pressed in the codicil fails of effect, there is no revocation of the directions contained in the trust-deed.

II. But the question remains—Is it a necessary consequence of a general conveyance of *acquirenda* in an antenuptial contract of marriage that no separate estate can be given to a wife which shall not fall under that conveyance to the marriage trustees? It is admitted in the case of *Douglas' Trustees* (decided before the Married Women's Property Act of 1881) that something of the kind might have been done by means of a trust; and the consulted Judges are of opinion that a power of disposal of the fee might in this way have been given to Mrs Brown. But the question has now to be decided with reference to a marriage which took place subsequent to the passing of the Married Women's Property Act of 1881, and under a state of the law which enables a wife to hold separate personal estate in her own right and without any trust. It is not suggested here as it was by Lord Mure in the case of *Douglas' Trustees*, that the testator was under any disability to exclude the marriage-contract trustees. Miss Simson was no party to the marriage-contract. The point for consideration therefore is whether the execution of a marriage-contract to which she was no party put it beyond the power of Miss Simson to leave property to Miss Brown "free from the control of the marriage-contract trustees."

Upon this point I concur in the result arrived at by Lord Young. I think that the marriage-contract trustees are excluded by the terms of the codicil from claiming any right, and that they have no interest, to object to Mrs Brown receiving this legacy on the conditions attached to it by the testator.

I am therefore of opinion that the questions stated ought to be answered in favour of Mrs Brown, or otherwise that they must all be answered in the negative.

The Court answered the first and second questions in the negative, and the third question in the affirmative.

Counsel for the First and Second Parties — Low. Agents — Romanes & Simson, W.S.

Counsel for the Third Parties—C. K. Mackenzie. Agent — John Rutherfurd, W.S.

Tuesday, March 11.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

WRIGHT & GREIG *v.* OUTRAM & COMPANY.

(*Ante*, vol. xxvi., p. 707, July 17, 1889; and 16 R. 1004.)

Reparation — Slander — Newspaper Report of Proceedings in Court of Justice— "Fair and Accurate"—New Trial.

A firm of merchants sued the proprietors of the *Glasgow Herald* newspaper for damages for slander contained in a report of proceedings in the London Bankruptcy Court, in the course of which a former agent of the pursuers, was, they averred, wrongly reported to have said "that they were very hard up, and he had financed them from time to time" by means of accommodation bills.

The defenders maintained that the report was fair and accurate, and therefore, being a report of judicial proceedings, was privileged. The case was tried on this issue—Whether the defenders published in the newspaper a paragraph in terms of the schedule annexed; and "whether the statements therein set forth are of or 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 advances of money." The jury found for the pursuers, damages £500. The defenders moved for a new trial, on the ground that the verdict of the jury was contrary to the evidence, and that the damages allowed were excessive.

Held that the paragraph was not a fair and accurate report, as it consisted of an abridged account of the proceedings which conveyed an impression different from what an accurate report would have produced; that therefore the verdict was not contrary to evidence, but that a new trial should be granted unless the pursuers consented to the damages being reduced to £250.

Diss. Lord Young, who thought that there was nothing false or calumnious in the report, and that the pursuers had suffered no damage.

In this case the pursuers Messrs Wright & Greig, wine and spirit merchants, Glasgow, sued Messrs George Outram & Company, proprietors and publishers of the *Glasgow Herald* newspaper, Glasgow, for £3000 damages for slander contained in a report of the examination in bankruptcy in the London Bankruptcy Court of a former agent and traveller of the pursuers named Smyth.

The pursuers averred—"(Cond. 5) Upon the 22nd January 1889 an application was made by Smyth in the London Bankruptcy Court for an order of discharge. The pur-

suers had instructed their London solicitor, Mr Wilde, to appear on their behalf before the Registrar and oppose Smyth's application for discharge. Mr Wilde accordingly appeared on the pursuers' behalf. Smyth was examined, and he and Mr Wilde having addressed the Registrar, the latter pronounced judgment, suspending the order of discharge for fifteen months; and on the following day, the 23rd January 1889, there appeared in the *Glasgow Herald* a paragraph purporting to give a report of the proceedings in the London Bankruptcy Court relative to Smyth's discharge, which contained, *inter alia*, the following passages:—'In examination by Mr Wilde the bankrupt said 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 monies 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 between them, he having made advances to them from time to time to enable the business to be carried on, and being repaid when the accounts came in.' . . . (Cond. 6) 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 falsely and calumniously represented the pursuers to be persons who were in financial difficulties, and had been or were being financed by means of accommodation bills and advances of money by the said Smyth. . . . (Cond. 9) The said paragraph was, in the particulars set forth, false, misleading, and calumnious. It was not a fair and impartial report of the proceedings in the Bankruptcy Court, but was incorrect and one-sided, in respect that it contained the statements above mentioned, which were not, in fact, true or made by the bankrupt; and, further, it suppressed statements made by the bankrupt and by the solicitor for the pursuers in the course of the proceedings, which corrected and put the true complexion on the whole transactions between the pursuers and the bankrupt—an entirely different complexion from that which the said paragraph gave to the public."

