the particular claimant, really pays, should go, not to him, but among the other children, including the child who has received the advances, collation of which creates the difference. In truth the divisible fund is not the proper legitim fund as calculated on the basis of the moveable estate still vested in the parent at his death, but that fund increased in the matter of accounting by the advances the parent has made. It is his claim on the divisible fund that the child considers, and it is in lieu of that claim that he accepts satisfaction and discharges, and it is that claim which he is entitled and, I think, bound to make good to the general disponee. The transaction may, as was pointed out in connection with the case of *Fisher* v. *Dixon*, be *ex proprio motu* between the general disponee and the child. The general disponee may say, Claim and take your legitim with all its incidents and I will give you what we agree on in exchange for it, and there is nothing of which the other children, including the child who has received advances and must collate, can complain. I see no reason for any difference in that the agreed-on payment is not *ex proprio motu* but is dictated to the general disponee *in gremio* of the settlement. This follows naturally, I think, on the principles whereon the cases of *Lashley* v. *Hog* and *Fisher* v. *Dixon* were decided. Otherwise an undue advantage would be gained by the child to whom advances have been made, contrary to the equitable principles which were the foundation of these decisions. If this be so in the case of advances which are only by equitable implication attributed to legitim, *a fortiori* must it be the case where the child has acknowledged by onerous writing that the advances are to account of his legitim, and discharged it to that extent.

There is a certain difficulty created by the use of the term discharge in Robert's letter of acknowledgment, in respect that discharge *in toto* during the parent's life, or renunciation, as I have termed it, enures, not to the parent, but to the remaining children, and it may be contended that partial discharge during the parent's life should do the same. But I do not think that the terms used in the letter are to be strictly interpreted. I think that they only infer an acknowledgment of advances to be collated—that is, an acknowledgment fixing the amount of the advances, and that they are advances of the class which fall to be collated.

I recognise that the conclusion to which I have come, though it is supported by the direct authority of *Nisbet* and by the opinions of the minority in the case of *Monteith*, is not in keeping with the opinions of the majority of the Court in the latter case, though it must be remembered that the question in *Monteith's* case is not the same as that in *Nisbet* and in the present. I have anxiously considered the opinions of the Judges in the majority in the case of *Monteith*, and, while I say it with the utmost respect, I am not persuaded by them. In particular, the late Lord Justice-Clerk Moncreiff, who delivered the leading opinion, appears to me to be carried away by the constantly repeated assertion that the child who accepts a provision in satisfaction of legitim does not claim but renounces without claiming. This is directly contradicted, and I think justly, by Lord Fullerton, whose opinion in *Fisher* v. *Dixon* has always been regarded as the most authoritative, and who repeatedly emphasises the contrary, as when he says (2 D. at p. 1139) "in law and in common sense the obligation is not renounced but extinguished by performance, or what the creditor accepts as performance." This is the basis of the judgment in *Fisher* v. *Nixon*, and I have endeavoured to make it mine in the present case.

LORD M'LAREN was absent.

The Court recalled the interlocutor of the Lord Ordinary, dated 16th July 1908, reclaimed against, assoilzied the defenders from the declaratory conclusions of the summons; *quoad ultra* dismissed the action and decerned.

Counsel for the Pursuer and Respondent (Robert Young)—Maclennan, K.C.—Chree. Agents—Auld & Macdonald, W.S.

Counsel for the Pursuer and Respondent (Mrs Stoddart)—Maclennan, K.C.—Chree. Agents—Morton, Stuart, Macdonald, & Prosser, W.S.

Counsel for the Defenders and Reclaimers—Craigie, K.C.—Watson. Agents—Pearson, Robertson, & Finlay, W.S.

Tuesday, January 18.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

WEBSTER *v.* PATERSON & SONS.

Reparation—Slander—Judicial Slander—Malice—Averments—Relevancy—Issue—Form of Issue—"Without Probable Cause."

