ligation to convey, and if clear in its terms, is assuredly effectual. There is no question of power.

He has executed a general disposition and conveyance of all his property, heritable and moveable, real and personal, in favour of Miss Robina Thoms, his illegitimate daughter; and this action of reduction has been brought to set aside that conveyance.

The pursuer, the brother and heir of Alexander Thoms, came into Court alleging that the disposition was intended to convey only personal estate, and that it was fraudulently impetrated from the granter by the defender and her agent Mr Welch, on the false pretence that the deed did convey nothing but personal property, and that, on that assurance and in that belief, the late Mr Thoms signed the deed. It has now been ascertained by the verdict of a jury that these averments are without foundation. It is no longer disputed that a small heritable property was conveyed. We must now hold that there was no essential error, and no fraud, and that the granter did intend to convey some heritage,—thus contradicting the pursuer's plea that only personal property was meant to be comprehended. But notwithstanding the verdict, the pursuer insists on the declaratory conclusions of the action. He maintains (1st), that the general disposition was inhabile as a conveyance of the estate or an obligation to convey the estate of Rumgally; that the deed could not convey the estate, even though it were clear that it was the granter's intention to include it: And (2d), that from the terms of the deed, and the evidence afforded by the surrounding facts and circumstances instructed by the record and the documents in process, it plainly appears that the late Mr Thom did not intend to include the estate of Rumgally in his general conveyance. On the first of these points I concur in the opinion of Lords Benholme and Neaves, and also in the remarks of Lord Barcaple. I do not think that the argument of Lord Curriehill on the state of the titles and the feudal difficulties of procedure is well founded. On the second point I am of opinion that there are no sufficient grounds for limiting the comprehensiveness of the general disposition. I gather the intention from the words of the deed, and I see no reason to doubt that the granter meant what he has said, and did not mean to make an exception which he has not expressed. In regard to the allowance of proof, I have only to say, 1st, that proof of the expression of intention otherwise than by the deed, is out of the question; and 2nd, that proof has not been offered or craved by either party. In the absence of proof I look to the clear words of the deed.

Even if I felt at liberty to speculate as to the probable intention of Mr Thoms, I do not think that I could arrive at the conclusion that he intended to exclude this landed property from his general conveyance. I see nothing to support that inference. It is now clear that the pursuer's plea, that the granter meant only to convey personal estate, is not well founded. He meant to convey, and did convey, one heritable estate. The deed bears to be a conveyance of all his heritable estates. I see nothing unnatural or unreasonable in believing that he meant to do so. He had educated this daughter, who was living in family with him, and for whom it is obvious that he entertained affection, and it may truly be said, that there is nothing improbable or unnatural in his giving her this estate. But I enter on no such speculation. The words of the deed are clear and wide. It is impossible to gather from its terms any materials for presuming an intention contrary to its terms; and there is nothing in the state of the titles, or in what we see of the surrounding facts and circumstances, which can justify me in construing the deed otherwise than according to its own terms. I retain the views which I expressed on the question of intention in the case of *Hepburn*, and in the case of *Chisholm*, and I do not think that I am in any way departing from these views in now expressing an opinion, which to my own mind is clear, in favour of the defender in this cause.

Agent for Pursuer—A. J. Napier, W.S.

Agents for Defender—Hill, Reid, & Drummond, W.S.

Monday, March 30.

SANDERSON AND MUIRHEAD *v.* MACFARLANE AND OTHERS.

Church—Presbytery—Heritor—Assessment—Minister—Cautioner. Tradesmen employed to execute repairs on Parish Church, sued the parish minister and the presbytery, conjunctly and severally, for payment. The minister died, and the action was transferred against his representative, between whom and the pursuers the action was litigated, no decree being taken against the presbytery, although they lodged no defences. The Lord Ordinary gave judgment against the representative of the minister, on the ground that the minister was proved to have been the direct and immediate employer of the pursuers, but the Court recalled, and remitted to the Lord Ordinary, to give the pursuers an opportunity of following out the action as against the presbytery. Observations as to the duty of the presbytery in recovering payment, from the heritors, of the assessment for the repairs.

