LORD JUSTICE-CLERK—I think in this case the Sheriff has come to a right decision. The Sheriff-Substitute decided the case upon the ground that the principal witness was speaking the truth, and that there was sufficient corroboration to justify him in holding that the pursuer had proved her case. The Sheriff-Principal was of the same opinion, and after considering the evidence I see no reason for disturbing the decision of the Sheriffs.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I agree. There is here sufficient corroboration of the pursuer's evidence to warrant the conclusion at which the Sheriffs have arrived. I should have contented myself with merely expressing this concurrence with your Lordships had it not been for some remarks made by the Sheriff in his note regarding the rules of evidence applicable to cases of this kind. He appears to have felt some difficulty on that matter, on account of what he thinks is an apparent conflict between the opinion of some of the Judges of this Division as expressed on that subject in recent decisions. I think there is no such conflict. The rule laid down by the late Lord President in *M'Bayne* v. *Davidson*, which the Sheriff quotes and adopts, is, in my opinion, the sound rule, and I have never said anything to the contrary, nor has any Judge in recent times, to my knowledge. That rule stated in a sentence is that in cases of filiation "the evidence is to be dealt with as in other cases . . . the pursuer must prove her case." There is nothing in any recent opinion conflicting with this. There is apparently some difference between Lord Young and myself as to the effect to be given, or the importance to be attributed, to a defender's denial of facts which are otherwise proved. But the difference obviously is not great, and consists more in the form of expression than the principle expressed. I adhere to the views which I stated in the two cases cited by the Sheriff.

The Court adhered to the Sheriff's interlocutor.

Counsel for the Appellant—Salvesen—Kennedy. Agent—W. R. Mackersy, W.S.

Counsel for the Respondents—Clyde. Agent—James Skinner, S.S.C.

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*Thursday, June* 8.

## FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

## INGRAM *v.* RUSSELL.

*Reparation — Slander — Privilege — Averment of Malice.*

A pursuer in an action of reparation for slander averred that a bank agent had in the bank office, and in presence of the bank clerks, repeatedly accused him of forgery, and set forth circumstances tending to show that the defender, in making and repeating the charges complained of, had acted without due inquiry, rashly, and without taking any precaution to secure secrecy.

*Held* (1) that the pursuer's record disclosed no case of privilege, and (2) that should a case of privilege emerge at the trial malice had been sufficiently averred.

In January 1893 A. C. M. Ingram, analytical chemist, Paisley, brought an action of reparation for slander against Robert Russell, agent for the Clydesdale Bank there, concluding for £1000.

The pursuer averred—In the month of December 1892 the pursuer had several meetings with the defender with reference to an overdraft which the pursuer was desirous of obtaining from the defender's bank for business purposes. After sundry communings the defender, at a meeting in the office of the said bank at Paisley, on or about 12th December 1892, suggested to the pursuer that he might get the pursuer's father-in-law, Mr Donald Sutherland, superintendent of the burgh police, Paisley, to accept a bill along with him, and the defender indicated that he would be prepared to discount such bill when presented. Following out this suggestion, the pursuer drew two bills, dated 16th December 1892, upon the said Donald Sutherland—one for £40 at three months' date, and the other for £50 at six months' date—and sent them to Mr Sutherland for acceptance. Mr Sutherland subscribed his name to the bills as acceptor, and returned them to the pursuer, who, about three o'clock in the afternoon of said 16th December, called at the bank and handed the bills across the counter to the accountant Mr Mackersie, to be discounted, explaining that he had arranged the matter with the defender.

About eleven o'clock in the forenoon of Saturday, 17th December 1892, the pursuer called at the bank to lodge some money to the credit of his account, and to see as to the discounting of the bills. He went into the defender's room for the purpose of giving any explanations the defender might wish regarding the bills. The defender, however, did not refer to the bills, but conversed in a general way, leading the pursuer to infer that he was satisfied. The parties went together into the public office of the bank, where the pursuer proceeded to write a "pay-in slip." Thereupon one of the bank clerks handed the said bills to the defender, and the defender, after scrutinising them, and passing a remark to the pursuer that he had got them accepted, to which the pursuer assented, intimated to the bank accountant Mr Mackersie that these were all right, meaning that the bills were to be accepted as good, and to be discounted, which was done, and the proceeds placed to the credit of the pursuer on current account, as appears from the entries in the books of the bank.