A firm of coffee essence manufacturers raised an action of interdict and damages against a grocer, in which they averred, *inter alia*, that he had stated to customers that there was no difference between "Kit" coffee (the kind of coffee sold by him) and "Camp" coffee (the coffee made by the firm), that he thereby induced persons who came to ask for "Camp" coffee to buy "Kit" coffee, that the statements made by him were not only false, but were made fraudulently and maliciously, and with the intention of damaging the reputation of the firm's coffee and encouraging the sale of "Kit" coffee, and that in making such statements he had acted fraudulently and maliciously in collusion with W. P., a former partner of the firm who had been paid out, with the intention of forcing "Camp" coffee

out of the market and substituting "Kit" coffee therefor. Similar actions were brought against thirty-four other grocers in the city.

In an action of damages for judicial slander at the instance of the grocer, the pursuer averred that the said action was raised by the defenders against the pursuer for the purpose of advertising and gaining publicity for their coffee essence known as "Camp" coffee, of interfering with the pursuer in the legitimate conduct of his business, and of intimidating him from buying or selling a coffee essence known as "Kit" coffee; that with this object in view the defenders falsely, maliciously, and calumniously stated in said petition that the pursuer made the statements therein mentioned falsely, fraudulently, and maliciously, and that in making such statements the pursuer was acting fraudulently and maliciously in collusion with W. P. He further averred that the said actions were raised "in pursuance of a fraudulent and malicious scheme conceived by the defenders using legal process for the purpose of advertising and gaining publicity for their coffee essence . . . . and of intimidating grocers from dealing in "Kit" coffee.

Held that the pursuer had averred facts and circumstances sufficient to infer malice.

Opinion per curiam that the words "without probable cause" ought not to have been put in the issue.

Reparation — Slander — Advertisement — Innuendo—Averments—Relevancy.

Makers of a coffee essence known as "Camp" coffee issued an advertisement beginning "*Truth will Prevail,*" in which they stated that false and misleading statements had been made by certain grocers whereby the public had been deceived and induced to buy inferior coffee which was "palmed off" as "Camp" coffee; that they (the advertisers) had made investigations which proved that a large number of grocers were "on various pretexts" in the habit of proffering other coffee essence when asked for "Camp" coffee; that no fewer than seventy-four grocers made these or similar statements which were "equally false and calumnious," and that they (the advertisers) had taken proceedings against thirty-five of their number.

In an action of damages at the instance of one of the grocers proceeded against, who however was not named in the advertisement, the pursuer averred that the said advertisement was of and concerning himself, and that it falsely and calumniously represented that he had acted dishonestly in the conduct of his business.

Held that the advertisement when read as a whole was capable of bearing the innuendo of dishonesty, and issue *allowed.*

On 13th January 1908 John Webster, grocer and provision merchant, Govanhill, Glasgow, brought an action against R. Paterson & Sons, coffee essence manufacturers, Glasgow, in which he sued for £1000 damages for slander.

He averred—"(Cond. 2) The pursuer has never had any businesss relationship with the defenders, and has never purchased or sold, or pretended to sell, the essence of coffee known as 'Camp' coffee, manufactured by them. Notwithstanding this fact, however, the defenders, on or about 12th August 1907, presented in the Sheriff Court at Glasgow, a petition at their instance against the pursuer, in which they craved the Court (*First*) To interdict the pursuer by himself, or those in his employment, from circulating or making statements to his customers or others to the effect that coffee known and sold under the name of 'Kit' coffee, or other coffee manufactured by Kit Coffee, Limited, 195 Broomloan Road, Govan, is the same and made of the same ingredients or from the same recipe as 'Camp' coffee, or from selling 'Kit' coffee or other coffee manufactured by Kit Coffee, Limited, for 'Camp' coffee, manufactured by the defenders, and to grant interim interdict; and (*Second*) to grant a decree against the pursuer ordaining him to pay to the defenders the sum of £100 as damages. . . . The said petition was served on the pursuer on 13th August 1907. (Cond. 3) The defenders averred, *inter alia,* in said petition that they had been coffee manufacturers in Glasgow and elsewhere for over forty years, and for the last twenty years have manufactured and put on the market a brand of coffee known as 'Camp' coffee, to which name they have the exclusive right, and in connection with which they have registered the word 'Camp' as a trade-mark as applied to coffee; that for many years prior to 1904 the partners of defenders firm were Mr Campbell Paterson and Mr Walter Paterson; that in or about the month of October 1904 Walter Paterson retired from the firm, being paid by the said Campbell Paterson the sum of £20,000 as his share and interest in the firm, including goodwill, which was valued at that date at the sum of £10,000 or thereby, and the greater part of which represented the value of 'Camp' coffee as a trade name; that notwithstanding the arrangement then come to, the said Walter Paterson has had a substantial interest in a firm of Adams & Co., who were the original makers of 'Kit' coffee, and has a substantial interest in the Kit Coffee Company, Limited, which company is competing with the defenders in the sale of coffee; that it had come to the knowledge of the defenders that the pursuer had been representing to his customers and to others that the coffee recently put upon the market under the name of 'Kit' coffee is exactly the same as 'Camp' coffee, that it is made from the same recipe, and contained the same ingredients; that the pursuer had further stated that 'Kit' coffee is