The defenders averred that the report was a fair and honest summary and abridgment of what took place in the public Bankruptcy Court in London, was published *bona fide* and without malice, and was privileged.

The following issue was approved of by the Lord Ordinary, and afterwards by the Second Division, viz.—"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 advances of money by a person named Smyth, to the loss, injury, and damage of the pursuers? Damages laid at £3000 sterling."

After a trial—the substance of which sufficiently appears from the opinions *infra*, especially from that of Lord Young—the jury returned a verdict for the pursuers. Damages £500.

The defenders applied for a new trial, on the ground (1) that the verdict was contrary to the evidence, and (2) that the damages were excessive.

A rule was granted on the pursuers to show cause, who thereupon argued—Both parties were agreed as to the law of the case. Reports of judicial proceedings were not privileged *qua* reports, but only if accurate. Newspapers took the risk if they published anything but *verbatim* reports of such proceedings. The defenders required to satisfy the jury that the report was fair and accurate before they could plead it was privileged. It was eminently a jury question, and the jury had found for the pursuers. Unless that view was clearly contrary to the evidence the Court would not disturb the verdict. Here the jury had sufficient evidence to entitle them to hold that the report was not fair and accurate. The address of the pursuers' agent was omitted. The stated account was omitted. The evidence as to "accommodation" was garbled. Sharpe, the shorthand writer, and the *origo mali*, admitted that the report published might convey a wrong impression to the mind of the public. If the damages were somewhat heavy, that was a matter for the jury, who were the best judges of the shake to their commercial credit the pursuers had sustained.

Argued for the defenders—The report was fair. The evidence omitted was immaterial. But in any case the damages were clearly excessive. The pursuers had not been able to show any specific loss they had sustained through the report. No further damage was done than the law would always attach where slander was proved, viz., nominal damages.

At advising—

LORD KYLLACHY—I adjusted the issues in this case, and afterwards tried it, and I was present, as your Lordships know, at the recent discussion on the rule. I am of opinion that the verdict of the jury, in so far as it finds for the pursuers, is a right one, and as regards the question of damages I agree, as I understand, with the majority of your Lordships, that justice would be

done by reducing the damages to £250, or rather by proposing that reduction to the pursuers on the condition of allowing the verdict to stand. With respect to the law of the case, I desire to explain that neither at the adjustment of the issues nor at the trial was any question of law raised. It was throughout a common ground between the parties that the sole question to be tried was whether the report in question was fair and accurate, and the only question approaching to a question of law upon what was at that time discussed before me was whether the *onus* lay on the pursuers to prove the unfairness of the report, or whether the defenders required to prove its fairness as a condition of obtaining the privilege they claimed. I decided the question at the adjustment of issues in favour of the pursuers, and I understand your Lordships in reviewing my judgment took the same view, and I accordingly charged the jury, and no exception was taken to my charge, that it was for the defenders to prove the fairness and accuracy of the report, and the question, and the only question, for the jury was whether the defenders had done so. I doubt therefore, with deference, whether the questions raised and argued at some length the other day were properly before us—I mean the questions of law—but as they have been raised, and opinions may have to be expressed upon them, I feel bound to state the views I expressed at the adjustment of issues, and which I observe are reported in the last volume of Rettie, p. 1004. I do not, for my part, consider that any privilege whatever attaches to a newspaper report as such. If a newspaper gives circulation to a slander, it is simply in the position of any other person circulating a slander, and the general rule is that a person circulating a slander is answerable equally with the author of the slander. That is the general rule, and it was at one time the absolute rule. But of late years, on the ground of public policy, a certain exception has come to be recognised—namely that a person reporting truly—that is, fairly and accurately—the proceedings in public courts of justice is not to be answerable for the circulation thereby of defamatory matter—at all events, in the absence of proof of express malice.

On that ground, and on that ground alone, does any privilege attach to the report of proceedings in courts of justice, and it is a privilege entirely conditional on the truth—that is, the fairness and accuracy—of the report, and it is a privilege, moreover, which is not at all peculiar to a newspaper, but extends to all other persons who desire for any legitimate reason to put the outside public in the same position as the portion of the public who happened to be within the walls of the Court. This is, as I understand it, settled law in England, and it is also, in my view, the law of Scotland. Now, that being so, the parties here were, I think, right in taking the case to a jury, and the only question of fact was—was the report fair and accurate, and on that matter I have to say that I quite agree with the jury. I thought at the time, and I think still, that the report was a very confused, a very inaccurate, and a very unfair report. I do not say intentionally unfair, but unfair as giving an entirely false impression of the effect and result of the bankrupt's examination, and as affecting the credit of the pursuers. I do not think it necessary to go into all this. The omission in the report of the speech of the pursuer's solicitor in answer to the statement of the bankrupt was certainly enough to justify the verdict, and there were other errors and other omissions which were not less important to my mind, and I cannot say that I was at all surprised by the conclusion to which the jury came. I do think—I am stating my own opinion—that I should have been surprised if they had come to any other conclusion. As to the amount of damages, I have considerable delicacy in disturbing the verdict in a matter which is so entirely a matter for the jury, but I do consider the damages excessive, and I concur in what I understand is the view of the Court, that the damages should be reduced to £250.

