permit a clear and unequivocal writing to be displaced by a parole agreement such as that alleged by the defender.

LORD ADAM concurred.

LORD M'LAREN—I quite agree, and have very little to add. The case is, that the purchasers of goods under a sale-note bring an action of damages against the sellers for failure to deliver the goods. The case for the defenders is that this sale-note is only *pro forma* a sale, and is subject to an antecedent agreement whereby five or six conditions have to be observed in all transactions between the parties. The effect of these is to reduce the contract of sale to one of agency. *Prima facie* this appears to be a kind of agreement which could only be proved by written evidence, because it is an agreement which the parties who might desire to enter into it would be careful to reduce to writing. It is not difficult to find a good legal justification in support of the result at which the Lord Ordinary has arrived, *i.e.*, that the defenders' averments can only be proved by writ or oath. I think the key to the question is to be found in the consideration that the effect of the alleged agreement is not to add to or vary the contract, but to put an end to the contract of sale and to substitute a new and different contract for it. Now, there is a doctrine in our law that where by a written contract property has passed, any agreement to restrict the right of property which has passed must be proved by writ or oath. I referred to certain cases in which, by an extension of the principle of the Trust Act 1696, rather than by the direct application of that Act, it was held that you could not transform a written agreement of sale into some other contract otherwise than by the writ or judicial admission of the *ex facie* owner. In *Hamilton* v. *Western Bank*, 19 D. 152, where goods were transferred to a bank *ex facie* absolutely, this principle was applied. A proof was allowed to the bank of its averment of pledge, but the Lord President announced that the proof had completely failed, and his Lordship's judgment is rested on the ground that the title could only be qualified in terms of the bank's judicial admission, which was that the bank had taken over the goods in security of present and future advances.

In what I say I recognise that there may be cases of sale where the essentials of the contract are in writing, in which nevertheless certain conditions of the contract may be proved by parole. As an illustration, the case may be figured where the time and place of delivery are not expressly stated in the agreement. In such a case the law implies the usual conditions in the particular trade, and allows parole evidence to prove what these are. And I do not think that our judgment at all infringes on the principle that in the case of sale, which is a proper consensual contract, evidence of all conditions in the contract is competent, and such evidence may be partly oral and partly in writing. Nor do I wish to suggest a doubt as to the principle on which the Lord Ordinary has rested his judgment, because I have no doubt that there may be cases of contracts so unusual that they can only be proved by writ or oath. As an illustration, take the case of a contract of service for an unusual period—say for a term of years. But I prefer to rest my judgment on the ground I have stated, that this is an attempt to substitute one contract for another by evidence less satisfactory than that by which the apparent contract is proved.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers and Respondents — Guthrie, K.C.— Cook. Agents — Menzies, Black, & Menzies, W.S.

Counsel for the Defenders and Reclaimers —Shaw, K.C.—Hunter. Agents—Auld & Macdonald, W.S.

Tuesday, January 29.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

BAYNE & THOMSON *v.* STUBBS LIMITED.

Reparation — Slander — Privilege — Trade Slander—Malice—Trade-Inquiry Association—Answer to Confidential Inquiry—Issue—Malice in Issue.

In an action of damages for slander, brought by a firm of traders against S., the pursuers founded on a letter written by the defenders in which they stated that the pursuers' account "from various causes is not regarded with much confidence in these markets, although in certain quarters they appear to be in receipt of moderate credit. The capital at command, however, is limited, and the payments of late have been slow and unsatisfactory, but their settlements for years have always been dilatory. At the same time several of their shops are not thought to be paying, and it is feared that credit transactions meanwhile represent more than an average risk." The pursuers ultimately admitted that the defenders were a company formed for the purpose of obtaining confidential information regarding the commercial standing and credit of traders, which they disclosed in answer to confidential inquiries made by subscribers to the company, and that the letter complained of was written in answer to such a confidential inquiry by a subscriber of the defenders' company. *Held* (1), *dub.* Lord Trayner, that the pursuers were entitled to an issue, and (2) that on the pursuers' averments and admissions a *prima facie* case of privilege was disclosed, and that consequently malice must be inserted in the issue.

Bayne & Thomson, confectioners, Glasgow, brought an action against Stubbs Limited, Edinburgh, in which they concluded for payment of £1000 as damages for slander.

