and regarding the said fire. By these paragraphs, and by the representations thereby conveyed to the public, the pursuer's feelings have been deeply injured, and his reputation and business position have also been, and may still further be, very injuriously affected, to his serious loss and damage. The works, &c., under his charge may have increased rates to pay for insurance, or insurance companies may decline such risks altogether, in consequence of the said articles, and so cause the pursuer to lose his occupation, or at all events materially injure his position."

To which the defenders answered—"Denied. The defenders entirely repudiate the construction which the pursuer seeks to place upon the notices referred to."

The pursuer pleaded—"(2) The defenders having falsely and calumniously accused the pursuer of committing, or endeavouring to commit, the crimes or offences libelled, the latter is entitled to solatium and reparation therefor. (3) The articles complained of by the pursuer having been published in regard to him by the defenders, and intended and understood to bear the actionable meaning put upon them by the pursuer in his condescendence, he is entitled to solatium and reparation therefor from the defenders."

The Sheriff-Substitute (GUTHRIE) allowed a proof before answer.

"*Note.*—I cannot say that it would be clearly unreasonable and unnatural for a jury to find that the innuendos here stated are implied in the report in the defenders' newspapers. That was the only point argued."

The pursuer appealed to the First Division of the Court of Session, and proposed the following issues for the trial of the case:—"(1) Whether the said articles, or part thereof, are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer? (2) Whether the said articles, or part thereof, are of and concerning the pursuer, and falsely and calumniously represent that he, being the manager of Thomas Hyland & Company's works in Ayr, had endeavoured to prevent the fire at the said works referred to in the said articles from being subdued, to the loss, injury, and damage of the pursuer?"

The appellant argued—The article was obviously enough calumnious, if false, without the addition of any innuendo. The first issue should therefore be allowed—*Mackay* v. *Wicks*, March 6, 1886, 13 R. 732. As to the second issue, the article could bear the innuendo put upon it, and when so innuendoed was undoubtedly slanderous.

The respondent argued—The article was not necessarily libellous at all, and therefore the first issue should be disallowed. With regard to the second issue, the innuendo sought to be put on the article was strained and unnatural. "Singular conduct" was not a libellous expression, especially as the article represented the pursuer as giving a perfectly proper reason for his conduct, viz., "that they could manage the fire by themselves." At all events the issue as it stood was ambiguous, as it was not calumnious to say that the pursuer had endeavoured to prevent the fire from being subdued.

The second issue having been amended at the bar by the addition after the word "subdued" of the words, "so as to cause the destruction of said works and stock therein," the Court pronounced this interlocutor:—

"Disallow the first issue: Approve of the second issue as amended at the bar, and appoint the same to be the issue for trial of the case."

Counsel for the Pursuer—Comrie Thomson—Dickson. Agents—Gill & Pringle, W.S.

Counsel for the Defender—Graham Murray. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, December 4.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

ROSS *v.* COWIE.

Prescription—Triennial Prescription—Continuous Account.

A joiner sued the executrix of a person deceased for payment of an account extending over many years, and which *ex facie* was capable of division into three parts—(1) a portion for jobbing work; (2) a portion said to have been incurred for work and materials supplied in a building contract; (3) a portion consisting of a few small items for jobbing during the last seven years of the deceased's life. The whole was charged as a continuous account. *Held*, in a question whether it or part of it was prescribed, that it must all be treated as a continuous account, and that the executrix was not entitled to treat the first and second portions as running a separate period of prescription.

Process — Triennial Prescription—Proof before Answer.

In an action upon a joiner's account, the defender averred that two small items, at the interval of a year from each other, had been inserted merely to prevent the account from prescribing, and were not properly due by him for work done on his behalf. Proof before answer of this averment *allowed*.

This was an action by John Ross, joiner, Stonehaven, against Mrs Jane Cowie, executrix-dative *qua* relict of Alexander Cowie, sometime feuar there, for a sum of £379, 4s. 6½d. as the balance of an unpaid account for joiner work done on behalf of the deceased Alexander Cowie.

Cowie died on 25th September 1887.

The pursuer's account bore to begin at June 1875, and end at 4th May 1886. It was made up in the following manner—Under date June 1875 were sums amounting in all to £23, 2s. 6d. for jobbing work in a house in Stonehaven belonging to Cowie. From 22nd June 1876 to 28th May 1877 were entered sums amounting to £350, 19s. 3½d. for timber supplied, and for workmen's time at certain concrete houses in Stonehaven which Cowie had erected. Included in this account were two sums—one of £50, said in the account to have been paid on 22nd June 1876 to John Lindsay & Son, Montrose, being first instalment for concrete work, the other, £29, in the account said to have

been paid to James Garvie & Sons for doors supplied by them. The whole entries subsequent to 28th May 1879 amounted in all to £3, 9s. 7d., made up of small jobbing items said to have been incurred in 1879, 1881, 1883, 1884, 1885, and 1886. They were all small jobbing entries. The last two items in the account were—August 15, 1885, To new pail and handle, 3s. 9d.; May 4, 1886, To attendance at sale of furniture, 2s. 6d. The pursuer gave credit for £100, £20, and £30, said to have been paid to account.

