cases which I have referred to. It is quite true that we have been referred to a case of *Macduff* v. *Macduff*, in which the English Court of Appeal seems to have come to an opposite conclusion. That case is not binding upon us, but of course one always looks to these decisions as worthy of the greatest respect. But my commentary upon that case is that that was a case of 1896, and that since then I think there have been decisions in a still higher Court, the House of Lords, which make me greatly doubt whether that judgment would be repeated. These decisions are binding upon us, having been given on Scotch cases, and I am bound to say that I have come to the decision that in the position we are placed in to-day we are more within our duty in following the case of *Murdoch* in the House of Lords, and the other cases which have gone there, than we should be if we slavishly followed the case of *Macduff*.

LORD PEARSON—I agree with your Lordship.

LORD DUNDAS—I quite agree. As a matter of impression—and I think cases of this sort must always be to some extent a matter of impression—I should have read the words used by this testator in the sense in which your Lordship proposes to read them; but further, I agree with your Lordship in thinking that we are conclusively bound by the two latest authorities at any rate, namely, the cases of *Hay's Trustees* and *Paterson's Trustees*.

LORD M'LAREN and LORD KINNEAR were absent.

The Court recalled the Lord Ordinary's interlocutor, sustained the claim for the reclaimers (Charles Mackinnon's trustees), and ranked and preferred them accordingly.

Counsel for Claimants (Reclaimers) Chas. Mackinnon's Trustees—Fleming, K.C.—Lippe. Agent—Campbell Faill, S.S.C.

Counsel for Claimants (Respondents) Lachlan Mackinnon and Others—J. A. T. Robertson. Agents—J. Miller Thomson & Company, W.S.

Tuesday, June 1.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

DRYSDALE *v.* EARL OF ROSEBERY.

Slander—Slander by Actions—Innuendo—Relevancy.

A factor brought an action for slander against his employer, a landed proprietor, in which he averred that on a certain day the defender's law agent called at the estate office; that he presented a letter from the defender desiring the pursuer to give the agent possession of all books, documents, and papers, and the contents of the safe, on presentation of the said letter; that on his demanding the meaning of such a proceeding, the agent stated that the defender wished "to hold an investigation"; that pursuer explained that the keys of the cash drawer of the safe were kept by a clerk who was away on holiday; that the agent then insisted on sealing up the office safe; that two days later two of the law agent's clerks presented a letter from him authorising them to break the said seals, examine and remove the contents of the safe, and to search the office for documents they might consider necessary for the investigation; that they did so in presence of certain pupils of the pursuer, and thereafter took away with them certain books and papers; and that all this was done with the authority of the defender.

Held that the averments were irrelevant and would not bear the innuendo; that by the said letter, words, and actings the defender falsely and calumniously represented that the pursuer had been unfaithful in the discharge of his duty.

Per Lord President—"I think there may be an actionable wrong of the nature of slander by actions alone; but the question must always be whether the innuendo sought to be put upon such actings can in truth reasonably be drawn from them."

Andrew Learmont Drysdale, residing at The Leuchold, Dalmeny, raised an action of damages for slander against the Right Honourable the Earl of Rosebery, Dalmeny House, Edinburgh.

The pursuer averred—"(Cond. 1) The pursuer has acted as factor and commissioner on the defender's estates in the counties of Edinburgh and Linlithgow since August 1890, conform to factory and commission granted by the defender in his favour, dated 9th and registered 13th August 1890. He received part of his original training in the Dalmeny estate office, and has been in the defender's service about twenty-five years. . . . (Cond. 2) From the date of his appointment the pursuer has regularly and properly discharged the duties of his office, ingathered the rents of the said estates and other revenues, submitted accounts which have been duly audited and found correct, and paid over the said rents and other revenues to the defender. The accounts have been audited annually and monthly, the last annual audit being for the year to 31st December 1907, and a formal and absolute certificate of accuracy is appended by the auditors to the annual statement of accounts for 1907. Statements of accounts up to 30th November 1908 and estimates up to 31st December 1908 have been rendered monthly, and these have been approved and passed by Mr T. S. Esson, W.S., on behalf of the defender. The pursuer has been prevented from rendering the statement of account for the month of December 1908, and the annual statement for that year, by the action of the defender, but the

defender's agents have now examined the accounts up to 31st December 1908, and are, the pursuer understands, satisfied that same are in order. . . . (Cond. 3) On Saturday the 2nd January 1909 the pursuer received a telegram about 11·30 a.m. from Mr George Dalziel, W.S., Edinburgh, intimating that he would call for the pursuer at The Leuchold at 12·30 on that day. Mr Dalziel duly arrived about 12·50, and saying 'That will explain the object of my visit,' presented to the pursuer a letter signed by the defender in these terms:—

'Dalmeny House,
'Edinburgh, 1*st January* 1909.

