incidence of the relief shifted to the parish of settlement.

I am not surprised that the Sheriff should have been embarrassed by the opinions in the case of *Borthwick* v. *Temple*, but I agree with your Lordship that apart altogether from that case, we must decide the question of right when brought before us in a competent form. At the same time I also think that the case of *Borthwick*, when rightly understood, is in no way inconsistent with the decision which we are going to pronounce. The case of *Borthwick* was brought under the 50th section of the Local Government Act, which conferred what may be called a consultative jurisdiction upon the Court, and, as we understood the statute, that jurisdiction was confined to questions of law in which the Boundary Commissioners had an interest. The present is a question of fact, not of law, although no doubt, as in many questions of fact, there is law underlying it. The question of fact is, where have these paupers their settlements? There are perhaps some expressions in the opinions of the Judges in the case of *Borthwick* which go beyond what was necessary for the immediate decision of the case, and I take my full share of responsibility for these. But plainly what was decided there was only this, that in the exercise of that special statutory jurisdiction we did not see our way to deal with a claim relating to the liability for the maintenance of an individual pauper, and still less with the possible consequences which were the subjects of the second and third questions of the case.

Coming to the merits of the two actions which we are here considering, I think it is possible to arrive at a satisfactory determination without taking any account of the cognate question where a pauper has resided for the necessary period, partly in a detached portion of a parish, and partly elsewhere in the parish. Taking first the case of the residential settlement, as the point presents itself to my mind, the woman had acquired an industrial settlement by residing for five years in the parish of Melrose, and consequently she has a claim of relief against that parish. It is of no consequence, so far as that claim of relief is concerned, at what spot within the parish she resided, because the parish is an indivisible area in all questions of settlement, and it is by no means necessary to prove all the various places where the pauper has resided if only the general fact of an industrial residence within the parish is made out. The law is clear that an industrial settlement once acquired will continue until it is lost by non-residence, or until, as in the case of marriage or forisfamiliation, a new settlement has been obtained. Prior, then, to the disjunction of a part of Melrose Parish the pauper had acquired a settlement in that parish, and such a settlement, according to settled principles, must remain until it is lost in the ordinary way. I quite grant that it may be lost by carrying away that part of the parish in which she is living, just as it would be lost by migration to another parish. But time is the important element, and the settlement will not be lost by migration, or by the disjunction of the pauper's abode from the parish except by non-residence for the necessary legal period. The cases which have been figured of residence in various parts of the parish do not therefore appear to me to affect the case, and I think the birth settlement is really identical with the residential, because it will continue until another settlement has been acquired, and none has been acquired here.

On these grounds I am of opinion that the claim of the inspector of Galashiels is well founded.

LORD KINNEAR was absent.

The Court recalled the interlocutor of 21st January 1892, and the subsequent interlocutor; repelled the defences, and decerned in terms of the prayer of the petition; found the appellant entitled to expenses, &c.

Counsel for the Pursuer—D.-F. Balfour, Q.C.—Dundas. Agents—Bruce & Kerr, W.S.

Counsel for the Defender—Jameson—C. N. Johnston. Agents—Romanes & Simson, W.S.

Thursday, May 12.

SECOND DIVISION.

[Sheriff of Lanarkshire.

REID *v.* COYLE.

Reparation—Slander—Privilege—Statement by Physician Called in to See Patient.

A midwife brought against a physician an action of damages for slander in which she averred that the defender was called in to see a patient whom the pursuer had attended, and that on hearing that the pursuer had given the patient a drug to soothe her pains, the defender, conceiving that it would be a favourable opportunity for indulging his hostile and malicious feeling towards the pursuer, falsely, wickedly, calumniously, and maliciously stated to the patient's husband that the pursuer had poisoned his wife.

An issue not containing malice and want of probable cause proposed by the pursuer for the trial of the cause *approved*, the Court holding that although *prima facie* a case of privilege was stated on record, yet it was not absolutely clear at that stage that the case was one of privilege, and that if the evidence at the trial raised such a case, it was the duty of the judge to direct the jury that malice on the part of the defender must be proved before they could find for the pursuer.

Mrs Elizabeth M'Connon or Reid, midwife

78 George Street, Whiteinch, with consent of her husband as her curator and administrator-in-law, raised an action in the Sheriff Court of Lanarkshire at Glasgow against Edward Coyle, druggist, 300 Dumbarton Road, Partick, and licentiate of the Faculty of Physicians and Surgeons, Glasgow, for the sum of £250 as damages and *solatium* for slander.

