suer's interest in the accounting is small in any view, but she is entitled to have the question tried, and this process is, I think, a fitting one to try it. To hold otherwise would only lead to more litigation.

The Court recalled the Lord Ordinary's interlocutor, and remitted to him to proceed.

Counsel for the Reclaimer—G. Watt. Agent—William Officer, S.S.C.

Counsel for the Respondent—Sir C. Pearson—Guthrie. Agents—Henderson & Clark, W.S.

Friday, July 18.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

GRAY *v.* THE SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS.

Reparation—Slander—Issue—Innuendo—Relevancy—Privilege.

A prosecution having been instituted against a stable manager for cruelty to a horse, the charge was found not proven. The stable manager thereafter wrote letters to the Society for the Prevention of Cruelty to Animals requesting them, as the prosecution, though nominally at the instance of the Fiscal, had really been at their instance, to pay the expenses of his defence, and representing that the charge had been unfounded and only brought through the excessive zeal of two officers of the society, and that it had ignominiously failed. On the society refusing to pay the expenses in question the stable manager sent these letters to the newspapers. The society shortly after sent a letter to these newspapers justifying their action and making the following statements—The horse was being worked with two large sores under its collar. On its state being pointed out to the driver it was replaced by another; the stable manager had admitted his responsibility for sending it out as he had been warned for a similar offence not long before. It was thought necessary to report the matter to the Fiscal; the Fiscal had decided to prosecute, and the Magistrate had "found the case 'not proven,' in the circumstances a very different verdict from 'not guilty;'" the coachman admitted in Court to the Fiscal that it was cruel to have the animal in yoke in the state in which it was found.

In an action of damages for slander by the stable manager against the society the pursuer did not deny the truth of the statements of fact contained in the letter, but averred that the defenders, by suppressing all illusion to the defence and to the testimony given by the pursuer's witnesses, while pretending to give the facts of the case, had given a narrative false in all the particulars applicable to the conduct of the pursuer, and designed to create, and which had created, a false representation of the facts.

Held that in the absence of any denial on record of the truth of the statements of fact in the letter, the pursuer's averments were not relevant, and action *dismissed.*

Opinion (*per* Lord Shand) that if there had been a relevant ground of action the defenders were in a privileged position, and the pursuer would have had to put malice in issue.

Process—Amendment.

Circumstances in which an amendment was allowed to be made upon record after the case had been taken to avizandum.

On 12th October 1889 two of the officers of the Scottish Society for the Prevention of Cruelty to Animals observed that one of the horses attached to a four-in-hand coach on the Edinburgh and Forth Bridge service belonging to Messrs John Croall & Sons, coach proprietors, had two sores on its neck under the collar and drew the driver's attention to the matter, with the result that the horse was replaced by another. Information as to the case was given to the Procurator-Fiscal, and a complaint was thereafter made against Andrew Gray, stable manager at the stables of Messrs John Croall & Sons, Easter Road, Edinburgh. The case was conducted by the Fiscal in the Burgh Court on 29th October, and a verdict of "not proven" was returned by the Magistrate.

On 30th October Mr Peter Morison, Gray's agent, wrote to Mr Langwill, the secretary of the Scottish Society for the Prevention of Cruelty to Animals, the following letter:—Dear Sir,—I am requested by Mr Andrew Gray, residing at Drum Stables, Easter Road, to write you regarding the complaint of cruelty to a horse made against him, and tried before the Magistrates yesterday, when the charge completely failed. You are aware that in reality the complaint was at the instance of your society, and while my client is aware that personally he cannot prevent the society from instigating the Public Prosecutor to take up and adopt such prosecutions, that being a matter between the Procurator-Fiscal and those who pay him; yet, as he is merely a working man, not only is he put to great disadvantage by having the resources of the Public Prosecutor directed against him, but he is put to this additional, and what I cannot help thinking unfair, disadvantage, viz., that he cannot get his expenses against the Public Prosecutor in a case where the latter ignominiously failed to establish the charge, as he did in this case. My client therefore trusts that when it is represented to them that he is merely a working man with a small weekly wage, that he is unable to bear the expenses of defending himself against an action brought in reality by your society, though sheltering itself behind the Procurator-Fiscal, your society

will pay the expenses necessarily incurred by him in establishing his defence, and thus in a small degree make some reparation for the great injury done to him.—P. MORISON. The account of expenses, amounting to £9, 13s. 4d., is enclosed."

Mr Langwill replied as follows on the same day:—"Dear Sir,—I have received your letter of this date, enclosing business account of £9, 13s. 4d. due to you by Mr Andrew Gray, Easter Road, which I beg to return herewith, as this society has nothing whatever to do with the matter. The action against your client, to which you refer, was 'at the instance' not of this society, but of the Procurator-Fiscal, whose duty it is, if he considers fit, to prosecute in any case of cruelty of which information may be submitted to him by any person."

Mr Morison wrote again on November 8th to the secretary of the society in these terms:—"*Procurator-Fiscal* v. *Gray*.—Dear Sir,—I duly received your letter of the 30th ult., and have heard from my client thereanent. My client has instructed me to say that if you refer to my letter to you of the 30th ult., you will see that one of the grounds upon which my client founds his claim for repayment of the £9, 13s. 4d. incurred by him in defending a charge against himself for cruelty to animals is because the complaint was in the name of the Procurator-Fiscal while in reality it was at the instance of your society. My client now requests that you will put my former letter together with this letter before the directors of your society, because he does not believe that a society formed for the prevention of cruelty to animals will do the injustice of allowing him to bear the costs necessarily incurred by him in defending himself against an unfounded charge, which, though not made in the name of the society, was, in point of fact at its instance and instigation. You say in your letter that any person may give information to the Procurator-Fiscal, and thus originate a prosecution under the Act. I am directed by my client to say in reply that he admits this to be quite true; but submits there is a great distinction between a member of the public giving information and this case. When a member of the public gives information, he is quite disinterested. He has no temptation to make a case in order to lead his employers to believe that he is an active servant in the discharge of his duty; and the temptation becomes very strong when the employer is a society which appeals to the public for support by reason of the number of prosecutions it originates each year. My client does not mean to allege that the directors of the society would knowingly permit its officials, through excess of zeal, to strain the law against anyone; but unfortunately they can exercise but very little control over officers who are constantly going about the streets looking out for cases of cruelty, In short, it is because my client believes that the directors of this society will rectify an injustice which has been done him through the excessive zeal of Mitchell and Gibson, two of the society's officers, that he appeals to the directors for redress. If Mitchell and Gibson had made the slightest inquiry, or taken the advice of anyone acquainted with horses, they would have ascertained that this was no case of cruelty. But instead of doing that they rushed my client into Court, with the result that they failed to prove anything against him. It cost him, however, £9 odds to prove his innocence. He now says that if he be left to pay this, your society will be guilty of far greater cruelty to a man than what some people are punished for causing to an inferior animal. He asks me again to enclose my account, to be submitted along with this correspondence to your directors."

