LORD M'LAREN—I think that actions involving questions of servitudes or right-of-way are best decided by a proof before a Judge, and in the Outer House I invariably followed that practice. It is seldom in such cases that the inquiry is limited to questions of pure fact; indeed, it almost invariably involves delicate inquiries regarding the amount of possession, interruptions, and of tolerance—all questions other than that of public right. It is besides notorious that cases of this kind often raise very difficult questions of law, resulting not infrequently in a difference of opinion upon the bench, all which goes to show how unsuitable they are for trial by jury.

The Court adhered.

Counsel for the Pursuers — Rankine. Agents—J. W. Fraser-Tytler, W.S.

Counsel for the Defenders — A. S. D. Thomson. Agents—R. Stewart, S.S.C., and A. Newlands, S.S.C.

Tuesday, March 18.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

SEXTON *v.* RITCHIE & COMPANY.

Reparation—Slander—Issue—Innuendo.

Circumstances in which the Court, in an action of damages for slander, *held* (*diss.* Lord Shand) that a writing, though of ambiguous meaning, was reasonably capable of bearing the innuendo put upon it by the pursuer, without the allegations of extrinsic facts to support such innuendo.

Opinion (*per* Lord Shand) that the primary meaning of the writing being inoffensive, the innuendo proposed by the pursuer should not be allowed without the allegation of extrinsic facts to support it.

This action was brought by the Right Hon. Thomas Sexton, M.P., Lord Mayor of Dublin, against John Ritchie & Company, proprietors, printers, and publishers of the *Scotsman* newspaper, for payment of £5000 in name of damages for alleged slander.

The pursuer averred—"(Cond. 2) In the number of the *Scotsman* of 19th July 1889 the defenders published the following:—

'ONE OF MR SEXTON'S MISREPRESENTATIONS.

'The following letters addressed to Mr Sexton, M.P., have been sent to us for publication:—

'*Ulster Loyalist Union Offices,*
'1 *Lombard Street, Belfast, 25th June* 1889.

'The Right Hon. Thomas Sexton, M.P.,
'Lord Mayor of Dublin.

'Dear Sir,—Pray excuse the liberty of this note. From what accounts I have of you as a member of the Nationalist party, I am constrained to believe you would not willingly give currency to a falsehood. In any case, you could not surely use unfair means to wilfully malign one who has the honour to be on the roll of the Division in Belfast which you represent in Parliament. If on no other grounds than this, I think I am entitled to a fair consideration at your hands. Having cleared the ground so far, I beg to direct your attention to the fact of your persistent efforts before the House of Commons on two or three occasions lately (indeed, one of those occasions not later than last evening) to give prominence to a statement that I had "insulted a virtuous girl at Gurlroe," on the Ponsonby estate, last week, by asking her to kiss me. Perhaps you and I have different opinions on what an insult is. I consider, for example, that if I could have seen my way to administer a kiss on any of those young women, that I would have conferred an honour on her she was not likely to again receive during the rest of her lifetime. Be that as it may, my kissing days—*ad libitum*—are past and gone, "for into the sere and yellow leaf my way of life has fallen," and especially before so many men I was not likely to use such liberties with this class of girl. She was too young to begin with. This brings me to say, therefore, that the insult you speak of, so far as it concerns me, is, from beginning to end, a wanton falsehood. Now I am not so unmannerly as to charge you with falsehood; but this I do charge you with. You have by your persistent questionings in Parliament brought me into prominence in a way that is anything like being dignified, without first assuring yourself that no one, especially one of your constituents, would suffer without a cause, even by implication. I think it was unfair, and I do think it very ungentlemanly, not to say indiscreet, for you to treat one who has never said or done you any harm in such an impolite way. I had hitherto looked on you as an ornament to your party, and one who would at least act honourably; but since this conduct which I have to complain of, and that justly too, has been so closely brought home to you, I think, at least, I am entitled to ask you to vindicate the good opinion I had of you by explaining how you were brought to cast, even by implication, such an uncalled for, and, indeed, a gratuitous insult on one who made it a point not to wound even the most susceptible of feelings.—Yours truly,

JOHN D. CROCKETT.'

'*Offices,* 1 *Lombard Street,*
'*Belfast, 2nd July* 1889.

'Dear Sir,—It is just seven days since I wrote you anent a matter that touches my character as a man, and I expected at least the ordinary courtesy of, if not an explanation, a reply to my polite note. You may rest assured I will not be put off with an evasion of my letter.—Yours very truly,

'JOHN D. CROCKETT.

'The Right Hon. Thos. Sexton, M.P.,
'Lord Mayor of Dublin.'

'*Offices,* 1 *Lombard Street,*
'*Belfast, 15th July* 1889.

'The Right Hon. Thomas Sexton, M.P.,
'Lord Mayor of Dublin.

'Dear Sir,—It is now three weeks since I wrote you first calling your attention to

