Lord Mure and Lord Shand concurred.

Lord Deas was absent.

The Court adhered.

Counsel for Pursuer—Trayner—Comrie Thomson. Agent—Alexander Morison, S.S.C.

Counsel for Defender—M'Kechnie. Agents—Irons, Roberts, & Lewis, S.S.C.

Friday, July 18.

FIRST DIVISION.

[Sheriff of the Lothians.

SCOTT *v.* TURNBULL.

Reparation—Slander—Judicial Slander—Privilege—Malice—Relevancy.

In an action of damages for slander alleged to be contained in a judicial pleading, where the statements complained of were relevant to the action, *held* that the pursuer was bound to aver facts and circumstances from which malice could be inferred, and in respect of his failure to do so, action *dismissed* as irrelevant.

Observed (*per* Lord President) that even where the statement complained of was irrelevant to the action in which it was used, the pursuer must aver malice.

This was an action in the Sheriff Court of the Lothians at Edinburgh, brought by James Gibson Scott against Patrick Turnbull, chartered accountant, Edinburgh, liquidator of the Money Order Bank, Limited, to recover £2500 damages for alleged judicial slander.

The action in which the slander was alleged to have been uttered was one brought on 2d February 1883, in the Court of Session, at the instance of Scott against the Money Order Bank, Limited. The company went into liquidation on 12th February 1883, and Turnbull having been appointed liquidator, was sisted as a defender. That action concluded for £5500 damages in respect the defenders had failed to work a system invented by the pursuer, in terms of an agreement entered into between them, in consequence of which the pursuer had been deprived of his share of the profits of the company, and in respect the defenders had so mismanaged the business generally that the pursuer's system and inventions had been brought into disrepute and rendered of no value.

In that action Scott pleaded—"(2) The defenders having failed to adopt and work the pursuer's system, and having otherwise mismanaged the business of the company, and having thereby caused loss and damage to the pursuer to the extent concluded for, the pursuer is entitled to decree in terms of the conclusions of the summons, with expenses."

The defenders pleaded—"(5) The pursuer having by his own misconduct brought about or contributed materially to bringing about the present state of matters, he is barred *personali exceptione* from succeeding in this action."

In support of this plea the defenders made the following statement which constituted the alleged slander—"(Stat. 4) The pursuer was never formally installed in office as manager, but according to the agreement he acted as such till on or about the 28th May 1881, when he was suspended from that office by the chairman of the board of directors in consequence of absence from business, inattention to his duties, and general misconduct. Prior to this, viz., towards the end of April 1881, the pursuer's attention was called to the fact that he had been intoxicated during business hours, and had been seen in that state by the chairman. He was asked to apologise and pledge himself that such a state of things should not recur. He practically admitted the offence, tried to explain matters, and promised good behaviour for the future. He again misbehaved in the same way within a month or thereby. The pursuer's conduct and a correspondence between him and the chairman was brought under the consideration of the directors at a meeting held on 8th June 1881, and it was resolved that the chairman should inform the pursuer that at the next meeting his dismissal from office would be moved. The chairman reported that he had suspended pursuer from his duties, which was confirmed by the meeting. (Stat. 10) Notwithstanding the pursuer's dismissal, he immediately thereafter began a systematic interference with the officials and agents of the company, representing himself as an official of the company, and claiming right to examine documents belonging to the company. Through this and other means of a like nature the company was commercially injured with the public, and the confidence of a number of the agents in the management and working of the business was shaken. Further, the pursuer at various times made unfounded charges against the directors and officials of the company, and threatened proceedings to enforce certain alleged rights. The pursuer was well aware that his conduct was greatly to the prejudice of and injurious to the company. His agents admitted this in the correspondence, which is produced and referred to for its terms. These charges were persisted in down to 24th August 1881, when the pursuer's agents, on his behalf, wrote that everything contained in any letter written by him to the chairman or law-agents, or communicated to them, which could be construed into an accusation against the company or anyone connected with it, was fully and without reservation withdrawn. The pursuer, however, shortly after this renewed his charges and misrepresentations."

In that action the defenders were assoilzied.

