dine's defence was that one of the items in the account, viz., "50 bags D. N. flour," had not been purchased by him, but that he had purchased 50 bags "Baltic white;" that he had declined to take delivery of the D. N. flour sent him, and that he had intimated his declinature to the sellers.

After a proof, the Sheriff-substitute (HOPE) decerned against the defender, holding it proved that the defender brought 50 bags D. N. flour, and obtained delivery of the same; and that though, by a letter some time after delivery, he refused to accept the flour, as not being conform to guarantee, his pursuers were not bound to take it back, no guarantee being in fact proved.

The Sheriff (NAPIER) adhered.

Jardine appealed.

GIFFORD and JOHNSTONE for appellant.

Solicitor-General (YOUNG) and WATSON for respondents.

At advising—

LORD PRESIDENT—In the view I take of this case I am disposed to assume that the contract was made between the defender and the pursuers' travellers in the terms which appear in the defender's memorandum, viz., that the pursuers, through their agent, sold to him 50 bags of Baltic white at 50s., and with this condition, that the pursuers should be at liberty to send D. N. flour, if it should be better than Baltic white. That is the contract as alleged by the defender. Then it appears from the correspondence that the invoice of the goods was received by Jardine on 20th April, on which day he acknowledged receipt. On 23d April he acknowledged receipt of the flour itself, and says in his letter of that date that he has not yet tried it, but it appeared to him—apparently from an examination of its colour — not equal to Baltic white. On the next day he says—"I have tried the French flour sent me, and I find it quite inferior to the Baltic whites, and on that account I will insist on having Baltic whites in its stead. The flour was guaranteed to me, of which I have proof, to be better than Baltic whites, and I hope you will fulfil your obligation without any trouble." At this date, therefore, the defender distinctly rejected the flour as in implement of the contract of sale, and an obligation thereby immediately lay on him to return the goods thus rejected, or if not immediately returning them, in respect of the distance, he was bound to put them into such custody as that they should thereafter lie at the order of the pursuers. That is a well established rule. But he says nothing at all about the matter at that time. Then, three days after, he writes a letter, on 27th April, in which he says—"The flour lies at the rail. station, and I will not allow it to be removed until I get Baltic whites, or something as good." That is to say, he rejects the goods, but holds to the bargain, and retains the rejected goods in security of the fulfilment of the bargain by the sellers. That he was not entitled to do. When a party so retains goods which he has rejected, it must be held, according to sound principles of mercantile law, that he takes the goods. The defender continued in the same position down to 9th May, when, for the first time, he expressly, in writing to the pursuers, gave them liberty to remove the goods. Under these circumstances, the defender is not entitled to refuse payment of the contract price. He must be held to have taken the goods, and not to have rejected them in such a way as, assuming them to be disconform to the contract, he was entitled to do.

The question on the evidence, as to the terms of the bargain, and whether the goods were a due fulfilment of the bargain, is more difficult; but on that I give no opinion, the rather because I think, if we had to pronounce judgment on that, the proof is not complete, and I should have wished more evidence as to the nature of the D. N. flour, as compared with Baltic whites. But it is unnecessary to say more on that, for the other ground of judgment is very clear.

LORD DEAS concurred, holding that the ground of judgment stated was sufficient, but being prepared to go farther, and to hold, with the Sheriff-substitute, that the appellant had in fact purchased D. N. flour, but without any proper guarantee entitling him to reject it.

LORD ARDMILLAN and LORD KINLOCH concurred with the Lord President.

Agent for Appellant—T. J. Gordon, W.S.

Agent for Respondents—P. S. Beveridge, S.S.C.

Thursday, January 28.

M'BRIDE *v.* WILLIAMS AND DALZELL.

Reparation—Slander—Privilege — Malice — Issue — New Trial. In an action of damages for slander, the pursuer alleged malice on record. The defender pleaded privilege, but his privilege not being apparent on the pursuer's case, an issue, without malice, was sent to the jury. In the course of the pursuer's proof, the defender's privilege was instructed. *Held* that the pursuer was entitled forthwith to lead proof of malice in answer to the defender's plea of privilege, although the issue, being framed on the footing that there was no privilege, did not contain malice.

New trial granted, the verdict being against evidence.

This was an action of damages at the instance of John Adam M'Bride, Ph.D. and Veterinary Surgeon, against William Williams, Veterinary Surgeon, Principal of the Edinburgh Veterinary College, and Allen Dalzell, M.D., Professor of Chemistry and Materia Medica in the College.