made by the original manufacturer of 'Camp' coffee, and that he would on no account keep 'Camp' coffee, 'Kit' coffee being the same article and more profitable to deal in; that in particular the pursuer on or about 6th and 24th July 1907 made such statements to Miss Millicent F. T. Dick and Miss Annie E. T. Dick, both residing in Stevenson Drive, Langside, Glasgow, when asked for 'Camp' coffee, and to John Abraham, 16 Barony Street, Glasgow, and to many others whose names were not then known to the defenders. (Cond. 4) The defenders further averred, *inter alia*, in said petition that the foresaid statements, alleged to have been made by the pursuer, were false; that the coffee known as 'Kit' coffee, and which is manufactured by Kit Coffee Company, Limited, is a different and inferior article to 'Camp' coffee in many respects, and in particular it is deficient in caffeine, the most valuable constituent of coffee, 'Camp' coffee containing about 25 per cent. more caffeine than 'Kit' coffee; that the said statements alleged to have been made by the pursuer are injurious to the defenders' business, in respect that by making such statements the pursuer was inducing his customers and others to believe that coffee sold under the name of 'Kit' coffee is the same article as desired by such customers and others who have ordered 'Camp' coffee, thereby inducing them to purchase 'Kit' instead of 'Camp' coffee, and diminishing the sale of the latter; and that not only were the said statements alleged to have been made by the pursuer false, but they were made fraudulently and maliciously by the pursuer with the intention of damaging the reputation of the defenders' coffee, and encouraging the sale of 'Kit' coffee, because the manufacturers of the latter article offered better terms to the pursuer than did the defenders—the Kit Coffee Company, Limited, preferring to sell at a loss in order to induce grocers to take their coffee in preference to 'Camp,' and thereby damage the latter. The defenders further averred in said petition that in making such statements the pursuer was acting fraudulently and maliciously in collusion with the said Walter Paterson, or his son Robert, or the Kit Coffee Company, Limited, with the intention of forcing 'Camp' coffee off the market, and substituting 'Kit' coffee therefor, a device to evade the restrictive obligation which the said Walter Paterson was under on his retiral from the defenders' firm with a large sum in name of goodwill. . . . . (Cond. 6) The foresaid petition and action for interdict and damages was raised by the defenders against the pursuer for the purpose of advertising and gaining publicity for their coffee essence known as 'Camp coffee, of interfering with the pursuer in the legitimate conduct of his business, and of intimidating him from buying or selling a coffee essence known as 'Kit' coffee. The defenders were well aware that the pursuer had a perfect right to sell 'Kit' coffee, that their action for interdict and damages against him was quite unwarranted and groundless, but that their malicious action would seriously hamper him in the legitimate conduct of his business, and might force him into giving up the sale of 'Kit' coffee rather than be involved in litigation. With this object in view, and for the purpose of wrongfully obtaining interdict against the pursuer, the defenders falsely, maliciously, and calumniously stated in said petition that the pursuer made the various statements before condescended on falsely, fraudulently, and maliciously with the intention of damaging the reputation of the defenders' coffee and encouraging the sale of 'Kit' coffee, because the manufacturers of the latter offered better terms to the pursuer than the defenders did, and that in making such statements the pursuer was acting fraudulently and maliciously in collusion with Walter Paterson or his son Robert, or the Kit Coffee Company, Limited, with the intention of forcing 'Camp' coffee off the market and substituting 'Kit' coffee therefor, which, they averred, was a device to evade the restrictive obligation which the said Walter Paterson was under on his retiral from the defenders' firm with a large sum in name of goodwill, and that the pursuer was thus guilty of fraud. . . . . (Cond. 7) At the same time as presenting the said petition for interdict against the pursuer the defenders presented no fewer than thirty-five such petitions and actions in the Sheriff Court at Glasgow on or about said 12th August 1907 for interdict and damages against that number of grocers and provision merchants carrying on business in the city of Glasgow. . . . This was done in pursuance of a fraudulent and malicious scheme conceived by the defenders using legal process for the purpose of advertising and gaining publicity for their coffee essence called 'Camp' coffee, and of intimidating grocers from dealing in 'Kit' coffee. . . . . (Cond. 9) The defenders, while the action was still in this position [*i.e., sisted on a plea of all parties not called*] and without a proof of their averments having been taken therein, maliciously caused to be repeatedly inserted in various newspapers which are issued to the public and have a large circulation in the City of Glasgow and throughout Scotland, conspicuously displayed advertisements with prominent head lines printed in specially large type, such as 'Appeal to the Public,' 'Truth will Prevail,' 'Honour Bright,' 'Warning to the Public' with reference to their 'Camp' coffee. The said advertisements set forth that the defenders 'having repeatedly received complaints from members of the public that when they asked for or ordered "Camp" coffee in certain grocers' shops they were supplied with another coffee essence said to be "exactly the same as Camp," "made from the same recipe as Camp," "made by the man who used to make 'Camp.'" Further, the said advertisement specially refer the public to the fact that the defenders have raised actions against thirty-five of the grocers found making false and misleading

