can be held to constitute *res judicata* in regard to a question which was never made the subject of discussion by the parties, or express decision by the Court. Still less can it be so held, seeing that none of the localities have been approved of as final.

"It is a different question what effect is due to the long course of payment and acquiescence. In any view, the Lord Ordinary does not think that this can be founded upon as against the objector with reference to the period while Keiss belonged to the Ulbster family, before it was acquired by the objector's ancestor in 1813. In regard to the period since that time, it must be kept in view that this is not a question of prescription, and that in order to constitute the alleged obligation as incumbent upon the proprietor of Keiss, it must be shown that he took it upon him in a manner clearly importing that he intended to do so, and in the knowledge that he was under no previous obligation in the matter. But the Lord Ordinary thinks that the inference from the whole facts of the case is, that the parties were all along in error as to the existence of an obligation, and he is of opinion that in these circumstances there is nothing to bar the objector from now betaking himself to his legal rights.

"In this view of the case it is unnecessary to consider whether the Court would ever sanction such a mode of localling where the question is raised, there being no real warrandice. The case of *Dykes* v. *Marshall* is adverse to such a practice; and if it were sustained on the ground that the present proprietor of Keiss, or those whom he represents had personally adopted the obligation, it does not appear that it could be held effectual against a singular successor who should now purchase the lands with no notice of such a burden on the records."

Mrs Sinclair reclaimed.

ADAM (with him SOLICITOR-GENERAL) for reclaimer.

LORD ADVOCATE, A. R. CLARK, and NEVAY, for respondent, were not called on.

LORD PRESIDENT—The stipend payable for the lands of Nybster has in the interim locality, been laid on the lands of Keiss. Now Mr Macleay objects that, there being no obligation or other deed instructing the liability of Keiss for the Nybster stipend, the respondent must, in a question with the objector, be localled on for the whole stipend of the lands of Nybster. The justification of the mode of localling which has been going on for a long series of years, is that so far back as 1740, in a minute of sale of Nybster by Sinclair of Dunbeath, the lands were sold free of all stipend, and there was an obligation to convey the lands of Keiss in real warrandice, not only against eviction but also against being affected by any public burden beyond land-tax and cess. It is admitted, however, that the obligation in this minute of sale has continued merely personal—that is, it is a personal obligation against the granter and his successors. But it did not enter the conveyance of the lands of Nybster by Sinclair of Dunbeath to Sinclair of Freswick; and no conveyance of the lands of Keiss in real warrandice was ever made. After the lapse of a considerable number of years, and so late as 1813, the lands of Keiss came into the hands of a singular successor, the predecessor of the objector; and since 1813 they have been in the hands of singular successors, against whom, *ex facie*, this obligation has no operation at all. It is said, however, that notwithstanding this obligation remained personal, and never was made real, still the obligation may be made effectual against singular successors in the lands of Keiss, and I don't say that that is impossible. It is quite possible for a singular successor in an estate so to adopt an obligation by his predecessor as to become liable. But we have no means of judging whether that be the case here or not. We have no *termini habiles* for determining that question.

The only difficulty about adhering to the interlocutor of the Lord Ordinary is, lest it be thought that adhering to it precludes the proprietor of Nybster from instituting proceedings to make her claim effectual; and if a reservation were added to the interlocutor of the Lord Ordinary, that would remove the difficulty, for it is quite impossible in this locality to give effect to the claim of the respondent in the manner proposed. The contention is now, that the transference of the stipend from Nybster to Keiss, as a burden, shall be given effect to and made perpetual in a final scheme of locality. Nothing short of that would satisfy the reclaimer, and nothing else can here be done. The parties are engaged in converting an interim into a final scheme. I ventured to suggest in the course of the argument, what appeared to me to be a conclusive objection to that, even if the obligation on Keiss were made out to be a personal obligation. Because if you laid this burden on the lands of Keiss, out of which it is not payable, and if Keiss were sold to a *bona fide* purchaser, he might be called on to pay stipend for which he has no teind. His teinds may be already exhausted by the stipend effeiring to Keiss. The consequence would be, that the singular successor would bring a reduction, on the ground that the locality had been conducted against all rule and precedent. It is true that in some cases the lands of a party in a locality may be made to bear the share falling on the lands of a neighbour, where there is a real burden or a disposition in real warrandice, but then in that case the burden is in its nature permanent, affecting all singular successors into whose hands the lands may come.