On the morning of Monday, 19th December 1892, the defender came into the

public office of the bank and asked for the said bills. Having got them and examined them, he there, in presence and hearing of the following clerks of the bank, viz., James Mackersie, accountant, residing at the Cross, Paisley; James Carrick, clerk, residing at 8 Whitehaugh Terrace, there; William Brown, clerk, residing at 8 Camphill Place, there; and James Mackay, clerk, residing at 3 Smith Street, Paisley, or one or more of them, and also in presence and hearing of members of the general public, who were in the bank at the time, falsely, calumniously, maliciously, and without probable cause, stated, referring to the said bills, "I am doubtful of their genuineness," and "I do not believe that Sutherland signed these bills," or did use words of the like import and effect. The words so used were of and concerning the pursuer, and were meant to imply that the pursuer had forged, or procured to be forged, the signatures of Donald Sutherland appearing on said bills, and had uttered these as the genuine signatures of the said Donald Sutherland. The defender then left the bank and went outside, taking with him the bills. He proceeded to the office of Mr Thomas Walker, clerk to the Police Commissioners of Paisley, where he submitted the bills to Mr Donald Paterson, writer, and asked him whether the signatures were those of Donald Sutherland. Mr Paterson informed the defender that although Mr Donald Sutherland usually subscribed "D. Sutherland," the subscriptions in question were, in his opinion, genuine subscriptions of Mr Sutherland. Notwithstanding this opinion, which should have satisfied the defender that his suspicions were groundless, the defender returned to the public office of the bank, and there in presence and hearing of the said James Mackersie, William Brown, James Carriek, and James Mackay, or of one or more of them, and also of members of the general public, who were in the bank at the time, again referring to said bills, falsely, calumniously, maliciously, and without probable cause, said, "I have got my opinion confirmed that these bills are not genuine," or did use words to the like import and effect of and concerning the pursuer, implying that the signatures "Donald Sutherland" appearing on said bills were not the true signatures of the said Donald Sutherland, but had been forged, or procured to be forged, by the pursuer, who had thereafter uttered the bills as containing the said Donald Sutherland's genuine signatures. The defender thereupon instructed the bank clerks to delete or erase from the bank books the entry or entries crediting the pursuer with the amount of said discounted bills, and this was done. The defender thereupon wrote a peremptory letter to the pursuer, requesting him to call at the bank at once, and instructed the clerk whom he sent out to deliver it to call at the pursuer's house, and at his works, and make sure of finding him. On the clerk returning and reporting to the defender that he could not find the pursuer, the defender, in the public office of the bank, and in presence and hearing of the said James Brown, James Carrick, Mackersie, William and James Mackay, or of one or more of them, and also of members of the general public who were in the bank at the time, falsely, calumniously, maliciously, and without probable cause, stated of and concerning the pursuer, "He may have skedaddled," or did use words of the like import and effect, implying that the pursuer having forged, or procured to be forged, the signatures "Donald Sutherland" on said bills, and uttered the same as containing the genuine signatures of the said Donald Sutherland, had probably fled in order to escape a criminal prosecution.

