LORD RUTHERFURD CLARK — Mrs Mackenzie claimed her legal rights and repudiated the provisions made for her by her father's trust-disposition and settlement. It is clear that in consequence she forfeited not only her personal provisions, but also the provisions made for her heirs and successors. In coming to that result I proceed entirely upon the deed itself, and I can read the clause in the deed as meaning nothing else than that repudiation of the provisions made for any of the daughters should lead to the forfeiture of the provisions to that extent. I do not proceed upon the cases of *Fisher* v. *Dixon*, and the other cases cited to us, because I think even if they were applicable they would not necessarily be conclusive the other way, while I think the words of the deed are conclusive as to the view I have expressed.

As respects the share of the estate which becomes free by the forfeiture of Mrs Mackenzie in view of her repudiation of her legal rights, I have great doubts whether Lord Lee's construction of the codicil is the right one according to a sound construction of the deed. On the contrary, I think the effect of the codicil is to restrict the interest of James Campbell to an alimentary liferent only. I do not think the deed can bear any other interpretation.

As regards the next question, what would become of the fee of the sum which in my opinion is liferented by Campbell, whether it falls into residue or into intestate succession? I desire to exercise my privilege and not express an opinion at all, as I do not think it necessary to do so in view of the opinion your Lordships hold of the primary right.

LORD JUSTICE-CLERK—I think it is quite plain that if Mrs Mackenzie chose to repudiate the provisions made for her in the will and claim her legal rights, she has thereby forfeited all claims under her father's settlement, both as regards herself and also as regards her children. It is clearly laid down in the settlement—"In the event of any of my children creating any dispute in regard to these presents, the child so acting shall forfeit all claims competent to him or her under the same." That is a plain declaration that by her repudiation the fee of her share is absolutely taken away from her and from her heirs.

On the other question I have come to be of the same opinion as Lord Lee. I think if we read the will and the codicil together they do not import a deprivation of the son James of the share coming to him through Mrs Mackenzie's repudiation of the provisions made for her. By the will the trustees were directed to pay over to James Campbell the sum of £2000, and the alteration in the codicil is to the effect that instead of paying over that sum they are to retain the capital and pay him the interest. There is a confusing direction at the end of the codicil, no doubt—"And at his death I appoint my trustees to pay and make over the said sum of £2000 stg. to his heirs and representatives whomsoever." But I do not think that that interferes with our opinion as to where the fee of Mrs Mackenzie's share is to go after her repudiation. There is no direction in the codicil except this, that if any sum should come to him from the repudiation of the provisions by any one of the children, the trustees are to retain the sum in their hands, and pay him the interest annually. Consistently with the case of *Christie's Trustees*, which we decided a short time ago, there may be a fee in a person, although the sum may remain in the hands of trustees, who can only pay him over the interest annually. I take it that this case is ruled by that of *Christie's Trustees*. The questions will be answered as provided in Lord Lee's opinion.

The Court pronounced this interlocutor:—

"Answer the first of the questions therein stated in the negative; and with reference to the third question, are of opinion that the second party is entitled to the fee of the half of the residue forfeited by Mrs Mackenzie, subject to the directions contained in the codicil of 5th July 1884; and that the first parties are bound to hold the other half of the residue so forfeited for behoof of the fourth party in liferent, and her heirs in fee," &c.

Counsel for the First and Second Parties—G. R. Gillespie. Agents—Dundas & Wilson, W.S.

Counsel for the Third and Fifth Parties—Sir C. Pearson—Dundas. Agents—W. B. Wilson, W.S.

Counsel for the Fourth and Sixth Parties—Gloag—Boyd. Agents—J. Pringle Taylor, W.S.

Wednesday, July 17.

SECOND DIVISION.

[Lord Trayner, Ordinary.

SHIELLS *v.* THE SCOTTISH ASSURANCE CORPORATION (LIMITED).

Insurance—Condition in Policy—Act 44 *and* 45 *Vict. cap.* 62.