The defender averred—"(Stat. 2) The items of the account libelled under date June 1876, amounting to £350, 17s. 3½d., have reference to work on two concrete houses in Ann Street, Stonehaven, erected by the said Alexander Cowie. These houses were erected at a cost of upwards of £1000, and the work performed on them by the pursuer was not of the nature of a jobbing or running account, and is entirely different in its character from the few small subsequent items which are of a regular jobbing nature. It is usual and customary for such work to be done under contract, and to be settled for whether done under contract or otherwise on its completion, and the whole other departments of the work except the joiner work were contracted for. The account prior to and under date June 1876, amounting in whole to £373, 19s. 9½d. falls to be treated as a separate and independent account from the subsequent items, and the pursuer has himself so treated it by charging interest on it separately to the extent of £131, 15s. 2d., and the account prior to and under date June 1876 is not a continuous or running account with the few small items amounting in the next ten years only to £3, 9s. 7d., and the account prior to and under date June 1876 falls by itself under the triennial prescription and is prescribed. It is not known and not admitted that the £100 here referred to were paid in the manner stated. Admitted that no formal contract was entered into for the execution of the work, and *quoad ultra* the counter averments are denied." He also averred that the last two items of the account were not due and resting-owing, and had been inserted with a view to obviate the plea of prescription.

The defender pleaded, *inter alia*—"(1) The whole account, or at least that part of it prior to and under date June 1876, is liable to and has suffered the triennial prescription, and can be proved only by the writ or oath of the defender."

The Sheriff-Substitute (Dove Wilson) on 20th February 1888 pronounced this interlocutor:—"Finds that the portion of the account libelled, which is said to have been incurred prior to 23rd May 1879, can be proved only by the writ or oath of the defender, and appoints the cause to be enrolled for further precedure.

"*Note.*—The earlier portions of the account for which the action has been brought are unquestionably prescribed, unless it can be made out that the later portions are mere continuations of them. It appears to me, however, that the later portions are of quite a different character, and that it would be a mere evasion of the prescription statutes to say that they were done under the same employment as the earlier. The later portions of the account are for trifling bits of jobbing work of a few shillings each, such as one might order from the nearest carpenter without anything in the shape of contract or arrangement. The middle portion of the account—that incurred in 1876 and 1877—was for the building of two houses at a cost of some £350, which undoubtedly had been the subject of special contract and arrangement; and it seems to me that it is not possible to speak of the account for the trifling repairs and supplies as being a continuation of the employment to build. The first portion of the account—that incurred in June 1875—has more analogy with the last portions, but it is separated from them by an interval of more than three years, as well as by the house building contract.

"The defender treats the account for building the houses as falling under the triennial prescription. I should rather myself have thought that it fell under the quinquennial, but whether it fell under the one or under the other it seems to me to have no sort of connection with the other portions of the account, and if this view be sound it is plain that it can be proved only by writ or oath.

"There are two large items in the account, one of £50 and one of £29, which apparently are claimed as having been cash advances on behalf of the defender's author. If they were they would be equivalent to loans to him, and are therefore also proveable by writ or oath only. I may add that it would appear to me to be exceedingly unfortunate were any other result to be reached. The defender's husband, who knew all about the work, is dead, and the defender at an interval of ten years from the conclusion of the transactions would necessarily be quite unable to obtain materials for her defence."

The Sheriff (Guthrie Smith) affirmed this interlocutor, "with this qualification, that the pursuer is at liberty to re-form the account by excerpting the payment of £50 to Laidlaw & Sons, and £29 to Garvie & Son, and any other disbursements made by him on behalf of the deceased Alexander Cowie; further, in respect it appears that two sums of £30 and £20 were received in loan from the deceased by the pursuer; . . . . appoints the parties, with a view to a proof on these points, to amend respectively the revised condescendence and revised defences."

Proof *prout de jure* was then allowed on the points specified in the interlocutor of the Sheriff.

The pursuer appealed to the Court of Session, and argued—The defender's plea of prescription should be repelled—*Aytoun* v. *Stoddart*, Feb. 4, 1882, 9 R. 631; Ersk. iii. 7, 17; *North British Railway Company* v. *Smith Sligo*, Dec. 30, 1873, 1 R. 309; *Whyte* v. *Currie*, Dec. 1, 1829, 8 S. 154; *Wotherspoon* v. *Henderson's Trustees*, July 10, 1868, 6 Macph. 1052; *Vallance* v. *Forbes*, June 27, 1879, 6 R. 1099; *Fisher* v. *Ure*, March 5, 1836, 14 S. 660. The averments as to £50 and £29 were not, as the Sheriff-Substitute thought, allegations of loan; they were averments that the pursuer, by mandate from the deceased, had advanced money for him. That could be proved by parole—*Grant* v. *Fleming*, December 10, 1881, 9 R. 257.

