him, argued—1. If the case is one of damages for defamation, it falls within the exception stated in the Lord Ordinary's note, and not within the general rule. Mason *v.* Trail, 2d July 1851, 13 D. 1282; Duncan *v.* Balbirnie, March 3, 1860, 22 D. 934. 2. But this cannot be said to be an action of damages for defamation. The letter was never published beyond being sent to the pursuer; and thus the injury done was one not to his character but to his feelings only. Lovi *v.* Wood, 1st June 1802, Hume p. 613.

The SOLICITOR-GENERAL and SHAND, for the pursuer, were not called upon.

The LORD PRESIDENT—It appears to me that this verdict ought to carry expenses. A distinction has been drawn between injury to character and injury to feelings only. But the letter complained of is couched in language held to be slanderous by the jury, and we must hold it to be so, and to mean what is expressed therein. I think probably the jury went on the ground that this letter had not occasioned any injury except injury to the pursuer's feelings. But I do not think this is a case for departing from the ordinary rule that a verdict for nominal damages carries expenses.

The other Judges concurred.

The Court accordingly affirmed the judgment of the Lord Ordinary.

Agents for Pursuer—J. W. & J. Mackenzie, W.S.
Agent for Defender—R. P. Stevenson, S.S.C.

Friday, Dec. 21.

FIRST DIVISION.

CAMPBELL *v.* CAMPBELL.

Trust—Vesting. A testator left the liferent of certain lands to his widow, and directed that on her death they should be conveyed to his nephew in the event of his surviving him. He also left an English will dated on the same day, in which he appointed his trustees to permit his widow to have the free use of certain furniture, &c., during her lifetime (which provision she afterwards renounced), and also directed them at any time after his death to convert his personal estate into money, and invest the residue in trust for his nephew. The nephew survived the testator, but predeceased the widow, leaving a settlement in favour of his mother. Held that the right to the lands and the furniture had vested in the nephew, and was carried by his settlement.

By trust-disposition and settlement, executed on the 26th June 1860, and recorded on 30th May 1862, Colonel John Campbell of Melfort conveyed to trustees the lands of Kilchoan and others, with directions to them "to permit his wife, Mrs Louisa Farquhar Ricketts or Campbell, to have and enjoy the use of the said lands and others, including the residence on Kilchoan, during all the days of her life, she paying the yearly burdens to which liferenters are liable." The deed further provided that on her decease the lands should be conveyed and made over in fee to the truster's nephew, "Archibald Frederick Campbell, son of his late brother, William Frederick Campbell, in case of his survivance of the said deceased Colonel John Campbell, and the heirs male of his body; . . . . and in case of the predecease of the said Archibald Frederick Campbell . . . . the trustees were directed, on the death of his said wife, ... to sell, dispose of, and realise his said estate, and apply the proceeds thereof and all accumulations of rent in their hands to and among the truster's sisters who might then be surviving, and the issue of any of his brothers and sisters who might have died in his lifetime." Of same date with this disposition, Colonel Campbell executed a will in the English form, by which he appointed the trustees under the trust-disposition as his executors, and directed them to permit his said wife, "besides her liferent interest in the farm and residence at Kilchoan, to have the free use and enjoyment during her lifetime of the furniture, bed and table linen in and about his said residence, and of all his silver plate and plated articles;" and after her death to deliver over the same to his residuary legatee. The executors were further directed, at any time they might see fit after his decease, to call in and convert into money such other parts of his said personal estate as should not consist of money; and after paying deathbed and funeral expenses, to invest the residue of his personal estate "in trust for his said nephew, Archibald Frederick Campbell, the son of his deceased brother, William Frederick Campbell (who would then be head of his family) as his residuary legatee, his executors, administrators, and assigns; but if the said Archibald Frederick Campbell should die during his lifetime, then in trust for the first and only son of his said nephew, Archibald Frederick Campbell, who should live to attain the age of twenty-one years absolutely; and in case there should be no such son, then in trust for the first and only son of his deceased brother, Patrick Campbell, ... and in case there should be no such son, in trust for such of his sisters as might be living at his death, and for such of the issue living at his death of any of his brothers and sisters who might have died in his lifetime. But declaring always, that in case the said trust-funds so payable to the said Archibald Frederick Campbell, or his son, or the son of his late brother Patrick . . . should exceed in value (exclusive of the value of his furniture and bed and table linen at his residence at Kilchoan, and of his plate) the sum of £5000 sterling, all excess over such sum shall be payable and paid to and among his sisters, and the issue of his deceased brothers and sisters." By marriage settlement in the English form, of date 15th April 1839, Colonel Campbell had, prior to the date of the above deeds, and in contemplation of his marriage with Mrs Louisa Farquhar Ricketts or Campbell, agreed to pay to certain trustees a sum of £5000 within six months after his decease, in addition to another sum of £5000, therein narrated to have been that day paid to the said trustees.