The owner of a Clydesdale stallion insured it "against death from natural disease or accident." By the conditions annexed in the policy it was stipulated that in case of the death of any animal notice in writing should be sent to the office of the insurance company within twelve hours of the death, either accompanied by or followed within a reasonable time by a full report in writing from a qualified veterinary surgeon, and that as soon as might be thereafter a claim should be given in with particulars of the loss, and the report of a qualified veterinary surgeon. Notice to an agent of the company was not to be a sufficient compliance with this condition. The horse was found at 7 o'clock on a Saturday morning suffering from a compound comminuted fracture of a foreleg, and was destroyed on the advice of a veterinary surgeon, who was not, however, registered as such under the Act 44 and 45 Vict. cap. 62. The same afternoon the owner telegraphed to the local agent of the company that the horse had broken its leg and had been condemned by a veterinary surgeon. This telegram was handed to the manager of the company the same night.

On Monday the veterinary surgeon sent a certificate to the company that the horse had been destroyed by his orders, and on the same day the manager of the company telegraphed to the owner of the horse "if horse killed without written consent, company no liability."

In an action by the owner against the company to recover the insurance money—*held* (Lord Rutherfurd Clark *dub.*) that the defenders were liable, in respect (1) that the injuries sustained by the horse necessitated its immediate destruction; (2) that the pursuer had sufficiently complied with the conditions in the policy as to giving notice; and (3) that the company were barred from raising any objections on the ground of defects in the subsequent procedure required by the policy, these having been caused by the position assumed by the company in repudiating all liability.

Opinion (*per* Lord Trayner) that the veterinary surgeon who ordered the horse to be destroyed was not a "qualified" veterinary surgeon in view of the terms of the Act 44 and 45 Vict. cap. 62.

The Scottish Assurance Corporation (Limited), having their office at 119A George Street, Edinburgh, insured live stock against death from disease or accident. James Shiells, Haddington, insured a dark brown Clydesdale stallion with the company for £100 on 19th May 1888. At 7 o'clock on the morning of Saturday 4th August 1888 Shiells found the horse had broken one of its forelegs. The fracture was a compound comminuted fracture of the metacarpal bone. Shiells at once sent for a veterinary surgeon, and Mr Wishart, of Bannatyne, & Wishart, Haddington, came and inspected the animal. He considered that the injury was incurable, and ordered the animal to be destroyed, which was done. The body of the horse was taken to a tanner, and skinned and buried the same day. The leg was kept for inspection by anyone who might be sent on behalf of the company. At 2·15 on the same day Shiells sent the following telegram to Mr Luke, the agent of the defenders' company at Haddington—"Horse leg broken; condemned by Wishart and Bannatyne."

Upon 5th August Luke wrote to Sheills acknowledging receipt of the telegram, and continued—"I at once went to the other side of the town to see the secretary, and he arranged that as it was now too late to do anything, I should see the manager to-day, and ask him to meet him this afternoon and arrange immediately what is to be done. I have just left the manager, and he will wire you later what course they are to take, so that you may rely that there will be no delay or want of attention by the company."

On Monday morning 6th August Sheills sent a letter to Luke confirming his previous telegram, and on the same day Wishart sent a certificate to the company's head office in these terms—"This is to certify that I examined Mr Sheills' horse on Saturday morning, and found compound fracture of off foreleg, when I ordered him to be destroyed." On the same day at 11 A.M. the manager of the company telegraphed to Sheills as follows—"Telegram Luke received. Not liable broken leg. Veterinary coming to-day. If horse killed without written consent, company no liability." Upon the same day Mr Wood, Shiells' agent, wrote to the company asking if it was necessary that the claim should be made upon any particular form, and requesting to be supplied with the same if that was necessary. The company in the meantime had sent down their own veterinary surgeon, who had seen and inspected the leg of the horse, and upon 7th August the manager wrote—"In reply to your letter of yesterday, I beg to inform you that there is no claim whatever under the above proposal, in respect that the insured has violated the conditions of his policy, and rendered it entirely null and void. The corporation's veterinary surgeon was sent to Mr Shiells yesterday, but was astonished to find the animal had been killed without either the sanction or knowledge of the company. Our policies do not cover broken legs, only death; and this is distinctly shown in the proposal signed by Mr Sheills." The condition under the policy to which the manager referred was the 9th stated in these terms—"Immediately upon any animal or animals hereby insured becoming ill, or upon any indication of approaching illness, or upon their receiving any injury, the insured shall have the said animal or animals at once attended to by a qualified veterinary surgeon, and shall forward to the company, addressed to their office at 119A George Street, Edinburgh, within twelve hours from such illness, ailment, or injury being brought to his knowledge, full particulars of the same, accompanied by the written report of the veterinary surgeon attending. In the event of the death of any animal or animals hereby insured, notice thereof in writing shall be sent to the office of the company as before mentioned within twelve hours after said death occurs, accompanying such notice by a full report in writing from a qualified veterinary surgeon, or sending the said report as speedily thereafter as possible, and as soon as reasonably may be after such notice, shall deliver to the company a claim for the loss or damage sustained, containing, as far as may be reasonably practicable, the particulars and the estimated amount thereof, and in support of such claim the insured shall give all such proofs and explanations as may be reasonably required, including the report and certificate of a qualified veterinary surgeon, together with, if required, a statutory declaration of the truth thereof, and in default thereof, no claim in respect of such loss or damage shall be payable, unless such notice, claim, particulars, proofs, and explanations respectively shall have been given and produced, and such statutory declaration, if required, shall have been made. It shall not be a sufficient compliance with this condition if such notice as aforesaid shall be only given to an agent, inspector, or veterinary surgeon of the company."

