of the debt. Moreover, I think that the pursuer, when he made this reference to the oath of the defender, must have been satisfied that he had failed to prove the constitution by writ. But he now says that by putting together the defender's deposition on oath and the entry in his book he has made out his case.

The oath, no doubt, explains the entry; and the explanation amounts to this, that at the date specified £300 was advanced to the defender, and if there was nothing more in the oath, that would be proof of the constitution of the debt. But in the oath there is adjected the qualification that the advance of £300 has been repaid. It is objected by the pursuer that that cannot be taken into account because it is extrinsic to the oath. The pursuer contends that he is entitled to found on the admission by the defender of the loan, but that he is not bound to take along with that the statement that the obligation has been extinguished in the proper manner, that is to say, by repayment. Why not? If there had been constitution of this debt by a proper writ there would have been a good deal to say for that argument, for then the defender's oath would not have been necessary in order to constitute the debt, and therefore the pursuer would not have been bound to take the qualification of repayment contained in the oath. Again, if the loan had been contracted by a writing, then it could not be extinguished except by writing. But it is just because the pursuer has no writ to constitute his debt that the qualification becomes of importance, because the constitution of the debt is proved by the defender's oath and nothing else.

The fact that a man's books are put into his hands when he is being examined in a reference to his oath, either for the purpose of stimulating his memory or pricking his conscience, would not make the books written proof of the debt.

Taking it, then, to have been proved by the defender's oath that this £300 was advanced, is there any doubt that the dissolution of the obligation can be proved in the same way as its constitution? The leading authority on this matter, Mr Erskine, lays down the law so accurately and distinctly that I prefer to put the ground of judgment in his words rather than in my own—"Where a debt not constituted by writing is referred to the oath of a defender, the quality of payment adjected to it is intrinsic, and so ought to be deemed part of the oath; for where no written vouchers exist against the debtor, he need take no written voucher for the discharge of the obligation; since his oath, by which alone the constitution of the debt can be proved, ought to be as effectual for proving the extinction of it, according to the rule, *unumquodque eodem modo dissolvitur quo colligatur*."—Ersk. Inst. iv. 2, 13. That is the ground of my judgment, and I think the case is a clear one. We have had a very satisfactory argument, and I do not regret its length because it has brought out enough to render the judgment very clear.

Lord Mure, Lord Shand, and Lord Adam concurred.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Asher, Q.C.—M'Kechnie. Agents—Gill & Pringle, W.S.

Counsel for Defender (Respondent)—W. Mackintosh—Graham Murray. Agent—J. Stewart Gellatly, S.S.C.

Saturday, December 5.

SECOND DIVISION.

STUART *v.* MOSS.

Reparation—Slander—Issue—Malice—Privilege.

A theatre manager who had contracted with the conductor of a troupe of actors to perform at his theatre cancelled the engagement, and in the course of the correspondence which followed in consequence wrote to him—"You made your engagement under false pretences; you advertise what you are not capable of performing." The actor sued him for damages, placing on these words the innuendo that it represented him as guilty of fraudulent conduct and wilful deceit in his communications with the defender and in the pursuit of his profession. *Held* (1) that the latter was capable of bearing the innuendo, and entitled the pursuer to an issue; but (2) that it having been written in the course of a correspondence about a disputed contract, it was written on an occasion when there was legitimate ground for the defender expressing his opinion on the matter, and that therefore there must be an issue of malice.