Somewhat later on the afternoon of said 19th December 1892, the pursuer, who had not received the letter despatched by the defender as aforesaid, but had occasion to call at the bank in regard to another matter, came into the public office of the bank. He was asked to go into the defender's private room, which enters from the public office. He did so, and the defender followed him in, but did not close the door. The defender there and then falsely, calumniously, maliciously, and without probable cause, said to the pursuer in a loud tone of voice, and pointing to the bills, which he exhibited, "You're a fine fellow. What does this mean? That's not Sutherland's signature at all;" and on the pursuer replying that it was, the defender falsely, calumniously, maliciously, and without probable case, said, "It's nothing of the kind. I heve examined the signature, and it is not Sutherland's signature. I have seen the like of this done before," or did use words to the like import and effect, implying that the pursuer had forged, or procured to be forged, the signatures on said bills, which purported to be the signatures of the said Donald Sutherland, and had uttered the same as the genuine signatures of the said Donald Sutherland. On the pursuer still maintaing that the said signatures were genuine, the defender instructed one of the bank clerks to go with the bills to the said Donald Sutherland, and ask him whether he had accepted and signed his name to said bills. The clerk went away with the bills and soon returned, stating that Mr Sutherland was engaged. The defender insisted that the clerk must get Mr Sutherland, and sent him away a second time for that purpose. The clerk then went back to Mr Sutherland's office, and in order to carry out the defender's peremptory instructions, had to interrupt Mr Sutherland in a business meeting. On being shown the bills, Mr Sutherland at once said that he had signed them. In a few minutes the bank clerk returned, and reported that the said Donald Sutherland stated that the signatures in question were his. Immediately on the clerk so saying, the defender called into his private office a gentleman who had been waiting for him, and the pursuer had to leave.

The statements of the defender to the effect that the bills did not contain

the genuine signatures of the said Donald Sutherland, implying that the pursuer had forged, or procured to be forged, said signatures, and had uttered the same as the genuine signatures of the said Donald Sutherland, are entirely unfounded. The said signatures were the true and genuine signatures of the said Donald Sutherland, and the defender, if he had any reason to suspect they were not, could have satisfied himself on that point in five minutes' time, as the said Donald Sutherland's office is only 100 yards from the office of the bank. Instead of so doing, the defender falsely, calumniously, maliciously, and recklessly, and without probable cause, in fact without any cause at all, uttered the slanderous statements concerning the pursuer condescended on.

The defender explained "that Saturday is a busy and short day in the bank, and he had not much time to reflect upon the transaction with pursuer. When, however, he had considered the circumstances certain suspicion arose in his mind, and on the Monday morning, after examining the bills with Mr Mackersie, the bank accountant, he expressed to Mr Mackersie his doubt as to the genuineness of Mr Sutherland's signatures. Defender thereafter went to the office of the clerk to the Police Commissioners and compared the signatures on the bills, which were signed 'Donald Sutherland,' with a specimen of Mr Sutherland's usual signature, which was 'D. Sutherland.' Defender's doubt was confirmed by this circumstance, and he stated this to Mr Mackersie. It is denied that the defender made any statements regarding the pursuer or the said bills in the presence or hearing of any members of the general public. . . . Explained and averred that on the Monday defender said to pursuer that the signatures to the bills as Captain Sutherland's were not his usual signatures, his usual signature being 'D. Sutherland.' Pursuer admitted this, but added that the signatures were all right. Defender asked him if he might send a clerk to inquire of Mr Sutherland. To this pursuer assented and a clerk was sent. Both parties remained together chatting in friendly terms. The clerk returned, reporting that Mr Sutherland was engaged, and he was told to go back again. On his return he reported that he had seen Mr Sutherland, and that he accepted responsibility for the acceptances. Defender then said to pursuer 'That's all right, then.' Pursuer assented, and defender felt relieved and considered the matter at an end. No one heard the conversation between pursuer and defender."

The defender, *inter alia*, pleaded (2) Privilege.