The pursuer averred that the defender had entertained feelings of malice towards her since September 1891 on account of her having without his consent prescribed for a child whom he was attending as medical man at that time. She also averred that the defender had looked upon her "as his opponent in his profession, and his enemy, and had taken every opportunity that appeared of injuring her." The pursuer set forth the circumstances in which the alleged slanderous statements were made, as follows—"(Cond. 5) In or about the month of September 1891 the pursuer was engaged by Mrs Agnes Moore, wife of Stephen Moore, 42 Smith Street, Whiteinch, to attend her in childbed. The pursuer had attended Mrs Moore on three previous occasions of childbirth. About half-past four o'clock on Monday morning 12th October 1891, Mrs Moore's husband came to the pursuer's house, and knocked her up out of bed, and told her his wife had been very ill during the night with labour pains, and asked her to go to see her. The pursuer accordingly accompanied him to see his wife. When she arrived she found Mrs Moore suffering from severe pains, and on examining her discovered she had symptoms of premature labour—indeed, that premature labour had commenced. Mrs Moore stated she felt very weak, and asked the pursuer if she could not give her something to soothe her pains. The pursuer answered that she could give her a little 'labour tea' (that was, ergot of rye) which would probably soothe her pains, and which pursuer had been taught was the proper treatment in such cases. Mrs Moore agreed to take it, and the pursuer measured and gave her half a teaspoonful of the ergot of rye. After getting it Mr Moore said she felt a little better, and inclined to sleep, and pursuer remained with her for an hour or so and then went home, but she left instructions that if Mrs Moore became worse in the morning she was to be sent for. The pursuer was not sent for that morning, but in the evening she received a message that she would not be further required as a doctor had been called in. (Cond. 6) The pursuer believes and avers that Mrs Moore's illness continued, and that the defender was called to see her on Wednesday the 14th October 1891, and on hearing that the pursuer had given her a drug to soothe her pains, he, without so much as inquiring at the pursuer what the drug was, or what dose had been given, and conceiving that it would be a favourable opportunity for indulging his hostile and malicious feelings towards her, falsely, wickedly, calumniously, and maliciously stated to Mrs Moore's husband, the said Stephen Moore, that the pursuer had poisoned his wife. The statement was made in the said Stephen Moore's house at 42 Smith Street, Whiteinch, and was made in a malicious spirit, with the view of injuring the pursuer in the practice of her art as a midwife. (Cond. 7) The pursuer believes that Mrs Moore's illness continued and that she gave birth to a child on Friday morning 16th October 1891, which survived till the evening of the following day, and that she herself died on Sunday 18th October. (Cond. 8) The defender further indulged his hostile and malicious feelings against the pursuer by falsely, wickedly, calumniously, and maliciously stating to the said Stephen Moore, on or about Saturday 17th October 1891, in his house at 42 Smith Street, Whiteinch, that his wife was dying and might not live till night, and that the pursuer had poisoned her by the drug she had given her, or using words of similar import and effect, meaning thereby that the pursuer had poisoned Mrs Moore, and that she was dying in consequence. (Cond. 9) The defender met the said Stephen Moore on Dumbarton Road, Partick, on or about Monday 19th October 1891, after Mrs Moore's death, and further, in pursuance of his hostile and malicious feelings towards pursuer, falsely, wickedly, calumniously, and maliciously stated to him that there was no doubt his wife had been poisoned by the pursuer, and died in consequence, and advised him to give information to that effect to the police authorities so that she might be charged with and put upon her trial for that crime. (Cond. 10) The said Stephen Moore accordingly called at the police office in Partick the same day and lodged information that his wife had been poisoned by, and had died from the effects of, the drug given her by the pursuer. (Cond. 11) The defender, in further pursuance of his hostile and malicious feelings towards pursuer, falsely, wickedly, calumniously, and maliciously, and without probable cause, stated to Archibald M'Kenzie, detective officer, Partick, on or about Tuesday 20th October 1891, in Dumbarton Road, near Whiteinch (while Mr M'Kenzie was mentioning to him that a *post mortem* examination was to be held that day), that Mrs Moore had been poisoned by a drug of some kind given to her by the pursuer which had caused her death."

The defender lodged defences to the action, in which he denied that he entertained feelings of malice towards the pursuer, and averred that he had no personal knowledge of the pursuer, and had no recollection of ever having met her. With regard to the alleged slanderous statement on 14th October 1891, he denied having made it, subject to the following explanation:—"Dr Macaulay was the medical man who was called in to attend Mrs Moore, the defender being called in afterwards merely as 'consultant.' Dr Macaulay was called in on the morning of Monday, 12th October, and the defender's first visit was made in company with Dr Macaulay on Wednesday the 14th. They examined the patient to-

