

nary, and I quite agree with your Lordships that there is one branch of the action with which the Lord Ordinary has dealt largely which can give no trouble. No case of partnership has been made out here. The defender was not known to the pursuers till long after the transactions between them and Munro were completed. Still it does not follow that if Munro was only ostensibly put forward and the defender was the real principal, having the sole interest, that the defender is not liable. He no doubt had an interest of a certain kind in the proceeds of the business of the "London House;" he was to be remunerated for his services in interposing himself as a check on behalf of Munro's creditors, and further stipulations were made in the agreement to secure him in the risk he was running. Beyond that extent the defender had nothing to do with the conduct of the drapery shop. It was conceded that Munro could have discharged the defender at any moment, on relieving him from his obligations and paying him the commission stipulated for. No partner could be so discharged, and this is perhaps a sufficient test on the question of partnership. But we have further to consider whether, failing a partnership, a case of agent and principal has been here instructed. This is the second alternative proposition which the pursuer asks us to affirm. His argument amounts to this, that Munro was a mere man of straw, who was put forward only to deceive the public. I cannot think that this was the case; on the other hand Grant was really no more than an agent. He was employed to liquidate and discharge Munro's liabilities, and in return it was arranged he was to receive a commission of 7½ per cent. upon the proceeds of the business from Munro. Grant was a mere medium between Munro and his creditors; he acted in the capacity of agent, and the present case therefore differs from that of *Edmonds v. Bushell and Jones*, which has been quoted as an authority for the pursuer.

LORD GIFFORD—Without any difficulty I have arrived at the same conclusion with your Lordships. The pursuers in entering into the transactions for which they are now claiming against the defender knew nobody but Munro, and they took Munro's bills, three in number, in payment of the goods. Further, on Munro's sequestration they ranked upon his estate for their claim. They now maintain that it was Grant who was the draper, and that it was to him that the goods were really furnished. This argument is founded upon two grounds. In the first place, it is said that Grant was in law a partner of Munro's and therefore liable, and this plea is a good one if made out in point of fact. In this the pursuers have quite failed, and without a shadow of doubt there was no partnership. Whatever the nature of the minute of agreement is, it is not a contract of co-partnership. The defender is not under it to receive any share of profits, nor is one of the elements which belong to a partnership present here. The second alternative on which the pursuers rest their case is only a little more difficult. The question whether Grant was the real person with whom the pursuers dealt is one of fact; if the fact was so, the legal result is undoubted. In my opinion, the pursuers have failed to prove this branch of their case also. The substance of the dealings and negotiations which took place between Munro and the defender must be looked at as a whole. It is

a fundamental principle of law of large application that when we get to the reality we must then disregard the form. This minute of agreement must be looked at in the light of this maxim, and if so, it is apparent that Grant was not here the real contractor.

Their Lordships therefore adhered to the Lord Ordinary's interlocutor, with additional expenses.

Counsel for Pursuer—Balfour and Alison.
Agents—J. W. & J. Mackenzie, W.S.

Counsel for Defender—Dean of Faculty (Clark)
Q.C. and Mackintosh. Agents—Murray, Beith & Murray, W.S.

Wednesday, July 14.

SECOND DIVISION.

AULD v. SHAIRP.

(Ante, p. 177.)

Title to sue—Loss, Injury and Damage.

The patron of a professorial chair in a university intimated to a certain person his intention of presenting him to the vacant chair. No appointment, however, was made. The present holder of the chair had been appointed Principal and had resigned the chair, but on learning the patron's intentions he withdrew his resignation and retained both offices, representing at the same time to the patron how injurious the appointment he proposed to make would be for the interests of the university. The patron not having appointed the person whom he had intended, but having left the Principal also in occupation of the chair, *held* (1) that there having only been an expectation of an appointment, there could be no title to sue in the person who was to have received the chair, or in his representatives. (2) That in law there was no absolute illegality in the retention by the Principal of the chair also.

Slander — Privileged Communication — Malice — Damages.

The Principal of a university having written a letter to the patron of a professorial chair to the effect that the appointment of a certain gentleman to the Chair would be injurious to the interests of the university; *held* that the communication must be deemed to have been a privileged one, and that malice had not been proved against the writer of it.

The circumstances of this case will be found fully detailed *ante*, p. 177.

At advising—

LORD JUSTICE-CLERK—When this very interesting and very important case was before us on the question of title, we repelled the plea of want of title, in so far as it was pleaded as a bar to the action, and to no other effect; and before further answer we of consent allowed both parties a proof of their respective averments. The question which had mainly been argued in that former discussion was, how far the pursuer, as executrix and representative of her deceased husband Dr

Auld, had a title to maintain the claim of damages which is the foundation of this action. We held that the claim was not excluded in respect of the personal nature of the action, although it is a claim of damages founded on alleged slander, and inferring compensation, not merely for loss of reputation and wounded feeling, but also for substantial loss on account of the exclusion of Dr Auld from the Professorship of Humanity in the United Colleges of St Andrews, which is said to have been the result of the slander founded on.

We have now the entire facts before us, and I think on the whole that the course which was adopted by the parties, and which we sanctioned, of taking this as a proof before one of ourselves, was the best course that could have been followed. We have the facts very clearly before us; the proof was taken before me; and I have now to express the opinion which I have formed upon these facts. The proof, though it is voluminous—I do not say too voluminous,—resolves into one or two very simple and indeed undisputed facts. Dr Auld was made the classical master in the Madras College I think about 1849. In the year 1861 some dissatisfaction appears to have arisen in St Andrews in regard to the mode in which his duties were discharged, or, at all events, in regard to the classical department in the college; and the trustees of the Madras College at that time came to the resolution to dismiss him. That, however, was not carried into effect, because some of the professors, including Principal Shairp, who was then Professor of Humanity in the United Colleges, and some other townsmen or citizens of St Andrews, interposed and signed a joint-remonstrance to the trustees, pointing out the great hardship that dismissing Dr Auld would be to himself, and saying many flattering and civil things in regard to his competency as a teacher and as a scholar. This attempt to dismiss Dr Auld was not renewed. In 1862 it appears from Mrs Auld's evidence that Dr Auld became a candidate for the head-mastership of the Ayr Academy, and in that year he obtained a variety of certificates from a number of very competent persons in regard to his qualifications, and, among the rest, one from Principal Shairp. He did not succeed in obtaining that appointment. In 1866, when there was some expectation that Principal Shairp, who was then Professor of Humanity, would be removed to Glasgow, it appears that Dr Auld printed, or reprinted, these certificates or testimonials which he had received in 1862, but apparently they were not used at that time. In 1868 the Madras College was examined by Mr Sellar and Dr Harvey, as sub-commissioners under the Royal Education Commission which was at that time sitting, and the report of Dr Harvey, who specially examined the classical portion of the Madras College, was unquestionably couched in unfavourable terms. And this brings us up to the point of the vacancy which gave rise to the whole of these proceedings. Principal Shairp was appointed to the office of Principal in 1869, and it was taken for granted by everyone that that created a vacancy in the chair of Humanity, and accordingly Dr Auld, among other candidates, became a candidate for the office, and sent to the patron, the Duke of Portland, a printed copy of the testimonials which he had received in 1862, and which he had printed in 1866, as indeed these printed testimonials themselves most distinctly bear. Principal Shairp communicated with the Duke of Portland,

