present case. He holds, and rightly, that the abortive appointment to children who were not objects of the power could not of itself render invalid a gift to an object of the power. But then he had to meet the difficulty that the power to test was not an absolute right, but was conditional upon Miss Wright dying without issue. He held, however, that the power to test, though qualified, was sufficient, coupled with the liferent, to constitute a good exercise of the power in favour of Florence. If it were good law that a liferent, plus a qualified power of testing, is equivalent to a right of fee, I should agree that the effect of an abortive attempt to interject persons who were not objects of the power would not affect the right to test conferred. But I know of no authority to the effect that a liferent with a power to test so qualified is equivalent to a right of fee.

In regard to the case of *Crompe* v. *Barrow*, which Lord Adam refers to, I fail to see its application to the case of *Wright*. In *Crompe* v. *Barrow* the contention on behalf of Charles Barrow was that the fee of the moiety, of which he had the liferent, having been given to his issue, persons not objects of the power, in the first instance, and in the event of his dying without issue to his sister Frances, the whole of the appointment fell, and the fund fell to be disposed of as unappointed. It is true that the judgment of the Master of the Rolls implies that Frances would only take in the event of Charles dying without leaving issue, and that if he left issue, although they could not take, the fund would go as unappointed. But Frances seems to have been content with this qualified right, and the real dispute was whether the gift to her was not wholly bad in consequence of the invalid appointment to the children of Charles. The Master of the Rolls held that it was not, and sustained the claim of Frances to that extent. The question does not seem to me to be the same. There the question was whether a gift in remainder of a full though conditional right of fee to an object of the power wholly failed because an ineffectual attempt had been made to give the fee to persons who were not objects of the power. In *Wright's* case, as here, the question was whether an object of the power who was entitled to a fee was bound to accept something less than a right of fee. If *Crompe* v. *Barrow* applied at all to the present case, the second and third parties would have no power to test on their shares if they had issue. That is exactly what they complain of.

None of these cases, assuming them to be well decided, seems to rule this case, or necessarily to conflict with the view which I take of it. In none of them was there such a distinct and separable appointment as here. Again, *Carver* v. *Bowles*, on which the decisions in *Lennock's Trustees* and *Wallace's Trustees* were intended to be based, merely decided that it was within the power to restrain the object of the power (a female) from anticipation, leaving her otherwise absolute owner, and free to dispose of her share by will or deed to take effect after her death.

In *Wright's Trustees* the only appointment was in liferent, which is sufficient to distinguish the case, but I do not agree in the judgment, which goes far beyond the other decisions. This case really depends on the well-settled law that "if the first appointment gives the absolute interest to the appointee, and the subsequent superadded modification of it is void, the original appointment stands exactly as if the attempted modification were struck out of the will"—*per* Master of the Rolls Lord Romilly, in *Churchill* v. *Churchill*, L.R., 5 Eq. 48.

I therefore would answer the second alternative of the first question in the affirmative.

LORD YOUNG concurred.

The Court answered the first alternative of the first question in the negative, and the second alternative in the affirmative.

Counsel for the First Parties—W. E. Mackintosh. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Second and Third Parties—Chree. Agent—W. K. Aikman, W.S.

Tuesday, January 22.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

ROBERTSON'S TRUSTEE *v.* ROBERTSON.

Husband and Wife—Donatio inter virum et uxorem — Provision — Revocation — Bankruptcy.

A husband who had executed no antenuptial marriage-contract, granted an assignation, whereby "in order in so far to supply that defect, and make provision" for his wife, he conveyed to her certain leasehold subjects (occupied by him as a residence) with immediate entry thereto, a policy of life insurance for £100, and his household furniture. These subjects, together with a sum of £459, which he subsequently uplifted from bank and delivered to his wife, constituted his whole means. At the date of the assignation the husband's private estate was solvent, but he was liable for the debts of a mercantile business belonging to a trust-estate on which he was a trustee. This business was in financial difficulties. The trust estate and the estate of the husband were subsequently sequestrated.