the grave implication to my character through the medium of questions by you in the House of Commons to the Right Honourable the Chief Secretary for Ireland. From the opinions of your friends, I had gathered you would have been polite enough to reply to my courteous application. Till now it is not so, however. I was inclined to believe it was the multiplicity of your duties prevented you from doing this, and to save any misapprehension I took the liberty of addressing a reminder to you, now two weeks ago. You have not seen your way to reply to that letter either, and I am therefore reluctantly constrained to believe that you are not incapable of adding insult to injury, and wish to avoid showing how totally incapable you are to act the part of an ordinary courteous gentleman. Withal, I am still inclined to believe that you find yourself in the dilemma of every gentleman who unwittingly becomes the dupe of more unscrupulous and designing men. I am desirous to take this view of the matter, and believe that you now find yourself totally deceived by whoever gave you the false material whereon your persistent questionings were framed. I hope and believe you will, on reflection, see with me that it is a very unfair and ungentlemanly, not to say uncharitable, way to treat anyone—to ask questions of the kind before you attempt to verify the statement put into your hand. Besides being unfair to the parties implicated, it is a wanton misuse of the rules of the House of Commons, which were framed to regulate the conduct of dignified and, up till recent years, honourable gentlemen. You have, whether unwittingly I will not undertake to say, grossly abused these rules for the purpose of maligning by implication one whom you are pleased for convenience sake to consider an opponent. As I have already said, I am willing to believe you have been the dupe of less scrupulous men; but see where this thing, if carried out by every honourable member, will leave you and the most of your colleagues. Supposing, for example, I sent a question to Colonel Sanderson, Colonel Waring, Mr Macartney, or any other honourable member, say Mr William Johnston, based on hearsay evidence, to the effect that while I was on my way through Dublin to the Ponsonby estate, to insult Canon Keller's 'virtuous girls who had never been out of their mother's house,' I heard from a gentleman, whom I would not think of doubting, that the Lord Mayor of Dublin was in such a state of '*delirium tremens*' through the effects of an over-indulgence of alcoholic liquor that it took four attendants to prevent him destroying himself and those that were about him. Or, supposing I had added to that further stories I had heard in support of this hearsay evidence, that the Right Honourable the Lord Mayor of Dublin when he was in Belfast last was so utterly intoxicated that while crossing the street it was with difficulty that he was prevented from measuring his length on the tramway path. To frame and have asked any such questions in the House of Commons on mere hearsay evidence would be ungentlemanly and utterly unfair to the Lord Mayor of Dublin, and an insult to his city to have such an imputation, even by implication, put upon their Lord Mayor without at first verifying the information. Withal, I do not hesitate to say there would be as much truth in my information if supplied to these Ulster members, as in the information supplied to you, and on which you framed your question, inasmuch as that I consider myself as a married man, and those who know me consider me totally incapable of making overtures to kiss these 'virtuous young women,' whose talk and conversation in my hearing, and the magistrates and gentlemen present, would disgrace a brothel; and in so far as those who know you being able to lay their hand on their heart, and say that they believed the Right Honourable Thomas Sexton, M.P., Lord Mayor of Dublin, a teetotaller, and one who was totally incapable of disgracing himself and the city he is the chief magistrate of, for which he receives the bulk of £4500 a-year, out of which he perhaps spends £200 in supplying dinners to his friends, in any such way by any such despicable and disgraceful conduct. I do not venture to say these stories are true; but here is a case in point, and I would, I believe, be as much justified in framing questions thereon as you were. It is doubtless painful for you to hear of these stories, as it is painful to me to have to imagine them true for the sake of bringing home to your mind the impropriety of your unfair questions; but you can understand that it is equally painful to me to be made the subject of such an insult in such a public way as you have felt it your duty to subject me to.

"While disclaiming all intention of paining you by the recital of these imaginary stories, I must say I could not find a case in point more suited to bring home to you the gross unfairness of your treatment of me; and as you have given the utmost publicity to your insult, I must, since you refuse to apologise therefor, take the best means of making public my disclaimer, and will consequently send these letters to the Press Association.—Yours truly,

JOHN D. CROCKETT.'

"The defenders did not in fact publish the said letters for the purpose of defending or protecting the reputation of Mr Crockett, but solely for the purpose of maligning and injuring the pursuer. The defenders are called upon to state who sent said letters to them for publication. It is believed and averred that, as announced at the end of the letter of 15th July, the correspondence was sent to the Press Association, which however, declined to publish the same; and that thereafter the defenders did so, making, however, certain alterations thereon. They did so, selecting as the date of the publication 19th July 1889, being one day before that on which the pursuer was announced to address a public meeting in Edinburgh. The letter of date 15th July 1889, above quoted, is of and concerning the pursuer, and falsely, maliciously, and calumni-

ously represents, and was intended by the publication thereof as aforesaid to represent, that the pursuer is a drunkard, or at all events that he on the occasions referred to drank alcoholic liquors to such excess as to produce intoxication, and on the occasion first mentioned *delirium tremens*, and had thus been guilty of despicable and disgraceful conduct."

The defenders admitted that the letters were published in the Scotsman on July 19, 1889, but denied that they would bear the meaning sought to be put upon them. They averred that the pursuer, in the House of Commons, on 24th June 1889, asked the Chief Secretary for Ireland, with reference to certain evictions which were being carried out in Ireland on the Ponsonby Estate, at which a force of police were present, whether he was aware . . . "that a person named Crockett, . . . who had been allowed within the lines, insulted a young girl, daughter of a widow, an evicted tenant, by asking her to kiss him." The above-quoted letters were written by Mr Crockett to protest against the baseless allegations which the pursuer had made against him, under shelter of the privilege of Parliament.

The Lord Ordinary on 23rd January 1890 disallowed one of the issues proposed by the pursuer, but allowed the following issue for trial of the cause:—"Whether the said publication, or part thereof, is of and concerning the pursuer, and falsely and calumniously represents that he, on the occasions referred to in the letter of 15th July 1889, quoted in said schedule, drank alcoholic liquors to such excess as to produce intoxication, and on the occasion first mentioned in said letter, *delirium tremens*, or makes similar false and calumnious representations of and concerning the pursuer, to his loss, injury and damage? Damages laid at £5000."

The defenders reclaimed, and argued—No part of the letters justified the innuendo sought to be put upon them. What the attention of the readers of the *Scotsman* was especially directed to was "one of Mr Sexton's misrepresentations." It was not hinted that the hypothetical cases suggested in the letter were true. On the contrary, they were used to illustrate how baseless were the pursuer's statements about Crockett. In the absence of circumstantial averments to support the innuendo, the letters must be taken to have been published in the *Scotsman* for what they purported to be. It was not the province of the jury to inquire what was the proper and true construction of a publication, but to draw inferences from the evidence as to the use it was intended to serve. There being no averments to impose an oblique meaning on the language used, all that would be submitted to the jury would be a matter of construction—*Kennedy* v. *Baillie*, December 5, 1855, 18 D. 138; *Fraser* v. *Morris*, February 24, 1888, 15 R. 454; *Sturt* v. *Blogg*, 10 Ad. and E., Q.B. 907; *Hunt* v. *Goodlake*, November 6, 1873, 43 L.J., C.P. 54; *Raven* v. *Stevens & Son*, November 11, 1886, 3 L.T. 67; *Capital and Counties Bank* v. *Henty & Son*, May 14, 1880, 5 C.P. Div. 514, and August 1, 1882, 7 App. Cas. 741; *Broomfield* v. *Greig*, March 10, 1868, 6 Macph. 563; *Brydone* v. *Brechin*, May 17, 1881, 8 R. 697; *M'Neill* v. *Forbes*, May 18, 1883, 10 R. 867; *Mulligan* v. *Cole, &c.*, June 16, 1875, 10 L.R., Q.B. 549.