The company refused to admit liability, and Shiells brought this action for recovery of the sum for which the horse had been insured.

The defenders pleaded—"(2) The horse no having died from natural disease or accident within the meaning of the policy; *et separatim*, the horse having died from wilful injury, negligence, mismanagement, or wrong-doing on the part of the pursuer within the meaning of condition No. 2, the defenders are entitled to absolvitor, with expenses. (3) The pursuer having

failed to perform and observe the conditions of the policy in the manner specified in the defences, is not entitled to recover thereunder from the defenders."

The Lord Ordinary (TRAYNER) allowed a proof, from which it appeared that Wishart had been in practice as a veterinary surgeon for many years, and was known as a skilful man in the district but he was not a registered veterinary surgeon. His partner Bannatyne was a registered veterinary surgeon. Wishart was the nearest surgeon who could be got. It was clearly proved that the injury was of an incurable character, and that it was proper and necessary to destroy the horse at once. As regarded the notice the pursuer deponed—"I thought I was giving them full enough information by saying that the horse's leg was broken, and that the animal had been condemned." Luke also deponed—"It is not unusual for me to get communications direct from the insurers. I informed the secretary as early as possible."

Upon 29th January 1889 the Lord Ordinary sustained the defenders' third plea-in-law, and assoilzied them from the conclusions of the summons.

"*Opinion.*—By the policy of insurance founded on in this action it is provided that the conditions on the back thereof, which are to be taken as part of the policy, shall be, so far as they are to be performed and observed by the insured, conditions precedent to his right to recover thereunder. By article 9 of these conditions it is stipulated (1) that upon the animal insured receiving any injury the insured shall have the animal at once attended by a qualified veterinary surgeon; (2) shall forward to the company, addressed to their office at 119A George Street, Edinburgh, within twelve hours from such injury being brought to his knowledge, full particulars of the same, accompanied by the written report of the veterinary surgeon attending; (3) in the event of the death of the animal, insured shall send notice to the office of the company as before mentioned within twelve hours after said death occurs; and (4) that it shall not be a sufficient compliance with this condition if such notice as aforesaid shall be only given to an agent, inspector, or veterinary surgeon of the company.

"The pursuer failed to observe these conditions. He sent no notice whatever of the injury which his horse had sustained, or of its death, addressed to the office of the company; the notice he did send to Mr Luke, the agent of the company, was not sufficient compliance with the conditions; and even the notice to Mr Luke was not accompanied by the written report of the veterinary surgeon attending. Further, the horse was not attended by a qualified veterinary surgeon, for in view of the terms of the Act 44 and 45 Vict. cap. 62, I cannot hold Mr Wishart (however experienced) to be 'qualified.'

"The conditions in question appear to me to be reasonable conditions for the protection of the defenders' company, and their observance on the part of the pursuer having been made by contract a condition precedent to his right to recover under the policy it follows that his failure to observe the conditions deprives him of the right which by this action he seeks to enforce."

