cause. Taking the said statements separately and substantially in the order in which they occur in said pleadings, they falsely, maliciously, and calumniously represented, and were intended by the defender to represent—(*a*) That the pursuer had grossly swindled the shareholders of the said Mercantile and General Insurance Company, Limited. (*b*) That the pursuer had acted towards the defender with deliberate fraud in the negotiations with him toward the alleged agreement referred to in condescendence 3, with the intention of impetrating the said agreement by fraud from the defender. (*c*) That the pursuer in endeavouring to negotiate the said agreement intended by its means or in carrying it out to defraud other shareholders of the said company, and in particular intended dishonestly to take thereby illegal payments for himself. (*d*) That the pursuer had formed the intention of committing, and if the agreement had been completed would have committed, an abuse of his authority as a director of the company by cancelling policies issued by the company, for his own benefit and not for the benefit of the company or shareholders. (*e*) That the pursuer by a gross abuse of his powers as a director of said company intimated to shareholders of the said company more than a week after the date of the said agreement fictitious calls of 10s. per share, fraudulently and with a view to his personal profit at the expense of these shareholders; (*f*) that the pursuer as a director of the said company illegally and dishonestly and for his own purposes persuaded his co-directors to commit a breach of their duty to the shareholders; (*g*) that before the date of the said agreement the pursuer had deliberately abused his position of trust as a director of the said company, and betrayed the interests of other shareholders with a view to his private profit; and (*h*) that since the date of the said agreement the pursuer had deliberately abused his position of trust as a director of the said company, and betrayed the interests of other shareholders with a view to his private profit. Said statements were calculated to be so understood, and they were in fact so understood, by the pursuer's friends and by the general public, and to them they had and could have no other meaning. The defender's accusations against the pursuer have become widely known in Glasgow and have been the subject of much comment. The explanations in answer are denied. (*Ans.* 6) The averments of the defender in said action are referred to for their terms. Explained that they were made in good faith on reasonable grounds, with probable cause and in the belief that they were true, without malice or any indirect or improper motive on the part of the defender. The defender has met the pursuer only on one occasion, viz., at a meeting of parties on 21st April 1915, and prior to that date did not know him by sight and knew nothing about him. The defender's only information regarding the pursuer was obtained incidentally in the course of the negotiations in April 1915 and in connection with the Sheriff Court action raised in September 1915 as above set forth. The extent to which the statements complained of have become known or commented on is unknown to the defender. *Quoad ultra* denied. (Cond. 7) The statements complained of were made by the defender well knowing that they were false and unfounded. At the date when the defender made the statements complained of he had in his possession or under his control a print of the petition for liquidation of the said company, and a print of the answers thereto, together with copies of the documents produced in process and of the opinions and judgment of the Court. The said petition was based upon the statements contained in the protest partially quoted in condescendence 4, and the defender was aware when the statements complained of were made that the said petition was dismissed by the Court after hearing the petitioners' counsel and without calling upon counsel for the respondents, and that the petitioners were found liable to the respondents in expenses.