statements, whereby the public have 'been deceived and induced to buy inferior coffee, which although bought by said grocers at a much lower price than they can buy "Camp" coffee is palmed on the public as being "the same as Camp," and *the public are charged the same price as if it were "Camp,"*' that the defenders thereupon made 'investigations and purchases, which proved that a large number of grocers in Glasgow and surrounding districts are, on various pretexts, in the habit of proffering other coffee essence when asked for "Camp" coffee, and that no fewer than seventy-four of these grocers made the above or similar statements, which are equally false and calumnious.' The said advertisements further proceed—'We therefore have taken proceedings against thirty-five of the grocers found making such misrepresentations. We most respectfully and *earnestly invite buyers of coffee essence to report to us* every instance wherein such misrepresentations have been made or may be attempted, so that the public, as well as ourselves may be protected from the substitution of inferior goods, which are invariably sold for the sake of extra profit.' . . . . (Cond. 11) The pursuer was one of the thirty-five grocers referred to in the said advertisements, against whom the defenders had taken proceedings on the ground of said alleged fraudulent misrepresentations, and the statements contained in them are of and concerning the pursuer. The public and the trade were freely informed that he was one of the said thirty-five grocers, through the medium of the public press. . . . . (Cond. 12) The defenders in the said petition and advertisements falsely, calumniously, and maliciously represented, and intended to represent, that the pursuer acted dishonestly as well as dishonourably in the conduct of his business as a grocer and provision merchant, that he was in the habit of making false and misleading statements whereby the public were deceived and cheated, and that he was guilty of fraud. The said statements were made by the defenders of and concerning the pursuer, and were false, calumnious, and malicious."

The defenders, *inter alia*, pleaded—"(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (4) The defenders should be assoilzied in respect that the statements complained of and alleged to have been made by the defenders were privileged, and were not made maliciously or without probable cause."