Argued for the pursuer and respondent—It was a matter for the jury to determine whether the publication would bear the meaning put upon it. The only reason for refusing an innuendo was when it was of such an unreasonable character that the jury would be necessarily wrong in adopting it as the meaning of the words. The innuendo in the present case was not strained or unreasonable—*Inglis* v. *Inglis*, February 24, 1866, 4 Macph. 491; *Dun* v. *Bain*, January 24, 1877, 4 R. 317; *Ross* v. *M'Kittrick*, December 17, 1886, 14 R. 255.

At advising—

LORD PRESIDENT—The pursuer in this action is the Lord Mayor of Dublin, and he is also a Member of Parliament for an Irish constituency. The defenders are the proprietors and publishers of the *Scotsman* newspaper, and the pursuer's complaint against them is that upon a certain day libelled they published in the *Scotsman* newspaper some letters which contained a libel against the pursuer. The Lord Ordinary in considering the issues approved of the first issue proposed by the pursuer, and disallowed the second, and we have now therefore only to do with the first issue, because the pursuer did not insist on his second when he came here by reclaiming-note.

Now, the issue is in these terms:—"Whether the said publication"—that is, the publication of July 19, 1889, of the *Scotsman* newspaper—"or part thereof, is of and concerning the pursuer, and falsely and calumniously represents that he, on the occasion first referred to in the letter of 15th July 1889, drank alcoholic liquors to such excess as to produce intoxication, and, on the occasion first mentioned in the said letter, *delirium tremens*, or make similar false and calumnious representations of and concerning the pursuer, to his loss, injury, and damage." The defenders object to this issue being allowed, upon the ground that the letters inserted in the *Scotsman* newspaper did not bear the construction ascribed to them in this issue and also on the record. They say that the true and obvious meaning of the letter or letters is not to impute drunkenness or *delirium tremens* to the pursuer, but only to state a suppositious case, to assume that such a charge might be made against him, and to discourse upon what his feelings would be if such a charge were made. The letters are not the production of the *Scotsman* newspaper itself. They are written by a person of whom we know nothing—somebody living in Ireland of the name of Crockett. But of course the liability of the newspaper is the same whether the libel is composed by the newspaper itself or by someone else. It is the publication of the

libel that infers liability against the newspaper.

I am not able to agree with the view taken by the defenders. On the contrary, I think the Lord Ordinary has done quite rightly in sending this issue to be tried by a jury. In all actions for libel where the writing complained of does not contain words or expressions clearly actionable, it is the duty of the pursuer to state on record what he understands and undertakes to show is the true meaning of the writing taken as a whole. But in such cases there is room for a distinction. Where the words or expressions used are in their natural and ordinary sense not actionable, and where the pursuer undertakes to prove or infer from extrinsic facts that they were intended to be used in a non-natural sense, he is bound to state on record the extrinsic facts from which the inference is to be drawn. This is illustrated and very clearly established by the case of *Broomfield* v. *Grey*, 6 Macph. 563, and the case of *Brydone* v. *Brechin*, 8 R. 697; but in other cases where a non-natural meaning is not sought to be ascribed to particular words or expressions, and the pursuer merely alleges that the writing, though not free from ambiguity, is yet according to its fair construction a libel on his conduct and reputation, he is not necessarily required to state extrinsic facts from which to infer the construction for which he contends. All that is required of him in such cases is to state distinctly the libellous meaning which he attaches to the writing. In such a case the question of construction must be left to the proper tribunal; and according to our law and practice the question of libel or no libel belongs to the jury in the first instance at least, subject no doubt to correction by the Court if the jury go flagrantly wrong.

The present case is of this description, and the pursuer has sufficiently discharged his duty by stating in the third article of the condescendence quite distinctly the libellous meaning which he attaches to the writing, and does not propose to prove that any particular words or expressions are used in a non-natural sense. The issue approved of by the Lord Ordinary is quite in accordance with the state of the record, and I am therefore of opinion that his Lordship's interlocutor ought to be adhered to.

LORD SHAND—As the result of a careful consideration of this case, I have come to the conclusion, differing from your Lordships, that the defenders' first and second pleas-in-law should be sustained, and that the action ought to be dismissed. I think the pursuer's averments are not relevant to support his claim of damages, and that the letters complained of, in the absence of any statement of facts to justify an innuendo, are not libellous, and do not warrant the issue which the Lord Ordinary has granted.

The ground of my opinion is, that taking the terms of the letters published by the defenders in their natural and proper meaning according to the ordinary construction of the language used, they do not bear the libellous signification attached to them by the pursuer on the record and in the issue; and that there is an absence of any statement of extrinsic facts or circumstances relating to the matters referred to in the letters which would give to the language used the libellous signification which he seeks to attach to it, and which is entirely different from its natural and proper meaning.

The record on the pursuer's part is very meagre in its statement, having regard to the subject of the letters of which he complains, which, according to the title of the publication, related to what was described as "one of Mr Sexton's misrepresentations." It may be properly described as a record in which the alleged libel is simply set forth, with the addition of the meaning which the pursuer says it conveyed, followed by a claim of damages in consequence of the publication. There is no introductory explanation of, or even any reference to the facts and circumstances which preceded the publication, which are very specially there referred to, and which obviously gave rise to the publication, as anyone reading it must at once see. The origin of the publication and the subject to which it relates was a question which was asked by the pursuer, in his place in Parliament, of the Chief Secretary for Ireland, and of which Mr Crockett, the writer or apparent writer of the letters, complains as containing what he regarded as a serious imputation against his character. It is not said by the pursuer that no such question was put by him, or that Mr Crockett did not write the letters of complaint. The defenders in their answer to Cond. 2 narrate in detail, and apparently from a full or authorised report, what took place in the House of Commons, and they explain that the letters were written by Mr Crockett with reference to the imputation which that gentleman alleged had been made against him in the form of questions by the pursuer in Parliament. The pursuer deals with this answer in a long addition to article second of his condescendence (which was made before the record was closed), beginning with the words "With reference to the answer hereto, it is explained," &c., and in this addition to his statement no denial is made that the proceedings alleged to have taken place in the House of Commons did occur, or that Mr Crockett wrote the letters with reference to these proceedings. The pursuer indeed states with reference to the defenders' averment that the letters were written by Mr Crockett—"It is believed and averred that, as announced at the end of the letter of 15th July, the correspondence was sent to the Press Association," adding, however, that the Association declined to publish it; and the passage in Mr Crockett's letter thus referred to by the pursuer is in these terms—"As you have given the utmost publicity to your insult, I must, since you refuse to apologise therefor, take the best means of making public my disclaimer, and will consequently send these letters to the Press Association."

