Cowper v. *Callender*, January 19, 1872, 10 Macph. 353, 9 S.L.R. 227.

Argued for pursuers — The interlocutor was not merely executorial, for it repelled objections to the Auditor's report on which there had been discussion. It was therefore a final interlocutor, and could be reclaimed against within twenty-one days —*Stirling Maxwell's Trustees* (*cit.*), *per* the Lord President at p. 2. That being so, it was timeously lodged on the second box-day. [Counsel for the defenders admitted that if this was a twenty-one days' interlocutor the note had been timeously lodged.] The restriction to ten days was limited to interlocutors which did not dispose in whole or in part of the merits of the cause — *Crellin's Trustee* v. *Muirhead's Judicial Factor*, October 21, 1893, 21 R. 21, 31 S.L.R. 8; *Taylor's Trustees* v. *M'Gairgan*, May 21, 1896, 23 R. 738, 33 S.L.R. 569. Here the merits were in part disposed of, for expenses were part of the merits of the cause.

LORD PRESIDENT—In this case I do not find it necessary to say anything upon the question whether the interlocutor reclaimed against is of the nature of a final interlocutor. That question is discussed in the opinion which I delivered in *Inglis* v. *National Bank of Scotland* (1911 S.C. 6). The question whether this reclaiming note should have been presented within ten days or within twenty-one is decided by the case of *Cowper* v. *Callender* (1872, 10 Macph. 353), which we must follow.

LORD KINNEAR—I agree.

LORD JOHNSTON—I also agree.

LORD MACKENZIE—I concur.

The Court pronounced this interlocutor—

"Sustain the objection: Hold that said reclaiming note has not been timeously lodged: Refuse the same: Find the pursuers liable to the defenders in expenses since 19th March 1913, and remit," &c.

Counsel for Pursuers—Dunbar. Agents—Henderson & Munro, W.S.

Counsel for Defenders—J. H. Millar. Agents—Mackenzie & Kermack, W.S.

HOUSE OF LORDS.

Thursday, April 3.

(Before the Lord Chancellor (Haldane), Lord Kinnear, and Lord Shaw, Lord Atkinson being present at delivering judgment.)

RUSSELL *v.* STUBBS LIMITED.

Reparation—Slander—Newspaper—Black List—Relevancy.

The defenders in an action of damages for slander were the proprietors and publishers of a weekly gazette, having a large trade circulation, which contained a column entitled "Extracts from the Court Books of Decrees in Absence in the Small Debt Courts. *Note.*—The following extracts from the Court books have been received since our last issue, made up to the several dates given in the second column. It is probable that some of the decrees have been sisted, settled, or paid; and in no case does publication of the decree imply inability to pay on the part of anyone named, or anything more than the fact that the entry published appeared in the Court books. . . . We are willing at all times to insert any authentic information or explanation relative to decrees, or to correct any inaccuracy of record or otherwise." There followed a list giving the courts, dates, names of pursuers and defenders, and the amounts of the decrees. In the issue of a particular date there appeared in this list an entry containing the name of the pursuer as a defender against whom decree had been given. No such decree had in fact been given.

The pursuer claimed damages upon the innuendo "that he was unable to pay his debts."

Held that the statement would not bear the innuendo and issue *disallowed*.

Crabbe & Robertson v. *Stubbs Limited*, July 4, 1895, 22 R. 860, 32 S.L.R. 656, and *Hunter & Company* v. *Stubbs Limited*, June 9, 1903, 5 F. 920, 40 S.L.R. 681, *distinguished*.

On 27th December 1911 John Russell, wholesale and retail furnisher and general ironmonger, 28 Quarry Street, Hamilton, *pursuer*, brought an action of damages for slander against Stubbs Limited, *defenders*.