In September 1867 the pursuer was appointed by the Highland and Agricultural Society Professor of Cattle Pathology in the Veterinary College. In March 1868 the defenders sent to the pursuer a letter in the following terms:—

"*Edinburgh Veterinary College, March* 1868.—Dear Sir,—We have done all in our power, by careful inquiry impartially conducted, to arrive at the cause of the unseemly occurrences which have taken place in your class, one of them no later than Wednesday last. We have no desire to hurt your feelings, much less to urge against you any wilful omission of duty, but we feel satisfied that you have failed to preserve that order in your class which is necessary for teaching it; and we need scarcely remind you that the occurrences we allude to, though happening only during your lectures, have a very bad effect on the general credit of this college. We are sorry that your position, in terms of the will of the late Professor Dick, makes it impossible for us to recognise you as a Professor of the College, and receive you as a member of its deliberative council; but this ought to have made you all the more anxious to call in our assistance in checking the first outbreaks of insubordination.

Instead of reporting to us, you have allowed matters to go on, threatening the unruly, without carrying your threats into execution. We are certain that this college will suffer if you continue in your present position; and, with sincere regret, we are compelled to suggest to you the propriety of relinquishing a position which seems to us not accordant to the will of the founder of this institution; and, taken in connection with what has occurred in your class, is, in our estimation, a position which you may not creditably to yourself continue to hold. We consider it our duty to forward a copy of this letter to Mr Fletcher Menzies. We remain, dear Sir, yours truly. Signed, in name of the Veterinary College Council, unanimously agreed, W. WILLIAMS, Principal."

A copy of this letter was sent by the defenders to the Highland and Agricultural Society.

In June 1868 the pursuer received from the Secretary of the Highland and Agricultural Society a letter intimating that his services would not be required after 19th September following.

The pursuer alleged—"The statement as regards the unanimous agreement of the members of the said college, as well as the statements which the said letter contained of and concerning the pursuer, so made and communicated by the defenders, were false and calumnious, and made by them maliciously and without probable cause. By and through these statements by the defenders, the pursuer has been dismissed from the said chair, and he has been injured in his character, feelings, and prospects. The damages thus caused to the pursuer by the defenders, he cannot estimate at less than £5000 sterling. The defenders refuse all reparation, and hence the present action has become necessary."

The pursuer pleaded—"The defenders having made the false statements as regards the unanimous agreement of the members of the Edinburgh Veterinary College, as well as the false and calumnious statements of and concerning the pursuer above condescended on, maliciously, and without probable cause, and the pursuer having been injured thereby, are liable to the pursuer in reparation, as concluded for."

The defenders alleged that "In writing and sending the said letter, and copy thereof, the defenders did not act maliciously, or without probable cause. On the contrary, in writing and sending to the pursuer the letter libelled on, and in sending the copy thereof to the Secretary of the Highland Society, the defenders acted in *bona fide*, and reasonably in the discharge of their duty; and they had reasonable grounds for believing the statements made in the said writings to be true."

This issue was adjusted.

"Whether, between 4th and 18th March 1868, both inclusive, the letter in the Schedule annexed was written and sent by the defenders to the pursuer; and Whether a copy thereof was sent by the defenders to Mr Fletcher Norton Menzies, Secretary of the Highland and Agricultural Society; and Whether the defenders, by said letter, did falsely and calumniously represent to the Secretary and Directors of the said Highland and Agricultural Society, or to the said Secretary or Directors, that the pursuer was incapable of discharging the duties of the said Chair of Cattle Pathology in a proper and efficient manner, and that such was the unanimous opinion of the members of the Edinburgh Veterinary College Council; to the loss, injury, and damage of the pursuer? Damages laid at £5000."

Then followed the letter *ut supra*.

The case was tried before the Lord President and a jury in December 1868.

At the trial certain witnesses for the pursuer were adduced, upon the evidence of whom it appeared that the defenders made the statements contained in the said letter in the performance of their duty as members of the council of the said Veterinary College, and were therefore protected from any liability for damages for making the said statements, unless it were proved that the statements were made maliciously. The pursuer proceeded to adduce evidence to instruct malice on the part of the defenders. The defenders objected to the competency of the evidence and line of examination so taken by the pursuer, on the ground that the pursuer was not entitled, under the issue, to prove malice on the part of the defenders. The Lord President refused to give effect to the contention of the defenders, and allowed the foresaid questions and line of examination to proceed.

The defenders excepted.