Notwithstanding his knowledge of this, the defender, without inquiry at any reliable source regarding the truth of the statements complained of, and without regard to the injury which would result to the pursuer, recklessly and maliciously made the said statements, not with the view of maintaining his defence that no agreement for the purchase of the shares of the company had ever been completed, to which purpose the statements complained of were neither relevant nor pertinent, but for oblique purposes of his own, and in particular for the purpose of intimidating the pursuer and compelling him to abandon the said action rather than allow the statements complained of to become widely circulated and be made the subject of public comment. The statements complained of were irrelevant and impertinent to the matters in dispute in the said action. It was never intended by the defender to attempt to establish any of the statements complained of. He did not believe in their truth, and had no preparation or precognition whereon to base the allegations. Although a proof of his whole averments was allowed, and the diet of proof assigned for that purpose was called, at the proof no evidence was led by the defender in support of the truth of any of the said statements, and no argument was addressed to the Court in support thereof. Moreover, many of the averments related to facts alleged to have occurred after the completion of the agreement between the pursuer and defender, from which the defender was attempting to resile, and had consequently no bearing on the issue. The averments in answer so far as not coinciding herewith are denied. (*Ans.* 7) Admitted that the defender had in his possession a print of the petition and the answers, copies of the documents produced, and the opinions and judgment of the Court, and that he was aware of the terms thereof, which are referred to. *Quoad ultra* denied. Reference is made to the preceding answer. Further, averred that the said statements were both relevant and pertinent to the issue in said action. Explained further that evidence was led in the said action in support of the said statements and the relative pleas-in-law, and that the pursuer refrained from going into the witness box, and submitting himself to examination and cross-examination in reference thereto; but that as the defender was successful in proving that no agreement of sale had been entered into as averred by pursuer, neither the Sheriff-Substitute nor the Sheriff found it necessary to deal with said statements. (Cond. 8) The pursuer occupies a prominent position as a public man in Glasgow, and he has been greatly injured in his feelings, reputation, and business, by the unfounded statements of the defender. He estimates the loss, injury, and damage sustained and to be sustained by him at the sum sued for. (*Ans.* 8) Denied."

The defender *pleaded*—"1. The pursuer's averments being irrelevant the action should be dismissed."

On 5th December 1918 the Lord Ordinary (ANDERSON) sustained the first plea-in-law for the defender and dismissed the action.

Opinion.—"This is an action of judicial slander in which the pursuer craves damages from the defender in respect of certain statements embodied in the pleadings of an action in the Sheriff Court in Glasgow. The said action was raised on 28th September 1915 at the instance of the pursuer, and it concluded for damages against the defender for breach of contract. The contract which was said to have been broken was an agreement alleged to have been concluded on 12th April 1915, between the defender on the one part and Mr Lewis C. Gray, chartered accountant, Glasgow, on the pursuer's behalf, on the other part. The said agreement purported to provide that the pursuer should sell and the defender purchase the pursuer's holding of shares in a joint-stock company known as the Mercantile and General Insurance Company, Limited.

"To the said action the defender proponed two separate and distinct defences, each of which I hold to have been, if established, a valid answer in law to the pursuer's demand (1) that there had been no concluded agreement, and (2) that if an agreement had been completed, in respect that it had been 'promoted by fraud and misrepresentation on the part of the pursuer,' the defender was entitled to resile therefrom. In support of the 8th and 9th pleas-in-law, which formulated this second ground of defence, the defender in his 4th and 5th answers made the statements quoted in condescendence 4 and 5 of this action, which are the subject of complaint. The Sheriff-Substitute, and on appeal the Sheriff, decided said action in defender's favour on the first of said grounds of defence, and expressed no opinion on the second ground.

"The statements made by defender in said action are undoubtedly defamatory, as they charge the pursuer with acts of fraud, accomplished and prospective, in connection with the completion and carrying out of said agreement.

"The pursuer has accordingly brought the present action, and has tabled issues for its trial by a jury. At the debate on the adjustment of issues the defender's counsel moved me to dismiss the action as irrelevant.

"The law to be applied to a case of this sort is well settled. A litigant, and especially one who is defending himself, is entitled to state in defence everything which is pertinent to the issue raised by the pleadings. If what is stated in defence is pertinent to that issue, and specially if it is relevant thereto, the litigant is presumed to have acted in *bona fide* and in pursuance of his undoubted right and privilege to defend himself from attack. The occasion, in short, is one which is highly privileged, and in which the litigant will be completely protected unless it be clearly and specifically averred and proved that he was actuated by malice in making the statement pertinent to the cause which has been complained of.

"If the statement complained of is manifestly impertinent to the issue raised by the pleadings the occasion is not privileged;

the case is then one of ordinary slander in which no privilege is enjoyed by the defender and in which he is presumed to have acted maliciously—*Mackellar*, 21 D. 222, 24 D. 1124.