In the present action the pursuer narrated the pleadings in the previous case and averred—"(Cond. 5.) In the statement of facts for defenders contained in the closed record in said action, the defender falsely, maliciously, and injuriously made the following statements of and concerning the pursuer, viz., 'The pursuer was never formally installed in office as manager, but according to the agreement he acted as such till on or about the 28th May 1881, when he was suspended from that office by the chairman of the board of directors in consequence of absence from business, inattention to his duties, and general misconduct. Prior to this, viz., towards the end of April 1881, the pursuer's attention was called to the fact that he had been intoxicated during business hours, and had been seen

in that state by the chairman. . . . He again misbehaved in the same way within a month or thereby . . . and notwithstanding the pursuer's dismissal he immediately thereafter began a systematic interference with the officials and agents of the company, representing himself as an official of the company, and claiming right to examine documents belonging to the company. Through this and other means of a like nature the company was commercially injured with the public, and the confidence of a number of the agents in the management and working of the business was shaken. Further, the pursuer at various times made unfounded charges against the directors and officials of the company, and the pursuer . . . renewed his charges and misrepresentations.' (Cond. 7) The averments of the defender were falsely, maliciously, and injuriously made with the view of representing the pursuer to be of drunken and dissipated habits, and that thereby he was an unfit and incapable person to manage or give advice in the business of the said company, and with the intention of hurting and injuring his personal and business character and ruining his reputation and credit. (Cond. 8) The said statements were wholly irrelevant to, and had no connection or bearing whatever on, the subject-matter of said action, and were made for no other purpose than to damage the pursuer."

The pursuer pleaded—"(1) The defender having falsely, maliciously and injuriously made the averments regarding the pursuer above set forth, is liable to the pursuer in compensation therefor."

The defender pleaded that the pursuer's averments were not relevant.

The Sheriff-Substitute (RUTHERFURD) on 28th January 1884 pronounced this interlocutor—"Finds that the pursuer has not set forth any relevant or sufficient ground of action: Therefore sustains the defender's first plea-in-law: Dismisses the action, and decerns: Finds the pursuer liable to the defender in the expenses of process, &c.

"*Note.*—On the 2d of February 1883 the pursuer raised the action referred to on record against the Money Order Bank, Limited, in which he sued the company for £5500, on the ground that by the alleged mismanagement of its directors he had been deprived of large profits which he would otherwise have realised under an agreement between him and the bank, in terms of which the bank was to work an invention of the pursuer for conducting money order business. The company went into liquidation on the 12th of February 1883, and the present defender having been appointed liquidator was sisted as a party to the suit on the 27th of the same month. In his condescendence in that action the pursuer alleged (article 14) that 'the defenders never asked the pursuer for the working plans of his system, and never consulted him, although they held out that they would work his system, and they refused to allow the pursuer to explain to and instruct them and their agents, and other persons employed by them, in the details and working of his system as provided by the said agreement. The pursuer ceased to be manager of the company on 30th May 1881, being one month before the company commenced business, and there was no official of the defender's company (other than the pursuer while he was their manager) who was acquainted with the working of the said system. The officials employed were wholly unskilled and untrained to any such business.'

"In order to meet these and the pursuer's other charges of mismanagement, the defenders made the averments contained in the 4th and 10th articles of their statement of facts, which are partially quoted by the pursuer in the 5th article of the condescendence in the present action. In the opinion of the Sheriff-Substitute these statements were not impertinent to the cause, and the case is therefore one of privilege, in which the pursuer must libel and prove malice on the part of the defender. For as the Lord President (then Lord Justice-Clerk) observed in *Mackellar* v. *The Duke of Sutherland*, 1861, 24 D. 1125—'In such a case as this the law does not presume a malicious motive in the defender, because there is another obvious and innocent motive, namely, to promote his rights and interests in the cause in which the statement is made. Therefore no action will lie for such a statement unless the pursuer undertake to prove as matter of fact that the motive was malicious.'

"The pursuer was therefore bound to aver malice, and as the defender was acting merely in an administrative capacity, and not as a private individual, it may be a question whether it was not also necessary for him to allege both malice and want of probable cause (opinion of the present Lord President in *Gibb* v. *Barron*, 1859, 21 D. 1103). It does not, however, appear to the Sheriff-Substitute to be necessary to express any opinion upon that point, for although the pursuer alleges that the statements of which he complains were made 'falsely, maliciously, and injuriously,' the Sheriff-Substitute is of opinion that in a case of privilege the mere use of the word 'maliciously' is not sufficient without a distinct statement upon record of the grounds from which malice is to be inferred.—*Urquhart* v. *Grigor*, 1864, 3 Macph. 289, per Lord Ardmillan; *Mackintosh* v. *Weir*, 1875, 2 R. 880, per Lord Ordinary (Lord Craighill); *Craig* v. *Peebles*, 1876, 3 R. 441. It therefore appears to the Sheriff-Substitute that the pursuer has failed to set forth a relevant case. The defender was merely the liquidator of the company, and it cannot be inferred from the pursuer's statement on record that he acted maliciously, in the absence of any averment tending to instruct a malicious motive."

On appeal the Sheriff (DAVIDSON) adhered on 15th February 1884.

"*Note.*—There is here no averment of facts, from which malice can be proved or inferred. The mere introduction of the word 'maliciously' will not do. Instead of there being any sufficient statement of malice, it seems that the averments complained of were quite relevant and proper in the circumstances set forth by the pursuer."