On 23rd December 1909 the Lord Ordinary (GUTHRIE) approved of the following issues:—"It being admitted that the defenders, on or about 12th August 1907, presented a petition for interdict and damages against the pursuer in the Sheriff Court at Glasgow, and that the condescendence annexed to the petition contains the following statements:—'It has come to the knowledge of the pursuers that the defender has been representing to his customers and to others that the coffee recently put upon the market under the name of "Kit" coffee is exactly the same as "Camp" coffee, that it is made from the same recipe and contains the same ingredients. The defender has further stated that "Kit" coffee is made by the original manufacturer of "Camp" coffee, and that he would on no account keep "Camp" coffee, "Kit" coffee being the same article and more profitable to deal in . . . The statements complained of and made by the defender are injurious to the pursuer's business in respect that by making such statements the defender is inducing his customers and others to believe that coffee sold under the name of "Kit" coffee is the same article as desired by such customers and others who have ordered "Camp" coffee, thereby inducing them to purchase "Kit" instead of "Camp" and diminishing the sale of the latter. Not only are the statements complained of false, but they were made fraudulently and maliciously by the defender with the intention of damaging the reputation of the pursuer's coffee and encouraging the sale of "Kit" coffee, because the manufacturers of the latter article offered better terms to the defender than did the pursuers, the "Kit" Coffee Company, Limited preferring to sell at a loss in order to induce grocers to take their coffee in preference to "Camp," and thereby damage the latter. Further, in making such statements it is believed that the defender was acting fraudulently and maliciously, in collusion with the said Walter Paterson, or his son Robert, or the Kit Coffee Company, Limited, with the intention of forcing "Camp" coffee off the market and substituting "Kit" therefor, a device to evade the restrictive obligation which the said Walter Paterson was under on his retiral from the pursuer's firm, with a large sum in name of goodwill'—Whether the said statements, or part thereof, are of and concerning the pursuer and are false and calumnious, and were maliciously and without probable cause inserted or caused to be inserted in the said condescendence by the defenders, to the loss, injury, and damage of the pursuer. Damages laid at £500. Whether the defenders inserted or caused to be inserted in the *Edinburgh Evening News* of date 19th December 1907 the advertisement contained in the schedule annexed hereto, and whether the said advertisement or part thereof is of and concerning the pursuer and falsely and calumniously represents that the pursuer has acted dishonestly in the conduct of his business as a grocer and that he has deceived the public by false and misleading statements, to the loss, injury, and damage of the pursuer. Damages laid at £500."

The schedule was—

"*TRUTH WILL PREVAIL!*

THE PROPRIETORS OF

'CAMP'

COFFEE

Having repeatedly received complaints from members of the public that when they asked for 'Camp' Coffee in certain

grocers' shops they were supplied with another coffee essence, said to be 'exactly the same as "Camp"'—'made from the same recipe as "Camp"'—'made by the man who used to make "Camp"'—and various other

FALSE AND MISLEADING STATEMENTS

whereby the public have been deceived and induced to buy inferior coffee, which, although bought by said grocers at a much lower price than they can buy 'Camp' Coffee, is palmed on the public as being the same as "Camp,"' and the public are charged the same price as if it were 'Camp.'

R. PATERSON & SONS
SOLE PROPRIETORS AND
MANUFACTURERS OF
'CAMP' COFFEE

thereupon made investigation and purchases which proved that a large number of grocers in Glasgow and elsewhere are, on various pretexts, in the habit of proffering other coffee essence when asked for 'Camp' Coffee, and that no fewer than 74 grocers made the above or similar statements, which are

EQUALLY FALSE AND CALUMNIOUS.

We therefore have taken proceedings against 35 of the grocers found making such misrepresentations, and will deal with the remainder whenever these test actions have been decided.

"We most respectfully and earnestly invite buyers of coffee essence to report to us every instance wherein such misrepresentations have been made, or may be attempted, so that the public, as well as ourselves, may be protected from the substitution of inferior goods which are invariably

SOLD FOR THE SAKE OF EXTRA PROFIT.

Kindly address—R. PATERSON & SONS, 77 Charlotte Street, Glasgow."

Opinion.—"I think both issues must be allowed.

