where a widow had right to an annuity out of an estate, and also to the liferent of it, she was entitled to interest on the reversion of the annuity.

"No Scotch decision to the effect that other wasting securities or postponed interests should be reduced into the form of money or of permanent investments was noted. But in *Strain's Trustees* v. *Strain*, July 19, 1893, 20 R. 1025, Lord M'Laren referred to the case of *Howe*, and to the discussion on it in Whyte & Tudor, with approval, at least so far as related to the realisation of terminable interests—M'Laren on Wills, p. 1031—and I am not aware that there is either principle or practice with us which can be said to be opposed to the rule thus established in England. It appears to me that if the reversionary interest in John's estate were realised as the pursuer contends for, that would be substantially fair to both liferenter and fiar. Both would take a benefit, and the interest of the one would not be sacrificed to the interest of the other.

"The pursuer referred to *Pringle* v. *Hamilton*, March 5, 1872, 10 Macph. 621, and to *Muirhead* v. *Muirhead's Factor*, Dec. 6, 1867, 6 Macph. 95; *Chesterfield* v. *Chesterfield*, 1883, 24 Ch. Div. 643; and *Dempster's Trustees* v. *Dempster*, March 10, 1898, 35 S.L.R. 657, where when the estate of a deceased consisted in part of interests not due and payable until after his death, the actuarial value of such portions as at the date of the truster's death was held to form the value of those parts of the estate.

"I understand that according to the English practice it is not difficult to displace the general rule by indications of the intention of the truster. But it does not appear to me that there is anything to displace the general rule.

"It may be urged that as James Stewart must have known that John's estate had to be retained by John's trustee during the life of the pursuer, he could not be supposed to have conferred on the pursuer any interest in the income of that estate. That consideration might have raised a complicated and difficult question if the pursuer's claim depended on her husband's trust-deed or on his intention as there expressed. But it does not, for it depends on the marriage-contract. The pursuer's claim is that of a creditor, and the testamentary intentions of her husband are not material, and therefore there seems to be no indication of James Stewart's intention which can interfere with the application of the present rule.

"It is said that the value of the reversionary interest in this case is so speculative that it will be impossible to sell it except at great loss, and that the trustees should not be directed to sell it. It is made dependent on the widow's second marriage, and on the amounts to be deducted from the capital necessary to make up the annuity. But I rather think the defender exaggerated the difficulty. The marriage was fifty years ago, and probably the provision about second marriage may be disregarded, and if so, then the value of the reversion would be found by ascertaining the actuarial value of the annuity and deducting it from the value of the whole estate. But I should desire to hear parties further as to the manner in which the reversionary interest is to be realised.

"I think that I am at present in a position to sustain the second and fourth pleas for the pursuer, and to decern in terms of the first, second, and third conclusions. I have not considered the second conclusion, because I was informed that parties were at one about it, and it was not explained at the debate. The defender did not object to the third conclusion. I could grant decree in terms of the fourth conclusions in part, but am not, as at present advised, prepared to hold that the pursuer is entitled to any capital sum out of the price of the reversionary interests as a *surrogatum* or otherwise.

"I think it premature to decide either that point or the point as to payment of Mr James Dalrymple Hay Stewart until the reversion has been sold and the sum available ascertained."

Counsel for the Pursuer — M'Clure. Agents—Davidson & Syme, W.S.

Counsel for the Defender — Cullen. Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, November 16.

OUTER HOUSE.

[Lord Kincairney.

TWEEDIE *v.* FORREST.

Reparation—Slander—Privilege—Malice.

A brought an action of damages for defamation against B, in respect of a certain statement alleged to have been made by B on two different occasions. In regard to the first occasion it was averred that the statement was made "in the knowledge that it was wholly unfounded," but this averment was not repeated with regard to the second occasion. B pleaded that his statement on the second occasion alleged, if made, was privileged. *Held* (by Lord Kincairney) that the averment in question might be read as applying to the second occasion as well as the first, and was a sufficient averment of particular circumstances inferring malice.

Observations (*per* Lord Kincairney) on the necessity of averring facts and circumstances from which malice may be inferred in an action on a defamatory statement when a plea of privilege is taken.

David Tweedie, 40 High Street, Peebles, brought an action against Thomas Forrest, farmer, Edston, concluding for £500 damages, in respect of alleged defamatory

statements made by Forrest concerning him.

