In the present case I may say for my own part that I think the questions were unfortunately framed for the purpose of obtaining from the jury answers to the questions of fact that would have a direct bearing upon what was the main question in the case, namely, whether there was common law liability upon the defenders in respect of the defective condition of one of their pits. I further think that the answer which was given by the jury to the first question—and I am quite prepared to take that answer without qualification as being the answer that in fact they gave, and in an appeal we can do nothing else than so take it—is ambiguous, because instead of being a direct answer to the question whether the pit was defective, it was an answer to the effect that the pit, owing to the damp state in which it was, was unsuitable. I think it may depend upon answers to other questions of fact whether that unsuitability amounted to such a defect as constituted a common law liability upon the defenders, or whether it did not merely amount to such defect as was curable and should have been cured by the act of some fellow employee of the deceased, in which case there would have been no common law liability at all. But all these matters are beyond our cognisance, as I think on the face of the proceedings as they appear before us and as a pure question of appeal it is quite out of our power to interfere with what the Sheriff has done.

LORD ANDERSON—I have a strong impression that the verdict recorded in this case and embodied in the interlocutor of 16th March 1922 is that of the Sheriff and not of the jury, and that the pursuers have thereby been improperly deprived of the award of £800 which I think the jury meant to give them. But I am quite clear that I am debarred from determining whether or not that impression is well founded by the explicit and plain terms of rule 147 of the Statute of 1907, the effect of which is, in my judgment, to make the Sheriff final in so far as an appeal is concerned in a case where the parties have agreed to dispense with shorthand notes of the proceedings being taken. I therefore agree with the judgment proposed.

LORD JUSTICE-CLERK—I should like to add to what I have said that what we were asked to do here was to allow a proof of an *ex parte* statement. In my opinion that is a form of procedure which so far as my experience goes is quite unknown in Scotland in connection with procedure affecting jury trials, and ought not to be adopted.

The Court dismissed the appeal.

Counsel for the Pursuers and Appellants—M. P. Fraser, K.C.—Maclean. Agents—Warden, Weir, & Macgregor, S.S.C.

Counsel for the Defenders and Respondents—Dean of Faculty (Sandeman, K.C.)—Russell. Agents—J. & J. Ross, W.S.

Saturday, July 15.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

COCHRANE *v.* YOUNG.

Reparation—Slander—Privilege—Malice—Meeting of Sub-Committee of Public Body—Duty to Communicate and Interest to Receive Communication of Statements Complained of.

The secretary of a War Pensions Committee brought an action of damages for slander against the vice-chairman of the War Pensions Committee, in which he averred that the defender, while acting as chairman of a meeting of a sub-committee, read to the meeting a letter from certain employees of the War Pensions Committee which contained defamatory statements regarding the pursuer's behaviour in the office of the War Pensions Committee; that the defender, who was not a member of the sub-committee, had no right to act as chairman of the meeting; and that there were present at the meeting, in addition to the members of the sub-committee, the Regional Director and two other representatives of the Region Office of the Ministry of Pensions. The letter had been sent to the chairman of the sub-committee, whose place at his request the defender had taken, and a similar letter had been sent to the Regional Director.

Circumstances in which the Court *dismissed* the action, *holding* (1) that the pursuer's averments disclosed a case of privilege, in respect that the defender had a duty to communicate the letter to the persons present at the meeting, and that they had an interest to receive the communication; and (2) that the pursuer had not averred facts and circumstances from which malice could be inferred.

Captain Roy Cochrane, Edinburgh, *pursuer*, brought an action against Dr William Young, West Calder, Midlothian, *defender*, for payment of £5000 as damages for slander.