'Dear Sir,—I desire you to give my agent, Mr Dalziel, possession of all books, documents, and papers, and all the contents of the safe in the estate office, and that on his presenting this letter to you. ROSEBERY.' (Cond. 4) The pursuer, on reading the said letter, asked Mr Dalziel what was the meaning of his presenting such a letter to him, as Lord Rosebery had not spoken to him of such a thing. He replied that Lord Rosebery was entitled to get his books. The pursuer said that he might be, but there were two or three ways of getting things, and that this was a most extraordinary way; that Lord Rosebery or his representative could have access to the books and papers, &c., at all times; that there was nothing at The Leuchold to hide, and demanded the meaning of such conduct. Mr Dalziel replied that the defender wished 'to hold an investigation.' The pursuer replied that this was a most serious matter for him, and that he must protest against such conduct. (Cond. 5) Mr Dalziel thereupon demanded the keys of all the repositories in the said office, including the safe. The pursuer explained that the keys of the cash drawer in the safe were kept by his assistant and cashier Mr Campbell, who was absent at the time. Mr Dalziel thereupon insisted on sealing up the office safe. After that he left. With reference to the statements in answer, it is admitted . . . . that Mr Dalziel went into the estate office and that pursuer pointed out the safe in which he stated the books, &c., were, and that the pursuer removed his private papers therefrom in Mr Dalziel's presence. (Cond. 6) On the morning of the 4th January 1909 two of Mr Dalziel's clerks, Mr Robson and Mr Crombie, arrived at The Leuchold in a motor cab, and presented to the pursuer a letter from Mr Dalziel authorising them to break the said seals, examine and remove the contents of safe, and to search the office for documents which they might consider necessary for the investigation which the defender desired. No arrangement was made by the pursuer with Mr Dalziel. The latter simply stated that he would send two of his clerks on Monday morning at 10·30 o'clock, without even consulting the pursuer as to whether this would be suitable or not. (Cond. 7) Messrs Robson and Crombie then broke the said seals and commenced a search of the whole premises in presence of the pursuer, Mr Hope Park, the pursuer's law agent, Mr Campbell, the pursuer's assistant and clerk, and Mr Carnegie, his clerk. While the search was going on Mr R. L. Colam, Mr J. M. Wilson, and Mr J. R. Pelham Burn, pupils of the pursuer, and Mr F. S. Brown, the defender's private secretary, came on the scene. (Cond. 8) After selecting certain books and papers from the safe, and examining and taking a note of documents declared by Mr Campbell to be private, and bearing that on the face of them, Mr Robson proceeded on a tour of inspection of everything in the office, and searched all the cupboards, desks, and drawers in the place. Some of the presses and desks had not been opened for years, being completely filled with old returns and vouchers, and even the keys for some were difficult to find. The key of one desk could not be found at the moment, and at Mr Robson's request a man was brought in who forced it open with a chisel and hammer. This man was William Coutts, the pursuer's chauffeur. The contents were at once seen to be old papers of no value. Mr Robson then had this desk removed in order to get into a press behind it, but as it was found to be locked, and as the key could not be found, Mr Robson decided reluctantly not to have it forced open. Finally he proposed to examine the contents of the pursuer's room, but against this the latter protested on the ground that it was his private room and part of his dwelling-house. Mr Park advised him, however, to let them examine the room and every other room in the house if they so wished, and to do this the pursuer agreed under protest. Mr Robson, however, waived the matter. Mr Robson then made up in duplicate an inventory of the books and papers to be removed by him and Mr Crombie, and they handed the pursuer one of the duplicates receipted. The books and papers were then taken away by them in the motor cab in presence of the parties (excepting Mr Pelham Burn) and pursuer's chauffeur, the proceedings having lasted from 9·30 to about 1 P.M. (Cond. 9) The statements made by Mr Dalziel and the acts above condescended on were made and done on the instructions of and with the authority of the defender. They represented to the pursuer and to the said gentlemen present that the pursuer had been unfaithful in the discharge of his duties, had been guilty of fraud and misconduct in the performance thereof, and was unfitted to be trusted with the custody of the defender's papers. The said course of action was taken by the defender without any inquiry into the intromissions of the pursuer, and without any reasonable grounds for suspicion of his actions, all previous accounts of the pursuer rendered during the previous eighteen years and the monthly statements during 1908 having been duly audited and found correct, and any explanations required having been always readily given by the pursuer. The pursuer has thus been grossly slandered by the defender. The said actings were done maliciously and without probable cause, and for the purpose of gratifying a private grudge which the

defender had conceived against the pursuer. . . ."

