enter on their office, I do not see how they could make the election. They may have had an opinion in their own minds that the election of the provisions of the father's settlement might be a good thing for the children, but a mere opinion existing in their minds will hardly be accepted as an equivalent to the discharge of the office of tutor in regard to so delicate a matter as making an election; and therefore I look on all the averments from the 6th to the 10th of the defenders' statements as being entirely irrelevant.

The only remaining matter regards the averment made as to what occurred on Mrs Ritchie's marriage. Her brother died in pupillarity, and Mrs Ritchie succeeded to her brother's share of legitim, and therefore she was entitled to the whole of it if she was entitled to any part of it. Mr Ritchie claims as assignee of his wife, and there is no doubt about his title. But it is said that in the marriage contract Mr Craig made a handsome provision in the shape of an annuity, and it is said that Mrs Ritchie and her husband could not take this without homologating the settlement of Mr Craig. That depends, in the first place, upon whether they knew their legal rights. My impression is that all parties were unaware of their legal rights; and in these circumstances it is impossible to hold the acceptance by the daughter of a free gift from the mother as a renunciation of her legal rights. I am therefore of opinion that we should repel the defences, and remit the case to the Lord Ordinary to proceed with the accounting. But as the case does not end here, and the interests of Mrs Craig may be involved, I think it is proper that the process should be intimated to her.

The other Judges concurred; and the case was remitted to the Lord Ordinary.

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

Agents for Defenders—Wilson, Burn, & Gloag, W.S.

Wednesday, May 16.

WHOLE COURT.

CAMPBELL *v.* CAMPBELL.

Declinator.—A Judge having declined on the ground that the mandatory of one of the parties was his brother-in-law, the declinator sustained.

Lord KINLOCH stated that the advocator, Mr Campbell of Boreland, was his nephew by affinity, being the son of his wife's sister, but that, after the recent decision in regard to the declinator of the Lord President in the case of Gordon *v.* Gordon's Trustees, he did not suppose that this relationship would be sufficient to entitle him to decline. But there was another party to this case—namely, General Campbell, who was mandatory for the advocator. He was his Lordship's brother-in-law, being his wife's brother. This relationship, his Lordship continued, was a clear disqualification, for it was decided in the case of Ommaney *v.* Smith, 13th February 1851, 13 D. 678, not only that a mandatory's brother-in-law could not act as judge, but also that procedure which had taken place for seven years, the judge being so related, fell to be quashed. He therefore declined to judge in this case.

The LORD PRESIDENT said that as there was one good ground for sustaining Lord Kinloch's declinator, as settled by the case of Ommaney, it was unnecessary to say anything as to the other. He thought they must sustain the declinator.

The other Judges concurred.

FIRST DIVISION.

TEASDALE *v.* MONKLAND RAILWAYS COMPANY.

Issue.—Form of issue in an action of damages for injuries sustained by a station-master when travelling on a railway engine, the defenders, the railway company, denying that he had any right to be on the engine at the time.

In this case the following issue was proposed by the pursuer:—

"Whether, on or about the 23d day of April 1864, the pursuer, while proceeding to Airdrie on one of the defenders' engines, was severely injured by a quantity of steam and boiling water suddenly issuing from the firebox in connection with the boiler, in consequence of the defective state of the said engine, through the fault of the defenders, to the loss, injury, and damage of the pursuer?"

The pursuer was station-master at Slamannan, but he alleged that the defenders, through their manager, had stipulated with him, as part of their contract with him, that they were to convey him on one of their engines from Airdrie to Slamannan every morning, and back to Airdrie every evening. This was denied by the defenders, and they objected to the issue proposed, that it did not include this disputed matter. They founded on the case of Hamilton *v.* Caledonian Railway Company, 18 D. 999, and 19 D. 457.

The Court altered the issue to the effect of adding after the word "engines," the words, "with the leave of the defenders."

Counsel for Pursuer—Mr Scott and Mr F. W. Clark. Agent—Mr D. F. Bridgeford, S.S.C.

Counsel for Defenders—The Solicitor-General and Mr Mackenzie. Agents—Messrs A. G. R. & W. Ellis, W.S.

SECOND DIVISION.

GARDNER *v.* M'GAGHANS.

(*Ante*, vol. i., p. 205.)

Reparation—Slander—New Trial. Verdict of a jury in an action of damages for slander set aside as contrary to evidence, and a new trial granted.

This was an action of damages at the instance of John Gardner, joiner, residing in Home Street, Edinburgh, against Mrs Mary Keddie, now wife of Michael M'Gaghan, and the said Michael M'Gaghan for his interest. The ground of action was that the defender, within her own residence in Edinburgh, falsely and calumniously accused the pursuer of having stolen her late husband's watch, and thereafter caused him to be apprehended and taken to the Police Office. The following issues were sent to the jury:—

"1. Whether, on or about Monday the 24th day of July 1865, and in or near the female defender's house in Spittal Street, Edinburgh, the female defender, maliciously and without probable cause, apprehended, or caused the pursuer to be apprehended, and thence conveyed to the Fountainbridge station of the Edinburgh City Police, to the loss, injury, and damage of the pursuer?

