

proceed only by consent of parties, which had not here been obtained. But in respect that this was an interlocutory judgment, and none of the Judges had formally intimated dissent, leave to appeal was necessary.

Argued for the petitioners—The question raised by the case was one of public right depending solely upon an inquiry into facts, and the usual way of trying such a case was on issues before a Lord Ordinary and a jury. There was greatly increased cost and uncertainty in an inquiry by proof before a Lord Ordinary compared with the sharp decision given by a jury. As there might be other cases in which the Society would have to act in the public interest it would be well to have the proper course of trial finally sanctioned.

Counsel for the defender was not called on.

LORD JUSTICE-CLERK—The question in this case when it was previously before us was, whether it was more desirable to have this case tried before a jury or by a Judge without a jury? After consideration we found it better to have the case tried before the Lord Ordinary without a jury, and we pronounced judgment accordingly. I need not state what reasons induced us to come to that decision, as they were given at the time. Now, in this matter of procedure we are asked to stop the whole proceedings in the case in order that this company may appeal to the House of Lords. I am of opinion that there is no ground for our granting the request, and think therefore it should be refused.

LORDS CRAIGHILL and RUTHERFURD CLARK concurred.

LORD M'LAREN—If it could be said that there was any fixed rule that such cases as this should be tried by a Judge without a jury I could see some reason for the petitioners' desire to appeal. But no such rule has been laid down in this Court. It is admitted that the judgment of the Court in the previous stage of this case was given in exercise of that discretion which is vested in the Judge and in the Division to say what is the proper mode of trial. But as in any appeal the House of Lords would refuse to interfere with the discretion of the Court, I see no good that can arise to the petitioners from an appeal.

LORD YOUNG was absent.

The Court refused to grant authority to the petitioners to present a petition of appeal to the House of Lords against the interlocutor of 23d October 1886.

Counsel for Petitioners—Graham Murray—W. C. Smith. Agent—A. Newlands, S.S.C.

Counsel for Respondent—Sol.-Gen. Robertson, Q.C.—Asher, Q.C.—Cosens. Agents—Tait & Crichton, W.S.

Tuesday, November 16.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

GORDON v. THE BRITISH AND FOREIGN METALINE COMPANY AND OTHERS.

Reparation—Company—Wrongous Use of Arrestment—Malice.

An action was brought against a company and the individual partners, jointly and severally, concluding for damages for alleged wrongous use by the defenders of the diligence of arrestment. The arrestments were used on the dependence of certain litigations, and the pursuer averred and put in issue that they were used maliciously and without probable cause. The defenders pleaded that the action ought to be dismissed, because the pursuer must prove malice, of which a company could not be guilty. *Held* (1) that this plea should be repelled, because the company being a *persona* capable of taking the proceedings complained of, must be answerable in law for them; but (2) that the pursuer was not entitled to put in issue whether the alleged wrong was done by the defenders or "one or more of them," so as to meet the case of one or more of the individual defenders showing that they never authorised the arrestments.

Reparation—Judicial Slander—Issue.

An action was brought for a slander alleged to have been uttered by the statements of the defender in an action which he had raised against the pursuer, and which had been dismissed. The statements complained of formed the ground of action in that process. They were alleged to have been made groundlessly and maliciously. *Held* (*alt.* judgment of Lord M'Laren) that while the pursuer must prove malice and want of probable cause, an issue could not be altogether disallowed on the ground that the statements in that action were not only pertinent to but formed the ground of it, and that the party had been entitled to submit them to a Court.

In an action of damages for judicial slander the pursuer must not only aver malice, but set forth facts from which a jury may reasonably infer it—*Scott v. Turnbull*, July 18, 1884, 11 R. 1131, commented on.

In May 1886 John Gordon junior brought this action for damages against the British and Foreign Metaline Company, manufacturers of metaline carrying on business in Dundee, and William Bruce Thompson, William Stiven, and David Stewart, "the individual partners of the said company, as such partners and as individuals." He concluded against the defenders, "jointly and severally," for £1000 as damages.

