pany to the effect that they wished to investigate their affairs fully, and would require time, the Court of consent meantime appointed Mr Molleson, C.A., provisional liquidator.

In these circumstances, and Reid's petition being still in Court, Thomas Syme, a debenture holder, raised an action in the Court of Session concluding for payment of £1000, the amount contained in certain debenture bonds which he held of the company, and the provisional liquidator, with the concurrence of the company, in these circumstances presented a note to the Court applying to have Syme restrained from obtaining such decree.

The 85th section of the Companies Act 1862 was as follows:—"The Court may, at any time after the presentation of a petition for winding-up a company under this Act, and before making an order for winding-up the company, upon the application of the Company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the Court thinks fit."

Authorities—Lindley, ii., 1276, vol. i., *addenda*, 99; *In re The London and Suburban Bank*, 19 Weekly Reporter, 950; Cameron on Joint-Stock Companies, 136; *Re The Railway Finance Co. (Limited)*, 14 Weekly Reporter, 754; *Sdeuard* v. *Gardner*, March 10, 1876, 3 R. 577.

At advising—

LORD ORMIDALE—Mr Syme here finds that his claim as it exists at present in the form of a debenture bond does not give any power of execution. What he wants is that power, and I think he should have it. He undertakes to do nothing more than to get decree for this amount, and I feel no doubt that there has not been any sufficient ground shown upon which any restraint of this application should be granted. It is always in the power of the Benhar Company to come here again if they wish.

LORD GIFFORD concurred.

LORD YOUNG—I understand that this application to restrain the petitioner from obtaining decree is to be refused by your Lordships as not being warranted by the Act. The 85th section of the Companies Act of 1862 is—[*reads as quoted supra*]. If there were any question here—for example, whether the Benhar Company was to go into liquidation or not—it might be very inconvenient to have applications presented on behalf of individual creditors for decree constituting their claims. In such a case as that the Court will order such restraint, and order it moreover upon the condition that the restraining parties find security for any damages that might be sustained by the creditor in consequence of their action. This is the usual course in England, as may be seen readily from the passage in Lindley quoted from the bar.

In the present instance a holder of the debenture bonds of a company for whose liquidation a petition has been presented, wants a decree, and he prefers to have this to the bond in its present shape; the company have not any defence whatever to the action raised on the bond, and I cannot see that they are entitled to restrain. The question was fairly put to their counsel whether they were prepared to give any undertaking to find security for damages, but they refuse to do this, and yet, notwithstanding, wish us to interdict the pursuer from the simple process of taking the decree to which he is entitled as a matter of course, and to which no defence is offered.

The Court refused the application *simpliciter*.

Counsel for Pursuer—J. A. Crichton. Agents —

Counsel for Defenders—C. J. Guthrie. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Friday, December 13.

FIRST DIVISION.

SPECIAL CASE — WATSON AND OTHERS (MUNRO'S TRUSTEES).

Trust—Intention—Deduction of Liferent Interest of Heritable Subject in Estimating Division of Estate where One Share Bequeathed to Liferenter.

By trust-disposition and settlement the truster's wife was liferented in the truster's house, and the furniture and plenishings therein. The trustees were further directed after certain payments as mentioned in the deed "to make up a state and valuation of my trust-estate, heritable and moveable, wherever situated, including that part thereof in which my said wife is liferented as aforesaid . . . and on a valuation and corresponding state being so made out showing the free amount or balance of my said trust-estate, to convey, assign, or pay over one just and equal third part or share of such free amount or balance of my said trust-estate to and in favour of my wife." *Held* (*diss.* Lord Shand) that the value of the widow's liferent interest in the house, furniture, &c., was a proper deduction from the trust-estate preparatory to a division thereof among the beneficiaries.

This Special Case was submitted for the opinion and judgment of the Court by William Watson and others, testamentary trustees of the deceased Alexander Munro, parties of the first part; and the accepting and acting trustees under the antenuptial contract of marriage between Mr A. C. Ponton and Miss J. R. Munro, only child of Mr Alexander Munro, on the second part.

Mr Alexander Munro died on 11th July 1877, survived by his wife Mrs Isabella Munro and by an only child by a former marriage. On 8th September 1871 Mr Munro and Mrs Isabella Munro his wife had entered into a mutual trust-disposition and settlement, the first three purposes of which were in the following terms:—"*First*, For payment of my just and lawful debts, deathbed and funeral expenses, and the expense of carrying this trust into effect, including the expense of maintaining and upholding in repair the heritable property hereby conveyed, and defraying the feu-duties, taxes, and other annual charges thereon. *Second*, In the event of my wife, the said Isabella Younger or Munro, surviving me, I direct the said trustees to give and allow her the liferent use and enjoyment during all the remaining years of her life thereafter of the dwelling-house,