On November 19th Mr Langwill replied:—"Dear Sir,—As requested in your letter of 8th inst., I submitted the whole correspondence in this matter, along with your business account, to the directors at a meeting held here to-day, when they unanimously declined to interfere in the matter. I return your business account herewith."

On 22nd November the above correspondence was inserted in the *Scotsman* newspaper, along with the following letter from Mr Gray to the editor:—"Sir,—As cruelty to man may be perpetrated by those who profess to shield the inferior animals from it, unless there be also a society formed to protect the former, I venture to ask you to insert the annexed correspondence in your paper, in the hope of originating a movement to protect working men from such cruel injustice as that from which I suffer. I understand our employers have formed a society to protect themselves from vexatious prosecutions for alleged cruelty to animals, but working men who may have to bear the brunt of such proceedings are surely more deserving of protection than the lower animals, and in one sense they are equally helpless, as the correspondence will show."

On 25th November 1889 the following letter from Mr Langwill, the secretary of the society, was inserted in the *Scotsman* and *Evening News* newspapers:—"Sir,—In reference to the letters which have appeared from Mr Morison and others, and to your leader of to-day, I deem it right to give the facts under which the society gave information to the Procurator-Fiscal in the above case. Mr Gray is stable manager at Easter Road stables to Messrs John Croall & Sons, coach proprietors, and is responsible for the state in which all the horses under his charge are sent out to work. About ten o'clock on the morning of Saturday, 12th October, two officers of the society observed in Princes Street at Waverley Steps a horse (one of four attached to a coach about to start for the Forth Bridge, Queensferry), and which had just come from the stable-yard, with two large sores, one on either side of the neck under the collar. The sores were very painful, in an inflamed, raw, open state, and appeared to be of several days' standing. The sore on the near side of the neck measured four inches by one inch, and that on the off-side

three inches by two inches. The officers considered it very cruel to have the horse at work with its neck in such a state. The coach was just about to start, but on the officers drawing the driver's attention to the painful state of the horse's neck, the coach was taken up to St Andrew Street, out of the crowd. The horse was then replaced by another, and the coach started on its journey. The driver stated that Mr Andrew Gray, stable manager, was responsible for having sent out the horse, and that the coach was ready yoked for him when he went to the stable-yard that morning. Two police-constables on duty in Princes Street were also present, and examined the horse along with the society's officers. When interviewed afterwards by the officers, Gray admitted his responsibility for sending out the horse that morning. The case was considered by the officials of the society, and the conclusion was come to that it was absolutely impossible that the sores as seen by the officers could have been caused that morning, as was evidenced by their condition and a portion of scab hanging from one of them. As Gray had been warned not long before for a similar offence, it was resolved that the case was one which should be reported to the Fiscal for his consideration. The Fiscal decided to prosecute, and on the case being tried the Magistrate, after a long trial, in consequence of the conflicting evidence, found the case 'not proven,' in the circumstances a very different verdict from 'not guilty.' The coachman, who was a witness for the defence, admitted in Court to the Fiscal that it was cruel to have the animal in yoke in the state in which it was found by the officers. I may state that the society exists for the purpose of preventing cruelty to animals, and that the exertions of our officers are uniformly directed to this end, and to warning those who are ill-using animals so as to get them to cease from their malpractices. But to prevent cruelty it is necessary that flagrant cases be exposed and brought to justice, and this seemed to the officials and to the chief inspector (who is thoroughly experienced in the management of horses) such a flagrant case as required to be brought under the cognisance of the Procurator-Fiscal. This course has met the entire approval of the directors of the society, who are very far from taking sentimental views of such matters, and who desire to carry out the society's objects in the most enlightened manner, and with every consideration for those who make their bread by the use of animals."

On 4th December the society inserted a similar communication as an advertisement in the *Scotsman*, with the following amplification—"Inasmuch as Mr Gray had been warned during the year for working a horse with a sore under the collar, and this case seemed to be an aggravated one, it was considered advisable to submit it to the Fiscal in order that he might take such steps as he found necessary in the interests of justice."

The warning referred to as given to Mr Gray was contained in the following letter from the secretary of the society to him dated December 8th 1888, to which he made no reply:—"Sir—It has been brought under the notice of this society by its officers that on Monday last (3rd inst.), in Princes Street, Edinburgh, a black mare belonging to John Croall & Sons, and under your care, was worked while it was suffering from a raw and inflamed sore on the neck under the collar, and unfit for work. Although it is not considered necessary to take proceedings under the Act in this case, the particulars are recorded in the society's books, and this letter is sent you as a warning."

In December 1889 Andrew Gray brought an action of damages for slander against the society.

He founded on the letter inserted in the *Scotsman* and *Evening News* on 25th November 1889, and averred—"Said letter is of and concerning the pursuer, and falsely and calumniously represents (1) that the pursuer, being stable manager to Messrs John Croall & Sons, and being responsible for the state in which all the horses under his charge are sent out to work, was, on the morning of Saturday 12th October 1889, guilty of an offence within the meaning of the Act 13 and 14 Vict. cap. 92, intituled 'An Act for the more effectual Prevention of Cruelty to Animals in Scotland;' (2) that although tried for said offence, and acquitted, the charge was nevertheless well founded; (3) that the verdict of the Magistrate finding the charge not proven was arrived at in consequence of false evidence having been adduced by the pursuer in his favour at his said trial; (4) that in violation of his duty as stable manager the pursuer was guilty of wanton cruelty to a horse under his charge by sending it out to work, and causing it to work, well knowing that it was not in a fit condition to be worked in consequence of having two raw sores on its neck; (5) that this was a flagrant case of cruelty which required to be exposed, as the pursuer by this conduct showed that he was not fit for his position as stable manager; and (6) that not long before the date of his said trial the pursuer had been found guilty of a similar offence, and warned for having committed it. Said representations are false, and were made by the defenders maliciously and with the view of injuring the pursuer in the eyes of the public." He also founded on the amplified statement made in the advertisement inserted in the *Scotsman* of 4th December, and averred—"The statement herein copied from said advertisement and circular is of and concerning the pursuer. It is false, and falsely and calumniously represents—(1) That at some time during the year 1889 he had, in violation of his duty as stable manager, been guilty of cruelly ill-treating a horse under his care by causing it to be worked in the knowledge that it was unfit to be worked by reason of having a sore under the collar; and (2) that the pursuer was guilty of an aggravated offence of cruelty to an animal under his charge."

The defenders pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant. (4)

The letter and advertisement complained of being privileged, and written and published in *bona fide*, and with reasonable and probable cause, and without malice, *et separatim*, not inferring any slander on the pursuer, the defenders should be assoilzied. (5) The correspondence having been begun by the pursuer as averred, and the letters and advertisement complained of being fair and proper answers to the letter of the pursuer and his agent, the defenders should be assoilzied."