The following were the material averments of the pursuer. He stated (Cond. 2) that from about 1st May 1878 to the end of April 1879 he was in the service of and interested in the profits of the Metaline Company, and that three months after that he left their service and set up in business for himself in Dundee. "Since leaving their service, the defenders, the partners of said company, have cherished the strongest feelings of ill-

will towards him ;" that on 20th October 1885 he obtained decree of the Court of Session for £350 in an action against John Shields of Balhousie Castle, Perth. "The defenders having immediately become aware of this, resolved to take that opportunity of gratifying their feelings of malice and ill-will towards pursuer, and their desire to injure him, by preventing him obtaining payment of the sum thus decerned for, and by, if possible, ruining his character and credit by means of the expedients after mentioned. They communicated with Mr Shields, requesting him to decline payment of the sum decerned for, and upon the day following the decree they threatened the pursuer with an action against him for an account which they alleged he was due, and which had never been mooted between the parties since their accounts were squared and settled shortly after the pursuer leaving their service ; and they further threatened that they would use arrestments in Mr Shields' hands, and so prevent the pursuer from obtaining the money due by him. The pursuer through his agents at once protested against the arrangement with Mr Shields, and against the threatened proceedings being carried out. The defenders nevertheless intimated their determination to proceed, although warned of the great damage which would be caused, while they stated that they would not have pressed such a claim 'but for the fortuitous concurrence of circumstances in Mr Gordon's favour.'" He further stated (Conds. 4 and 5) that "accordingly" on 4th November 1885 the defenders raised an action against him for £125, 0s. 7d. sterling in Dundee Sheriff Court, which they alleged to be due to them in respect of an alleged account incurred by him between 13th January 1879 and 11th December 1880, and also used arrestments on the dependence to the extent of £140, less or more, of the money in Mr Shields' hands, and declined to restrict the sum to £140 so as to enable him to uplift the surplus of £210 ; that he was ultimately assoilzied from the conclusions of that action ; that on 18th December 1885 they raised another action against him for £500 in the name of damages, "founding upon grossly untrue allegations as to the present pursuer having surreptitiously obtained the secret of their business, and having fraudulently made use of an alleged trade-mark," and used similar arrestments on the dependence of this action ; that "this second action was entirely groundless," and was dismissed by the Sheriff-Substitute and Sheriff. "(Cond. 7) Neither of said actions was raised in *bona fide*, but both were initiated and prosecuted with the sole purpose of gratifying the malice and ill-will foresaid, and, if possible, of extorting money from the pursuer. The laying-on of the arrestments in both actions was also carried out solely from said motives, and with a view to injure the character, credit, and reputation of the pursuer. The said arrestments were so laid on and continued maliciously and without probable cause, and in spite of repeated warnings as to the great loss and inconvenience caused thereby ; and further, without even the restriction already referred to, which would have amply protected their rights." He set out (Cond. 9) that he had suffered great loss in credit and in business by these proceedings, and by the defenders' conduct in a multiplepounding raised by Shields to distribute the money in which he had been found liable to him (the pursuer)."

"(Cond. 10) In the first-mentioned Sheriff Court action it was averred on record by the present defenders that the pursuer Mr Gordon had improperly and illegally endeavoured to trade upon their alleged registered trade-mark, 'Metalline.' The allegation was and is wholly untrue. Nevertheless, in the second action in the Sheriff Court, which as already averred was raised solely with the object of extorting money from the pursuer, and of gratifying their malice and ill-will towards him, and of ruining his character, reputation, and credit, it was alleged by the present defenders in their condescence that the present pursuer Mr Gordon 'unwarrantably pried into and obtained insight and information in regard to the secrets of their said invention and manufacture of metalline.' It was further alleged by defenders in said condescence that 'after leaving their said employment, and in the years 1881, 1883, 1884, and 1884, or during a portion of all or some of these years, the defender fraudulently and illegally represented and held himself out to the public as a manufacturer of the pursuers' invention of metalline, and surreptitiously and illegally used and appropriated or imitated the secret of the pursuers' invention or manufacture of metalline, and also fraudulently and illegally used and appropriated or imitated the pursuers' said registered trade-mark, "Metalline." The defenders in said condescence further alleged as follows—'Amongst others to whom the defender during said years or some of them fraudulently and illegally represented himself as a manufacturer of the pursuers' said invention of metalline under the pursuers' said registered trade-mark, "Metalline," and also as a seller of such metalline, were the following, viz., William Alexander & Co., blockmakers, Govan ; Fisher & Co., oil merchants, Leeds ; A. H. Bateman & Co., East Greenwich ; A. A. Rickaly, engineer, Sunderland ; F. S. Sandeman, manufacturer, Dundee. The defender also during said years or some of them fraudulently and illegally got his name inserted in Slater's Directory for Scotland as a manufacturer and seller of the pursuers' invention of metalline under their said registered trade-mark. He also fraudulently and illegally advertised himself in the London newspaper *Engineering* as a manufacturer and seller of the pursuers' said invention of metalline under their said registered trade-mark, "Metalline." The defenders further alleged in said condescence that 'the pursuers by and through the defender's fraudulent and illegal representations as before mentioned, and of his fraudulent and illegal use and appropriation or imitation of their said registered trade-mark, "Metalline," and advertising, &c., and unwarrantably infringing the pursuers' rights as before mentioned, sustained serious loss and damage.' (Cond. 11) Said allegations were grossly untrue. They are of and concerning the pursuer, and were made by the defenders falsely, calumniously, maliciously, and without probable cause. They falsely and calumniously represent that he surreptitiously obtained certain secrets of the defenders' business, and that he by means of false and fraudulent representations held himself out to the public as a manufacturer of the defenders' invention of metalline, by surreptitious means used and appropriated or imitated the secret of the defenders' invention, and was guilty of fraudulent and