The pursuers averred that in February 1900 they ordered a half ton of chocolates from Messrs Gatti, chocolate manufacturers, London, through Messrs Gatti's Glasgow agent, one half of which was to have been delivered immediately, and the balance when required. The pursuers also averred as follows:—"(Cond. 3) Immediately after the said order was given, the defenders, in or about February or March 1900, wrote to Messrs Gatti, stating that the pursuers' account 'from various causes is not regarded with much confidence in these markets, although in certain quarters they appear to be in receipt of moderate credit. The capital at command, however, is limited, and the payments of late have been slow and unsatisfactory, but their settlements for years have always been dilatory. At the same time, several of their shops are not thought to be paying, and it is feared that credit transactions meanwhile represent more than an average risk.' (Cond. 4) The said statements made by the defenders are of and concerning the pursuers and are false. By the said statements the defenders represented that the pursuers were in financial difficulties, and were persons whose financial position was so bad as to render it unsafe for merchants and traders to have business relations with them. They were made by the defenders of and concerning the pursuers falsely, calumniously, and maliciously. If the defenders had made adequate inquiry they would have ascertained that the financial status of the pursuers was excellent. They, however, failed to make such inquiry. As a result of said statements being made, Messrs Gatti failed to deliver the first portion of the chocolate when required, and only made delivery thereof upon receiving an assurance from their said representative that the said statements regarding the pursuers were entirely untrue."

The defenders stated that they were "a company of merchants and others engaged in trade, formed for the purpose, *inter alia*, of promoting *bona fide* trading, and preventing their subscribers from making bad debts."

They also averred as follows:—"The said Messrs Gatti, who are subscribers of the defenders, made inquiry regarding the pursuers' position in the spring of the present year, and the defenders, in the exercise of their lawful rights in the interests of their said subscribers, answered said inquiry, but the defenders' answer was marked 'private and confidential,' and is a confidential document, and is regarded as such by Messrs Gatti. Said answer contained no libel on the pursuers, and did not contain the imputations alleged by the pursuers. It merely informed Messrs Gatti of facts which they desired to know, and which the defenders stated truly and accurately, or at all events, which they in *bona fide* believed to be true and accurate and in accordance with information which the defenders obtained at the time. The defenders aver that it is the fact that in recent years the pursuers' payments have been slow and unsatisfactory to a number of traders with whom the pursuers deal. In the year 1887, Isdale & M'Callum, Paisley, obtained a decree in absence in the Small-Debt Court at Glasgow against the pursuers for the sum of £2, 16s. 8d.; and in 1899, Bell, Cruickshanks & Co., Glasgow, obtained a decree in absence against the pursuers for the sum of £6, 2s. in the Small-Debt Court at Glasgow. Both of said degrees appeared in the list of defaulting debtors in *Stubbs' Gazette*."

The defenders pleaded, *inter alia*—"(1) The pursuers' averments are irrelevant and insufficient in law to support the conclusions of the summons. (2) The answer which the defenders made to Messrs Gatti's inquiry being confidential, and, *separatim*, being a privileged communication, the defenders ought to be assoilzied."

By interlocutor dated 13th Nov. 1900 the Lord Ordinary (KINCAIRNEY) repelled the first and second pleas-in-law for the defenders, approved of the following issue, and appointed the same to be the issue for the trial of the cause.

The issue approved was as follows:—"Whether on or about February or March 1900 the defenders wrote to Messrs Gatti stating that the pursuer's account 'from various causes is not regarded with much confidence in these markets, although in certain quarters they appear to be in receipt of moderate credit. The capital at command, however, is limited and the payments of late have been slow and unsatisfactory, but their settlements for years have always been dilatory. At the same time several of their shops are not thought to be paying, and it is feared that credit transactions meanwhile represent more than an average risk,' and whether the said statements are of and concerning the pursuers, and are false and calumnious, to the loss, injury, and damage of the pursuers."

Opinion—"This is a case of considerable importance and difficulty, but after careful consideration I have come to the conclusion that the first and second pleas for the defenders should be repelled, and that an issue for the pursuers should be adjusted.

"The pursuers are tradesmen. The defenders say that they (the defenders) are a company of merchants and others engaged in trade, formed for the purpose, *inter alia*, of promoting *bona fide* trading and preventing their subscribers from making bad debts. This may be quite true but cannot be assumed at this stage, as the pursuers gave no admission on the subject.