On 1st March 1890 the Lord Ordinary approved of the following issues for trial of the cause:—"(1) Whether the letters printed were inserted respectively in the *Scotsman* newspaper and in the *Edinburgh Evening News* newspaper of 25th November 1889 by or on behalf of the defenders; and whether said letters, or part thereof, are of and concerning the pursuer, and falsely and calumniously represent, that although the pursuer was tried for an offence within the meaning of the Act 13 and 14 Victoria, chapter 92, intituled 'An Act for the more effectual Prevention of Cruelty to Animals in Scotland,' and acquitted, the charge was nevertheless well founded; and that not long before the 29th October 1889, being the date of his said trial, the pursuer had been guilty of a similar offence; or falsely and calumniously makes one or more of the foregoing representations? Damages laid at £350. (2) Whether the defenders caused the following statement, *inter alia*, to be inserted in an advertisement in the *Scotsman* newspaper of 4th December 1889:—'Inasmuch as Mr Gray had been warned during the year for working a horse with a sore under the collar, and this case seemed to be an aggravated one, it was considered advisable to submit it to the Fiscal in order that he might take such steps as he found necessary in the interests of justice;' and whether said statement is of and concerning the pursuer, and falsely and calumniously represents that during the year 1889 the pursuer had been guilty of cruelly illtreating a horse? Damages laid at £150."

"*Opinion.*—The first question is, whether the letters warrant the innuendo, and I am of opinion that they do. The letters bear reference to an offence for which the pursuer had been tried, and say that the pursuer had been warned before for a similar offence. The offence of which they speak was of necessity and obviously an offence under the Act for Prevention of Cruelty to Animals, and if so, I think they seem to affirm, or at least may be reasonably understood to affirm, that the pursuer had on a previous occasion been guilty of an offence falling under that Act. I think also that the letters may very fairly be read as implying that the pursuer was guilty of the charge on which he was tried and acquitted. They do not say so in express terms, but I think it is not improbable that many people, perhaps most people who read them, would receive that impression. They say that the case seemed to their officials and their inspector, who was thoroughly experienced in the management of horses, to be a flagrant one. They say that what took place met with the entire approval of the directors, who were persons desirous of acting with consideration and moderation. In short, it was a flagrant case in the judgment of persons of skill and moderation. They emphasise the fact that the verdict was 'Not proven,' which they say is a very different verdict from 'Not guilty'—an unnecessary platitude, unless inserted to indicate that the pursuer was something very different indeed from 'Not guilty;' and they also say that a witness for the pursuer admitted the cruelty in Court. Reading these letters by themselves, it appears to me that they may be reasonably understood to mean that the pursuer, in spite of the verdict of not proven, was guilty after all. They certainly do not contain an admission that he was innocent, nor do they lead one to think that the defenders had suspended their judgment in the matter, but rather that they had had a well-founded opinion at first, and that they held by it.

"But reference was made to the letters which passed between the pursuer and his agent and the secretary of the society, and it was argued that if the letters said to be libellous were read with reference to these previous letters, it would be seen that the letters complained of did not truly assert or insinuate the guilt of the pursuer, but only stated that the defenders had probable cause, and acted justifiably and reasonably in submitting the case to the Procurator-Fiscal, not because the pursuer was in fact guilty, but because appearances had led them to think so, and that they could not be blamed for what they had done, nor be considered the less worthy of public support.

"But that is not the necessary nor I think the natural meaning of the letters. For example, they mention the adverse evidence of one of the pursuer's witnesses at the trial, a circumstance which of course had nothing to do with the information lodged by the defenders with the police. In short, I consider that the letters naturally mean, or at least may be reasonably understood to mean, and would probably be understood by many people to mean, not only that the defenders had been reasonable, but that the pursuer had been guilty.

"It was further argued that the occasion was privileged, and that the pursuer was bound to have averred want of probable cause, and was bound to put malice, which he had averred, in the issue. No authority was quoted in support of the argument that the action was irrelevant, because there was no averment of want of probable cause, and I know of no ground for it.

"The argument that malice should be inserted in the issue appears somewhat more plausible. The privilege was said to arise from the provocation which the defenders had received, and the public attack which had been made on them, against which it was said they were entitled to defend themselves. It was maintained that as the letters founded on are admitted, the question of privilege was raised on record, and ought to be settled now and not at the trial. It

was maintained that the publication of the letters requesting payment of the pursuer's expenses, having regard to the way in which they were expressed, could be regarded as nothing but an appeal to the members of the public who supported the defending society by their subscriptions, and that as the pursuer had chosen to lay his case before the public, the defenders were entitled to do the same.

"It seems true enough that the pursuer had no legitimate right to appeal to the public, and it is difficult to doubt that the object was to injure the defenders in the eyes of the public, and in particular of the subscribers; and I think that the occasion might have justified some measure of retort, and that the defenders might have been protected had they confined themselves to self-defence, even though their defence might have glanced on the pursuer. But I cannot see that they were justified in saying and publishing that the pursuer, though tried and acquitted, was really guilty, which is what the innuendo asserts that they did say. No similar case in our own Courts was referred to in which malice had been put in the issue, the recent case of *Croucher* v. *Inglis*, 16 R. 774, which was quoted, belonging obviously to a different category.

"Reference was made to the case of *O'Donohue*, Ir. Rep., 5 C.L. 124, and to Odgers on Libel and Slander, p. 232, in regard to the law of libel applicable to newspaper disputes, and to the amount of protection arising from provocation. But I could not see that they bore out the contention that malice should be inserted in these issues.

"I think, however, that there should be two issues, and not three. The two first issues relate to the same libel, and I think a jury might be misled if there were two issues with separate schedules of damages to try what is only one question—*Sheriff* v. *Wilson*, March 1, 1855, 17 D. 528; *Cunningham* v. *Phillips*, June 16, 1868, 6 Macph. 926.

"But I think the third issue must be allowed separately, because it regards an advertisement and not a letter, because the date is different, and because it is differently expressed and differently innuendoed."

The defenders reclaimed, and also gave notice that they would move the Court to vary the issues by the insertion of the words "maliciously" and "without probable cause."

Parties were heard on Saturday, May 17, and the case was put out for judgment on the following Thursday.

Before judgment was given the pursuer moved the Court for leave to amend his record, or if leave to amend were not granted, for leave to abandon the action. In support of his application he referred to the following authorities—*Gelot* v. *Stewart*, March 4, 1870, 8 Macph. 649; *Mackenzie* v. *Munro*, March 17, 1869, 7 Macph. 676; *Western Bank* v. *Bairds*, March 20, 1862, 24 D. 859; Mackay's Practice of the Court of Session, i. 487-8.