The pursuer reclaimed, and argued—It was undoubtedly proved by all the witnesses, including those for the defenders, that this horse was in such a condition that it had to be killed at once. Assuming that, there were only the three following points to be considered—(1) As to notice—The notice given to the company was sufficient under the conditions of the policy. It was sent in the afternoon of the day on which the accident occurred. The telegram said the horse had been condemned, which implied that it would be necessary to kill it at once. Though the notice had been sent to an agent it reached the manager of the company the same night, while in ordinary course of post the information could not have reached the head office till Monday. (2) As to the surgeon's report—This must be treated as a case of death, and in these circumstances the report of the veterinary surgeon had only to be sent to the company within reasonable time. It was sent off within forty-eight hours of the accident, and as the intervening day was a Sunday, that was sufficient compliance with the condition. The certificate stated that there was compound fracture of the leg, and that the horse was ordered to be destroyed. These were all the particulars which it was necessary for the company to know. Even if the report ought to have been fuller it was not in the mouth of the defenders to raise that objection, because from the very first they treated the case as one in which they intended to repudiate liability—Bell's Comm. i. 673, 4; *Mason* v. *Harvey*, June 1, 1853, 8 W. H. & G. 819; *London Guarantee Company* v. *Fearnley*, June 27, 1880, L.R., 5 App. Cas. 911. The objection founded on the fact that Mr Wishart was not a registered veterinary surgeon could not be sustained. He was qualified in the sense that he was a man of approved knowledge in the treatment of live stock. The pursuer could not be expected to ask Mr Wishart to show him his diploma before he called him in to look at the injured horse. Cases might arise of animals insured in this company being injured and killed in places where no registered veterinary surgeon could be got. Mr Wishart's partner, Mr Bannatyne, was a registered veterinary surgeon. By calling in Mr Wishart the pursuer had satisfied the condition in the policy. All that the Act, upon which the defenders founded, insisted upon was that there must be no misrepresentation. If a veterinary surgeon was not registered in the meaning of the Act he must not say that he was, but he might be a qualified practitioner for all that.

The defenders argued—Assuming that the horse had to be killed as the result of the injury which it had sustained, the pursuer had failed in carrying out the conditions of the policy. (1) The pursuer had not called in a qualified veterinary surgeon as he was bound to do. There was only one meaning of the word "qualified" when used in the way it was used in this policy, and that was, qualified to practise according to some recognised standard. The statute regulating the qualification of veterinary surgeons was the Act of 1881 (44 and 45 Vict. cap. 62). It was admitted that Mr Wishart was not qualified under that Act, and therefore he did not fulfil the conditions of the policy. It was a most reasonable provision, as the company could not be expected to take proof as to the opinion of the countryside of the abilities of a man called in to examine an animal insured under their policy. (2) This case must

be treated, primarily at least, as one of injury to the horse, and the pursuer had not complied with the necessary conditions. He had had the animal killed and buried before any surgeon sent by the company could make an inspection to see if the animal had been properly treated. (3) But even assuming that this was to be treated as a case of death, the pursuer had not complied with the conditions of the policy. Notice was not properly given to the company. A telegram was sent to an agent, but that was not notice sent to the company. The notice was in itself defective, as it did not tell that the horse had been killed, or what had been the nature of the injury. The certificate of the surgeon was also defective, and it was not sent until forty-eight hours after the death of the animal, and it did not give the necessary particulars of the injury. All these were conditions precedent to the pursuer recovering under this policy, and they had not been observed. The most literal fulfilment of conditions precedent had been enforced in all the cases —*Standard Life Assurance Company* v. *Weems, &c.*, August 1, 1884, 11 R. (H. of L.) 48; *Life Association of Scotland* v. *Foster and Others*, January 31, 1873, 11 Macph. 351; *Patten* v. *Employers Liability Assurance Company*, January 28, 1887, Irish L.R., 20 C.P.D. 93; *Gamble* v. *Accident Assurance Company*, June 18, 1870, Irish Rep., 4 C.L. 204; *Cassel* v. *The Lancashire and Yorkshire Insurance Company*, May 19, 1885, 1 Times' Rep. 495; *Cowley* v. *The National Employers Accident Insurance Company*, February 8, 1885, 1 C. & E. 597. The only case in which conditions had not been enforced strictly was where they were not held to be conditions precedent—*Stoneham* v. *The Ocean, Railway, &c., Insurance Company*, June 16, 1887, L.R., 19 Q.B.D. 237.

At advising—

Lord Justice-Clerk—The pursuer's horse was insured in the defenders' company. The horse was found on Saturday 4th August with its leg broken, and in such a state that in the opinion of all who saw him, who were by knowledge qualified to speak on such a matter, although perhaps not "qualified" in the technical sense, he ought to be immediately killed.