illegal use and appropriation or imitation of their trade-mark, 'Metaline.' Said allegations further falsely and calumniously represent that the pursuer fraudulently and illegally represented himself to the persons above named as a manufacturer and seller of defenders' said invention of metaline under their alleged trade-mark, and that he fraudulently and illegally got his name inserted in Slater's Directory for Scotland, and advertised himself in the newspaper called *Engineering* as manufacturer and seller foresaid. The grossly false and malicious charges above mentioned were currently reported in Dundee district, and have become widely known. They have caused the pursuer the deepest pain, and they have most seriously injured his business connection, credit, and reputation. By means of them, and the arrestments before mentioned, the pursuer has suffered great loss and damage, for which the defenders refuse to make reparation to him. The pursuer estimates the damage due to him in respect of said arrestments at the sum of £500, and in respect of said slanders a similar sum."

In defence the defenders other than Thompson pleaded—" (2) The defenders being entitled to use said arrestments, and having done so on reasonable grounds, in good faith, and without malice, should be assolvizied with expenses. (3) The allegations complained of being relevant and pertinent to the cause in which they were made, and the defenders having made them in *bona fide* belief that they were true, on reasonable grounds, and without malice, the defenders are entitled to decree of absolvitor with expenses."

The defender Thompson, who made a special defence, founded on his never having been, as he alleged, an active partner in the business, and on his having retired altogether at 1st February 1886, pleaded in addition—" (4) The defender not being responsible for any of the proceedings complained of, he should be assolvizied with expenses."

The following issues were proposed by the pursuer:—" 1. Whether, on or about the 4th day of November 1885, the defenders, or one or more of them, maliciously and without probable cause, used or caused to be used against the pursuer an arrestment in the hands of John Shields of Balhousie Castle, Perth, for the sum of £140, less or more, and caused the same to be continued until on or about the 18th day of May 1886, to the injury and damage of the pursuer. Damages laid at £250. 2. Whether, on or about the 18th day of December 1885, the defenders, or one or more of them, maliciously, and without probable cause, used or caused to be used against the pursuer an arrestment in the hands of the said John Shields for the sum of £500, and caused the same to be continued until on or about the 18th day of May 1886, to the injury and damage of the pursuer. Damages laid at £250. 3. It being admitted that the defenders raised an action of damages for £500 in the Sheriff Court of Forfarshire at Dundee at their instance against the pursuer on or about the 18th Day of December 1885, and that a record was made up and completed in said action, and it being further admitted that the condescence annexed to the petition in said Sheriff Court action contains the following passages:—[The passage in question is fully quoted in Cond. 10 as above given]—Whether the said statements or part thereof are of and concerning the pur-

suer, and are false and calumnious, and were maliciously inserted or caused to be inserted in the said condescence, to the loss, injury, and damage of the pursuer. Damages laid at £500."

On 27th October the Lord Ordinary (LORD M'LAREN) disallowed the third issue, and approved of the first and second issues as the issues for the trial.

"*Opinion.*—The issues which I propose to allow, being the first and second of those given in by the pursuer, are intended to raise the question of the pursuer's right to damages for the illegal arrestment of his funds. They are in the usual form, and under them the pursuer must prove malice and want of probable cause as conditions of his claim to recover damages. The chief question regarding these issues is as to the insertion of the words 'or one or more of them.' The defenders object to these words on the ground that the action is instituted against them jointly and severally. They contend that under an action instituted in this form it would not be competent to obtain a decerniture against one or more of the defenders, but only against the whole body of partners collectively. They further object to the action altogether in so far as instituted against a mercantile firm or copartnery.