I feel no difficulty therefore in this state

of the record in taking the case on the footing (1) that questions were put in the House of Commons relating to the proceedings at certain evictions in Ireland, which imputed to Mr Crockett, who was said to have been then present, conduct which he regarded as seriously reflecting on his character and reputation; and (2) that the letters founded on, in which Mr Crockett complains of these imputations, made under the cover and form of questions, were so made, not as having been invented by the pursuer, but upon mere hearsay evidence which was false—were written by way of complaint of the pursuer's conduct in publicly putting the questions in Parliament as he did:

What, then, is the meaning of these letters? and will their terms justify the issue asked being granted (apart from any circumstances alleged which can give them a signification different from the natural and ordinary meaning of the language used), the issue, namely, that they represented that the pursuer, on the occasions referred to in the letter of 15th July 1889, "drank alcoholic liquors to such excess as to produce intoxication, and on the occasion first mentioned in said letter, *delirium tremens*, or made similar false and calumnious representations concerning the pursuer."

In my opinion, the language, in the absence of any statement of such facts and circumstances, will not bear the meaning ascribed to it in the issue. I do not mean to go over the publication in detail, for indeed it was scarcely maintained by the pursuer's counsel that, taking the terms of the letters in their natural and ordinary sense, the meaning expressed in the issue could be ascribed to them. The argument for the pursuer as I understood it, was rather to this effect, that although the language used in its primary and proper signification did not convey the imputation that the pursuer had drank alcoholic liquors on the occasions referred to to such excess as to produce the consequences described, yet it admitted in a secondary sense of this meaning; or, in other words, that while in its primary sense it did not bear the meaning attributed to it in the issue, yet it was capable of being so understood, and that this was enough to entitle the pursuer to have the issue presented to a jury. I do not understand that any of your Lordships are of opinion that giving to the terms of the letters their natural and proper meaning, they do bear the meaning ascribed to them by the pursuer. A charge or hurtful imputation may be made in direct terms, admitting of no possible doubt, as, *e.g.*, by alleging that a person committed theft or embezzlement, or drank on certain occasions to such excess as to produce, as the consequence, complete intoxication or *delirium tremens;* and in such cases the language, according to its direct and primary meaning, is libellous. That is, I think, certainly not the case in regard to the letters here complained of. The utmost that can be said of them, as it appears to me, is, that while according to their true meaning — by which I intend their meaning giving to the language used its natural and ordinary signification—they do not convey the imputations alleged; yet some people, more or less numerous, and especially persons reading the publication cursorily, might take them in another sense and attribute to them the meaning of which the pursuer complains.

It must, I think, be conceded to be clear that the writer was complaining of a false charge which he alleged the pursuer had made by implication against him on hearsay evidence by putting the questions which he asked in Parliament, and that he called for such an explanation from the pursuer as would clear his character. There is nothing beyond such a complaint and request or demand for explanation contained in the first two letters of 25th June and 2nd July 1889, to neither of which the pursuer made any reply. In the third letter, dated a fortnight later, viz. on 15th July, the writer renews his complaint and request, and goes on further to reproach the pursuer for what he calls "persistent questionings" founded on false material supplied by others who had deceived him; and by way of illustrating the evils which would result if the course adopted by the pursuer were "carried out by every honourable member," he proceeds to put a supposed case of a similar or parallel kind, in which he professes to place the pursuer in the position in which he, the defender, had himself been placed by being made the subject of a serious imputation against his character by implication in the form of questions put in the House of Commons. There is no doubt that what follows in the letter professes to be the statement of such a parallel case, and that the parallel case is put by way of supposition only, and this for the purpose "of bringing home to the mind of the pursuer the impropriety of unfair questions," the injury which such questions may do to the characters of those against whom false imputations are thus made, and the injustice that is committed by making such imputations on hearsay evidence not verified. The letter draws such a parallel in a style and mode of expression which most people would condemn as being in the worst of taste, and the illustration given is unquestionably of a very coarse description. But having said this, I am unable to say further that the language used, taken in its ordinary and natural sense, conveys the imputation against the pursuer which he alleges it bears. The case put by way of parallel, to the treatment which the defender himself says he suffered, is that it should be supposed that he, the defender, had been informed that the pursuer had been seen in a state of *delirium tremens* through the effects of an over-indulgence of alcoholic liquor, or that the pursuer had been on one occasion "so utterly intoxicated" that it was with difficulty he could keep his feet on the street, and he proceeds to say that, on mere hearsay statements to that effect, it would be "ungentlemanly and utterly unfair" to the pursuer to frame questions on the subject and send them to

one of certain members of Parliament in order that these should be asked in the House without even verifying the information. The letter then proceeds—"Withal, I do not hesitate to say there would be as much truth in my information, if supplied to these Ulster members, as in the information supplied to you and on which you framed your questions." The complaint of Mr Crockett was based on the falsehood of the charges made by implication against him, and the case as a parallel depended for its point and application entirely on the falsehood of the hearsay statements which it was figured might have been made the ground or occasion for an imputation of gross drunkenness in the form of questions put in Parliament relative to the pursuer, and the very extravagance of the suppositions made of absolute and complete intoxication and *delirium tremens* tended strongly to show that false charges were taken as illustrations—which indeed was necessary to make the supposed case a parallel at all. One passage was specially founded on as giving, or rather tending to give, to the letter the meaning of a direct imputation, viz., the words—"I do not venture to say these stories are true; but here is a case in point, and I would, I believe, be as much justified in framing suggestions thereon as you were. It is doubtless painful for you to hear of these stories, as it is painful to me to have to imagine them true for the sake of bringing home to your mind the impropriety of your unfair questions," &c. I cannot, however, read these words as either making a charge of drunkenness or as adopting and repeating such a charge as made by others—particularly keeping in view what precedes and follows them, and including these words which occur a few lines further on, and which form the beginning of the concluding paragraph of the letter, viz., "while disclaiming all intention of paining you by the recital of these imaginary stories," &c.

