think that the innuendo is reasonable to this extent at least, that the whole question is a fair one for the consideration of a jury.

The defender maintains that as the letter in question was sent to the pursuer personally, and not to a third party, it cannot be made use of to found an action of damages. But it is settled in the law of Scotland that an action of damages may be laid for *solatium*, which fairly meets the objection that the letter in question was not addressed to a third party. On that account therefore I think that the defender's contention is unsound.

It is quite possible that a case of privilege may be made out, but if such a case exists it does not arise on the present record. If the signature to the promissory-note should not turn out to be that of Mr Low, but a forgery, that circumstance might, no doubt, raise a case of privilege. But the case of *M'Bride* v. *Williams and Dalzell*, reported in 7 Macph. 427, decided conclusively that when in the course of the trial a case of privilege was made out, the pursuer should be allowed to rebut this by leading evidence of malice, if he had any, although the word "maliciously" was not inserted in the issue.

I am therefore for approving of the first issue.

The second issue seems to me to depend upon the same principle as the first, for the law which allows a party to recover damages for slander contained in letters addressed to himself also allows verbal statements made to him personally to found an action of damages.

LORD DEAS and LORD MURE concurred.

LORD SHAND—The pursuer has not given us any account of what took place when the promissory-note was presented for payment. According to the defender, Low repudiated his signature, and the bill was then protested for non-payment. Had the pursuer admitted this repudiation by Low, which, on the contrary, he denies, and avers that he is able to prove by documentary evidence that no such repudiation took place, then I must say that I should have felt considerable hesitation in allowing this first issue, but looking to the state of the facts as maintained by the pursuer, I agree with your Lordships in thinking that it ought to be allowed. In the case when a person gets a bill returned to him which has been repudiated by the party whose signature it ostensibly bears, it certainly is better to allow of explanations being given before putting the matter into the hands of the procurator-fiscal.

Had the fact which is here averred by the defender—Low's alleged repudiation of his signature—been admitted by the pursuer, a question would have arisen whether "malice and want of probable cause" would not require to have been proved; and the question of privilege in business would then have arisen. In these circumstances I should then have held that privilege had been proved, and would have required the pursuer to prove malice and want of probable cause.

I am of opinion with your Lordships that both issues should be allowed.

The Court altered the first issue by adding after the word "forgery" the words "or of uttering a document as genuine knowing it to be forged." *Quoad ultra* the Court adhered to the interlocutor of the Lord Ordinary, and approved of the issues as adjusted by him.

Counsel for Pursuer — J. Campbell Smith. Agent—William Officer, S.S.C.

Counsel for Defender—Guthrie Smith—Young. Agent—James Philip, L.A.

Saturday, January 27.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

SIMSON AND OTHERS, PETITIONERS.

Nobile Officium — *Trust* — Delectus personæ — *Judicial Factor—Special Powers.*

A testator by his trust-disposition and settlement conveyed his estate in trust to certain parties named or to be named, or who should be assumed into the trust, and the acceptors or acceptor, survivors and last survivor of them, whom all failing, then to the nearest heir-male of the last accepting and surviving trustee, and the assignees of the trustees. The trustees were directed to invest £4000 for the liferent use allenarly of one of the truster's sons, with power, if they should think it advisable, to pay over to him the whole or any part of the principal. The trustees having resigned, a judicial factor was appointed. The Court, on the application of the liferenter of this sum, and the parties presumptively intended to succeed to him, *granted* power to the judicial factor to invest £1000 in the purchase of an annuity for the liferenter.

By trust-disposition and settlement executed by David Simson senior, tenant of Oxnam Row, in the county of Roxburgh, and Mrs Elizabeth Rutherford or Simson, his wife, dated 15th and 18th September 1863, and registered in the Books of Council and Session 29th April 1865, David Simson gave, granted, assigned, and disponed to and in favour of Mrs Elizabeth Rutherford or Simson, his wife, George Simson and James Simson, his sons, John Somerville Johnston and John Beveridge, his sons-in-law, "and to such other person or persons as he should thereafter name or should be assumed in terms of law to act in the trust thereby created, and to the acceptors or acceptor, survivors and last survivor of persons thereby named or to be named or assumed as aforesaid, as trustees for executing the trust thereby created, whom all failing, then to the nearest heir-male of the last accepting and surviving trustee who should be major at the time, and the assignees of his said trustees," heritably and irredeemably, his whole heritable and moveable property, with the exception of a certain lease therein named, in trust for certain purposes.