"The privilege enjoyed by a defender in an action of judicial slander is so high that the pursuer of such an action is bound to aver specific facts and circumstances from which malice may be inferred—a bare averment that the defender acted maliciously will not suffice. On this topic the Lord President (Inglis) in the case of *Scott* v. *Turnbull*, 11 R. 1131, 21 S.L.R. 749, said at p. 1134—'The pursuer in the present action sets out the statement I have just read, and avers that it was made falsely, calumniously, and maliciously. The question is whether this statement is relevant to support a claim of damages for slander. Now, obviously, in such a question as this the relevancy of the statement in defence is the most material thing to be considered, although it is not necessary, in order to put on the pursuer the *onus* of averring malice, to show that the statement is relevant. For even if the statement is irrelevant the pursuer must aver malice; he must aver malice unless the statement be not only plainly irrelevant but be also impertinent. That is the distinction between this case and the case of *Mackellar* v. *The Duke of Sutherland*, January 14, 1859, 21 D. 222, for there the statement was clearly irrelevant—so clearly so that when the attention of counsel for the defender was called to it he struck it out. But the Court held that it was not impertinent, for it was intended to explain a statement of the pursuer's which was also irrelevant, imputing certain motives to the defender, and was intended to show that he was not actuated by the motives which were imputed to him. In the present case there is no question of pertinency or impertinency, for the statement is plainly relevant; and it appears to me that we are here dealing with a case in which something must be alleged to the effect that this relevant statement made by the defender as representing the shareholders, and which it was his duty to make if he believed it, or was informed that it was true, was made maliciously. Therefore in order to displace the honest and proper motive of the defender, and to show that the statement was made from an improper motive, I think there must be a statement of facts and circumstances from which malice can be inferred.' Again, in the case of *Beaton* v. *Ivory*, 14 R. 1057, the Lord President at p. 1062 said—'I think a case of judicial slander a very special case indeed, because there is a very strong presumption in such a case that if a man makes an averment which, whether it be irrelevant or not, is at least pertinent to the case, he must be presumed to have made it from an honest motive, with a view to urging everything that he knows of in support of his case. That is a perfectly justifiable and proper motive, and it will protect the party making it against the consequences of any injury that he may have done by that statement to a third party. Now this becomes all the more strong if the averment is not only pertinent to the case but is a perfectly relevant averment, for then it becomes the duty of the party to himself and to his advisers and to the Court to make the averment. The case would not be complete, and would not be ripe for judgment, unless the averment were made, and therefore the presumption in favour of proper motive in such a case is stronger than in almost any other case of slander.' See also *Gordon*, 14 R. 75, 24 S.L.R. 60; *Ewing* v. *Cullen*, 6 W. & S. 566, *per* Lord Wynford at p. 578.

"It follows from these authorities that the pursuer will be entitled to an issue if he satisfies the Court (*a*) that the statements complained of were impertinent to the issue raised by the pleadings in said Sheriff Court action; or (*b*) that, on the footing that the statements were pertinent, malice has been relevantly averred.

"Pursuer's counsel maintained that the statements complained of were impertinent to the question arising for determination in said Sheriff Court action; alternatively he contended that malice had been relevantly averred.

"1. *Were the said statements impertinent?* I am clearly of opinion that the said statements were pertinent to said action. I am further of opinion that these statements were not only pertinent but were relevant. To plead that an alleged agreement was induced by fraudulent misrepresentation and concealment is to make a pertinent rejoinder to an action of damages for breach of said agreement, and to set forth by way of specific averment in what the said fraud and concealment consisted is to formulate a relevant defence to such an action. The pursuer therefore fails on this point.

