Lord Ardmillan—I am of the same opinion. It is a clear principle of law that co-existent rights in one subject must not be destructive of each other. There must always be some means of preventing such a result. In such a case as this, there must be in the Supreme Court a power of equitably adjusting the claims of the proprietor of ground on the one hand and the holder of a servitude on the other. The law will not permit the holder of a servitude so to exercise his right as to infringe injuriously on the just rights of the proprietor, nor will the law permit the proprietor of the ground so to exercise his right as to impede the just exercise of the right of the servitude holder. In the present case, I am of opinion that the just exercise of the servitude has been adequately secured; and that the demand made by the holder of the servitude would be inconsistent with the exercise of the right of the proprietor.

Motion refused.

Agent for Pursuer—L. M. Macara, W.S.

Agents for Defenders—J. M. & J. Balfour, W.S.

Saturday, February 1.

M'NEILL *v.* CARRUTHERS.

Reparation—Slander—Inuendo—Issue. Action on slander dismissed as irrelevant, the statement put in issue not being in itself slanderous, and there being no inuendo on record.

William M'Neill, miller, Crossmichael Mill, in the parish of Crossmichael and stewartry of Kirkcudbright, brought an action of damages for slander against Thomas Carruthers, farmer in Mountaintop in said parish. It appeared that in February 1867 the defender sent a quantity of corn to the pursuer for storage. The pursuer now averred that the defender, on two specified occasions, "falsely, calumniously, maliciously, and without probable cause, stated that he had delivered to the pursuer, not 37 bushels, but 47 bushels of corn, and the pursuer had failed to account for ten of these bushels, and that he would force him to account for the ten bushels before the Sheriff, or did use words of and concerning the pursuer of a like import and effect." He proposed issues founded on this averment. The defender contended that the action was irrelevant.

The Lord Ordinary (Barcaple) reported the case on issues, stating his opinion that the statement put in issue—viz., that the pursuer failed to account for a part of the oats stored with him, and that the defender would force him to account before the Sheriff—was not defamatory in the legal sense of the term.

W. M'Laren for pursuer.

Solicitor-General (Millar) and Scott for defender were not called on.

The Court unanimously dismissed the action as irrelevant.

The Lord President said that the case was one of the clearest he had ever seen. There was no possible ground for holding that the statement made by the defender was slanderous in itself. It might, perhaps, have been made so by inuendo, but there was no inuendo on record, and the action must therefore be dismissed.

Action dismissed with expenses.

Agent for Pursuer—J. M. Macqueen, S.S.C.

Agent for Defender—W. S. Stuart, S.S.C.

Saturday, February 1.

SECOND DIVISION.

WALKER *v.* CUMMING.

Issues—Reparation—Search of Premises without a Warrant—Carrying away of Goods—Privilege—Maliciously and without probable Cause—Circulation of Slander—Revised Condescendence—New Ground of Action—Defect in Specification. Held (1) that the pursuer was not bound to put into his issue the words "maliciously and without probable cause" where the act founded on was not the giving of information to the police—in doing which, the defender would be in a position of privilege—but the alleged seizure of property, without a warrant, after the information was given. (2) That a party who circulates a slander to non-official persons is not in a position of privilege merely from first having given information to the police. (3) Statements which held to be a mere expansion of, not inconsistent with the grounds of action set forth in the condescendence. (4) Issue disallowed in respect of defect in specification.

William Walker, photographer, brought this action against John Cumming, photographer, 1 South Hanover Street, Edinburgh, for damages for wrongfully entering his premises at Hawick, and taking away certain photographic materials in his (the pursuer's) lawful possession, which Cumming alleged to have been stolen from him by the pursuer and another.

The pursuer made the following statements, *inter alia*, in his original condescendence:—"On or about said 3d May 1867, the defender, in the Railway Hotel, Wilton, Hawick, occupied by Robert Learmond, innkeeper in Wilton, Hawick, in presence of the said Robert Learmond, and Joseph Lush, servant to the pursuer, or one or other of them, and also in presence of several other parties, falsely and calumniously stated that the pursuer and the said Joseph Laurie Cox had been carrying on a system of robbing him of his property; that Cox would soon be in jail; and that, so soon as he got to Edinburgh, he would get a warrant for apprehending the pursuer on said charge; or used words of a like import and effect of and concerning the pursuer.