and undertook to teach the class to the end of the then session, that is to say, the session ending in 1870; and intimated that at that time it was his intention to demit his office. The Duke of Portland resolved to appoint Dr Auld to the vacancy, and at his special request that intention was publicly intimated, and, on that intention becoming known Principal Shairp wrote the letter which contains the alleged slander in this case, dated on the 17th of March 1870, in which he remonstrated against the intention indicated by the patron, on the ground that Dr Auld had notoriously failed in the capacity of classical teacher in the Madras Institution, and that his department had been reported against by the Education Commission; and he also stated that if Dr Auld had used the testimonials granted in 1862, these were granted for a totally different purpose, and that Dr Auld had no right to use them as he did. Now that is the alleged slander. What followed upon that was this—the Duke of Portland simply did nothing, but Principal Shairp, with the concurrence and, he says, with the advice of his colleagues, although he had intimated his intention to demit the chair, resolved to hold it, and resolved to hold it for the express purpose of preventing the patron from presenting Dr Auld. And hold it he did, and continued to teach it either himself or to supply the teaching for a period of nearly two years, until the death of Dr Auld on the 11th of August 1871, and then, and then only, did he resign the Professorship.

Now, that, I think, is a sufficient summary of the facts that have been proved in this case. And, in the outset, it is quite plain that one material part of the case, as originally stated, entirely fails. It was alleged, and that was one main element in the former argument, that the suit was not merely for reparation for wounded feelings, or for injury to character, but that the slander had culminated in a most serious patrimonial loss, and that the result of the slander was that Principal Shairp was allowed to retain this Professorship to Dr Auld's injury, and that the patron was induced not to insist on his presentation in consequence of the representations that were made. That was an important element in the case, but it turns out that that was not the fact. The Duke of Portland did not withhold his hand from appointing Dr Auld in consequence of these representations. He says exactly the reverse. He says in his letters, and in those answers to questions, which are held in this case—and very properly held—to amount to his testimony, that he thought he was in no way called upon to interfere in that matter,—that as long as the Principal did not demit his office he did not think that he was bound to contest the question of whether there was or was not a vacancy, and he did not intend to do so. But he also stated in the most distinct terms that the moment the office was vacant Dr Auld was the person that he intended to appoint, and that he would accordingly appoint him. And, therefore, the slander, whatever it was, was not a slander that led to any action or inaction on the part of the patron, who simply held his hand because Principal Shairp had not resigned his office, and he did not mean to contest, and did not think himself bound to contest, the question whether he was bound to resign or not. Now, that clears a very considerable portion of the ground in this action; for the real damage supposed to be suffered in

consequence of the defender's representations vanishes from the case entirely, and it becomes one simply of slander, not accompanied or said to be accompanied by any specific patrimonial loss. As to the defender's right to retain the Chair of Humanity, it is perhaps not necessary that we should express any decided opinion. But the question has been raised very clearly and distinctly, and my impression certainly is that by accepting the office of Principal Mr Shairp necessarily vacated the Chair of Humanity. If the patron had issued a presentation I cannot see that Principal Shairp could by possibility have excluded the presentee. I do not think he could have resisted his induction, and that all the more that he had voluntarily undertaken to the patron to demit his chair at the end of the then current session. I say nothing as to what might be the arrangements for temporary administration; and I say nothing as to what the powers of the patron might be,—either the patron of the office of Principal or the patron of the Chair of Humanity. These are matters that are not in question here, because none of them occur. The arrangement upon which Principal Shairp held the Chair of Humanity was not an act of temporary administration, and the patrons of the two chairs gave no consent whatever to the state of matters that existed at that time. The Crown did not interfere, and the Duke of Portland did not interfere, but it was left upon its own merits. The notion that in order to exclude a particular candidate the Principal could continue to hold this Chair at his own hand, and to violate the admitted usage of the University from time immemorial, is one to which I should not wish to be supposed to give any sanction whatever. It is plain that if it had not been for the untimely death of Dr Auld this question must have arisen, and I cannot see any good ground upon which Principal Shairp could have maintained his position. I have said this much because the question was directly raised, and I am unwilling to appear to sanction a course which I think has no foundation in the proper order of the University. But whether it was so is immaterial in this case, for Dr Auld had no vested right in the appointment. He had nothing but an indication from the patron of what he was to do when the Chair should, in his opinion, become vacant,—an intention which he might change at any time, and which conferred no vested right whatever on Dr Auld. This being so, the case resolves itself into a simple action of damages for defamation, brought by the executrix of the person said to be defamed, and the damages claimed consequently are not for special loss, but for injured feelings and reparation only. I do not say, if that had been the complexion of the action at first, whether I should have thought it clear that the right to sue did descend to an executor, for that was not the position in which the case was originally presented. But assuming that it did, the question now remains, whether the proof has established the claim. There are two grounds on which the alleged libel is said to be defamatory. The first is the allegation it contains that Dr Auld had notoriously failed as a teacher in the Madras College, and secondly, that Dr Auld had improperly used the testimonials which he had received from the defender and the other professors in the University in 1862. I do not go into the particular terms of the letter. They are rather sharp, and

certainly unfriendly to Dr Auld, but the substance of the alleged slander rests on these two allegations, that he had notoriously failed as a teacher in the Madras Institution and that he had made an improper use of the testimonials. Now, I am not prepared to say that if this communication is not privileged it is not slanderous. I rather think that in the absence of allegation and proof of the truth of the matters stated by the defender it is slanderous, and is a sufficient ground of action. In reference to the first, viz., that Dr Auld had notoriously failed as classical master in the Madras College, I do not think that that has been proved, and I do not think that it is alleged to be proved. Dr Auld may not have been, and probably was not, a very vigorous master, but there is a long interval between that and notorious failure; indeed, there are many instances of teachers who turned out in the end men of the greatest reputation having their alternations of success and failure, and popularity and unpopularity, and I do not think, looking to the very respectable body of evidence that was adduced of Dr Auld's qualifications, that the allegation that he had notoriously failed was substantiated by proof, and, not being substantiated by proof, I think it was an imputation for which the defender would have been liable unless it is privileged. Still less do I think that there was any ground whatever for the reflection made on Dr Auld's use of the testimonials; and I entirely demur to the view that seems to have been taken for the defender in this matter. It is quite plain to me that the defender wrote very hastily and without sufficient recollection of the facts in regard to which he was writing. He had confused in his mind between the testimonials or remonstrance addressed by himself and the other professors to the Trustees of the Madras College in 1861, and the testimonials which were given when Dr Auld was or intended to be a candidate for the mastership of the Ayr Academy in 1862. In regard to these last testimonials, it is plain on the face of them that they were not given for any such specific object as having weight with the Trustees of the Madras College, which would have been absurd in itself, because the Trustees of the Madras College had already got the remonstrance of the professors in their hands, and there is not the smallest indication that Dr Auld intended ever to use them for that purpose. I am perfectly satisfied that Dr Auld obtained them for the purpose of his candidature in 1862, which he intended to insist in; and, if I were to surmise, I should say that probably Dr Auld, finding his position uncomfortable in the Madras Institution, wished to have a general attestation of his qualifications, in case any place might become vacant to which he might aspire, and that his friends, the professors, were perfectly willing to aid and assist him in that object. I cannot for one moment admit that there is any usage or practice of trade by which a professor is to attest the qualifications of a man, as shown in his public actings and teaching, for one purpose, and, without any special agreement with him complain when that attestation of a fact is used for another purpose. Dr Auld's scholarship, knowledge, and powers of teaching, as exhibited in the Madras College, were facts to which these testimonials were addressed, and, if the testimonials were true the fact could not possibly be altered by his candidature for a professorship, and when such general testimonials as these are given to a man,