"Under the first issue there are two questions (*first*) whether there is sufficient averment of facts and circumstances to enable a jury to infer malice, and (*second*) whether want of probable cause should be inserted in the issue. In regard to the first matter, it is admitted that on the face of it this is a case of privilege. The averments were pertinent and relevant, and they were made in judicial proceedings. There is therefore a case of privilege which, in the matter of degree, is high.

"The next point that is clear is that the mere averment that the defenders were actuated by malice would not be enough. That was strongly put by Lord Justice-Clerk Moncreiff in the case of *Gordon*, 14 R. 75. The Court must be in a position to judge whether, if the averment of malice is proved, a jury could reasonably infer malice from the circumstances which are alleged. Merely to say that there was malice does not put the Court into that position. There must, therefore, be, as Lord Kinnear put it in *Stevenson* v. *Wilson*, 5 F. 309, such facts and circumstances stated as to enable malice to be inferred—'facts and circumstances'—in his Lordship's words—'by which such malice has been "evinced and evidenced" as the Lord Ordinary put it.' The question whether it is sufficient to say that the statements complained of were known to be untrue has been much discussed. There are cases where it has been held that knowledge of untruth would be enough. There are other cases, with different circumstances, where it was held that such knowledge would not be enough. But in this case I find facts and circumstances averred by the pursuer which make it unnecessary to decide that question, namely, the averments at the commencement of condescendence 6, and in condescendence 7 at the end, where it is alleged that there was a fraudulent scheme conceived by the defenders under which, without having any foundation for the statements they were going to make, and without any legitimate object, they devised untrue statements against certain individuals, among whom the pursuer says he is included, to enable them to advertise and gain publicity for their coffee essence, and to enable them to intimidate grocers, and to prevent them dealing in Kit coffee. Now it appears to me that is an averment which will square with all the dicta and all the decisions, with the exception possibly of the dictum in *Campbell* v. *Hamilton*, 8 F. 205, by Lord M'Laren, where Lord M'Laren says you must have an averment of something not only antecedent to but also outside of the particular matter involved. The averment here, if true, involves something antecedent, but it would not involve anything outside the subject-matter. I do not find that Lord M'Laren's second requirement is supported by other authority, and, however applicable it may be in certain circumstances, I cannot follow it as a universal rule. Therefore, admitting that mere statement of malice is not enough, and assuming, further, that the mere statement that the averments were known to be untrue would not be enough, I hold that there are here such facts and circumstances in the shape of a conspiracy antecedent to the proceedings complained of as might lead a jury reasonably to the inference of malice.

"On the other question—want of probable cause—the authorities do not seem consistent; but I think, on the whole, that the view put by Mr Cooper in his book is the sound one, namely, that while under the former practice want of probable cause was not inserted in cases of this kind, the present practice is to insert these words. I do not think that in this case the matter is of great importance, because if the defenders are well founded in their defence they should have no difficulty in showing that they had such information as would amount to probable cause.

"On the second issue it is said that the pursuer is neither mentioned nor referred to in such a way as to make it possible for a jury reasonably to affirm that the statement complained of is of and concerning him. But the pursuer has undertaken to show that it is, and there is nothing on the face of the advertisement to exclude the alleged reference to the pursuer, and it will

therefore be for the pursuer to establish what he alleges.

"The other question is not so simple, namely, whether the words used in the advertisement are reasonably capable of warranting the innuendo sought to be placed on them. The advertisement must be taken as a whole. There are passages in it which are objected to but which are not capable of the innuendo, but when one finds that it starts with the heading 'Truth will Prevail,' and goes on to allege 'deceit' and 'palming' on the public, and the use of 'pretexts,' with the view of acquiring a trade advantage at the expense of the public by buying Kit coffee at a cheaper rate than Camp coffee, and then selling at the same rate at which Camp coffee is sold, on the statement that it is the same article, I think there would be enough to warrant the conclusion stated in the issue, namely, that the pursuer has acted dishonestly in the conduct of his business.

"The only other question is, Whether on the face of it the advertisement was privileged? I see no ground on which privilege can be maintained, and no case was quoted in which such a doctrine has been made out in regard to a newspaper advertisement."