Held (*rev.* Lord Kincairney, Ordinary, *diss.* Lord Young) that the assignation was a *donatio inter virum et uxorem*, revocable by the husband, and therefore reducible at the instance of the trustee in his sequestration.

John Robertson, merchant, Portree, died in 1890 leaving a trust-disposition and settlement whereby he nominated Donald Robertson, station agent, Portree, to be one of his trustees. The testator empowered his trustees to carry on his business, which they accordingly did under the name of John Robertson, merchant.

On 2nd June 1898 Donald Robertson executed an assignation, whereby, on the narrative that no regular contract of marriage had been entered into between himself and his wife Mrs Mary Margaret Ferguson or Robertson, "and in order in so far to supply that defect and make provision for" her, he assigned to her and her heirs and assignees whomsoever (1) a lease of certain heritable property (viz., No. 5 Beaumont Crescent, Portree, held on lease by him) with entry as at the date of the assignation; (2) a life assurance policy for £100; and (3) his household furniture.

The assignation contained the following declaration:—"Providing and declaring always, as it is hereby expressly provided and declared, that I shall have no right or title to the lease or tack in the first place hereinbefore assigned, or to the subjects and others contained in the said lease or tack, or the rents, maills, or duties of the same, or to any part thereof, and that neither the same, nor the subjects, property, and effects in the second place and in the third place hereinbefore assigned and conveyed shall be liable to my deeds or subject to the legal diligence of my creditors; but that notwithstanding such deeds, debts, or diligence it shall be lawful for the said Mary Margaret Ferguson or Robertson by herself alone, without my consent, to uplift and discharge the rents of the subjects contained in the said lease or tack, and to apply the same as she shall think proper." The assignation also excluded the granter's *jus mariti* and right of administration from the subjects conveyed. The assignation was duly recorded in the Register of Sasines.

On 9th August 1898 Robertson uplifted a sum of £439 which stood in his name in the Highland Railway Savings Bank, and handed it to his wife.

On 1st April 1899 sequestration was granted of the estates of the company trading as John Robertson, and of the estates of the individual trustees acting under John Robertson's trust-disposition and settlement in their capacities (*a*) as such trustees, (*b*) as partners of the said company, and (*c*) as individuals. John M'Bain, C.A., Aberdeen, was appointed trustee in the sequestration.

On 15th November 1899 M'Bain as trustee brought an action against Mrs Robertson and Donald Robertson, her husband, as her curator and administrator-in-law, and for any interest competent to him, in which he concluded, *inter alia*, (1) for reduction of the said assignation, and (2) for decree ordaining Mrs Robertson to deliver to the pursuer the titles of the leasehold subjects, the policy of insurance, and the furniture referred to *supra*, and also to make payment of the sum of £439 above mentioned. The pursuer averred that at the dates of the said assignation and donation respectively the defender Donald Robertson was insolvent.

The pursuer pleaded—"(1) The subjects assigned and the money gifted as above stated having been assigned and gifted *stante matrimonio*, the pursuer is entitled to decree of reduction, delivery, and payment as concluded for. (2) The said assignation having been made contrary to the provisions of the Act 1621, c. 18, ought to be reduced as concluded for."

The defenders averred that Donald Robertson had granted the assignation as a provision for his wife, for whom he had made no provision by antenuptial contract or otherwise; that the value of the subjects and others conveyed by the assignation was in all £236; that the provision made was in all respects moderate and reasonable, and that at the date thereof Donald Robertson was solvent.

With regard to the sum of £439 sued for, the defenders averred that to the extent of £400 it was and had always been the property of Mrs Robertson, that she had handed it to her husband for investment at various times, and that it was invested with the Highland Railway Provident Society in his name, but really for her behoof; and that the balance of £39 uplifted was retained by Donald Robertson and used by him.

The defenders pleaded—"(2) The assignation sought to be reduced being no more than a reasonable provision to the defender by her husband, and having been granted while he was solvent, is not reducible."