The defenders, who were proprietors and publishers of a gazette called *Stubbs' Weekly Gazette*, published in the issue of that periodical of date 26th October 1911 the following statement:—

Court.	Date.	Pursuers.	Defenders.	Amount in Decree.
Hamilton	Oct. 20	British Electric Detonator Co. Ld. Liverpool	John Russell, 28 Quarry St. Hamilton	£9, 19s. 6d.

The column in which this statement appeared was headed as stated *supra in rubric.*

The pursuer averred—"(Cond. 2) The defenders carry on for profit a business which they describe in their advertisements and prospectuses as a means of enabling traders to avoid making bad debts, and they act as an agency for the recovery of overdue accounts, bills, and rents, etc. The said *Stubbs' Weekly Gazette* has a wide circulation, which is not confined to the trading community, throughout Scotland, and also in England and Ireland. It has a special portion devoted to the publication of the names and addresses of traders and others by and against whom decrees in absence have been taken. This is popularly known as, and called, the 'Black List,' and the name of any trader appearing in that list is looked upon with grave suspicion as to solvency by all persons reading the said gazette or knowing of its contents. Its object is to give information to tradesmen and the mercantile community generally as to bankrupts, insolvents, and defaulters in payment of their just debts and obligations. (Cond. 3) The pursuer, as a part of his business, is a dealer in explosives, and a large part of such business consists in supplying colliery companies and dealers with explosive material and colliery furnishings. One of the companies from whom the pursuer obtained the goods he required was the British Electric Detonator Company, Limited, 43 Castle Street, Liverpool. Questions arose between the pursuer and this company as to the amount of the pursuer's indebtedness, the pursuer maintaining that he had a counter claim which fell to be set off against this company's claim. Ultimately the British Electric Detonator Company raised an action against the pursuer in the Sheriff's Small Debt Court at Hamilton for payment of the sum of £9, 19s. 6d. On 12th October 1911 the dispute between the pursuer and said company was adjusted, and on said date said sum of £9, 19s. 6d. was paid by the pursuer, and the action was settled. The case was called in ordinary course in the Sheriff Small Debt Court at Hamilton on 20th October 1911, when the matter in dispute having been settled as stated, neither party appeared, and the action was dismissed. (Cond. 4) Notwithstanding that the said action had been dismissed as aforesaid, the defenders wrongfully, falsely, and calumniously published—[*statement given supra*]. This entry is not a correct record from the Court books, nor of what took place in Court, and is of and concerning the pursuer, and is false and calumnious. It falsely represented that a decree in absence had been granted against the pursuer for £9, 19s. 6d., that the pursuer was unable to pay his debts and was in insolvent circumstances and in pecuniary embarrassment, and was evading payment of a just debt, and it was so understood by the public, and in particular by the pursuer's customers and creditors."

On 28th February 1912 the Lord Ordinary (HUNTER) approved of an issue, and on 29th May the Second Division dismissed a reclaiming note, but, of consent, granted leave to appeal.

The defenders, Stubbs Limited, appealed to the House of Lords and referred to *Wood* v. *The Edinburgh Evening News Limited*, 1910 S.C. 895, 47 S.L.R. 786. The respondent referred to *Crabbe & Robertson* v. *Stubbs Limited*, July 4, 1895, 22 R. 860, 32 S.L.R. 656; and *Hunter & Company* v. *Stubbs Limited*, June 9, 1903, 5 F. 920, 40 S.L.R. 681.

At delivering judgment—

LORD ATKINSON—The Lord Chancellor desires me to state that he has had the advantage of reading the judgments which have been prepared by Lord Kinnear and Lord Shaw and that he concurs in them.

LORD KINNEAR—The question in this case is whether the Court below has done right in adjusting an issue for the trial of an action for libel, or whether they ought not to have refused to send the case to a jury and given judgment at once for the defenders. We have not the advantage of having any opinions of the learned Judges before us. But from what was said at the Bar it may probably be inferred that they proceeded on the supposed authority of *Crabbe & Robertson* v. *Stubbs Limited.* I am of opinion that that case does not support the judgment. But however that may be, it is not binding on this House, and before I examine it I think it will be convenient in the first place to consider the present question on its own merits with reference to rules of law that are otherwise well settled.