"The defender repeated the said slander of and concerning the pursuer between the 4th and 7th May 1867, at different places within the city of Edinburgh, to George Mason, commercial traveller, then in Edinburgh; John Aitken, presently photographer at Hawick; and the said Joseph Laurie Cox, or one or more of them. He also repeated said slander in Edinburgh, during said period, to various other parties. Further, on or about the said 4th May 1867, he repeated said slander at the Railway Station, Galashiels, to the said George Mason."

The pursuer proposed the following issues:—

"1. Whether, on or about the 3d day of May 1867, the defender, along with John Nicol, superintendent of police at Hawick, and Joseph Bailey Cartlidge, photographer there, wrongfully and illegally entered the premises at Wilton, Hawick, occupied by the pursuer, and took possession of, and carried away several glasses, and an album containing photographic prints, or one or other of them, belonging to or in

the lawful possession of the pursuer, to the loss, injury, and damage of the pursuer?

"2. Whether, on or about the 4th day of May 1867, and in or near the Railway Hotel, Wilton, Hawick, now or lately occupied by Robert Learmond, innkeeper, in the presence and hearing of the said Robert Learmond, of Mrs or Learmond, his wife, and of Joseph Lush, residing in Moray Street, Edinburgh, or one or other of them, the defender did falsely and calumniously say that Joseph Laurie Cox, at that time in the employment of the defender, had been robbing him (the defender) of his property, and would be in jail that night; and that so soon as he (the defender) got to Edinburgh, he would get a warrant to apprehend the pursuer on the same charge; meaning thereby that the pursuer had been engaged, along with the said Joseph Laurie Cox, in robbing the defender; or did use words to the same effect of and concerning the pursuer, to the loss, injury, and damage of the pursuer?

"3. Whether, on or about the said 4th day of May 1767, and at or near the Railway Station, Galashiels, in presence and hearing of George Mason, commercial traveller, in the employment of Mr John Spencer, photographic warehouse, Glasgow, the defender did falsely and calumniously say that he had found out a fine thing in connection with his (the defender's) place; that it was no wonder he was poor, as he had been robbed for months; that he had found as much stuff in the pursuer's place, taken from his (the defender's) place, as it had taken three men to carry away; that Cox was then in jail; and that the pursuer would be in that night; meaning thereby that the pursuer, along with the said Joseph Laurie Cox, had been engaged in robbing him, the defender, and would be criminally apprehended that evening; or did use words to the same effect of and concerning the pursuer, to the loss, injury, and damage of the pursuer?

"4. Whether, on various occasions between the 4th and 7th days of May 1867, both inclusive, and at various places in the city of Edinburgh, the defender did falsely and calumniously say, in presence of John Aitken, photographer in Hawick; John Macnee, residing in Princes Street, Edinburgh; and Robert Moodie, residing at Swanfields, Bonnington Road, Edinburgh, or of one or more of them, that the pursuer, in connection with the said Joseph Laurie Cox, was guilty of robbing him, the defender, of his property; or did use words to the same effect of and concerning the pursuer, to the loss, injury, and damage of the pursuer?

"Damages laid at £500 sterling."

Parties having failed to adjust these issues before the LORD ORDINARY (ORMIDALE), his Lordship reported them to the Inner-House, adding the following note:—

"It was objected by the defender to the *first* of the pursuer's proposed issues, No. 12 of process, that it does not charge malice and want of probable cause; but it appears to the Lord Ordinary that there is no sufficient ground for this objection, and that the issue may be approved of for trial. (See *Pringle* v. *Bremner & Stirling*, as decided in House of Lords, 6th May 1867, 5 M'P., page 55 of House of Lords Cases.) The Lord Ordinary understood that ultimately the defender did not insist on any objection to the second of the pursuer's proposed issues. The defender, however, objected to the *third* and *fourth* of the pursuer's proposed issues, in respect that, as regards the former, there was no proper foundation laid for it in the original condescendence annexed to the summons; and that, as regards the latter, the places where the alleged slander was uttered are not specified, either in the issue or the record. The Lord Ordinary is inclined to think that these objections are not without foundation; but perhaps the pursuer might be yet allowed to make his *third* issue more conform than it is to his statement in the original condescendence, and to specify places in his *fourth* issue."