By the sixth purpose of the trust-settlement it was provided that the trustees should invest £4000 for behoof of David Simson junior, a son of the truster, in liferent, for his liferent use allenarly, and of his lawful issue in fee, with a power of appointment to David Simson, and it was declared that the provision was to be alimentary.

On the death of David Simson junior without issue the fund was to be disposed of in the following way—"I appoint the said sum of £4000 to be divided and paid to my other sons George Simson, James Simson, and John Simson, equally among them, share and share alike, and their respective heirs and assignees: But it is hereby specially provided and declared that the foregoing provisions in favour of my said son David Simson junior in liferent, and of his issue, whom failing in favour of the said George Simson, James Simson, and John Simson, and their foresaids in fee, are made by me subject to this condition and provision, that in case at any time my trustees may, in the exercise of their own judgment and discretion, think it prudent and advisable to pay over to the said David Simson junior the whole or any part of the principal of the said sum of £4000 as his own absolute property, they shall have, and they are hereby granted, full power, authority, and liberty to do so; and they shall be completely exonered thereof by the discharge of the said David Simson junior alone, and shall not thereafter be subject to any claim thereto, or to the part so paid, at the instance of his issue or of my said sons George, James, and John, or any of them, or on the part of their respective foresaids, it being my intention to give to my trustees the same full powers and discretion in giving the said principal sum to the said David Simson junior, or withholding the same from him, which I myself now possess; and the said David Simson junior shall have no right or power to claim or demand payment of said principal sum, or any part thereof, from my trustees in case they may not deem it proper to give the same to him of their own free will and motive, they being hereby declared to be the sole and uncontrolled judges in the matter."

The trustees nominated, with the exception of Mrs Simson, accepted of the office, and entered on the management of the estate. All the purposes of the trust were fulfilled except that relating to David Simson, which was to endure during his lifetime. On 8th October 1867 George Simson and John Beveridge, and on 3d May 1875 the remaining trustees, resigned, and Mr Richard Wilson, C.A., was then appointed judicial factor. Mr Wilson resigned in 1882, and consented to his appointment being recalled.

This was a petition by George Simson, James Simson, John Simson, David Simson, and Richard Wilson, for recal of Mr Wilson's appointment, the appointment of another judicial factor, and for authority to the new factor to invest out of the trust-estate the sum of £1000 in the purchase, from an insurance company, of an annuity on behalf of David Simson. Part of the estate was invested in Indian railway stock capable of being realised at a premium. The petitioners also asked that the judicial factor might be allowed to hand over to David Simson for his absolute use any sum realised for this stock over and above its purchase price.

David Simson was fifty-two years of age, and unmarried, and George, James, and John Simson were presumptively the only parties interested in the fee of the liferent provisions. It was stated in the petition that the income of the estate had proved insufficient to meet the wants of the petitioner David Simson, the liferenter.

The Lord Ordinary (KINNEAR) having appointed Mr James Howden, chartered accountant, Edinburgh, to be judicial factor, Mr Howden lodged a minute in which he stated that he concurred in the opinion that the special powers craved ought to be granted. Thereafter, having resumed consideration of the petition, the Lord Ordinary refused to grant the special powers craved.

"*Note.*—The special power craved is not in conformity with the directions of the trust-deed, and the consenting petitioners George, James, and John Simson have only a contingent interest in the fund.