gether and made full inquiry into the case, and in the course of these inquiries Mrs Moore told the doctors that she had got half a teacupful of 'labour tea,' *i.e.*, ergot of rye, of which the defender expressed disapproval. In the opinion of both medical men Mrs Moore's health was seriously affected by the blood poisoning and other effects resulting from said mistaken and excessive dose, which in their opinion contributed to her death. Dr Macaulay, who certified the death, gave as its cause, 'said to be some drug,' 'gangrene of hand and arm.' Ergot of rye is not an opiate, and is never used as such. On the contrary, it is an excitant, and is used to strengthen labour pains, but never until labour has begun." He denied having made the statements on 17th and 19th October attributed to him by the pursuer. With regard to the alleged slanderous statement on 20th October, he also denied having made it, subject to the following explanation:—"In the course of making his investigations, following upon the report made by Mr Moore, Mr M'Kenzie called on Dr Macaulay, and thereafter on the defender at his surgery, and in reply to inquiries put by the detective, the defender stated his opinion as to the injurious effects on Mrs Moore of the administration of said ergot tea."

On 9th February 1892 the Sheriff-Substitute (SPENS) allowed a proof.

The pursuer appealed to the Second Division of the Court of Session for jury trial, and proposed the following issues for the trial of the cause:—"(1) Whether, on or about 14th October 1891, in the house 42 Smith Street, Whiteinch, occupied by Stephen Moore, the defender falsely and calumniously stated to the said Stephen Moore that the pursuer had poisoned his wife Mrs Agnes Moore, or used words to a like effect, to the loss, injury, and damage of the pursuer? (2) Whether, on or about 17th October 1891, in said house 42 Smith Street, the defender falsely and calumniously stated to the said Stephen Moore that the pursuer had poisoned his wife Mrs Moore, by a drug she had given her, or used words to a like effect, to the loss, injury, and damage of the pursuer? (3) Whether, on or about 19th October 1891, and in or near Dumbarton Road, Partick, Glasgow, the defender falsely and calumniously stated to the said Stephen Moore that there was no doubt that his wife Mrs Moore had been poisoned by the pursuer, and that he ought to give information to the police authorities to that effect, or used words to a like effect, to the loss, injury, and damage of the pursuer? (4) Whether, on or about 20th October 1891, and in Dumbarton Road near Whiteinch, the defender falsely, calumniously, and maliciously, and without probable cause, stated to Archibald M'Kenzie, detective-officer, Partick, that Mrs Moore, wife of Stephen Moore, had been poisoned by a drug given to her by the pursuer, which had caused her death, or used words to that effect, to the loss, injury, and damage of the pursuer?—Damages laid as follows:—Under each of the first three issues £50, £150; under the fourth issue £100—in all £250."

The defender objected to the first three issues because the words "maliciously and without probable cause" were not inserted in them. He argued—This was a clear case of privilege. A medical man was bound to give a true opinion on the case when called in to attend a patient. He was an official acting in the exercise of his duty—*Croucher* v. *Inglis*, June 14, 1889, 16 R. 774.

At advising—

LORD JUSTICE-CLERK—To adopt a phrase used by one of your Lordships during the course of the argument, it is to "demonstration plain" that this is a case of privilege on the face of the record. I think it is a hundred to one that at the trial it will turn out to be the duty of the judge to direct the jury that the evidence submitted by the pursuer raises a case of privilege, and if so, that they must be satisfied that the evidence shows that the defender was actuated by malice. But that point not being at this stage absolutely clear, I think we should allow the issues to remain as they at present stand.

LORD YOUNG—I am of much the same opinion. I do not think either party is greatly interested in the insertion of malice in the issue, since even when malice is inserted in the issue, the judge at the trial may direct the jury that it is to be implied from the nature of the allegations and the circumstances of the case, and the absence of justification for the statements made; and, on the other hand, if malice is not inserted in the issue, the judge may tell the jury that malice is not to be implied from the mere fact that the defender made a particular statement, but that it must be proved to their satisfaction that malice existed. It seems probable that this case will present a question of that sort at the trial.

I do not imagine that it will occur to anyone that malice is to be presumed where a medical man is called in to attend a patient, and on being told that A B, who attended the patient, had adminstered a drug, expresses an opinion "The woman has poisoned the patient." No one would suggest anything of the sort. Therefore the pursuer to succeed in her action must show that the charge made against her was untrue, and must also satisfy the jury that it was unreasonable of the defender to make it, that he had no justification in making it, and that the reasonable explanation of his conduct was that he had taken an ill-will to the pursuer, and gratified his spite by making an untrue statement regarding her. This does not look a very probable charge to make out, but it is averred, and the case must go to trial.

LORD RUTHERFURD CLARK—I think the right course in this case is to leave any question of privilege open till the trial.