In June 1885, Henry Stuart, a pantomimist, raised an action against H. E. Moss, proprietor of a theatre of varieties in Edinburgh, concluding for £750 damages for alleged slander. The pursuer stated that on 28th October he and his troupe had been engaged by the defender to appear at his theatre for a week, beginning 11th May 1885. "(Cond. 2) . . . The defender, however, without any good or sufficient reason, cancelled the said engagement, and the pursuer has in consequence been obliged to raise an action against the defender for breach of contract, which action is presently in dependence in the Sheriff Court at Edinburgh. (Cond. 3) On or about 25th April 1885, the defender falsely, calumniously, and maliciously, and without probable cause, or any cause, wrote and transmitted, or caused to be written and transmitted, to the pursuer a note or letter in the following terms:—'April 25th, 1885—To Mr Harry Stuart, Scotia, Glasgow.—You made your engagement under false pretences; you advertise what you are not capable of performing. Under these circumstances I decline to have you in my establishment. I have too much respect for my audience. You may come to Edinburgh if you choose—that is your business—but you will not be announced; and as I have to be away that week, I shall leave strict orders that neither you or your luggage will be allowed to enter the doors.—Yours, &c., H. E. Moss. P.S.—I have a letter from you admitting the fact of inefficiency of your company, &c., &c.'"

The innuendo which the pursuer put on this letter was stated as follows:—"(Cond. 4) The said letter, which is herewith produced, was of and concerning the pursuer, and by it the defender falsely and calumniously, and without probable or any cause, represented that the pursuer had wilfully deceived the defender, and been guilty of fraudulent and dishonourable conduct; and that the pursuer in the pursuit of his profession as a pantomimist is guilty of fraudulent and dishonourable conduct, in advertising to the public, and to the theatrical profession, for the purpose of furthering his own ends by deceiving them, that he can perform what he well knows he is incapable of performing. (Cond. 5) The said letter, which was addressed to the pursuer at the Scotia Music Hall, Glasgow, was perused and received there by him, and he was greatly shocked and much injured in his feelings by the false and calumnious charges therein made against him. The defender has not only refused to retract the said charges, but has, between the 16th day of May and 9th day of June 1885, the particular dates being unknown, repeated them verbally, in the presence and hearing of the pursuer and others, in the defender's said theatre in Chambers Street there, and also within the University Hotel, Chambers Street there. In particular, within the defender's said theatre, at Chambers Street, Edinburgh, on or about the 16th day of May 1885, he repeated the said charge, and said of and concerning the pursuer that he would expose the pursuer's true character to the whole profession. In these circumstances the pursuer has been compelled to raise the present action for vindication of his character, and for reparation and *solatium*, and the sum concluded for is reasonable."

The pursuer pleaded—"The defender having slandered the pursuer, as condescended on, the pursuer is entitled to decree as concluded for, with expenses."

The defender admitted the letter, but pleaded —"(1) The statements complained of are privileged. (2) The pursuer's averments, or at least his averments of verbal slander, are irrelevant. (3) *Veritas*."

On 23rd October the Lord Ordinary (Lee) approved of the following issue and of a counter issue of *veritas*:—"(1) It being admitted that on or about 25th April 1885 the defender wrote and transmitted to the pursuer a letter in the terms set forth in the schedule [being that above printed]—Whether the said letter, or any part thereof, was of and concerning the pursuer, and falsely, maliciously, and calumniously represented that the pursuer had wilfully deceived the defender, and had obtained an engagement from him under and by means of false pretences, to the loss, injury, and damage of the pursuer? Damages laid at £750."

The defender reclaimed, maintaining that no issue should be allowed.

The pursuer moved the Court to vary the issue allowed by substituting this issue:—"(2) It being admitted, &c.—Whether the said letter, or any part thereof, was of and concerning the pursuer, and falsely and calumniously represented that the pursuer had wilfully deceived the defender, and had obtained an engagement from him under and by means of false pretences, and that the pursuer dishonestly advertised that he can perform what he well knows he is incapable of performing, to the loss, injury, and damage of the pursuer? Damages laid at £750."

On the suggestion of the Court at the debate, the defender produced the correspondence of which the letter complained of formed a part. That correspondence disclosed that the defender, who also had theatres in Newcastle and Sunderland, through a theatrical agent engaged the pursuer and his troupe, in September 1884, to perform at his English theatres for three weeks from 30th March 1885. While the engagement at Newcastle was being fulfilled, the defender wrote to the pursuer cancelling the Edinburgh engagement. The pursuer replied, declining to accept this cancellation, upon which the defender wrote—"According to your contract you were engaged to produce at all my establishments the following ballets. . . . . You also state in your printed form that all the ballets will be produced in first-class style. You have failed to complete your part of the transaction, and I therefore shall not announce you for Edinburgh, May 11th." Some further correspondence followed, in which each party adhered to his position, and then the defender wrote the letter complained of.