he is entitled to use them in every quarter and for any purpose for which he thinks they may be required or are useful. No doubt there may be a special bargain made with him that he shall only use them for one purpose, but to tell the truth the fact of such a bargain or reservation would not very much commend itself to my mind.

But then the question arises—Was this communication privileged? In other words—Is the defender free from liability unless he be proved to have acted maliciously, or is it enough that he acted honestly and in good faith? I think there was privilege. Privilege consists in the right of a man to express his honest opinion on a matter in regard to which he has a duty or a right or an interest to speak, or to express that opinion to any other who has a corresponding duty or right or interest. Now this is the law even in regard to matters of private concern. But a chair in one of our Universities is a matter of public concern, and a subject in which, indeed, any member of the community is entitled to take an interest. Much more has the Principal of the University a substantial right to speak his mind to the patron of the chair within his bounds when he knows or believes that an appointment prejudicial to its interests is likely to take place; and, in my opinion, this being a matter of public concern, the principal, or the person at the head of the institution, must necessarily have—what I imagine persons with an inferior duty or interest must also have,—a right to express an opinion in the proper quarter upon a matter in which the credit of the University is so largely concerned. I do not mean to say that I would hold out any very great encouragement to professors, or even to the principal, to interfere in matters of patronage. I cannot say that there was a duty in the stricter sense to interfere. My impression rather is, looking to the nature of this controversy, that though Dr Auld's qualifications might not be of the highest, they were not of that nature that necessarily or imperatively called for a remonstrance of this description—but we have seen and known things of the same kind before. There was a very celebrated occurrence some 30 years ago in regard to a chair in the University of Oxford, which is fresh in the recollection of some of us, where the whole of the professors in the University of Oxford in a body remonstrated with the Crown against an appointment which had been proposed; and we know very well that the language used on that occasion was by no means measured, and that the length of time during which the controversy lasted was very considerable. Now, I do not intend to express any opinion as to whether Principal Shairp would have been better advised if he had remained silent, but thinking that the interest of the university was at stake, and feeling the importance of the Chair of Humanity in regard to every Scotch University, because it is the portal or gateway through which the students enter—I cannot possibly say that he was not within the general rule of law which affixes a privilege to persons expressing their honest mind upon occasions on which they have an interest and a right to speak. Here he spoke to the patron, who was the proper recipient of his opinions.

I am therefore of opinion that this case is clearly within the rule of privilege, and that malice must be proved before the pursuer can succeed.

The question of malice is perhaps not without some little difficulty. What is said on the part of

the pursuer, and said with some strength and plausibility, is that Principal Shairp in 1861 and 1862, when he did not expect, no doubt, to have Dr Auld for a colleague, expressed himself in the strongest terms in regard to Dr Auld's qualifications as a teacher, and notwithstanding that, he writes to the Duke of Portland, when he feared that he may have him as a colleague that he had notoriously failed in the very capacity to which his compliments had previously been addressed, and it is said by the pursuer that that is proof of malice. I think there is plausibility in that statement, but having heard the evidence, and having heard Principal Shairp's account of the matter, I have come to the clearest opinion that there was no personal feeling or ignoble motive on the part of Principal Shairp at all, but that his honest belief when he wrote to the Duke of Portland was that Dr Auld's appointment would be injurious to the University, and therefore he is only liable to this observation, that he made his encomiums somewhat too broad in 1861 and 1862, probably from a feeling of good nature, which sometimes prompts in that direction, but that at all events whatever he had said in 1861 or 1862, he was quite honest in stating as his opinion that Dr Auld had notoriously failed in the Madras College and that his appointment would be injurious to the University. The difficulty in which the defender is placed is obvious, but as I must affirm as matter of fact that he did not write his honest opinion in 1869 before I can affirm the allegation of malice, I have no hesitation at all in saying that I believe thoroughly in the honesty of the statement made in the letter in question. The second point in regard to the proof of malice is also of some weight, and that is, that there was a persistency on the part of Principal Shairp which led him to do what I take to be an illegal act for the purpose of excluding Dr Auld, viz., to retain the professorship against the patron, without right, for no other purpose whatever than to prevent the appointment of the presentee, whose appointment he feared. Now, if there had been malice—if there had been the slightest ground to suspect that there was personal and not public motive at the bottom of all this—I should think that a very dangerous element indeed, as far as the Principal was concerned; but not finding any element of that kind, the only result is that whatever it proves it does not prove malice on the part of the Principal. Whether he had or had not a right to retain the Chair of Humanity does not derogate from the honesty of his intervention, whatever may be said of his discretion; and therefore, upon the whole matter, I have been unable to come to any other conclusion than that the pursuer must fail in her action.

I cannot close without saying at the same time that it is impossible not to feel a considerable amount of sympathy both for the pursuer and for her deceased husband; for the unfortunate man, having been tantalised with the expectation of this professorship, not merely failed to obtain it, but lost at the same time the office which, on the representations of the Duke of Portland, he had been induced to resign.

On the whole matter, I think we must pronounce a decree of absolvitor to the defender.

LORD NEAVES—This is a case of interest and importance both on general and on special grounds. I cannot help feeling considerable sympathy for

the pursuer of the action; for, left as she has been a widow, and with this history before us, her husband's disappointment and her own disappointment must have been very great, and looking to her point of view of these matters, one can easily see how strongly she must have felt. We cannot expect her to adopt any views of her husband's inefficiency or want of right and title to this chair. That is not to be expected from her even if she were competent to form an opinion upon it, which she probably is not. She must know and remember him as an amiable and excellent man, who, after getting a promise of this appointment was deprived of it partly by delay and partly by other circumstances. But while we entertain these feelings of sympathy for her, we must also look at the other side of the case, and I firmly believe that Principal Shairp was actuated in what he did by a desire for the good of the University of which he was a conspicuous member as Principal. One sympathises also with his feelings, even although they were expressed with apparent keenness.