The policy under which this horse was insured in the defenders' company rendered them liable only in case of the death of the animal. The policy prescribed certain procedure in two different events. In the first place, it prescribed procedure in case of the illness or injury of the animal, and in the second case procedure in case of death.

Now, as regards the first of these, the procedure in case of injury to the animal, it has no application to this case. The object of it is to give the company an opportunity of regulating the treatment, and of observing the progress of the injury towards recovery, or otherwise, in order to protect themselves if evil results should follow from an unsatisfactory mode of treatment.

This was a case of death, and all we have to look to is the procedure in the case of death. It was admitted that in the circumstances here the right thing to do was to accelerate the inevitable end; it was a hopeless case, and humanity demanded that the animal should be put out of its misery. The pursuer under this policy, if he takes the course of killing the animal after it has received an injury, takes also the risk of proving that the injury was such that it ought to have been killed. If he fails, then he loses his case If he succeeds in showing that the only result of the injury would be the death of the animal, then we must take the case as if the horse had been immediately killed by the injury. The first question then is, Has the pursuer proved that that was the case here? I do not doubt that he has. I think it is proved by the evidence of his own witnesses, who were quite able to give advice in such a matter, that the horse was in such a condition that the only proper course was to put it to death. But if any doubt remained, it is settled by the evidence of the defenders' own witness Mr Gray, a qualified veterinary surgeon. When the question was put fairly to him, "Do you think any veterinary surgeon of experience would have expected that leg to mend?" he answered, "No I don't think it." The pursuer then was justified in looking upon this injury as incurable, and in killing the animal. The case standing thus upon the facts, it is plain that if the pursuer complied with the forms prescribed by the policy for giving notice he is entitled to recover the value from the company.

It is important to notice that from the first the defenders' company treated this as a case of death, and not of injury.

On the day of the accident the pursuer sent a telegram to Mr Luke, the agent of the company with whom he had effected the insurance, in these terms—"Horse leg broken; condemned by Wishart and Bannatyne." Luke replies to this next day, showing what he had done on the receipt of the telegram—"I at once went to the other side of the town to see the secretary, and he arranged that as it was now too late to do anything, I should see the manager to-day, and ask him to meet him this afternoon and arrange immediately what is to be done. I have just left the manager, and he will wire you later what course they are to take, so that you may rely that there will be no delay or want of attention by the company." So that the pursuer on receiving this letter from Luke got information that his notice had reached the head office, and was in the knowledge of the secretary and manager. Now, what did the company do on receipt of this notice? They sent off this telegram dated 6th August—"Telegram Luke received. Not liable broken leg. Veterinary coming to-day. If horse killed without written consent, company no liability." That telegram very plainly shows that they thought the horse must be killed, and they say they repudiate liability if it was killed without their consent. In my opinion they were not within their right in taking up that position, but the importance of the telegram is that it shows the view of the defenders as to the nature and the only possible result of the injury. On the same day, the 6th August, Mr Wood, the pursuer's agent, wrote to the defenders' manager—"With reference to the loss and claim under this policy, if you require the claim to be made in a form prescribed by the company, be so good as furnish me with a copy; or if in sufficient form as already made, kindly say so. I am Mr Shiells' legal adviser." The only reply to this was—"In reply to your letter of yesterday, I beg to inform you that there is no claim whatever under the

above proposal, in respect that the insured has violated the conditions of his policy, and rendered it entirely null and void. The corporation's veterinary surgeon was sent to Mr Shiell's yesterday, but was astonished to find the animal had been killed without either the sanction or knowledge of the company. Our policies do not cover broken legs, only death; and this is distinctly shown in the proposal signed by Mr Shiells." So that the company at once took up the position that the pursuer's claim was bad, and that they were prepared to fight it.

Now, what is the condition in the policy on which the defenders found? It is in these terms:—"In the event of the death of any animal or animals hereby insured, notice thereof in writing shall be sent to the office of the company as before mentioned within twelve hours after said death occurs, accompanying such notice by a full report in writing from a qualified veterinary surgeon, or sending the said report as speedily thereafter as possible, and as soon as reasonably may be after such notice, shall deliver to the company a claim for the loss or damage sustained," and so on; and then the notice concludes—"It shall not be a sufficient compliance with this condition if such notice as aforesaid shall be only given to an agent, inspector, or veterinary surgeon of the company."