The appellants, who are defenders in the action, are the proprietors and publishers of a newspaper called *Stubbs Weekly Gazette*, and the pursuer avers that they carry on for profit a business which they describe in their advertisements and prospectuses as a means of enabling traders to avoid making bad debts. As Lord President Inglis observes in *Andrews* v. *Drummond*, with reference to a similar publication, "The object seems quite a legitimate one, and if it were carried on in a legal way no one could object to it." But the pursuer's complaint is that the defenders have gone beyond what the law allows, to his injury, inasmuch as their gazette contains a list of persons against whom decrees in absence have been obtained, and in the issue of 26th October 1911 his name appeared in the list as a defender against whom a decree in absence for £9, 19s. 6d. had been taken in the Sheriff's Small Debt Court at Hamilton, whereas in fact this statement was false, because the claim of debt to which it referred had been settled and the action had been dismissed.

It is admitted that the entry of the pursuer's name in the list was made in error. The validity of the excuse the appellants put forward for their mistake is not relevant to the present question. But I observe in passing that people who follow such a business as was undertaken

by the appellants impose upon themselves a duty of care and circumspection, because they have taken the reputation and credit of their neighbours into their own hands, and it will be no answer to any well-grounded complaint of injury through misrepresentation of fact that they have misunderstood the import of entries in the Sheriff's Court books, or that the entries themselves were misleading. They undertake to say what passed in Court apparently by a study of what is recorded in the Sheriff's Court books, and they take the risk of their own interpretation of the entries which they may not perfectly understand. But, as I say, that is not material to the present question, which is whether there should be a trial or not. All that is to the present purpose to say upon this statement in defence at present is that the appellants cannot plead, as they might otherwise have done, that no action will lie for a mere statement made in a newspaper or elsewhere that a decree has passed in a public court of justice, because that is a public fact which everybody is entitled to state. But no such plea of justification is required if the statement is not in itself libellous, and I am of opinion that taken by itself it bears no defamatory meaning. To apply the approved definition of a libel, for which action will lie, it certainly does not hold the pursuer up to hatred, contempt, or ridicule, and just as little does it convey an imputation injurious to him in his trade. An injurious inference might no doubt have been drawn if inability to pay a just debt were the only reason which could account for a decree in absence being allowed to pass in a Small Debt Court. But, as the appellants' counsel very forcibly pointed out, such a thing may happen from a variety of causes that are perfectly consistent with solvency and honest intention on the part of the debtor. If this were all, the question would be whether a publication is libellous because one out of various possible inferences from the facts which it states may be injurious while others are harmless. This question was answered in the negative by the decision of this House in *The Capital and Counties Bank* v. *Henty*. But in the present case it does not really arise. It is absolutely excluded by the express language of the very statement of which the pursuer complains.

The alleged ground of action is an entry in what he describes as the defenders' black list. But the entry is a mere statement of names, with a date and a sum of money; and what it is intended to represent is explained in a head-note, which must be read along with it in order to make it convey any intelligible meaning. The head-note begins with a descriptive title of what is to follow, to wit, "Extracts from the Court Books of Decrees in Absence in the Small Debt Courts"; and to this there is appended a note in the following terms:—"The following extracts from the Court books have been received since our last issue. . . . It is probable that some of the decrees have been sisted, settled, or paid, and in no case does publication of the decree imply inability to pay on the part of anyone named, or anything more than the fact that the entry published appeared in the Court books." This appears to me to be conclusive of the whole question. It is impossible to say that this statement fairly read would convey to any reasonable mind the imputation on persons whose names are found in the list that they are unable to pay their just debts. The pursuer admits that he cannot put the bare entry in the list to a jury without an innuendo; and the only innuendo he proposes is embodied in the issue which has been allowed, and by which it is proposed to ask the jury "whether the said statement" (that of course refers to the statement in the appellants' newspaper which it is proposed to append in a schedule to the issue) "falsely and culumniously represented that the pursuer was unable to pay his debts." But that is the very thing that "said statement" in the plainest and most explicit language declares that it does not represent.