The other judges concurred.

Agent for Reclaimer—A. J. Napier, W.S.

Agents for Respondent—Horne, Horne, & Lyell, W.S.

Thursday, July 4.

DIXON'S TRUSTEES *v.* STEWART'S TRUSTEES AND OTHERS.

Issues—Reparation—Upper and Lower Heritors. Issue adjusted in an action by a lower heritor against an upper, for alleged wrongful interference with the course of a stream. Counter issues of prescription and acquiescence disallowed, there being no foundation for them in averment.

The pursuers, trustees of the late William Dixon of Govan, proprietor of the estate of Carfin, which he purchased in 1846, brought this action against Robert Stewart of Murdostown, and the Earl of Stair, asking damages for alleged injury done to the lands of Carfin through the wrongful act of the defenders. The action was now insisted in against the trustees of the defenders, the defenders having died since the raising of the action. The ground of action was, that during the period subsequent to 1839 (the date when Mr Stewart entered on the

iron works), Mr Stewart deposited quantities of slag or other refuse from the Omoa Iron Works on ground belonging to Lord Stair, on the banks of the Tillon or Cleland Burn. The Tillon flows into the Calder Water, which, 1300 yards below the junction, begins to form the boundary of the estate of Carfin, and at a point farther down intersects these lands. By the action of the water of the Tillon, particularly when the burn is in flood, quantities of slag had been carried down into that burn, and afterwards by the Calder, to the lands of Carfin. By the accumulation of the slag the natural flow of the Calder had been interfered with, its channel altered, soil and trees carried away from the lands of Carfin, and these lands otherwise injured. The pursuer proposed this issue:—

"Whether, by the wrongful depositation of slag or other refuse from the Omoa Iron Works upon or near the banks of the Tillon Burn, during the period subsequent to the year 1839, the deceased Robert Stewart, proprietor of said works, interfered with the natural flow of the water of the said Burn and of the River Calder, to the loss, injury, and damage of the pursuers, as proprietors in trust of the estate of Carfin."

The defenders, Stewart's trustees, contended that the action was irrelevant; that, at all events, except as regards slag deposited in the Tillon after Whitsunday 1846, when Mr Dixon purchased the estate of Carfin, there could be no action at the instance of the pursuers: that the pursuers could not complain of the condition of the bed or banks of the Tillon or Calder as existing at the time when Mr Dixon purchased the estate, or sue for damages in respect of injury arising from slag or other material then in the bed or on the banks of these streams. They pleaded farther, the pursuers' claims were excluded, in respect, (1) that no exception was taken by the proprietors of Carfin to the operations complained of at the time when the same were executed; (2) that such operations were carried on by Mr Stewart's predecessors in the iron works, without interference or complaint, for upwards of fifty years prior to 1840.

The Lord Ordinary (KINLOCH) reported the case, indicating an opinion against the relevancy. The case against Lord Stair's trustees his Lordship held to be clearly irrelevant, and accordingly, *quoad* these defenders, dismissed the action.

YOUNG and W. M. THOMSON for pursuers.

CLARK and WATSON for defenders.

After discussion the following issue was proposed for the pursuers:—

"It being admitted that the now deceased William Dixon of Govan purchased the estate of Carfin, situated on the Calder water, with entry thereto at Whitsunday 1846, and that the pursuers, as his trustees, are now proprietors of the said estate; it being farther admitted that in the year 1839 the now deceased Robert Stewart became proprietor and occupant of the Omoa Iron Works, situated on or near the banks of the Tillon Burn, which falls into the Calder Water at a point above the said estate of Carfin.