"The pursuers set forth that the defenders wrote to Messrs Gatti the letter or memorandum set forth on record, but they do not aver or admit that that letter was an answer to inquiries by Messrs Gatti. The form of the pleadings forbids the assumption that it was. The pursuers have presented

issues without any innuendo. They pressed for approval of these issues as they stood; but stated that they were willing to put in issue the innuendo which they have averred, if that was necessary. I may deal with this question of the innuendo at once by saying that I do not think it admissible. So far as the innuendo expresses no more than the letter quoted, it would be superfluous. So far as it expresses something which the letter according to its sound construction does not express, I do not think it admissible. The innuendo sets forth that the letter represented that the pursuers were in financial difficulties. I think that is going further than the letter goes, and is putting on it a meaning which on its sound construction it does not bear. Therefore while, as I have said, I think the pursuers are entitled to an issue, I think it must be on the letter without the innuendo.

"The defenders have maintained that the letter is not libellous, and that the action is irrelevant. They founded on the case of *M'Laren* v. *Robertson*, January 4, 1859, 21 D. 183, which they represented as conclusive in their favour. That case, however, does not relate to a trade slander. The pursuer was not a merchant or tradesman, but an innkeeper. The judgment proceeded on an extremely rigid criticism of the averments, and I think the Court regarded the alleged slander as imputing to the pursuer no more than poverty. They held that the words did not warrant the innuendo that he was represented to be insolvent. The case certainly decides that it is not defamatory to say of a man that he is poor, but I think it cannot be regarded as deciding any more general proposition, at least in regard to defamation of trade.

"There have been, however, later decisions which appear even more in point. The case of *Andrews* v. *Drummond*, March 5, 1887, 14 R. 568, was an appeal from the Sheriff Court. It was an action directed against parties who issued a publication which related to the financial position of the persons whose names they published. The pursuer's name was published in one of the lists, and certain statements were made in reference to them. The Lord President, in whose judgment the other Judges concurred, in dealing with these statements observed that the meaning of them was, 'that as regards the whole persons named in the list there is risk in dealing with them. If that be the true meaning, it certainly contains something that in law amounts to slander as against any party whose name is in that list, because it manifestly means that he is a party who cannot be dealt with by shopkeepers without the shopkeepers incurring a risk, which means that he is not in good credit.' That appears to me to lay down distinctly that it is slanderous to say of a tradesman untruly that he is in bad credit.

"In *Wright and Greig* v. *Outram*, July 17, 1889, 16 R. 1004, which was also a case of trade slander, an issue was adjusted whether a paragraph in the *Glasgow Herald* represented that the pursuers were in financial difficulties and were being financed by means of accommodation bills. That representation, however, goes further than the statement in this case, which does not represent or mean to assert that the pursuers were in financial difficulties. It is no doubt carefully and temperately expressed, but I think it is certainly disparaging to the pursuers' credit, and represents it as under average. The opinion given, however moderately expressed, is such as, if published, might be destructive of the pursuers' credit and ruinous to their trade.

"It was further argued for the defenders that the expression of their opinion was privileged, and that the pursuers could not succeed without proof of malice, which was not, and indeed according to the defenders could not be, relevantly averred. But I think it impossible to deal safely with that question at present, because I know nothing judicially about the defenders or their connection with this case except that they made, or are said to have made, the statements referred to, with what object, and whether in answer to inquiries or ultroneously, I do not at present know. There was no proof of malice in the case of *Andrews* v. *Drummond*, and malice was not put in the issue in the case of *Wright and Greig* v. *Outram*. But I do not desire to decide at present that when the facts are fully disclosed there may not be room for the plea of privilege and for the argument that the statement complained of was the legitimate answer to legitimate questions."

The defenders reclaimed, and moved the Court to vary the issue by adding the words "and were made maliciously" after the word "calumnious."

In the course of the hearing in the Inner House the pursuers admitted that the defenders were a company formed for the purpose, *inter alia*, of obtaining information on behalf of their subscribers regarding the commercial standing and credit of persons proposing to enter into contracts with such subscribers; that Messrs Gatti were subscribers of the defenders' company; and that the letter complained of was written by the defenders in answer to an inquiry by Messrs Gatti regarding the commercial standing of the pursuers. The inquiry and the full text of the defender's reply were produced and were admitted by the pursuers. The inquiry, which was written on a form supplied by the defenders to their subscribers, was in these terms:—

"*Please Report (upon the terms and conditions at foot hereof) respecting*
"(*Name in Full*) Bayne & Thomson.
"*Profession, Trade, or Occupation*, Confectioners.
"*Street*, 23 Renfrew Street.
"*Town*, Glasgow.
"*Nature of Information Required*, How long established and if safe for £30 to £40.