The pursuer proposed the following issues —"(1) Whether, on or about the 19th day of December 1892, and at or near the office in Paisley of the Clydesdale Bank, Limited, the defender, in presence and hearing of the following clerks of the bank, viz.: James Mackersie, accountant, residing at the Cross, Paisley; James Carrick, clerk, residing at 8 Whitehaugh Terrace, there; William Brown, clerk, residing in Paisley; and James Mackay, clerk, residing at 3 Smith Street, there, or one or more of them, falsely and calumniously stated of and concerning the pursuer, and with reference to two bills, dated on or about 16th December 1892, drawn by the pursuer upon and accepted by Donald Sutherland, superintendent of the burgh police, Paisley, that he (the defender) did not believe that the said Donald Sutherland had signed the said bills, meaning thereby that the pursuer had forged, or procured to be forged, the signatures of the said Donald Sutherland appearing on said bills, and had uttered these as genuine, or did use words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage. (2) Whether, on or about the said 19th day of December 1892, and at or near the said office in Paisley of the said Clydesdale Bank, Limited, the defender, in presence and hearing of the said James Mackersie, James Carrick, William Brown, and James Mackay, or one or more of them, falsely and calumniously stated of and concerning the pursuer that he (the defender) had got his opinion confirmed that the said bills were not genuine, meaning thereby that the pursuer had forged, or procured to be forged, the signatures of the said Donald Sutherland appearing on said bills, and had uttered them as genuine, or did use words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage. (3) Whether, on or about the said 19th day of December 1892, and at or near the said office in Paisley of the said Clydesdale Bank, Limited, the defender, in presence and hearing of the said James Mackersie, James Carrick, William Brown, and James Mackay, or one or more of them, falsely and calumniously stated of and concerning the pursuer that he might have 'skedaddled,' meaning thereby that the pursuer having forged, or procured to be forged, the signatures of the said Donald Sutherland appearing on said bills and having uttered them as genuine, had probably fled in order to escape a criminal prosecution, or did use words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage. (4) Whether, on or about the said 19th day of December 1892, and at or near the said office in Paisley of the said Clydesdale Bank, Limited, the defender, in presence and hearing of the pursuer, falsely and calumniously said of and concerning the pursuer, that the pursuer was 'a fine fellow,' that the signature on said bills was not the signature of the said Donald Sutherland at all, that he (the defender) had examined the signature and that it was not Sutherland's signature, and that he had seen the like of this done before, meaning thereby that the pursuer had forged, or procured to be forged, the signatures of the said Donald Sutherland appearing on said bills, and had uttered them as genuine, or did use words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage. Damages laid at £1000."

Upon 17th May 1893 the Lord Ordinary (STORMONTH DARLING) refused the first three issues and allowed the fourth issue.

"*Opinion.*—Of the four issues proposed by the pursuer, the first, second, and third seem to me to stand in a different position from the fourth. All three refer to statements made by the defender to clerks in the branch bank of which he was the agent, and on the pursuer's own statement they are covered by privilege. If the defender, though erroneously (as I must assume), had doubts about the genuineness of the signatures to the bills in question, he was within his right, and indeed it was his duty, to mention the matter to the other officials of the bank, and it would most seriously hamper the freedom of confidential communings of this kind to weigh in nice scales the language used, and to hold that he lost his privilege by expressing his own adverse opinion in somewhat decided terms. I am therefore very clearly of opinion that these three issues ought not to be granted without the insertion of the words 'maliciously and without probable cause.'

"But then arises the question, whether malice is relevantly and sufficiently averred on record. Now, I am aware that in some cases it has been thought sufficient to aver malice in general terms, while in others it has been held necessary to condescend upon particular facts and circumstances from which the inference of malice is to be made, and no very definite line of distinction has ever been drawn between the one class and the other. (See the late Lord President's opinion in *Innes* v. *Adamson*, 17 R. p. 15). I do not myself think that official duty, interpreting that phrase as the duty of a public official, affords any sound or satisfactory criterion. A man in the position of a bank agent, though he is not a public servant, discharges very important and responsible duties towards his employers, and I think it is just as much required, both by justice and by the true interests of the community at large, that the protection of privilege in its fullest degree should be extended to him as to the holder of a *munus publicum*. At all events I am not compelled by any decision to hold, contrary to my own opinion, that a general averment of malice is enough in such a case. Now, on this record, so far as these three issues are concerned there is nothing more than a general averment of malice. It is said that the defender might have satisfied himself of the genuineness of the signatures by applying to the acceptor Mr Sutherland, whose office was in the immediate neighbourhood of the bank, but it cannot seriously be maintained that he was bound to do that before speaking to his own clerks, and it is admitted that he had some ground for suspecting the signatures, inasmuch as Mr Sutherland's usual signature was 'D. Sutherland,' and not 'Donald Sutherland' as on the bills. I am therefore of opinion that, so far as these issues are concerned, there is no sufficient averment of malice, and that the issues must for that reason be disallowed.