The defenders contended that the amendment could only be allowed on payment by the pursuer of the defenders' whole expenses.

The Court allowed the pursuer to amend his record on condition that he paid the defenders' expenses from the date of closing the record till the lodging of answers to the new averments.

The pursuer having paid these expenses, the following averment was added by the pursuer to the record—"With reference to the letter inserted in the *Scotsman* on 25th November—The statements in said letter which allege or imply that the pursuer was guilty of an offence against the Act for the prevention of cruelty to a horse on the occasion in question are false. The defence stated at the trial on behalf of the pursuer was that at the time the horse was sent out on the occasion in question it was quite well and fit to be worked, but that the sores supervened between the time it was sent out and when it was found in Princes Street, and the pursuer adduced four witnesses who deponed that the horse was quite well and fit to be worked when sent out, and had no sores on it. But the defenders, by suppressing all allusion to the defence, and the testimony given by the pursuer's witnesses, while pretending to give the facts of the case, have given a narrative false in all the particulars applicable to the conduct of the pursuer, and designed to create, and has created, a false representation of the facts. With reference to the advertisement inserted in the *Scotsman* on 4th December—It is not true that the pursuer was ever guilty of an offence of cruelty to animals or guilty of working a horse with a sore under the collar. Before sending said notice the defenders never communicated with the pursuer in any way. They did not inform him of any complaint made against him, and never asked him to make any explanation. The pursuer had nothing to do about the working of the horse on the occasion in question. He has charge of the stables during the day, but there is another man who has charge of them during the night. On this occasion, as the pursuer has been informed, a cab was wanted for a case of emergency about four o'clock in the morning of the 3rd December 1888. The man in charge sent out the black horse mentioned in the notice."

Argued for the defenders — 1. *On the relevancy*—The society was entitled to send some answer to the letters which had appeared in the newspapers, and that answer rightly contained a statement of the facts on which the report to the Fiscal had proceeded. A verdict of 'not proven' was always a sufficient justification for a prosecution, and the fact that such a verdict had been returned in the pursuer's case was accordingly relevantly referred to in the letter as justifying the defenders' action. There was no assertion that the pursuer knew of the condition in which the horse had been sent out, and therefore there was no libel. The pursuer did not aver that the statement of facts in the letter were false, and that being so, he had set forth no relevant ground of action, and the action

should be dismissed—*Campbell* v. *Ferguson*, January 28, 1882, 9 R. 467. 2. *On the issues*—Where a person attacked another in the newspapers he must expect a reply, and the question then was whether there was malice in the terms of the reply. The defenders' position being a privileged one, malice must be put in issue—Odgers on Libel, p. 232; *O'Donohue* v. *Hussey*, 1871, Ir. Rep., 5 C.L. 124; *Laughton* v. *The Bishop of Sodor and Man*, 1872, L.R., 4 P.C. 495.

Argued for the pursuer—1. *On the relevancy*—The letters would bear the innuendo put upon them, as they were not fairly an answer to the letters of the pursuer and his agent, but contained an attack on the pursuer's character, inasmuch as they repeated a charge of which he had been acquitted. There was no want of a specific averment that the statements in the advertisement were false, and the amendment was sufficient to make the case relevant so far as founded on the letters—*Tuson* v. *Evans*, 12 Ad. & E. 2. *On the issues*—It was unnecessary to insert malice in the issues, as the letters contained the repetition of a charge of which the pursuer had been acquitted. At all events, this was not a clear case of privilege, and the question of whether or not it was necessary for the pursuer to prove malice might be left to the Judge who should preside at the trial—*M'Bride* v. *Williams*, &c., January 28, 1869, 7 Macph. 427; *Woodgate* v. *Ridout*, 1865, 4 F. & F. 202; *Brown* v. *Croombe*, 1817, 2 Stark, 297.

At advising—

Lord Adam—This is an action of damages for slander said to be contained in a letter dated November 23rd 1889, addressed by the defenders to the *Scotsman* and *Evening News*, and inserted in these newspapers on 25th November, and a complaint is also made of the same letter being inserted as an advertisement in the *Scotsman* of 4th August, the only difference in the latter case being that one statement was a little amplified. The letter was not an isolated one, but was the concluding letter of a correspondence between the pursuer and his agent on the one side, and the defenders and their agent on the other. This correspondence arose out of certain proceedings taken by the Procurator-Fiscal at the instigation of the defenders against the pursuer in the Burgh Court.

The first letter of the correspondence, dated 30th October 1889, is addressed by the pursuer's agent to the secretary of the defenders' society, and is in these terms—"Dear Sir,—I am requested by Mr Andrew Gray, residing at Drum Stables, Easter Road, to write you regarding the complaint of cruelty to a horse made against him, and tried before the Magistrates yesterday, when the charge completely failed. You are aware that in reality the complaint was at the instance of your society, and while my client is aware that personally he cannot prevent the society from instigating the Public Prosecutor to take up and adopt such prosecutions, that being a matter between the Procurator-Fiscal and those who pay him; yet, as he is merely a working man, not only is he put to great disadvantage by having the resources of the Public Prosecutor directed against him, but he is put to this additional, and what I cannot help thinking unfair disadvantage, viz., that he cannot get his expenses against the Public Prosecutor in a case where the latter ignominiously failed to establish the charge, as he did in this case." The account incurred by the pursuer was enclosed, with a request that it should be paid. That letter was answered by a note from the secretary of the society refusing to pay the expenses incurred by the pursuer, and this led to a second letter from the pursuer's agent in which he said—"My client now requests that you will put my former letter, together with this letter, before the directors of your society, because he does not believe that a society formed for the prevention of cruelty to animals will do the injustice of allowing him to bear the costs necessarily incurred by him in defending himself against an unfounded charge, which though not made in the name of the society was in point of fact at its instance and instigation. You say in your letter that any person may give information to the Procurator-Fiscal, and thus originate a prosecution under the Act. I am directed by my client to say in reply that he admits this to be quite true, but submits there is a great distinction between a member of the public giving information and this case. When a member of the public gives information he is quite disinterested. He has no temptation to make a case in order to lead his employers to believe that he is an active servant in the discharge of his duty, and the temptation becomes very strong when the employer is a society which appeals to the public for support by reason of the number of prosecutions it originates each year. My client does not mean to allege that the directors of the society would knowingly permit its officials through excess of zeal to strain the law against anyone, but unfortunately they can exercise but very little control over officers who are constantly going about the streets looking out for cases of cruelty. In short, it is because my client believes that the directors of this society will rectify an injustice which has been done him through the excessive zeal of Mitchell and Gibson, two of the society's officers, that he appeals to the directors for redress. If Mitchell and Gibson had made the slightest inquiry, or taken the advice of anyone acquainted with horses, they would have ascertained that this was no case of cruelty. But instead of doing that they rushed my client into Court, with the result that they failed to prove anything against him." Then there followed a second letter from the society refusing to pay the pursuer's expenses.