It is said that although the language of the statement taken by itself may be harmless, a libellous character may nevertheless be given to it by evidence of extrinsic facts relating to the purpose or circumstances of the publication. I agree, and if there were any relevant averments of such facts I should think the pursuer should be allowed to prove them. But there is nothing stated on record which can alter the plain meaning of the document. If the purpose ascribed to the defenders were more suggestive than it is of an intention to defame by imputing insolvency, no inference of that kind could stand against the positive and explicit language in which it is repelled by the defenders. The question is in reality whether the defenders' statement means what it says, or whether it means the reverse of what it says, and I am of opinion that that is a question which should not be allowed to go to a jury.

The law is perfectly well settled. Before a question of libel or slander is submitted to a jury, the Court must be satisfied that the words complained of are capable of the defamatory meaning ascribed to them, That is a matter of law for the Court. If they are so, and also of a harmless meaning, it is a question of fact for a jury which meaning they did convey in the particular case. It is unnecessary to cite authorities because they are many, but I take the doctrine as laid down by Lord Selborne in *The Capital and Counties Bank* v. *Henty*, where, after stating the general rule to the same effect as I have just stated it, the learned Lord adds—"If the Judge, taking into account the manner and the occasion of the publication and all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the innuendo to the jury."

In a very recent case, *Smith* v. *Walker* (1912 S.C. 224), in the Court of Session, the Lord President pointed out that in applying this doctrine, which his Lordship cited from Lord Selborne as I have just done, to the practice of Scotland, it is necessary to substitute for the words "facts properly in evidence" the words "properly averred on record." This is because in Scottish practice the question of libel or no libel, so far as it is a question for the Court only, is not left to be raised at the trial, but must be decided at the stage at which the interlocutor now under review has been pronounced. The Court cannot allow an issue in any case without deciding that there is a proper case to go to a jury and ascertaining the question of fact which the jury is to decide. In the present case, therefore, it is decided by a final judgment of the Court that the words complained of when taken in connection with the facts alleged on record are capable of the defamatory meaning ascribed to them; and the judge at the trial would have no power to withdraw the case from the jury on the ground that they will not bear that innuendo. I think it clear, in the first place, that the whole of the statement in the head-note, as I have quoted it, must be read in conjunction with the alleged excerpt from the Sheriff Court books, and, secondly, that when it is so read it is impossible that any reasonable man should collect from it the libellous imputation alleged.

Taking this view of the law, I do not think that the Court need have been embarrassed by the case of *Crabbe & Robertson* v. *Stubbs*. It so far resembles the present that in an action against the present appellants it was held that a statement in their paper that a decree in absence had passed against a certain person when read along with the context, and in the circumstances there alleged, might support an issue in the same terms as that before us. But the facts alleged as to the avowed purpose of the publication were more suggestive of an intention to impute insolvency than anything stated in the present record, and, what is much more important, the perfectly explicit statement which I have quoted, and which seems to me to be the vital point in the appellants' case, was not to be found in the paper complained of in the case of *Crabbe & Robertson*.

There was a statement as to the possible imputation of insolvency, but the Court did not read it as a clear disavowal of such imputation as regards all the persons whose names were found on the list, but only as an indication that some of them might have paid their debts or taken proceedings for avoiding the decree. It was therefore thought that the record presented a relevant case to go to a jury. I am bound to say that I think the case was a very narrow one although I still remain of opinion that it was rightly decided. But the only general doctrine for which it can be cited as an authority is that which I have already had occasion to state, and which I take to be beyond dispute, that the purpose and circumstances of a publication may impart to language a meaning which it would not otherwise bear. Whether that doctrine was rightly applied or not in the particular case is a matter of no importance, because a decision as to the libellous or innocent character of particular words in particular circumstances cannot govern the construction of different words, however minute the difference may be.