"With regard to the fourth issue the case is different. It relates to a statement made to the pursuer himself roundly declaring that the signatures were not genuine, and the words are innuendoed as importing a charge of forgery. Now, this on the face of it was not a privileged occasion. It may turn out that it was, and much will no doubt depend on the precise words used. If all that the defender did was to call the pursuer's attention to the admitted difference between Mr Sutherland's usual signature and the signature on the bills, and to ask for an explanation, then the defender was acting within his rights, and I apprehend it would be the duty of the presiding judge to direct the jury that in that case malice must be proved. But the defender would not be entitled to charge the pursuer with forgery as if the matter were an ascertained fact, and that is what the pursuer says he did. I think, therefore, that the question of malice as regards this issue should be left to arise at the trial, and that in the meantime the pursuer is entitled to an issue in simple terms. If it should become necessary at the trial to consider the question of malice, there are, I think, sufficient averments for this issue though not for the others. Before the defender made a definite charge of forgery against the pursuer (if that is what he really did), it probably was his duty to communicate with Mr Sutherland as he did eventually, and ascertain the facts on the best authority. His omission to do so might be recklessness of the kind which the law holds equivalent to malice; at all events, I cannot say at present that it might not. A man may be entitled to make inquiries of others which plainly imply the commission of a crime, when he would not be justified in directly accusing the suspected person himself.

"Everything depends on how the thing was done, and that cannot be determined without inquiry."

The pursuer reclaimed, and argued—(1) No case of privilege was disclosed in his record. (*a*) A statement to be privileged must be made by a person having a duty or an interest, to a person having a corresponding interest—*Auld* v. *Shairp*, July 14, 1875, 2 R. 940, following upon *Laughton* v. *Bishop of Sodor and Man*, November 1872, L.R., 4 P.C. App. 495. The ordinary bank clerks had no more right or interest to hear the bank agent's doubts than the general public—*cf. Walker* v. *Cumming*, February 1, 1868, 6 Macph. 318, where statements made to the police were held not privileged when repeated to the public. (*b*) A person in a privileged position must avoid unnecessary publicity—*Rankine* v. *Roberts*, November 26, 1873, 1 R. 225. The bank agent here had abused and consequently lost any privilege he might have. (*c*) A person even if privileged is not privileged in every statement he may make. The statements here made on the third occasion referred to were plainly not privileged — *Fraser* v. *Wilson*, December 10, 1850, 13 D. 289; *Milne* v. *Bauchope*, July 19, 1867, 5 Macph. 1114. (2) If it should appear

at the trial that the statements were privileged, there was sufficient averment of malice looking to *M'Donald* v. *Fergusson*, March 10, 1853, 15 D. 545; *Blackett* v. *Lang*, June 21, 1854; *M'Murchy* v. *Campbell*, May 21, 1887, 14 R. 725; *Beaton* v. *Ivory*, July 19, 1887, 14 R. 1057; *Innes* v. *Adamson*, October 25, 1889, 17 R. 11 (Lord President Inglis, p. 15); *Bruce* v. *Leisk*, February 20, 1892, 19 R. 482 (Lord Kinnear, p. 487). (3) It was not necessary to insert the words "and without probable cause" of *Croucher* v. *Inglis*, June 14, 1889, 16 R. 774.