Colonel John Campbell died on the 1st October 1861. He was survived by his wife, Mrs Louisa Farquhar Campbell; and on his decease the parties named in the above trust-disposition and settlement accepted and entered upon their office as his trustees and executors. The widow having claimed her provision both under the marriage-contract and under the *mortis causa* deed, Archibald Frederick Campbell, on the 26th September 1862, raised an action against her and against the testamentary trustees of his late uncle, concluding for declarator that she had, under the testamentary deeds of Colonel Campbell, accepted a liferent of the lands of Kilchoan in place of the sum of £5000, agreed by the marriage-settlement to be paid to her upon his decease; and, further, that the testamentary trustees should be interdicted from paying that sum of £5000; or otherwise to have it found that

Mrs Campbell was not entitled to both, but was bound to make her election between the liferent of the heritable property or the provision under the marriage-settlement. The Court, on 17th Nov. 1864, having found that she was not entitled to both, she elected to take her provision under the marriage-contract; and the case having been remitted to the Lord Ordinary, his Lordship, on 9th December 1864, pronounced an interlocutor, declaring that she had forfeited all right to the liferent of the farm and lands of Kilchoan. Archibald Frederick Campbell, the truster's nephew, died on 12th October 1863, at the age of twenty-three, leaving a disposition and settlement, dated 4th July 1862, whereby he bequeathed his whole estates, heritable and moveable, to his mother, Mrs Anne Moore or Campbell. Upon the 21st June 1865, Mrs Anne Moore or Campbell brought an action of declarator, count, reckoning, and payment against Colonel Fitzroy Campbell and Mrs Louisa Farquhar Campbell and others, the surviving and accepting trustees and executors under Colonel Campbell's trust-disposition and testament. The conclusions of the summons were—(1) that it should be found and declared that the pursuer had good and undoubted right to all and whole the town and lands of Kilchoan, with the island and mill thereto belonging and pertinents of the same; (2) that the trustees should be decerned and ordained to dispone and convey the said lands to the pursuer and her heirs and assignees; (3) that the pursuer had right to the furniture, bed and table linen, silver-plate, and plated articles in and about the residence of the said deceased Colonel John Campbell at Kilchoan at the time of his death; (4) that the defenders should make payment to the pursuer of the rents and annual profits of the said lands, furniture, and others, from 1st October 1861 to 26th May 1865; or (5) in the event of the same not having been let, of the sum of £200 per annum as the yearly value of the same for the above period; (6) that the pursuer had right to the residue of Colonel Campbell's personal estate to the extent of £5000, exclusive of the value of the furniture, plate, and others; (7) that the defenders should hold count and reckoning with the pursuer for their intromissions in the premises; or (8) if they failed to do so, should pay to her the sum of £5000 as the residue of the means and estate of the said Colonel John Campbell.

In this action the children of the deceased brothers and sisters of Colonel Campbell were also called as defenders. Defences were lodged for Melfort Campbell, eldest son of the truster's deceased brother Patrick Campbell, by John Leishman, W.S., his tutor *ad litem*, to the effect that Archibald Frederick Campbell having predeceased the widow of Colonel Campbell the truster, without heirs male of the body, the succession to the estate of Kilchoan as also to the residue of Colonel Campbell's personal estate, at least to the extent of £5000, and to his furniture, plate, bed and table linen, had opened to him, and that he was entitled to obtain possession thereof on his attaining the age of twenty-one years.

Thereafter, on the 28th November 1865, the trustees and executors raised an action of multiplepoinding and exoneration to have it found that they were liable only in once and single payment on denuding of the estate and effects of the late Colonel Campell, so far as the same had been recovered or were held by them. The actions were then conjoined. On the 13th March 1866, the Lord Ordinary (Jerviswoode) pronounced an interlocutor, in which his Lordship found, declared, and decerned, in terms of the first, second, and third conclusions of the summons of declarator. To this interlocutor the following note was appended:—

"It appears to the Lord Ordinary that, under the trust-disposition of the deceased Colonel Campbell, dated 26th June 1860, his nephew, Archibald Frederick Campbell, took an interest in the fee of the estate thereby conveyed, which vested in him through his survivance of the truster, and through his attaining to majority on the 19th October 1861, and consequently that the disposition and settlement executed by him on the 4th July 1862 was sufficient to carry and did operate as a conveyance of the whole estate, heritable and moveable, including that to which he had right under the trust-disposition of Colonel Campbell, above referred to, to his mother, the pursuer.