After the conclusion of the evidence, the jury, by a majority of 9 to 3, found for the pursuer, and assessed the damages at £500.

The defenders presented this bill of exceptions, and also moved for a rule, on the ground that the verdict was contrary to evidence.

Lord-Advocate (MONCREIFF) and RETTIE for defenders.

Solicitor-General (YOUNG) and THOMS for pursuer.

At advising—

LORD ARDMILLAN—This is an action of damages for written slander. The pursuer is Professor of Cattle Pathology—the defender Williams is Principal—and the defender Dalzell is Professor of Chemistry—all in the Edinburgh Veterinary College.

The slander is said to be contained in a letter to the pursuer, sent by the defenders to Mr Fletcher Menzies, Secretary to the Highland Society. I need not read it. It is sufficient to say that it contains statements in regard to the pursuer which are injurious to his character, and which we must hold, as in granting the issue the Court has already held, to be slanderous.

The pursuer on record alleges malice. The defenders allege that they acted in good faith, and in discharge of duty, and thus the statements are privileged.

The case was tried by the Lord President and a jury, on the following issue. (*Reads issue.*) The verdict, by a majority of nine to three, was for the pursuer, with £500 damages.

We have now before us—1*st*, a bill of exceptions for the defenders; and 2*d*, a motion for a new trial by the defenders, in respect that the verdict was against evidence.

1*st*, In regard to the bill of exceptions, the point which the Court have to decide comes out very clear. The pursuer alleged *malice* on record. The defenders alleged privilege.

The statements of the pursuer do not so bring out the privilege as to entitle the defenders to assume it, or stand on it as an admitted fact requiring the pursuer at once to put malice in issue. Therefore malice was not inserted in the issue which went to trial, though it had been averred on record; and, on the other hand, the defenders were bound to instruct the privilege which they had alleged.

This they were entitled to do without a counter issue.

The result was, that the presiding Judge was of opinion that, on the evidence led for the pursuer, the privilege alleged by the defenders was sufficiently instructed, and that, unless malice was proved by the pursuer, the defenders were entitled to a verdict,—in other words, that the jury could not find for the pursuer except they should be satisfied that malice had been proved. The pursuer then proposed to prove malice. The defenders objected to the whole line of examination, contending that the pursuer was not entitled to prove malice under that issue. The Lord President repelled the defenders' objection, and allowed the examination to proceed. This ruling is the subject of the bill of exceptions.

I am humbly of opinion that the ruling was according to law, and that the exception should be refused.

In an action of damages for slander, where there may or may not be privilege, the question whether malice shall be put in issue depends on the pursuer's averments. If he has himself brought out the privilege, he must meet it by putting malice in issue. If privilege does not come out on the pursuer's record, but is alleged by the defender, an issue is allowed without malice. But whenever the privilege appears on the proof, malice becomes essential to the pursuer's case. If he has not alleged malice on record, his case is gone. But if he has alleged malice on record, then, though the issue, framed on the footing of the absence of privilege did not contain malice, he is, in my opinion, entitled to prove malice to meet the privilege. There is a certain amount of legal malice involved in every slander. Where there is no privilege, that legal malice is presumed. When privilege is instructed, the presumption ceases, and malice must be proved.

I am not influenced by the suggestion of surprise.

When the defender pleads privilege against a pursuer who on the Record has alleged malice, I think he may be fairly and reasonably held bound to expect, and to be prepared to meet, proof of malice, when by instructing the existence of privilege he has discharged the presumption of malice. The defender's plea of privilege is not a complete answer to the action,—for malice is alleged. But it is an answer to the action unless malice is proved. Now proof of malice in aid of the presumption, and to explain the purpose and meaning of calumny, and to aggravate damages, is not incompetent where there is no privilege; but where there is privilege, proof of malice is necessary,—and necessary only when the privilege appears. The averment of malice must meet the averment of privilege. The issue must put malice, if the privilege is apparent, on the pursuer's case. When not thus apparent, but alleged by the defender, and coming out at the trial, the pursuer must prove malice when the privilege appears. There is no privilege of slander. The privilege, arising from the position of the defender, and the duty in which he was engaged, consists simply in the exclusion of the presumption, and the requirement of the proof, of malice.

The obligation of the pursuer to allege, and to prove malice in a case where privilege is pleaded and instructed, is, I think, according to settled law and practice in Scotland. In such a case it is to be assumed that the pursuer is prepared with his proof, and that the defender is prepared to meet it. A defender who has pleaded privilege cannot plead surprise, if the pursuer at the trial meets the privilege by adducing evidence of malice, provided malice has been alleged on record.

