of profit; in respect of surplus capital, any partner putting surplus capital in was to receive 6 per cent. of interest out of the first readiest funds of the profits of the company. So far as surplus capital was concerned, the partner became as it were creditor of his fellow partners for that amount, and was to get interest upon it.

In striking the balance it appears to be perfectly clear that this property was put in, and put in at a valuation, because having been so put in each of the Messrs Smith's capital is fixed at a certain sum, and that sum was not only equal to what they would require to give—their stipulated capital—but it was a sum which left a surplus capital. The only way in which you can reach a surplus capital—that is to say, money or shares in that business which was to bear 6 per cent.—was, as the Solicitor-General pointed out, by putting in the property which was to be taken at that valuation, and which being taken at that value made them creditors for so much money—having right to so much money which should bear interest at that rate; and accordingly I think that that being the true nature of the arrangement, puts it beyond question that the company took the property at the valuation at which it stood in their balance. I think that is made even clearer, if it were necessary to say so, by article 7, and upon pressing the language of that article upon the Lord Advocate in his argument, the only way in which he could escape from its direct effects was by adding words which made it conditional in its operation, there being nothing in the article to suggest a condition from beginning to end. That being so, I think there is an end of the question between the parties. The heritable property is the property of this firm, though vested, no doubt, by the title in the two Messrs Smith of this firm. The moveable property is admitted to be the property of the firm, and therefore this diligence is a competent diligence in such circumstances. If it were necessary to go into the question as to whether the new firm, of which Mr Macleod is a partner, became liable for the debt due to these petitioners, I have no doubt whatever they became liable for that debt but that is not necessary in order to entitle the pursuers to use this diligence.

There is no necessity for sending this case back for proof—it being in this Court we are in a position to dispose of it. As Lord Deas has remarked, the appellants have gained no advantage, but on the contrary have apparently been subjected to a disadvantage, by appealing; but I dare say it is satisfactory to all the parties that they have the question between them shortly and quickly settled, and at the least expense, in this way, instead of having been sent back to have a proof, and after the expense of a proof finding that this is the result after all. I have no doubt as a result of the case that we ought to repel the defences and grant the prayer of the petition.

The Court repelled the defences and granted warrant to poind in terms of the prayer of the petition.

Counsel for Appellants — Lord Advocate (Balfour, Q.C.)—Trayner—Strachan. Agents—Mack & Grant, S.S.C.

Counsel for Respondents — Solicitor-General (Asher, Q.C.)—Jameson. Agents—J. & J. Ross, W.S.

Saturday, January 27.

FIRST DIVISION.

[Lord Lee, Ordinary.

MACKAY *v.* M'CANKIE.

Process — Jury Trial — Reparation — Slander — Verbal Slander.

Held that as an action of damages for slander may be raised to recover *solatium* for wounded feelings, (1) averments of alleged slanderous statements contained in a letter addressed to the pursuer himself, and (2) averments of slanderous expressions said to have been used to the pursuer, but not said to have been uttered in the presence of third parties, will entitle the pursuer to an issue.

Relevancy—Innuendo.

A creditor on a promissory-note given as security for a debt payable by instalments, wrote to the debtor, after payment of one instalment was due and unpaid, stating that another person whose name was on the note along with that of the debtor had repudiated it, and that unless the full amount was paid next day he should think it necessary to hand the case to the procurator-fiscal. *Held*, in an action of damages for slander raised by the debtor, that this letter was reasonably capable of the innuendo that it charged the pursuer with forging and utteringthe note, or with some other crime which should be brought under the notice of the criminal authorities, and issue *granted* for the trial of the question.

John Mackay, writer, Edinburgh, raised this action of damages against James M'Cankie, accountant, Edinburgh, concluding for £200 as damages and *solatium* said to have been caused by slanderous statements made by the defender verbally and in writing. It appeared from the averments of the pursuer and the defender's admissions that the pursuer had upon different occasions borrowed money from the defender, and that upon the 12th July 1882 he obtained a loan of £12. The pursuer averred that he gave as security a promissory-note subscribed by himself and by a firm of Low & Company and Mr Francis Low, sole partner thereof, the loan being repayable in three instalments of one, two, and three months from date, and £2 being deducted as discount or interest; that on 14th August following, the first instalment having become due, and application having been made by the defender for payment, he intimated that payment would be made in the course of a day or two; that on the 18th August the defender wrote to him this letter, which contained the written slander complained of:—"The promissory-note handed by you to me, signed by yourself, Low & Co., and Francis Low, was presented to-day to Mr Low for payment of the instalment now past due. He repudiates all knowledge of the said note, and I have therefore to inform you that unless the full amount of the promissory-note is now paid to me before 11 o'clock to-morrow (Saturday), I shall consider it necessary to hand the case in to the Procurator-Fiscal.—Your obedient servant, JAS. M'CANKIE."