The pursuer's pleas are two-fold. The first is, that the defender having illegally retained possession of the Chair of Humanity, and wrongfully prevented Dr Auld from being presented thereto, and having thereby caused loss, injury, and damage to the pursuer, ought to be decreed to make reparation as concluded for. As to the alleged illegal retention of the Chair by Principal Shairp, I cannot find such a relation subsisting between Dr Auld and Principal Shairp as to lead me to suppose that a right of action can arise to Dr Auld against Principal Shairp for what he may have done. I am rather inclined, with your Lordship, to look upon the holding of the two offices as incompatible. At the same time, they may be retained temporarily for special purposes and in special circumstances. It could scarcely be said that Principal Shairp might not hold the Chair of Humanity during the remainder of the session following his appointment, or for the time necessary to make ulterior arrangements; and that shows that there is no vital incompatibility between the two offices. The idea of any permanent retention of both is out of the question, but I am not satisfied that there was any intention to retain them permanently. I do not see any evidence of that, though there may have been a retention until it should be seen what should be the final outcome of this dispute. But whether Principal Shairp was right or wrong—whether he might be considered to have vacated the Chair or not—I cannot see that that gives rise to any legal ground of action at the instance of Dr Auld or his representative. Dr Auld had no presentation to the Chair. He had only a promise of the appointment when the Duke of Portland should consider that the vacancy had taken place. The Duke of Portland was willing to give him the Chair when it was vacant, but he was not willing to enter into any litigation on the subject, or to contest the point. A fair enough illustration of this was given during the argument with reference to a landlord's right to remove a tenant in the case of his having promised a lease of the farm to another tenant. I cannot say that that other tenant who may have got that promise has any direct right of action against the tenant in possession. He may urge upon the proprietor by moral or legal considerations to do all that is necessary to fulfil his

promise; but I do not think that he has any right of action against the tenant in possession. As little can I say that if the patron here chose deliberately to remain neutral, which he did—for that is the position which he expressly avowed himself as occupying—a party in Dr Auld's position, having no presentation to the office, could have any right of action against Principal Shairp to vacate the Chair for his behoof, or to pay him damages. If anything had happened to the Duke of Portland—if he had died before Dr Auld—What would Dr Auld's position have been? His promise would not have been binding upon the Duke's successor—it was not binding on himself as a matter of law—but it would not have been binding on his successor; and so Dr Auld had just what might be called a *spes successionis* in the matter, which gave him no direct right of action against Principal Shairp.

The second plea is with reference to the slander and this turns on the letter addressed to the Duke by Principal Shairp. I confess that I have great difficulty in seeing any slander in that letter. It undoubtedly speaks of the inferiority of Dr Auld's claim to become a professor, and it also complains that he has used certain testimonials; but I cannot say that I see anything libellous in that letter. We must look at the whole circumstances. Dr Auld was an aspirant to a public situation. He was not being assailed in an actual position which he occupied, by some person who was depreciating him; but he was aspiring to a new appointment, of a different kind from the one he held, requiring different qualifications, and a higher training. He was publicly aspiring to that office, and he was in communication with the patron on the subject. Now, I confess I have a strong idea that wherever an appointment of a public nature is contemplated, and in particular one which, besides affecting the public at large, affects a certain locality in a very strong way, the aspirant to that position lays his character and qualifications open to criticism by all who have a natural and legitimate interest in the appointment. I am not sure that I would call that privilege. I do not think that it is of the nature of libel to speak of an aspirant for an office of that kind as not being qualified for the office. I think the newspapers might have discussed the merits of all the candidates, and said that they considered one to be good and another to be inferior, with the most perfect freedom, without being found fault with any more than any literary critique of any kind. An appointment of that public kind is subject to the observation of the public, and is, I think, a legitimate subject of discussion; and I cannot help thinking that it would be a very sad thing if it were not so. A patron is a trustee for the benefit of the public. The patronage is vested in his person, but it is vested under the responsibility that he owes to the public. He is entitled to expect—and no patron with right feeling will complain that he receives—such light fairly stated by any competent party on the subject—to assist him in his choice, and to guide him to a right decision on the one hand, or prevent him from making an improper choice on the other. I see no libel in anything of that kind. To say that a man, although a good master in a burgh school and a respectable and aimable man,—for there is not a word said against his morals,—but to say that such a man is not a first-rate scholar or has not

been successful in his class, when he is aspiring to another position, and putting himself therefore upon a scrutiny as it were, appears to me to be a very dangerous proposition, and in that light alone I consider the action unfounded. But at any rate it runs into the question of privilege when once you come to consider the close connection between Principal Shairp and the office which was to be filled up. Can we suppose that a man at the head of a University is not to take a strong interest in the welfare of the body with which he is connected, and with which his own prosperity and happiness are so intimately bound up. It is for the public interest that he should do all he can consistently with justice in such a matter. I cannot doubt that he had a privilege to go to the patron and to represent, if he did it honestly and without any evil purpose or sinister view, the opinion that he entertained of the candidates who were proposed. It is said he should not have interfered because the patron had said that he would make the appointment, but that is not sufficient. The appointment was not made. It was right that Principal Shairp should let it be known what he thought on the subject, and the opinion he stated was honestly entertained by a great number of persons in the same position. It was entertained by the other professors, except I think, by Professor Flint and by one gentleman who is now no more, and who perhaps did not hold a very high position at the time.—I mean Dr M'Donald, whose appointment one knows about, and who, if I remember right, was appointed to the Chair of Civil History, but as he could not teach Civil History he taught Natural History instead. If, then, there is privilege, it can only be got rid of by proving malice, and the question is, has that been proved? I cannot say that I see any proof of malice. The idea of personal malignity has not been suggested, and if it were, it is groundless upon the face of the case. There may have been an anxiety, and perhaps an over-anxiety, about the matter on the part of Principal Shairp, but that will not make malice. It was a matter of great importance that Principal Shairp should make known his opinion if he thought that the appointment would be injurious to the University, and that opinion was shared in by Professor Campbell, who had a very deep interest in the matter; and having stated that to the patron, will the mere manner in which it is done constitute malice? I think not. It is said that it arose from a desire to have an Oxford man, and that that makes malice. I cannot exactly see it in that light. I am not such an exclusive admirer of Oxford as perhaps Principal Shairp is, though I recognise in the fullest manner the benefit we have got from Oxford scholars and from the connection which has subsisted between Oxford and Scotland. But no one who knows the history of English literature is ignorant of the very good reasons which Principal Shairp has for looking back on Oxford as a most excellent nursery for young men, and as connecting it with some of the most distinguished body of scholars that have been produced in this century. This was a feeling which he naturally had, and I cannot think that was malice. I cannot put that construction on it. It was also said that his former testimonials proved malice. His former testimonials proved a little too much facility, I think, in the other direction; but I do

not think they prove malice in this direction. And the only thing said about the testimonials as far as Dr Auld is concerned is that Principal Shairp was of opinion that he (Dr Auld) had no right to use them as applicable to a professorship, for they had been given him as general testimonials. That seems to have been his view; and I agree with him thus far, that testimonials for a schoolmaster are not necessarily testimonials as to a man's fitness as a professor. On the whole matter, there being no proof of malice, I think this was either a communication to the patron which required no privilege at all, or a communication that was privileged owing to the position of Principal Shairp. On these grounds I come to the same conclusion with your Lordship, that we must assolvie the defender.