"It is very doubtful whether the discretion committed to the trustees could be exercised by the judicial factor. But the proposed transaction does not appear to me to be within that discretion. The trustees are authorised, if 'in the exercise of their own judgment' they think it prudent and advisable, to pay over to the legatee David Simson the whole or any part of the principal of his legacy. But to sink £1000 in the purchase of an annuity is a very different thing from paying over that sum to the legatee; and the proposal to buy an annuity does not proceed upon the opinion either of the factor or of the consenting petitioners that it would be prudent and advisable to make over that sum to the legatee as his absolute property, but would appear to imply that they are of a contrary opinion."

The petitioners reclaimed.

Authorities—*Home*, M. 16,382; *Busby*, February 1, 1823, 2 S. 176; *Nisbet* v. *Todd*, January 15, 1848, 10 D. 361; *Morrison* v. *Wedderspoon*, December 1, 1855, 18 D. 132; *Allan*, November 13, 1869, 8 Macph. 139; *Jamieson* v. *Allardice*, May 30, 1872, 10 Macph. 755; *Auld*, February 5, 1856, 18 D. 487; *Hill, &c.* v. *Thomson, &c.*, October 30, 1874, 2 R. 68; *Melville* v. *Lady Preston*, February 8, 1838, 16 D. 457—*aff.* 2 Robinson, 45; *M'Aslan*, July 17, 1841, 3 D. 1263; *Ireland* v. *Glass*, May 18, 1833, 11 S. 626; *M'Cormack* v. *Barber*, January 25, 1861, 23 D. 407.

At advising—

LORD PRESIDENT—This question is one of considerable delicacy and importance, and we accordingly took time to consider it, and to examine the authorities to which we were referred, in order to make sure that in granting the powers craved we were not going against precedent. I am now satisfied that these powers may be granted, and in granting them I do not think that we are going beyond what has hitherto been done. By the sixth purpose of the trust-deed the truster provided that the sum of £4000 was to be invested by his trustees for behoof of his son David Simson junior, for his liferent use allenarly, and for his issue in fee, and on the death of the said David Simson junior without issue—[*reads passage above quoted*]. All the trustees nominated, except one, accepted of the office. After fulfilling the other purposes of the trust, and continuing for some years in the management, the acting trustees resigned, and the estate passed into the hands of a judicial factor. After managing the estate for some time, the judicial factor then appointed has resigned and consented that his appointment should be recalled, and part of the prayer of the present petition is for the appointment of another judicial factor. This appointment was made by the Lord Ordinary in July

last. What is proposed in the application under our consideration is, that £1000 of the £4000 should be devoted to the purchase of an annuity for the liferenter's behoof, and it is further proposed that any balance existing over and above the purchase price of certain stocks referred to in the petition should be paid over to him absolutely, leaving the capital sum untouched and liferented by him. Had the trustees in the present case been a body of selected individuals who alone had the power to act, then I think a difficulty would have existed in the granting to a judicial factor powers such as are here sought for, but the truster did not so appoint his trustees by name, but after nominating certain persons, he adds, as stated in the petition—"Or to such other person or persons . . . as should be assumed in terms of law to act in the trust thereby created, and to the acceptors or acceptor, survivors and last survivor of the persons thereby named or to be named or assumed as aforesaid, as trustees for executing the trust thereby created, whom all failing, then to the nearest heir-male of the last accepting and surviving trustee who shall be major at the time." Now, this form of nominating trustees clearly excludes *delectus personæ*. It admits of persons unknown to the trustee being assumed into the trust, the power of disposal being also given to the nearest heir-male of the last surviving trustee.

Now, surely it is not a very strong proposition to say that such a power as this might be exercised by anyone appointed by this Court, and might especially be exercised in virtue of special authority granted by this Court. The judicial factor could not under his general powers exercise this discretion, but only under direction of the Court.

The Lord Ordinary has thought that the powers here sought for are not such as a judicial factor ought to be entrusted with, and that the discretion committed to the trustees cannot properly be exercised by him. The second difficulty suggested by the Lord Ordinary is, that while the terms of the deed authorise the trustees to pay over to the legatee the principal of his legacy, what is here proposed is to sink a portion of that principal in an annuity.

But it is to be observed that the parties interested are all agreed in the course proposed, and it is to be done with the consent and at the desire of David Simson, the only persons unrepresented being his possible issue, and he is a man of fifty-two years of age and unmarried.