LORD JUSTICE-CLERK—This case was sent to be tried by jury on an issue which was adjusted by your Lordships. The issue refers to a schedule containing a newspaper report of proceedings in the examination of a bankrupt, and the point the jury had to decide was whether that report did "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 advances of money by a person named Smyth." If the report did so represent, the falsehood is not denied, and the calumny in making such a representation falsely is obvious. The only question, as it appears to me, which was really before the jury was the question whether the defenders, in issuing their report of the proceedings, published a fair report, which, whatever it might imply in regard to the pursuers, could not be challenged as having either by addition, omission, or alteration, conveyed an impression which an accurate report would not have conveyed. There is not before us any exception to the law laid down by the learned Judge at the trial. We must assume that in his charge to the jury he directed them correctly on those points on which direction was necessary. Therefore the sole matter we have to consider is, whether upon the facts as disclosed in the evidence the verdict is bad either as being contrary to the facts or contrary to law. Having considered the evidence, I am of opinion that the verdict is not contrary to evidence. I am satisfied that the jury had evidence before them upon which they were entitled to come to the conclusion that the report as printed did make the representation set forth in the issue, and that the report was not an accurate account of the proceedings, in respect that it omitted those parts which would have shown that the representation contained in the report as they published it was not true. In saying this I do not mean at all to suggest that a news-

paper may not abridge a report of such proceedings, and even omit parts altogether. But if a newspaper reports part of proceedings in which statements are made which if false are plainly slanderous, and omits altogether those parts of the proceedings which negative and set aside the slander, I hold that a newspaper has no privilege in so doing. The defenders were entitled to prove that their report was fair and accurate, and if they did so were entitled to a verdict in their favour. But if they failed to do so then they were in no better position than an ordinary member of the public. Their recognised right to disseminate news gives them, as I think, no privilege. It only saves them from the presumption that their publication of any such report as this, if fair and accurate, is done to gratify malice. But if it is not fair and accurate, they can have no benefit by their freedom from such general presumption, and the ordinary presumptions applicable to slander apply. Here, being satisfied that the jury were right in holding that the report was not fair and accurate, I see no ground for setting aside their verdict as contrary to evidence.

Is there any ground, then, for setting it aside as contrary to law? I see none. Any legal question which could arise in this case must have arisen on the adjustment of the issue or at the trial. But the matter of issue was subjected to full criticism, and disposed of on appeal from the Lord Ordinary, and we have nothing before us to indicate that there has been any error of the jury in misunderstanding or refusing to accept and apply the law laid down by the learned Judge who tried the case, and against whose directions there is no exception taken, and who was not asked to give any legal direction which this Court could afterwards review. The jury have held that the report as scheduled was made, that it made the representation innuendoed in the issue falsely and calumniously, and I can see no legal ground on which that verdict can be challenged any more than I can see that it is contrary to the evidence adduced.

On the question of damages, I am of opinion on the evidence before us that the damages given by the jury were excessive, and I should be prepared to grant a new trial on that ground unless the pursuers were content to allow the sum to be reduced of consent. It seems to me that £250 of damages would have been ample in the circumstances disclosed.