The pursuer argued—The letter of 25th April contained issuable matter, at least as innuendoed. "False pretences" naturally, if not necessarily, meant something criminal; and the tense of the verb "advertise" implied a practice, not a mere isolated act. At all events, this was a case of trade slander, and it made no difference, even in such a case, that the letter was sent to the pursuer himself and not to a third party. Then this letter was not privileged, for it had been volunteered after the correspondence was practically closed; but if privileged, the record relevantly averred that it had been written maliciously. That was stated in terms, but if a specification of facts and circumstances implying malice was necessary, the letter itself, coupled with the allegations of verbal slander, was enough.

Replied for the defender—(1) The letter complained of was not in itself slanderous, and could not bear the innuendo put on it. It was no more than a somewhat outspoken expression of opinion. As a trade slander it ought not to be held actionable, being written to the pursuer himself. (2) But if actionable it was privileged, being plainly part of a privileged correspondence, and if so, the pursuer must put malice in issue, but could not competently do so, having made no relevant averments of facts and circumstances from which to infer malice.—*Watson* v. *Burnet*, February 8, 1862, 24 D. 494; *Urquhart* v. *Gregor*, December 21, 1864, 3 Macph. 283; *Mackintosh* v. *Weir*, July 3, 1875, 2 R. 877, per Lord Craighill, Ordinary; *Scott* v. *Turnbull*, July 18, 1884, 11 R. 1131; *Broomfield* v. *Greig*, March 10, 1868, 6 Macph. 563. "Maliciously" alone was not enough; the letter itself was no evidence of malice; and the averments of verbal slander were irrelevant, there being no issue founded on them, and the names of the persons other than the pursuer in whose hearing the alleged slanders were uttered not being set forth.

At advising—

Lord Craighill—The first question on which

parties have been heard is whether there is issuable matter on the record. The pursuer points, in support of the affirmative view, to the letter sent to him by the defender of 25th April 1885, which is printed in article 3 of the condescendence. In that letter the defender, addressing the pursuer, wrote—"You made your engagement under false pretences. You advertise what you are not capable of performing." Taken in its ordinary acceptation, the expression "You made your engagement under false pretences" is an imputation involving dishonesty or deception, and there is not in the context anything, so far as I can see, by which the sting is extracted from the imputation and a less offensive meaning put upon the words. But our duty upon this occasion is not to fix a meaning on the words; the most which we legitimately can do is to say whether they will or will not bear the meaning put upon them by the pursuer, which, as alleged in article 4 of the condescendence, is that the defender thereby represented that the pursuer had "wilfully deceived the defender, and had obtained an engagement from him under and by means of false pretences, and that the pursuer dishonestly advertised that he can perform what he well knows he is incapable of performing." This is what the pursuer desires an opportunity of proving to a jury, and it appears to me that he is entitled to that opportunity, for according to my comprehension of the words complained of, these without violence may be read as importing that which in the innuendo is set forth by the pursuer on the record. This, I think, is sufficient for the decision of this question, inasmuch as if the words in the letter may be read as meaning what has been alleged by the pursuer, the case cannot be dealt with as one in which the Court are at liberty to hold, at the present stage at all events, that the letter conveys no injurious imputation. This objection, therefore, to the issue approved of by the Lord Ordinary, ought, I think, to be repelled.