The Lord Ordinary (KINCAIRNEY) allowed a proof.

The proof disclosed that the trustees in carrying on the business of the deceased John Robertson had obtained an overdraft from the North of Scotland Bank, for which they, including Donald Robertson, granted a personal guarantee in August 1896. They were subsequently pressed by the bank to grant a bond over certain heritable estate belonging to the trust, in further security of the overdraft, but this was not done. From a valuation obtained by the trustees in April 1897 it appeared that the said heritable property was valued at £2600. From the balance-sheet of the business as at 30th April 1898, it appeared that the overdraft amounted to £1145, but that there was an apparent surplus of £1966, due to the inclusion of the said heritable property, which was entered as of the value of £2300. From a state of affairs prepared by the pursuer (who was consulted by the trustees prior to the sequestration) as at 26th August 1898, the estate, exclusive of the said heritable property, showed a deficiency of £734. The heritable property when subsequently sold by the pursuer after his appointment as trustee, realised only £1083, and the trust estate proved insufficient to meet its liabilities.

The house No. 5 Beaumont Crescent, the lease of which was assigned by the asssignation under reduction, was at the date of

the assignation, and continued thereafter to be occupied by Mr and Mrs Robertson as their residence. The furniture conveyed by the assignation was the furniture in this house.

On 28th June 1900 the Lord Ordinary pronounced an interlocutor, by which he found, *inter alia*, "(1) that it has not been established that the assignation sought to be reduced was a gratuitous provision or donation in favour of the female defender, but finds that it was an onerous provision in her favour; (2) that the said assignation is not reducible under the Act 1621, c. 18, in respect that it has not been proved that it was granted without true, just, and necessary cause," and assoilzied the defenders.

There were also findings with regard to the sum of £439 sued for, but as the decisions of the Lord Ordinary and of the Court reversing his Lordship's judgment upon this point turned wholly upon the evidence, it is not considered necessary to report that part of the case.

Opinion.—"The late John Robertson, sometime merchant in Portree, died in 1890, leaving a trust-deed, in which he directed or requested his trustees to continue his business, which they did under the name and style of John Robertson, merchant in Portree. The result was unfortunate, and the estates of the company, and of the trustees who carried on the business, were sequestrated on 1st April 1899, and the pursuer was appointed trustee on the sequestrated estates. One of John Robertson's trustees, who carried on the business and became involved in the losses incurred, was the defender Donald Robertson, who was no relation of John Robertson, but who seems to have undertaken the trust and the conduct of the business through friendship for John Robertson, and for the benefit of his widow. It is, however, not disputed that he is liable for the whole debts, and his estates are included in the sequestration. The debts which the trustee is in the course of paying were, however, not incurred by the defender Donald Robertson in carrying on business for his own benefit, but in carrying on the business of the trust.

"It appears that for some time after the pursuer was appointed trustee he was of opinion that the business was solvent. This appears from a memorial which he submitted to counsel in or about June 1899, in which the question asked was whether the heritage which belonged to the deceased John Robertson was embraced in the sequestration, and in which it is stated that 'if the heritable properties are carried by the sequestration, the estate will be more than sufficient to pay 20s. per £; while if the heritable properties are not carried, the dividend from the estates—other than the individual estates of the trustees—cannot, it is thought, exceed 10s. per £.'

"The answer of counsel was that the heritable properties were included, and the trustee, acting on that opinion, has realised them.

"The result, however, has not been what was anticipated. The price obtained for the heritable properties fell far short of their estimated values, and the stock-in-trade was sold at a large discount, with the result that a state of affairs made up on 30th May 1900 shewed that the estate of John Robertson was insolvent, and that there was a deficiency of £486, 13s. 6d.