Some of the expressions used in this part of the letter may no doubt be described as loose, but they are always qualified by others which show that the meaning intended to be conveyed, and what is of more consequence to the present question, the meaning in fact conveyed, was that a hypothetical case only was stated. And so I do not doubt that, taking the letter as a whole, in the absence of any statements of extrinsic facts to give its terms a special meaning, and interpreting its language in its natural and ordinary sense, the illustration of the pursuer's extraordinary state of drunkenness was put merely as a hypothetical case to bring out in a forcible way, and with a personal application to the pursuer, of whom Mr Crockett thought he had just reason to complain, the hardship and injustice which he conceived he had suffered by a false charge made by implication against his character by the pursuer.

If this be so, is the pursuer entitled to present an issue to the jury putting the issue whether the publication directly charges him with gross drunkenness followed by *delirium tremens*?—for in form this is the nature of the issue, which does not use the terms "meaning thereby" usual where an innuendo is set forth on record. I am of opinion that the pursuer is not entitled to do so, because if that course were allowed it would come to this, that while according to the primary meaning of the letter, and therefore its true meaning taking its language in its natural and ordinary sense, it states only a hypothetical and parallel case to the case which had occurred in the writer's own experience, yet it should nevertheless be in the power of a jury to find that a secondary meaning—a charge of gross drunkenness made against the pursuer—was its true meaning.

My opinion proceeds on the assumption that the pursuer has stated no facts or circumstances which can give a colour to the meaning of the words used different from their natural and ordinary sense, for of course a statement of this kind might at once admit of an innuendo, and warrant a finding by a jury that the publication had the secondary meaning maintained. It humbly appears to me that this ought not to be allowed. If the primary meaning of the publication be what I have said it is—and as I have said I scarcely think this was seriously disputed or that your Lordships have any doubt on the subject—then the pursuer's issue really proceeds on an innuendo, leading to the result that the language insinuates what it does not state, for it attributes a secondary meaning to the language. And if the issue be sanctioned then the innuendo is allowed without a key in the form of facts and circumstances alleged to suggest that the true meaning of the article is not what its language taken in its ordinary sense conveys.

The present discussion has taken place on the relevancy of the action. Suppose instead of this a verdict to have been returned for the pursuer, and that no extrinsic facts have been laid before the jury to give to the language anything but its natural meaning—just as no such facts are alleged on record—on a motion for a new trial, if the Court be satisfied that the jury have affirmed a secondary and defamatory meaning of the publication, while its language taken in its ordinary sense does not convey that meaning, is the verdict nevertheless to stand? This can only be on the view that a jury are entitled to give to a publication a meaning which primarily it does not bear without any facts before them to justify this, and proceeding, it must be, on conjecture and surmise only; which in the result comes to this, that a defender in such a case as this is to have the alleged libel interpreted at the option of a jury, having nothing but the publication before them, not according to its natural and ordinary meaning, which is not libellous, but according to a secondary meaning which in the opinion of a jury may attach to it. That, as it seems to me, would be an unfortunate and unreasonable result.

I have proceeded on the assumption

that extrinsic facts and circumstances if alleged might give to the publication the colour imputed to it—in which case it would be for the jury to decide whether this was so, but on the view that there is an absence from the record of a statement of any such facts. It may be said by the pursuer that the question ought not to be decided at this stage, but that a trial should take place that it may be seen what facts are put in evidence. But I think expediency and the practice of the Court are both quite against this course, which must result in the same question now raised coming up for decision after trial, in the manner I have already put by way of illustration of the argument. The defenders are entitled to have their first and second pleas disposed of on the case as stated; and there is nothing better settled in practice than this, that if a publication requires an innuendo in order to give it a meaning which is not its natural meaning, but which a pursuer says is its true signification, then the pursuer must state the extrinsic facts which shew that the language is that of insinuation as distinguished from representation, express, or by direct implication; and cases are constantly occurring in which the Court consider, as the Lord Ordinary did in the present case with reference to the second issue asked, and which he refused, whether the facts alleged will so far justify the innuendo as to entitle the pursuer to have the case on the alleged libel and facts submitted to a jury. The system of pleading in the Scottish Courts is similar to that which formerly prevailed in England in such cases, where in the special pleadings required the pursuer was obliged to state the grounds in fact by which he proposed to support an innuendo of the words of an alleged libel. There is this important distinction however that no possible hardship can be sustained by a pursuer in Scotland by requiring him to state facts and circumstances to justify his innuendo; for the power of amendment of the record is so great that down to the time of judgment he can make such additions to his averments by way of statement of facts as will supply the elements required to make his pleading relevant where it is not so, and so if the facts had admitted of it the pursuer had an opportunity even at the last discussion of the case to make such amendments if he desired it. If, for example, he had been able to say that the whole reference to questions put by him in Parliament, regarding Mr Crockett's conduct as affecting his character, was imagined, and untrue in fact, and that the statements on the subject were introduced into the publication complained of merely to enable Mr Crockett to draw a supposed parallel to a case which had never occurred, then it might fairly be represented that this fact gave a colour and a key to the true meaning of the language used which would justify the issue; but nothing of this kind is suggested. Again, if it had been alleged that false stories or rumours had at one time been in existence imputing habits of drunkenness or occasions of drunken conduct to the pursuer, and that the publication in its true meaning was a revival of these rumours, there would have been room for saying the publication should be taken in this secondary sense, and that it is for a jury with the extrinsic facts before them to say whether this was not the true meaning. But there not only was never any ground for such an imputation, but no such stories or rumours were ever in existence. Accordingly there is no statement of anything of the kind, and the case must be dealt with on that footing. The fact being so is indeed a very strong circumstance against even the idea that the publication can be taken as having any hidden meaning such as is imputed to it.

The only fact beyond the mere publication of the letters which is alleged is in regard to the object which it is said the defenders had in publishing it. The pursuer says—"The defenders did not in fact publish the said letters for the purpose of defending or protecting the reputation of Mr Crockett, but solely for the purpose of maligning and injuring the pursuer," and it is added that they selected as the date of publication the 19th of July 1889 (the last of the letters bearing date the 15th of July), being one day before that on which the pursuer was announced to address a public meeting in Edinburgh. But even taking this statement to be true, however much it might affect the question of damages, if it were once held that the publication was in itself libellous, the object, political or personal, of the publication in the mind of the writer or publisher cannot affect the question what was or is the meaning of the publication itself.