The defender pleaded, *inter alia*—"(1) The action is irrelevant. . . ."

On 20th April 1909 the Lord Ordinary (SALVESEN) sustained this plea and dismissed the action.

Opinion.—"This is an action of damages for slander; and it is peculiar in this respect, that no spoken or written words are founded on as conveying by themselves any imputation on the pursuer's character. The issue which the pursuer proposes for the trial of the cause reflects this peculiarity, for, after summarising the leading averments on record, it concludes with the query—'Whether, by the said letter, words, and actings, the defender falsely and calumniously represented that the pursuer had been unfaithful in the discharge of his duty, and was unfit to be trusted with the custody of the defender's books, papers, or money, to the pursuer's loss, injury, and damage.'

"The defender's counsel argued that the form of the pursuer's issue was in itself conclusive against the relevancy of the action as an action for slander, because it appeared from the issue that the letter written by the defender and the words spoken by his agent were not in themselves actionable, and that they could not become so merely in consequence of actings which had followed upon them. There is certainly no reported case in Scotland in which actings have been used for the purpose of importing a slanderous meaning into words which were not in themselves defamatory, or as in themselves importing a slanderous accusation. The case of *Kennedy* v. *Allan*, 10 D. 1293, on which the pursuer's counsel founded as precisely in point, appears to me to be of a wholly different nature. No doubt it was the circulation of a letter which was the subject of complaint, but the pursuer averred and offered to prove that the letter itself contained a false and actionable insinuation, and it was on this ground that the Court allowed an issue. No actings were founded on except the publication of the letter, which is an element common to all actions based upon written slander. On the other hand, I do not doubt—and it has been more than once so decided in England—that an action for slander may lie although no defamatory words, spoken or written, are founded upon. Thus a picture may convey a slanderous imputation as plainly as a paragraph in a newspaper, and instances may readily be figured where a slander may be conveyed by signs or gestures only. It is therefore, in my opinion, not conclusive against the pursuer's case that it is laid partly upon the actings of the defender or his authorised agent, and it becomes therefore necessary to examine the averment in the condescendence in order to ascertain whether the actings complained of are reasonably capable of supporting the proposed innuendo.

"The material facts are these. The pursuer had acted as factor on the defender's estates for a period of nineteen years, and his accounts have been regularly audited and passed as correct. The annual statements for the year 1908 had not been made up at the time when the events founded on occurred, but monthly statements and estimates had been rendered to the defender's agent and passed by him. On 2nd January 1909 the pursuer received a call from Mr Dalziel, who explained the object of his visit by presenting a letter signed by the defender in these terms—'1st January 1909. Dear Sir,—I desire you to give my agent Mr Dalziel possession of all books, documents, and papers, and all the contents of the safe in the estate office, and that on his presenting this letter to you.' The pursuer says that he had previously had no hint that the defender was dissatisfied with his management, and that he protested against this method of dealing with him, and that Mr Dalziel replied that the defender wished to hold an investigation, and thereupon demanded access to all the repositories in the office, including the safe. 'The pursuer explained that the keys of the cash drawer in the safe were kept by his assistant or clerk—a Mr Campbell—who was absent at the time. Mr Dalziel thereupon insisted on sealing up the office safe.' It is not said that any other persons were present at this interview; and it may be inferred from the pursuer's own statement that the sealing of the safe was connected with the pursuer's inability to hand over all the keys which belonged to it. The above exhausts the narrative of what took place on the 2nd of January. The other actings founded on are the arrival of two of Mr Dalziel's clerks on 4th January, and their breaking the seals, examining and removing the contents of the safe, and searching the office for documents which they thought necessary for the investigation which the defender desired. The search for documents was in progress when certain pupils of the pursuer arrived on the scene and saw what was going on, including the opening of a press for which no key could be found.