The other case cited, *Hunter* v. *Stubbs*, is in a different position. The publication complained of seems to have been in terms which I cannot distinguish from those in the publication now complained of; and it follows from what I have said, that, in my opinion, the issue ought not to have been granted in that case. But the only question reported arose after trial, when it was too late to question the issue, and it does not appear from the report on what ground it was allowed, or whether the point was contested. I cannot therefore regard the case as an authority upon this question one way or the other. It was certainly not binding upon the Court below, and of course it is not binding upon this House.

I have only to add, that if the innuendo proposed cannot be allowed, I think it impossible that your Lordships should send the case back to the Court below as was suggested in order that some permissible innuendo may be discovered. This would, in my opinion, be inconsistent with all sound practice and with legal principle.

I cannot say that I see any other libellous suggestion in the publication complained of if the pursuer's innuendo fails, and there are no extrinsic facts averred which would support any other. But I do not propose to put my judgment upon that ground. I make the observation in passing, but the true ground of judgment is to my mind that the pursuer must allege his own ground of action, and must state on record all material facts which he is prepared to establish in support of it. If it cannot be sustained as he states it, it is not for the Court to discover some other ground which he has not found out for himself, or to require him to prove some injury which he has not averred.

On the whole matter I am of opinion that the interlocutors under review ought to be reversed.

LORD SHAW—The appellants are the proprietors and publishers of *Stubbs' Weekly Gazette*. This is a newspaper which they issue for profit, and which it is admitted has a large circulation among traders. It is considered to be of interest and advantage to these traders to find in this paper what upon application they could have ascertained for themselves as registered public facts, namely, the decrees in absence pronounced in the Small Debt Courts of Scotland. No question is raised as to the right of the appellants to publish this record.

Upon the other hand, it is also, as it must be, conceded that while this is the appel-

lants' right, it is also their duty to make their publication of these decrees accurate in fact. If for any reason they fail in this duty, and if thereby a trader against whom no decree in absence has in fact passed is erroneously entered in that list, the appellants must stand responsible for any injurious consequences which the erroneous entry has produced or would be reasonably likely to produce, taking into account its terms and the circumstances upon the one hand of the trader and upon the other of the publication. I did not gather that the appellants disputed this proposition. It has been the basis of many decisions both in Scotland and in England, and I do not desire in the judgment which follows to throw doubt upon it. It lies, however, with the pursuer to make a relevant averment of such injurious consequences, and the burden rests upon him of establishing them as the effects of the erroneous publication.

The rights and obligations of parties being thus granted, it must also, I think, be admitted that an erroneous statement that a decree had been passed for a small debt in Scotland would not necessarily import harm to anybody. In order to enable it to be treated as a harmful publication, an innuendo must be placed upon the erroneous entry showing that the character or business of the trader has been injuriously affected because the readers or the public were led to conclude as against him something much more serious.

For such a decree might pass for a large variety of reasons, none of which would injuriously affect the reputation or trade of the debtor. One quite natural interpretation of the entry would be that the alleged debtor had forgotten to pay the small sum sued for. Another reason might be that he was, having certain opinions as to the injustice of the claim or the full amount of it, determined not to pay except under force of law. A third reason for such a decree might be that he was absent and knew nothing about the summons. And a fourth that he was a person given to refusing or delaying to pay his debts in ordinary and proper course. This last might possibly affect the reputation and credit of the alleged debtor; and I am not prepared to say that there may not be circumstances in which injury, more particularly to a trader in humble and struggling circumstances, would not be produced if the erroneous entry had been taken up in the last-mentioned sense. Such a person might never have been in a court, might always have met his obligations with regularity, might be in a critical stage in the development of his business, and, as at present advised, I should not say that it was a strained construction to put upon the entry that it was reasonably likely to imply that he was given to or had begun the practice of refusing or delaying to make payment of his debts, and that the public or those dealing with him had understood it in that sense.