I cannot conclude without making the observation that I hope some light has been thrown in this question upon the subject of testimonials which ought to produce serious thoughts in the minds of those who give and those who sometimes receive them. A testimonial ought to be strictly true and not coloured. It very often is—probably almost always is. I do not say that one should write a testimonial as he would write history, for there he must not be afraid of speaking of everything that is bad as well as of everything that is good. That would never do, and the testimonial would not be used if that were done. But it ought to be a strictly true testimonial, and, if we may borrow from a heathen author in regard to truth, we should not allow ourselves to be carried beyond the truth on any subject—testimonials or anything else—

“Though Phalaris with his brazen bull be nigh,
And loudly dictate to our lips a lie.”

These gentlemen would not have done or said anything incorrect out of fear or compulsion. But favour, friendship, compassion, are sometimes as great seducers from the path of strict accuracy as fear or force, and it is acknowledged that to some extent the testimonials were modified by these amiable influences. But though I think in this case there was a little embellishment given to the facts, I cannot visit that error in such a way as to convict Principal Shairp of malice in this case, because he may have been a little too easily led to further the views of Dr Auld on a former occasion. I think he had countenance for all that was done. There was some truth in what was said about Dr Auld having failed. We see in Mr Grace's evidence an opinion to that effect. But the question is not whether that is the truth, but whether it was an opinion which Principal Shairp was entitled to entertain, and did honestly entertain: and he tells us that even from the time that the testimonials were given he had seen proofs of Dr Auld's teaching that did not influence him favourably; and I cannot wonder that any one connected with the University of St Andrews should, in reference to the filling up of the Chair of Humanity, fail to see what a very serious stigma was cast on the Madras School teaching by the report of the Sub-Commissioners on Education becoming publicly known. I think that must have been a very painful thing—the idea that a man of whom that had been said (whatever explanation might be given of it) was to become the professor of so important a Chair in the University as that of Humanity. On the whole, I see nothing that

would lead me to deprive Principal Shaipr of the privilege that he possessed, or of his right to tender to the patron his opinion, believing it to be an honest opinion in the matter.

LORD ORMDALE—In this case, which raises some questions of novelty and importance, I must now assume—my views on the point having been at a former stage of the litigation overruled by a majority of the Court—that the pursuer, as executrix of the late Dr Auld, is entitled to sue, as she does, the present action of damages for the injuries caused by certain alleged libellous or slanderous statements uttered by the defender of and concerning her late husband, and also for the defender's alleged illegal conduct in retaining the Chair of Humanity in the United College of St Salvador and St Leonards at St Andrews, he being at the same time Principal of that College.

The pursuer also concludes for damages arising to herself "as an individual," but she does not in the record explain how she was or could be individually injured; and she has not by evidence or argument attempted to support this branch of her action, which may therefore be laid aside as not requiring further notice.

The pursuer has endeavoured to support her claim for damages as executrix on the grounds, 1st, that the defender libelled and slandered her late husband Dr Auld; and 2nd, that he acted illegally in retaining for some time the Chair of Humanity, thereby preventing Dr Auld being inducted into that Chair and enjoying the emoluments thereof. These grounds of action substantially relate to and arise out of the same matters.

The defender in December 1868, while he held the office of Principal and the Chair of Humanity, intimated to the College, and to the Duke of Portland, the patron of the Chair, his intention of resigning the latter in May following. In consequence of this intimation, Dr Auld, who was then the master of the burgh school of St Andrews, called the Madras College, applied to the Duke to be appointed to the Chair about to be vacated by the defender, and the Duke in March intimated by letter to Dr Auld that he had determined to give him the appointment. The defender a few days thereafter wrote to the Duke deprecating the appointment of Dr Auld to the Chair of Humanity as not having the necessary qualifications; and the defender also continued till after the death of Dr Auld, in August 1871, to hold the Chair himself, thereby, as the pursuer says, preventing her late husband obtaining it.

Such is, briefly and in general terms, the state of matters in relation to which the pursuer, after the death of her late husband, who had himself neither raised nor intimated any intention of raising an action of damages against the defender, insists in her present claim as her husband's executrix. Her claim requires for the sake of distinctness to be considered, *first*, as arising from the defender's alleged libellous or slanderous statements, and *secondly*, from his alleged illegal conduct in retaining as he did the Chair of Humanity as well as the office of Principal.

In her record the pursuer is very vague and general in her allegations—which are all contained in the 8th article of her condescendence—touching the alleged libellous and slanderous statements of which she complains. She there explains as the reason of this, that she did not know the exact

terms of the letters the defender had written, and therefore that she could not specify more particularly his libellous utterances—a somewhat strange and unusual statement coming from the pursuer of an action of damages. Ultimately, however, the pursuer in the course of the proof recovered all the defender's letters. And it is in respect of the statements in his letter to the Duke of Portland of 17th March 1869, that she has chiefly, if not exclusively, maintained her claim for damages under her first ground of action. For although it is true that in the 8th article of her condescendence she also avers in general terms that besides libelling her husband in letters to the Duke of Portland, the defender slandered her husband in verbal statements to all the professors of the United College, and particularly to Professor Campbell, the professor of Greek in the University, during the months of March, April, and May 1869, or about that time," the nature and terms of the slanderous statements thus vaguely alluded to have never yet been explained, and she has made no attempt to support them. It is obvious, indeed, from the proof, that no case of that description has been established; and I did not understand her counsel at the discussion to say that it had. It is a different question, which will be afterwards noticed in dealing with the matter of privilege, whether the defender's communications to the professors, such as they were, may not go some length to show *quo animo* he wrote the letter of 17th March to the Duke of Portland.

Now, there is no doubt that the defender in his letter to the Duke of Portland of 17th March expressed himself in very decided terms as to the failure of Dr Auld as classical master of Madras School, and stated his opinion, for that and other reasons, that Dr Auld was ineligible for the Chair of Humanity. The defender also stated in that letter, in reference to certain testimonials which Dr Auld had some years previously obtained from various persons, and from the defender himself amongst others, "that they were never intended to certify to his fitness for a professorial chair, and that if Dr Auld has laid them before your Grace for this purpose I must be allowed to say that he had no right to do so." The pursuer endeavoured to make two points out of this, 1st, that it was false and calumnious for the defender to say of Dr Auld that he had failed as a teacher in the Madras School and that he was consequently unfit and disqualified for the position of Professor of the Humanity Chair in the United College; and 2dly, that it was also false and calumnious for the defender to say of Dr Auld that he had improperly used testimonials given for one purpose in order to accomplish another. I am not quite satisfied that these propositions of the pursuer are maintainable—looking merely at the terms of the letter of 17th March—but as the alleged libellous statements might be so inuended as to have enabled the pursuer to get into a proof, and as a proof was allowed and has been adduced, I consider it unnecessary, especially in the view I have taken of the result of the proof, to scrutinize, apart from it, very critically, the statements of which the pursuer complains, in order to determine whether they are or are not libellous in themselves.