"In that state of matters the trustee directed his attention to the estates of John Robertson's trustees, and in particular to the estate of the defender Donald Robertson, which was liable to pay the balance of the company's debt, and on inquiry he found that Donald Robertson was wholly, or almost wholly, without estate; but on further inquiry he discovered two things, viz. (*Firstly*) That on 2nd June 1898, Donald Robertson had executed in favour of his wife an assignation of (1) certain leasehold property, (2) a policy of insurance on his life for £100, and (3) the household furniture in his dwelling-house, which deed was duly recorded. The value of the subjects covered by this assignation was not great. It is estimated by Robertson at £150 for the leasehold property, and £36, 9s. 2d. for the policy. The furniture was of small value, and I think that the total value of the subjects assigned would not much exceed £200 or £250. (*Secondly*)—[*His Lordship referred to the question as to the* £439].

"In these circumstances the trustee has raised this action, calling as defenders Donald Robertson and his wife. The conclusions are for reduction of the assignation, and decree against Mrs Robertson for delivery of the titles of the leasehold subjects, of the policy of insurance, and of the household furniture, conform to an inventory produced in process. The grounds of reduction are two—(*first*) that the assignation was a donation or gratuitous provision by Robertson to his wife, made to take effect during her life, and was therefore revocable by Robertson, and subject to reduction by his trustee; and (*secondly*) that it was an alienation by him in favour of a conjunct and confident person when he was insolvent, without true, just, and necessary cause, contrary to the Act 1621, cap. 18.

"It is important to observe that fraud is not alleged; the word fraud is not in the record; neither is it averred that Donald Robertson knew that he was insolvent or contemplated insolvency at the date of the assignation; and it may be as well to say here that although the circumstances are suspicious, yet it does not appear that fraud is made out, for the reason that Robertson may have thought, as the pursuer himself, after examining into the matter, did think, that the company was perfectly solvent. Erskine speaks of such a deed as sometimes granted by a husband 'under the consciousness of his own insolvency,' but I do not think so much as that can be confidently predicated of Robertson when he executed the assignation. Possibly, however, although he may have thought that the company estate was solvent, still, as the value of the heritable

which was not unreasonable, although it was all that Robertson had. In *Dunlop* v. *Johnston, supra*, the husband had already made a provision for his wife, to take effect after his death—here the wife was unprovided for. In *Craig* v. *Galloway, supra*, the gift of an insurance policy, said to be by way of provision, was sustained, although it was clear that the wife could have disposed of it. Here it was not shown that the narrative of the assignation, which was "to make provision for" the granter's wife, was incorrect. In any view *Craig* v. *Galloway* was a direct authority for sustaining the deed *quoad* the insurance policy. The deed might be partly good and partly bad, and might be sustained so far as valid, *i.e.*, to take effect after the husband's death. On the assumption of Robertson's insolvency the defenders supported the Lord Ordinary's judgment on the question of reduction under the Act 1621, cap. 18.

At advising—

LORD JUSTICE-CLERK — The pursuer M'Bain is trustee on the sequestrated estate of a company trading under the name of John Robertson. The business of this firm was after John Robertson's death taken up by the defender Donald Robertson, who had been appointed trustee by John, and in Donald's hands the business was unsuccessful. The trustee in the sequestration now seeks to reduce an assignation by the defender Donald Robertson in favour of his wife, of certain leasehold property, of a policy of insurance, and certain household furniture. The gift to the wife is an absolute gift, and there is nothing of the nature of a postnuptial contract making provision to take effect at his death. The trustee contends that this gift was revocable, and therefore reducible at the trustee's instance, or otherwise that it was an alienation struck at by the Act 1621, cap. 18.