The position taken up by the respondent, the pursuer in the action, however, is that he has put forward in issue the erroneous entry with a much more sweeping and serious innuendo. That innuendo is that the entry "falsely and calumniously represented that the pursuer was unable to pay his debts." He has, in short, taken upon himself the burden of saying that the entry of a decree in absence having passed against him for £9 odd was equivalent to or implied an imputation of his insolvency.

After much consideration I am of opinion that this innuendo imports into the erroneous entry more than it can reasonably bear. For I think the test in these cases is this—Is the meaning sought to be attributed to the language alleged to be libellous one which is a reasonable, natural, or necessary interpretation of its terms? It is productive, in my humble judgment, of much error and mischief to make the test simply whether some people would put such and such a meaning upon the words, however strained or unlikely such a construction may be. The interpretation to be put on language varies infinitely. It varies with the knowledge, the mental equipment, even the prejudices, of the reader or hearer; it varies—and very often greatly varies—with his temperament or his disposition, in which the elements, on the one hand, of generosity or justice, or, on the other, of mistrust, jealousy, or suspicion, may play their part. To permit in the latter case a strained and sinister interpretation, which is thus essentially unjust, to form a ground for reparation, would be, in truth, to grant reparation for a wrong which had never been committed.

There are circumstances, to which I am about to allude, which bring very vividly before the mind the mischief to which I have referred. But before I mention them I desire to add that it appears to me that the statements which I have made are amply supported by authority. The general rule, indeed, occurs by way of statement in a single sentence of Lord Justice Brett in *Henty's* case (5 Common Pleas Division, 541)—"It seems to me," said that very learned Judge, "unreasonable that when there are a number of good interpretations the only bad one should be seized upon to give a defamatory sense to the document." In the same case in the House of Lords Lord Selborne enunciated the familiar proposition that the words must be "taken in the natural sense." I refer to *Henty* on account of its high authority. It was twice argued in this House and was the subject of careful and elaborate judgments. On this question of the meaning attributable to words no dissent in the judgments of the majority is expressed from the general proposition just quoted from Lord Justice Brett. Indeed, I am not sure that in particular the judgment of Lord Blackburn does not go further, for he states the principle on which the Court is to proceed in this language, "namely, that unless the plaintiff has so far satisfied the *onus* which lies on him to show it to be a libel that the Court can with sufficient certainty say that the writing has a

libellous tendency, they should not so say"; and in another passage he refers to this *onus* which is upon plaintiffs, thus, "that the Court can, to adopt Lord Tenterden's language, with reasonable certainty say that the tendency of the letter was to convey a libellous imputation." Lord Watson uses language of a less pronounced but still broad and emphatic character when he says—"If I were satisfied that an inference injurious to the credit of the bank would naturally and necessarily suggest itself to the mind of any person of average intelligence on reading the circular"; and Lord Bramwell puts the hypothesis—"If a libellous inference may be drawn from them as a necessary or natural consequence, they are libellous." Out of this variety of expressions I have ventured to gather up what I think to be the result, namely, that the innuendo must represent what is a reasonable, natural, or necessary inference from the words used, regard being had to the occasion and the circumstances of their publication.

By the laws both of England, and of Scotland the duty of saying whether this inference may be made lies with the Court. The difference of procedure between the two countries is this, that in England the whole inquiry may be taken, the jury may have passed its verdict, before this essential and truly preliminary question is determined. If the verdict be for the defendant, then of course that is an end of the matter; but if the verdict be for the plaintiff, it is open—after, it may be, a very lengthy procedure—to the defendant to maintain that the inference made by the jury in favour of the plaintiff was one which the language employed will not bear. If the Court affirms that proposition, then judgment is entered for the defendant.