LORD YOUNG—This case is a peculiar one in many aspects—I think I may say in all aspects of it—and it is impossible for me to entertain confidence in the conclusion at which I have arrived, looking to the opinions of the learned Judge who tried the case, and your Lordships' opinion which I have just heard, and which I understand will be the opinions of the other learned Judges, although I confess that but for those opinions, and my sincere respect for them, I should have entertained no doubt whatever in my own mind that the verdict was wrong—against the evidence, against law, and against every consideration of good sense. But the difference of opinion makes it all the more necessary that I should explain my views quite distinctly, and I shall do so with as much brevity as I can, consistently with being quite distinct. I have said that the case is a peculiar one. Every feature of it is out of the way. The general nature of it is this—The pursuers, who are wine and whisky dealers in Glasgow, in the beginning of 1884 employed a Mr Smyth, who had some time before become bankrupt, to represent them in London. Mr Wright, the leading partner of the pursuers' firm, who speaks of this Mr Smyth with a considerable amount of disrespect, says that he was a mere servant, that he was not an agent. But he had a salary of £300 a-year to represent them and to extend their whisky trade, I suppose chiefly in London. He had failed for £20,000 Mr Wright explains to us, and we see him in the report of the bankruptcy proceedings paying a shilling in the pound, although it is fair to take into account a circumstance which was brought forward when he applied in bankruptcy for his discharge. It is explained that his failure was connected with the failure of the Glasgow Bank. In the beginning of 1884 he is engaged by those partners, as I have said, and they were so satisfied with him after two years' trial that in February 1886 they purchased for him a small spirit business in the Fulham district of London, and supplied the goods necessary to carry on the business. I suppose the business must have been of considerable extent pecuniarily. Mr Wright explains in his evidence that towards the end of that year, 1886, he began to be suspicious of Smyth. Let me refer to what he says, and it is not unimportant—the way he speaks of him always—"I got doubtful about the man in the latter end of 1886, and went to London in January 1887 and discovered his defalcations." I think it not unimportant to notice what he says upon record, or what the pursuers say on record with respect to Mr Smyth—"In January 1887"—I am reading from condescendence 2—"the pursuers discovered that during the eleven preceding months Smyth had not only gone behind in the pursuers' books to the extent of £269, 9s. 6d., but he had also embezzled £442, 5s. 3d. of their money." Now that discovery of embezzlement is made in January 1887, and I pray the date to be noticed, and this is the account of the embezzlement which Mr Wright gives in his evidence which he discovered in January 1887—"The man stole the money. (Q) And the *Herald* refused to insert a substantive statement that Smyth had misappropriated the money?—(A) They refused. I wanted the word 'misappropriated' put into the letter. I mean that the man stole the money." Well, he discovered that in January 1887—discovered that the man whom he had been trusting was a thief, and had stolen £442. How does he act? He tells upon record—"Upon discovering these defalcations the pursuers compelled Smyth to give up the said shop at Fulham, but they retained him in their em-

ployment under a stringent agreement dated 14th January 1887." They retained a detected thief in their employment to represent them in their business in communications presumably with honest people. And this brings me to notice the account, the failure to notice which in the report has been made such a feature. It bears no date, but it is entitled, "Stated and settled account between William Smyth and Wright & Greig." The last date in it is February the 3rd, but under date January 13, which I suppose may be taken as the date of the discovery of the embezzlement or theft amounting to £400, we have this entry, which is stated to be the important one—"Cash, being accounts collected and not paid over, £442, 5s. 3d." Now, that is stated to be an acknowledgment under his hand of his embezzlement or of the money which he stole. Wright says, "The man stole the money; I discovered that." Well, they continue him in their employment to represent them with honest people—a detected thief, who has put his hand, according to the representation made to us, to an acknowledgment of the money which he stole. He is continued, I suppose, at £300 a-year. What is the next we have? This is the month of January, observe. In the month of May they write to him the letter which is quoted in the answer to condescendence 2 and 3. I have got the letter here—a curious letter from people who have been robbed—"9th May"—that is five months after the discovery—"Dear Sir,"—the thief is the dear sir—"We omitted to draw for the £619, 14s. 9d. standing at your debit"—£400 of it is stolen money—"Please to sign the enclosed, which will complete the matter, and we will return you the one for £342, 5s. 3d."—they had the thief's bill for £342, 5s. 3d.—"We will return that when we get the other. We may require to discount, this month being the term time, and requiring money for new property." That is to say, these robbed whisky dealers write this letter to the thief, and ask him to sign the bill for the stolen money that they may discount it, because they need the money to pay for some property. These are the people whose feelings have been so hurt. They keep him in their service for thirteen months after they say that his plundering of them had been discovered, and an acknowledgment made under his hand. They did not dismiss him till February 1888, and what is the explanation which they give of that upon the record? I am reading from condescendence 4—"In February 1888, Smyth was in consequence of his irregular habits and reckless mismanagement of their business, involving serious losses, dismissed from the pursuers' service. A few days after his dismissal the pursuers discovered that Smyth had embezzled a further sum of £30"—two days before he left their service. In the following year he became bankrupt, and on the 22nd January 1889 he applies for his discharge; but I should have noticed first that in June 1888 they raised an action against him, and got judgment for £630, he having in vain pleaded a claim of damages for wrongful dismissal. One is not surprised that no attention was paid to that; but in June 1888 they got judgment for the amount brought out at his debit in the stated and settled account. Well, when he applied for his discharge they instructed a Mr Wilde to oppose his discharge on any possible grounds Mr Wright is asked the reason, and he says, "Why, he did not deserve a discharge," and neither he did, certainly, if their account of him was true—that he was a thief, that he had stolen the money. But they instructed Mr Wilde to oppose the discharge, and he did so upon the ground that the man was a thief, "Fraud and embezzlement" were the words which he uses in the application. I know nothing about Mr Smyth—nothing in the world—but the Judge in bankruptcy did not agree with Mr Wilde or with his client, the pursuer. He said, "That stated account shows there is a sum of money due, but it is no proof of fraud or embezzlement, and, looking to the manner in which you dealt with the man, I cannot think that there is any justification in your imputations of fraud or embezzlement." And he found there was none. Smyth must have been carrying on their business to the extent of many thousands a year. Many thousands a year must have passed through his hands. This account which has been referred to brings out only £619, £442 being cash not accounted for, £269 the loss on the Fulham Road business, and they had his cash in their hands which he had deposited for security when he was employed, to the amount of £100, and his bill for between £300 and £400. Can anybody be surprised that the Registrar should have rejected Mr Wilde's charges as unfounded, and declined to hold that they were established? There is a great deal too much readiness in places here and with some people to extend the lash of the criminal law and to hold that whenever a man is behind in his accounts he is a thief, an embezzler, a blackguard. I agree with the Registrar here, that if it comes to a matter of accounting, and you keep a man in your service, let him continue in the management of your business, although he is some hundreds behind, and apply to him for a bill to the amount that you may discount it in order to enable you to pay for property as it is near term time, that it is not in your mouth to accuse him of crime. The Registrar declined to find the charge substantiated. Now, what is the gravamen of Mr Wright's complaint against this report of the bankruptcy proceedings? It is that the Registrar was not shown up as having fallen into grave error in not finding that the man was guilty of fraud. It is put to him pretty distinctly in cross-examination. The first question is—"(Q) Did you not think it was quite right the article should state what Smyth had mentioned about the matter?—(A) I had no feeling about that. It was not a count and reckoning. I believe Smyth held it as an account. He said so before the Registrar. I should fancy that was one of the points the Registrar had to