"CONDITIONS.—It is agreed that all information is furnished in confidence, for the personal use of the subscriber, and is

under no circumstances to be divulged to a third party, and the subscriber shall be held accountable for any loss or damage arising from the breach or non-observance of this agreement; also that subscriptions are only received, status enquiry books and search cards or forms furnished, and all information given, upon the understanding that the agency is not to be held responsible for damage or loss arising from insufficient or inaccurate information, whether by reason of mistake or negligence of the agency, its servants, agents, or correspondents, or otherwise.

"The dispensing of credit with safety being a matter demanding the utmost discretion, the subscriber undertakes to obtain information from other available sources and not to give credit in sole reliance upon any information furnished by the agency."

The full text of the defenders' reply, which contained the expressions complained of, was also produced, and was in these terms—"This is an old established firm of grocers and tea merchants, having several retail branch shops throughout the city, and an office and stores at address given.

"They do a fairly extensive trade, but the account from various causes is not regarded with much confidence in these markets, although in certain quarters they appear to be in receipt of moderate credit.

"The capital at command, however, is limited, and their payments of late have been slow and unsatisfactory, but their settlements for years past have always been dilatory. At the same time several of their shops are not thought to be paying, and it is feared that credit transactions represent more than an average risk. Registered Information: — Small Debt Decree 1887; Small Debt Decree 1899."

Argued for the defenders and reclaimers — (1) The letter complained of contained no issuable matter. It was not slanderous to say of a trader that he was in "moderate credit," or was dilatory in his payments. In *Andrews* v. *Drummond*, March 5, 1887, 14 R. 568, relied on by the pursuers, the meaning of the words founded on was that the pursuers were in bad credit. That could not be spelt out of the letter complained of. (2) If an issue were allowed, malice must be inserted, as the occasion was clearly privileged. It was now admitted that the letter was written in answer to a confidential inquiry by Messrs Gatti, who were subscribers to the defenders' company. In giving the information asked, the defenders were not merely performing a social duty, but were under legal obligation to give it. They were in effect the private agents of Messrs Gatti.—*Newton* v. *Fleming*, March 10, 1846, 8 D. 677, *per* Lord Fullerton; *Shaw* v. *Morgan*, July 11, 1888, 15 R. 865, *per* Lord Young; *Robshaw* v. *Smith* [1878], 38 L.T. 423; *Nevill* v. *Fine Arts and General Insurance Company* [1895], 2 Q.B. 156; *Waller* v. *Loch* [1881], 7 Q.B.D. 619.

Argued for the pursuers and respondents —(1) The case was indistinguishable from *Andrews* v. *Drummond*, *supra*, where it was held to be slanderous to say of a trader that he was in bad credit. That this was the natural meaning of the letter was shown by the fact that Messrs Gatti refused to deliver the goods to the pursuers. (2) The pursuers' averments and admissions did not disclose a case of privilege. Admitting that Messrs Gatti had a right to make inquiry as to the pursuers' credit, the defenders had no privilege unless they had a right and a duty to give the information. The defenders had neither. They were in the same position as a private person who puts himself forward to volunteer information regarding the affairs of other people. A banker or tradesman giving information as to the credit of his customers was privileged, because he acquired the information in the ordinary course of his business. The defenders here had no relation with the pursuers. They were merely private detectives who made it their business to pry into the affairs of others, and they had no privilege in communicating information so acquired.

LORD TRAYNER—This case as presented to us stands in a somewhat different position from that in which it stood when the Lord Ordinary pronounced the interlocutor under review. It is now admitted by the pursuers that the defenders' company exists, *inter alia*, for the purpose of obtaining information on behalf of its members in regard to the commercial standing and credit of persons or firms proposing to enter into contracts with such members; and that the letter complained of was written and sent by the defenders in answer to an application made to them by Messrs Gatti (members of the defenders' company) for information regarding the position and credit of the pursuers. Copies of the application and the answer are now before us, and from them it appears that the contents of the defenders' letter do not go beyond the information which they were asked to furnish. The defenders' letter bears that it is private and confidential, and that its contents are to be divulged to no one by the Messrs Gatti.