The pursuer appealed to the Court of Session, and argued his case in person.

The defender argued that there was no sufficient averment of malice.—*Urquhart* v. *Grigor*, Dec. 21, 1864, 3 Macph. 283; *Mackintosh* v. *Weir*, July 3, 1873, 2 R. 877.

At advising—

Lord President—This is a case of judicial slander, a class of cases which are of rare occurrence, and which when they occur require to be carefully considered.

The slander is said to be contained in a statement made upon record in an action instituted by the pursuer Scott against the Money Order Bank Limited, in which he concluded for a sum of damages said to be due to him, in respect the defenders had failed, under a contract entered into with him, to work a system said to have been invented by him, and that they had so mismanaged the business as to lead to its being put into liquidation and being brought to an end; and that therefore the pursuer's invention had not been made of use or available. The plea-in-law stated by the pursuer was that the defenders "having failed to adopt and work the pursuer's system, and having otherwise mismanaged the business of the company, and having thereby caused loss and damage to the pursuer to the extent concluded for, the pursuer is entitled to decree in terms of the conclusion of the summons." In answer to this the defenders pleaded "that the pursuer having by his own misconduct brought about or contributed materially to bringing about the present state of matters, he is barred *personali exceptione* from succeeding in this action." Now, it is quite plain on the face of the record that this is a relevant defence, and the statement complained of in this action was made in support of it. The statement is contained in the fourth article of the defenders' statement of facts, and is to the following effect:—"The pursuer was never formally installed in office as manager, but according to the agreement he acted as such till on or about the 28th May 1881, when he was suspended from that office by the chairman of the Board of Directors in consequence of absence from business, inattention to his duties, and general misconduct. Prior to this, viz, towards the end of April 1881, the pursuer's attention was called to the fact that he had been intoxicated during business hours, and had been seen in that state by the chairman. He was asked to apologise and pledge himself that such a state of things should not recur. He practically admitted the offence, tried to explain matters, and promised good behaviour for the future. He again misbehaved in the same way within a month or thereby. The pursuer's conduct and a correspondence between him and the chairman was brought under the consideration of the directors at a meeting held on 8th June 1881, and it was resolved that the chairman should inform the pursuer that at the next meeting his dismissal from office would be moved," and that was done accordingly.

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 that 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 *Mackellar* v. *The Duke of Sutherland*, 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 meet 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 from which it can be inferred that this relevant statement made by the defender as representing the shareholders, and which it was his duty to make if he believed, 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. Where the statement is irrelevant of course it is easier to do this, for the statement itself is the foundation for an inference of malice. Therefore I think that in this case, in order to entitle the pursuer to go to proof, he must state facts and circumstances which he is prepared to prove, and which he must prove, from which malice can be inferred, and therefore I think that this condescendence is irrelevant, and that the Sheriff-Substitute is right.

Lord Mure—I am of the same opinion. When the statement complained of is relevant and pertinent to the action, it is necessary that there should be a distinct allegation as to what the facts and circumstances are from which malice may be inferred. I do not think that the mere insertion of the word "maliciously" is sufficient.

Lord Shand—I also concur in thinking that the judgment should be adhered to. It does not appear to me that the authorities to which the Sheriff-Substitute refers decide the question. I rather take the question as new, and that there has been no case hitherto upon the point. Where the statements have been relevantly made a different question arises from that in the previous cases in which the statements were not relevant.

The question arises here, What must the pursuer aver? I am clearly of opinion that in a case where a litigant is only using his lawful right in making a relevant statement to support his pursuit or defence, and when, indeed, it is his duty to do so, it is not enough in an action for slander founded upon such a statement to aver that the statement is malicious. I think the litigant must be protected against an action of this kind, unless the pursuer puts on record the facts and circumstances from which he is to ask the jury to infer that there was malice. I think it is only reasonable, if there be such facts and circumstances, that they should be set forth on record, and that it is not enough, as has been done in the present case, to prefix the word "maliciously" to the words falsely and calumniously, with a bare recital of the words complained of.

The Court affirmed the judgment of the Sheriff.

Counsel for Appellant—Party.

Counsel for Respondent—Nevay—M'Kechnie. Agents—Richardson & Johnston, W.S.

Friday, July 18.

FIRST DIVISION.

SPECIAL CASE—DUNLOP AND OTHERS.

Succession—Mutual Deed—Vesting—Delivery.