This action was originally brought by Messrs Sanderson & Muirhead, wrights and builders, Edinburgh, against the late Rev. Dr Macfarlane, minister of Duddingston, as an individual, and the Presbytery of Edinburgh, as a body, and the individual members of the Presbytery, concluding that "the defenders, viz., the said Rev. James Macfarlane individually, and also he and the other members of the Presbytery of Edinburgh, at least such of them as authorised the repairs to be made on Duddingston Church, referred to in the account thereof aftermentioned, ought and should be discerned and ordained, by decree of the Lords of our council and session, conjunctly and severally, to make payment to the pursuers of the sum of £959, 18s. 9¾d., being the amount of an account for materials furnished and work done by the pursurers, on the employment of the defenders," with interest. Dr Macfarlane having died after the execution of the summons, the action was transferred against Mrs Macfarlane, his widow and executrix, and, no defences being lodged, decree in absence was taken against Mrs Macfarlane, but no decree was taken against the Presbytery. Thereafter the decree against Mrs Macfarlane was opened up, and a record was made up between her and the pursuers. After a proof, the Lord Ordinary (Ormidale) found, as matter of fact, that the work for which the pursuers' account was charged was duly performed by them, and that no objection had been taken to the

sufficiency of the work, or amount of the charges therefor; that the pursuers were employed by the late Dr Macfarlane through Mr Charles M'Gibbon, architect, Edinburgh, to perform said work; that Dr Macfarlane undertook to see the pursuers paid for the work to be performed by them, and that the work was performed on the credit of Dr Macfarlane as an individual, and that therefore Mrs Macfarlane, as his executrix and representative, was liable to payment of the account, with interest—reserving her rights of relief, whatever they might be, against the Presbytery of Edinburgh and the heritors of the parish of Duddingston, and the individual members of these bodies. His Lordship, in a note, stated that he thought the proof made it clear that Dr Macfarlane was directly and immediately responsible to them as their employer. It was necessary only to refer to the evidence of Mr M'Gibbon and the pursuer (Mr Muirhead) taken in connection with the writings spoken to by them. The main defence was, that the pursuers knew the work was not on the private property of Dr Macfarlane, but on a parish church; that the Presbytery had authorised the work to be done, and that, therefore, they or the heritors were alone liable. But the only party who contracted was Dr Macfarlane, and it was not enough to say he merely acted as an agent disclosing his principal. The Presbytery had no funds to pay the account, and it was not said that any particular set of individual members of Presbytery were disclosed as the principals who were to be answerable. It was the same as to heritors.

Mrs Macfarlane reclaimed.

Clark and Lee for reclaimer.