Then, again, it was further said that the defenders were not in the same position as Crockett would have been had he directly made the publication in the defenders' newspaper, which the pursuer does not admit he did, but in a less favourable position. But this point also appears to me to have no bearing on the present question, which relates entirely to the meaning of the publication made. The defenders must bear the consequences if they have published a libel; but the meaning it conveyed or was calculated according to the natural interpretation of the language used must be taken with the fact that it was represented to and read by the public, not as emanating from the defenders, but as the publication of Crockett, by whom it must be taken to have been written as the statements on record stand.

As to the authorities applicable to the case, I am not aware of any previous case which raises the precise question to be decided, for in the cases which have hitherto occurred I think that where the pursuer has sought to give to words spoken or written—to alleged slander or libel, in regard to which the law is the same—a meaning other than the primary or natural meaning of the language used, there have been surrounding circumstances or extrinsic facts averred and founded on to warrant the secondary and libellous meaning alleged. In such cases,

of which there have been a number, and some of which were quoted in the argument, the Court has constantly entertained an argument when raised by the defender on the question whether the circumstances or facts averred warrant the innuendo put on the language used. In many such cases it has been held that the pursuer's statements were insufficient to warrant the innuendo and the defender has been assoilzied, while in many others it has been held that the innuendo is supported without unduly straining the language, or, in other words, that the language taken in the light of the facts averred is capable of bearing the meaning alleged, and an issue has been sent to a jury to determine whether they really did so. All of the cases of the class to which I have now referred presented proper jury questions. They were not cases merely of construction of a written publication, or of words used, but of the application of facts and circumstances arising out of the conduct of the parties, or relating to the subject of the alleged libel or slander to the language used. These cases involved the consideration of extrinsic facts in regard to their bearing on the meaning of the language compained of. In the cases of *Kennedy* v. *Baillie*, 18 D. 138, *Bryden* v. *Brechin*, 1881, 8 R. 697, and *Fraser* v. *Morris*, 1888, 15 R. 454, and *Cockburn* v. *Reekie*, decided in this Division of the Court a few days ago, the actions were dismissed because the Court held either that the language complained of was not libellous, or that the facts alleged did not warrant the innuendo proposed. In the case of *Broomfield* v. *Greig*, 1867, 6 Macph. 563, most of the issues asked were refused, because the Court were of opinion the language was not libellous, and one issue only was granted, and in the cases of *Inglis*, 1866, 4 Macph. 491, and *Dun* v. *Bain*, 1876, 4 R. 317, issues were allowed. It must be noted in regard to the most if not all of the cases now cited, and especially those of later years, that the reports do not profess to contain, and do not contain the detailed statement of the facts alleged by the pursuer, and that in their abridged form they are of really little use in the present question. In none of the Scottish cases has the question, which was so fully and carefully discussed in the House of Lords—the case of the *Capital and Counties Bank* v. *Henty* in 1882—been the subject of argument and decision so far as I am aware. These cases seem to me, speaking of them generally, to have been of three classes. Cases where the slander or libel unmistakably contained a libellous charge, in which case the province of the jury was substantially that merely of assessing damages—the Court being satisfied that the language had but one signification, and that a libellous one. In that class I should place the case of *Ross* v. *M'Kittrick* in 1886, 14 R. 255, in which the libel unmistakeably charged the defender with dishonest conduct, and where the Court granted a new trial, the jury having acted apparently on the view that there was no libel. Another class of cases is that in which the Court have held that the language complained of was not libellous, and dismissed the action. And the third is, where language not libellous in itself according to its ordinary meaning, has been innuendoed with a statement by the pursuer of facts and circumstances which it was maintained showed that the words complained of had been used in a secondary and calumnious sense. In these cases, too, it was for the Court to say whether the facts alleged did or did not warrant the innuendo, and the case has been sent to or withheld from a jury according to the view which the Court took on that question. If any cases have occurred which can be represented as similar to the present in this respect, that while the primary meaning of the publication is clear and not libellous, it was possible for casual readers to accept a secondary and libellous meaning as the true meaning, and such cases have been sent to a jury without any statement of facts which would warrant an innuendo or secondary meaning, I do not think that the argument which was submitted in this case was presented and considered and disposed of by the Court.

In any view, it humbly appears to me that the law which was settled by the House of Lords in the case of *Henty* is of direct application to this case, and should, I think, lead to the action being dismissed. If this case had proceeded to trial, and verdict, it would I think present substantially the same question as their Lordships in the House of Lords decided. The alleged libel in that case did not from its terms, taken alone, admit of the meaning which the pursuers alleged. So I think the publication here complained of does not admit of the meaning put upon it in the issue. In this case, as in the case of *Henty*, a statement of extrinsic facts and circumstances might warrant an innuendo. From the loose nature of part of the language used, it might not be difficult to give to the publication a secondary and libellous meaning, as, *e.g.*, if it had been averred that there had been rumours existing regarding the pursuer's habits in the use of alcoholic liquors—while in the case of *Henty* it would have required a statement of facts of a kind which do not readily suggest themselves as the ground of an innuendo, that the bank in that case could not be trusted to cash the cheques of their customers. This, however, is a difference in detail not in principle.

With regard to the case of *Henty*, I must point out that the argument for the pursuers which was submitted was to this effect—that it was for the Court to say if the words are capable of a defamatory meaning, and for the jury to say if they had that meaning in fact. The argument for the defenders, on the contrary, was that *prima facie* the primary meaning must be given to the writing—that if a secondary meaning is imputed, evidence of facts must be given to support it, and none had been given. And as I read the judgment the defenders' argument was sustained, with one very learned Judge dissenting. I think I cannot better bring out the