In Scotland the inquiry as to the reasonable, natural, or necessary interpretation of the libellous words is not entered upon at a stage so late. It is for the pursuer of an action to state definitely the meaning which he alleges the article or words complained of to bear, and to put that meaning in issue, and thereafter the Court determines whether there is any issuable matter and approves or disapproves, or it may vary or adjust, the issues proposed for the trial. But the principles upon which the Court proceeds in Scotland at the early stage are identical with those which the Courts in England proceed upon at the later stage in reference to the point now under discussion.

What happened in the present case was this—The pursuer stated the entry, alleged that it was false, that there was such a decree in absence. This was admitted. He then proponed the issue whether the statement was of and concerning him, and "falsely and calumniously represented that the pursuer was unable to pay his debts." The defenders in their record founded upon the following heading, which was, in the issue of their paper complained of, prefixed to the list of decrees in absence which they gave. That was in these terms:—"Note.—The following extracts from the Court books have been received since our last issue, made up to the several dates given in the second column. It is probable that some of the decrees have been sisted, settled, or paid, and in no case does publication of the decree imply inability to pay on the part of anyone named, or anything more than the fact that the entry published appeared in the Court books." For some reason which has not appeared, the pursuer was allowed to present his issue with a schedule confined to the erroneous entry, but without any mention of this note. Such a proceeding cannot be defended. It was corrected by the Inner House in the case of *Crabbe & Robertson* v. *Stubbs* (22 R. 860). It appears to me quite clear that the omission of this note from the schedule must have been inadvertent.

The defenders admit the error, explain how they had been led into it, and quote the apology made to the pursuer in their next week's issue. But they then proceed to give a list of eleven cases, extending over six months prior to the alleged slander, in which the pursuer had figured in the Court lists, and with regard to which they say that the pursuer's creditors "were unable to obtain payment from him of the sums due at their due date, notwithstanding repeated remonstrances, and only obtained payment after actions had been raised in the Sheriff Courts of Lanarkshire, and in some cases after decrees had been pronounced." They also accordingly proposed a counter issue "whether the pursuer, during the period from February until October 1911 repeatedly refused or delayed to make payment of his just and lawful debts to his trade creditors."

The importance of the shape of the pursuer's issue, and in particular of its innuendo, thus becomes apparent. For while the pursuer's issue with its sweeping innuendo has been allowed, the counter-issue of the defender—the defenders' counter-issue—that the pursuer repeatedly refused or delayed to make payment of his debts—has been disallowed by both Houses of the Court of Session. This has been done presumably upon the familiar ground that the counter-issue does not meet the entire breadth of the innuendo which the pursuer had put in his issue, namely, that he was unable to pay his debts. In short, the defenders were disabled from tendering proof that the pursuer for eight months before the entry founded on repeatedly refused or delayed to make payment of his just debts because he might have done all that, although he was not insolvent, and the pursuer had so framed his issue as to make the erroneous entry of one decree in absence impute insolvency in general terms. It is plain to my mind that this was paving the way for a complete miscarriage of justice.

But that miscarriage arose, or would have arisen, simply because in my humble judgment the Courts below had permitted the imputation of insolvency to be put forward as a reasonable, natural, or necessary inference from a statement that a

decree in absence had been taken for a sum of between £9 and £10. I do not refer to the note, which specifically stated that nothing was meant to be inferred except that a decree had been taken. It may be true that in a weekly gazette of this character a note so inserted might not obliterate the evil effect of the erroneous entry; but it does not appear to me to be justifiable to infer an imputation of insolvency from a single decree in absence for a small amount. Had the far less strained interpretation been put upon the words that the entry meant that this trader was a person who was refusing or delaying to pay his just debts, this would have enabled the whole facts under both the issue and the counter-issue to go before the jury, because it was exactly that not unreasonable interpretation which the defenders were willing to meet, and if they had established their averments and their counter-issue they would of course have been entitled to a verdict.