It does not appear to the Lord Ordinary that there can here exist any doubt whatever as to the intention of Archibald Frederick Campbell to convey every estate and right which he possessed, whether heritable or moveable, to his mother, and that, as such right as he took under the deeds of settlement of the deceased Colonel Campbell had in fact opened to him previous to the date of his own deed of disposition and settlement of 4th July 1862, effect must be given to the principle of construction on which the case of Campbell *v.* Campbell and Husband, 17th February 1743 (1 Craigie and Stewart, (Paton), p. 343) proceeded, and which was more recently and clearly enunciated and enforced by Lord Currichill in the case of Collow's Trustees *v.* Connell and Grierson, February 23, 1866. Now, assuming the application of this doctrine here it cannot be doubted that Mr Campbell intended to convey to his mother every right of which he should die possessed; and as his deed of settlement bears date 4th July 1862, while the late Colonel Campbell, the right to whose property is here in question, had died on the 1st October 1861, it must, it is thought, be held that, whatever right (if any) which Mr Campbell had in that property, was, so far as respects intention, apart from the question of power, conveyed by him to his mother.

On the whole, the Lord Ordinary is of opinion that the pursuer must here prevail; but he is far from saying that, in his opinion, the question is free from doubt or difficulty.

Against this interlocutor Melfort Campbell and his tutor *ad litem* reclaimed.

Millar (with him the Lord Advocate), for him, maintained—The question was one of vesting and not of intention. A. F. Campbell's right under the trust was not intended to give him power over the estate until he got a disposition from the trustees after the widow's death. There being words of survivorship in the trust-deed, the vesting was postponed till after the death of the liferentrix; that event must be held to be the period of division of the estate. Young *v.* Robertson February 11, 1862, 4 M'Q. 319.

Crichton, for Mrs Anne Moore or Campbell, submitted—The case falls under the rule of Leitch *v.* Leitch's Trustees, February 17, 1829, 3 W. and S. 366. The estate vested in A. F. Campbell on the death of his uncle; but he was not entitled to demand a conveyance of the subjects till after the death of the liferentrix.

Lee, for the trustees and executors, was not called upon.

The opinion of the Court was delivered by

Lord Deas—It is not very easy to apply the

decerniture of the Lord Ordinary to the summons. But parties mutually explained to us that by the first conclusion of the summons was meant the conclusion relative to the lands of Kilchoan; by the second, a decerniture that the pursuer should prevail; and by the third, the conclusion as to the furniture, plate, and other articles, and that it was not intended to decide the question in regard to the £5000, or what we may call residue. The substance of that explanation I take to be that the Lord Ordinary meant to decide that the farm of Kilchoan and the fee of the furniture vested in Archibald Frederick Campbell by his survivance of the truster, and had been effectually conveyed by his general disposition and settlement to his mother. I do not understand that the Lord Ordinary meant to deal with the question, what is to become of the intermediate rents of Kilchoan, or what is to become of the furniture during the lifetime of Colonel Campbell's widow? What he decided was, that the fee vested by the survivance of Archibald and was conveyed to his mother, leaving behind the question of the surviving widow's liferent and of her having taken the option of her provisions by the marriage settlement. In that view it would be an open question whether these rents and furniture are to be regarded as intestate succession and go to the executors of the truster or to whom. The question as to the fee of the lands comes before us immediately under the Scotch trust; the fee of the furniture is regulated by the will. These are the two questions we have to decide, and we must decide them, both under the Scotch trust-deed and under the will.