Assuming them to be libellous, or that by *inuendo* they could be made to bear that character, I can entertain no doubt that in making them the defender had the protection of privilege.

According to all the authorities, English as well as Scotch, cited at the discussion, it is a well established principle that a communication made *bona fide* upon any subject matter in which the party making it has an interest, or in reference to which he acted in the discharge of a duty—public or private, legal or moral—is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter, which, without that privilege, might subject him in damages. The plea of privilege was, in language even more favourable for the party founding on it, recognised and given effect to in the judgment of the Judicial Committee of the Privy Council in the recent cases of *Hart v. Gumpach* (Law Reports, Privy Council Cases, vol. iv. p. 439); and *Laughtin v. The Bishop of Sodor and Man*, *Ib.* p. 495. And to the same effect also is the law stated in Brown's Commentaries (p. 753), and in Starkie on Libel (p. 267). In our own Court, again, we have very good illustrations of the principle in the cases of *Milne v. Bauchope*, July 19, 1867 (5 Macph. 1114); and *Macbride v. Williams & Dalzell*, Jan. 28, 1869 (7 Macph. 427). The former of these cases related to certain statements which a party claiming to be in the position of head master of an educational establishment had made about a female teacher in that establishment, but although the jury found that he did not occupy the position on which he rested his privilege, and therefore negatived that ground of defence, the Court in disallowing a motion for a new trial threw no doubt upon the principle itself as applied to such a position as that of the head of an educational establishment. On the contrary, Lord Cowan, apparently with the concurrence of the rest of the Court, expressly said, "I desire to state in explicit terms that I do not dispute the privileged position of a person placed in the position of governor, rector, or head master of an educational or other institution, in his communications to the managers or directors of the institution, with relation to its management or its interests. These communications when made in *bona fide* within the scope of his proper functions are certainly privileged." And so in the other case of *Macbride v. Williams & Dalzell*, the Principal of a Veterinary College was held to be privileged in making certain statements, in themselves of a criminatory nature, to the patrons of the institution in relation to one of the professors. That case, indeed, has in its leading features a very striking resemblance to the present—the only distinction between the two being one pointed out by the pursuer at the discussion, viz., that there the individual complained of held the appointment of Professor, and was in the actual discharge of its duties, while here the statements made by the defender were of and concerning a candidate merely for the office of Professor. But I am unable to see how this distinction can be held to affect the matter of privilege, for all the elements requisite to constitute privilege are to be found in the present as clearly as they existed in the case referred to.

But before remarking further on the position of the defender in the circumstances of the present case as a privileged one, it is necessary to notice that besides the statements in his letter of 17th March to the Duke of Portland in regard to Dr Auld's unfitness for the Professorship of Humanity, the pursuer also complains of his statements in the

same letter regarding the testimonials, to the effect that they had been granted about seven years before to assist Dr Auld for a different object than to obtain a Professorship, and therefore that "if he had laid them before your Grace for this purpose, I must be allowed to say that he had no right to do so." Surely the defender was entitled to express that opinion whether it was a correct one or not, without subjecting himself in damages as for a false and calumnious libel. The defender did not say that Dr Auld laid the testimonials before the Duke for a fraudulent or deceitful purpose. And in anything he said he did not impugn the motives of Dr Auld at all, but merely questioned his right.

Supposing, however, that the defender's statements were held to be calumnious, I think that in making them, equally as in making his other statements complained of, he must be taken as having acted in a matter in which he had an interest, and from a sense of duty, and is accordingly protected by privilege. What the precise rights and duties of the defender as Principal of the United College are does not appear, and for the present purpose need not, I think, be minutely inquired into. It is enough that his position as Principal vested him with an interest, and conferred on him a duty to interfere to the extent he did. According to the pursuer's own statement in the first article of her condescendence the defender as Principal of the United College is "head of the Society, and in that capacity fulfils the offices of superintendence and jurisdiction which the original constitution of the colleges assign to him." It can scarcely be doubted, therefore, that the defender had, in reference to the reputation and prosperity of the college, of which in the pursuer's own words he was the head and exercised a superintendence over, a material and obvious interest to see that a suitable appointment of a professor, and especially a Professor of Humanity, was made. And if he had such an interest, it follows that, interfering to the extent he did, he did no more than discharge a duty which obviously lay on him. Nor can it be doubted that the defender's communication was made to a party who, as patron of the Humanity Chair, had a corresponding interest and duty.

If I am right so far, the pursuer cannot prevail unless she establishes that the defender acted maliciously. But I have been unable to discover from the proof any ground for imputing malice to the defender. To me it appears manifest that he entertained none, but that in making his communication to the Duke of Portland he acted solely from a sense of what he honestly believed to be his duty towards the college of which he was the head, and whose interests were in some measure in his keeping and under his superintendence. One thing at least is clear, that in his whole actings he had the approval, with a single exception, of all the Professors of the United College, who, indeed, participated in everything he did. His communications to and with the Professors, in place of showing that he was actuated by any improper animus or feeling towards Dr Auld, go far to prove the very reverse.

In regard, again, to the alleged illegal conduct of the defender in retaining the Humanity Chair after the date when he had intimated his intention of resigning it, the pursuer's statements are to be found in the 3d and 7th articles of her con-

descendence, and require careful attention. In the third the pursuer sets out a minute of the College, which bears that the defender, "while he was ready to demit the Chair immediately if it should seem desirable, was willing to teach the Humanity classes until the end of the session, and that at that date or on the 15th of May to resign the Chair;" and then the pursuer further goes on to say that "notwithstanding the legal disability of the Principal of the said United College to hold a Professorship in conjunction with his office of Principal, and notwithstanding his actual resignation of the Professorship of Humanity to take effect on the 15th of May 1869, as embodied in the foresaid minute, the defender on the expiration of the time during which it was agreed that he should continue to perform the duties of the Professorship, refused to demit the same and continued to exercise the office of Professor, and to receive the endowments pertaining to the office until after the death of the said James Auld, which took place on 11th August 1871." In making the statement the pursuer proceeds on the assumption that the defender had by the minute referred to actually resigned the Professorship, but I can scarcely think she is right in this, for by the minute the defender had merely intimated an intention to resign it at a future date; and in point of fact he had not prior to the death of Dr Auld actually resigned. The pursuer again, in the 7th article of her descendence, assumes the legal "disability" of the defender to hold a Professorship in conjunction with his office of Principal, but she has not succeeded in showing that there was any such disability. Indeed, beyond some speculative observations and suggestions made at the discussion, nothing has been advanced by way of evidence or otherwise to instruct this, while it is well known that the Principal of St Mary's College at St Andrews has long held and now holds a Professorial Chair along with his office of Principal.