He averred that being in the service of the Peebles Co-operative Society, Limited, as salesman and as purchaser of stock, he had in July 1897 purchased a lamb from Forrest. With regard to statements made by Forrest as to what took place at that sale, he made the following averments—"(Cond. 3) In or about the month of July or the month of August 1897, and at or near the defender's said farm of Edston, the defender falsely, calumniously, maliciously, and without probable cause, stated of and concerning the pursuer to William Wilson, ploughman in the defender's employment, that on the occasion of the purchase by the pursuer mentioned in the preceding article, the pursuer had proposed to the defender that the lamb then purchased by the pursuer on behalf of the Peebles Co-operative Society, Limited, should be nominally purchased at the price of 25s., and that it should be invoiced to said society at that price, but that out of that sum the defender should allow the pursuer a sum of 2s. for himself, retaining 23s. as the actual price, or used words of like import and effect of or concerning the pursuer. The said statement was entirely without foundation. The said William Wilson repeated the said statement to various persons, who again repeated it, with the result that eventually it came to the ears of the committee of the said Peebles Co-operative Society. In particular, it is believed and averred that the said William Wilson repeated the story to John Campbell, residing at Young Street, Peebles, in the presence of his wife Mrs Jane Scott or Campbell. Mrs Campbell repeated the statement to Mrs Agnes Calder or M'Donald, wife of William M'Donald, also residing in Young Street, Peebles, in his house there. Mrs M'Donald repeated the statement to John Rennie, mill-worker, Peebles. The said John Rennie informed Duncan Bennett, mill-worker, Peebles, that there was a rumour in circulation to the discredit of the pursuer, and the said Duncan Bennett then inquired of John Dunlop, who is a town councillor in Peebles, and a member of the committee of the Co-operative Society, whether said society had dispensed with the services of the pursuer, as he heard he was serving two masters. The said John Dunlop repeated this statement to the other members of the committee, with the result that a sub-committee was appointed to investigate the truth of the report. Said sub-committee called in succession upon the said Duncan Bennett, John Rennie, John Campbell, and William Wilson, and in consequence of the information given by Wilson, they, the said sub-committee, consisting of the said John Dunlop, Alexander Michie, and Walter Nicol, on or about Saturday, 11th June 1898, called for the defender and asked him what had taken place between him and the pursuer on the occasion of the purchase of the said lamb. The defender then, on said 11th June 1898, and at or near his said farm of Edston, in presence and hearing of the said John Dunlop, and also of the said Alexander Michie and Walter Nicol, all members of the committee of the said Peebles Co-operative Society, Limited, falsely, calumniously, maliciously, and without probable cause, stated of and concerning the pursuer that when purchasing the lamb above referred to from him the pursuer had proposed that the price of the lamb should be fixed at 25s., but that he (the defender) should give 2s. to him (the pursuer), and that the pursuer should debit his employers, the said Peebles Co-operative Society, Limited, with 25s. as the price of the lamb, whereas the actual price to be paid would be 23s., or did use words of like import and effect of and concerning the pursuer. The said statement was without foundation. The statements in answer, except so far as coinciding herewith, are denied. (Cond. 4) By the said slanderous statements made as above mentioned by the defender of and concerning the pursuer the defender intended to represent, and did represent, that the pursuer had been unfaithful to the trust reposed in him by his employers, that he was capable of acting, and had proposed to act, in a fraudulent and dishonest manner towards his employers, and that he was a dishonest and unfaithful servant, and unfit for the position he held as purchaser of cattle and sheep for said society. Said representations were wholly without foundation. The defender has a strong antipathy to co-operative societies, and on the occasion of his first uttering said slander he was arguing with the said William Wilson against such societies. For the purpose of founding an argument against the said Peebles Co-operative Society, of which Wilson was a member, the defender recklessly and maliciously invented said slanderous statement, and uttered it to Wilson in the knowledge that it was wholly unfounded. He further knew, and the fact is, that the position which the pursuer occupied as purchaser of cattle and sheep stock for his said employers was one of great trust and responsibility, and any imputation upon his honesty and trustworthiness is bound to be seriously prejudicial to him. The slander has obtained wide publicity in Peebles and the surrounding district."

Forrest denied these statements, and pleaded, *inter alia*—"(2) Any statement made by the defender concerning the pursuer having been made in reply to inquiries by pursuer's employers without malice, and *in bona fide*, is privileged, and the defender is entitled to absolvitor."

On 16th November 1898 the Lord Ordinary (KINCAIRNEY) approved of issues for the trial of the cause.