The innuendo placed by the pursuer upon this letter was as follows:—"(Cond. 3) The statements in the said letter are of and concerning the pursuer, and falsely and calumniously, maliciously, and

without probable cause, accuse the pursuer of having forged, or at least mean or imply that the pursuer had forged, the subscription of the said firm of Low & Company, and Francis Low, adhibited to the promissory-note therein referred to, being the promissory-note given for the loan of £12 made by the defender to the pursuer in July last; or otherwise the said statements falsely and calumniously, and maliciously and without probable cause, accuse the pursuer of having, or mean and imply that he had, committed the crime of uttering a forged document knowing it to be forged, or some other criminal offence in connection with the promissory-note last mentioned, which could be brought under the cognisance of the Procurator-Fiscal."

The pursuer went on to aver that Low had not repudiated the signature said to be his, and that on the contrary he had written to the defender stating that he had never done so.

He further averred that on the day following the date of this letter the defender called on him at his office, and in violent and threatening language demanded payment of the entire loan, though only one instalment was then exigible, "and then and there accused the pursuer of having forged the subscription of Low & Co., and of Francis Low, which were appended to the promissory-note. Upon this occasion the defender called the pursuer a forger, and stated that he would at once charge him with the crime of forgery to the Procurator-Fiscal."

The pursuer pleaded, *inter alia*—"(2) The defender having accused the pursuer of a crime falsely and calumniously, maliciously and without probable cause, is liable in damages as concluded for."

The defender admitted the writing of the letter, and explained that it referred to what passed at a meeting between one of his clerks and Low, and averred that Low had at that meeting repudiated the promissory-note. He denied having slandered the pursuer at the meeting in the pursuer's office, and stated that he had called there with the object of getting payment of the instalment then due.

He pleaded, *inter alia*, that the pursuer's averments were not relevant or sufficient to support the conclusions of the summons.

The Lord Ordinary (Lee) approved of the following issues for the trial of the cause:—"(1) Whether the defender wrote and sent to the pursuer a letter in the terms contained in the schedule hereto annexed, and whether said letter is of and concerning the pursuer, and falsely and calumniously represents that he has been guilty of forgery or uttering, to the loss, injury, and damage of the pursuer? (2) Whether, on or about 19th August 1882, the defender, in or near Thistle Court, Edinburgh, falsely and calumniously stated to the pursuer that he the pursuer was a forger, and that he would charge him with the crime of forgery to the Procurator-Fiscal; or did use words of similar import or effect, to the pursuer's loss, injury, and damage?—Damages laid at £200."

The letter referred to in the first issue was that quoted *supra*.

"*Note.*—With regard to the first issue, it appears to me that the letter referred to is capable in its natural meaning of supporting the innuendo put upon it by the pursuer. It is not a mere intimation of the fact that Mr Low repudiated the signature purporting to be his, and that the defender considered it necessary to place the matter in the hands of the Procurator-Fiscal. But it is a demand for payment of the full amount (although only one instalment was due), coupled with an intimation that unless this demand is complied with 'I shall consider it necessary to hand the case in to the Procurator-Fiscal.' It represents the pursuer as having an interest to avoid this; and it does not represent the writer as thinking it necessary to take that step in the interests of public justice. Had that been his view, he would have given information whether the promissory-note should be paid next day or not. I think that the principle stated in the case of *Brydone* v. *Brechin* (8 R. 697) does not exclude the innuendo put upon the letter in this case, and that the pursuer is entitled to an opportunity of establishing if he can that that innuendo was conveyed. The case of the *Capital and Counties Bank* (*Limited*), 1st August 1882, 7 App. Ca. 741, seems to me to be in no way inconsistent with this view."

The defender reclaimed, and argued—As to the first issue:—The letter was not written to a third party, but to the pursuer himself. In these circumstances it could not found an action of damages. Besides, the letter would not support the innuendo which the pursuer put upon it. The occasion was privileged; the words "maliciously and without probable cause" should be inserted.—*Kennedy* v. *Baillie*, Dec. 4, 1855, 18 D. 138; *Broomfield* v. *Greig*, July 7, 1868, 6 Macph. 992. As to second issue:—The alleged verbal slander was not said to have been uttered in the presence of anyone; if not, it was not slander, and therefore no issue should be allowed.

Argued for respondent on the first issue—Nothing had been admitted by the pursuer letting in privilege; the question therefore came to be, Was the innuendo admissible? The statement in this letter was an accusation of forgery and nothing less; and it contained a threat that proceedings of a criminal kind would be taken if a sum was not paid by a certain time. On the second issue:—The slander was relevant matter for an issue though uttered to no one but the person interested. Injury to one's feelings was quite actionable although no one was present but the person interested. Slander in a writing sent only to the person slandered was actionable, because that person's feelings were injured, and there was no difference in principle between written and spoken slander.—Borthwick on Slander; *Hutchison*, M. "Delict;" *M'Bride* v. *Williams and Dalzell*, Jan. 28, 1869, 7 Macph. 427.