The pursuer averred, *inter alia*—"(Cond. 1) The pursuer when the present action was raised was the secretary of the Midlothian War Pension Committee. He is married and resides in Palmerston Place, Edinburgh. The defender is a member of the said Committee. On or about 9th November 1921 No. 2 Standing Committee of the said War Pension Committee appointed a small Sub-Committee for the purpose of considering a letter from the Ministry of Pensions with reference to the reduction for reasons of economy of the staff of the Committee. The said Sub-Committee consists of T. W. H. M'Dougal, Esq., of Raeshaw, Gorebridge, chairman of the main Committee and No 2 Standing Committee, Mrs Stuart, Borthwick Castle, Gorebridge, and Mr Robert Hood, Burnbank Cottages, Ratho. The pursuer acted as secretary to the said Sub-Committee. The

defender is not and never was a member of the said Sub-Committee. The statements in answer in so far as not coinciding herewith are denied, subject to the admissions that the defender is vice-chairman of the War Pensions Committee, but as such he is not *ex officio* a member of all Sub-Committees, and in particular that he was not a member of the foresaid Sub-Committee. Explained that Mr M'Dougal, who is chairman of the War Pensions Committee, was specially appointed as a member of the said Sub-Committee. (Cond. 2) A meeting of the said Sub-Committee was held on 18th November 1921, and a letter from Colonel Warden, the Regional Director of the Ministry of Pensions, with reference to the reduction on grounds of economy of the staff of the Committee, was submitted by the pursuer. It was subsequently decided to adjourn the meeting to enable Mr M'Dougal, the chairman, to interview the Regional Director, and to arrange for the Regional Director attending the next meeting at which the subject of the said letter would be dealt with. (Cond. 3) The next meeting of the said Sub-Committee was held on 28th November 1921 in the pursuer's room at the Local War Pension Committee's Office at 17 Atholl Crescent, Edinburgh. At the hour arranged for the meeting Mrs Stuart, Mr Hood, the Regional Director, a Mr Simpson and a Mr Rintoul (both from the Region Offices of the Ministry of Pensions), and the defender entered the pursuer's room. The defender, though not a member of the Sub-Committee, immediately announced that he had been requested by the chairman to take the chair. The defender then assumed the chair though not entitled to do so, and in the presence and hearing of the pursuer and of all those present at the said meeting proceeded to read a letter which he stated Mr M'Dougal had received from three members of the staff of the Local War Pensions Committee. The said letter was in the following terms or in terms of the like import and effect:— '17 *Atholl Crescent, Edinburgh, 25th November* 1921.—T. W. H. M'Dougal, Esq., of Raeshaw, Heriot.—We, the undersigned members of staff, respectfully wish to place before you our united protest against the intolerable treatment meted out to us by Captain Cochrane, and to bring to your knowledge facts which we think should now be known to you. It is the case that Captain Cochrane's treatment to many pensioners and to members of staff is utterly obnoxious and offensive, and that he makes use of obscene and indescribably filthy language when addressing us; that his immoral conduct has now become a byeword in the office; and that we now find it impossible to continue under his control. We wish also to state that it is the case that while his daily average attendance at the office is not more than 4½ hours, about half of that time is employed by him in dealing with business matters other than that pertaining to pensions. We would therefore ask that full investigations be made, and that if you consider it desirable immediate opportunity be afforded us to substantiate this protest. We have thought it advisable to forward a similar protest to the Regional Director. We speak on behalf of all the members of the staff other than two female members.— ALICE M. T. GORRIE. R. GUTHRIE IRVINE. JOHN S. SLORACH.' The pursuer is not in possession of the said letter or of any copy thereof, and requests for a copy which he has made to the acting secretary of the Committee and to the Regional Director have both been refused. The terms of the said letter as now set forth in the condescendence are quoted from the defences in an action which the pursuer has raised against the writers of the letter. By the statement in said letter that pursuer's 'immoral conduct has now become a byeword in the office,' on which the defender commented, the defender intended to represent and did represent that the pursuer had been guilty of immoral relations with female members of his staff, and it was so understood by those who heard it. . . . (Cond. 4) The pursuer immediately protested that the said letter was a complete surprise to him, and that the statements made in it were absolutely untrue. Mr Hood said that the meeting could not consider the letter, as it had no connection with the business for which the meeting had been called. The defender, however, stated that as chairman he overruled Mr Hood's objection. At the instigation of the defender the meeting thereupon determined to proceed at once to investigate the matter by questioning the writers of the letter. It was at first proposed by the defender that this should be done outwith the presence of the pursuer, but the pursuer protested against this course, and after discussion it was agreed to allow him to be present. The writers of the letter were then called in succession into the room and were questioned as to the statements made by them in the letter. None of the writers of the letter was able to substantiate, or did in fact substantiate, any of the statements therein. . . . (Cond. 5) At the conclusion of this inquiry the pursuer again protested, and referring to the charge against him of immoral conduct with female members of the staff, said that it was abominable that such a charge should be made against him. The defender then said, 'I believe it is true.' These words or words of the like import and effect were uttered by the defender in the presence and hearing of the pursuer and of all those present at the said meeting. By them he intended to represent and did represent that pursuer had been guilty of immoral conduct with female members of the staff. . . . (Cond. 8) Pursuer's relations with defender have been strained for years past, and on many occasions the defender has taken up a hostile attitude and manifested a strong animus against him. *Inter alia* in 1918 the pursuer, who was then also secretary of the West Calder War Pensions Committee, as the parish minister there, Dr Anderson, had interested himself in pension work and done much for war pensions and was prepared to accept nomination upon the Local Sub-Committee, wrote to the defender, who was chairman of the Committee, suggesting that