Opinion.—"The pursuer of this action of damages for slander avers that he was in the employment of the Peebles Co-operative Society, Limited, and that in July 1897 he, acting for the Society, bought a lamb from the defender at the price of 23s.; and he afterwards learned that the defender had asserted to one Wilson, a ploughman in his employment, that he, the pursuer, had proposed to the defender that the nominal price of the lamb should be 25s.

and that it should be invoiced to the Society at that price, while he, the pursuer, should pay only 23s., thus defrauding or enabling him to defraud the Society of the difference. This averment is the foundation of the first issue. The pursuer further avers that nearly a year afterwards and on 11th June 1898 a sub-committee of the Co-operative Society called on the defender and inquired about the transaction, when the defender repeated the statement which he had formerly made to Wilson, and the second issue is based on this statement by the defender. Certain particulars are given on record to show in what manner the charge against the pursuer was divulged and came to the knowledge of the Co-operative Society.

"The defender has not objected to the innuendo, which is of course the same in both issues, and has not disputed that the defender's statements as innuendoed were defamatory. I might have expressed the innuendo a little differently, but as parties have raised no question about that I have not thought it necessary to alter it. . . .

"A different question is raised in the second issue. The defender contends that in that case the statement made by him was made on a privileged occasion, and that therefore the issue cannot be granted without putting to the jury the malice of the defender; but that there is no relevant averment of malice on record, seeing that although there is a general averment of malice there are no facts and circumstances averred from which malice can be deduced by the Court. These questions as to privilege, malice, and circumstances indicative of malice arise so frequently and occasion so much discussion and difficulty, especially the last point as to the necessity of an averment of circumstances indicating malice, that it may, I think, be permissible to consider them somewhat fully.

"I have no doubt that *prima facie* on the occasion on which the defender's second statement was made the defender was in a position of privilege. He was answering a legitimate inquiry made by the pursuer's masters about an alleged attempt by the pursuer to defraud them when transacting as their servant with the defender. It was perfectly right to answer as he is said to have answered if he was satisfied that he was speaking the truth.

"The pursuer has not put malice in his issue, and while not disputing that *prima facie* the occasion was privileged he raised this somewhat curious point. He said that the statement was not made for the first time to the committee but had been made on a previous occasion ultroneously when the defender had (admittedly) no privilege, and he submitted that seeing that the statement on the first occasion was, if false, presumably malicious and knowingly false, it could not be presumably not malicious and made in innocent error on the second occasion. I certainly was puzzled with this argument, but have come to think it not substantial. I think that the issues must be treated separately and independently, and that malice must be put in the second issue. If at the trial the jury should find for the defender on the first issue, then there is no doubt that they would require to find malice proved before finding for the pursuer on the second issue. If on the contrary they should find for the pursuer on the first issue, it is not easy to see that the question of malice would create much difficulty in considering the second. In short, I think that the pursuer will suffer no unfair disadvantage by the insertion of malice in the second issue. I therefore think that the second issue should not be allowed without malice inserted.

"But the defender maintains that the pursuer is not entitled on this record to an issue of malice. He maintains that in this case and in cases of this class an averment of facts and circumstances indicative of malice is essential for relevancy, and that there are not such averments in this case.

"In considering this point I think it important to keep in view that our law in regard to actions of damages for slander is somewhat—perhaps it may be said highly—artificial, and that the rules we are accustomed to follow are the results of practice rather than of principle. What is important is to have a settled rule. It has been often said on high authority that the malice of the defender is at the root of all actions of defamation, and that the difference between privileged and unprivileged cases is only a difference of onus. When, however, it is said that malice is of the essence of slander it must be remembered that malice is a technical word with a meaning much wider than the ordinary meaning, covering many more conditions of mind than hostility or malevolence toward the pursuer, so that the proposition does not amount to more than this, that an action of damages for slander is founded on delict or quasi-delict of the character which we are in use to express by the word "malice;" and the question is how this delict or malice should be expressed on record.

"The defender quoted a very recent case, *Sheriff* v. *Denholm*, decided by the Second Division on 4th March 1898. The case is only reported 5 S.L.T., case 437, and there nothing is said except that the Court affirmed Lord Kyllachy's judgment, and I am informed that no opinions were delivered; but Lord Kyllachy's judgment is reported as case 309 in 5 S.L.T. The action was by a dismissed servant against her mistress, and was for a charge of drunkenness made by the mistress in answer to a demand for wages and board wages. There was no doubt about either the defamation or the privilege. It does not appear from the report whether it was averred that the defender made the statement in the knowledge that it was false. Lord Kyllachy assoilzied the defender. His Lordship is reported to have said in reference to the defender's contention that it was necessary to aver facts and circumstances from which malice might be inferred, that that requirement "must now be taken as applicable generally to all cases where a defamatory statement is made in pursuance of any