The second question is, whether the case is one of privilege? As to this I have felt difficulty. The pursuer and the defender were parties to a contract, under which services were to be rendered by the pursuer in consideration of a salary to be paid by the defender, but this does not appear to me necessarily to be a ground of privilege even when the communication that is complained of was written with reference to the contract. The defender was not performing any duty when he made this communication to the pursuer. He was acting simply for his own purposes, and in furtherance of an endeavour to justify an intended breach of his contract with the pursuer. The present, therefore, on the statement of the pursuer in the record, cannot be taken to be a case of privilege; and consequently it is not necessary, and would not be convenient, that the issue should be qualified by the word "maliciously." But should it appear at the trial that, in the opinion of the Judge, the case as presented to the jury is one of privilege, the defender will have the benefit of a ruling to this effect, and must prevail, unless "malice" being averred upon the record as an influencing motive, that shall, as matter of fact, be proved to the satisfaction of the jury. The case of *M'Bride* v. *Williams*, January 28, 1869, 7 Macph. 427, is a precedent, which as I think ought to be followed on the present occasion, and therefore I am of opinion that the motion of the pursuer to substitute issue No. 2 for the issue No. 1 approved of by the Lord Ordinary ought to be granted.

Lord Rutherfurd Clark—I confess I am reluctant to send this case to a jury, but on full reflection I find myself unable to refuse to do so. I do not think that I should have sustained the letter by itself as containing issuable matter, but it has been innuendoed to mean that the pursuer wilfully deceived the defender. Whatever I may think of the pursuer's prospects of success, I cannot say that the letter will not bear that innuendo. If the pursuer can satisfy the jury that the defender meant to suggest that he was guilty of wilful deception, then he is entitled to a verdict.

In regard to whether malice should be put in issue, if the letter complained of had been a mere volunteer on the part of the defender, it might be a question whether it was privileged. But the whole correspondence is before us now. It is produced by the parties, and we are entitled to look at it. And, doing so, I think the letter complained of was written on what we call a privileged occasion, and consequently that malice must be proved. I think, therefore, that the pursuer before he can get a verdict must prove that the defender charged him with wilful deception, and that in making that charge the defender was actuated by malice.

Lord Young—I should be inclined to hold that this letter written and addressed to the pursuer himself is not actionable even as innuendoed. I say I should be inclined to hold that opinion, but not with any confidence after what your Lordships have said. I think, nevertheless, that I may state generally the grounds of the opinion to which I incline.

The defender is the proprietor of two theatres in England, in Sunderland and in Newcastle-upon-Tyne, and he has also a theatre in Edinburgh. He engaged the pursuer and his troupe to appear at one or other or both of his English theatres in March last, and prior to his experience of their performances there he entered into a further engagement that they should appear at his Edinburgh theatre later on. He was so dissatisfied with their appearances in the English theatres that he declined to go on with the Edinburgh engagement. We were told that an action for breach of contract was raised against him in consequence in the Sheriff Court, and that he was assoilzied, or the action dismissed—I do not know which. But the letter which has given rise to the present action was written with reference to this engagement, and when the pursuer was urging the fulfilment of the engagement and the defender resisting. The defender's motive plainly was that he was disappointed with the pursuer's acting and that of his troupe at the English theatres. They did not answer his expectations, and he thought they had given too favourable an account of themselves. That that is the truth as to his motives is too transparent to be doubtful, and he writes this letter giving his reason for not going on with the Edinburgh engagement. It is written in rude and coarse language. There is no doubt about that. Its language is language which ought to be reserved

for cases of moral turpitude and delinquency; whereas all he means to say is that the pursuer and his companions are not good pantomimists. If he had said so plainly and frankly there is not the least doubt that that would not have been actionable. He says the pursuer made the engagement "under false pretences." But then that is false pretences with reference to the subject-matter of the correspondence, namely, the professional merits of the pursuer and his troupe. No more than that. On these grounds I should have been disposed to hold that this letter does not contain any statements that can fairly be regarded as actionable. I should have been disposed not to extend the action for slander to the case of rude and coarse language contained in a letter written to the man himself. It is a different thing when such a letter is written and sent to another person. But I should have been disposed to limit, rather than to extend, the grounds of action in the case of letters written to the persons complaining themselves. It has been held that if a letter imputes crime to a man that shall sustain action though the letter be addressed and sent to the man himself. That has been so held, and we cannot go back on it, but I do not think we should extend the principle so as to include the case of mere rude and unbecoming language.

