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

claim, by showing that the money advanced by the pursuer was not advanced under the contract alleged; that is the proper subject of conjunct probation; (2) The only other matter is certain separate counter-claims. I think the defender cannot plead any of these counter-claims in answer to the claim by the pursuer here. As to the claim in the second statement, that is a claim which, if it belongs to the defender at all, is vested in him as his father's executor, and therefore in a fiduciary character, for it is not alleged that he is executor for his own behoof exclusively, and indeed that idea is excluded by the import of the statement. The third, fourth, and fifth articles do not raise counter-claims at all. The eighth and ninth are open to the same objection, as far as I can understand them,—the eighth being a claim which belongs to another party altogether,—and the ninth is a claim for board, which it is said the pursuer owes in consequence of his wife and children having lived with his mother; but that cannot be sustained as a counter-claim in this action.

I am therefore disposed to recommend that, as far as the defender is concerned, the only proof to be allowed to him is a conjunct probation. We must therefore recal this interlocutor, and remit to the Lord Ordinary, with instructions to him to allow a proof in the manner I have suggested.

Lord Deas—It is necessary to attend to the object of this action. It is brought on the narrative that in 1848 a written contract was entered into between these two brothers, to the effect that the pursuer should pay a variety of debts due by the defender on certain conditions. That writing is holograph of the defender, but it is not a probative writing so far as testing is concerned, and not probative as a mutual deed. It is said that that was acted on by the pursuer going on to pay all these debts for his brother. If this document were stamped we should have a relevant averment—to the effect that it was acted on—proveable *prout de jure*, to the effect of setting up the document as a valid and sufficient contract, while the same proof would also prove that the pursuer implemented his part of the contract. The only difficulty there is, that the document is not stamped; and though we might deal with it under the section of the recent Act, there is nothing in that Act to prevent the parties from getting it stamped at once, without any order, and probably that is the simplest course. But assuming the document to be stamped, the question comes to be whether there is any doubt that parol testimony is admissible (1) to set up the document as a valid document, and (2) to make the money exigible under it, in respect that the pursuer has fulfilled his part of the contract? At present I see no doubt of the competency of proof *prout de jure* for these two purposes, and that is proof of the whole case. If there is any room for doubt, that difficulty is removed by proof before answer. I should rather be disposed to hold, that if we allow this proof before answer, we don't contemplate that at every stage the proof is to be stopped by objection to its competency, on the ground that writ or oath is alone competent. It will be better to allow the proof to be completed, and then it will be open to the Court to lay aside any incompetent evidence. Supposing the Lord Ordinary not to decide these questions in the course of the proof, which I humbly think would be the more expedient course, the question will be open for his consideration at the end of the proof.

As to the counter-claims, I agree that those which are stated in a different character, both in strict form and in expediency, if they are to be insisted in, must be so in a counter-action.

As to the claim for board, that is a more delicate question; but I am disposed to think that it should be dealt with in the same way. It is a very anomalous claim, and I am not prepared to say that the triennial prescription would not apply. Looking to the necessity of a very distinct statement of such a claim, much more distinct than there is here, and considering that there is no rule that we must allow a counter-claim of whatever kind to be set up in defence, but that that is to some extent a question of discretion, I am disposed to think there should be a separate action.

Lord Ardmillan—I am of the same opinion as your Lordship on all the points in this case, except the last, on which I have some doubt, unless the judgment is so qualified as to save the defender's right to prove the ninth article in his statement by reference to oath.

The claims of the defender, in so far as made by him in the capacity of executor of his father, or of his sister, cannot, I think, be pleaded as proper counter-claims in this action. But the ninth article of the defender's statement sets forth a personal claim, and contains averments that the pursuer at one time, and his wife and family at another time, lived in the defender's house, and boarded with the defender, and that the pursuer is indebted to him accordingly. This claim is apparently prescribed. If so, it can only be proved by writ or oath of the pursuer; but proof by writ has not been produced, and there is no reference to oath. It did occur to me that, if on this point you now decern in favour of the pursuer, and compel the defender to raise another action, you do practically, in this action, refuse to the defender proof by writ or oath of these averments in the ninth article. If such proof is held to be still available to him, I do not differ from the judgment; but I think that point should be made clear.

Lord Kinloch—I agree with your Lordship in the chair.

It is enough for the determination of the first point that some proof is essential, and I concur in thinking that the proof to be allowed should be general, leaving all questions as to the admissibility of particular items of evidence to be determined afterwards.

As to the counter-claims, it is an insuperable objection to them—except to the last—that the defender makes them in his capacity of executor, and not in his individual character. There is, in that view, no *concursus debiti et crediti.*

With regard to the claim for board, the objection to it, in my view, is, that it is not set forth with sufficient precision. It is not enough to aver merely that the pursuer lived in the defender's family for a certain time. The defender was bound to set forth that he individually supplied board to the pursuer, and in such circumstances as to imply the constitution of a debt. He was bound also to state whether the board was due by agreement, and, if so, what was the rate agreed on; or, if not due by agreement, he should have stated what he alleged to be a reasonable amount of board. All these particulars must be attended to in making a relevant claim of board. If we refuse the defender a proof of his claim for board in this action, that

does not preclude him from advancing it in another action; and this may, if thought necessary, be expressed in the interlocutor.