definite and special duty, whether to the public or to an individual, including any duty owed to the aggrieved person himself." That dictum seems to cover all cases of privilege except those in which the alleged slander has been spoken in virtue of a right without being in pursuance of a duty. My study of the recent cases hardly enables me to make so definite a statement, or to say that the requirement of particulars of malice has been held to be applicable to so wide a class of cases. I should have been disposed to think that the class of cases in which such particulars have been required does not cover the present case. The recent decisions appear to me to stand in this way:—In *M'Murchy* v. *Campbell*, May 21, 1887, 14 R. 725, an action against an inspector of police and a procurator-fiscal was held irrelevant because no particulars suggesting malice were averred, Lord Rutherfurd Clark expressing a doubt as to the correctness of the proposition that such particulars were necessary 'stated broadly.'

"In *Beaton* v. *Ivory*, July 19, 1887, 14 R. 1057, where the complaint was of the conduct of a Sheriff, and in *Innes* v. *Adamson*, October 25, 1889, 17 R. 11, where the defender was a chief-constable, in both of which cases it was held that particulars were required, the Lord President (Inglis), apparently with the assent of the other Judges, said that there were two classes of cases, in one of which particulars were required and in the other a general averment might suffice. But he did not define the cases which fell under the latter class.

"In *Laidlaw* v. *Gunn*, January 31, 1890, 17 R. 394, which was an action by a dismissed servant against her master for a defamatory allegation made by him in answer to a demand for the balance of her wages, the Court held the case privileged, but allowed an issue, although there were no special averments of malice. Lord Shand says expressly that that case did not in his opinion fall under the class of cases in which particulars were required. This case is absolutely in point, and it would be incumbent to follow it unless it is overruled by *Sheriff* v. *Denholm*.

"On the other hand, in *Farquhar* v. *Neish*, March 19, 1890, 17 R. 716, which was an action by a servant against her former mistress for a letter written to the keeper of a register, a statement of particulars was held necessary. I observe that *Laidlaw* v. *Gunn*, which had been decided shortly before, is not referred to, although *Innes* v. *Adamson* is. In *M'Fadyan* v. *Spencer*, January 7, 1892, 19 R. 350, which was an action by a shipwright accused of stealing whisky from the defender's premises, the action was thrown out for want of particulars inferring malice—Lord Rutherfurd Clark expressed his doubts in a manner which might be held to indicate his dissent.

"The next case of importance is *Ingram* v. *Russel*, June 8, 1893, 20 R. 770, which was an action against a bank agent for having accused the pursuer of forgery. In that case it is true that the Court negatived privilege on the pursuer's averments, but the Lord President, foreseeing that a case of privilege might be made out at the trial, said that 'an averment of malice in general terms might be enough,' and also that the record did contain averments which a jury might, if they were proved, hold to indicate malice. Lords Adam and Kinnear concurred, so did Lord M'Laren, but he qualified his concurrence by stating that in his view a circumstantial case of some sort must be set forth in every case of malicious slander—an opinion which has not, I think, been sanctioned by any reported decision. His Lordship adds that the kind of facts necessary to be averred might vary in different cases. In *Reid* v. *Moore*, May 18, 1893, 20 R. 712, the point was discussed, although in the end the case was treated as unprivileged. But Lord Trayner said that he concurred in the opinion of the Lord President in *Innes* v. *Adamson*, to the effect that there were with reference to this point two classes of cases. Lord Trayner also expressed his dissent from the decision in *Farquhar* v. *Neish*. The only other recent case where this question came up in the Inner House, so far as I know, is *Murdison* v. *Scottish Football Union*, January 30, 1896, 23 R. 449. There no doubt it was held that there were no sufficient averments of malice against the defender Dick to warrant an issue against him, but the case is special and not easily to be brought within any special class; it is a case in which it was held that the circumstances were in no way indicative of malice but rather the reverse, and that when that was so some circumstantial case might reasonably be required.

"Considering these cases, I cannot say that I think them on all points consistent; but that there is a class of cases in which in our practice—and the question is only a question of practice—a general averment of malice is held sufficient seems established by abundant authority; and I am unable to see that the case of *Laidlaw* v. *Gunn*, here in point, has been deprived of authority or even doubted; while *Farquhar* v. *Neish* has been gravely attacked, and *M'Fadyan* v. *Spencer* is seriously weakened by the doubt, to put it no higher, of Lord Rutherfurd Clark. On the whole I could not, apart from the case of *Sheriff* v. *Denholm*, conclude that the rule requiring particulars suggestive of malice has as yet been extended to privilege cases between private parties, except where the circumstances suggested the absence of malice.