"In none of the actings complained of can it be said that the defender exceeded his legal rights. The safe and its contents, as well as the books and papers which were taken possession of or examined on the 4th of January, were the exclusive property of the defender, and he had an absolute right at any time to have them removed for any purpose that he chose, including an investigation into the correctness of the pursuer's accounts. He had also an absolute right to ensure that the contents of the safe should remain undisturbed until the investigation was commenced; and as the whole keys of the safe could not be delivered up owing to some of them being in possession of an absent clerk, the sealing of the safe seemed a reasonable precaution to adopt. The pursuer himself could draw no defamatory inference from this act any more than he could have done from the request to deliver up the keys; and of course once the safe had been sealed it was necessary to break the seals in order to get possession of the contents. No doubt people who heard of

what had been done, or who saw that an investigation was being made into the books and accounts of the pursuer, might be disposed to draw unfavourable inferences as to the reason for such an investigation, and they might even leap to the conclusion that no such investigation would have been made if the pursuer had been faithfully discharging his duties. Such an inference, however, would have been entirely unwarranted, and is not one for which the defender can be made responsible. Similar inferences might have been drawn if the pursuer had been summarily dismissed from the mere fact of his dismissal, but if the dismissal was itself within the defender's rights no responsibility would attach to him for the conjectures by which outsiders might seek to explain the circumstances. The only legitimate inference from any of the actings which I have detailed was that the defender, as the pursuer's master, desired to investigate his accounts, and pending the investigation wished to ensure that all the documents which were necessary for the purpose should remain undisturbed. In all that was done I can find nothing which is reasonably capable of a defamatory meaning, any more than I can spell an accusation against the pursuer out of the defender's letter desiring him to give possession of the estate papers to Mr Dalziel. I shall accordingly sustain the defender's first plea-in-law and assoilzie him from the conclusions of the action.

"I would only add, in justice to the pursuer, that the result of the investigation appears to have been entirely satisfactory, and that no allegation against his probity is made by the defender on record."

The pursuer reclaimed, and argued—There might be slander by actions alone, and here, whether the exact issue proposed were allowed or not, an issue should be allowed as to whether by the actings averred a charge of dishonesty and untrustworthiness had been made. [LORD PRESIDENT—Do you say the actings were illegal?] Perhaps taken one by one the acts were legal, but taken together they were not. The acts, however, must be regarded as a whole and not considered in isolation—*Monson* v. *Tussauds Limited*, [1894] 1 Q.B. 671, Lord Collins at p. 678, Lopes, L.J., at p. 692. It could be shown that everyone present understood that a charge of dishonesty was being made, and that was the proper test of whether the actings complained of were libellous—Lord Halsbury at p. 686 of *Monson* (*cit. sup.*).

The Court did not call upon counsel for the defender.

LORD PRESIDENT—In this case the matter has been admirably put by the Lord Ordinary, and I have really nothing to add to what his Lordship has said. I think there may be an actionable wrong of the nature of slander by actions alone; but the question must always be whether the innuendo sought to be put upon such actings can in truth reasonably be drawn from them. In this case I think it cannot. I am appalled at the length to which the opposite doctrine would lead. If a person is not to be entitled to investigate his agent's accounts without thereby charging him with dishonesty I think that all protection of confidential relations would be at an end.

The actings here seem to me, if I must say so, perfectly reasonable and without harshness; and on legal grounds I have not the least doubt that they will not bear the innuendo sought to be put upon them by the pursuer.

LORD KINNEAR and LORD GUTHRIE concurred.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Morison, K.C. — Sandeman. Agents — Thomas White & Park, W.S.

Counsel for the Defender (Respondent)—Murray, K.C.—Hon. Wm. Watson. Agents —Tods, Murray, & Jamieson, W.S.

Wednesday, June 2.

SECOND DIVISION.

[Sheriff Court at Dunoon.

SCOTT *v.* BURGH OF DUNOON.

Police—Public Health—Burgh—Drainage—Sewers—Formation—"Reasonable Notice in Writing" to Owner of Private Ground—"Report of Surveyor"—Proof that Proceedings were Regularly carried through—Onus—Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 101), *sec.* 73—*Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 215.

The Public Health (Scotland) Act 1867, sec. 73, enacts—"The local authority shall have power to construct within their district . . . such sewers as they may think necessary for keeping their district properly cleansed and drained, and may carry such sewers . . . after reasonable notice in writing (if upon the report of surveyor it should appear to be necessary), into, through, or under any lands whatsoever. . . ."

In 1875 a sewer for the purpose of the drainage of a portion of their district was carried through private ground by the then local authority of a burgh.

In 1908 a singular successor in possession of this private ground brought an action against the burgh authority to interdict the use of the sewer. There was no evidence that any "notice in writing" had been given to the owner in 1875, but it was proved that he knew of the work being done, raised no objection to it, took a great interest in it, and that the drain from his own house was carried into it. In 1875 the local authority had no burgh surveyor, but for the drainage scheme, of which the