ground of the judgment than by contrasting the view of Lord Penzance (who differed from the other learned Lords) with the views of the majority, as we find them in the report. Lord Penzance says, at page 762 of the report:—"I am of opinion that if a publication, either standing alone, or taken in connection with other circumstances, is reasonably capable of a libellous construction, it is for a jury and not for the Court to say whether a libellous construction should be put upon it." It appears to me to be very clear that this view was not adopted by the Court. For example, Lord Blackburn says, at page 772, that "in construing the words to see whether they are a libel, the Court is, where nothing is alleged to give them an extended sense, to put that meaning on them which the words would be understood by ordinary persons to bear, and to say whether the words so understood are calculated to convey an injurious imputation. The question is not whether the defendant intended to convey the imputation, for if he without excuse or justification did what he knew or ought to have known was calculated to injure the plaintiff, he must—at least civilly—be responsible for the consequences, though his object may have been to injure another person than the plaintiff, or though he may have written in levity only;" and then he goes on to say—"If there were circumstances relating to the publication which it was alleged caused the words to bear a more extended sense than they would otherwise do, the law was that these must be stated on the record, in order to enable the Court to judge whether the words understood with reference to these circumstances bore that more extended sense, or else these circumstances could not be looked at in favour of plaintiff." And again, on page 776, his Lordship says—"It was argued by the appellant's counsel at your Lordships' bar that if the words were capable at all of conveying the libellous imputation, the plaintiff had a right to have the question left to a jury;" while in a subsequent part of his opinion he makes it clear that he thought there were no authority for this, and that the statement was not sound in principle. Again, Lord Watson, in dealing with the same question, at page 788, says:—"I am accordingly of opinion that whilst the language of the circular is, in the sense which I have indicated, capable of suggesting the injurious imputation of which they complain, the appellants have failed to prove facts and circumstances leading to the conclusion that it must have been so understood by those who received it, or, in other words, have failed to show that it had a libellous tendency. And as I have been unable, after carefully considering the authorities bearing on the case, to differ from the law as stated by the noble and learned Lord (Lord Blackburn) who has just delivered his opinion, it necessarily follows that in my opinion the judgment of the Court below is right." Lord Bramwell, in a passage further on, says this:—"I say then, that the words are harmless in themselves, and that they do not import or justify the inference of the plaintiff's insolvency. If I am wrong in this, and if the words do impute or justify the inference of insolvency as a possible cause of the defendant's refusal to take cheques on the plaintiff, I say that that is only one of several things which they import or of which they justify the inference; and that no action lies in such a case;" and although there is no passage in Lord Selborne's opinion so clearly expressed to the same effect, I read his Lordship's judgment as coming to the same result. That case, I think, was decided on no specialties of English law. It was decided after considering the various views of Judges who had differed on the very point which has been the subject of argument in this case. It was decided on general principles which commended themselves to the learned Lords who took part in the judgment, and it humbly appears to me to be decisive of this case, if I am right in saying that the writings in their primary meaning—which I think, it is for the Court to determine—do not bear the construction which the pursuer seeks to put upon them. Of course, I qualify that statement—as I have done from the first—by saying that the words might bear a secondary meaning, if facts were alleged to justify it. By the examination I have made of the record, I think I have shown there are no such facts here alleged. Accordingly I am of opinion that the Lord Ordinary should have dealt with this first issue as he did with the second issue, and have refused to allow it on the ground that the primary meaning of the words does not justify the meaning sought to be attached to them, and that there are no extrinsic facts alleged which would give to the alleged libel a meaning different from its primary signification.

In the absence of any statement of facts to support the alleged secondary meaning of the publication, I think the Court should give effect to its language according to its ordinary signification—with the result of dismissing the action.

LORD ADAM — Where a publication is complained of as a libel it may be in its terms so clearly libellous that it requires no innuendo or meaning put upon it. In that case, as Lord Shand has said, it will go directly to the jury. At the other end of the scale a document complained of as a libel may be in its terms so entirely innocent apparently that by no ordinary or reasonable, or I may say possible, construction could the libellous meaning attributed to it by the pursuer be allowed. In that case the Court, as we did last Saturday, and as we have often done, would refuse to send such a case for trial to a jury. But even in that case, if the pursuer avers extrinsic facts and circumstances to show that notwithstanding the apparently perfectly innocent nature of the publication complained of it had a malicious and libellous meaning, he would be allowed to go to a jury with the innuendo which he alleges is the proper meaning of it.

But this is a case which is at neither of

the extremities, but lies in the middle of this class of cases. Mr Sexton does not aver any extrinsic facts and circumstances so as to show that the meaning he attributes to the publication in question makes it a libellous publication. What he says is this, that upon a construction of the document itself it is reasonably capable of bearing the meaning that he attributes to it. That is his case, and it is upon that ground that he desires this case to be sent to a jury.

Now, it has always been my impression that by the law of Scotland the question in such a case is whether in construing a document it is or is not reasonably capable of bearing the construction or meaning put upon it by the pursuer. If, as we have often occasion to say, the meaning put upon it—the innuendo which he proposes to ask—is so strained and violent that the terms of the publication will not bear it, then he would not be allowed to have that issue; but if upon a construction of the document, arrived at in the first place by the Court, it appears to the Court that the document is reasonably capable of bearing the meaning attached to it by the pursuer, although that may not be, in their opinion, its proper construction in the first instance, then, according to my understanding of the practice of the Court, it has always been the practice to send such a case to a jury. It is, I think, by the law of Scotland for the jury in such a case to say whether or not the libellous meaning attributed to it by the pursuer in such circumstances is in fact the true meaning of the document. Now, that is, I understand, Mr Sexton's contention here.

In my opinion, agreeing with the Lord Ordinary and your Lordship, I think that this document is capable of bearing upon it, as matter of construction, the meaning and innuendo which Mr Sexton says is its true meaning. I think by the law of Scotland he is entitled to have the verdict of a jury upon that matter; and therefore I agree with your Lordship that this case ought to go to a jury. I have considered the case of *Henty* as far as I could understand it. To my mind it is very much complicated by English law on this matter of libel, which does not appear to me to be the same as the Scottish law, and by English practice and procedure in such cases. But the result of my study of that case is that, more especially in the opinion of Lord Selborne, he would have treated that case—if the forms of procedure had been the same in England as in Scotland—exactly as your Lordship proposes to dispose of this case. On the whole matter I agree with your Lordship that this case must go to a jury.

LORD M'LAREN—The practice of the Court of Session differs in one respect from that of the High Court of Justice—that in our Court the issue put to the jury is stated by the Court, and this always, and of necessity, implies a preliminary consideration on the written statement or libel complained of. I shall, therefore, first state what I understand to be the duty and practice of our Court irrespective of the decision in the English case of *Henty*, and then consider whether the judgment of the House of Lords on that case calls for a revision of our practice in regard to the adjustment of issues of slander or defamation.