Even if that were not the case, it cannot be doubted that in construing the one deed, in a question of the intention of the testator, we could not avoid looking at the other. Even if they had not been of the same date, they are both part of the truster's settlement. When we look at the trust-deed, it can hardly be doubted that what the truster intended as to the vesting of the fee of the lands is somewhat obscurely expressed. There are considerations arising on the face of the deed both ways. The question seems to be, did the fee of the lands vest by survivance of the truster, or did it vest only by survivance of the widow? I think it is clear that at whichever of these two periods it was to vest, it was to be an absolute fee. When the time came for a conveyance to be granted, it was to be a conveyance in fee simple. It was not to be a conveyance with a substitution or a destination beyond the immediate disponee. Whichever of the parties was to take the succession at the proper period, that party was to take it absolutely. The consequence of this is, that if the fee did vest in Archibald Campbell it would go to his heir-at-law. Even if the testator's intention had been that no conveyance of the property was to be granted till after the death of his widow, the practical result would have been the same—Archibald Frederick Campbell would have had full right to dispose of it. If, therefore, the testator meant that the fee should vest in A. F. Campbell simply by his survivance of the truster, then that meaning is given effect to either by Archibald Campbell getting the estate when alive, or by his heir or disponee getting it. All that is consistent with the truster's intention. It is not at all surprising that that was the testator's meaning. We see here that the lands of Kilchoan was not a landed estate of any importance. It was a farm; the residence was a cottage. It was worth only £100 a year, and subject to the burden of a heritable debt of £2000. The only difficulty is, did Colonel Campbell mean the party who survived him to get the beneficial fee, or did he mean the party who survived his widow to get it. The strongest argument against the vesting was that there was to be no actual conveyance of the lands till the widow's death. I am alive to the importance of the principle involved in the case of Donaldson's trustees, which I think is, that whenever there is a survivorship or its equivalent, and where there is no life interest in the estate, the period of vesting is the death of the truster, but where there is a life interest, the presumption is that the period of vesting is the period of the decease of the person who has the life interest or of conveyance of the estate. Here, therefore, there is a presumption that vesting did not take place till the death of the widow. But while we take that into account we must also take into account all else that appears in the deed before we answer the question what was the intention of the testator. For the whole question is one of intention. But when we come to the question of intention, there is a difficulty on the face of the trust-deed, because the truster says the lands are to go to A. F. Campbell "in case of his survivance of me." The natural reading of that is that if A. F. Campbell survived the truster, the beneficial right vested in him, although he was not to get a conveyance of the estate till after the death of the widow. If we take these words standing by themselves, they would be conclusive as to the vesting of the beneficial right. But then we come down to the words, "And in case of the predecease of the said A. F. Campbell or of the failure of heirs male of his body. . . . . the said trustees were on such failure to sell, dispose of, and realise the said estate," &c. It is by no means so clear what the truster means there by the predecease of the said A. F. Campbell—whether it means predecease of the truster or of the widow. If it is to be read consistently with what goes before it, it is predecease of himself. To say the least of it, it is very dubious. And what follows is scarcely less so; for it says the proceeds are to be applied "to and among the truster's sisters," &c. It is a remark of importance that the whole parties there named are those who are to be living at the truster's death. But, however doubtful all that is, the result is rather I think in favour of holding that he contemplated vesting at his death. It is remarkable that he mentions no other of his nephews except Archibald, who at the truster's death was past majority, and must have been personally known to him, and was apparently in favour with him. It rather seems that he contemplated that if Archibald survived him he was to have the beneficial fee. But we can't decide this upon the trust-deed alone. We must look also at the will. There is a little embarrassment arising from the fact that as the Lord Ordinary has not decided where the fee of the residue of the £5000 is to go, we cannot do so either. But in considering the question before us we must look at both deeds. The will gives the widow the use of the furniture and plate, to be delivered at her death to the residuary legatee; the executors are to convert it into money, and then invest the balance "in trust for his said nephew Archibald Frederick Campbell." Archibald is to be residuary legatee, and these monies are to be held in trust for him. And then it goes on, "but if the said Archibald Frederick Campbell shall die," then the monies are to be held in trust "for