"2. *Has malice been relevantly averred?* So far as one decision can be an authority in cases of this kind, where the facts are never quite the same, this point seems to have been settled adversely to the pursuer by a case which was not referred to at the debate. I refer to *Campbell* v. *Cochrane*, 8 F. 205, 43 S.L.R. 221. Indeed the present action presents features which make it much more favourable to the defender than that cited. In *Campbell* objection was taken to statements made by the defender in two letters written by him to the pursuer's solicitor after threat of legal proceedings for wrongous dismissal of the pursuer by the defender had been made. The *lis* had thus been merely threatened and not, as in the present case, actually brought into Court. In that case, as in this, what was complained of was a charge of dishonesty. In *Campbell* there were averments of malice extrinsic to the actual statements complained of. Here there is no suggestion of antecedent or extrinsic malice. The defender in the present case had only met the pursuer on one occasion, to wit, at a meeting of parties on 21st April 1915, *prior* to which date he did not know the pursuer by sight and knew nothing about him. The case of *Webster*, 1910 S.C. 459, 47 S.L.R. 307, correcting a practice which had up till then subsisted, decided that the words 'without probable cause' are not appropri-

ate to an issue in an action of slander. But although a pursuer in a case of judicial slander is not bound to prove that a defender made the defamatory statement without probable cause, it seems to me that in considering whether or not the defender acted maliciously it is a material circumstance that he had probable cause for making the statement complained of. In *Campbell* the defender had some ground for charging the pursuer with dishonesty. In the present case the circular of the directors referred to by the defender, and the other information of which he became possessed prior to making the defamatory statements, as condescended on in ans. 4 and 5 of this record, afforded him certain justification for making the statements complained of. I do not say that the actings of the pursuer led necessarily to the inference that he had been guilty of fraud; it would obviously be unfair to the pursuer so to hold without having his explanation of his conduct, but it seems to me that the conclusion reached by the defender was not so unreasonable as to compel me to decide that it was malice which determined it rather than a legitimate desire to state a *bona fide* defence. In the case of *Campbell* Lord M'Laren goes so far as to say that nothing short of an averment of 'some tangible antecedent circumstance' will suffice in a case of this sort as a relevant averment of malice. If this observation is sound in law, the pursuer is out of Court, for admittedly his record contains no such averment. I prefer, however, to decide the action on the ground on which the Lord President based his judgment in that case, namely this, that when the pursuer's averments are 'scrutinised very strictly' in order to see whether there are any averments from which malice could possibly be inferred no such averments are found.

"I shall accordingly sustain the defender's first plea-in-law and dismiss the action."

The pursuer reclaimed, and argued—Admittedly the statements complained of were pertinent to the issue in the Sheriff Court action, but they were irrelevant, for the alleged frauds were subsequent to the agreement. Where the statement complained of was relevant, extrinsic facts and circumstances must be averred from which malice might be inferred—*Scott* v. *Turnbull*, 1884, 11 R. 1131, *per* Lord President Inglis at p. 1134, 21 S.L.R. 749—but that rule was strictly limited to the case where the averments were relevant—*Beaton* v. *Ivory*, 1887, 14 R. 1057, *per* Lord President Inglis at p. 1062, 24 S.L.R. 744—and it did not apply where the averments were merely pertinent. In such a case extrinsic facts and circumstances instructing malice need not be averred. Malice was sufficiently averred by a statement that the averments were made in the knowledge of their falsity—*Clark* v. *Molyneux*, 1877, L.R., 3 Q.B.D. 237; *Ewing* v. *Cullen*, 1833, 6 W. & S. 566, *per* Lord Wynford at p. 578; *Williamson* v. *Umphray and Robertson*, 1890, 17 R. 905, *per* Lord President Inglis at p. 912, 27 S.L.R. 742; *Stevenson* v. *Wilson*, 1903, 5 F. 309, *per* Lord M'Laren at p. 316, 40 S.L.R. 286; *Suzor* v. *Buckingham*, 1914 S.C. 299, *per* Lord Skerrington at p. 305, 51 S.L.R. 309; *Suzor* v. *M'Lachlan*, 1914 S.C. 306, *per* Lord President Strathclyde at p. 312, and Lord Skerrington at p. 315, 51 S.L.R. 313. Further, malice was sufficiently averred by a statement that the occasion had been used for some other purpose than that which rendered it privileged—*Clark's* case (*cit.*), *per* Brett, L.J., at p. 246, which case was approved in *Jenoure* v. *Delmege*, [1891] A.C. 73, *per* Lord Macnaghten at p. 79; *Jackson* v. *Hopperton*, 1864, 16 C.B. (N.S.) 829. In the present case there was ample averment judged by those standards. It did not matter that the averments had been made by counsel, the party was still liable. Further, it was unavailing to say that no proof of those averments had been tendered by the defender because he considered he could win his case without such proof, for after the judgment had been given the defender had been asked to withdraw the averments and had refused to do so. *Campbell* v. *Cochrane*, 1905, 8 F. 205, 43 S.L.R. 221, and *H.* v. *M.*, 1908 S.C. 1130, 45 S.L.R. 874, were very special cases and really were decided on the ground of want of specification. *Gordon* v. *British and Foreign Metaline Company*, 1896, 14 R. 75, 24 S.L.R. 60, was referred to.