LORD TRAYNER—I agree in that view also. The leaning of my mind was towards holding that the case on record was one of

privilege, and that malice should be inserted in the issue. But I do not dissent, as the pursuer cannot suffer from its non-insertion. If the case turns out at the trial to be one of privilege, the judge will tell the jury that unless malice is proved their verdict must be in favour of the defender. It is perhaps better on the whole to leave it out.

The Court approved of the issues proposed by the pursuer for the trial of the cause.

Counsel for Pursuer—Shaw—M'Watt. Agents—Carmichael & Miller, W.S.

Counsel for Defender—Burnet. Agents—Cuthbert & Marchbank, S.S.C.

Friday, May 13.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

BRAND AND ANOTHER *v.* BRAND AND OTHERS (SCOTT'S TRUSTEES).

Succession—Heritable Security—Heir and Executor—Relief—Relevancy.

A testator by a settlement dated 1879 directed his trustees after payment of his debts, to pay one-half of the residue of his estate to his sisters, and the other half to his sister-in-law and her children in fee. By a codicil in 1889 he conveyed to his sister-in-law in liferent and her daughter in fee certain heritable subjects, which at the testator's death in 1890 were burdened with a bond and disposition in security for £4000 granted by him in 1880. The sister-in-law and her daughter sought declarator that they were entitled to the subjects disencumbered of the bond, and averred that the bond had been granted voluntarily to protect a friendly creditor against the testator's possible bankruptcy, that subsequently the testator's affairs became prosperous, and at his death the bond which he had retained in his possession had disappeared with the probability that it had been destroyed by him; that the security-subjects had never been of greater value than £3000, and thus the bequest was valueless unless relieved of the bond.

Held that the facts averred were not relevant to make the case an exception to the general rule that heritable debt is payable out of heritable estate, and the action *dismissed.*

John Scott, surgeon, Langshaw, Moffat, by trust-disposition and settlement dated 26th August 1879 disponed his whole heritable and moveable estate to and in favour of trustees for certain purposes, *inter alia,* as follows—"After payment of all my just and lawful debts, and deathbed and funeral expenses, and the expense of executing this trust, my said trustees shall pay and make over to Mistress Janet Carruthers or Brand, wife of the said William Brand, my sister-in-law, in liferent, for her liferent use allenarly, and to Jane Anne Scott Brand, their daughter, and their other children in fee, one-half of the residue of my estate, the said Jane Anne Scott Brand being entitled to one-third part of said half, and the other children equally among them, share and share alike, to the remaining two-third parts of said half of the residue, and shall pay and make over to Isabella Scott, Samuel Kennedy, David Kennedy, Margaret Kennedy, and Jane Kennedy or Lawrie, my brothers and sisters, equally among them, share and share alike, the other half of the residue of my said estate."

On 6th August 1889 he executed a codicil by which he disponed and made over to "Mrs Janet Carruthers or Brand, widow of William Brand, Esquire, merchant in London, my sister-in-law, in liferent for her liferent use allenarly, and to Jane Anne Scott Brand, their daughter, and her heirs and assignees whomsoever, heritably and irredeemably in fee all and whole my dwelling-houses, offices, and grounds of Langshawbank or Langshaw, in the parish of Kirkpatrick-Juxta and county of Dumfries, all as now occupied by me and as described in the title-deeds thereof; together with the whole household furniture, silver plate, and other moveables in the said dwelling-house: And I revoke the said settlement only in so far as the same conveys generally the said dwelling-house, offices, and grounds, and the said household furniture, silver plate, and moveables in the said dwelling-house, hereby confirming the same in all other particulars."

Dr Scott died upon 22nd July 1890. His whole property amounted to about £12,000. At his death Langshaw was burdened with a bond and disposition in security for £4000 granted by the testator to Mrs Brand's husband in 1880. Upon Dr Scott's death the firm of W. & H. Brand & Company intimated a claim for £9097, the amount due to them by Dr Scott. His trustees paid the sum upon receiving an assignation by the late Mr Brand's trustees as executors, to the said bond for £4000, which sum appeared *ex facie* of the record to be a charge upon Langshaw.

Mrs Brand and her daughter therefore raised this action against Dr Scott's trustees to have it found and declared that they had obtained a valid right to the estate of Langshaw under the aforesaid codicil, and that they were entitled to hold and possess the said lands free and disencumbered of the bond and of the debt therein contained, and that the defenders were bound to deduct the sum of £4000 from the moveable estate of the deceased Dr John Scott administered by them.

The pursuers averred that in August 1879 Dr Scott was proprietor of a sugar estate in Demerara, called Zeelugt. Messrs W. & H. Brand & Company, merchants in London, managed this estate for him, and they had made large advances to him, which upon 4th January 1881 amounted to £11,764. Dr