Dr Anderson should be put on the Sub-Committee. The defender refused to agree to this, and was annoyed with pursuer for having mentioned the minister's name as (unknown to pursuer) the defender was not on good terms with the minister. Again, in the beginning of 1920, while the foresaid T. W. H. M'Dougal was vice-chairman of the Midlothian Pensions Committee, the pursuer had occasion to object to his interfering with the staff and the working of the office, and pointed out that the staff should be under his (pursuer's) authority, as had been recorded in the minutes of the Committee. Defender went to pursuer and told him that unless he gave an abject apology to Mr M'Dougal he would not only have Mr M'Dougal against him, but that he himself (the defender) would do everything in his power to make him suffer for it. The pursuer could not see his way to give such an apology, there being no occasion for it, and defender carried out his threat and has ever since been most antagonistic to pursuer. Further, without any reason the defender quarrelled with pursuer regarding the latter having paid out of the Civil Liabilities Fund a sum of £75 to a West Calder pensioner of whom the defender disapproved, and threatened to have pursuer made personally responsible for said sum although the Committee had definitely approved of the payment before it was made. Other similar instances might be given. . . . (Cond. 9) The allegations made by the defender by his reading of the statements contained in the said letter and commenting thereon—which statements he adopted and made as his own—and the statement made by the defender which is condescended on in article 5 hereof, are of and concerning the pursuer and are false and calumnious and represented and were intended to represent, *inter alia*, that the pursuer had had immoral relations with female members of the Ministry of Pensions staff at 17 Atholl Crescent, Edinburgh, and were so understood by those who heard them. The defender read the statements contained in the said letter and made the said statement to the said meeting maliciously and without any knowledge of or belief in their truth, and without making any previous inquiry in the matter, but recklessly and with a desire to injure the pursuer and gratify his ill-will towards him. The whole proceedings of the meeting were irregular and partial and were conducted by the defender with the desire to injure the pursuer. The defender was not a member of the said Sub-Committee and had no right or duty to be present at any of its meetings or to make any statements in connection with its business, and it was beyond the remit to the Sub-Committee to deliberate upon the position of the pursuer or investigate any charges made against him. The pursuer's reputation and good character have greatly suffered as a result of the defender's said statements, and the pursuer has sustained great injury to his feelings and in his business interests as secretary of the said Committee. Reparation for the said injury and loss of reputation is moderately estimated at the sum concluded for."

The defender pleaded, *inter alia*—"1. The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons and the action should therefore be dismissed."