Argued for respondent—(1) The statements complained of were not slanderous because not statements of fact, but only of opinion upon known facts—*Archer* v. *Ritchie & Company*, March 19, 1891, 18 R. 719 (Lord M'Laren, p. 727); *Turnbull* v. *Oliver*, November 21, 1891, 19 R. 154. (2) The occasions were privileged and "maliciously" must be inserted in the issue. The statements were made only in presence of bank officials. The pursuer was unable to condescend upon any member of the public being present. The defender was bound to investigate so as to protect the bank. He was not bound to go at once to Mr Sutherland, and even if he had gone, that would not have been sufficient inquiry. (3) Doubtless the defender might with safety leave the question of malice to be determined by the judge at the trial, but looking to *Stuart* v. *Moss*, December 5, 1885, 13 R. 299, he was entitled to have malice inserted now. (4) Malice was not relevantly and sufficiently averred—*Watson* v. *Burnet*, February 8, 1862, 24 D. 494; *Ritchie & Son* v. *Barton*, March 16, 1883, 10 R. 813; *Selbie* v. *Saint*, November 8, 1890, 18 R. 88. (5) The words "without probable cause" should be inserted—*Hill* v. *Thomson*, January 16, 1892, 19 R. 377.

At advising—

LORD PRESIDENT—My opinion is that the pursuer is entitled to the four issues which he has lodged, and I do not think it is necessary that the word "maliciously," and still less the words "maliciously and without probable cause," should be inserted in them.

We have to consider the case made by the pursuer on the record, and it is not legitimate at this stage to form conjectures or to draw inferences as to what may prove to be the actual state of the facts after inquiry.

Now, the case of the pursuer is, that on the occasions libelled the defender accused him of forgery, and I observe in the first place that although the pursuer may have great difficulty in establishing it in fact, he has sufficiently set out words, the use of which by the defender may have borne the meaning assigned to them.

The Lord Ordinary seems to have held that a case of privilege is disclosed by the record.

How stands that matter?

The defender is a banker or bank agent, and it is said that the slander was uttered in the bank premises and in connection with banking business; but it is not the law that any defamatory statement is privileged merely because it is uttered in such circumstances. It must depend on the occasion of uttering. Here there is nothing averred in the pursuer's statement to raise even a presumption of privilege, except that each of the persons in whose presence the slander was uttered is in the employment of the bank and is designed as a clerk.

Now, it is said that the statement is privileged because uttered when the only audience was one of clerks or employees of the bank. But take the case suggested by one of your Lordships, of the head office of one of the large banks, where are to be found, it may be, scores of employees of all grades and degrees. Would it do to say that the occasion was privileged if the manager came out of his private room into the public office, and in the presence of all of these (from the head official down to the youngest employee of the bank), said that he thought that certain bills had been forged—such an argument would be untenable.

Now, the privilege pleaded here arises in the very same way as in the illustration I have given. The pursuer does not say that the bank agent wanted to consult with the other officials of the bank, or that they were the proper persons with whom to consult, but that he went into the public office of the bank and called for the bills, and then having got and examined them, he there, in the presence and hearing of the persons named, and also in presence of members of the public, used the language complained of.

I differ from the Lord Ordinary, and I hold, first, that there is a good averment of defamation, and second, that a case of privilege is not disclosed by the pursuer on the record.

It is unnecessary but it may be expedient to notice that the defender's record contains an abundant case of privilege, and it is highly probable, or at anyrate it is possible, that a case of privilege may arise at the trial. Should that be so, then it will be the duty of the presiding Judge to direct the jury that a verdict cannot be obtained by the pursuer without proof of malice. The question will then arise, Is there a good averment of malice in the pursuer's statements.

Now, here we are not dealing with the case of a person making a statement to officers of law, but a widely different case, and the same pointed and detailed averments of facts and circumstances inferring malice are not required, and an averment of malice in general terms might be enough. But what is more, I think that the pursuer's record contains a sufficient statement of circumstances which may give rise to an inference of malice according to the events which are proved at the trial. They may disclose a course of conduct on the part of the defender which was undue, unjustifiable, and reckless, and only to be ascribed to illegitimate and oblique motives.

I hold then, first, that the pursuer's statements do not disclose a case of privilege,

and, second, that they contain a sufficient averment of malice to entitle him, if a case of privilege is made out at the trial, to meet that by proving malice. The former question is that which alone arises at this stage for immediate decision.