Now, the first letter of the pursuer's agent, it will be observed, stated that the prosecution had ignominiously failed, and his second letter said that the society had

made an unfounded charge, and that officers acting with excess of zeal and without inquiry had rushed his client into Court, with the result that nothing was proved against him.

These letters were sent to the *Scotsman*, and inserted in that newspaper on 22nd November, along with the following letter from the pursuer:—"Sir—As cruelty to man may be perpetrated by those who profess to shield the inferior animals from it unless there be also a society formed to protect the former, I venture to ask you to insert the annexed correspondence in your paper in the hope of originating a movement to protect working men from such cruel injustice as that from which I suffer. I understand our employers have formed a society to protect themselves from vexatious prosecutions for alleged cruelty to animals, but working men who may have to bear the brunt of such proceedings are surely more deserving of protection than the lower animals, and in one sense they are equally helpless, as the correspondence will show."

Now, it was in reply to these letters so published that the letter complained of was written. No one can, I think, dispute that when charges such as I have mentioned had been brought against the society the society was entitled to defend itself in as public a manner as the charges had been made, and the only question is whether the letter written on the society's behalf, and sent to the newspapers, exceeds the limits of a legitimate reply, and in order to ascertain that I must read that letter.

It sets out first of all the purpose with which it was written—"In reference to the letters which have appeared from Mr Morison and others, and to your leader of today, I deem it right to give the facts under which the society gave information to the Procurator-Fiscal in the above case;" and then proceeds—"Mr Gray is stable manager at Easter Road stables to Messrs John Croall & Sons, coach proprietors, and is responsible for the state in which all the horses under his charge are sent out to work." That is not disputed to be a perfectly true statement, and it certainly appears to be a most relevant statement to make in reply to the accusation which had been made against the society. "About ten o'clock on the morning of Saturday 12th October two officers of the society observed in Princes Street, at Waverley Steps, a horse (one of four attached to a coach about to start for the Forth Bridge, Queensferry), and which had just come from the stable-yard, with two large sores, one on either side of the neck under the collar. The sores were very painful, in an inflamed, raw, open state, and appeared to be of several days' standing. The sore on the near side of the neck measured 4 inches by 1 inch, and that on the off-side 3 inches by 2 inches. The officers considered it very cruel to have the horse at work with its neck in such a state. The coach was just about to start, but on the officers drawing the driver's attention to the painful state of the horse's neck the coach was taken up to St Andrew Street out of the crowd. The horse was then replaced by another, and the coach started on its journey." That is a distinct statement of what the officers of the society saw, and I cannot conceive a more relevant statement for the society to make for the purpose of justifying themselves to the public for what they had done. Again, it is not said that that statement is untrue. It is admitted that the sores were there, but it is said in the amendment which has been made on record that the sore supervened between the time when the horse was sent out and when it was found in Princes Street, and one can quite understand that the defenders should not have taken that for granted. The letter continues—"The driver stated that Mr Andrew Gray, stable manager, was responsible for having sent out the horse, and that the coach was ready yoked for him when he went to the stable-yard that morning"—and the truth of that statement is not disputed—"Two police-constables on duty in Princes Street were also present, and examined the horse along with the society's officers. When interviewed afterwards by the officers, Gray admitted his responsibility for sending out the horse that morning." That again is a material statement, and its truth is not denied. The letter then goes on—"The case was considered by the officials of the society, and the conclusion was come to that it was absolutely impossible that the sores as seen by the officers could have been caused that morning, as was evidenced by their condition and a portion of scab hanging from one of them." That is not a statement of fact but of opinion, and I cannot see that the society were not justified in expressing it. The letter proceeds—"As Gray had been warned not long before for a similar offence, it was resolved that the case was one which should be reported to the Fiscal for his consideration." This again is a perfectly true statement and relevant as giving the reasons which induced the society to give information to the Fiscal in the present case, and it appears from the statement of the pursuer himself that he took no notice of the warning, but simply acquiesced in receiving it. The letter goes on—"The Fiscal decided to prosecute, and on the case being tried, the Magistrate, after a long trial, in consequence of the conflicting evidence, found the case 'not proven,' in the circumstances a very different verdict from 'not guilty.'" We have here no doubt a statement of fact which is not relevant to show the reasons which induced the society to report the matter to the Fiscal, but the charges made against the society are not only connected with that; they are charged with having taken up a case and ignominiously failed to prove it. In answer to that charge they were, I think, quite entitled to point out that the verdict had been "not proven" as distinguished from "not guilty." The letter continues—"The coachman, who was a witness for the defence, admitted in Court to the Fiscal that it was cruel to have the animal in yoke in the state in which it was found by the officers." That

again is not the statement of a fact which induced the society to report the matter to the Fiscal, but it is a relevant statement to make in answer to the charge that they had taken up an unfounded charge. The letter then goes on—"I may state that the society exists for the purpose of preventing cruelty to animals, and that the exertions of our officers are uniformly directed to this end, and to warning those who are ill-using animals, so as to get them to cease from their malpractices. But to prevent cruelty it is necessary that flagrant cases be exposed and brought to justice, and this seemed to the officials and to the chief inspector (who is thoroughly experienced in the management of horses) such a flagrant case as required to be brought under the cognisance of the Procurator-Fiscal." What could be a more relevant statement for them to make in meeting the charge made against them than that they thought the case a most flagrant one.

I have now read the whole statements made in the letter, and it appears to me that there is not a single one of them which goes beyond what the defenders were perfectly justified in saying in reply to the charges brought against them, and make as public as these charges had been made. My view accordingly is that no issue should be allowed with regard to the letter. No doubt the Lord Ordinary says that anyone reading the letter might think that the pursuer had been really guilty of the charge made against him, but it was just because the statement of facts in the letter led to that conclusion that the defenders were induced to act as they did in making a report to the Fiscal, and to say that the facts which induced the society to inform the Fiscal would lead a person to think that the pursuer had been guilty of cruelty to the horse in question is to show that these were most relevant facts for the defenders to state in defending themselves against the accusation that they had taken up an unfounded charge. What I mean comes out very clearly if one looks at the pursuer's amendment. After stating that the sores supervened between the time the horse left the stable and was found in Princes Street, the pursuer says—"But the defenders by suppressing all allusion to the defence and the testimony given by the pursuer's witnesses, while pretending to give the facts of the case have given a narrative false in all the particulars applicable to the conduct of the pursuer, and designed to create and which has created a false representation of the facts." The fallacy of the pursuer lies in this, that the letter complained of does not pretend to give the facts of the case. The object of the letter is the purpose stated in its first clause—"In reference to the letters which have appeared from Mr Morison and others, and to your leader of to-day I deem it right to give the facts under which the society gave information to the Procurator-Fiscal in the above case."