"I think that as the arrestments complained of were used by the company and its partners, the pursuer is within his rights in bringing the action against the parties who used the arrestments, designing them in the terms which the defenders used in laying on the arrestments, as descriptive of the character in which they claimed to attach the pursuer's property. I think, also, that the pursuer is entitled to insert the words 'or one or more of them' to meet the possible case of one or more of the defenders establishing that he or they did not authorise the use of the arrestments. The pursuer is not proposing to discharge any of the defenders, or to withdraw his action against any of them; and in these circumstances I think the distinction founded on the circumstance of the action being directed against the defenders 'jointly and severally' is too critical, and is not supported by the authorities referred to.

"The third issue (which I propose to disallow) is intended to raise the question of the pursuer's right to recover damages in respect of allegations affecting his reputation made by the defenders in an action instituted against him in the Sheriff Court of Forfarshire.

"The representations made in that action were to the effect that the pursuer had infringed a patent, the property of the defenders, and had also improperly made use of information as to trade secrets which he acquired while in their employment. The claim in the Sheriff Court action was for damages in respect of these alleged wrongs, and there can be no doubt that the description of the alleged wrong was pertinent to the action. The action, however was dismissed as irrelevant, because, as the Sheriff-Substitute explains, it did not appear that there was any subsisting patent, and it was not explained what were the trade secrets which the defender (the present pursuer) had used or disclosed. The case intended to be made under the issue is that there was no real cause of action to justify the Sheriff Court proceedings, and that these proceedings were merely the vehicle of spiteful insinuations against the pursuer's honesty or integrity. How-

ever this may be, I am very unwilling to make a precedent for sending to trial an issue of judicial slander where the matter alleged to be libellous is really the whole subject-matter of the action. It is the privilege of any member of the community to submit his supposed claims and grievances to judicial decision, even where these are unfounded or, it may be, purely imaginary. If the charges are investigated and disproved or dismissed as irrelevant, no injury is done to the reputation of anyone unless to the party whose statements are found to be absurd or untrue. There may be exceptions. But I have difficulty in figuring a case where a defender would be injured by charges from which he successfully defends himself in a court of law. I think also that it is for the public interest that litigants should not be deterred from discussing their claims and grievances in open court through the apprehension that if unsuccessful an action of damages would lie against them.

“If the issue in question is allowed, it will be difficult to assign limits to such claims. Any person against whom an action of damages for negligence is unsuccessfully maintained may retaliate with an action of judicial slander on the ground that his capacity for the conduct of his business, or his character otherwise, is affected by imputations of inhumanity or want of care in matters affecting the safety of his men. I do not know any instance of an action of judicial slander being sent to trial, except where the slander was extrinsic to the subject or motive of the action. And there is nothing that I can see in the present case to warrant a departure from precedent in this respect. Any annoyance or discomfort which the pursuer may have experienced in consequence of the epithets applied to his conduct in the defender's pleading is, in my view, no more than a part of the friction incident to public business, which everyone must submit to for the sake of general convenience. I do not enter into the question of the sufficiency of the averments of malice, for I rather incline to the opinion that no action will lie for injury arising from the mere fact of a claim of reparation being made unsuccessfully in a court of law.”

The pursuer reclaimed, and argued—*On the third issue*—In the case of judicial slander the pursuer must no doubt prove that the statements he complains of were maliciously inserted in the record, upon which he founds his action of damages, but here the pursuer was willing to do that—*M'Intosh v. Flowerdeu*, November 28, 1851, 14 D. 116; *Mackay v. The Commercial Bank of New Brunswick*, March 14, 1874, L.R., 5 P. C. App. 394. It was not enough, doubtless, to aver malice, but here there was a sufficient detail of the circumstances to enable a jury to infer malice from the conduct of the partners. *1st. and 2d. issues*—The action was laid against all the members as well as the company, and all the members were liable for the slander committed by the company. Thompson's individual case was based solely upon statements made by him which were denied. There was no doubt that an action for slander could be brought against a company as such—*Abrath v. The North-Eastern Railway Company*, June 22, 1883, L.R., 11 Q.B.D. 440; *Whitfield and Others v. The South-Eastern Railway Company*, April 29, 1858, 27 L.J., Q.B. 229; *Keith v. Outram and Company*, June 27, 1877, 4 R. 958.