Now, in the first place, it may be noticed that the defender is barred from objecting that notice was not properly given under the last clause of the 9th condition. It is true that the pursuer only sent his notice to Luke, an agent in Haddington, and took the risk of the notice reaching the head office, but in point of fact the notice reached the secretary the same day. The fact being so, I think that is sufficient compliance with the requirements of the 9th condition with regard to notice. Again, it was said by the defenders that the notice was not accompanied by a full report from a qualified surgeon. Now, it is not made essential that a report should accompany the notice, but that it should either accompany or be sent within a reasonable time after. By the time that the pursuer would have been able to send in the full report with his claim the company had taken the position that they repudiated all liability, and that all his rights under the policy had gone, and all negotiations were at an end. In these circumstances I am of opinion that the defenders are liable to the pursuer in the value of the animal on the following grounds. In the first place, the accident which happened to the animal meant its death; in the second place, that the company received notice of the death on 4th August 1888; in the third place, I hold that any objection which the company may take to defects in the formal procedure after the death of the horse are rendered useless by the position taken up by them in at once repudiating all liability.

Lord Rutherfurd Clark—I am very glad to think that your Lordship has been able to propose such a judgment as you have indicated. I doubt very much if I can reach it. Indeed I doubt seriously whether such a judgment is not depriving the company of the benefit of the stipulations contained in the policy, but the conclusion at which your Lordship has arrived is so reasonable that I will not say anything against it.

Lord Lee—I agree in thinking that the case as proved was from the first a case of death caused by the horse breaking its leg. It was found in the morning in such a condition that it had to be immediately destroyed. I think that this should be found as matter of fact. If this be the true view, no question arises as to fulfilment of the conditions applicable to mere illness or injury.

The only question is, whether the pursuer fulfilled the conditions, or failed to fulfil the conditions applicable in case of a death?

Here I think the defenders put themselves in the wrong. They knew that the telegram referred to the injury as fatal, or possibly fatal. For they answered—"If horse killed without written consent of company, no liability." That was a plea-in-law, which I think was good or bad according to the true view of the facts. If the injury was such as rendered necessary the immediate destruction of the horse, it was clearly bad.

In this view of the facts it was unnecessary to give two notices, first notice of injury, and a second of the killing. The notice given was in my opinion sufficient notice of death, and was so dealt with.

But it is said that the notice was not accompanied by a veterinary surgeon's report. The conditions here in question do not require that such report shall in all cases accompany the notice. They provide that it may be sent "as speedily thereafter as possible." The pursuer by his agent wrote next day asking to be furnished with a form for making a claim, but the defenders answered this by telling him that there was no claim, and practically refusing to receive any claim or any report. After their manager's letter of 7th August it would have been absurd to send any report. The question was reduced to one of law, whether killing without the sanction of the company deprived the pursuer of all claim?

I think, as I have said already, that this question of law depended on a question of fact which the company refused to inquire into, but which has now been inquired into, viz., whether it was necessary to kill the animal, looking to the condition in which he was found.

Now, it was not disputed before us; it was conceded that the pursuer had established the necessity of putting an end to the horse's sufferings.

The conditions of the policy are not so framed as to exclude a claim in such a case. The manager seems to have thought otherwise, but he was wrong, and his mistake has caused the whole difficulty. What the company were entitled to require, and ought to have given the pursuer an opportunity of furnishing, was, in addition to the notice of death, (1) a report by a qualified veterinary surgeon, (2) a claim with particulars, (3) such proofs and particulars as may reasonably be required, including the report and certificate of a qualified veterinary surgeon.

In the view I take of the case it is unnecessary to decide whether or not the expression "qualified veterinary surgeon" means the same thing as the expression used in some cases, "qualified and registered veterinary surgeon."

I desire to reserve my opinion on that question.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Lord Ordinary: Ordain the defenders to make payment to the pursuer of the sum of One hundred pounds stg., with interest thereon at the rate of five pounds per centum per annum from the 2nd day of October 1888 until payment: Find the pursuer entitled to expenses," &c.

Counsel for the Pursuer—Shaw—Forsyth. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders—W. Campbell. Agent—Robert C. Gray, S.S.C.