N. C. Campbell and Gifford for respondents.

At advising—

Lord President—This is rather a troublesome case, and it is not very easy to form a satisfactory opinion in any view of it; but I have come to a conclusion upon one point on which I rather believe all your Lordships agree with me, that the case is not at present presented to us in such a shape that we ought finally to dispose of it. The mode in which this case has been treated by the pursuers is very peculiar. They brought this action originally against the late Dr Macfarlane as an individual, and also against the Presbytery of Edinburgh; and they concluded against those parties that they should be conjunctly and severally liable to them in payment of their accounts for the repairs made upon the parish church of Duddingston. Now, the manner in which the ground of action was originally set out in the pleas of law appended to the summons was this. They pleaded, in the first place, that the work having been executed by the pursuers on account of Dr Macfarlane, he is personally liable in payment of the pursuers' account. Then, secondly, that the Presbytery of Edinburgh having authorised the employment of the pursuers to execute the said work, the pursuers are also entitled to decreet for the amount of their account against the Presbytery—at least, they are entitled to decreet against such of the members of Presbytery as authorised the pursuers' employment. Now, the manner in which liability was said to be attached to each of the defenders in this way was very peculiar, and not very reconcileable, because, if the Presbytery of Edinburgh authorised the employment of the pursuers to execute the work, as the plea sets out, that must have been done through the agency or instrumentality of Dr Macfarlane, and that assumes that Dr Macfarlane was acting as the representative of the Presbytery in employing the pursuers. But then, on the other hand, the employment of Dr Macfarlane himself is rested on this ground only, that he individually employed them. Any difficulty arising from the mode of libelling the summons, however, would have been easily got the better of if the action had proceeded in ordinary course, and both defenders had appeared. But, unfortunately, before the summons was brought into Court, Dr Macfarlane died, and the course which the pursuers took was this:—They transferred the action against Dr Macfarlane's representatives, and then, no appearance having been entered for any of the defenders, on the 12th June 1866 they took decree in absence against the dedefender (Mrs Macfarlane) as her husband's executrix, but they took no decree against the other defenders, the Presbytery of Edinburgh. Then, Mrs Macfarlane came into Court and opened up the decree and put in her defence, and a record was made up as between the pursuers and Mrs Macfarlane. But still the pursuers took no decree against the Presbytery; and down to the present day they have never asked for such a decree, although the Presbytery have put in no defences. The record was made up between the pursuers and Mrs Macfarlane, and the only ground of action set out in the record is the ground of direct personal employment of the pursuers by Dr Macfarlane. I think, if we were called upon to determine the question whether Dr Macfarlane was the employer, it would be a question of considerable difficulty upon the evidence before us; but the argument was not confined to that. On the contrary, it was represented that, even though there was not anything to show direct and complete employment as between Dr Macfarlane and the pursuer, yet still Dr Macfarlane had, by his acting, become personally answerable, either as cautioner for the Presbytery, or in some manner as a guarantee to the pursuers that their account should be paid; and that, therefore, his executrix is now responsible for payment. This seems to be inconsistent with the plea against the Presbytery; but I am not disposed to say that some such ground of liability may not ultimately be established against Mrs Macfarlane. I do not wish at present to give any opinion upon that, but I am of opinion that the pursuers are not entitled to take the course they have done, especially in the present state of the record, and to go directly against the executrix of Dr Macfarlane without taking any action at all against the Presbytery. I think I might suggest to your Lordships, as the proper course in the present stage of the case, that the Lord Ordinary's interlocutor should be recalled *in hoc statu*, and that the case should be remitted to the Outer House, to give the pursuers an opportunity of taking proceedings against the Presbytery. I desire to say no more, because the question may come before us in a different shape. We may have the Presbytery before us. A great deal of the ground on which Mrs Macfarlane has been sought to be made liable may either be removed or strengthened when the whole case is discussed as against the Presbytery.

Lord Curriehill—I agree with your Lordship. Taking the position in which the case at present stands, and in reference to the pleas which have been stated in the summons, I think that, in the exercise of a sound discretion, the course which your Lordship has suggested is the proper one.

Lord Deas—I quite concur in the course which your Lordship has proposed. I think it is very un-