The respondent argued—The quinquennial prescription applied to the second part of the account. It applied to bargains about moveables, and was entirely applicable to such a case. Triennial prescription applied to the various parts of

the account separately. They were separate accounts. It could not be said that there was here any formal contract for the erection of these contract houses, and no written contract was produced, but it was a separate piece of business performed upon a separate subject from that sued for in the other parts of the account, and fell under the quinquennial prescription. The continuity of the account was broken—*Wotherspoon, supra cit.; Stewart* v. *Scott*, February 28, 1844, 6 D. 889; Bell's Prin. 629; Ersk. iii. 7, 20.

At advising—

Lord Lee—This is an action for payment of a joiner's account, commencing in June 1875, and purporting to be continued subsequent to May 1877 by sundry charges for work done and materials supplied in May 1879, in September 1881, in March 1883, in July 1884, in August 1885, and in May 1886.

The Sheriff-Substitute and the Sheriff have held that the whole account prior to 23rd May 1879 is subject to the triennial prescription, and upon the ground that the charges subsequent to June 1875 must have been the subject of special contract and arrangement, in which view there would be a period of more than three years between the charges in 1875 and the later portion of the account.

I think that the account cannot be so dealt with upon the record as it stands. There is nothing in the character of the account for June 1876 and for the period from 9th August 1876 to 28th May 1877 which is at all inconsistent with the pursuer's allegation that it was incurred for work done and materials supplied by the pursuer in the ordinary course of his business, and upon what he calls a running account. The joiner work upon the buildings referred to is not alleged to have been done under any special contract. Both the work and the materials are charged in detail according to time and price. I therefore think that the Sheriff-Substitute's interlocutor of 20th February, and also the interlocutors of the Sheriff proceeding upon the same view of the account, must be recalled.

There is, however, another view in which the account is said to be prescribed. It is pointed out that if the items charged on 15th August 1885—"to new pail and handle, 3s. 9d."—and 4th May 1886—"attendance at a sale of furniture, 2s. 6d."—should be struck out, prescription has run. For the action was not raised for more than three years after the preceding items under date July 1884.

It is alleged by the defender that these two last items are not due, and have been inserted with the view of obviating the plea of prescription. This raises a point which was referred to by Lord Neaves in the case of *Wotherspoon*, 6 Macph. 1052, and I think that the course there suggested should in substance be followed by allowing the parties a proof before answer as to these items. I think this proof must be taken before the plea of prescription is disposed of.

Another question is raised as to two entries in the account charging sums of £50 and £29, as paid to other tradesmen by the pursuer on behalf of the defender for work done by them upon the buildings on which the pursuer was employed to do the joiner work, and prepare the plans and specifications.

The pursuer produces receipts for these sums as paid by him, and I think that there is authority for holding that parole proof is competent on the question whether the disbursements, so instructed, were made upon the authority of the deceased as a customer of the pursuer—*Annand's Trustees*, 7 Macph. 526; *Grant* v. *Fleming*, 9 R. 257.

On these grounds I think that we should recal the interlocutor of 20th February 1888, and whole subsequent interlocutors, and remit to the Sheriff to allow the parties before answer a proof of their averments on record as to the last two items charged in the account, and thereafter to proceed in the cause as may be just.

Lord Rutherfurd Clark and the Lord Justice-Clerk concurred.

The Court allowed a proof before answer as to the averment contained in the defender's fourth statement regarding the two last items of the account.

Counsel for the Pursuer—Comrie Thomson—Rhind. Agent—William Officer, S.S.C.

Counsel for the Defender — Gloag — Sym. Agent—William B. Rainnie, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, December 7.

(Before the Lord Justice-Clerk, Lord Rutherfurd Clark, Land ord Lee.)

M'FARLANE (P.-F. OF SHERIFF COURT AT DUNFERMLINE) *v.* BIRRELL.

Justiciary Cases—Truck Act (1 *and* 2 *Will. IV. cap.* 37), *secs.* 2 *and* 23—*Deduction from Wages for House Rent.*

Section 2 of the Truck Act (1 and 2 Will. IV. cap. 37) prohibits any contract between an employer and an artificer, by which provision is made for the expenditure of wages due to the latter.

Section 23 provides "that nothing herein contained shall extend, or be construed to extend, to prevent any employer . . . from demising to any artificer, &c., the whole or any part of any tenement at any rent to be thereon reserved . . . nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent: . . . Provided always, that such stoppage or deduction . . . shall not be in any case made from the wages of such artificer unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer."

A workman was employed by a coal company, and occupied a house belonging to them upon the conditions specified in certain regulations issued by the company, which provided, *inter alia*, that "all houses,