With reference to the question of privilege—and I now assume the action to be relevant after what your Lordships have said—there is in truth no action for slander without malice. Malice is the foundation of all such actions, whether the defender be in what is called privilege or not; and the difference between a case of privilege and one in which the defender is not privileged is no more than this, that in the latter the man who has had no occasion to write or speak in a defamatory manner of another, but has nevertheless done so, shall be assumed to have acted maliciously unless the contrary be proved. Malice is assumed from the mere fact of his so writing or speaking of his neighbour. In cases of privilege, on the other hand, which are cases in which one has legitimate occasion to speak or write in a defamatory manner of one's neighbour, malice is not assumed but must be proved. In the present case I agree with Lord Rutherfurd Clark that, on the assumption that this letter is libellous, it was written by the defender on an occasion when he had legitimate grounds for saying what he thought of the pursuer, and consequently the pursuer must aver and prove malice. I therefore think that the issue as adjusted by the Lord Ordinary should stand.

The Lord Justice-Clerk was absent.

The Court refused the defender's reclaiming-note, and refused the pursuer's motion to vary the issue, and remitted the case to the Lord Ordinary for trial on the issue now above quoted.

Counsel for Pursuer—A. S. D. Thomson. Agent—M. J. Brown, S.S.C.

Counsel for Defender—Rhind. Agent—R. Menzies, S.S.C.

Tuesday, December 15.

OUTER HOUSE.

[Lord Kinnear.

MARQUIS OF HUNTLY AND OTHERS *v.* EARL OF FIFE.

Superior and Vassal—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4, *sub-secs.* 1, 3 — *Trustees, whether Liable as Singular Successors.*

Prior to 1874 A succeeded his deceased ancestor as heir of tailzie and provision, and was duly infeft. Thereafter, by the passing of the Conveyancing Act of 1874, he became entered with the nearest superior. Thereafter he granted a trust-disposition by which he conveyed certain lands in trust for payment of debts, with powers to his trustees to sell and realise co-extensive with his own under his titles, but under an obligation to reconvey when the trust purposes were satisfied and the trustees were infeft thereon. The superior demanded a composition from those trustees as singular successors entered with him by the operation of the Act. *Held* that A was still feudal proprietor though subject to a burden, and that the casualty to which the superior was entitled was only the relief-duty payable by him.

This was an action at the instance of the Marquis of Huntly and the trustees acting under a trust against the Earl of Fife, concluding to have it found and declared (1) that the Marquis as proprietor of the lands of Davoch and Inverenzie was duly entered with the said defender as superior in these lands; (2) that the pursuers were liable only in payment of relief-duty of one penny Scots, and that no further composition or relief-duty was payable by the pursuers or either of them to the Earl of Fife in respect of the lands during the life of the Marquis of Huntly; and (3) that the said trustees were not liable in any composition in respect of the said trust-disposition in their favour and infeftment thereon.

On the death of the late Marquis of Huntly, the pursuer the Marquis of Huntly succeeded as heir of tailzie and provision, and was so served by the Sheriff of Chancery, conform to decree of special service dated 1st November 1866, and he was infeft by the recording of the said decree in the General Register of Sasines on 5th December 1866. Davoch and Inverenzie were held blench for payment by the heirs of investiture of one penny Scots if asked only. No payment of this relief duty was then made by or asked of the Marquis.

The next deed to affect the investiture was a trust-disposition dated 9th June 1882, by which the pursuer the Marquis of Huntly conveyed to the other pursuers, as trustees, certain lands in trust for the payment of (1) all taxes, &c., affecting the estates; (2) all advances made on his behalf by them; (3) repairs on the mansion-house, &c.; and (4) payment of certain debts set forth in schedules appended to the trust. This deed gave the trustees (the other pursuers) powers