For these reasons it humbly appears to me that the statements contained in the letter do not go beyond what the defenders were entitled to make and publish in reply to the charges made against them, and therefore I think the issue approved of by the Lord Ordinary should not be allowed.

The Lord Ordinary has allowed a second issue with reference to the terms of the advertisement, which only differs from the letter in containing the following statement —"Inasmuch as Mr Gray had been warned during the year for working a horse with a sore under the collar, and this case seemed to be an aggravated one, it was considered advisable to submit it to the Fiscal in order that he might take such steps as he found necessary in the interests of justice." That is not an addition, but only an amplification of the statement previously made in the letter. The terms of the notice sent to the pursuer were these:—"Sir—It has been brought under the notice of this society by its officers, that on Monday last (3rd. inst.), in Princes Street, Edinburgh, a black mare belonging to John Croall & Sons, and under your care, was worked while it was suffering from a raw and inflamed sore on the neck under the collar, and unfit for work. Although it is not considered necessary to take proceedings under the Act in this case, the particulars are recorded in the society's books, and this letter is sent you as a warning." In his answers the pursuer admits that he received and did not reply to the said notice, and avers "that there was no foundation for the charge of cruelty brought against the pursuer in said notice. The defenders never preferred any charge against pursuer in respect of the subject-matter in said notice. Said notice was never referred to at the trial, or in the correspondence which followed, and its insertion in the defences is a gross slander against the pursuer, in respect of which action is reserved." Now, I am far from saying that the notice contained a charge of cruelty against the pursuer. That may be the subject of an action of damages in the future. The question here is whether or no the defenders had warned Gray as they said they had done—whether when they were setting forth the reasons which induced them to give information to the Fiscal it was not relevant to refer to the fact of their having done so. As I said before, in criticising the letter of 23rd November, they were entitled in the circumstances to set forth this fact, and I am accordingly of opinion that the second issue should also be disallowed.

LORD SHAND—I regard this case as one of considerable importance and novelty in law in many respects. The pursuer complains of slanders alleged to be contained in letters sent by the secretary of the Society for the Prevention of Cruelty to Animals to the *Scotsman* and *Edinburgh Evening News* newspapers, and the Lord Ordinary has allowed two issues, one with reference to the general tenor of the letters, and another with reference to a specific passage in them. The decision of the Lord Ordinary has now been brought under review, and we have had a careful and full argument on two points, these being, first,

a motion to vary the issues by the insertion of "maliciously," and in the next place, a reclaiming-note against the granting of any issues at all, and although I entirely agree with Lord Adam in holding that there is no good ground of action, I think it also right to indicate my opinion, if there were a ground of action, what should be the terms of any issue to be allowed.

The circumstances of the case are these—The pursuer was prosecuted by the Fiscal on the information of officers of the society for cruelty to a horse. The result of the trial was a verdict of "not proven." Some time after the trial the pursuer through his agent made a request or, I might perhaps say, a demand on the society for payment of the expenses incurred by him in defending himself against the charge brought against him, and I am not surprised that the directors of the society declined to pay these expenses, the position of the society being merely this, that they had drawn the attention of the Fiscal to certain facts in connection with the horse in question, and had left it to the Fiscal to take proceedings against the pursuer if he thought fit. The pursuer's demand for payment of his expenses having been rejected, what did he do? The subject, so far as these expenses were concerned, was one in which no one was interested, but in order to make the matter one of public interest he makes an appeal to public opinion, and I think he did so for the purpose of injuring the society. Lord Adam has gone carefully over the letters which were written by the pursuer's agent, and I shall merely note what I have abstracted as the result of these letters. The first states that the case against him had ignominiously failed, and concludes by pointing out the injustice of the society, who were the true prosecutors, sheltering themselves behind the Procurator-Fiscal. In the second he avers that if the slightest inquiry had been made it would have shown that there was no case of cruelty at all, but that instead of making any inquiry the defenders had rushed him into Court in consequence of the excessive zeal of their officials, and with the result that they proved nothing against him. He further contrasted the case of the society with that of a private person giving information to the Fiscal in this way—"When a member of the public gives information he is quite disinterested. He has no temptation to make a case in order to lead his employers to believe that he is an active servant in the discharge of his duty, and the temptation becomes very strong when the employer is a society which appeals to the public for support by reason of the number of prosecutions it originates each year."

Now, the result of these letters, had they been left unanswered, would have been to leave the public under the impression or conviction that instead of the society existing for the purpose of preventing cruelty to animals it was so conducted as to inflict grievous hardship on innocent persons by means of got-up cases, of which the pursuer's case was a very bad instance. Such being the charge, what are the terms of the answer, which is alleged to be libellous? Lord Adam has gone over the letter complained of, and in referring to that letter I may say that I do not think any material statement contained in it is disputed, though a number of facts are related. If the pursuer could say that one of these facts after another was entirely false this would be a very different case, but in the absence of any statement traversing them we must, I think, take them as being true. That view was adopted in the case of *Campbell* v. *Ferguson*, 9 R. 467. That was a case in which a clergyman complained of an alleged slander contained in a letter written to a newspaper by one of his parishioners because the letter accused him of neglecting his duty by absenting himself from his charge for six of the busiest weeks of the year, and the Court held that the statements of fact contained in the letter not being denied the pursuer was not entitled to innuendo the charge made against him.

Now, this case was admittedly a case of cruelty, though the pursuer said that the least inquiry would have shown that there was no case of cruelty. The letter sets out the nature of the sores with which the horse was being worked, and therefore it was a case with regard to which the society was called upon to take steps. It further appears from the letter that according to the statement of the driver the pursuer was responsible for sending out the horse on the morning in question, and that when the officers pointed out the state of the horse it was immediately withdrawn. It is further intimated that the pursuer afterwards admitted his responsibility for sending out the horse, and that the coachman in his evidence admitted that it was cruelty to work the animal in the state in which it was. An allusion is made to the fact that the pursuer had been warned for a similar offence before, and it is stated that this seemed to be a flagrant case deserving to be brought under the notice of the Fiscal, and that the result of the trial was that the Magistrate found the case "not proven," in the circumstances a very different verdict from "not guilty." Such is the letter which is the foundation of the charge of slander in the present case.