Argued for the defender Thompson—If any of the partners of a company had cherished ill-will against any party, and made slanderous statements regarding him in an action at law, that slander could not be imputed to the company, and through the company to anyone who, although a partner of the company had taken no part in promulgating, and indeed did not know of the slanderous statements until after they were made. If the slander had been used in the course of the company's business, it might be different, but here it was not so—*The Western Bank of Scotland v. Addie*, May 20, 1867, 5 Macph. (H. of L.) 80; *Houldsworth v. The City of Glasgow Bank, &c.*, March 12, 1880, 7 R. (H. of L.) 53. These two cases showed that a company could not be found guilty of fraud, and by analogy could not be guilty of malice—*Stevens v. The Midland Counties Railway Company*, June 22, 1854, Hurl & Gordon's Repts. 353; *Western Bank of Scotland v. Bairds*, March 20, 1862, 24 D. 859. The words “or one or more of them” ought to be taken out of the issues; if these words were left in, the case was made to bear more heavily against the individual partners—*Taylor v. M'Dougall and Sons*, July 15, 1885, 12 R. 1304. The third issue ought not to be allowed—*Scott v. Turnbull*, July 18, 1884, 11 R. 1131.

Argued for the defenders Stiven and Stewart on the third issue—The case of *Scott v. Turnbull* (reported *supra*) was distinctly against the giving of such an issue. The insertion in the record of the word “malice” would not make a relevant averment of malice if the Court were of opinion that the facts did not show that the allegations in the record were malicious. Here there were no facts averred relevant to show malice. The arrestment had been laid on for a perfectly proper reason, viz., to recover a debt which the present pursuer owed to the Metaline Company. There was a higher privilege in judicial pleading than in the use of diligence; malice in the arrestment must be proved.

At advising—

LORD JUSTICE-CLERK—In this case the pursuer sues a company for damages on two grounds, one of which is the wrongful use of arrestments and the other judicial slander. The Lord Ordinary has granted issues on the first of these grounds, but he has refused the proposed issue on the ground of judicial slander. In regard to the first, and indeed in regard to both grounds, it is maintained that as the party is a trading company malice and want of probable cause cannot be pleaded against such a company. What the company, and those who act for the company, say, is not that the company were not entitled to sue an action or to use diligence, nor even that the company were not capable of using defamatory words and oppressive and illegal diligence, but that they were privileged, and that inasmuch as these were judicial proceedings malice and want of probable cause cannot be pleaded against them. It is said that in a claim for damages for wrongful arrestment it is incompetent to plead and prove against a company malice and want of probable cause. In the same way in regard to judicial defamation it is said that statements complained of are privileged, and that as the party who made the defamatory statements was a company malice and want of probable cause cannot be pleaded to avoid the privilege. That

being the way in which the questions come up, it must be quite manifest that it is not an ordinary case of allegation of moral delinquency against a company. I have my own opinion upon that general question. But this is a plea of privilege on the part of the alleged delinquent, who says the grounds on which privilege would be overcome cannot be pleaded because the delinquent is a company. I am of opinion that there is no ground whatever for such a contention. It may be quite true that the company cannot be guilty of moral wrong in one sense. It is said that a company has no *animus*. No more it has. It has no will, it has no memory, it has no conscience. But notwithstanding all these things, the supposed or imaginary *persona* which a company constitutes may contract obligations although it has no will, and although it has no memory and will it may be compelled to fulfil them. And it is mere getting into metaphysical subtlety to say that a company cannot be guilty of malice where the very nature of the proceeding in which the plea is taken necessarily implies that the *persona* has a power of action and a power of judgment, and therefore I should say also a power of exercising an arrestment illegally. These are the general views I take on the question raised here. The first thing said here is, that certain arrestments were used by the company, of whom the pursuer was originally, if not a partner, at least an agent, in the hands of a debtor of the pursuer. The second part of the action relates to certain defamatory statements made in an action raised by the company against the present pursuer. On the second ground it is said that these statements are irrelevant; that there is no specification of the circumstances from which malice is inferred. Now, at this point I should wish to say a few words on the case of *Scott v. Turnbull*, and the general principle which that case involved. The objection here is, that the mere allegation of malice, without a specification of facts which might infer malice and lead the jury to come to that conclusion, is fatal to the action. Now, I entirely agree in the view that was taken in the case of *Scott v. Turnbull*. Malice is in the breast of the party accused, and it cannot be known to the outer world without some act that evinces malice, and from which the existence of the malice is deduced or inferred. And therefore when a man brings an action alleging malice against a party in a position of privilege, he must have some reason to infer, some reason not in his own mind, but some reason deduced from outward acts or words of the person against whom the allegation is made. And all that the rule laid down in *Scott v. Turnbull*—and it had been frequently laid down before—was this, that he should not leave it on bare allegation; that he shall at least specify to some extent outward acts, words, or circumstances which have led him to infer that the party in question was using his rights maliciously. And I think that is quite reasonable, because otherwise a mere allegation of malice may be a mere random suggestion of which the pursuer has no grounds in fact to rest upon. But I do not think this case falls under that category at all. On the contrary, without saying in the least that the facts set out on the record necessarily lead to the conclusion that the proceed-