I think that there is great force in the trustee's contention that the gift being to the wife *stante matrimonio*, so that she could have disposed of everything, it cannot be looked upon as a provision made by the husband, to which the equitable considerations relating to such a provision can apply. To me it appears that the two cases quoted by the Lord Ordinary, viz., *Kemp* v. *Napier* and *Dunlop* v. *Johnston*, directly apply so far as regards present gift, while they both recognise the distinction where a provision is made for a benefit to the wife after the dissolution of the marriage. In *Dunlop* v. *Johnston* it was held that an annuity to a wife during the subsistence of the marriage was not a natural equivalent for her legal rights as a wife. Here, in this case, what was done was a transference to the wife of the husband's estate to be administered as she should please. That seems to me to be a stronger case than the case of *Dunlop*, where the procedure was to place money in the hands of trustees to pay an alimentary annuity to the wife, *stante matrimonio*. It is, as the Lord Justice-Clerk described the annuity in *Dunlop's* case, "nothing but a transfer from the husband without adequate consideration," the plain purpose being to protect what is given from the diligence of the husband's creditors—a purpose which is not legitimate. Such a gift is revocable, and a postnuptial deed to attain that object cannot receive effect in a question with creditors. The Lord Ordinary in deciding that *Dunlop's* case does not apply here gives weight to the case of *Rust* v. *Smith*, where a husband purchased a property, and got the disponers to grant the title in name of his wife, and where this was upheld as a provision for the wife. The circumstances there were very exceptional. In the first place, as pointed out by Lord Deas, it was not left within the power of the husband and wife by destroying the deed to alter the state of matters, as they might have done had the deed been one granted by the husband, and in the second place it appeared in that case that the wife was carrying on an industry of her own, and thus bringing profit to her husband, and that there was ground for holding that out of these profits the husband might make "some small irrevocable provision for his wife by buying the property for her." The case was therefore highly exceptional, and I cannot hold as the Lord Ordinary does that the case of *Rust* detracts from the authority of *Dunlop's* case. I am therefore of opinion that the pursuer is entitled to reduction of the assignation on the first ground stated. This makes it unnecessary to consider the second question put by the trustee in the sequestration.

[*His Lordship then dealt with the question as to the sum of* £439].

LORD YOUNG—This case has been fully argued, and we took time to consider our judgment. The result of my own consideration was a disposition to agree with the Lord Ordinary; indeed, my opinion was that his Lordship's judgment ought to be affirmed. I reconsidered that opinion when I ascertained that your Lordships all held a different view, but I must own without being able to change the impression which I had formed. It would serve no good purpose to enter upon the details of the case. I was certainly favourably impressed with the position of the defender Robertson. He was in a good position, and had retired from the service of the Railway Company. He had very little personal property. He had been concerned in the business of the deceased John Robertson as one of his trustees—not on his own account, but for behoof of the truster's wife and family; and the result was that in 1899 it turned out that the business was unsuccessful, and there was a question whether the trust estate would be sufficient to pay the company's debts. He seems to have thought it uncertain in 1899 whether the heritage was liable to pay the debts of the company. If it was, the conclusion arrived at was that the company was solvent—if not, that there would be a deficiency. It is to be observed that

Robertson had no debts of his own, but was liable for this deficiency because of his conduct in connection with the trust for behoof of the truster's widow and children. Now, in 1898 Robertson was solvent, and was under no apprehension as to his liabilities except for a deficiency not then ascertained. In these circumstances his attention was called to the fact that the business was turning out unsuccessful—that there was a risk—and he accordingly thought it right to make this provision for his wife. In my opinion he was entitled to do so, and I think that the judgment of the Lord Ordinary is right.

[*His Lordship then dealt with the question as to the sum of* £439.]

LORD TRAYNER—I am unable to concur in the judgment of the Lord Ordinary.