At advising—

Lord President—The first question which we have to determine appears to me to be, whether the letter of 18th August 1882, addressed by the defender to the pursuer, contains any actionable words? Now, I do not think that it can be maintained that there are any words or expressions of an actionable character in that letter, and this brings us to the consideration of the next point, which is, whether the innuendo proposed to be put upon these words by the pursuer is reasonable in itself, and not inconsistent with the words which have been used, and the meaning which would naturally be put upon them? I am inclined to

think that the innuendo is reasonable to this extent at least, that the whole question is a fair one for the consideration of a jury.

The defender maintains that as the letter in question was sent to the pursuer personally, and not to a third party, it cannot be made use of to found an action of damages. But it is settled in the law of Scotland that an action of damages may be laid for *solatium*, which fairly meets the objection that the letter in question was not addressed to a third party. On that account therefore I think that the defender's contention is unsound.

It is quite possible that a case of privilege may be made out, but if such a case exists it does not arise on the present record. If the signature to the promissory-note should not turn out to be that of Mr Low, but a forgery, that circumstance might, no doubt, raise a case of privilege. But the case of *M'Bride* v. *Williams and Dalzell*, reported in 7 Macph. 427, decided conclusively that when in the course of the trial a case of privilege was made out, the pursuer should be allowed to rebut this by leading evidence of malice, if he had any, although the word "maliciously" was not inserted in the issue.

I am therefore for approving of the first issue.

The second issue seems to me to depend upon the same principle as the first, for the law which allows a party to recover damages for slander contained in letters addressed to himself also allows verbal statements made to him personally to found an action of damages.

LORD DEAS and LORD MURE concurred.

LORD SHAND—The pursuer has not given us any account of what took place when the promissory-note was presented for payment. According to the defender, Low repudiated his signature, and the bill was then protested for non-payment. Had the pursuer admitted this repudiation by Low, which, on the contrary, he denies, and avers that he is able to prove by documentary evidence that no such repudiation took place, then I must say that I should have felt considerable hesitation in allowing this first issue, but looking to the state of the facts as maintained by the pursuer, I agree with your Lordships in thinking that it ought to be allowed. In the case when a person gets a bill returned to him which has been repudiated by the party whose signature it ostensibly bears, it certainly is better to allow of explanations being given before putting the matter into the hands of the procurator-fiscal.

Had the fact which is here averred by the defender—Low's alleged repudiation of his signature—been admitted by the pursuer, a question would have arisen whether "malice and want of probable cause" would not require to have been proved; and the question of privilege in business would then have arisen. In these circumstances I should then have held that privilege had been proved, and would have required the pursuer to prove malice and want of probable cause.

I am of opinion with your Lordships that both issues should be allowed.

The Court altered the first issue by adding after the word "forgery" the words "or of uttering a document as genuine knowing it to be forged." *Quoad ultra* the Court adhered to the interlocutor of the Lord Ordinary, and approved of the issues as adjusted by him.

Counsel for Pursuer — J. Campbell Smith. Agent—William Officer, S.S.C.

Counsel for Defender—Guthrie Smith—Young. Agent—James Philip, L.A.

Saturday, January 27.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

SIMSON AND OTHERS, PETITIONERS.

Nobile Officium — *Trust* — Delectus personæ — *Judicial Factor—Special Powers.*

A testator by his trust-disposition and settlement conveyed his estate in trust to certain parties named or to be named, or who should be assumed into the trust, and the acceptors or acceptor, survivors and last survivor of them, whom all failing, then to the nearest heir-male of the last accepting and surviving trustee, and the assignees of the trustees. The trustees were directed to invest £4000 for the liferent use allenarly of one of the truster's sons, with power, if they should think it advisable, to pay over to him the whole or any part of the principal. The trustees having resigned, a judicial factor was appointed. The Court, on the application of the liferenter of this sum, and the parties presumptively intended to succeed to him, *granted* power to the judicial factor to invest £1000 in the purchase of an annuity for the liferenter.

By trust-disposition and settlement executed by David Simson senior, tenant of Oxnam Row, in the county of Roxburgh, and Mrs Elizabeth Rutherford or Simson, his wife, dated 15th and 18th September 1863, and registered in the Books of Council and Session 29th April 1865, David Simson gave, granted, assigned, and disponed to and in favour of Mrs Elizabeth Rutherford or Simson, his wife, George Simson and James Simson, his sons, John Somerville Johnston and John Beveridge, his sons-in-law, "and to such other person or persons as he should thereafter name or should be assumed in terms of law to act in the trust thereby created, and to the acceptors or acceptor, survivors and last survivor of persons thereby named or to be named or assumed as aforesaid, as trustees for executing the trust thereby created, whom all failing, then to the nearest heir-male of the last accepting and surviving trustee who should be major at the time, and the assignees of his said trustees," heritably and irredeemably, his whole heritable and moveable property, with the exception of a certain lease therein named, in trust for certain purposes.

By the sixth purpose of the trust-settlement it was provided that the trustees should invest £4000 for behoof of David Simson junior, a son of the truster, in liferent, for his liferent use allenarly, and of his lawful issue in fee, with a power of appointment to David Simson, and it was declared that the provision was to be alimentary.