Practically all that is proposed to be done here is to make payment of £1000 to David Simson, with which sum he might perfectly well proceed to purchase an annuity himself.

On the whole matter, therefore, I think that we ought to recal the interlocutor of the Lord Ordinary and allow the powers craved.

Lord Deas—In this case we have had an interesting and able argument from Mr Urquhart, who has supplied us also with an exhaustive list of authorities, which leave no doubt on my mind that apart altogether from the special circumstances of this case we would have been warranted in granting the powers craved.

But taking into consideration the peculiarities of this case, I have no doubt whatever that the prayer of the petition may be granted. I can see no difference between purchasing an annuity with the legatee's consent and handing him over the money, and looking to the terms of this deed, and the powers given to the trustees under it, I concur with your Lordship in thinking that the present application may be granted.

Lord Shand—Since this petition was before the Lord Ordinary the judicial factor appointed on the resignation of Mr Wilson has lodged minute in which he states that he concurs in the opinion that it would be advantageous if these special powers were granted. That is an additional element in the case. It appears to me that by the clause in the trust-deed which your Lordship has read it was intended that the trustees should have a very wide discretion indeed. The testator uses the expression, that if they think it prudent and advisable they may pay over to David Simson junior the whole or any part of the capital sum of £4000. He might have conferred a more limited discretion, as, for example, by saying the trustees might make the advances if they were satisfied that the legatee was to be trusted to employ the amount prudently in business. He does not do so, but goes on to give the trustees the same full power and discretion in exercising this right "which I myself now possess." I think that simply means that with regard to the £4000 the trustees are to be put in precisely the same position as the testator himself was. Now, that discretion is confided not only to the trustees who are nominated specially by the testator, but is conferred on any trustees who might be assumed under the trustees' powers of assumption. In the circumstances, looking to the fact that the machinery of the trust provided by the truster failed by the resignation of the original trustees, I am clearly of opinion that the discretion given to the trustees can be well exercised by the judicial factor with the authority of the Court, by whom he was appointed. The Court in giving such authority is only assisting to carry out the intentions of the testator, and the leading object of the Court in dealing with trust-deeds is to carry out the testator's intentions. It is always so stated in all questions of construction of settlement, and the same principle applies in questions of administration, where trustees fail or decline to act and the Court appoints a judicial factor. They do so that he may carry out the testator's intentions. It appears to me to be only an extension of that principle to hold that where special powers are granted to trustees in their administration of the trust, and the machinery of the trust fails, the special powers may nevertheless be exercised, and that even where the act involves the exercise of a discretion committed to the trustees the Court may take the place of the trustees, and in their discretion authorise the act, if in their opinion they are thereby carrying out the testator's intention.

The case would be different if there was a power of appointment between children given, say to the trustee specially named, or to the testator's widow. In that case, if the person named should fail, the Court would not exercise a power obviously conferred because of a special reliance on the judgment of a particular individual.

The rule applicable to the case is very clearly stated by Lord Deas in the case of *Allan*, where he says—"If the trustees had it in their power

to make such an addition, it is clearly in our power to authorise the judicial factor to do what they might have done." To the same effect is his Lordship's opinion given effect to in a matter involving the exercise of a discretion in the case of *Jamieson* v. *Allardice* (10 Macph. 755). There his Lordship says—"The trustees have power given them by the trust-deed to sell, and there is nothing which tends in an opposite direction except the wish expressed by the testator that they shall, if possible, make over the landed property to his son Robert. If the sale is allowed, the estate will obviously remain in a better form for whoever may get it than it is now." Lord Kinloch concurs, and says—"The trustees could have sold without applying to the Court at all, and it is only because Mr Jamieson is a judicial factor that he has thought it necessary to apply to the Court." These cases seem to me authority for the course to be adopted, but even without this authority I should have had no difficulty in granting the power now asked.

Lord Mure was absent on Circuit.

The Court recalled the interlocutor of the Lord Ordinary and granted the special powers craved.