Argued for the defender—The averments in question were both pertinent and relevant, and if so, admittedly extrinsic facts and circumstances inferring malice must be averred. No such facts and circumstances had been averred. But even if the statements were merely pertinent, an averment of extrinsic facts and circumstances was still required. The present case was completely covered by *H.* v. *M.* and *Campbell* v. *Cochrane*. A mere averment of knowledge of the falsity of the statements was not enough, for there was such an averment in *Stevenson's* case, in which both *Williamson's* case and *Gordon's* case were quoted. *Ewing's* case was very meagrely reported with regard to averment, and in any event it was a decision after proof. If, however, the knowledge of the falsity of the averments inferred malice at all, it only did so in cases where the person making the statement necessarily knew whether it was true or false—Cooper on Defamation, 2nd ed. p. 204. The pursuer should have set out the defender's means of knowing whether the statements were true or false. Here there was no averment of antecedent ill-will; the statements had been made before the defender made them in a liquidation petition and the pursuer had taken no action, and the pursuer did not admit or deny the truth of the statements though called upon to do so. If the present averments were sufficient, malice could be averred in every case. Such averments as the present should not be too liberally construed—*A B* v. *X Y*, 1917 S.C. 15, 54 S.L.R. 37; they were of the nature of word painting by counsel—*Campbell's* case (*cit.*), *per* Lord President Dunedin at p. 212.

At advising—

LORD MACKENZIE—This is an action of damages for judicial slander, and the principles laid down in *Scott* v. *Turnbull* (11 R. 1131, 21 S.L.R. 749) therefor apply to it. The pursuer admits that the statements complained of were pertinent to the issue in the Sheriff Court action, in which they were stated in way of defence. It is therefore necessary for the pursuer to aver facts and circumstances from which malice may be inferred.

The Lord Ordinary has dismissed the action as irrelevant. In doing so I think his Lordship has not given sufficient weight to the averments in condescendence 7. The action in which the admittedly defamatory statements were made was at the instance of the present pursuer against the present defender for damages for breach of contract. The defender pleaded that there was no concluded agreement, and upon this point he was successful. The defender further averred that the agreement had been promoted by fraud and misrepresentation on the part of the pursuer. The agreement alleged was for the purchase by the defender of shares in an insurance company, of which the pursuer was a director. In defence the defender quoted from a minute of meeting of the directors of the company. He averred that he believed the conduct on the part of the pursuer referred to in the minute was a gross act of fraud on the part of the pursuer, and that all information in regard thereto was deliberately and fraudulently withheld from the defender during the negotiations; that the pursuer fraudulently concealed from the defender that a petition for winding up the said company had been presented to the Court based to a great extent on charges of misconduct on the part of the pursuer; that the proposal in the alleged agreement to cancel policies of the company could only be given effect to by the pursuer by an abuse of his powers as director; and that the pursuer intimated calls of 10s. a share fraudulently for the purpose of obtaining private profit at the expense of the shareholders.