It would be productive of wrong if the over-straining of an innuendo were in such a manner and by a finesse of procedure to be permitted to block out the real substance of a case; a verdict for the pursuer in such a situation would be obtained because the jury had been left compulsorily in the dark. I am aware of the answer made, that the debtor's bad record could be looked at for the purpose of mitigating damages and that the jury might grope towards the real truth on the whole case by the light thus let in upon one point as through a chink in the shutter. This again is a finesse of procedure; its use beyond the one point is illegitimate as all parties know. In the case in hand any exclusion of the whole light on the whole case would, in my opinion, be productive of possible mischance and contrary to law.

These considerations illustrate the necessity of confining innuendoes upon, and inferences from, words which in themselves are not libellous within an area which admits of their being made without strain and as an expression of the reasonable, natural, or necessary meaning of the words employed. The present case shows that if that rule were to be departed from it would enable pursuers, first, to strain by inference the meaning of words, and then, secondly, to prevent a complete answer to an issue being made by a defender who might be thoroughly furnished in his defence against the inference which was the reasonable and natural one.

I am aware that in the case of *Hunter* v. *Stubbs*, and also in that of *Crabbe & Robertson*, to which I have referred, the form of issue now to be declared by this House improper was allowed. In *Hunter's* case, however, the defender had agreed to the issue and the question was not raised at the proper stage. *Crabbe & Robertson* has been dealt with fully by my noble and learned friend Lord Kinnear, and I agree with his Lordship's observations thereon and with the course which he suggests should be pursued.

Their Lordships allowed the appeal with expenses.

Counsel for the Appellants—T. B. Morison, K.C.—H. A. M'Cardie. Agents—M'Kenna & Co. (London) and George F. Welsh, Solicitor (Edinburgh).

Counsel for the Respondents—R. Munro, K.C.—M. S. Fraser—J. T. Macpherson. Agents—Hamlins, Grammer, & Hamlins (London)—Erskine Dods & Rhind, S.S.C. (Edinburgh).

COURT OF SESSION.

Friday, May 16.

SECOND DIVISION.

[Sheriff Court at Glasgow.

M'COARD *v.* MICKEL.

Landlord and Tenant—Damage to House from Bursting of Pipes during Tenant's Absence—Duty of Tenant to Turn off Water or Notify Landlord — Duty of Tenant to Use "Reasonable Degree of Diligence" in Preserving House from Harm.

A tenant of a house vacated it for a month in winter without having turned off the water, and without having intimated to the landlord that she had vacated the house and had not turned off the water. The water-pipes in the house burst during frost, and damage was caused to the house.

Held that the tenant was liable for the damage, in respect of her failure to intimate to the landlord that she had vacated the house without having turned off the water.

Observations (*per* Lord Salvesen) on the duty of a tenant to use "a reasonable degree of diligence" in preserving a house from harm.

Robert Mickel, timber merchant and property owner, Glasgow, *pursuer*, brought an action in the Sheriff Court at Glasgow against Mrs Sarah M'Coard, formerly residing in Glasgow, then residing in Kilcreggan, Dumbartonshire, *defender*, for £350 in respect of damage caused by flooding to a house in Glasgow belonging to the pursuer, of which the defender was formerly the tenant.

Proof was allowed and led. The import of the proof, so far as relevant to this report, was that during the defender's tenancy of the house she vacated it on 25th December 1909, leaving no person in it and taking away with her the keys. The stop-cock for cutting off the water from the main was situated outside the garden gate, and on the defender's son failing to find it inside the house, the defender left, without taking any steps to have the water turned off or informing the pursuer of her absence. She left the house empty and without any firing or airing until 26th January 1910. On that date the constable on the beat