"Whether the said Robert Stewart wrongfully deposited slag and other refuse from his said works upon and near to the banks of the said Tillon Burn, in consequence of which the said slag and other refuse, subsequent to the term of Whitsunday 1846, fell into the Tillon Burn, and interfered with the natural flow of the said Burn and of the Calder Water, to the loss, injury, and damage of the said William Dixon, and of the pursuers, as proprietors of the estate of Carfin."

The defenders proposed counter-issue of prescription and acquiescence.

LORD PRESIDENT—In so far as regards the pursuer's issue, what he insists upon is this, that for all injury done to his property since his acquisition of that property in 1846 he is entitled to sue for damages from the defenders, if he can show that it is in respect of operations by the defenders or their predecessors at any time after Mr Stewart became proprietor of the works in 1839. On the other hand, the defenders contended that the pursuer is entitled to recover such damages only for injury caused after the pursuer became proprietor of the estate of Carfin in 1846; and accordingly they put their issue in such a form as to lay it on the pursuer to prove that slag fell into the burn subsequent to Whitsunday 1846. I am not prepared to hold that an inferior heritor may not in certain circumstances be entitled to recover damages for injury done to his estate through the influence of operations that may have been performed by a superior heritor before he became proprietor. All I will say in reference to such a case is that it would require to be very precisely averred in order to show that the claim of damage by the inferior heritor was not a claim that belonged to his predecessor in the estate, and not to himself. The question we have to determine here is whether such a case has been averred.

Now, as I read the condescendence of the pursuer, there is not a single averment from beginning to end that has any natural reference to a period anterior to 1846. There is no mention of any other date. In particular, there is no mention of 1839. For anything that appears on the face of the pursuer's condescendence, Mr Stewart might have become proprietor of the Omoa Iron Works after Mr Dixon became proprietor of Carfin. In the 1st article of the condescendence Mr Dixon is said to have become proprietor of Carfin at Whitsunday 1846. The 2d article states "that the late Robert Stewart was the proprietor of the Omoa Iron Works, which are erected on ground which belonged to him, and situated to the eastward of the estate of Carfin. There are several furnaces in operation at these works, and for a considerable number of years past the said Robert Stewart was in the practice of depositing, in a reckless and illegal manner, and with a total disregard to the consequences afterwards condescended on, large quantities of slag, or refuse from furnaces, on ground which formerly belonged to the late North Hamilton Dalrymple, Earl of Stair, but which now belongs to the defenders, the trustees of the said Earl, close to the banks of the Tillon or Cleland Burn. Mr Stewart died on 12th September 1866. This speaks of operations which have been going on for a considerable time, to the injury of the pursuer's estate, which he acquired twenty years before. The natural construction of these statements is, that the injury was done *since* he acquired the estate. But that is not left to mere inference. The 3d article merely describes the position of the burn. The 4th and 5th describe the action of the slag when it finds its way into the burn but have nothing to do with the matter of date. But the 6th commences thus:—"For some time, the damage done to the pursuer's lands of Carfin by the slag carried down, as represented, was not very marked, but latterly the slag has come down in such increased quantities as to

cause serious damage thereto," &c. Here again there is no specification of dates—nothing to suggest that the operations complained of were anterior to the pursuer's acquisition of the estate, for the estate is described as the *pursuer's* lands. The terms of the article do not carry back beyond twenty years. If there were any doubt as to the reasonable construction of this, it would be entirely removed by the pursuer's answer to the 3d statement of the defenders, in which he says:—"It is only within the last ten years, and chiefly within the last five years, that the damage done to the pursuer's land commenced to be serious." This may be taken as a construction of the words in the 6th article of the condescendence "for some time," and "latterly." And there is therefore not the slightest foundation in the record for the kind of case the pursuer has been trying to bring within the issue proposed. I therefore think the contention of the defenders should be given effect to; and the only suggestion I wish to make is, to omit the words "the said" in the issue. It is not necessary to say much as to the issue proposed by the defenders. The essential objection to them both is, that there is no foundation for them in averment. The pursuer claims for damages during the last twenty years, and there is nothing in the defenders' statement against this. On the contrary, there are averments putting acquiescence out of the case. For it is said that there were no injurious operations to acquiesce in; it is said that after Mr Stewart acquired the iron works, the practice of depositing slag in the burn was discontinued, and only on two occasions there was an accidental slip of slag into the burn. How the pursuer could acquiesce in the despositation of slag in these circumstances the defenders have failed to explain.