As the Lord Ordinary observes, these statements are undoubtedly defamatory, and I agree with the Lord Ordinary that they are not only pertinent but relevant to the issue in the case. The averments in condescendence 7 of facts and circumstances from which it is said malice may be inferred are as follows—"The statements complained of were made by the defender well knowing that they were false and unfounded." It was argued by the Solicitor-General that if condescendence 7 contained no more, that would be sufficient, and he founded on *Ewing* v. *Cullen*, 6 W. & S. 566; *Gordon* v. *Metaline Company*, 14 R. 75, 24 S.L.R. 60; and *Williamson* v. *Umphray & Robertson*, 17 R. 905, 27 S.L.R. 742, in support of his contention. I am unable to assent to this view of the law. If it were held that in every case it was sufficient merely to aver that the person uttering the slander knew it to be false when he uttered it, that would make the law of *Scott* v. *Turnbull* nugatory. If this argument advanced by the Solicitor-General is sound, then it is difficult to see how *Campbell* v. *Cochrane*, 8 F. 205, 43 S.L.R. 221, or *Stevenson* v. *Wilson*, 5 F. 309, 40 S.L.R. 286, or *M.* v. *H.*, 1908 S.C. 1130, 45 S.L.R. 874, could have been decided as they were. On the other hand such averments as there were in *Williamson* show that in certain circumstances such an averment may be enough to entitle the pursuer to an issue.

It is, in my opinion, necessary in each case to examine the whole averments in the case before estimating the weight to be attached to the bald statement that the slanderer knew the statements to be false when he uttered them. Reference may also be made to *M'Ternan* v. *Bennet*, 1 F. 333, 36 S.L.R. 239. When one reads what follows in condescendence 7, I think there is sufficient to satisfy what is required by *Scott* v. *Turnbull*. I summarise the averment as follows:—The defender made no inquiry regarding the truth of the statements; he had no precognition on which to base his allegations; he led no evidence in support of them; he did not believe in their truth and never intended to establish any of the statements complained of; they were put on record, not with the view of maintaining his defence but for the oblique purpose of intimidating the pursuer and compelling him to abandon the action rather than allow the statements to become widely circulated and made the subject of public comment.

Along with these averments in condescendence 7 must be taken the fact that the language used by the writer of the defences (for which the defender is responsible) is very strong in its terms. The view of the Lord Ordinary is thus stated—"I do not say that the actings of the pursuer led necessarily to the inference that he had been guilty of fraud; it would obviously be unfair to the pursuer so to hold without having his explanation of his conduct, but it seems to me that the conclusion reached by the defender was not so unreasonable as to compel me to decide that it was malice which determined it rather than the legitimate desire to state a *bona fide* defence." It appears to me that even if the pursuer's averments are scrutinised very strictly, they are of such a character as to entitle him to the verdict of a jury upon the question the Lord Ordinary has decided.

I am therefore of opinion that the interlocutor should be recalled, the first plea for the defender repelled, and the case remitted to the Lord Ordinary.

LORD CULLEN concurred.

LORD SANDS—The privilege here relied upon by the defender is of a very high order—the privilege of statements made in the course of judicial pleading. This privilege, as has often been explained, exists, not for the protection of slanderers, but for the protection of honest litigants, and to enable them freely to state their representation of the facts without incurring the risk of being exposed to an action of damages. It is well settled that in such a case it is not enough baldly to aver that the statement was made

maliciously. Something more in the nature of averment in regard to malice is required, and I think it is settled that this something more is not supplied by the bald averment that the defender knew the statement complained of to be false. Were it otherwise there would be little value in the rule that the mere averment that the statement was malicious will not suffice. It is as easy to aver at random that the defender knew the statement to be false as to aver at random that he made it maliciously, and, indeed, the latter generally implies the former.

In three recent cases (*Stevenson* v. *Wilson*, 5 F. 309, 40 S.L.R. 286; *Campbell* v. *Cochrane*, 8 F. 205, 42 S.L.R. 221; and *M.* v. *H.*, 1908 S.C. 1130, 45 S.L.R. 874) an issue has been disallowed where there was an averment that the defender knew the statements complained of to be false. There may be some specialty in each of these cases which makes it not irreconcileable with the view that as a general rule such an averment is sufficient. But I cannot read these cases as proceeding upon the footing that there is such a rule, and that the particular case in hand may be distinguished. On the contrary, the opinions appear to me to proceed upon the recognition as law that the bare statement that the defender knew the statement to be false is not sufficient to elide a plea of privilege as a bar to an issue.