The deed sought to be reduced is a conveyance by Robertson to his wife of the whole estate of which he was possessed at its date, and the purpose for which it was granted appears to me from the whole circumstances to be plain. I think that purpose was to put the estate of Robertson beyond the reach of his creditors, but not beyond the reach of his own enjoyment. It is said that the deed is maintainable on the ground that it was only a reasonable provision made by a husband for a wife for whom no provision had previously been made. Looking to Robertson's circumstances at the date of the deed I seriously doubt whether he was in a position to make any provision for his wife which would have been preferable to the claims of creditors. But the deed has none of the characteristics of a provision, and, on the contrary, has the characteristics of a gift. It is a conveyance of the granter's whole estate, heritable and moveable, and it is not usual for a husband to strip himself of everything he possesses and transfer it to his wife as a provision for her *stante matrimonio*. It is not conditioned to take effect in the event of the wife's survivance, but gives possession to both heritage and moveables at once—that is, at the date of granting. These circumstances alone stamp the deed, in my opinion, with the character of a gift. If this view is sound, then it follows that the gift was revoked by Robertson's bankruptcy, and the pursuer is entitled to have it set aside. It was urged upon us that the deed in question might be sustained as a provision, at all events in so far as regards the life policy which it transfers, on the authority of the decision in the case of *Craig* v. *Galloway*. But that case was distinctly different from the present. There the life policy was originally taken out in the wife's name, and the only thing (certainly the main thing) urged against it as a provision was that the wife could *stante matrimonio* surrender it, and take the surrender value. The Court thought that such a proceeding was not at any time within the contemplation of the parties, and was in itself so improbable that no weight was given to that consideration, and the Court being of opinion that the life policy was taken out as a provision for the wife, sustained the wife's right against the challenge of the husband's creditors. But I am satisfied that in the present case the transfer of the husband's policy was not made as a provision, but as part of the gift of his whole estate, and in that view the case of *Craig* v. *Galloway* has no application.

[*His Lordship then dealt with the question as to the sum of* £439.]

LORD MONCREIFF — In more than one passage in his opinion the Lord Ordinary discloses his uneasiness and suspicion of the defenders' case, but notwithstanding he has assoilzied the defenders from the whole conclusions of the action.

I entirely differ from him on both branches of the case, and first as to the assignation granted by the male defender in June 1898. Having considered the whole of the evidence I can come to no other conclusion than that when by that deed the male defender professed to divest himself in favour of his wife of (what he says was) his whole property, including the lease of the house in which he lived, and all the furniture therein, he did so, not for the *bona fide* purpose of making a provision for his wife in the event of his predeceasing her, but in order to defeat the rights of his creditors in the event which he anticipated of their proceeding against his estate under the guarantee which he had granted.

The assignation does not profess to be a provision for the wife in the event of her survivance; it is an absolute gift, to take effect from its date and during the husband's life. If it is of any effect the wife might have realised the whole of the property assigned immediately. A husband if solvent can by postnuptial settlement make a rational provision for his wife in the event of her survivance, which shall not be revocable except *quoad excessum*. "But there must be no circumstances whence to presume an intention in the husband to prefer his wife to his other creditors"—Ersk. iv. 1, 33. Now, in two points this assignation fails. First, it is not a provision to take effect only in the event of the wife's survivance; and secondly, it was clearly made for the purpose of defeating an anticipated claim by the husband's creditors. The effect of it, if a demand had been made on him at the time would have been to make him ostensibly bankrupt.

I am therefore of opinion that this assignation was either a gratuitous donation *inter virum et uxorem* made *stante matrimonio*, or, as I think, a purely collusive attempt by the male defender to put his whole estate beyond the reach of his creditors while truly retaining control of it. In either case it is revocable and reducible.

In this view it is not necessary to consider the case on the footing that the assignation can be regarded as *bona fide* intended to be a provision for the female defender. But if it could be so regarded it would be reducible in part. A husband cannot make an irrevocable provision for his wife to take

effect *stante matrimonio*. I do not share the Lord Ordinary's doubt on this point, which I think is settled by the case of *Dunlop* v. *Johnston*, 3 Macph. 758, aff. 5 Macph. (H. of L.) 22.

The only matter as to which some doubt might have existed is in regard to the policy of assurance. In the view which I take of the case this policy was assigned not as a provision to take effect in the event of the wife's survivance, but simply as one asset of the male defender's effects which was made over along with the rest of his property.

[*His Lordship then dealt with the question as to the sum of* £439.]

The Court recalled the interlocutor reclaimed against, granted decree of reduction, and ordained the defender Mrs Robertson to deliver to the pursuer the titles of the leasehold subjects and the policy of insurance.