Wednesday, July 17.

SECOND DIVISION.

WRIGHT & GREIG *v.* GEORGE OUTRAM & COMPANY AND GUNN & CAMERON.

Slander—Issues—Newspaper Report of Judicial Proceedings—Counter Issue as to Fairness and Accuracy of the Report.

A firm of merchants brought an action of damages against the proprietors of two newspapers for slander contained in the reports of proceedings in the London Bankruptcy Court during which a former agent of the pursuers was reported to have said "that they were very hard up, and he had financed them from time to time" by means of accommodation bills. They proposed as an issue . . . "whether the statements therein set forth are of and concerning the pursuers, and falsely and calumniously represent that the pursuers had been or were in financial difficulties, and had been or were being financed by accommodation bills . . . to the loss, injury, and damage of the pursuers."

The defenders averred on record that the report was a fair and accurate one of judicial proceedings, and as such privileged, and that the pursuers were bound to raise the question of its fairness in their issue; or alternatively, that they were entitled to raise that question before the jury by means of a counter issue.

The Court (*aff.* Lord Kyllachy) approved of the issue and disallowed the counter issue, holding that the question sought to be raised by it was a matter for the direction of the Judge at the trial.

Messrs Wright & Greig, wholesale wine and spirit merchants in Glasgow, brought actions for slander in the Court of Session against George Outram & Company, proprietors and publishers of the *Glasgow Herald* newspaper, Glasgow, and against Gunn & Cameron, proprietors and publishers of the *North British Daily Mail* newspaper, Glasgow, respectively, concluding in each case for £3000 as damages.

The pursuers had had in their employment as a traveller, and also as their London agent, a person named Smyth, whom they had dismissed on the ground of misconduct, and against whom they had obtained decree for £630 in consequence of which he became bankrupt. He afterwards applied in the London Bankruptcy Court for his discharge, and this application was opposed by Wright & Greig.

The reports in these newspapers of the proceedings in the Bankruptcy Court were the occasion of the present actions of damages. They contained, *inter alia*, the following passages —"In examination by Mr Wilde, the bankrupt stated that he came to London in 1884 as traveller for Messrs Wright & Greig of Glasgow. He remembered giving them a bill for £619. He did not know that that represented moneys received by him and not handed over. All he knew was that they were very hard up, and he had financed them from time to time. It was not right for Mr Wilde to make the wide allegations he had done against him." . . . "The bankrupt, in addressing the Court, said that there was not the slightest truth in the allegations made by the petitioning creditors. It was a matter of account, he having made advances to them from time to time to enable the business to be carried on, being repaid when the accounts came in."

The pursuers averred—"The said paragraph gives a false and misleading account of the proceedings which took place in the London Court of Bankruptcy on the occasion in question. The bankrupt did not say, as is represented in the said paragraph, that the pursuers 'were very hard up, and he had financed them from time to time.' Nor did he say, as is represented in the said paragraph, that he had made advances to the pursuers from time to time to enable their business to be carried on. These statements were utterly false and calumnious, and in point of fact were not made by the bankrupt." They also averred that the report in certain specified particulars was false, misleading, and calumnious, and that it was not fair and impartial, but incorrect and one-sided, and they pleaded—"(1) The defenders having slandered the pursuers by printing the said false and calumnious statements, are liable in reparation and damages as concluded for. (2) The defenders having slandered the pursuers by the publication of a garbled, partial, and one-sided report of the said proceedings in the London Bankruptcy Court as condescended on, are liable in reparation and damages, as concluded for. (3) In respect that the paragraph complained of does not contain a fair and accurate report of the proceeding referred to, the defenders are not entitled to plead privilege."

The defenders explained that they published the reports in good faith in the ordinary course of business, knowing nothing of the persons or matters referred to beyond what the report itself disclosed, and believing it to be a fair and accurate report of the proceedings in question.

They pleaded, *inter alia*, that the notice being a fair summary of the proceedings in a public Court, and having been published without malice was privileged.

The pursuers proposed the following issue—"Whether, on or about the 23rd January 1889, the defenders published in the *Glasgow Herald* an article or paragraph in the terms of the schedule hereunto annexed: Whether the statements therein set forth are of and concerning the pursuers, and falsely and calumniously represent that the pursuers had been or were in financial difficulties, and had been or were being financed by means of accommodation bills and