The pursuer proposed the following issue —"It being admitted that at a meeting of a Sub-Committee of No. 2 Standing Committee of the Midlothian War Pensions Committee at 17 Atholl Crescent, Edinburgh, on or about 28th November 1921, the defender read aloud, in the presence and hearing of the pursuer and of all those present at the said meeting, a letter in the terms printed in the schedule hereto appended (see *supra*, condescendence 3)—Whether the statements contained in the said letter and read aloud by the defender were of and concerning the pursuer, and falsely and calumniously represented that the pursuer was guilty of using obscene and indescribably filthy language towards members of the Ministry of Pensions staff at 17 Atholl Crescent aforesaid; that the pursuer had had immoral relations with female members of the said staff—to the loss, injury, and damage of the pursuer? Damages laid at £5000."

On 26th May 1922 the Lord Ordinary (BLACKBURN) pronounced this interlocutor —". . . Dispenses with the adjustment of the issue: Sustains the plea of irrelevancy stated for the defender: Dismisses the action; and decerns. . . ."

Opinion. — "This case raises a different question from the other two cases before me at the instance of the same pursuer, and I am very clearly of opinion that it is irrelevant. The letter alleged to be slanderous and complained of was written and sent to two people, one being Colonel Warden, the Regional Director of the Ministry of Pensions, the head of the whole Department in Scotland, and the other to Mr M'Dougal, the chairman of the Midlothian War Pensions Committee, the letter to each of them being in the same terms, and requesting an inquiry into the whole matter.

"There was a Sub-Committee of the Midlothian War Pensions Committee which had been appointed to consider matters rather germane to the question raised in the letter, because it had to do with the organisation of the staffs throughout the district, and a meeting of this Sub-Committee was called by Mr M'Dougal to inquire into the matters raised in the letter. He was prevented by ill-health from attending the meeting, and at his request the defender, who was vice-chairman of the District Committee, attended in his place. It is averred by the pursuer that the defender had not been expressly nominated as a member of this Sub-Committee, and that he was accordingly not entitled to attend the meeting. This averment appears to me to be quite irrelevant, as in my opinion the chairman of a public body is always entitled to nominate a vice-chairman of the body to take his place and discharge his duties when he is himself prevented from doing so. Now the letter being addressed to Mr M'Dougal as chairman of the Pensions Com-

mittee for the purposes of an inquiry, I think it is quite clear that the publication of the letter to the members of the Departmental Committee to enable them to inquire into the matters complained of is clearly covered by the plea of privilege. But the meeting of the Sub-Committee was also attended by the Regional Director, Colonel Warden, with two officials from the Headquarters Office, and it is argued that the plea of privilege does not extend to the defender's disclosure of the contents of the letter to these individuals. But the Regional Director had also received a similar letter and it was his duty to make some inquiry, in which he was clearly entitled to the assistance of any members of his staff with whom he chose to consult. Now I think the facts as stated and admitted make it perfectly clear that all these people were assembled at 17 Atholl Crescent on 28th November 1921 for the purpose of considering and discussing the matters dealt with in the letter, and that it was their duty to consider and deal with the whole matter. The only ground of action against the defender is that he read this letter to the meeting. It seems to me that this was his obvious duty, and that in discharging this duty he was privileged. I further think that it would be quite irrelevant to suggest that the pursuer is entitled to prove or attempt to prove that in discharging such a duty he was acting maliciously. Accordingly I shall dismiss the action as irrelevant."

The pursuer reclaimed, and argued—The pursuer's averments did not disclose a case of privilege. The contents of the letter were not relevant to the business of the meeting. Moreover, there were present at the meeting persons who were not members of the Sub-Committee. In any event the pursuer averred facts and circumstances from which malice could be inferred. *Ingram* v. *Russell*, (1893) 20 R. 771, 30 S.L.R. 699, was referred to.

Argued for the respondent—There was no publication of the alleged slander. The pursuer's averments disclosed that it was uttered on a privileged occasion, and facts and circumstances from which malice could be inferred were not averred.