offices, and garden and pertinents belonging to and presently occupied by me, called Viewfield House, situated at Merchiston, Edinburgh, together with the household furniture, silver plate, pictures, jewellery, bed and table linen, books, and other effects, which shall be situated in said premises and belonging to me at the time of my death, and that free of all feu-duty, taxes, rates, repairs, and other burdens and charges of maintenance, all of which shall be paid and defrayed by the said trustees out of the residue of my trust-estate and funds. *Third*, In the event of my said wife surviving me, I direct the said trustees at the first term of Whitsunday or Martinmas which shall happen after my death, and after paying or making provision for paying my said debts, &c., as mentioned in the first purpose of this trust, to make up a state and valuation of my trust-estate, heritable and moveable, wherever situated, including that part thereof in which my said wife is liferented as aforesaid, and the rents, profits, and issues of the said estate down to the said term, and if necessary to take the assistance of practical valuators or other men of skill, and on a valuation and corresponding state being so made out, showing the free amount or balance of my said trust-estate, to convey, assign, or pay over one just and equal third part or share of such free amount or balance of my said trust-estate to and in favour of the said Isabella Younger or Munro absolutely, which provisions in favour of my said wife in the event of her surviving me are hereby declared to be made irrespective of her entering into a second marriage, which event, should the same happen, shall no ways affect the said provisions or any part thereof: And further declaring that the foresaid provisions in favour of my said wife shall come in room and place of the provisions in her favour in the foresaid contract of marriage, and are in full satisfaction of all claims and demands which she as my widow can make or pretend against my heritable or moveable estate, or against my heirs and representatives."

It was contended by the second parties that before dividing the estate in terms of the trust-disposition and settlement there should be deducted from the gross amount the capitalised value of the liferent given to Mrs Munro in Viewfield House and furniture, and that Mrs Munro was only entitled to one-third of the nett estate after making that deduction.

The parties of the first part urged that the sum in question was not a proper deduction in the ascertainment of the estate for division, and that they were bound as trustees to pay Mrs Munro one-third of the free estate after such deductions only as were specially directed to be made in the clauses declaring the trust purposes.

The following question was submitted to the Court:—"Is the value of Mrs Munro's liferent interest in Viewfield House and furniture a proper deduction from the trust-estate under the administration of the first parties preparatory to a division thereof between Mrs Munro and the second parties? Or, Is Mrs Munro entitled to one-third of the said estate without deduction of the value of her said liferent interest?"

At advising—

Lord President—The question in this Special Case depends for its answer on the construction of certain clauses of the trust-disposition and settlement of the late Mr Alexander Munro. The general scheme for dividing the estate, which consists chiefly of house property, is set out in three purposes in the following terms—[*His Lordship here quoted the purposes as supra*]. The question which arises from the peculiar expressions in the deed, taking into consideration the intention of the testator as gathered from the general scheme, seems to me to be easily answered. The question is, whether the value of Mrs Munro's liferent interest in Viewfield House and furniture is a proper deduction from the trust-estate preparatory to a division thereof—that is to say, whether in estimating the amount of the three portions the subject Viewfield House and the furniture within it is to be brought into the valuation as if unburdened with the liferent, or whether the amount is subject to that deduction prior to the valuation. As an ordinary rule, I should say without hesitation that in estimating the free amount of an estate each subject must be dealt with separately, and the burdens on each part deducted before the valuation is made out, and that therefore Viewfield House being subject to a liferent interest could not be said to be a free subject. In short, it would be the reversionary interest after deduction of the liferent burden that would form a part of the testator's free estate. But it may be said, and was earnestly argued, that the peculiar expression of the third purpose of the deed takes it out of the common rule. That peculiarity is that in mentioning that the trust-estate shall be valued the trustee says "including that part thereof in which my said wife is liferented as aforesaid," and it is said that these words show that something different from the ordinary rule was present in the mind of the testator, and that therefore the ordinary rule cannot be applied for its interpretation.

There can be no doubt that Viewfield House and the furniture are to be included in the valuation. That would have been the case even if these words were not present, and on that ground the widow says the words must have been put there for a special purpose, and that purpose she says is, that Viewfield House is to be brought into the valuation as if there were no liferent interest upon the house. I cannot assign that meaning to the clause. It is true that the words are of no particular use. I cannot ascribe to them any particular effect, but I cannot think that by merely using them the testator meant anything different to what would have been the meaning if the words had been omitted. When he says that the different objects of the trust-estate are to be valued, he must, I think, mean that they are to be taken with reference to existing value subject to any burdens that may be laid upon them. If one house in the trust-estate is subject to some burden, such as an heritable security, it cannot be said that it is to be valued without deduction of the burden; but what is a liferent interest but a burden. What the general trust gets after the first and second purposes are fulfilled is simply the reversionary interest, and therefore it only appears fair to me that the subject liferented by the wife should be valued on the same principle as everything else—that is to say, should be valued subject to any burdens with which it is charged. On that ground I think that the first question should be answered in the affirmative.