BLACK and GUTHRIE for pursuer.

A. MONCRIEFF and GLOAG for defender.

The following cases were quoted:—*Pringle*, 5 M'P., 55; *Cameron*, 1st February 1856, 18 D., 423; *Dallas* v. *Mann*, 15 D., 746; *Watson* v. *Burnet*, 24 D., 494; *Bissett*, 2 M'P., 1096; *Martin*, 6 D., 981; *Innes* v. *Swanston*, 20 D., 250; *Sutherland* v. *Robertson*, 3 S. Law Reporter, 364; Macfarlane on Issues, p. 82.

At advising—

LORD JUSTICE-CLERK—The defender objected to all the issues. In the first and second, he proposed that the words "maliciously and without probable cause" should be inserted. But this contention is inadmissible. The pursuer did not seek an issue as to the giving of information to the police, in which the defender certainly had a privilege, and would have been entitled to have these words in the issue; but he asked an issue upon a separate question, viz., the alleged seizure of his property without a warrant after this information had been lodged. The act alleged against the defender was quite consistent with a case of wrongdoing in which no privilege existed. If the act turned out to have been done in the course of a justifiable inquiry into the alleged crime, that would come out at the trial, and might have effect given to it. As to the second issue, it is out of the question that a person who had given information of a crime to the police should be held to have a privilege to circulate the slander to persons in no official position. The objection to the third issue is, that while it was properly extracted from the revised condescendence, it rested on a ground of action materially different from that contained in the original condescendence. The original condescendence, after specifying with some detail the slander set forth in the second issue, merely said as to this act, "Further, on or about the said 4th May, he repeated the said slander at the Railway Station, Galashiels, to the said George Mason." The third issue, following the words of the revised condescendence, was whether "the defender did falsely and calumniously say that he had found out a fine thing in connection with his (the defender's) place; that it was no wonder he was poor, as he had been robbed for months; that he had found as much stuff in the pursuer's place taken from his (the defender's) place, as it had taken three men to carry away; that Cox was then in jail; and that the pursuer would be in that night; meaning thereby that the pursuer, along with the said Joseph Laurie Cox, had been engaged in robbing him (the defender), and would be criminally apprehended that evening," &c. This is a mere expansion, not inconsistent with, but explanatory of, the original article, and allowed the issue proposed. I come to a different conclusion as to the fourth issue. There is no intimation as to any one particular place in Edinburgh, or any occasion between the

4th and 7th May, when the slander was uttered; and it was said to be "in presence of one or more," not all, of the persons named. It is not within the authority of the cases of *Innes* v. *Swanston*, and *Sutherland* v. *Robertson*, referred to; for it does not refer to a slander repeated in one place, such as a village, in which the special cases of defamation set forth in other issues have occurred. It is a matter for reconsideration whether, in granting such issues ("general issues") in future cases of slander, the issue should not embody a reference to the former special instance.

The other judges concurred.

The Court accordingly allowed the first three issues, and refused the fourth.

Expenses reserved.

Agent for Pursuer—L. Mackersy, W.S.

Agent for Defender—R. Menzies, S.S.C.

Saturday, February 1.

THE NORTH BRITISH AND MERCANTILE INSURANCE CO. *v.* THOMSON AND OTHERS.