the first and only son of his said nephew Archibald," &c. The natural theory is, that not only are the trustees to be invested at once with these funds for Archibald, but there is no trust created in favour of anybody else except in one event, and that is, "if Archibald Frederick Campbell shall die in my lifetime." It seems to be clear, therefore, that Archibald, having survived the truster, becomes residuary legatee, entitled to the £5000 and fee of the furniture, &c., under the will. If that be so, it leaves only the question whether it is most reasonable, looking to the circumstances of the case, to suppose that the truster intended the £5000 and the furniture to go one way, and the lands of Kilchoan another. That Colonel Campbell intended the £5000 to go to Archibald Campbell is beyond doubt. Does that not throw light upon the question of vesting under the trust-deed? The lands of Kilchoan are not the most important part of the truster's succession; the residuary estate is so, and it is difficult to suppose that he meant Archibald Campbell to get the fee of the one and not of the other. This furniture of which he at once gets the fee, is the furniture in the cottage on the lands of Kilchoan, and if the testator's intention was that the parties under the will should be different from those in whom the rights under the trust-deed were to vest, it comes to this that he meant one party to get the furniture in the cottage, and another the cottage itself. But the will says they are to go to Archibald Frederick Campbell, "who will then be head of my family," if he survives. What made him head of the family? He was Colonel Campbell's heir-at-law, but it is difficult to suppose that that made him head of the family. The expression here used can mean nothing else but that Archibald is to have the beneficial fee of the lands. If that is the fair meaning of the word, it gives us the testator's own construction of what he meant in the trust-deed. So that although I don't say that two views may not be taken of these deeds (the other being that he meant the party under the will to be different from that under the trust-deed), I think, looking to all the circumstances, that he meant the parties to be the same. I think he has himself given us a kind of glossary to construe his trust-deed. Now, if I am right in this view, a decision to the effect that the fee of the furniture and lands vested in Archibald Frederick Campbell is according to the plain meaning of these deeds, and does not therefore trench in the least upon any principles of construction such as that laid down in the case of Donaldson's trustees. The detailed provisions here enable us to see that although the conveyance was to be postponed, vesting was not. The intention of the testator is the ruling principle in all those deeds.

The only other question is whether the general disposition and settlement has conveyed these subjects to Archibald Frederick Campbell's mother. Upon that I have no doubt. If I am right, Archibald Frederick Campbell by survivance of the truster became fee-simple proprietor. He held not under a deed with a destination, but under a deed which would have made these subjects descend to his own heir-at-law, if he had not executed this disposition. And I therefore think it clear that this general disposition conveyed them to his mother.

I think the better form of our interlocutor would be to recal that of the Lord Ordinary, to find that the fee of the lands and furniture vested in Archibald Frederick Campbell, and *quoad ultra* remit to the Lord Ordinary.

Agent for Anne Moore or Campbell—William Waddell, W.S.

Agents for Colonel Campbell's Trustees and Executors—A. & A. Campbell, W.S.

Agents for Melfort Campbell—Adam & Sang, S.S.C.

LEIGHTON *v.* LINDFIELD.

Promissory Note—Proof pro ut de jure—Allegation of Fraud. Circumstances in which held 1. That a sufficient case was averred to defeat the probativeness of a promissory note so as to entitle the defender to a proof of his averments *pro ut de jure*. 2. That the evidence had failed to establish the allegation of fraud.

This was an advocation from the Sheriff Court of Stirlingshire. The action was brought upon a promissory note for £44, alleged to have been granted by the advocator to a person of the name of Somerville, with whom he was in business, whose indorsee the respondent was. The defence was that the document had been impetrated at a time when the advocator was signing an acknowledgment to Somerville as to the state of the partnership affairs, he really signing, through the fraud of Somerville, a different document from what he believed himself to be signing. The answer to this was that the promissory note was granted in satisfaction of a private, not a company, debt; but it was proved in evidence that, under a reference which the parties made of their company affairs, no mention was made by Somerville of his possession of this document, although a balance was found by the referees against him, and that it was, after ascertainment of this balance, indorsed to the respondent.

Before answer, the Sheriff-Substitute (Robertson) allowed a proof of the defender's averments, and pronounced the following interlocutor:—

"Having considered the closed record, productions, and whole process, and heard parties' procurators thereon—before farther answer, allows the defender a proof *pro ut de jure*, of his averments on record, and to the pursuer a conjunct probation, grants diligence at the instance of both parties for citing witnesses and havers, and assigns Tuesday, the 16th April, at eleven o'clock, within the Sheriff Court-house, Stirling, for the defender proceeding with his proof.

"ROBT. ROBERTSON.

"*Note.*—Nothing could be more correct in legal argument than the pleading for the pursuer on the general law in reference to bills and promissory-notes, as regards the limitation of proof to the writ or oath of the drawer or indorser, and the Sheriff-Substitute entirely concurs in it. But the present is quite an exceptional case, and aware as the Sheriff-Substitute is of the previous litigation between the indorser (Somerville) and the defender, and the circumstances connected therewith, and keeping in view the pursuer's admission that every plea available to the defender as against Somerville, is equally good as against him (the pursuer), he has had no hesitation in allowing the defender a proof *pro ut de jure* of his whole averments."

The Sheriff (Moir) adhered on advising an appeal against this interlocutor, and appended the following note to his judgment:—

"The Sheriff fully adopts the rule of law that in the general case where a bill or promissory-note is alleged to have been granted without value, the proof of that averment must be limited to writ or