The defenders reclaimed, and argued—Both issues should be disallowed—(1) The ground of the first issue was judicial slander, and no facts and circumstances sufficient to infer malice had been averred. The statements complained of were pertinent, and a pursuer was entitled to plead his case as high as he could provided his statements were pertinent—*Campbell* v. *Cochrane*, December 7, 1905, 8 F. 205, 43 S.L.R. 221. It was not enough to say there was a fraudulent scheme; facts and circumstances sufficient to infer malice must be averred—*Selbie* v. *Saint*, November 8, 1890, 18 R. 88, 28 S.L.R. 84. Malice might be inferred, for example, from some extrinsic facts, or from the intemperance or violence of the words used—*Adam* v. *Allan*, June 23, 1841, 3 D. 1058 at 1076; *A* v. *B*, 1907 S.C. 1154, 44 S.L.R. 870. No such inference could be drawn here. Further, the facts set forth must also be sufficient to infer want of probable cause—*Selbie* (*cit. supra*), and no such facts were averred. (2) The second issue ought also to be disallowed for the advertisement complained of contained no issuable matter. *Esto* that it might have imputed misrepresentation to the pursuer, it made no accusation of dishonesty—it inferred nothing more than honest mistake, and that was not actionable.

Argued for pursuer—(1) The Lord Ordinary was right, except as regards the words "want of probable cause" which should be deleted from the first issue—*Gordon* v. *British and Foreign Metaline Company*, November 16, 1886, 14 R. 75, 24 S.L.R. 60; *Williamson* v. *Umphray and Robertson*, June 11, 1890, 17 R. 905, 27 S.L.R. 742. *Esto* that malice must go into the first issue—*Ewing* v. *Cullen*, (1833) 6 W. & S. 566—facts and circumstances sufficient to infer it had been averred—*Brown* v. *Fraser*, June 27, 1906, 8 F. 1000, 43 S.L.R. 741; *Gall* v. *Slessor*, 1907 S.C. 708, at 714, 44 S.L.R. 547; *M* v. *H*, 1908 S.C. 1130, 45 S.L.R. 874. (2) The advertisement read as a whole inferred that the pursuer had been guilty of fraud, for it bore that he had passed off an inferior kind of coffee as the defenders'. The words were reasonably capable of bearing the innuendo put on them by the pursuer.

LORD PRESIDENT—In this case the defenders were a firm of coffee essence manufacturers, and had obtained a great reputation for a coffee known as "Camp" coffee, and raised actions against a former partner of their own firm who, having been paid out, had, according to their view, acted in fraud of the sale he had made of the goodwill in so far as pertaining to him by starting a business under which he sold a preparation called "Kit" coffee and attempted to show that it was virtually the same as the "Camp" coffee, which was the article belonging to this firm of coffee essence manufacturers.

While that action was pending, the firm also raised actions of interdict against various retail grocers in Glasgow, and sought to have them interdicted from making statements that the coffee known as "Kit" coffee was the same thing as the coffee known as "Camp" coffee, and also asking for damages against them. That application for interdict and damages was backed up by averments, and these averments narrated the alleged proceedings of the grocers which, glossed, may be said to come to this, that they made representations to customers that there was truly no difference between "Kit" coffee and "Camp" coffee, and did thereby induce persons who came to ask for "Camp" coffee to buy "Kit" coffee. The averments went on to say that not only were the said statements alleged to have been made by the pursuer false, but they were made fraudulently and maliciously by the pursuer with the intention of damaging the reputation of the defenders' coffee and encouraging the sale of "Kit" coffee, because the manufacturers of the latter article offered better terms to the pursuer than the manufacturers of "Camp."

Now among the people against whom these actions of interdict and damages were raised was the present pursuer. The defenders succeeded in their main action against the *quondam* partner, and whether they were satisfied with that success or not it really boots not to inquire. They brought the interdict directed against the present pursuer to an end by abandoning under the statute. The present pursuer—respondent and defender in that action—now brings the present action for slander, and sets forth as slanderous the statements which I have, not textually but substantially given in the remarks I have already made, and the Lord Ordinary has allowed an issue. The slander being contained in what is admittedly a judicial pleading, is obviously a judicial slander, and accordingly, it is

common ground that the word "malice" must go into the issue. But the defenders here have argued, that here the mere averment of malice is not sufficient, and that there are really no facts and circumstances averred from which malice may be inferred. I do not agree with that argument. I agree with what the Lord Ordinary has said. The Lord Ordinary has based his view upon a further statement, which is made in the condescendence, that in acting as they did the pursuer was acting fraudulently and maliciously in collusion with Walter Paterson, that is to say, the Kit Coffee Company.