ings in question were malicious, I think they are at all events facts which a jury are entitled to deliberate upon, and decide whether they were in their view malicious. Shortly stated, the allegations are these. The pursuer was the agent of this company, engaged apparently in pressing the sale of a certain article said to be patented, although there are doubts whether the patent was good. The pursuer and the company parted, and the company it is said entered into negotiations with a debtor of the pursuer requesting him not to pay his debt, and they thereafter raised an action against the pursuer for £125, part of the sum arrested in the hands of the debtor, which amounted to £300. I do not say that that necessarily implies that there was malice but it was rather an irregular proceeding. The next thing we find is a proposal by the pursuer to allow so much of the money, £140, to lie in the hands of the debtor covered by arrestment if the arresting creditor would allow the rest to be uplifted. The case went on for the £125, and the company lost it, from which it appeared that there was no debt of £125 owing. Having lost that case they raised a second case, in which they made a variety of assertions which are said in this action to be calumnious and defamatory, to the effect that the pursuer, while their agent, had fraudulently ascertained the one secret that belonged to them, and had fraudulently disclosed it or traded on it. These are things put in issue, and that they were defamatory admits of no question at all. The question is, whether there is sufficient allegation on this record to justify a statement that these allegations were defamatory, and that they were made maliciously and without probable cause? I do not think there is any doubt of that. It cannot be said that there is any want of specification. I think the specification is sufficient, and I think that if the jury are satisfied when they hear the evidence that these statements were made maliciously, it cannot be objected to the statement that it is a bare allegation of malice without any specification of facts supporting it. As far as these grounds are concerned, therefore, I think the issues ought to be allowed. The Lord Ordinary has held that the issue on the second branch of the case ought not to be allowed, because these defamatory statements were in truth the ground-work of the whole action. I do not quite see that that is a sufficient reason for not granting the issue. On the contrary, it rather seemed to me that more importance must be attached to these defamatory statements by the fact to which the Lord Ordinary refers than if they had been merely incidental. The Lord Ordinary says the party should be satisfied with his absolvitor, but absolvitor may be no redress against injury done by such statements, if indeed the statements are false and injurious. I do not know of any precedent for making that distinction, and I am therefore inclined to grant an issue on both grounds.

LORD CRAIGHILL—The action brought before us by the present reclaiming-note is at the instance of the reclaimer, Mr Gordon, against the British and Foreign Metaline Company and the individual partners, as such partners and as individuals, and the purpose of its institution is to recover damages—first, for the alleged wrongous

use of arrestments; and secondly, for the judicial slander set out in the record. The conclusion is for a slump sum of £1000, and decree is sought against the defenders jointly and severally. The action is thus an action against the company. They are set forth as the wrongdoers, and as the parties by whom reparation is to be rendered, and unless the liability of the company shall be established, the pursuer must fail in his action. There is no case laid, either in the condescendence or in the conclusions, by which, if there is no liability upon the company, any liability can be brought home to the individual partners of the company either as partners or as individuals.

After the record was closed the pursuer moved for the approval of the issues which were submitted for the consideration of the Lord Ordinary. These were three in number, the two first relating to the alleged wrongous arrestments, and the third to the alleged judicial slander. The last was refused, the other two were granted, and the case is now before us for decision of the questions upon which the Lord Ordinary gave judgment.