At advising—

LORD HUNTER—It was admitted by counsel for the defender that the letter read by the defender at a meeting of a Sub-Committee of the Midlothian War Pension Committee appointed for the purpose of considering a letter from the Ministry of Pensions with reference to the reduction for reasons of economy of the staff of the Committee, held on 28th November 1921, was susceptible of bearing the slanderous innuendo ascribed to it in the issue proposed by the pursuer. That being so, it is of course for a jury to say whether or not the pursuer's contention as to the meaning of the letter is sound. It was, however, contended for the defender that the publication took place upon a privileged occasion, and that there are no averments made on record by the pursuer from which a jury would be entitled to infer that the defender in reading the letter was not acting in the discharge of any duty imposed upon him but was actuated by malice.

The question whether or not the averments of the pursuer—and it is from this standpoint that the question must be determined—disclose a case of privilege appears to me to be attended with difficulty. In *Jenoure* v. *Delmege* ([1891] A.C. 73) Lord Macnaghten, after pointing out that in the opinion of the members of the Privy Council who were considering that case no distinction could be drawn between one class of privileged communications and another, and that precisely the same considerations apply to all cases of qualified privilege, at p. 78 quoted with approval the following passage from Parke, B.'s, opinion in the case of *Wright* v. *Woodgate* ((1835) 2 C.M. & R. 577)—"The proper meaning of a privileged communication is only this, that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made." Lord Macnaghten then added the following passage—"There is no reason why any greater protection should be given to a communication made in answer to an inquiry with reference to a servant's character than to any other communication made from a sense of duty, legal, moral, or social."

In *Adam* v. *Ward* ([1917] A.C. 309) Lord Dunedin, at p. 328, said—"The duty of deciding whether the occasion is privileged is cast upon the judge alone and the jury has no hand in it. The criterion as to whether the occasion is privileged or not is most tersely stated in the well-known passages of Parke, B.'s, judgment in *Toogood* v. *Spyring* ((1834) 1 C.M. & R. 181, at p. 193)—'. . . Fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned;' and again, 'If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits.'"

In the earlier case of *London Association for Protection of Trade* v. *Greenlands, Limited* ([1916] 2 A.C. 15) Lord Buckmaster, L.C., after quoting the passages from Baron Parke's opinion in *Toogood*, referred to above, said (at p. 22)—"The circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact. New arrangements of business, even new habits of life, may create unexpected combinations of circumstances which, though they differ from well-known instances of privileged occasion, may none the less fall well within the plain yet flexible language of the definition to which I have referred."

The question of what constitutes a privileged occasion was dealt with by Lindley,

L.J., in *Stuart* v. *Bell* ([1891] 2 Q.B. 341) in an elaborate opinion which has more than once been considered by members of the House of Lords as containing an authoritative pronouncement upon this branch of law. At page 348 of the above report occur these passages — "He (*i.e.*, Erle, C.J., in *Whiteley* v. *Adams* (15 C.B. (N.S.) 418) says— 'Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter have all felt great difficulty in defining what kind of social or moral duty or what amount of interest will afford a justification; but all are clear that it is a question for the judge to decide; and I am clear that the letters in question, seeing the circumstances under which they were written, do not show what in law amounts to malice.' Then he goes on to say that 'the rule has since become gradually more extended upon the principle that it is to the general interest of society that correct information should be obtained as to the character of the persons in whom others have an interest. If every word which is uttered to the discredit of another is to be made the ground of an action, cautious persons will take care that all their words are words of praise only, and will cease to obey the dictates of truth.'" In considering this well-known exposition of the law, Lord Justice Lindley indicates that it is authority for holding an occasion as privileged if the person to whom the slanderous communication is made has an interest in receiving the communication. "But," he adds, "this would be going further than is warranted by the language of Mr Baron Parke in *Toogood* v. *Spyring* (1 C.M. & R. 181); it would not therefore be satisfactory to pass over the other matters indicated as important for consideration—I mean the defendant's interest in making the communication and his duty to make it." As regards the particular case with which he was dealing, he said (at p. 349)— "I am not prepared to base my judgment on the ground that the defendant made the communication complained of in the conduct of his own affairs or in a matter in which his interest was concerned. I am not clear that the defendant had an interest as distinguished from a moral or social duty to act as he did." In the result he held that the existence of such a duty short of interest or legal duty in the party making the communication coinciding with an interest in the person receiving the communication was sufficient to found a case of privilege.

