was precisely of the same kind as that of the bishop *quoad* his fourth part. It is not to be supposed that there was a division of the lands among the titulars, they really held a *pro indiviso* right to the teinds of the whole parish; their rights were identical except in extent, for the parson here was interested as titular to the extent of three-fourths, while the bishop had the same interest in only one-fourth, so that it was not unreasonable, in the Sub-Commisioners being satisfied with the parson's consent, particularly as he in point of fact possessed and drew the teind belonging to the bishop in the shape of rental bolls and, was himself quite satisfied. I think it would be unfortunate if, this report having been acted on for so many years, the Bishop should not be now held to have acquiesced.

The other Judges concurred.

Counsel for Pursuers—G. H. Pattison and W. Watson. Agents—T. & R. B. Ranken, W.S.
Counsel for Rev. Colin Campbell—Millar, Q.C., and Duncan. Agents—M'Neill & Sime, W.S.

COURT OF SESSION.

Wednesday, December 11.

SECOND DIVISION.

[Sheriff of Lanarkshire

M'CAIG *v.* MOSCRIP.

Judicial Slander—Privilege.

In an action for damages for slander, a statement put on record in a judicial process, and not deleted or withdrawn, *held* privileged, as being pertinent to the issue and made in *bona fide.*

The pursuer in this action, an accountant in Glasgow, at a meeting for the election of trustee and commissioner on the sequestrated estates of John Mitchell, held on 13th December 1870, attended and voted as mandatory for a number of creditors in favour of Henry M'Lachlan. At the same meeting the defender, as mandatory for certain other creditors, put himself in nomination for the trusteeship. Thereafter the defender had a list of objections to the election of M'Lachlan as trustee prepared and lodged with the Sheriff-Clerk as follows:—"The eligibility of the said Henry M'Lachlan is objected to in respect—(1) That he altered and amended the oaths of the deponing creditors after these were emitted and signed by the deponents and the attesting justices; and further, that he was privy to the alterations made upon the oaths by William Lucas, writer in Glasgow, and Kenneth M'Donald, law clerk, Glasgow, or by one or more of the clerks in the employment of Gordon, Smith, & Lucas, writers, Glasgow, the agents of the bankrupt; and (2) That the said Henry M'Lachlan, or some one acting for him, in his knowledge, and with his consent and authority, gave, or has promised and agreed to give, a consideration in money to Patrick M'Caig, accountant in Glasgow, in respect of the vote tendered and given by him in favour of the said Henry M'Lachlan as trustee."

On 12th January the Sheriff, after a proof which failed to bring home to M'Lachlan the allegations in the objections, found him duly elected trustee. On 24th February 1871 the pursuer raised the summons in this action, which concludes for £90 in name of damages in respect of the allegations contained in the objections. The defender pleaded that the objections being lodged by his agent unknown to him, and without his instructions, he was not responsible, and that, assuming he did authorise the statements, they were justified by the pursuer's actings in connection with the sequestration, and were privileged, as being contained in a pleading forming part of judicial proceedings to which they were pertinent; and further, that having been made *ex malitia*, the pursuer could not maintain action for any loss or injury sustained by him.

On 22d May 1872 Sheriff Galbraith "Finds it proved out of the defender's own mouth that he read and allowed the statements complained of to form part of the pleadings in the sequestration process; Finds that these statements are slanderous, and fitted to injure the pursuer in his business, inasmuch as they amount to a charge of corruption in the discharge of the duties entrusted to him by his client; Finds that there is no evidence whatever to support the plea of justification, and that therefore the stating of that plea indicates ill will, or at least great rashness; Finds that the defender must be held personally responsible for all the statements made in his name in the competition which he followed forth, the more especially so that he was present at discussions before the Sheriff, and the objectionable statements were not withdrawn; Therefore finds the defender liable to the pursuer in the sum of £50 sterling, as damages and *solatium*; Finds the defender liable to the pursuer in expenses; Allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report, and decerns.

"*Note.*—The Sheriff Substitute would have regarded the defender's position with more favour but for the plea of justification stated, as it must have been after mature consideration, and in support of which not one title of evidence has been adduced. Although the defender may not have had any animus against the pursuer in the competition, it is very plain from his examination in this case that he desired to underrate the pursuer's position, while at the same time professing nothing but friendliness."