fortunate that the decreet against the Presbytery has not been followed out. There has been nothing suggested to us to show that the decreet against the Presbytery should not have been carried out unless the doubt—it may perhaps be more than a doubt, I do not know—as to whether the assessment was laid on upon a right principle. I think that has been suggested as an obstacle to the decreet being carried out.. Now there is really no obstacle at all. I do not mean to give any opinion as to whether the assessment should be laid on upon the landward heritors or upon the landward and burghal heritors; but it is quite clear that, if the Presbytery had gone wrong, all that they have got to do to get the matter put right is to direct the collector to proceed against some one heritor for his share of the assessment, and the heritor so proceeded against will either pay or bring the matter under review of this Court, so as to have it ascertained whether the assessment has been put upon a right principle or not; and if it comes to this Court either by way of suspension or in any other way, it will be the duty of the Court, if they think the assessment has been laid on upon a wrong principle, to direct that it be laid on upon a right principle. We have done that again and again. The whole thing is not to fail supposing the Presbytery may have mistaken the way in which the assessment is to be levied. It is the duty of the Presbytery, having made the decree and appointed the collector to collect the money, to direct him to proceed, or else to set the matter right in some other way. I do not wish to give any opinion as to whether the Presbytery may or may not be liable as employers here. I do not say that they are. I do not wish to say anything about that, because they are called here as defenders upon the footing that they are proper defenders, and, whether they are liable or not, I agree with your Lordship that the case ought to proceed against them; but I would merely say this, that, suppose it were to be assumed that as long as the Presbytery go on to do their duty they incur no liability, it does not follow that, if they do not give the proper directions, they won't become liable. And it is obviously the interest of the Presbytery to avoid any question of the decreet; and, if they wish to avoid it, they have only to take the course which I have just suggested. In the meantime, if it were clear that Dr Macfarlane became personally and directly liable to these tradesmen for their amounts, whatever the Presbytery should or should not do, there might be ground for saying the pursuers were entitled to decree against his executrix. I do not desire to dispose of that finally just now; but I would say this, that in so far as I have any opinion upon the matter, it is that Dr Macfarlane did become bound that the matter would be carried through before the Presbytery. I incline to think that he became bound to that extent, but I do not see my way to hold at present that he became bound that he was to pay personally and directly as the direct employer, personally responsible to those tradesmen for their accounts. I do not at present see that. If he had given a guarantee of that kind, it may be that it would have fallen under the Mercantile Amendment Act, and the pursuers would have proceeded now-a-days (which they could not have done before) directly against him, leaving him to seek his relief from the Presbytery. But I do not think at present that that is the nature of his obligation. I think the nature of his obligation was that he guaranteed that the thing should be carried on, and go through in the usual way; and if that be the nature of his obligation, the Mercantile Law Amendment Act has nothing to do with it, and the tradesmen, in that view of it, would not be entitled to go directly against him, and leave everybody else out in the way that is proposed here under the Lord Ordinary's interlocutor. I do not see my way to that, but I do not wish to go any further than suggest these things for the consideration of all parties. I don't wish to give any express decision upon them. I think this is a case in which the assessment had better have been followed out in the usual way before resorting to this Court, and I think it would be a great deal better for all parties that this were still done.

Lord Ardmillan—The purpose for which these pursuers are seeking payment is the repair of the parish church; and undoubtedly the parties who generally are liable for such repairs are the heritors, according to some assessment or other. I do not differ from your Lordship's proposal not to decide at present whether the liability rests with the Presbytery, or whether the Presbytery are bound to proceed against the heritors, or whether there is any liability against the executrix of Dr Macfarlane. The one point upon which I really have no difficulty is that the one result that would be contrary to all justice would be that these tradesmen should not be paid.

Lord President—There is not the least cause for apprehension of that in the long run.

The Court recalled the interlocutor of the Lord Ordinary, and remitted the case to the Outer House, to give the pursuers an opportunity of proceeding against the Presbytery in terms of the conclusions of the summons, or otherwise as they might be advised, reserving in the meantime all questions of expenses.

Agents for Pursuers—Murray, Beith, & Murray, W.S.

Agents for Defenders—A. & A. Campbell, W.S.

Monday, March 30.

SHARP *v.* WILSON.

Reparation—Slander—Veritas convicii. After a proof before the Lord Ordinary, damages awarded against a medical practitioner for slanderous statements as to incompetence and unskilfulness on the part of another medical practitioner.

Proof—Veritas—*Particular Case.* A defender in an action of damages for slander against a medical practitioner having, in his defences, alleged particular instances of unskilfulness on the part of the pursuer, so as to justify the defender's statements, *held* incompetent for either party to lead evidence as to other particular cases.

Hugh Sharp, member of the Royal College of Surgeons, England, residing in Cullen, in the county of Banff, sued James Wilson, licentiate of the Faculty of Physicians and Surgeons, Glasgow, also residing in Cullen, concluding against the defender for payment of £1000 in name of damages and *solatium.* It appeared that in February 1864 the defender wrote and sent to Dr Greig, Portsoy, a letter in the following terms:—

"*Cullen, 12th February* 1864.—Dear Sir, I understand you were called some time ago to attend Mrs