I agree with what the Lord Ordinary has said, but I will also put my own judgment on this, that that sentence which I have read that the statements made were not only false but were made fraudulently and maliciously by the pursuer with the intention of damaging the reputation of the defenders' coffee—I think that all this is a statement out of which upon inquiry malice might be inferred. It was not a statement, it seems to me, absolutely necessary for the action. In other words, it is not a statement that falls into the same category as the statement which was made in the case of *M.* v. *H.*, where without the statement there would have been no action at all. Here I think there had been sufficient statements made to support the action, and if, over and above that, there is painted upon the pleadings the colour of fraud, that does not, of course, settle the question, but I think it does give such room for inquiry as would allow a jury to come to a determination upon proof that these statements were maliciously inserted —in other words, were inserted for the purpose of damaging the defender and not for the purpose of furthering the action.

I am very far, of course, from saying that that is so; but it seems to me that the pursuer here in the issue will have a fairly heavy *onus* of proof to show that it is so, because the moment the defender shows that the statements are pertinent—and I agree here that they are pertinent — then the pursuer, I think, will have to show something more. But if he is in such a position as to show not only that there was no foundation of truth in them, but that really the man who made them knew quite well, or must be held to have known quite well, that they were false, then I think he will show a state of facts from which the jury would infer malice. On the first matter, therefore, I think the Lord Ordinary is right.

I ought to say that I think the words "without probable cause" ought not to have been put into this issue, because I do not think the words "without probable cause" have any relation to an action of slander at all. They are meant to deal with a perfectly different class of circumstances—where a person has done something, as, for instance, executing a diligence or denouncing a person to the police authorities; and I think it is really *per incuriam* that these words have crept into an issue of slander to which they are not appropriate, and from which they were certainly absent in the older practice, both as shown in the cases and as I remember the practice for many years in this Court. In the absence of notice of motion to vary the issue, however, it is not competent for the Court to remove the inappropriate words.

Besides that, there is another matter of which the pursuer complains. The defenders at the same time that they took these legal proceedings advertised in the papers, and they put in an advertisement beginning "Truth will Prevail," and then going on to say that false and misleading statements had been made by grocers to the public who came anxious to buy "Camp" coffee and were then told that "Kit" coffee would do just as well; that 74 grocers had made these statements; and that 35 were presently having proceedings taken against them. Well then, the pursuer proposes an issue upon that in which he sets forth the article at length, and then avers that it is of and concerning the pursuer, and falsely and calumniously represents that the pursuer has acted dishonestly in the conduct of his business. I think if the article is read as a whole, that it is not impossible to read it in that way. I am not going to say more, because I think the question does become one for the jury. It is, of course, trite law to say that it is for the Bench to say whether a statement will possibly bear the innuendo which is attempted to be put upon it; but when the innuendo comes within the bounds of possibility, then it is not for the Court but for the jury to say whether it actually does bear that innuendo or not. Therefore I say no more.

In the same way, there being no actual mention of the pursuer in the body of the advertisement, it will be for the pursuer to discharge the *onus* of proving that it is "of and concerning" him. But that he may be able to do, and that again, I think, must go to proof.

On the whole matter I think the issues were rightly approved by the Lord Ordinary.

LORD KINNEAR—I think the case for the pursuer upon either of the issues is a very narrow one, but for the reasons that the Lord President has given I think he is entitled to go to a jury upon the whole of them.

LORD JOHNSTON—I concur.

LORD M'LAREN was absent.

The Court adhered.

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Counsel for Defenders (Reclaimers) — Murray, K.C.—M. J. King. Agents—Dove, Lockhart, & Smart, S.S.C.