Two brothers, A and B, executed a mutual trust-disposition in favour *inter alios* of the children of B, who was married, "declaring that in the event of there being any more children procreated" of B's then present or any future marriage, "and in the event of me the said" A "becoming married and leaving issue," each family was to have one-half of the subjects *pro indiviso* in fee, "but in the event of there being no such issue of us the said" B and A the declaration should be null, and B's children should take all. There was no delivery of the deed until the trustees took infeftment on it twelve years after its execution. A died unmarried, and B had another child by a second marriage. *Held* that the deed was not such a mutual contract as to render delivery unnecessary, that no vesting took place until the infeftment of the trustees, that on a fair construction of the deed the child of B by his second marriage, was entitled to a share of one-half of the fee of the estate, while the remainder of that half and the whole of the other half fell to be divided equally among the children of B by his first marriage.

In 1850 Alexander M'Crae and his brother Andrew M'Crae executed a disposition by which they conveyed to certain trustees named certain heritable subjects in Glasgow of which they were the *pro indiviso* proprietors. The disposition bore that for certain good and onerous causes and considerations the granters conveyed the subjects to the trustees "in trust for Mrs Janet More or M'Crae, wife of me the said Alexander M'Crae, in liferent for her liferent alimentary use, and in the event of me the said Alexander M'Crae surviving the said Mrs Janet More or M'Crae, for me the said Alexander M'Crae in liferent, for my liferent use allenarly, the whole of the subjects herein disponed; and in the event of my, the said Andrew M'Crae, surviving the said Mrs Janet More or M'Crae, and the said Alexander M'Crae, for me the said Andrew M'Crae in liferent, for my liferent use allenarly, one-half of the subjects hereby disponed, and for George Auld M'Crae, Jessie M'Crae, William M'Crae, Alexander Small M'Crae, Margaret M'Crae, and John M'Crae, all children of the said Alexander M'Crae in fee: But declaring, that in the event of there being any more children procreated of the marriage between me the said Alexander M'Crae and Janet More or M'Crae, or of any future marriage to be contracted by me the said Alexander M'Crae, and in the event of me the said Andrew M'Crae becoming married and leaving lawful issue, then and in that case the said trustees shall make over and convey to the said George Auld M'Crae, Jessie M'Crae, William M'Crae, Alexander Small M'Crae, Margaret M'Crae, and John M'Crae, and any other children to be procreated of the body of the said Alexander M'Crae, as aforesaid, the one-half *pro indiviso* of the subjects after disponed, equally among them in fee, and dispone equally among the child or children of the said Andrew M'Crae, in the event of his leaving any as aforesaid, the other half in fee; but in the event of there being no such issue of us the said Alexander M'Crae and Andrew M'Crae, this declaration at our deaths, *eo ipso*, becomes void and null, and the said trustees shall make over to the said George Auld M'Crae, Jessie M'Crae, William M'Crae, Alexander Small M'Crae, Margaret M'Crae, and John M'Crae the absolute fee of the whole subjects and others after disponed, under burden of the liferent of the said Janet More or M'Crae if she may be then living, in the first place, All and Whole," &c.

Mrs Janet More or M'Crae died on 13th March 1858 predeceasing her husband Alexander M'Crae. Alexander M'Crae subsequently entered into a second marriage, by which he had one son Edward, and died intestate on 9th March 1883, survived by three of the six children named in the deed, and by his second wife and by the son Edward. The children who predeceased him all died unmarried and intestate before December 1862.

Andrew M'Crae never married, and died intestate on 21st May 1863.

The subjects conveyed by the trust-disposition were sold, and it was the proceeds which fell to be divided, but the parties interested were agreed that the sale did not operate conversion from heritable to moveable *quoad* succession.

The trust-disposition was never delivered, but the trustees took infeftment on it on 22d December 1862.

Questions having arisen as to the effect of the trust-disposition in the circumstances which had occurred, this Special Case was stated for the opinion and judgment of the Court. The parties to it were—(1) Hugh Dunlop, the sole surviving trustee; (2) Alexander Small M'Crae, the eldest surviving son of Alexander M'Crae's first family; (3) John M'Crae and Jessie M'Crae, the remaining two surviving children of the first family; (4) Edward M'Crae, the child of Alexander M'Crae's second wife.

The questions of law for the opinion of the Court were as follows:—(1) Is the fourth party [Edward M'Crae] entitled to participate in the division of the proceeds of sale of said subjects? (2) Is the second party entitled to four-sixths, or (in the event of the first question being answered in the affirmative) to four-sevenths of said proceeds? or (3) Are said proceeds to be divided equally, or if not equally, in what proportions, among the children found to be entitled to participate therein?

Argued for the second party—Only the first family was entitled to participate, the condition under which alone the fourth party could come in, being the double event of Alexander having more children, and Andrew marrying and having children. If the fourth party took at all, it could be only a share in the fee of one-half of the estate, there being no words of gift which could possibly give him any more. He, in addition to his own share, was entitled to the shares of his predeceas-