Irrespective, however, of such considerations, and whatever may be thought of the defender's conduct in retaining as he did the Humanity Chair, it is sufficient to remark that the pursuer has entirely failed to show that any right of action could have thence arisen to Dr Auld or to her as his executrix. Dr Auld was not the patron of the Chair, nor had he actually obtained any legal or enforceable right to it. Neither had the defender come under any obligation or promise to Dr Auld to resign the Humanity Chair. In short, there neither was, nor is it said that there was any, privity of contract whatever between the defender and Dr Auld in the matter. Whether the Duke of Portland, as patron of the Chair, or the Crown, might have challenged the defender's retention of the Humanity Chair is another thing altogether, which it is unnecessary to inquire into, for it is not pretended that Dr Auld had come into the right and place of either the patron or the Crown, by assignment or otherwise. I am therefore quite unable to understand upon what principle the pursuer as executrix of Dr Auld has any right or title to insist in the present action, so far as it is laid upon the assumed disability of the defender to retain for some time, as he did, the Humanity Chair in conjunction with his office of Principal.

The result is, that for the reasons I have now stated I am of opinion that the pursuer has failed to support her action on any of the grounds

libelled, and that the defender is entitled to absolvitor.

LORD GIFFORD—This case is now before us as a concluded cause upon the proof which has been led, and on the whole pleas of parties, which have been very fully and ably argued. The case involves several distinct questions, all of which are attended with nicety and difficulty, but on all of these questions, so far as necessary for the decision of the present case, I have formed a clear opinion in favour of the defender, Principal Shairp.

The case divides itself into two great branches.

1. The first question is, Whether Principal Shairp is liable in damages to the pursuer, Mrs Auld, for having, as the pursuer alleges, slandered the pursuer's husband, the late Dr Auld. The alleged slander is said to be contained in Principal Shairp's letter to the Duke of Portland, dated 17th March 1869. The pursuer also complains of Principal Shairp's letter to the Duke of Portland of 12th May 1869, but this last letter merely repeats part of the previous one, and substantially the statements complained of are those contained in the letter of 17th March 1869. The pursuer maintains that the statements in this letter relative to the late Dr Auld are false and calumnious, and operated to his loss, injury, and damage.

The alleged slander complained of consists of two particulars which may be shortly stated thus:—(1) A statement that Dr Auld was unfit to discharge the duties of Professor of Humanity in the United College, St. Andrews, and that he had notoriously failed to discharge efficiently the duties of classical master in the Madras College; and (2) that Dr Auld had made an improper use of testimonials which had been given him some years previously by the defender, and by some other Professors of St Andrews University.

The main defence relied upon by the defender in this branch of the case is that the defender in making the statements complained of was in a position of privilege, as Principal of the United Colleges of St Andrews, and that having made the statements in *bona fide*, and in the honest discharge of his duty, he is not liable in damages therefor. Although not on record, the plea of *veritas* was also suggested at the debate, and it seemed to be maintained that the statements in the letter of 17th March being in all respects true, there could be no damages awarded in respect therefor.

If the case had depended upon the plea of *veritas* I would not feel myself in a position to sustain it. I do not think that upon the closed proof now before us there is sufficient evidence to enable me to affirm, in point of fact, that the late Dr Auld was unfit to be Professor of Humanity in St Andrews University, or that he had notoriously failed as Classical Master in the Madras Institution, and still less would I be prepared to find, in point of fact, that Dr Auld had made an unfair or unjustifiable use of the old testimonials which he had received from the St Andrews Professors. The question of Dr Auld's fitness for the Professorship, and the question whether he had been successful in the Madras Institution, are to a large extent matters of opinion, as to which different persons might very fairly take different views. It is apparent that different views on these questions were held, and quite honestly held, by different parties as well as by different sections of the public of St Andrews interested in its educational prosperity, but I find

no sufficient evidence to enable me to say with any confidence which of the conflicting opinions was the right one, and accordingly I could not sustain the technical plea of *veritas conviciæ*.

But I think the main defence upon which Principal Shairp relies in this branch of the case is well founded. I think Principal Shairp was in a privileged position, entitling him honestly to express to the patron of the Humanity Chair his opinion as to the fitness or suitability of any of the candidates for that Chair. Principal Shairp admittedly held the office of Principal of the United Colleges. Whatever be his special duties as Principal, I cannot doubt that they include the general supervision of his branch of the University, and impose upon him the duty of doing what is in his power to secure its efficiency. Nothing can more closely touch the efficiency and prosperity of the University than the appointment of its Professors, and although the duty may be a most difficult and delicate one, requiring the greatest prudence and caution in its discharge, I cannot say that it is not fairly within the duty of the Principal to remonstrate in proper and fitting terms, and to the proper persons, against an appointment which he honestly thinks would be injurious or ruinous to the interests of the University. To this extent I am of opinion that Principal Shairp was in a privileged position, and this seems to me to be sufficient for the determination of this branch of the case.

To a certain extent every one who openly and avowedly becomes a candidate for a position like a public chair in a public University exposes himself to and invites fair and honest criticism, and if that criticism proceeds from proper quarters and does not exceed fair and reasonable limits, I think the candidate cannot complain although the criticism should be adverse or even severe, but it is not necessary in this case to consider any such general question of privilege, for surely if any person was privileged or called upon honestly to criticise or comment upon Dr Auld's claims, it was the Principal of the University in which Dr Auld was seeking a Chair. I say nothing of the delicacy of the Principal's position, or whether the case was such as to make his interference an absolute duty. Of this the Principal must I think be himself the judge, but this I do say, that if the Principal honestly believed that the proposed appointment would be hurtful or ruinous to the University, then it was his duty to remonstrate, and he will be protected by his privilege in an action for slander. I do not think it necessary to find how far this privilege extends. I incline to think it would extend to the other Professors and Members of the Senatus, all of whom have a very direct interest, and some of whom have a serious pecuniary interest, in the appointment of their colleagues. It is enough to say that this interest, this duty, and this privilege resides in the Principal.

Now if this be so, it follows that the Principal must be protected in an action for slander unless it can be established that he acted maliciously and in *mala fide*,—not in the honest discharge of what he believed to be his duty, but under the influence of personal and unjustifiable motives, and with an intention not to benefit the University but to injure the late Dr Auld. I think malice in cases like the present has this wide meaning, that it includes every motive except the honest and pure wish fairly and sincerely to discharge a duty.