Jurisdiction—Forum Competens—Forum Conveniens—*Domicile—Sist—International Law—English Court.* (1) Jurisdiction of Court of Session sustained in an action for payment of a policy of insurance directed against the company that were the debtors in the policy, in respect they were domiciled in Scotland. (2) *Held* that the Court of Session being a *forum competens*, the action could neither be dismissed nor sisted on the ground merely that proceedings were contemplated or had been instituted in England, it being a rule of international comity that the courts of one country must abide the result of proceedings in another country raising the same issue. But (3) right reserved to renew the objection that the Court of Session was not a *forum conveniens* if it should appear in the course of the proceedings that the questions raised were more suitable to be disposed of by an English Court.

This was a multiplepoinding brought in the name of the North British and Mercantile Insurance Company to determine the rights of parties in a policy of insurance for £500 on the life of the late John Fleming, accountant in Glasgow. The policy in question was claimed by two parties—(1) the trustee on Mr Fleming's sequestrated estate, who was the real raiser; and (2) the marriage-contract trustees of Mr Fleming's daughter, who reside in England, and who claim under an alleged assignment contained in the said marriage-contract. The nominal raiser objected to the competency of the multiplepoinding on the ground that the English Court was the only *forum competens* to try the question, or at least it was the *forum conveniens*, and that an action had been intimated at the instance of the marriage-contract trustees against the nominal raisers in the English Courts.

In support of this contention, the nominal raisers made the following averments:—

"The policy of insurance in respect of which this action has been brought was effected by the said John Fleming with the United Kingdom Insurance Company. The said Company was domiciled and carried on business in England. In 1862, while the said policy was in force, the business and funds of the United Kingdom Insurance Company were transferred to the objectors, who are now liable to pay the sums arising under the said policy; but this obligation does not relieve the United Kingdom Insurance Company so far as the parties entitled to the sums in the policy are concerned. On the 14th December 1866, the objectors received at their office in London, from Mr W. K. Clay, solicitor, Dublin, a copy of a deed of assignment of the said policy of insurance in an English form, alleged to have been granted by the said John Fleming on the 10th March 1864, to Alfred Acheson and David Gilkison, the parties called in the third place as defenders in the present action. The said Alfred Acheson and David Gilkison have lodged no claim, and have intimated to the objectors that they decline to lodge a claim in this process, on the ground that they are advised that they are not bound to submit their right to hold the policy in question, and to obtain payment of the sums due under the same, to the law of Scotland. They have further intimated to the objectors that they are about to institute an action against them for payment of the policy in the English Courts. The objectors carry on business as an insurance company in England, and are subject to the jurisdiction of the English Courts. They are ready and willing to pay the whole sums due under the policy to the party or parties entitled thereto. But they are not in safety to make any payment under any decree which might be pronounced in this action, in the absence of the actual holders of the policy, and of the parties said to be interested in the alleged assignment above-mentioned, who are not subject to the jurisdiction of this Court. The policy libelled on has not been produced in process."

And they pleaded—

"In the circumstances stated, the present action ought to be dismissed, or at least to be sisted, leaving to the real raiser to take such proceedings in England as he may think proper. The proper *forum* for trial of the question of right to the said policy of insurance is in England. The holders of the alleged assignment above-mentioned being about to institute a suit against the objectors in the English Courts, the present action is incompetent, or at least inexpedient and inequitable; and no decree for payment or consignation ought to be pronounced in this process until the result of the proceedings taken in England shall appear."

The Lord Ordinary (Barcaple) repelled the objections, and sustained the jurisdiction of the Court of Session.

The nominal raisers reclaimed.

Lord Advocate and Kinnear for them.

Solicitor-General and John Marshall in answer.

At advising—

Lord Justice-Clerk.—This case comes before us on a reclaiming note from the judgment of Lord Barcaple, repelling objections of the nominal raisers, the North British Insurance Company, as stated by them to the multiplepoinding instituted in their name by the real raiser, the trustee on the sequestrated estate of the deceased John Fleming, merchant in Glasgow.

The ground on which the action proceeds is, that the nominal raisers are liable in payment of the contents of a policy on the life of the deceased, and that the right to the proceeds is matter of contest between him, as trustee on the estate, and the marriage-contract trustees of the marriage of the deceased's daughter. These trustees are two in number, one resident in Ireland and the other resident and domiciled in this country. The marriage-con-