decide. (Q) And he decided in Smyth's favour and against you upon that?—(A) The Registrar certainly made a statement that I thoroughly objected to and do object to now. He said it was not a case of fraud. I say it was a case of fraud. I object to the Registrar's decision because I wanted him to decide in favour of our agent, Mr Wilde. He said it was not fraud, whereas I say it was fraud. The man stole the money. (Q) The Registrar was the bankruptcy judge before whom the proceedings were taken?—(A) But I am as good a judge as the Registrar." Then again the question is put to him—"(Q) Your only objection to the article seemed to be that Smyth said you were hard up?—(A) Clearly. (Q) Have you any doubt Smyth said that before the Registrar?—(A) I was told it was thought by Mr Wilde that he said it." No doubt in the world he said it. "(Q) If he stated that before the Registrar, do you think it would have been fair for the *Herald* to put in all the things you have mentioned and keep out his statements in defence?" Now, here is this view of the man with the injured feelings who is soothed with five hundred pounds. "(A) I think it most unfair for any newspaper to say of any respectable firm, even though it was said in the witness-box, that they were hard up. My complaint is that the *Herald* printed what they should not have printed, even though he said so." Will anybody maintain that view of the case, which is his view, in the evidence which he gives? Then what really is the complaint? All that is said to be unfairness on the part of, I think I may say, as respectable a newspaper as any which exists in this country is that they erroneously reported this man, who was under a charge of fraud, of embezzlement, of having stated that they were hard up, and accounted for his having granted a bill by saying that it was for their accommodation—that is the bill which was sent in answer to this letter which I have just read. That is the falsehood and calumny on the part of the *Herald* newspaper. Now, what was the condition, according to the evidence of Mr Wilde, in which this man was put by those charges of fraud, embezzlement, and theft, put in no measured language? Here is what Mr Wilde says of it—it is in the matter of reporting what is described by Mr Wilde that the falsehood and calumny of the *Herald* newspaper is said to consist. He says—"No doubt fraud of such a nature as that with which I have charged the bankrupt would have been a misdemeanour. It would be utterly impossible for me to tell, or I believe for any shorthand writer to take down, what Smyth said when he was defending himself against my charge"—the false charge, as the Registrar thought it was, and as I think it was upon any evidence which is before us or was before the Registrar. "I do not know that he said so much, but he shouted at the top of his voice and as fast as ever he could. He was excited about that stated account. That was where all the fight took place." Now, it is reporting what was said by a man under this almost delirium of excitement under the accusations which were made against him—it is in the report of that that the falsehood and calumny of the *Glasgow Herald* is said to consist. Take it for a moment that he was the man that they represented, that he was a swindler and a thief, that the man stole the money—would Mr Wright's feelings be very much shocked by anything that Smyth said under the influence of that charge? His own agent has described the state of excitement into which the charge threw him. Suppose he said they were hard up—would that disturb Mr Wright's feelings? or if the newspaper reporter said, "I understood him to say that," would that hurt his feelings, or with any sensible people hurt his credit? But his feelings!—the thing is in my view altogether extravagant. But did Smyth not say they were hard up? Why, the pursuer has produced the notes of the shorthand writer of the Court. This is a transcript of the speech which Smyth made in this state of excitement, when no shorthand writer could take down all he said, he was in such a state of agitation. "There was never the slightest attempt to charge me with dereliction of duty"—and certainly except this evidence of Mr Wright there is not a suggestion of any charge of swindling or fraud having been made against him during the four years, or upwards of four years, he was in their service. "There was never the slightest attempt to charge me with dereliction of duty. I had the whole transactions of the London business of the firm in my hands from 1884 to 1887. I found the money to carry on their business, and it was a matter of accounting between us. In January 1887 Mr Wright took a bill for the amount I owed, less £100 in their hands. It was not till some time after that that Wright & Greig charged me with the slightest insinuation of anything whatever. They treated it as a debt, and this £619 was made up in connection with the account with respect to the Fulham Road business." Then in the same shorthand writer's notes I have got this as to what he said. "(Q) I call your attention to the heading of the account 'Cash, being the accounts collected and not paid over, £442.' You see that down. Now, Mr Smyth, you gave a bill of exchange to Wright & Greig for £619, 19s.?—(A) Yes, I did give it for their accommodation, as they wrote to me a letter in which they said, 'We omitted to draw for the amount standing to your debit. Please sign the enclosed bill, which will complete the matter, and we will return the other. (Q) Now did you give a bill to Wright & Greig?—(A) Yes, I did, because they wrote to me that letter asking me to do so, as they were hard up for money. I may say it is a most atrocious thing that I should be put up here and asked such questions." That is part of the excitement he is under on being met with a charge of crime—embezzlement, theft, for the first time. Now, the pursuer in his evidence says—it is a little contradictory, but he says