"2. Whether, on or about the 24th day of July 1865, and on the way between the female defender's house in Spittal Street and the Fountainbridge station of the Edinburgh City Police, the female defender did falsely and calumniously, in the hearing of Mrs M'Gregor,

wife of Donald M'Gregor, residing in Spittal Street, Edinburgh, say that the pursuer had stolen her late husband's watch, or did falsely and calumniously utter words to that effect of and concerning the pursuer, to the loss, injury, and damage of the pursuer?"

Damages laid at £250.

The trial took place last session before Lord Jerviswoode. After an absence of three hours, the jury, by a majority, found for the pursuer, and assessed the damages at £10.

The evidence adduced in support of the first issue was generally to the effect that the pursuer came to the defender's house, and that they were for some time together in a room engaged in general conversation. A watch belonging to the defender's late husband lay usually on the mantelpiece, and about twenty minutes after the pursuer came into the house was missed by the defender. She thereupon charged the pursuer with having stolen it, and went for police-officers, whom she instructed to take the pursuer into custody. The police-officers said that the defender did so with hesitation, and when the parties reached the Police Office the defender did not press the charge, and the pursuer was liberated.

The only evidence relied upon in support of the second issue was the testimony of one witness, who said that when the defender was going for the police she called in at her house, which is on the same stair as the defender's, and stated that she had lost her watch, and she thought that she had the man in the house who had taken it.

At the end of last session the defender applied for a new trial, and obtained a rule upon the pursuer to show cause why it should not take place.

To-day, in showing cause,

GIFFORD, for the pursuer, argued that the evidence of malice, which was to substantiate the first issue, was to be infered from the facts and circumstances of the case, and particularly from the manner in which the defender conducted herself on the occasion. It was not necessary to prove either that the malice was direct or antecedent to the fact. If it could be shown that the defender had acted with utter regardlessness and recklessness there was what the law held to be malice, and there being therefore a case to go to the jury, the Court should not usurp its function by setting aside the verdict. The second issue was established by the evidence of the witness, who said that the defender had stated to her she thought she had the thief in her house. Further, the Court should not grant a new trial, in respect the sum awarded by the jury in name of damages was so small. The rule in England was that if a jury awarded a sum under £20 a new trial was refused. Bayne *v.* M'Gregor, 14th March 1863; 1 Macq. 615, and Chitty's Practice were cited.

A. MONCRIEFF and W. A. BROWN, for defenders, were not called upon.

The LORD JUSTICE-CLERK said—The rule which the defenders formerly obtained will now be made absolute, and I regret that we cannot put Lord Jerviswoode in a position to throw the case out of Court altogether. I never saw a more trashy case in Court, and if the pursuer has saddled himself with two trials, he has himself to blame for it. The evidence of malice applicable to the first issue is a total blank, and there is just as little evidence in support of the second. In regard to Mr Gifford's argument, founded upon the English practice of not granting a new trial where the sum awarded by the jury is under £20, I can only say that we have no such rule here, and besides, Mr Gifford has not shown us that that is the practice in England in cases where character is affected.

The other Judges concurred; Lord NEAVES remarking, in reference to his opinion in Bayne *v.* M'Gregor, that it was quite true that malice might be made out inferentially from facts and circumstances, but there was no suggestion of malice in the present case.

The rule accordingly was made absolute, and a new trial granted.

Agent for Pursuer—James Renton, S.S.C.
Agent for Defender—James Bell, S.S.C.

Saturday, February 10.

OUTER HOUSE.

(Before Lord Barcaple.)

FAIRBAIRN *v.* DUNDEE AND NEWCASTLE SHIPPING COMPANY (LIMITED).

Merchant Shipping Act—Notice of Action to Board of Trade. Held (per Lord Barcaple, and case not carried further) that the provision of the Merchant Shipping Act requiring notice of all actions of damages arising through the fault of the crew of another vessel to be given to the Board of Trade before the action is instituted was sufficiently complied with, by the matter having been brought by another than the pursuer of the action, under the notice of the board, who instituted no inquiry.

In this action the pursuer claimed damages from the defenders for loss sustained by her in consequence of the death of her husband, who was a fisherman, by the running down of a fishing-boat, of which he and three other fishermen formed the crew, by the steamer Dalhousie, in the month of October 1864. The defenders stated a preliminary plea to the effect that the action was irrelevant in respect the pursuer had not complied with the provisions of section 512 of the Merchant Shipping Act 1854, which enacts "that in cases where loss of life or personal injury has occurred by any accident, in respect of which the owner of any such ship as aforesaid is or is alleged to be, liable in damages, no person shall be entitled to bring any action or institute any suit or other legal proceeding in the United Kingdom until the completion of the inquiry (if any) instituted by the Board of Trade, or until the Board of Trade has refused to institute the same; and the Board of Trade shall, for the purpose of entitling any person to bring an action or institute any legal proceeding, be deemed to have refused to institute such inquiry, whenever notice has been served on it by any person of his desire to bring such action or institute such suit, or other legal proceeding, and no inquiry is instituted by the Board of Trade, in respect of such intended action, suit, or proceeding, for the space of one month from the service of such notice."

The Lord Ordinary repelled this plea. A reclaiming note was presented against his interlocutor, but before it was heard the case was compromised.

In his note his Lordship observed:—"The 512th section of the statute provides that where the Board of Trade has not already instituted an inquiry, no person shall bring an action until the Board has refused to institute the same. In this case, an application was made to the Board of Trade on 13th October 1864 by Mr Wilson, officer of the Board of Fisheries at Eyemouth,