The case of *Fenton* v. *Currie* is an important authority on this point. The manner in which the Lord Justice-Clerk (Hope), who presided at that trial, disposed of the point, appears clearly in the report, and is very instructive. The report bears (5 D. p. 708), that after the pursuer had led evidence from which it appeared that the case was one of privilege, "The Lord Justice-Clerk then stated, that as it appeared in the proof that the statement in question was made by an inferior officer of the customs, not in casual conversation, but to his superior, in presence of other custom-house officers, and in the course of an investigation and complaint made by Fenton against the conduct of the defenders, at which the defender had been summoned to attend to give explanations and defend himself, it was necessary for the pursuer to prove that the statement was made maliciously, for the purpose of injuring the pursuer, and not in the course of the defender's official communications; and that, as the pursuer did not undertake to prove malice, the case was not one which he could submit to the jury as sufficient in law—and he therefore directed the jury to find for the defender." Again, in advising the bill of exceptions, the Lord Justice-Clerk said, "The issue in this case was properly framed" (without malice), "for the pursuer's summons did not admit enough to entitle the defender to require that malice should be inserted in the issue, as the statement was not admitted to be part of any official investigation, and indeed the pursuer draws back in the issue in part from his summons—for he did not in the issue admit that the conversation was actually in the custom-house. It is also a very great mistake—one opposed to the understanding and rules which have been acted on since the institution of jury trial—to say that the plea in defence could not be raised on the facts as they came out in proof, and especially as they came out on the pursuer's evidence, without a counter-issue. There is no countenance for such notion, either in authority or practice. In answer to this action, the defender pleaded substantially by his first defence—privilege. That plea was part of this case, undisposed of, and to be insisted in at the trial. That plea arose on the pursuer's own evidence, and of course effect was given to it. It was the answer to the action unless malice was proved. I might have let the pursuer's case close, and then have held that it was insufficient in law, in respect that the facts raised that plea. But if the pursuer had any evidence of malice, it would in that case have been too late to tender it. I intimated my opinion then before the pursuer's case closed, and without calling on the defender, that malice was necessary. The pursuer might then have proceeded with evidence of malice, if he any had; but he did not undertake that proof."

In the case of *Dunbar* v. *Stoddart* (15 February 1849, 11 D. 587), the point now before us is only brought out in an incidental observation by Lord Robertson, which was, so far as I can perceive, not expressly adopted by any of the other Judges, and which was pointedly referred to by Lord Mackenzie, Lord Fullerton and Lord Jeffrey as "an inadvertent remark," in which they could not concur. Lord Robertson had observed, in the opinion returned by him as one of the consulted Judges—"I think

the defender is sufficiently protected, should the facts proved disclose a case of privilege, because it will then be the duty of the presiding Judge to direct the jury, in point of law, that the case being privileged, and no issue of malice being taken, the defender is entitled to a verdict." But, at the advising of the cause, Lord Mackenzie and Lord Fullerton stated that they did not concur in Lord Robertson's remark; and Lord Jeffrey, agreeing in the opinions of Lord Mackenzie and Lord Fullerton, says, "I rather regret that the passage quoted by Lord Fullerton from the opinion of Lord Robertson should be found there; and I cannot believe that it expresses correctly the opinions of the Judges who concur in it. If it is to be literally read, then, were a case of privilege made out on the part of the defender, and, at the same time, one of express malice made out in answer to the privilege, the pursuer would not obtain his verdict, because malice was not expressly inserted in the issue. I cannot agree in any such doctrine, and I do not think it was intended that such a doctrine should be promulgated." So also in the case of *Graham* v. *M'Lachlan* (12th July 1853, 15 D. 889). The Lord Justice-Clerk (Hope) there observed—"In the case of slander, whether the occasion was one giving privilege or not, the true ground of action—the cause of complaint—is the fact that *the words were spoken*, and the *defamatory and injurious character* of these words. The pursuer's complaint is, that he has sustained injury in his reputation by the imputations contained in the slanderous expressions. That is his ground of action—and it is the same ground of action—the same injury—whether the occasion was one importing privilege or not. The pursuer does not (say) admit the privilege, and does not set forth the particular facts which raise the privilege. But if the facts proved show for the defence that the occasion was privileged, then when the pursuer in reply offers to prove that the occasion was made use of maliciously, and without probable cause, to utter the slander, and that the words were not *bona fide* spoken in the exercise of a right, or in the discharge of a duty, but for the *purpose*, under such colour, of injuring him, his ground of action, the fact of which he complains, is not thereby changed. He complains still of the same fact, viz., the character and effect of the words spoken. But if privilege is raised he proves the *animus* with which these words were spoken, and establishes by direct proof that there existed personal malice against him individually." The principle, that the pursuer may adapt his procedure to the emerging state of the proof on the subject of privilege, is well illustrated in the case of *M'Kellar* v. *Duke of Sutherland* (14th January 1859, 21 D. 226).