pretty distinctly—"Mr Wilde informs me he never made the speech in which it is said it was a matter of account," and so on. That is not accurate. If you look at Mr Wilde's evidence he says—"Smyth certainly never made any statement that he himself had advanced monies to Wright & Greig. He did say it was a matter of account." Now he could not have said the contrary, at least I suppose not, to his client, to what he swears here that he did. Mr Wright in his evidence was asked—"(Q) Referring to article 8 of the condescendence, do you see there that your agent suggests that he answered Smyth's allegation that he had financed the pursuers?—(A) Yes, that is the answer. I have no reason to doubt that it is correct. (Q) Then, with reference to the last sentence in article 8, is it your view that Smyth did not suggest that he had financed your firm?—(A) He undoubtedly made the statement, at least so I am informed, that we were hard up. (Q) Were you not informed by Mr Wilde that the bankrupt stated before the Registrar that he had granted the bill to finance your firm?—(A) I believe Smyth did say that 'all he knew was that they were hard up.' I am not aware he said he had financed us from time to time." Then Mr Wilde says, and I think it not unimportant to notice—"Speaking from memory, what really took place was this:—The bankrupt made some suggestion that Wright & Greig were hard up, or words to that effect, and he then said something about this bill, that it was at their request he had given the bill, but I am not sure whether the word accommodation was used. It was never used as we understand the term in the sense of nothing passing between the drawer and acceptor. He meant that it was drawn at their suggestion, and it was suggested to the Registrar that it was done no doubt for the purpose of discount." It is suggested in their letter that they wished to discount it—"I thereupon handed the bill to the Registrar to show it had never been endorsed." I must say it would have been a most scandalous proceeding if these people had taken a bill from the person they represented as a thief, and then had gone and discounted it to enable them to pay for property. Mr Wilde is next asked—"You handed the bill to the Registrar to counteract the statement by the bankrupt that he had granted it for the accommodation of the pursuers?—(A) Yes, I think he used the word accommodation, but I will not be perfectly certain." Then Mr Wilde says a little further on—"I do not interpret the expressions 'hard up and accommodation' as indicating that he had financed them. (Q) How do you interpret them?—(A) It was spite on his part entirely. I think it was merely an intention on his part to damage the pursuers by pretending they were hard up. (Q) And required his accommodation?—(A) His accommodation! Why, he was bankrupt." No doubt about that. Where is the falsehood in this report? Does it represent the bankrupt as saying anything worse or anything in effect different than the pursuers' agent here swears that Smyth said, although through spite on his part entirely, "it was merely an intention on his part to damage the pursuers by pretending that they were hard up." Is there anything in this article that represents more than that, or anything different from that? I am not able to find it, and I must say that in this question of a false and calumnious report falsely and calumniously reported I was staggered by the observation of the learned Judge who tried the case that he thought the omission of the speech of the pursuers' agent was sufficient to justify the verdict that a respectable newspaper, admittedly having no evil intention, no bias, no partiality in favour of either party, or prejudice against either party—for I put this question, and it was admitted—may be righteously convicted of falsely and calumniously publishing a report because the speech of an agent is omitted. These were the words of the learned Judge, that the report, he thought, was confused, inaccurate, and very unfair, that there were several omissions, but he thought that the omission of the speech of the pursuers' agent was sufficient to justify the verdict. It was put by the learned Judge as the question for the jury—Was the report fair and accurate? Now, I must take leave to say that "fair and accurate" is not technical nor legal language. It is language which requires explanation, requires to be very carefully explained, and very anxiously guarded, so that there may be no misapprehension as to its meaning. We have proper technical legal language in the issue:—"Whether the statements therein set forth falsely and calumniously represent that the pursuers have . . ." and so on. To whom is the falsehood and calumny imputed? To the defenders, necessarily. It must be imputed to intelligent moral agents. Falsehood and calumny cannot be imputed to any others. And if there was falsehood and calumny on the part of any one for whom this newspaper was responsible that would warrant the verdict. But was there any falsehood and calumny? It is said that falsehood and calumny must be presumed unless they prove that in an unexplained sense—for it was altogether unexplained, so far as I know—the report was fair and accurate. What is the meaning of the word "fair," for example? What is the meaning of the word "accurate," and what is the meaning of the combined expression "fair and accurate?" May it be fair without being accurate, or accurate without being fair, or are the two words to be taken in connection, "fairly accurate?" I repeat that this is not technical language at all, and it is not the language of any formula. It may have been used by Judges, I daresay has been used by Judges, and if they used that in a charge to a jury I hope they explained to the jury what they meant. Dr Johnston gives in his dictionary—I turned it up—the explanation of the word "fair" under seventeen heads. The word fair comes from the same derivation which means a clearance. The "fair-way" is the most original application of it, where there is a fair passage, all obstructions and im-