The company does not object to the interlocutor reclaimed against in so far as it approves of the issues granted by the Lord Ordinary, but this part of the interlocutor is reclaimed against by Mr Bruce Thomson, an individual partner of the company. He contends that these issues ought not to be allowed, inasmuch as there is no relevant case stated for the pursuer. The irrelevancy is said to consist in this, that special malice is alleged, and must be proved, and that this cannot be established inasmuch as the defenders are a limited company. This in my opinion is an erroneous contention. The existence of malice is a fact, and there is no more incongruity in a proof of such a fact against a limited company than of any other fact which necessarily is an element of liability. If it can be proved against such a company that wrongous arrestments were used, proof that the act was done maliciously may be brought home to the company for anything that appears to the contrary, or can be imagined in the nature of the case. The difficulty of the proof is not the question. Its possibility and its competency are the only things now to be decided. Upon neither of these can reasonable doubt be entertained.

The company and Mr Thomson object to the third issue for the reasons explained by the Lord Ordinary, and also upon the ground that there is no relevant libelling of the malice imputed to the defenders. As to the former, my opinion is that the Lord Ordinary ought to have allowed the third as well as the two first issues. Judicial slander is a case of privilege, but not of immunity. If pleadings in an action are made the vehicle of slander, it is not the policy of the law to afford absolute protection. If malice is alleged there must be a trial, and if malice be established judgment for reparation must be pronounced.

The second objection ought also, I think, to be overruled. The case of *Scott v. Turnbull* no doubt raises a difficulty, for there is considerable similarity between the circumstances in the one case and those in the other, though these are not by any means identical. Nevertheless, were it not that every case truly in such a question is one of circumstances, I could hardly avoid the application of that decision on the present occa-

sion. I am not, however, for carrying that precedent further than is necessary. Were we to do so we would practically be deciding that which it is for the jury to determine, and all that we can competently do is to judge whether, if the facts are as represented by the pursuer, the jury may reasonably come to the conclusion that the defenders were influenced by malice.

Such a case is, I think, presented on this record, and accordingly I agree with your Lordship in thinking that the third issue ought to be allowed. To that extent there should be an alteration of the Lord Ordinary's interlocutor.

I may add, that when we come to the wording of the issues it will be well to consider whether the words "or one or other of them" ought not to be kept out of the first and second issues. The defenders, to whom liability for the wrong complained of is imputed, are the company, and the company only. The pursuer cannot recover unless company liability be proved. How that is to be done is not matter for present consideration; but it is plain that even if the individual partners are to be examined, and one or more of them are to prove that the arrestments were used by their orders, the evidence in this case will be immaterial unless the result be that the order given is proved to have been the order of the company. The name of the company, therefore, is all that ought to be introduced into the issue. The proposed addition is inconsistent with the nature of the case, and its insertion might lead to inconvenience or confusion by which the simplicity of the trial would be prejudicially affected.

LORD RUTHERFURD CLARK—I agree in the opinions expressed. It was conceded, and it could not help being conceded, that this action would lie against the Metaline Company for the use of wrongous arrestment and for slander. In defence the company were entitled to bring forward the plea of privilege. But that plea of privilege is only a plea that throws upon the pursuer the *onus* of proving the malice that in other cases of slander would be inferred. But it is maintained on the part of the defenders that that plea of privilege is one that would have the effect not merely of making the pursuer prove malice on the part of the defender, but would have the effect of making the action against the company impossible. I cannot assent to such a result as that. The company when accused of slandering the pursuer can certainly plead privilege as a defence, but they can use that plea only so far as it will carry them, and not to the length of making the action against them impossible.

With respect to the ground on which the Lord Ordinary has disallowed the third issue, I think his Lordship has taken an erroneous view of the case. Where a party in raising an action makes statements which are relevant even if they are defamatory of the defender's character, then that party is not liable in law for damages unless it can be shown that he made these statements maliciously and without probable cause. It has been held that malice must be proved in regard to statements on record, even if these are not necessary to the subject-matter of the case, but are pertinent to it. But I have never understood that a party who has made a defamatory statement in a process has a privilege to escape from the consequences. He has a privilege indeed in

making his statement, but he is subject to any consequences that may result from his having made that statement, if in addition to having given utterance to the calumny he is proved to have made it maliciously.

LORD YOUNG was absent.

The Court allowed the issues, which were amended at the bar so as to read, "Issues in which John Gordon is pursuer and the British and Foreign Metaline Company are defenders," with the exception of striking out the words "or one or more of them" in the first two issues, and remitted the case to the Lord Ordinary for trial.

Counsel for Pursuer—Pearson—Shaw. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Defenders The British and Foreign Metaline Company, William Stiven, and David Stewart—D.-F. Mackintosh, Q.C.—Macfarlane. Agent—J. Smith Clark, S.S.C.