The fact that the defender knew the statement to be false is the best evidence of malice. But, like the existence of malice generally, it must be proved, and the facts from which it is to be deduced must be capable of specification in all cases where knowledge of its falsity does not, in the light of surrounding circumstances, appear on the face of the statement itself. It may be enough in a certain class of case to aver that the statement is a pure invention, as, for example, the statement about an abstemious neighbour that he is an habitual drunkard. But something more than the bald statement of knowledge of falsity is necessary. No doubt, the defender must be aware whether or not he knew the statement to be false, but the pursuer cannot be allowed to proceed with his action merely on the chance that the defender will admit that he knew the statement to be false, any more than he can be allowed to proceed with his action merely on the chance that the defender will admit that he was actuated by malice.

The rule is, as it appears to me, a salutary one. The question of whether it is necessary or expedient to aver fraud is often one of delicacy, particularly in contract cases, and is generally left to agents and counsel. It would place an intolerable burden upon practitioners if they were to be hampered in their discretion by the fear that an averment of fraud might expose their client to an action of damages for slander on the mere averment that their client knew the charge to be false.

In the present case the pursuer relies, as instructing or giving the necessary specification to his averment of malice, upon the averment that defender knew his statements to be false. He does not, however, rely solely upon the bald averment, but specifies certain facts, which he is prepared to submit to a jury, as evidence that the defender knew the statements to be false. Upon this branch of the case I feel difficulty. That difficulty is due partly to the consideration that what is complained of as false is not false statements on definite and readily verifiable matters of fact, but chiefly false statements in regard to motives in relation to facts which are not in dispute. A certain protest by dissentient directors is referred to, also certain circular letters. It is not disputed that there was such a minute of protest as quoted in defender's pleadings, or that there were such letters as also quoted or referred to. The gravamen of the complaint is not that these documents were fabricated, but that the defender placed a false construction upon the matters set forth in the protest and the pursuer's object in sending the letters. Again, the pursuer was charged with "fraudulently withholding" certain information and "fraudulently concealing" a certain matter. If pursuer averred that the defender knew this to be false because the pursuer had in fact communicated this information to the defender the case would have a different aspect. But he does not aver this. The complaint, as I read the record, is not that the defender had obtained this information from the pursuer and falsely averred that it had been withheld, but that not having so got it he averred that the withholding of it was fraudulent.

The pursuer relies upon his averment that the defender made his statements without inquiry, and without taking a precognition. Whilst it appears to me that this is his best argument, its force is very much weakened by the considerations to which I have just adverted. If, for example, the letter quoted in answer 5 had not been signed by pursuer, but by somebody else, or if there had been no such letter and the defender had attributed such a letter to the pursuer, the absence of all previous inquiry might have been a very material element against the defender. But I do not think that the statement that averments were made without inquiry or precognition is sufficient, irrespective of the nature of the averments, as instructing that the defender knew the averments to be false. There may be cases where this will suffice. If a litigant sued by, say, a London moneylender about whom he knew nothing, were to aver that the pursuer was an ex-convict or a fraudulent bankrupt, I think the defender might be answerable in damages if the pursuer averred and proved that the defender had made the statement at random without any information or any inquiry into the matter. But this case appears to me to be in a different category. The interpretation put upon the facts and documents may have been wholly unwarranted, but these facts and documents were not inventions.

Another averment upon which pursuer relies is that defender put the averments complained of upon record without any intention of attempting to substantiate

them, and merely to intimidate the pursuer, and he invites this inference to be drawn from the fact that at the proof in the Sheriff Court defender did not attempt to substantiate these averments. Defender, however, may have eventually been quite satisfied to rely upon the evidence of no completed contract as it came out, and discretion in the conduct of the case at the proof was presumably in the hands not of the defender but of his solicitors. Moreover, as it seems to me, there would be little protection in privilege if eventual failure to attempt to substantiate the averments complained of elided the requirement of facts and circumstances inferring malice. In this view the defender in a slander action who did not plead *veritas* could hardly insist upon the specification of other facts and circumstances as necessary to make relevant an averment of malice.