pediments being removed. Then it may mean without spot and without blemish. But the only ones of the many definitions at all applicable to the present case which I could find were—equal, just, not affected by any insidious or unlawful methods, not practising any fraudulent or insidious arts, open, frank, honest, not foul, not sophisticated or insidious. Is it in any of these senses that the word was used here? There was nothing insidious or sophistical, trying to injure a party while sailing very near the law, not intending what was fair and true. I think, if the necessity of anything of that sort had been explained, that the jury could not possibly have returned the verdict which they did, and it was quite admitted that there was nothing off the straight path on the part of the newspaper or of any party that it represented, nothing unfair in their intention or motive or views to favour one party and prejudice another. Then, what is the meaning of the word "accurate?" Accurate, according to our ordinary acceptation, is exact, without defect or failure, exactly, without error, nicely, exact to a nicety. Now, we are familiar with the words true and false, but I do not think we are familiar with that language in law, which may be used with great propriety if it is explained. If there was any unfairness, anything foul—as in the expression of a foul blow—in this article, then there should be responsibility. Inaccurate, if used in any other sense than substantially untrue, really an untrue report, I should object to altogether. But I simply put this, Do you use the two expressions as meaning different things, or the one as qualifying the other—fairly accurate not literally accurate, not exactly accurate, but fairly accurate, that is, accurate without any twist in it intended to prejudice one party in favour of another? I cannot find that the jury had any direction of that kind, nor can I find anything whatever in the evidence to suggest unfairness. It is the report of a bankruptcy proceeding in open Court, and, not speaking about the exact word "financed" or the exact meaning of the word "accommodation," there is nothing imputed to the bankrupt, who was under a charge of embezzlement and theft, and who was writhing under that charge, and whose spitefulness had been excited by it, except what the agent of the pursuer says the bankrupt intended to express, to show his spite by expressing it. Therefore upon the whole matter I must come to the conclusion—and I repeat that but for the sincere respect which I have for your Lordship's opinion I should have done so without any doubt—that there is no foundation for this charge at all. I think the pursuers behaved, according to Mr Wright's account of their conduct, with the greatest impropriety. To detect a man of having committed embezzlement—actually stolen from them—and to keep him in their employment for thirteen months thereafter, without making any other accusation than writing to him to send them a bill for the stolen money, and they would return another bill of his which they had in their hands, professing they might require it to discount, and then at the end of thirteen months, without anything new coming to their knowledge except dissipated habits—for even the £30 was not discovered till some after that—to charge him in this gross and foul manner with being an embezzler, a thief, is, I must say, conduct of which I cannot approve, and, so far from differing from the Registrar, I think he acted with great propriety in suspending the certificate because of a groundless defence which was maintained on an unfounded claim of damages, but dismissing as having no ground at all these grave charges which had thrown the man into a state of delirious excitement. The question of damages can be of no importance to such a newspaper as the *Glasgow Herald*, but I think it is of importance that they should not be falsely charged with a false and calumnious report. I think there was nothing false or calumnious in the report. I see nothing in it of which the shorthand writer who sent it need be ashamed. I see nothing in it of which the newspaper publishing it need be ashamed. I should set aside the verdict without hesitation, and grant a new trial.

LORD RUTHERFURD CLARK—We have before us a motion for a new trial. I think it is right to emphasise that fact. We can do nothing more than decide whether the verdict shall stand or a new trial shall take place. The case was tried on the issue which was adjusted before us. There was no exception to the law which was laid down by the Judge. On the contrary, the counsel for the defenders expressly admitted that the Judge had put before the jury the true question which they were to try, namely, whether the report which the defenders had published of the proceedings in the English Court of Bankruptcy was a fair and accurate report. Neither party desired any further or other direction, nor did the defenders suggest that the meaning of the direction was not fully explained by the Judge and fully understood by the jury. There was therefore no miscarriage due to the Judge, nor had the defenders so asserted. That the report was defamatory was not disputed, nor was it disputed that the defenders had a sufficient defence if it were fair and accurate. The jury held that the report was not fair and accurate, and found a verdict for the pursuers. The only question which is or can be before us at the present time is, whether the verdict is contrary to the evidence? I cannot say that it is. It was a question very proper for a jury to decide, and I do not think that we should disturb their verdict, more especially as the Judge who tried the case was satisfied with it. But I concur with your Lordship in thinking that we should make it a condition in refusing the rule for a new trial that the pursuer should consent to a reduction of the damages to £250.