Writings alleged to be defamatory may be classified under four heads. First, if the primary meaning of words used be defamatory, the issue sent to the jury merely puts the question whether the writing is of and concerning the pursuer, and is false and calumnious, to his loss and damage. Under this issue the defender may be able to satisfy the jury that the words used, although apparently defamatory, were used in jest or in some secondary sense, conveying no imputation on the pursuer's character, and he may thus succeed in obtaining a verdict. Secondly, if the primary meaning of the writing be inoffensive—but the pursuer sets forth extrinsic facts which he says interpret the writing, and impress upon it a secondary and defamatory meaning—a question of relevancy is raised, and it is for the Court to determine whether the facts stated are such as to entitle the pursuer to have the case sent to a jury on an issue setting forth the innuendo or secondary meaning which he undertakes to prove. Thirdly, if the words of the writing complained of are unambiguous, and harmless in themselves, and if no extrinsic facts are set forth tending to impress a defamatory meaning on the writing that is in question, then the defender is entitled to have the action dismissed, and is not bound to justify publication to a jury. We dismissed an action last week on this ground, being all of opinion that the words complained of would not bear the meaning which the pursuer ascribed to them. Fourthly, if the writing is ambiguous—that is to say, if there are two meanings apparent to any intelligent person, one of them being inoffensive, and the other defamatory, I conceive that the pursuer is entitled to have a case referred to a jury, and that it is for the jury to say (subject to review on the motion for a new trial) which of these is the true meaning of the publication. The most obvious illustration is the case of an ironical attack. In such a case the defender is not entitled to absolvitor on the ground that he merely said that "Brutus is an honourable man." A letter may be so worded that it does not need the aid of voice and gesture, or the knowledge of extrinsic facts, to suggest to the mind of the reader that the meaning conveyed is something different from the grammatical and logical meaning.

In the present action the pursuer contends that the letter published in the *Scotsman* charges him with drunkenness, under a somewhat subtle form of irony. The ostensible object of the writer is to satirise Mr Sexton's controversial methods by supposing that he himself were charged with very aggravated excesses of drunkenness, and that he could obtain no apology or redress from his defamer. But it is said that under the disguise of an

attack on Mr Sexton's habits of controversy the writer meant to insinuate that there were grounds for such an accusation respecting his habits as to sobriety as he argumentatively supposes.

It is no doubt true that the logic of the writer's argument requires that the hypothesis of drunken habits should be purely imaginary; but it is permissible to suppose that the writer of the letter preferred to be vindictive rather than logical, and that he might not care what became of his argument, provided he succeeded in creating an impression as to the insobriety of the person referred to. When I first read the letter I confess I formed the impression that the writer was putting a purely hypothetical case which could not be supposed to have any real application to Mr Sexton; but on reading the letter more carefully, and my attention having been called to certain expressions near the end of the letter of 15th July, I am not prepared to say that the letter is unambiguous, and I think it ought to be left to a jury to consider what is its true meaning.

I have here considered the case as if the question were, What is the meaning conveyed by the writer of the letter? But the real question is, What is the meaning of the proprietors of the *Scotsman* newspaper, or those for whom they are responsible, in circulating the letter through the medium of their newspaper? For the reasons given, I think this is a question for the jury.

I may now state in a single sentence why I think this opinion is consistent with the decision of the House of Lords in the case of *Henty*. I understand that in the opinion of their Lordships—and I refer particularly to the carefully-guarded expression of Lord Selborne—the language of Mr Henty's letter was unambiguous and incapable of sustaining the defamatory innuendo sought to be read into it. There was some evidence of extrinsic facts tending to support the innuendo, and nothing can more clearly illustrate the principle of their Lordships' decision than the circumstance that they disregarded these facts and rested their judgment entirely on the words of the letter, which according to their judgment were not susceptible, even with such light as could be collected from the evidence, of the alleged defamatory meaning.

The Court accordingly adhered to the Lord Ordinary's interlocutor allowing the issue.

Counsel for Pursuer and Respondent—D.-F. Balfour, Q.C.—Shaw. Agent—R. Ainslie Brown, S.S.C.

Counsel for Defenders and Reclaimers—Lord Adv. Robertson, Q.C.—F. T. Cooper. Agents—Henderson & Clark, W.S.

Wednesday, March 19.

SECOND DIVISION.

SNODGRASS *v.* RITCHIE & LAMBERTON.

Deposit—Duties of Storekeeper—Storage of Flour—Turning.

A firm of storekeepers received 240 bags of flour which they stored in 3 tiers and allowed to stand untouched for more than a year. The flour deteriorated in quality. *Held* that such storing was improper unless the bags were turned from time to time, and that as this had not been done, the storekeepers were liable in damages to the owners of the flour.

Messrs Ritchie & Lamberton, storekeepers, 81 Lancefield Street, Glasgow, took delivery of 240 bags of flour, and undertook the storage of said goods in January 1888. Upon 19th January 1889, 40 of those bags were removed, but the remainder of the flour continued with the said storekeepers until July 1889, when it was sold.

In March 1889 Messrs J. & R. Snodgrass, Washington Street, Glasgow, the owners of the said bags, brought an action in the Sheriff Court at Glasgow against Ritchie & Lamberton for £60 for deterioration of the flour while in the defenders' possession.

The pursuers averred—"It has recently come to the pursuers' knowledge that the defenders have grossly and negligently failed to take the ordinary precautions usually taken by storekeepers for the safe keeping and preservation of flour, and, in particular, they heaped the bags up in too many tiers, and failed to change and turn them from time to time, whereby said flour has been greatly damaged and deteriorated in quality, the flour having become curdled and lumped, and bitter and musty tasted. They also failed to intimate that said flour was going out of condition. In this way the pursuers have suffered and will suffer damage, which they fairly estimate at the sum of £60."

The defenders answered—"Denied. It was the duty of the pursuers themselves to inspect their flour from time to time, and satisfy themselves of its condition, and they have at all times access to the defenders' store for that purpose."

The pursuers pleaded—"The pursuers having, by defenders' neglect of duty as storekeepers, suffered loss and damage to the amount sued for, decree should be granted, with interest and expenses as craved."

The defenders pleaded—"(4) No damage to or deterioration of pursuers' goods having been caused or brought about by or through any fault or negligence of defenders, they ought to be assoilzied, with expenses."

A proof was allowed.

The evidence for the pursuers was, *inter alia*, as follows:—

Hugh Lamberton, defender—"Sometimes we do turn flour in sacks. I have been in