In these circumstances I doubt whether the pursuers have set forth a relevant case. The defenders' letter may fairly be regarded as a confidential communication made by a servant to a master, or by an agent to his principal; and communications of that kind are to be regarded very differently from ultroneous statements made by one person to another, between whom no confidential relation exists regarding a third. Looking to the defenders' letter itself, and considering the circumstances under which it was written, I have difficulty in coming to the conclusion that it is a libel on the defenders. Its language is very moderate and guarded, and says nothing (or certainly says very little) more than one commercial man may say in confidence to another about a third whose commercial standing is a matter in which they are personally and immediately concerned. But perhaps it may be enough to entitle the pursuers to an issue that they

aver not only that the statements in the defenders' letter are false, but that by adequate inquiry they would have known or ascertained this, an inquiry which (as alleged) they failed to make. I understand that your Lordships are both of opinion that the pursuers have stated a relevant case, and having stated my doubt on the matter I am not prepared to dissent from your judgment.

Taking the case as relevant, I am clearly of opinion that the defenders were privileged in writing as they did. They had, in my opinion, both a right and a duty to make the communication complained of, and consequently malice must be put in the issue. The form of the issue as adjusted does not seem to me to be satisfactory, but the parties have agreed I understand to take the issues in the form which I suggested in the course of the discussion.

LORD MONCREIFF—I am of opinion that the pursuers are entitled to an issue remodelled in the way Lord Trayner has suggested. Two questions arise here—first, as to the relevancy of the pursuers' statements, and second, whether a case of privilege is disclosed. On the first question I do not entertain the doubt that Lord Trayner indicated. I think that a case of slander or libel is disclosed in this letter, although the letter is framed in very guarded and cautious language, the benefit of which no doubt the defenders will get at the trial. But notwithstanding the care with which the letter was written, what it conveys is this—"You will, from inquiries we have made, certainly find, if you comply with the order you have received from this firm, that you will have to wait some time for your money, and you will certainly run some risk, and the risk you will run will not be an average risk. In confirmation of what we have said we call your attention to two small-debt decrees against them, one so recently as 1899." I cannot doubt that a letter in these terms would have a most discouraging effect on any intending customer, and would injure the pursuers' trade.

On the second question I have no doubt after the explanations we have received from the parties. As the record stands at present it does not clearly appear that the communication complained of was made in answer to any letter written by Gatti Brothers; but it is now candidly and fairly admitted that, as one would have gathered from the terms of the letter itself, the letter was written in reply to inquiries privately made by Gatti Brothers as to the sufficiency and solvency of the pursuers. Now, that being so, I think that is *prima facie* a case of privilege, and therefore malice must go into the issue. I should like to guard myself by saying that I confine my opinion entirely to the circumstances of the present case. This was a private inquiry in the strictest sense, made by Gatti Brothers to Stubbs & Company asking Stubbs & Company to give them certain information about the pursuers, who had placed an order with them, and that information is given expressly on the footing that it is strictly confidential and not to be divulged. That being so, I think the case is exactly the same as if Gatti Brothers had sent their own special agent to make inquiries on their behalf, and the special agent had made a report to them with regard to the financial condition of the pursuers. I cannot doubt that a report so made, and communicated to nobody else but the employers, would have been privileged, and I think in their dealings with Stubbs & Company in this matter Stubbs & Company were really in the position of Gatti Brothers' agents. But it would be a different case if the publication had been made ultroneously by Stubbs & Company to the public, or even—but upon this matter perhaps it would be better I should reserve my opinion—if it had been made for private circulation among their own subscribers. But viewing this case as one of private and confidential inquiry made by Gatti Brothers to Stubbs & Company, and a communication made in reply by Stubbs & Company on the footing that it was not to be divulged, but to be confidential, I think *prima facie* that it is privileged.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court recalled the interlocutor reclaimed against, repelled the defenders' first plea-in-law, and appointed the issue as amended to be the issue for the trial of the cause.

The issue as amended was as follows:—"Whether in or about February or March 1900 the defenders wrote and sent to Messrs Gatti a report in the terms set forth in the schedule hereto, and whether the said report or part thereof is of and concerning the pursuers, and is false, calumnious, and malicious, to the loss, injury, and damage of the pursuers?"

The schedule set forth the full text of the defenders' answer to Messrs Gatti's inquiry as quoted *supra*.

Counsel for the Pursuers and Respondents—Jameson, K.C.—Graham Stewart. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Reclaimers—Dean of Faculty (Asher, K.C.)—T. B. Morison. Agent — George F. Welsh, Solicitor.