Finally, the pursuer relies upon the strength of the language used by the defender. There may be cases where the form of the charge may have an important bearing upon the question of whether the defender knew the statement to be false. But in my view the fact that a charge is strongly expressed founds no presumption that the person making it knew it to be false. Faith may be as vocal as unbelief. Moreover, there is no reason to take it that the defender adjusted his own pleadings. The lurid language of the adjuster of pleadings is no key to the state of mind of his client. A litigant may be responsible for statements made on his behalf by his professional advisers, but it seems to be quite a different matter to draw inferences as to the state of his knowledge from forms of expression used by them in adjusting his pleadings.

Upon the whole matter I agree with the view taken by the Lord Ordinary, which I summarise as follows:—(1) The statements were made in judicial proceedings and were pertinent to the matters in issue. (2) It is not enough baldly to aver that the defender knew them to be false. (3) There are no relevant averments upon record proof of which could warrant the inference that the defender knew the averments to be false.

The LORD PRESIDENT and LORD SKERRINGTON were absent.

The Court recalled the interlocutor of the Lord Ordinary, repelled the first plea-in-law for the defender, and remitted the cause to the Lord Ordinary to proceed.

Counsel for the Pursuer (Reclaimer)—The Solicitor-General (Morison, K.C.)—A. M. Mackay. Agents—Dove, Lockhart & Smart, S.S.C.

Counsel for the Defender (Respondent)—Wilson, K.C.—Crawford. Agents—Arch. Menzies & White, W.S.

Tuesday, July 15.

COURT OF SEVEN JUDGES.

[Lord Hunter, Ordinary.

CARMICHAEL'S EXECUTOR *v.* CARMICHAEL.

Contract — Donation — Jus quæsitum — Insurance—Delivery—Insurable Interest —Policy of Insurance Taken out by Father on Life of Son.

A father when his son was in his ninth year took out a policy of "deferred insurance" on his son's life. The son was born on 29th October 1894, and the proposal was dated 21st October 1903. In terms of the policy the father was to pay a premium every year on 22nd October until his son reached majority, which he did on 29th October 1915. The father paid all the premiums up to and including that due on 22nd October 1915. The policy further provided that if the son died before reaching majority the father was entitled to repayment of the premiums paid by him without interest. He was also entitled to the surrender value of the policy. If the son reached majority, and if he continued thereafter to pay the premium, the son's representatives were in the event of his death to be entitled to £1000 (the sum assured), and the son was also given certain options. The son died in July 1916 without having paid any premium or exercised any option. He was aware of the existence of the policy and had meant to take it up. The father retained the policy in his own possession. He never informed the son of the existence of the policy, and never delivered it to him or anyone on his behalf. The father and the son's executor claimed the sums due under the policy. *Held* (1) (*dis.* Lord Salvesen and Lord Skerrington) that the policy remained the property of the father and had not been donated to the son, in respect that there had been no delivery or its equivalent to the son; (2) (*dis.* Lord Salvesen and Lord Skerrington) that the policy being gratuitous as regards the son, and without delivery or intimation to the son, he had no *jus quæsitum* under the policy.

Opinions per Lord Skerrington and Lord Cullen that under the law of Scotland a father has an insurable interest in his son's life.

The English and Scottish Law Life Assurance Association, Edinburgh, *pursuers and nominal raisers*, brought an action of multiplepoinding against Hugh Fletcher Carmichael, *real raiser*, and against Miss Catherine M'Coll, executrix-nominate of the late Ian Neil Carmichael, *defenders*, who both lodged claims. The fund *in medio* was a sum of £1000 due under a policy of insurance taken out with the pursuers upon the life of Ian Neil Carmichael.

The *policy of insurance* provided—"Whereas Hugh Fletcher Carmichael, con-