LORD DEAS and LORD MURE concurred.

LORD SHAND—In this trust-deed the provisions are certainly not happily expressed, but having applied my mind to the question I have formed a different opinion to that stated by your Lordship as to the effect of these words. The question is one of intention, and I think that, taking the three purposes together as a whole, the evident intention of the truster was to give his wife a third of the gross amount of his estate including the value of her liferent interest, and in addition to give the use of Viewfield House and furniture over and above. If that be so, the widow would be entitled to have the third without any deduction. I do not think it is necessary for me fully to enter upon all the clauses, but I think the scheme was shortly this. Under the first purpose provision was to be made for the payment of feuduties, &c., as the trustees should think fit, and thereafter, and after all debts were paid, under the third purpose the trustees were directed to make a state and valuation of everything that was left. There the important words occur. In directing that this valuation should be made the truster expressly provided that in the estate there shall be included "that part in which my said wife is liferented." In seeking to discover the intention of a testator it is a cardinal rule to give effect to any special words, and the difficulty I feel in concurring here is that I think the judgment pronounced gives no effect to these special words. I think the truster meant that the liferent subject should be valued, and has specially said so, while he has not added "but deducting the widow's liferent." The presence of the special clause that the liferent subject is to be included, and the absence of other deduction, is the determining element in my difference of opinion.

The Court therefore affirmed the first alternative of the question put.

Counsel for First Parties—M'Laren. Agent—David Cook, S.S.C.

Counsel for Second Parties—Rutherfurd. Agent—J. T. Mowbray, W.S.

Tuesday, December 17.

SECOND DIVISION.

[Sheriff of Midlothian.

GREEN *v.* CHALMERS.

Reparation—Slander—Privilege—Necessity of Averment of Malice and Want of Probable Cause.

Held that information given to police constables to the effect that the gardener of the proprietor in the neighbourhood had been connected with a theft from his master's house was privileged.

Circumstances which were *held* (*diss.* Lord Young) insufficient to establish malice and want of probable cause on the part of a defender who had successfully pleaded privilege in an action of damages for slander, and *Opinion per* Lord Young, that in such an action the absence of an averment of malice upon record is not material, the distinction between privileged or unprivileged cases resolving itself into a question of presumption and *onus*.

This was an action of damages for slander at the instance of James Green, gardener to Mr Fraser, Murrayfield, near Edinburgh against Miss Janet Chalmers, who inhabited and occupied the villa next adjoining Mr Fraser's. In December 1877 some articles had been stolen from Mr Fraser's house. The ground of action was that the defender in January following made statements to two police constables, who had called upon her to get their call-book marked, to the effect that the pursuer was concerned in the theft. Malice and want of probable cause were not averred. The defender denied having made the statements complained of and moreover pleaded privilege. She did not attempt to justify the statements as true. The action was brought in the Sheriff Court at Edinburgh.

The Sheriff-Substitute (HALLARD) found the slander proved, and held that there were no grounds for the plea of privilege. In his note the Sheriff-Substitute, *inter alia*, said—"On the record, the case of the defender is not an admission in express terms that the statements complained of were made. Yet there is a plea of privilege of which in the absence of such an admission it is somewhat difficult to trace the legal foundation."

The Sheriff (DAVIDSON) pronounced this interlocutor:—"Finds that on or about the 10th day of January 1878 the defender did state to George Johnston Bain and Andrew Peebles, then constables of the Edinburgh County Police, who had called upon her to have their call-book marked, that the pursuer was a bad lot, and had been caught stealing in a small way, and that he was worth watching; that on or about the 17th of January 1878 the defender did state to the said George Johnston Bain and Andrew Peebles, who had again called on her for the above purpose, that if the said constables would search the pursuer's house she had no doubt they would there find the missing property, meaning some articles that had shortly before been stolen from the house of Mr Fraser, the pursuer's master—meaning thereby that the pursuer had stolen the said articles; that the said statements were made by the defender in her own house, and to the said constables only, no other person being present; that the said statements were calumnious, and calculated to injure, and injurious to the pursuer in his character and feelings: Finds that the defender is liable in damages to the pursuer for the said statements; Fixes the amount of the same at £20, for which sum decerns against the defender."

He added this note:—

"*Note.*—. . . It is proved, the Sheriff thinks, that the defender did state what is set forth in the above interlocutor to the two constables. It is not proved she said it, nor is it alleged she did, to any other persons. The fact of her stating it to the constables rests on the evidence of the constables alone. So far as appears if these men had not repeated to the pursuer what had been said this case would not have been heard of. . . .

"The Sheriff has had some hesitation in this case created by the conduct of these constables. There had been and was in the neighbourhood much