The other Judges concurred.

The pursuer's issue, as amended, was approved of, and the defenders' counter issues were disallowed.

Agents for Pursuers—Melville & Lindesay, W.S.
Agents for Defenders—James Webster, S.S.C.

Thursday, July 4.

SECOND DIVISION.

MILNE *v.* BAUCHOPE.

(*Ante*, vol. iii., p. 372.)

Reparation — Slander — New Trial — Contrary to Evidence — Head-Master — Privilege. In an action of damages for slander at the instance of a school-mistress against a master, who claimed to be head-master of the school and who maintained the privilege of his situation to utter the slander libelled on, new trial refused, in respect the slander did not fall within the privilege.

In this case, Eliza Milne, teacher, was pursuer, and John Bauchope, teacher, was defender. The following issue was submitted for the pursuer:—

"It being admitted that the pursuer is a certificated teacher, and was infant schoolmistress of St Mary's Sessional School, Edinburgh, from October 1861 to July 1875, and that the defender was, during said period, and still is, a master in said school.

"Whether, on or about the 10th day of January 1865, the defender did write and transmit, or cause to be written and transmitted, to the Rev. Dr Grant, minister of the parish of St Mary's, Edinburgh, a letter in the terms contained in the schedule. And whether, in said letter, the defender did falsely and calumniously say of and concerning the pursuer that she had told falsehoods—to her loss, injury, and damage?

"Damages, £500."

The letter in question charged the pursuer with misrepresentations of fact regarding some of the pupil teachers; of conduct in many respects subversive of discipline; and concluded by saying:—"She questions some of the scholars about me in a way she ought not to do. She has spoken insolently and falsely to me and about me in presence of the pupil teachers and others. In many instances she has shown little or no interest in school, and she seems to be actuated by a spirit of petty annoyance. She has sometimes told direct falsehoods, occasionally to the knowledge of the pupil teachers. Her conduct in ignoring my position, and the daily system of petty annoyance which she pursues, makes me desirous of having this state of matters remedied as soon as possible."

The following counter issue was submitted for the defender:—

"Whether the statements in the said lettter, to the effect that the pursuer had told falsehoods, are true?"

The jury, by a majority of nine to three, found that, although by the letters and documents before the Court the defender is regarded as head-master, there is no evidence to show that he was appointed to such an office, and the jury do not recognise him as such; also by the same majority they found for the pursuer, and assessed the damages at £10.

The defender moved for a new trial, on the ground that the verdict was contrary to evidence, and obtained a rule.

J. C. Smith and Kebe showed cause.

Watson and Gloag in support of the rule.

At advising—

Lord Cowan said—I am of opinion that the verdict ought to stand, and that a motion for a new trial should be refused. That the pursuer's issue was proved, and that the counter-issue was not supported by evidence of any materiality whatever, are positions which are indisputable. From the alleged position of the defender as head-master of the school, it was argued that, as malice was not established, the verdict ought to be set aside. The terms of the verdict on this point are—"That although by the letters and minutes before the Court the defender is recognised as head-master, there is no evidence to show that he was appointed to such a situation." It was as head-master that the defender claimed privilege, and the jury found him not appointed to that situation. But the verdict proceeds—"And they do not recognise him as such." They refuse to recognise him as head-master in the question in the issue before them. The operative part of their finding as regards the case they were trying is this latter part. On these premises they find for the pursuer. Two questions here occur—(1) Whether the jury have egregiously erred as to the view they have taken of the position of the defender as head-master? and (2) whether they have egregiously erred in refusing to recognise him as head-master in this question with the pursuer? On these points there is evidence both documentary and parole:—(1) The position of the defender in certain minutes and letters is stated to be that of