In Broom's Commentaries on the Common Law (p. 750), the rule, as recognised in England, is well explained, and is, I think, substantially the same as in Scotland.

With regard to the motion by the defenders for a new trial, on the ground that the verdict was contrary to evidence, the case must be viewed with reference to the question of malice. Unless there is proof of malice, the defence of privilege, if properly instructed, is conclusive. We must therefore ask ourselves whether, in the case before us, the pursuer has adduced sufficient proof of his allegations of malice. I have read the evidence again and again, and I have come to the conclusion that there is not only not sufficient proof of malice, but really no proof of malice at all. This is one of the clearest cases I have seen. The proof of malice undertaken by the pursuer has totally failed. Therefore, on the question of malice, the verdict is contrary to evidence, and without proof of malice this verdict cannot stand.

Lord Deas—I concur.

Lord Kinloch—I am of opinion that the Bill of Exceptions taken in this case should be disallowed. I think the evidence of malice was rightly admitted, although the word "maliciously" was not inserted in the issue.

The *species facti* is, that the case, in the course of the trial, turned out to be a case of privilege, in which the pursuer could not succeed unless he proved the slander to be malicious. The defenders contended, as they still contend, that no such proof should be allowed, because the word "maliciously" was not in the issue, and they maintain that the jury should have been directed at once to return a verdict against the pursuer. The result would have been that the pursuer's case would have been irretrievably disposed of against him, and never could be tried again under any form. On the other hand, it is the contention of the pursuer, that when the case of privilege emerged, it was proper he should be allowed to meet it by evidence of that malice by which a case of privilege would be overcome.

I concur in this view of the pursuer. I think it is the only one consistent with that equity which it ought to be the object of all our forms of procedure to promote. I cannot hold that the pursuer was bound to entertain a prophetic foresight so entire as to be aware that the case would turn out to be one of privilege, and in that view to insert malice in the issue. When the case of privilege arose, it was only bare justice that he should be allowed the opportunity of overcoming that case if he could.

Nor do I think that there was anything in the technical terms of the issue to prevent this course being taken. I concur in the view presented to us, that in every case of slander the law implies malice or *malus animus;* and that the only difference between an ordinary and a privileged case is, that in the former malice is presumed without proof; in the latter it requires express evidence for its establishment. In the implication of law, malice *was* in the pursuer's issue, though not expressly stated; and what was done at the trial was to permit the pursuer to prove that which would otherwise have been assumed in his favour.

I am of opinion that the defenders can complain of no injustice in this. They were insisting in a case of privilege; and must be presumed to have been prepared with full evidence on the point. The result only arises in consequence of their insisting in this plea. But any other course would, I think, be injustice to the pursuer.

I am disposed to hold the point to have been decided in accordance with the view now stated in the case of *Fenton* v. *Currie;* for the course taken in the present case was explicitly stated by the Lord Justice-Clerk to have been the course adopted by him in that case; and, with this view fully brought before them, the Court disallowed the Bill of Exceptions. I do not think the authority of that case displaced by anything occurring in the case of *Dunbar* v. *Stoddart.* The third case mentioned to us, of *Graham* v. *M'Lachlan*, was not a case of slander at all, and did not raise the point now in controversy.

I would only add, with reference to some suggestions thrown out in the course of the discussion, that I do not think the object in view would be sufficiently gained by an alteration on the issue being made in the course of the trial, to the effect of allowing the word "maliciously" to be inserted. Such an alteration could only be made on the motion, or with the assent, of the pursuer, and would tie him down beyond retrieve to a concession that the case was one of privilege. I do not think he should be so tied down; but should have it left open to him to except to the direction that the case was a privileged one; whilst, at the same time, doing what was in his power to meet that emerging case.