LORD DEAS—I wish to explain that if the defender offers proof of his claim for board by writ or oath of the pursuer, I should not then exclude him from pleading it as a counter-claim, for then the reason for postponing that counter-claim is taken away, for the claim is made out on the facts at once.

LORD PRESIDENT—I adopt the explanation made by Lord Deas, for if such a counter-claim is instantly verified by writ or oath it becomes equivalent to a liquid claim, for *statim liquidari protest.*

Agents for Pursuer—Millar, Allardice, & Robson, W.S.

Agents for Defender — Mackenzie, Innes, & Logan, W.S.

Friday, January 29.

GLASGOW AND SOUTH-WESTERN RAILWAY CO. *v.* RAIN.

Railway—Carrier—Special Contract—Railway and Canal Traffic Act—Just and Reasonable—Gross Negligence. Where a cattle dealer sent by rail a lot of cattle, in a truck selected by himself, signing conditions whereby he undertook all risk of injury or loss in loading, &c., and two of the cattle died on the journey from overcrowding; *held* that the railway company were not liable, the fault lying with the cattle dealer for selecting too small a truck, and the conditions signed by him being in the circumstances just and reasonable.

On the 11th March 1867 William Rain, cattle dealer, went to the railway station at Castle-Douglas, and made arrangements for having a fifteen foot waggon ready for trucking thirteen of his cattle at Bridge of Dee station on the following day, for conveyance to Norwich. On the following day, Rain and M'Michan, from whom Rain had bought the cattle, trucked the cattle. The following conditions of carriage were signed by Rain:—"(1) The rates of carriage for the within mentioned animals having been fixed at less than the Company's ordinary rates, the owner hereby undertakes all risk of loss, injury, damage, delays, and other contingencies, in loading, unloading, conveyance, or otherwise, except such as shall arise from the gross negligence or default of the Railway Company or their servants. (2) The Railway Company do not undertake to forward the animals by any particular train, or at any specified hour; nor shall they be responsible for the delivery of the animals within any certain time, or for any particular market." When the truck arrived at Stafford it was found that three of the cattle had fallen down in the truck, one of them being dead, and another so much injured that it had to be killed. Rain brought this action against the defenders for the value of these two cattle, alleging that their death was owing to the gross fault or negligence of the defenders. The defenders denied that the death of the cattle had occurred through any fault on the part of them or their servants, and contended that, the pursuer having signed the above conditions of carriage, whereby he undertook the "whole risk of loss, injury, damage, delays, and other contingencies, in loading, unloading, conveyance, or otherwise, except such as shall arise from the gross negligence or default of the Railway Company or their servants," they were free from liability. The pursuer, in reply, contended that the conditions of carriage were not just or reasonable.

The Sheriff (HECTOR), adhering substantially to the judgment of his Substitute (DUNBAR), pronounced this interlocutor:—"The Sheriff having considered the interlocutor appealed against, the defenders' reclaiming petition, record, proof, and process, as matters of fact, finds that on 12th March 1867, at Bridge of Dee station of the defenders' railway, the defenders received from the pursuer *thirteen* cattle for the purpose of being conveyed and delivered to Robert Stroyan, cattle-salesman at Norwich in England: Finds that at the same time the defenders procured the pursuer's signature to the document, No. 6 of process, bearing special reference to 'live stock traffic,' and specifying the said number of thirteen cattle, and the said address to which they were deliverable at Norwick for the sum of £8, 3s. 9d. of railway fare as therein set forth. Also bearing that the defenders did not undertake to forward the animals by any particular train or at any specified hour, and they would not be responsible for their delivery within any certain time or for any particular market; also bearing that the owner undertook all risks therein mentioned, 'except such as shall arise from the gross negligence or default of the Railway Company or their servants:' Finds that when received by the defenders, the said thirteen cattle were, at the sight and with the assistance of their station-master, put into a cattle truck belonging to the defenders, or in their custody and under their control, and the carrying capacity of which was known to them, and for the sufficiency of which the defenders were responsible: Finds that the pursuer was also present and assisted in loading the said cattle, and that no injury was sustained by them in the course of being loaded: Finds that the defenders did not require or stipulate that the said cattle should be accompanied by the pursuer or any servant on his behalf, and that when they were taken in charge by the defenders all the thirteen cattle were in sound condition: Finds that the said cattle were conveyed and delivered to the said consignee at Norwich, with the exception of *two*, for which the defenders failed to account, except by alleging that they had been trampled to death, or had died before reaching Stafford by the overcrowding of the truck in which they had been placed for conveyance: Finds that, according to a witness adduced by the defenders, viz., Zachariah Cox, goods railway agent at Stafford, the train conveying the said cattle reached Stafford at 3 P.M. on 13th March, the day succeeding that on which they were received by the defenders, and he (Mr Cox) 'never saw a waggon of the size of the waggon in which these animals came, so much overcrowded as it was,' and he attributed the death of the two animals belonging to the pursuer to the overcrowded state of the waggon: Finds it is not proved nor alleged that any sustenance or drink was supplied to the said cattle during the said journey: Finds that the pursuer suffered loss through the non-delivery of the said two cattle to the amount of £27 concluded for: Finds, as matter of law, that the defenders having failed to deliver, according to contract, two of the said thirteen cattle received by them for conveyance and delivery as aforesaid, and the overcrowding of the defenders' cattle truck or waggon, caused or permitted by them, being at