"But while I have thought it necessary to examine the cases and permissible to state the result of my examination, I think that this case may be decided quite consistently with *Sheriff* v. *Denholm*. For I think there is here a sufficient statement of particulars inferring malice. In none of the decisions is there, so far as I know, any description or suggestion as to the nature of the particulars required to be stated. It may be for the Court in the first instance to judge of the relevancy of such averments, but ultimately the question of malice is for the jury and not for the Court. It is averred that the defender had a strong

antipathy to Co-operative Societies, but I give no weight at all to that statement. I think it would be out of the question to hold that it indicated malice. But it is averred that the statement was uttered on the first occasion 'in the knowledge that it was wholly unfounded.' Singularly enough that averment is not repeated in regard to the second occasion; but I think it must be held as implied, and that it was omitted in the notion that such repetition was superfluous. Now, I consider that in this particular case that averment is a sufficient averment of a particular circumstance implying malice. If it be proved that the defender in making this statement to the pursuer's masters said what he knew to be false, there could not possibly be a more convincing proof of his malice. There is, I think, no case where an averment that the defender made a slanderous statement maliciously and in the knowledge that it was untrue has been held irrelevant. But no doubt it may be said that that is intended by the word 'falsely,' and is implied in all actions for slander. That may be; but is it to be suggested that this averment is not sufficient on account of its generality, and that there must be an averment of circumstances tending to show the defender's knowledge of the falsehood of the slander? No such proposition has yet been tabled. But if it were, then I am of opinion that we have such a circumstance here, and a circumstance conclusive in a question of relevancy because the occurrence in question took place with the defender himself; and it is fair, as matter of relevancy, to say that supposing the accusation to be false, which is in this question to be assumed, the defender must needs have known it to be false, and if he knew it to be false he was malicious in uttering it. No doubt it is quite true that this is not a necessary consequence, because it may turn out to be a case of mere misunderstanding, and it may be that in that case malice may be negatived. All I say is that there are here sufficient averments of malice and inferring malice to entitle the pursuer to have his case submitted to a jury.

"No question was raised as to the counter-issue, and I am of opinion that the word 'maliciously' should be added to the second issue for the pursuer, and that these issues should be then approved of."

Counsel for the Pursuer — M'Lennan. Agent—William Gunn, S.S.C.

Counsel for the Defender—Deas. Agents —J. & A. Hastie, Solicitors.

Tuesday, November 22.

OUTER HOUSE.

[Lord Kincairney.

WATNEY *v.* MENZIES.

Game-Laws — Muirburn — High and Wet Muirlands—Civil or Criminal Procedure —Act 13 Geo. III. cap. 54, sec. 6.

By the Act 13 Geo. III. cap. 54, penalties are imposed upon the making of muirburn after the eleventh of April, with the exception of high and wet muirlands, which may be burned by the proprietor or by his tenant with his authority until the 25th April.

In an action at the instance of a shooting tenant against the grazing tenant, concluding for interdict against muirburn between the 11th and 25th April, on the ground that the lands in question were not high and wet muirlands, *held* (*per* Lord Kincairney) that the pursuer must discharge an onus of proof similar to that which would have lain upon him had he elected to prosecute, in the character of a common informer, for the penalties provided by the Act.

Circumstances in which *held* that the onus of proof had not been discharged.

Question—Whether a civil action of interdict against muirburn was competent.

Vernon James Watney, tenant of Tressady Lodge and shootings, in the county of Sutherland, brought the present action against Duncan Menzies, tenant of the grazings of Blairich in the same county, concluding for interdict against Menzies making muirburn or setting fire to any muir or heath within the limits of Tressady shootings between the 11th April and 1st November in any year, except upon such high and wet muirlands, if any, as could not be burned before 11th April, and for which Menzies might have express authority in writing from his landlord, the Duke of Sutherland, to make muirburn until the 25th of April. A proof was taken, the import of which fully appears from the opinion of the Lord Ordinary.

By the Act 13 Geo. III. cap. 54, it is provided, sec. 4—"That every person who shall make muirburn, or set fire to any heath or muir, in that part of His Majesty's dominions called Scotland, from the eleventh day of April to the first day of November in any year, shall forfeit and pay the sum of forty shillings sterling for the first offence, five pounds sterling for the second offence, and ten pounds sterling for the third offence and every other subsequent offence."

Section 6—"Provided always, and be it enacted by the authority foresaid, that every proprietor of high and wet muirlands, the heath upon which cannot frequently be burned before the 11th day of April, may when such lands are in his own occupation, burn the heath upon the same at any time between the 11th and 25th