Counsel for Petitioners—Urquhart. Agent—J. H. S. Graham, W.S.

Tuesday, January 30.

OUTER HOUSE.

[Lord Kinnear, Lord Ordinary on the Bills.

LESLIE *v.* THE ORKNEY COMMISSIONERS OF SUPPLY.

JOHNSTON *v.* THE ORKNEY COMMISSIONERS OF SUPPLY.

Parish Minister—Glebe—Commissioners of Supply—Lands Valuation (Scotland) Act (17 *and* 18 *Vict. cap.* 91), *sec.* 19—*Proprietor* ex officio.

Parish ministers having in virtue of their offices glebes above £100 of yearly value *held* not to have the statutory qualification under the Lands Valuation (Scotland) Act 1854 to be enrolled as Commissioners of Supply.

These appeals were brought (under section 6 of the Commissioners of Supply (Scotland) Act 1856, which provides for a summary appeal to the Lord Ordinary on the Bills from the determination of the Commissioners of Supply on Claims and Objections) by the Reverend Alexander Leslie of Lesliedale, minister of the united parishes of Evie and Rendall, and by the Rev. David Johnston, minister of the united parishes of Harray and Birsay, both in the county of Orkney, against the judgment of the Committee on Claims and Objections of the Commissioners of Supply for that county, refusing to sustain their claims, under sec. 19 of the Lands Valuation (Scotland) Act 1854, to be enrolled as Commissioners of Supply for the county. Each of the appellants had glebe lands of a yearly value exceeding £100 within their respective parishes. Mr Johnston claimed to be enrolled on the ground that he was, "in right of his office, proprietor of lands" (not burdened with any liferent) in the county of the yearly rent or value of £100 and upwards, exclusive of the yearly rent or value of houses and other buildings, not being farmhouses or offices or other agricultural buildings. Mr Leslie, who besides having his glebe lands, was also proprietor in his own right of land in the county to the value of £60 per annum, and founding on that fact in his claim, claimed as being, "as minister" of his parish, "proprietor in liferent" of lands exceeding £100 in yearly value.

Section 19 of the Act 17 and 18 Vict. cap. 91, is as follows:—"From and after the passing of this Act the qualification for a commissioner of supply in any county shall be . . . the being proprietor, or the husband of any proprietor, infeft in liferent or in fee not burdened with a liferent in lands and heritages within such county of the yearly rent or value, in terms of this Act, of at least £100, or the being eldest son and heir-apparent of a proprietor infeft in fee not burdened with a liferent in lands and heritages within such county of the yearly rent or value, in terms of this Act, of £400, and the factor of any proprietor or proprietors infeft either in liferent or in fee, unburdened as aforesaid, in lands and heritages within such county of the yearly rent or value, in terms of this Act, of £800, shall be qualified to act as a commissioner of supply in the absence of such proprietor or proprietors: Provided always, that with reference only to the qualification of commissioners of supply under this Act the yearly rent or value of houses and other buildings or offices or other agricultural buildings shall be estimated at only one-half of their actual yearly rent or value in terms of this Act."

The Committee on Claims and Objections having, as above stated, refused to sustain the claim, the claimants appealed to the Lord Ordinary on the Bills.

The Lord Ordinary pronounced this interlocutor in each case:—"Having heard counsel for the petitioner, and considered the petition and productions, dismisses the same.

"*Opinion.*—I have considered these appeals, and am of opinion that they cannot be sustained. The statutory qualification is quite clear, and the appellants do not possess it, not being infeft either in liferent or in fee in property of the statutory value.

Counsel for Appellants—Pearson. Agent—J. B. M'Intosh, S.S.C.

Friday, February 2.

SECOND DIVISION.

[Lord Adam, Ordinary.

KENNETH & COMPANY *v.* MOORE AND ANOTHER.

Marine Insurance—Time Policy—Constructive Total Loss—Perils of Sea—Seaworthiness—Inherent Defects.

In an action on a time policy of insurance for an alleged constructive total loss of a vessel by perils of the sea, the underwriters denied liability on the ground that, assuming