The first question is whether this is a case in which the pursuer is to be allowed to go before a jury without putting malice in issue, and I think most decidedly this is a privileged case. In a leading and important case in Ireland, I mean the case of *Dwyer* v. *Esmonde*, L.R. 2 Q.B.D. 243, in which almost all the learned judges took part, I see that Lord Justice Christian on p. 262 refers to a passage in an opinion of the late Baron Fitzgerald which has a material bearing on a case like this—"The Court," said Baron Fitzgerald in *Murphy* v. *Halpin*, speaking of *O'Donohue* v. *Hussey*, "had to consider the facilities which the public press, through the medium of pamphlets, periodicals, newspapers, and others, affords for the rapid propagation of defamatory statements, and did consider these various instruments, not as what some of them represent themselves

to be, organs of public opinion, but what they really are, appeals to public opinion. Appeals in such a form (as distinct from mere printing), through the public press, are appeals to the judgment of a tribunal which has a recognised right to form a judgment. The 'tribunal of public opinion', the 'bar of public opinion' and the like are not now mere phrases. For myself, I might perhaps think it better if it were otherwise, but it is not otherwise, and courts of law must accept the fact. They have done so, and in truth every libel sustained as a fair criticism supposes the existence of such a right of judgment in the public." Accordingly the Judges in the case allowed the principle, and I do not mean to go over the opinions in detail. The case was one in which the plaintiff complained of a letter written and published by the defendant, which undoubtedly contained calumnious charges against him. The answer was that the plaintiff had published a document making gross charges against the defendent as a landlord, and that he was entitled to reply and the Judges were unanimously of opinion that in a case of that class the defender from having been attacked was *prima facie* in a privileged position. That decision followed on a very important and ruling case—*Laughton* v. *The Bishop of Sodor and Man*, 4 P.C. Rep. 495. The learned Judges in that case were Sir James William Colvile, Sir Barnes Peacock, Sir Montague Smith, and Sir Robert Collier. It appeared that a barrister in addressing the House of Keys on a bill before it, had attacked the Bishop, and in the course of his speech had said—"His Lordship came here in 1854, and what good has he done in the way of patronage? Has he so supported the Manx Church as to entitle himself to the support and confidence of the Manx clergy and Manx people? Has he advanced the spiritual interests of the diocese over which he was appointed? Has he been careful in all ways to do that which would be for the good of the souls committed to his charge? Or has he not, by act after act, till the whole island has echoed and re-echoed with cries of 'shame,' brought a foul stain and scandal upon the church?" That speech was published in the newspapers and sometime afterwards the Bishop in addressing the clergy of the diocese replied with a sharp attack upon the barrister, and sent the address to the newspapers. The Court were perfectly clear that malice must be put in issue, but also held, taking the case to be one in which malice had to be put in issue, that the case clearly failed. There are one or two passages in the opinions delivered which I should like to notice because they are very applicable to the case before us. Sir Robert Collier says "Some of the expressions here used undoubtedly go beyond what was necessary for self-defence, but it does not therefore follow that they afford evidence of malice for a jury. To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond absolute exigency of the occasion to be evidence of malice, would in effect greatly limit, if not altogether defeat, the protection which the law throws over privileged communications." In a subsequent passage the same Judge says—"Adopting the principle of these cases (to which he had referred) their Lordships do not think it necessary to determine whether or not the language of Mr Laughton was such as is ordinarily used by barristers of high reputation, nor whether or not the accusations against the Bishop were false, or false as to the knowledge of the plaintiff, or of those who instructed him, or whether they were preferred honestly or wickedly. It is enough that, having regard to the circumstances and nature of the attack upon him, the Bishop may, in their Lordships' opinion, have honestly believed that everything which he said was true, and proper for his own vindication, although in fact some of his expressions exceeded what was necessary for it, and that the language of his charge is more consistent with such honest belief, and with the purpose of self-vindication than with that of injuring the plaintiff. That being so, the Deemster ought to have decided in accordance with the case of *Somerville* v. *Hawkins*, that the language of the charge afforded no evidence of malice to be submitted to the jury. Had the Bishop referred to the conduct of the plaintiff on any other occasion than that of his addressing the House of Keys, or made any general attack upon his private or professional character, the case would have been different." On the authority of that case, I take it that the issue in the present case would have to be whether the letter complained of could be regarded as a malicious libel, being an answer to an attack which might have destroyed the usefulness of this society. I think the law is correctly laid down in the following passage from Odgers on Libel, p. 232—"Every man has a right to defend his character against false aspersion. It may be said that this is one of the duties which he owes to himself and to his family. Therefore communications made in fair self-defence are privileged. If I am attacked in a newspaper, I may write to that paper to rebut the charges, and I may at the same time retort upon my assailant, where such retort is a necessary part of my defence or fairly arises out of the charges he has made against me. A man who himself commenced a newspaper war cannot subsequently come to the Court as plaintiff to complain that he has had the worst of the fray. But even in rebutting an accusation the defendant may not of course state what he knew at the time to be untrue, or intrude unnecessarily into the private life or character of his assailant. The privilege extends only to such retorts as are fairly an answer to the plaintiff's attacks."

Such being the law applicable to the present case, the next question is whether the pursuer has a case to present to the jury under these issues. The Lord Ordinary has, with regard to the first issue, sustained it in these terms—"Whether said letters . . . falsely and calumniously represent that,

although the pursuer was tried for an offence within the meaning of the Act 13 and 14 Vict. c. 92, entituled an Act for the more effectual prevention of cruelty to animals in Scotland, and acquitted, the charge was nevertheless well founded; and that not long before the 29th October 1889, being the date of his said trial, the pursuer had been guilty of a similar offence; or falsely and calumniously makes one of the foregoing representations?"

I am of opinion that issue cannot be sustained in the case, and I put my decision on the ground that the pursuer having written the letters he did, complaining of the conduct of the society, put the society in a position in which they were entitled to say that in their opinion the charge though found "not proven" had been made out. There are serious cases here every day, and I never heard it said that legitimate criticism on the result of a trial was not allowed, and I do not think a person who differs from the verdict of a jury or the charge of a judge, as leading to a miscarriage of justice, thereby renders himself liable to an action of libel. But apart from that, and following the reasons given by Lord Adam, I find that the letters contained nothing but a statement of the facts on which the Procurator-Fiscal acted, and which are not denied. The only question is, whether the Court is entitled at this stage to stop the case and say that it is not to go to a jury. But following many previous cases, I think we are entitled to refuse an issue. The only way in which the pursuer says the statement was unfair to him was in the suppression of various points which would have shown that he was not connected with any case of cruelty. If there was any suppression it seems to me to have consisted in an omission on the part of the pursuer. In all the letters it is supposed that there was an undoubted case of cruelty, and with reference to the allegation by the pursuer that the defenders in their letters do not bring out the facts of the case, I may say, they do not profess to give the facts of the case.

There are, therefore, I think, no facts to justify this issue, but, on the contrary, the letter was one which was quite within the right of the defenders to write on the occasion in question.