Counsel for Defender William Thompson—Dickson. Agents—Boyd, Jameson, & Kelly, W.S.

Tuesday, November 16.

FIRST DIVISION.

CUNINGHAME AND OTHERS (GLENGARNOCK IRON COMPANY) v. WALKINSHAW OIL COMPANY (LIMITED).

Company—Winding-up—Creditor's Petition—Disputed Debt—Companies Act 1862 (25 and 26 Vict. cap. 89), 1867 (30 and 31 Vict. c. 131), and 1886 (49 and 50 Vict. c. 23).

A creditor of a limited company on certain bills which were overdue, but on which he had done no diligence, served on it a notice under the Companies Act 1862, requiring payment of the debt, and on its non-compliance with the notice presented a petition for a winding-up order. It appeared that there was a *bona fide* dispute as to a contra-account which the creditor owed the company, and the balance on which the company alleged to exceed the amount of the bills, and there was no evidence of insolvency other than the non-compliance with the notice. The Court, in view of the whole circumstances, dismissed the petition.

The Glengarnock Iron Company were, and for many years prior to 1886 had been, the tenants of two adjoining mineral fields in the county of Renfrew, known as the "Douglas Field" and the "Abercorn Field" respectively, which had always been wrought together as one mineral field. The Walkinshaw Oil Company (Limited) was sub-tenant under the Glengarnock Iron Company of the fields, the latest sub-lease being dated July 1883.

During the currency of a previous sub-lease the Walkinshaw Oil Company, sub-lessees, had purchased from the Glengarnock Iron Company part of the plant, &c., upon the subjects, at the price of £7000. Afterwards they purchased the remainder of the plant, &c., at the price of £15,250, and in part payment thereof granted two bills for £5250 and £5500 respectively, of which the former fell due on 17th

July 1886, and the latter on 21st July 1886. On 14th August 1885 the sub-lessees had given notice of their intention to exercise their option to terminate their sub-leases. By minute of agreement between the Glengarnock Iron Company and the Walkinshaw Oil Company Limited, dated 14th May 1886, the Glengarnock Company agreed to purchase from the Walkinshaw Company, as at 26th May 1886, "all the plant of every description upon and connected with the sub-lease of the subjects embraced in the Douglas lease, and that at the valuation to be placed thereon" by the valutors thereafter appointed. It was further agreed that the price of the said plant should be applied *pro tanto* in payment of the sums due by the Walkinshaw Oil Company, Limited, under current acceptances. In the course of the valuation, however, the parties differed as to the extent of the plant described by the words "upon and connected with the subjects in the Douglas lease." They agreed in holding as falling within this description plant valued at £8913, 3s. 10d. The items which according to the contention of the Walkinshaw Oil Company did, and according to the contention of the Glengarnock Iron Company did not, fall within this description were valued at £9443, 6s. 1d.

On 9th October 1886, while negotiations were pending for the adjustment of these differences, John Charles Cuninghame and others, the partners who were carrying on business under the name of the Glengarnock Iron Company, presented a petition under the Companies Acts 1862, 1867, and 1886, for the purpose of having the Walkinshaw Oil Company, Limited, wound-up under those statutes. They averred that they were creditors of the latter company to the extent of £1836, 16s. 2d., *i.e.*, the difference between £10,750, the amount of the two bills above mentioned, which had not been paid, and £8953, 3s. 10d., the value of the plant which they admitted to fall within the terms of the agreement of 14th May 1886, and for which they were ready to give credit; that they had served a notice on the company on 3d September 1886, and that as three weeks had elapsed since the service of the notice without payment having been made, the company was unable to pay its debts, and the present application should therefore be granted.

On the 18th October 1886 answers were lodged for the Walkinshaw Oil Company, Limited. In these answers liability upon the two bills was admitted, but they maintained that the plant, about which the parties were not agreed whether it fell within the description, did really fall within the description, and had been purchased by the petitioners. As it was worth £9443 as valued, they claimed that the balance was truly in their favour. Alternatively, they maintained that as the petitioners had entered on possession of the whole plant they were, in any view, bound to pay its fair value, which even at break-up prices would exceed the £1836 in respect of which the petition was brought. They stated that the petition was really brought to concuss them, under threat of a liquidation, to give up their contention as to what fell within the description of plant sold.

Argued for the petitioners—The company was unable to pay its debts in the sense of the statute, and therefore a winding-up order should be pronounced—25 and 26 Vict. c. 89, sec. 80;