Counsel for the Pursuer and Reclaimer —Ure, Q.C.—M'Clure. Agents — Cairns, M'Intosh, & Morton, W.S.

Counsel for the Defenders and Respondents—W. Campbell, Q.C., A.S.D., Thomson. Agents—Duncan Smith & M'Laren, S.S.C.

Friday, January 25.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

NEILL *v.* HENDERSON.

Reparation—Slander—Privilege—Judicial Slander — Arbitration Proceedings — General Charge of Mendacity against Witness — Malice — Issue — Malice in Issue.

In an action of damages for slander the pursuer averred that after he had given evidence in the course of certain arbitration proceedings between the defender and A, which he had been asked by A to attend as a witness, the defender, in the presence and hearing of the arbiter, A's agent, and A, said to the arbiter "That man cannot speak one word of truth, and all he has stated just now is lies from beginning to end," or used words of like meaning and import; that the said statement was of and concerning the pursuer, was false and calumnious, and was made maliciously and without probable or any cause; that pursuer immediately called on the defender to withdraw the statement, but he refused to do so and reiterated it, and that subsequently the pursuer wrote to the defender calling upon him to apologise, but that the defender made no answer to this letter.

Held (1) (*aff.* judgment of Lord Kincairney, *dub.* Lord Young) that the action was relevant; and (2) (*rev.* judgment of Lord Kincairney, *dub.* Lord Moncreiff) that malice must be inserted in the issue.

George Neill, formerly builder and now commission agent, Edinburgh, raised an action against Simon Henderson, baker, Edinburgh, in which he concluded for payment of £500 as damages for slander.

The pursuer averred—"(Cond. 2) About twenty years ago the defender and Dr John Bowie, 41 Lauriston Place, Edinburgh, and John Nisbet, High Street, Edinburgh, purchased the estate of Parsons Green for feuing purposes, and entered into an agreement for the construction of certain roads dividing their respective portions of said estate. Some time ago disputes arose between the defender and Dr Bowie as to the payment of the cost of constructing said roads. The defender and Dr Bowie agreed to refer the matters in dispute between them in connection with said roads to the arbitration of Mr William Ormiston, Lord Dean of Guild of Edinburgh. Mr Ormiston accepted the reference, and appointed a meeting of parties and their agents to be held on the ground on 6th April 1900, at 2·30 P.M., to hear parties and take evidence on the matters in dispute. As the pursuer had constructed the major portion of the roads on said estate, he was asked by Dr Bowie to attend the proposed meeting, so as to point out to the arbiter the roads which he had made on the orders of and at the expense of Dr Bowie. (Cond 3) On said 6th April 1900 the pursuer accordingly went to said meeting at Hobart Street, Parsons Green. After the agents of the parties had made statements to the arbiter, the pursuer was called upon to state to the arbiter which of the roads in question were made by the different proprietors Dr Bowie and the defender. After the pursuer had made this statement, the defender, in the presence and hearing of the said William Ormiston, Alexander Guild, of Messrs Reid & Guild, W.S., agent for Dr Bowie, and the said Dr Bowie, said, 'Mr Ormiston, that man cannot speak one word of truth, and all he has stated just now is lies from beginning to end,' or used words of like meaning or import. The said statement was of and concerning the pursuer, was false and calumnious, and was made maliciously and without probable or any cause. The pursuer immediately called upon the defender to withdraw the said statement, but he refused to do so. On the contrary, the defender reiterated the said slanderous statement in the same or similar language, and subsequently, during said meeting, he addressed other offensive terms towards the pursuer. Subsequently the pursuer wrote the defender by registered letter, calling upon him to apologise for said slanderous statement, but to this letter the defender has made no answer."

The defender pleaded—"(1) The pursuer's averments are neither relevant nor sufficient to support the conclusions of the summons. (3) In any event, any statement made by the defender regarding the pursuer being privileged, and the defender having made the same without malice, and