The second issue is founded on a passage in the letter published as an advertisement on 4th December 1889, and the facts in reference to the publication are these—The pursuer's letter appeared on the 21st November, and was followed by leaders in terms unfavourable to the society, at which I am not surprised, because of the garbled statement inserted in the *Scotsman* by the pursuer. On the 23rd the directors of the society, feeling that it might be injured by the statements which had been made, wrote a letter to the newspapers in reply, and on 4th December they published this letter as an advertisement, containing the passage which is made the subject of complaint, namely, the passage in which allusion is made to the notice of warning which had previously been sent to the pursuer, the fact being that such a notice had been sent to the pursuer.

The letter is quite a relevant answer to the charges made by the pursuer. The directors first take up the point made against the society, that it tried to swell the number of prosecutions originated through its action, and very properly gives the following information about that—"Out of 508 cases which were last year brought by the public and the officers before the society's notice, it was not felt necessary to bring more than 164 under the consideration of the procurators-fiscal. In the remaining cases a remonstrance or caution was all that was deemed necessary." Taking the facts as there stated we see that a warning was a very serious thing to get. They then go on to say—"Out of the 164 cases submitted to the fiscals they considered 156 to be not only deserving of prosecution, but as having sufficient proof to secure a conviction; 142 were found proven; and in 14 cases evidence was produced in favour of the defenders sufficient to satisfy the Judge that a verdict of 'not proven' might be given. In no case prosecuted on the information of the society was a verdict of 'not guilty' returned." These surely were legitimate facts to state in answer to the charges made against the society. They then proceed to deal with the charges made in connection with the pursuer's case, and in course of rebutting them they mention that a warning had been given to the pursuer, and it is not fair to say that that is a charge against the pursuer that he had been guilty of cruelty to a horse. It does not imply more than that he might have been prosecuted.

I think that no issue should be allowed, and I am prepared to say that if the facts had been proved to be as the pursuer states them, and he had obtained a verdict in his favour, I should have granted a new trial. I am therefore of opinion that the defenders should be assoilzied.

LORD M'LAREN—I took occasion in a recent case—*Godfrey* v. *Thomsons*—to call attention to the distinction between criticism and libel, and I may repeat that, as I understand it, the law does not give redress for criticism or comments or argumentative statements founded on a true representation of the facts before the public. I say before the public, because I am far from saying that if a newspaper publishes private matters about an individual with which the public has no concern that these are public matters which it is the privilege of everyone to express their opinion upon. It is, however, quite a different case where the person writing to the newspapers is only defending himself against imputations which have been made upon his public conduct. Very great latitude is allowed to anyone who comes before the public in such a way.

It appears to me to be quite clear in the present case, on the facts as stated on record, that there is no case of actionable damage against the society. I may further say that I would not have felt at liberty to grant an

issue in the terms in which the first issue has been granted by the Lord Ordinary against any person, namely—"Whether said letters . . . falsely and calumniously represent that although the pursuer was tried for an offence within the meaning of the Act 13 and 14 Vict. c. 92 . . . and acquitted, the charge was nevertheless well founded." That issue may mean one of two things, either that the evidence was such as to warrant a prosecution, or that it was such as to warrant a conviction. The first view I have already considered. A party charged with instituting a malicious and rash prosecution is entitled to lay before the public a true statement of the facts which came to his knowledge, and on which he informed the fiscal. If the meaning is that the verdict was wrong, and that the evidence should have been followed by a conviction, I see no reason why the defenders should not make such a statement. It is not uncommon after a trial, both in private conversation and in the press, to find opinions expressed as to the soundness of the verdict, and such expressions of opinion are never thought to be libels on the accused. What is the meaning of the Courts being open if the proceedings are not to be watched and criticised. If it is a libel to say that the judgment of a jury is wrong, it must equally be a libel to say that the decision of a judge is wrong, and our legal journals in pointing out that decision as inconsistent with the previous law render themselves open to actions for libel. I do not think there is anything calumnious in expressing an opinion for or against the opinion of a judge or jury.

LORD PRESIDENT—I concur entirely in holding that no issue should be granted, on the ground that there is no relevant averment of libel, and I think therefore the defenders' first plea should be sustained and the action dismissed.

With regard to the question on which Lord Shand has expressed an opinion, whether the issues should proceed on an allegation of malice, and whether malice should be put in issue, I desire to give no opinion, because I think that question does not arise in the present case. We are holding the case irrelevant, and therefore it is impossible to frame any issue at all. If the record were relevant it would be a different case—how far different I cannot conjecture.

LORD SHAND—In my view, in considering the relevancy of a case like this, the first point which the pursuer has to consider is whether he is bound to put the case as one of malice, and accordingly it enters into my judgment in this case to consider whether the pursuer was bound to make an allegation of malice in order to succeed in his case.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action as irrelevant.

Counsel for the Pursuer—Comrie Thomson—Shaw—Wilson. Agent—P. Morison, S.S.C.

Counsel for the Defenders — Graham Murray—C. S. Dickson. Agents- Traquair, Dickson, & Maclaren, W.S.

HOUSE OF LORDS.

Monday, May 12.

(Before the Lord Chancellor (Halsbury), Lords Watson, Bramwell, and Herschell.)

MUIRHEAD AND OTHERS *v.* MUIRHEAD AND OTHERS.

(*Ante*, December 23, 1887, vol. xxv., p. 204, and 15 R. 254.)

Succession—Will—Construction—Widow Renouncing Provisions—Acceleration of Provisions to Children—Period of Vesting.

A truster directed his trustees to pay to his wife if she survived him an annuity, and to give her the liferent of a house, and "to draw the revenue of all my estate not above disposed of during the life of my said wife, and to accumulate the revenue, after paying my wife's said annuity, with the principal." He then provided that "as soon after the death of my said wife as convenient" certain heritable subjects should be conveyed to three of his children, and that the residue should be divided equally among his children, declaring that if any of them should predecease the term of payment without leaving issue, their provisions should lapse and become part of the residue, unless the predeceasing child left issue, in which case such issue should succeed to the parent's share. The widow repudiated her testamentary provisions and obtained her legal rights.

Held, on a construction of the deed (*rev.* judgment of the Second Division), that the provisions to the children of the specific heritable subjects and residue would not vest until the death of the testator's widow.

This case is reported *ante*, December 23, 1887, vol. xxv., p. 204, and 15 R. p. 254.

The claimants Charles Muirhead and Agnes Muirhead or Christie and their children appealed.

At delivering judgment—

THE LORD CHANCELLOR—My Lords, I have had an opportunity of reading in print the opinion which is about to be delivered by my noble and learned friend Lord Watson, and I can only say that I entirely concur in it, adding as my only contribution to the judgment that it seems to me to disentangle the case from the difficulties which surround it, and to give a strict but true construction to the document. On the other hand, the construction put upon it by the Court below seems to me to offend against two very familiar rules for construing instruments, inasmuch as it puts into the instrument words which are not there, and by putting those words into it robs of their proper meaning words which are there.

LORD WATSON—My Lords, the decision