Keeping in view the expressions of opinion as to privilege to which I have referred I proceed to examine the averments of the pursuer. He says that he was secretary of the Midlothian War Pension Committee of which the defender was vice-chairman. It appears to be obvious that the pursuer's employers were interested in his character and efficiency. The letter which the defender read at the meeting of the Sub-Committee bore upon these subjects. It was written by fellow-employees of the pursuer to the chairman of the Committee, who were their common employers. All members of the Committee were interested in the subject-matter, and I do not see how, if the principles for determining a privileged occasion to which I have referred are applied, the person who receives the communication loses privilege by divulging it to one or more of his fellow-members. The pursuer says the defender was not a member of the Sub-Committee; that he had no right to assume the chair; and that the letter ought not to have formed the subject of discussion at the meeting. These averments might have a bearing upon the question of the regularity of the proceedings of the Sub-Committee or upon the question whether any action taken by that body was *ultra vires*. They do not appear to me to be relevant to the question whether or not the occasion of making the communication was privileged.

One averment of the pursuer causes me more difficulty. It is said by him that the meeting was attended by the Regional Director and by two gentlemen from the Region Offices of the Ministry of Pensions. These gentlemen were not members of the Sub-Committee, and I presume were not members of the Midlothian War Pensions Committee, though there is no averment to this effect made by the pursuer. The defender cannot create a privilege for himself because of honest belief on his part that the person to whom he has made a slanderous communication has an interest or duty in respect of the subject-matter of such statement—see *Hebditch* v. *MacIlwaine*, [1894] 2 Q.B. 54. In that case Lord Esher, M.R., said (at p. 59)—"I cannot see how the belief of the defendants who have made a mistake, and have published a libel to persons who have no interest or duty or power in the matter, can affect the question." Similarly Lord Davey said (at p. 64)—"I cannot think that the mistake of the defendant in addressing the communication to the wrong person, or his belief, however honest, that the person to whom it is published has a duty or interest in the matter, can make any difference with regard to the question whether the occasion is privileged." On the other hand, in the case of *Boxsius* ([1894] 1 Q.B. 842), a solicitor who was acting for a client, in sending a letter to the plaintiff containing defamatory statements, did not deprive himself of the right to plead privilege by dictating the letter to a clerk, as such publication was necessary and usual in the discharge of his duty to his client.

What, then, was the position of the Ministry of Pensions with reference to the subject-matter of the letter? That Ministry was established by the Ministry of Pensions Act 1916. There are a number of Acts of Parliament dealing with the powers and duties of that Ministry and also with the constitution, powers, and duties of Pension Committees in different parts of the country, and the relationship between these bodies and the Ministry. It is not necessary to consider these provisions in detail, but I may note that by section 5 (1) of the War Pensions (Administrative Provisions) Act 1918 (8 and 9 Geo. V, cap. 57) it is, *inter alia*, provided that the minister "may make

general regulations . . . (*a*) for determining what classes of officers are required by committees for the proper discharge of their functions . . . (*b*) for authorising the attendance of officers of the Ministry at meetings of committees, and for providing that the records of committees shall be accessible to officers of the Ministry." I think that the Ministry were clearly interested in the subject-matter of the letter, and I do not think that the presence of representatives of that body at the meeting of the Sub-Committee deprives the defender of the right to plead that his statement was made on a privileged occasion. It may be noted that the letter of the pursuer's fellow-employees reflecting upon his character had been directly communicated by them to the Regional Director.