On appeal Sheriff Bell, on 6th August, "Finds that it appears that the only grounds upon which the action is laid have not been substantiated, and all that can be laid to the defender's charge is, that after he became aware of the contents of the note he did not formally repudiate the said statement; Finds that it has long been established that a statement made in a judicial process, which is pertinent to the cause, is privilege, and cannot form the ground-work of an action of defamation unless it can be proved to have been made maliciously; Finds that the defender has all along denied that he entertains any malice or ill will towards the pursuer, and states in his defences (article 13), that whilst denying all liability he was prepared to make a suitable apology to the pursuer for any injury to his feelings, character, and reputation, he might conceive to have been occasioned by the unauthorised statement of his (the defender's) agent; Finds that the presence or absence of malice is to be inferred from the whole circumstances of

the individual case, and the facts which have been here instructed do not bring home malice to the defender, considering, 1st, that the insertion of the injurious matter in the note of objections was not done by him or by his instructions or with his knowledge; 2d, that he is not proved to have on any occasion adopted or repeated the statement, but, on the contrary, seems to have taken an early opportunity of intimating to his agent that he did not wish it to be insisted in; 3d, that the said statement was pertinent to the issue of the competition between the defender and M'Lachlan, and although the defender did not formally withdraw it when it first came to his knowledge, this may have been because he supposed that his agent had not made it without probable cause; and 4th, that nothing has transpired to show that the defender was in point of fact actuated by malice to the pursuer; Therefore sustains the defences, and assoilzies thed efender from the conclusions of the action; but, in respect the defender has alleged in the closed record, certain actings by the pursuer in Mitchell's sequestration which he maintains went to justify the statement complained of, and yet failed to prove any such actings, finds no expenses due, and decerns."

The pursuer appealed, and argued that the privilege attached to such a statement only so long as the party founded on it as relevant and intended to prove it, that here, as no attempt had been made to prove it, and as it still remained in process, the privilege had ceased.

Cases cited—*Smith*, 15 D. 549; *Bell* v. *Black*, 2 Scot. Law Rep. 58; *Logan*, October 26, 1872.

At advising—

Lord Justice-Clerk—I think the pursuer has failed to make out that the statement was made maliciously. It was a statement made in a judicial process and was pertinent to the issue and therefore privileged, and if privileged when put on record it does not cease to be so when the party who makes it finds himself wrong. The defence is the utter want of justification, but I see no evidence of a real desire to injure the defender by making a false statement. I do not doubt the defender is responsible for those statements and he did not take any vigorous steps to withdraw them. But I think it is important that parties should be quite free to make relevant statements, and very inexpedient that they should be hampered by fear of a prosecution so long as these statements are honestly made.

The other Judges concurred.

Appeal dismissed.

Counsel for Pursuer—Rhind and Scott. Agent—W. Officer, S.S.C.

Counsel for Defender—H. Moncreiff. Agent—A. A. Hastie, S.S.C.

Thursday, December 12.

SECOND DIVISION.

SPECIAL CASE—ALLAN'S TRUSTEES.

Settlement—Construction—Vesting.

A died leaving a trust-disposition and settlement of the entirety of his estate for certain purposes. *Inter alia*, he directed his trustee on the death of his widow (who life-rented the residue) to denude and pay over the fee of the said residue among the whole of his children who might survive him, and the issue of such as might predecease him; and declaring that the provisions hereby made in favour of females shall be purely alimentary to them, not alienable or assignable, and shall be exclusive of the *jus mariti* and right of administration of any husband they or either of them have or may have, and shall not be affectable by their own, or such husband's debts or deeds, or the diligence of their own or his creditors, all which are hereby excluded and debarred.

On the death of truster's widow, in a question between the trustees and the daughters of the truster—*Held* (1) that the trustees were bound to make payment to the daughters of their shares of the residue; (2) that the exclusion of the *jus mariti* and right of administration must be inserted in the receipts by the daughters; (3) that the clause declaring the shares alimentary and not alienable was to be held *pro non scripto*.

In a question between the issue of a son who predeceased the truster and the surviving children—*held* that the share of the son vested *a morte testatoris*.

Thursday, December 12.

FIRST DIVISION.

SPECIAL CASE—MORICE'S TRUSTEES AND OTHERS.

Succession—Fee and Liferent—Power of Apportionment.

A testator provided in his trust-disposition that the free residue of his estate should be divided amongst his children in just and equal proportions, and declared with respect to his daughter's portion, that the same, with the exception of £500 to be at her absolute disposal upon attaining twenty-one years of age, should be laid out on heritable security, and so remain until her marriage, when the same should be secured in the same way for her proper liferent use, and afterwards to her children in fee. At the date of this trust-disposition only one daughter had been born to the testator, but subsequently he had a large family, and was survived by four daughters, besides sons. By a codicil the testator provided that the division of his property should take effect among all his sons and daughters, share and share alike, and, excepting £500 payable on marriage to each of the daughters, and £500 more which each was permitted to bequeath, the entire residue of the shares of daughters dying unmarried or childless, was to revert to the surviving sons and daughters. On the marriage of one of the testator's daughters, a clause was inserted in her marriage-contract reserving to her the right to apportion the shares which her children were to have of the estate bequeathed to her by her father, at her death. In virtue of the power thus conferred upon her, the daughter executed a deed of apportionment. *Held* that she had only a liferent under her father's trust-disposition of the capital of the original share