LORD ADAM concurred.

LORD M'LAREN—The first question of course is, whether on the pursuer's statements a case of privilege is disclosed, because if the action as laid discloses no case of privilege, we must grant an issue in the ordinary form. The defender will suffer no prejudice or injury in consequence of the case being sent to a jury in such a form, because at the trial if facts are established which bring the case within the region of privilege, the presiding Judge will direct the jury that they are not entitled to find for the pursuer unless malice is proved. Now, looking to the averments of the pursuer only, I fail to see that a case of privilege coming within any of the known categories is here raised. Everyone will admit that in carrying on the business of banking, confidential inquiries are necessary, especially with regard to the character and credit of customers applying for advances of money; in general, the answers to such inquiries will be privileged. But then the junior clerks of the banking establishment are not the persons who would naturally be consulted in connection with those delicate questions. It might be that there was a special reason for consulting a junior clerk, *e.g.*, that he personally knew the man whose credit was in question, or that he was acquainted with the signature of a party the authenticity of whose subscription was doubted, but no such special reasons are here disclosed, and the issue raised by the pursuer is the ordinary issue of defamation.

Then supposing that a case of privilege should arise at the trial—that is, if the facts be of the character averred by the defender, it is my opinion that the anticipatory averments made by the pursuer are sufficient to raise the counter case of malice. I am inclined to think that there is not really so much difference between the views expressed by Lord Rutherfurd Clark in the case of *M'Murchy*, and the opinion of the late Lord President in the case of *Ivory* as has been supposed. I do not understand the Lord President to say that even in a case of judicial slander it is necessary to aver antecedent facts from which the inference of a malicious motive may be drawn. I may say that it has always been a fixed idea in my mind that it is not enough to use the word "malice" or "maliciously" to make a relevant case of malicious slander, but that a circumstantial case of some kind must be set forth. But what would amount to a relevant averment in the present case is very different from what would be required in a case, say, of judicial slander. The kind of facts would vary with the circumstances of each case, the question being one of degree rather than one of a distinct and separate principle or criterion of relevancy. The circumstances here detailed, and especially the absence of all precautions with a view to secrecy, the repetition of the offensive statements after an inquiry which might have tended to allay suspicion or at least to induce caution, and the broad and unqualified language in which these statements are said to have been expressed; these elements are in my opinion sufficient to satisfy the first part of the rule that in cases of privilege malice must be averred and proved.

LORD KINNEAR—I am of the same opinion.

The Court sustained the reclaiming-note, approved the four issues proposed by the pursuer, and remitted the case to the Lord Ordinary.

Counsel for Pursuer and Reclaimer—Strachan—M'Lennan. Agents Miller & Murray, S.S.C.

Counsel for Defender and Respondent—Comrie Thomson—A. S. D. Thomson. Agent—F. J. Martin, W.S.

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*Friday, June 9.*

## FIRST DIVISION.

[Lord Kincairney, Ordinary.

## RITCHIE (YOUNG'S TRUSTEE) *v.* THE DEACONS OF THE EIGHT INCORPORATED TRADES OF PERTH.

*Trust—Charitable Purpose—Cy près—Destination-over.*

A testator directed his trustees to transfer certain annuity bonds to the trustees of a particular school, who were to apply the proceeds in supplementing the salary of the teacher in said school, declaring that the said provision should be paid to and accepted by these trustees "only on condition of their undertaking to retain the management of said school in their own hands, and that in the event of their declining to accept payment of said provision on this condition the amount thereof shall fall into . . . the residue of my estate, it being my desire that the said provision shall be applied in providing moral and religious instruction for as many boys or girls" of a certain class "as the fund will admit." After the testator's death the bequest was paid over, and for fourteen years the proceeds were applied by the trustees of the school in the manner prescribed by the testator. At the end of that period, owing to the passing of the Free Education Act, the school became useless and was closed.

*Held* that the bequest was made subject to the condition that the trustees should continue to carry on and manage the school, that as that condition