The question that has now to be considered is whether the pursuer has or has not made averments of malice against the defender which if established would entitle him to obtain a verdict. The Lord Ordinary at the conclusion of his note says — "I further think that it would be quite irrelevant to suggest that the pursuer is entitled to prove or attempt to prove that in discharging such a duty he (*i.e.*, the defender) was acting maliciously." With this statement I am unable to agree. It is not and could not be maintained for the defender that he is entitled to absolute privilege, and it is only in cases where such privilege is enjoyed that malice is irrelevant. In all cases of qualified privilege malice is of importance, and proof that the defender acted from an illegitimate motive will give the pursuer right to a verdict unless in the case of a communication to the authorities as to the commission of an offence where the pursuer must in addition establish that the defender has not probable cause for making his statement—*Lightbody* v. *Gordon*, 1882, 9 R. 934, 19 S.L.R. 703.

What, then, is the nature of the averments made by the pursuer as to the malice of the defender? I do not think that the mere allegation that the defender acted maliciously is sufficient. There must be facts and circumstances alleged from which malice may be inferred. The pursuer does not allege that the defender was in any way personally responsible for the letter being sent, or that he made any allegation against the pursuer as being within his own knowledge. No doubt the pursuer avers that an inquiry was held, when the writers of the letter were called into the room where the Sub-Committee met and questioned as to the statements made by them, that the writers did not substantiate any of the statements therein, and that the defender at the conclusion of the inquiry said, "I believe it is true," meaning by this the charges made against the pursuer. Assuming that the defender was wrong in the inference which he drew from the statements made, I do not think that such a circumstance would justify a jury in holding that he had read the letter from a wrong or improper motive of injuring the pursuer and not from a sense of duty. In condescendence 8 there are a number of incidents referred to in which the pursuer suggests that the defender had taken up a hostile attitude towards him. These acts, however, do not appear to be in any way connected with the occasion of the reading of the letter or to justify an inference that the defender had abused the position in which he was placed in order to injure the pursuer. I think therefore that the Lord Ordinary reached a right conclusion, and that the reclaiming note ought to be refused.

LORD CULLEN and LORD ORMIDALE concurred.

The LORD JUSTICE-CLERK and LORD ANDERSON did not hear the case.

The Court adhered.

Counsel for the Reclaimer (Pursuer)—Watt, K.C.—Thom. Agents—Arch. Menzies & White, W.S.

Counsel for the Respondent (Defender)—Fraser, K.C.—J. B. Young. Agent—Campbell Smith, S.S.C.

Saturday, July 15.

SECOND DIVISION.

MONTGOMERIE-FLEMING'S TRUSTEES *v.* MONTGOMERIE-FLEMING'S TRUSTEES.

Succession—Vesting—Conditional Institution—Destination on Occurrence of Certain Event to a Person Named "and His Heirs and Assignees"—Construction of "And" preceding "Heirs" — Effect of Addition of Words "And Assignees."

A testator, on the narrative that it was his wish that his son should occupy his house on his marriage, directed his trustees on the death or second marriage of his wife, "if and when the whole of my daughters are married or when my son is married, whichever of these latter events shall first happen," to assign and dispone to his son "and his heirs and assignees" the house in question. The son died unmarried, predeceased by his mother and survived by one unmarried sister, and leaving a will by which he left all his estate to trustees. *Held* (1) that the general rule that a destination over to heirs of a person appointed conditionally made the heirs conditional institutes and thus suspended vesting till the purification of the condition, was not elided by the use of the word "and" preceding "heirs" in place of the word "or," the two words having the same meaning of "whom failing"; (2) that the addition of the words "and assignees" gave no right to the son's testamentary trustees, the son having no right to assign, and that accordingly the son's heirs took the house as conditional institutes.

George Porteous Scott, Glasgow, and others, testamentary trustees of James Brown Montgomerie-Fleming of Kelvinside, Glas-