Now the existence or absence of malice is

always a question for the Jury, and the Jury are entitled to take into consideration the whole circumstances of the case, and the whole actings of the defender, and to infer therefrom whether his conduct has not been such as to infer the presence of other than pure and upright motives. On this point I am of opinion, as a jurymen, that malice has not been established,—on the contrary, I think it sufficiently appears that Principal Shairp in what he did was actuated only by an honest desire to secure the welfare of the University and to avert what he honestly believed would be an injury or a misfortune. I do not judge of his actings according to canons of mere taste, but I think that his whole conduct shews an earnest and sincere belief that what he did was necessary for the University over which he presides. I abstain from entering upon detail. He was a personal friend of the late Dr Auld. He seems to have gone to him privately to induce him to withdraw his candidature. He addressed his remonstrances to the proper quarter, the Duke of Portland, and privately, without seeking to give needless publicity thereto. His opinions were shared by the great majority of the Senatus, the action of some of whom was even stronger than his own. I think his remonstrance was timely, for although the patron had intimated his intention to appoint Dr Auld, no appointment had been issued, and it was undoubtedly in the patron's power if he found sufficient reason to withhold the appointment and give it to another. If the appointment had been actually issued it might have been otherwise, for it would have been a strong proof of mere malice to express an opinion when it was too late and when there was no end to be served thereby. The pursuer founded strongly on the fact that the defender retained the Humanity Chair after having intimated resignation, and this as a proof of malice, apart altogether from her separate plea that such retention was illegal and wrongous. I do not think that this argument has much weight. It is proved that the defender retained the Chair at the express request of the Senatus with only two or three dissentient voices. He did so after communication with the patron, who left him at entire liberty to act as he thought right and apart from all questions of illegality. I am disposed to think that the defender's continuing to hold the Chair of Humanity in compliance with the earnest wish of the great majority of the Professors, and in circumstances open to misconstruction, is rather a proof of the Principal's strong and *bona fide* belief in the extreme inexpediency of the proposed appointment of Dr Auld. I cannot for a moment listen to the suggestion that the defender was actuated by unworthy or mercenary motives regarding the fees or emoluments connected with the Chair.

It was further urged for the pursuer that the defender's malice was proved by his having misrepresented to the patron the nature of the testimonials which he and the other Professors had granted to Dr Auld in 1860 and 1862. It is true that some of these testimonials appear to have been given not merely to enable Dr Auld to retain his situation in the Madras College, but with a view to his candidature for the Ayr Academy or other appointment. Principal Shairp seems to have overlooked this, and to have represented that they were merely given to save him from the threatened dismissal from the Madras College. But the real substance of the statement was that the testi-

monials were not intended to certify Dr Auld's fitness for a Professorial Chair, and this is undoubtedly true; and it appears to me that the mere inaccuracy in detail as to what had happened six years previously is no sufficient proof of the defender's malice, and not even an indication of the absence of *bona fides*.

On the issue of slander, therefore, in respect of the defender's privileged position, and that he acted in *bona fide* and without malice, I feel myself bound to find for the defender. I might add, in reference to the alleged damages resulting directly from the slander, that there is no proof of any direct damage. It is in evidence that Principal Shairp's letter had no effect on the mind of the Duke of Portland, to whom it was addressed. It did not alter the Duke's intention. The Duke himself expressly says so. He adhered to the last to his intention to appoint Dr Auld the moment the office should become vacant, and whether the defender acted illegally or not in retaining the office (which is a different question), it seems clear enough that the alleged slanderous letter had no effect *per se* in keeping Dr Auld out of the Professorship, and this brings me to the second branch of the case.

2. The second ground of action on which the pursuer relies is that the defender acted illegally, and to Dr Auld's loss, injury, and damage, in retaining the Humanity Chair after having intimated his intention to resign it as at 15th May 1869. This branch of the action involves several distinct and difficult questions, apart altogether from its bearing on the question of malice, to which I have already adverted.

In the first place, I am of opinion that neither the late Dr Auld up to the time of his death, nor the pursuer, as his widow and executrix, ever had any title to challenge the illegality of Principal Shairp's retention of the Humanity Chair, or to claim damages therefor.

The late Dr Auld never was appointed Professor of Humanity. The presentation was never issued or delivered. All that Dr Auld had or could have was an intimation of the patron's intention to appoint him to the Chair, an intention which, while it never varied and was never altered on the part of the patron, was yet never carried into effect. Dr Auld, so far as that Chair was concerned, was never more than one of the general public, with expectations certainly, but with no more rights than any citizen of the country. A hoped for or expected appointment will not give a title to sue. Suppose, then, that Principal Shairp had never written to the Duke of Portland at all, and had never been in communication either with the patron or his agents, would this action have lain—would the present branch of it have been competent either at the instance of Dr Auld or of his widow? I think not. The abstract legality or illegality of Principal Shairp's conduct might have been raised by the patron, by the Crown, by the Senatus or its members, and perhaps by any member of the University, or by others, but not by any mere member of the community, and not by Dr Auld unless he had actually obtained a presentation, and certainly without such presentation Dr Auld, even supposing that he could have tried the question, could never have claimed damages.

But, in the second place, I am not prepared to affirm in point of law the absolute illegality in Principal Shairp continuing after his induction as Principal

to hold the Chair of Humanity. It is plain that in certain circumstances he might do so after becoming Principal. For example, in this very case, when appointed Principal in the middle of a session, it was hardly disputed that he might fairly and rightly continue Professor of Humanity till the close of the Session. Any other course would have been unfair to the University, and unjust to the students of the class.

In like manner, it might often happen that circumstances might render expedient even a more prolonged tenure of the Chair by a Principal or by an occupant who had been promoted to the Principalship. It is rather a question of expediency than of absolute illegality, and if all interested concur or acquiesce in a temporary union of the two offices I see no absolute illegality which would prevent such temporary arrangement. In this case there was, if not a virtual acquiescence and concurrence, at least an absence of any challenge on the part of all concerned, that is, neither the Crown, nor the patron, nor the Senatus, nor the University Court, nor any other party interested, intervened or complained of the illegality of the course taken.

On the general abstract question whether a Principal holding that office for life might not also hold for life the Chair of Humanity, I would rather decline giving any opinion. Such unions are not unknown in other Universities, although in general I should think they are not expedient. Something might depend on the terms of each appointment, and on the concurrence of the Crown, the patrons, and the authorities of the University. It is sufficient for the present case—if, indeed, it is even necessary to go so far—to find that there was no absolute illegality in the unchallenged arrangement of a temporary and precarious character which took place in the present case.

On the second branch of the case, also, I think the defender is entitled to absolvitor.

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Counsel for Mrs Auld—Solicitor-General (Watson) and Smith. Agent—Thomas Spalding, W.S.

July 14, 1876.

FIRST DIVISION.

A. V. B.

Process—Seduction—Damages—Diligence to recover defender's books.

A. raised an action of damages for seduction against B., and in the course thereof moved for a diligence to recover (1) the books of the defender; (2) The books of a railway company to which B. acted in the capacity of a carrier, the object being to show the amount of his income—held that in an action of damages for seduction such a diligence could not be competently granted, and motion refused.