LORD LEE—We are not here to decide whether the pursuer Wright was entitled to represent Smyth as a thief, nor are we to decide whether Smyth was entitled to

represent his indebtedness to Wright & Greig as a mere matter of account.

What we have to decide is whether the verdict of the jury upon the issue submitted to them was against the weight of the evidence, and that question depends on whether this was an impartial and accurate report, or a calumnious report not justified by the fact that it was an impartial report of what took place before the Registrar. I hold it to be settled that a defamatory statement contained in a report, or what professes to be a report, of proceedings in a court of justice is not protected by privilege unless it be impartial and fairly accurate, and the question whether it is impartial and accurate is in my opinion a question for the jury. I think there was evidence for the consideration of the jury on that question, and I concur with your Lordship in thinking the conclusion the jury arrived at was supported by the evidence.

As to the *onus probandi* in the question of accuracy and impartiality, it must be observed that no misdirection on that subject is alleged. The pursuer appears to have accepted the burden of proving that the report was partial and inaccurate, especially in omitting matters which would have made an appreciable difference in his favour, and would have counteracted the objectionable statements which were fully set forth. My opinion is that the pursuer was right in undertaking this burden. He has satisfied the jury on the subject, and I cannot say that the verdict of the jury is against the evidence. It seems to me that the omissions pointed out were very material. The answer made to the bankrupt's statement is not given, nor is the bankrupt's admission as to the account, although that admission was said to have been sufficient of itself to contradict the defamatory statements complained of.

With regard to the amount of damages, although it is larger than I should have awarded as sufficient, I consider that the amount of damages, especially damages for slander affecting the credit of a person engaged in commerce, is peculiarly within the province of the jury, and I should have thought it doubtful whether the amount is so excessive as to justify the interference of the Court. But as your Lordships think it is excessive, I agree that the verdict can only stand if the pursuers agree to a reduction as suggested.

Subject to the question about the amount of damages, I think this rule ought to be discharged.

The pursuers having agreed that the damages should be reduced to £250, the Court discharged the rule and applied the verdict.

Counsel for the Pursuers—Graham Murray—Ure. Agents—Smith & Ritchie, S.S.C.

Counsel for the *Glasgow Herald*—Asher, Q.C.—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, March 12.

FIRST DIVISION.

PIRIE *v.* THE CALEDONIAN RAILWAY COMPANY.

Process—Jury Trial—Citation of English Witnesses—Affidavit—Witnesses Out of Jurisdiction Act 1854 (17 *and* 18 *Vict. cap.* 34), *sec.* 1.

The Witnesses Out of Jurisdiction Act 1854, section. 1, provides that "If in any action . . . depending . . . in the Court of Session . . . it shall appear to the Court . . . that it is proper to compel the personal attendance at any trial, of any witness who may not be within the jurisdiction of the Court in which such action is pending, it shall be lawful for such Court . . . if in . . . their discretion it shall so seem fit, to order that a . . . warrant of citation shall issue in special form commanding such witness to attend such trial wherever he shall be within the United Kingdom." . . .

A party applying under this statute, presented a note to the Court, which consisted of a signed statement by the agent, that the witnesses designed would not attend without special citation, and concluded with a prayer for warrant to cite, signed by counsel.

Held that this was a proper form of application, and that an affidavit was unnecessary.

Counsel for Petitioner—Wallace. Agent—A. Morison, S.S.C.

Friday, March 14.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

CROSKERY AND OTHERS *v.* HENDRIE AND ANOTHER (BOYD GILMOUR'S TRUSTEES).

Trust—Loan—Powers and Duties of Trustees—Ultra Vires—Delict—Reparation.

In an action by beneficiaries under a trust against one of the trustees for alleged losses to the trust estate, arising from loans thereof by the trustees to certain of their own number—*held* that as the action was founded on delict, the trustees were all liable *in solidum* and conjunctly and severally, and a plea of "all parties not called" *repelled.*

Western Bank v. *Douglas*, 22 D. 447, and *Perston* v. *Perston's Trustees*, 1 Macph. 245, *followed.*

Mrs Mary Gilmour or Croskery and Mrs Jeanie Logan Sinclair, two of the beneficiaries under their father's trust, sued John Hendrie junior and others, the trustees, for an account of the trust estate, and for payment of their shares, and John Hendrie junior, as an individual and as factor for