With reference to the motion for a new trial, I am of opinion that the rule should be made absolute, and a new trial granted. The case was sent to the jury, and I think rightly, as a case of privilege, in which the pursuer could not prevail unless he proved that the defenders acted maliciously. The jury, in finding for the pursuer, must be held to have found this proved. I think the evidence entirely fails to establish malice against the defenders. It is not merely that the verdict is not such as I myself would have given—that would be no sufficient reason for interfering with the verdict of a jury,—I think it has no evidence to support it; or, if any, only of such a paltry and insufficient nature as to place the case substantially in the same predicament. In the view of a new trial taking place, I think it best to say no more than this.

LORD PRESIDENT—I concur.

Agents for Pursuer—Lindsay & Paterson, W.S.
Agent for Defenders—M. Macgregor, S.S.C.

Thursday, January 28.

STUART *v.* STUART.

Proof—Loan—Counter Claim—Executor—Prescription—Writ or Oath—Proof before answer. In an action for repayment of money alleged to have been advanced on loan, on conditions set forth in a written agreement, which agreement, the pursuer alleged, had been acted on, proof before answer allowed to the pursuer, reserving objections to competency, and to the defender a conjunct probation.

Held that the defender could not plead, as counter claims in this action, certain claims competent to him as executor, for himself and others, of his deceased father.

A claim for board *held* not competently stated as a counter claim in this action, the claim being prescribed, and no proof by writ being tendered, and no offer being made of proof by oath of the pursuer.

Colonel Stuart brought this action against his brother, the Rev. Athole Stuart, for payment of a sum of money, in the following circumstances.

The pursuer alleged that in 1848 the defender applied to him for assistance in paying certain debts then due by him. The pursuer agreed to make the necessary advances for that purpose as a loan to the defender, to be repaid by him, with interest at 4 per cent., the conditions of advance being set forth in a writing holograph of the defender, and signed by the pursuer and defender on 19th August 1848. The pursuer alleged, further, that, in fulfilment of this agreement, he gave the defender on the day named a cheque, which the defender cashed, applying the money to his own purposes, and delivering to the pursuer shortly afterwards certain vouchers, for the purpose of showing that the money advanced by the pursuer had been applied as agreed on; that he, the pursuer, paid to or on account of the defender certain other sums; and that the defender had repeatedly acknowledged in letters to the pursuer that these payments and advances were in loan, to be repaid to the pursuer.

The defender, on the other hand, besides denying the allegations of loan, alleged that the pursuer had received large advances of money from his father, the most part of which still remained due to his father's executry estate, and to the defender as executor-dative of his father; and had also received money advances from his mother, to whom he was still largely indebted. "Any sums that may have been advanced by the pursuer in connection with the informal writing libelled were advanced by the pursuer on behalf of his mother, and towards the extinction *pro tanto* of the large debt due by him to her, and in acknowledgment thereof."

The defender further alleged (stat. 8) that the pursuer was due to him, as executor of his deceased sister, a sum of £200, with interest. He further (stat. 9) stated a personal claim against the pursuer for board supplied, in 1854–5–6, to the pursuer's wife and two children and a nurse, in the defender's house, for about two years; and also for board supplied to the pursuer himself for several months. The rate, he said, had not been fixed at the time, but was left for after adjustment. Two payments to account had been made.

The Lord Ordinary (JERVISWOODE) pronounced this interlocutor:—"Allows to the pursuer a proof of the averments contained in the 3d, 5th, 6th, 7th, 8th, and 10th articles of the condescendence by the writ or oath of the defender, and to the defender a proof of the averments contained in statements 2, 3, 4, 5, and 8, by the writ or oath of the pursuer; and *quoad ultra* allows proof to both parties of the respective averments *prout de jure*, and appoints the cause to be enrolled with a view to further procedure."

The pursuer reclaimed.

At advising—

LORD PRESIDENT—I cannot concur in the course taken by the Lord Ordinary. He has selected certain articles of the pursuer's condescendence and certain other articles of the statement of facts for the defender, and found that these are proveable by writ or oath of the parties, and *quoad ultra* has allowed a proof *prout de jure*. That is a very unusual course in a case of this kind. I think it is not only unusual but inexpedient. There is no doubt that there must be parol evidence to a certain extent. It may turn out that some points in the pursuer's case can be proved only by writing; but allowing a proof in general terms will not exclude the defender from raising such objections in the course of the proof. The proper course therefore is, before answer, and reserving all objections to the competency of any particular evidence that may be tendered, to allow the pursuer a proof of his averments.

The only other question is as to the extent of the proof. As I understand the defender's statement, it may be divided into two parts—(1) That which constitutes a direct answer to the pursuer's