against one of the co-obligants for payment of the whole. If so, what took place here was simply this—The creditor selected two of the debtors, viz., Samuel Morton Smart and Hugh Morton Gavin, and from their estates he recovered £3100, and granted a discharge. But that did not impair his right to recover from the representatives of Stewart Robertson what remained unpaid, assuming that he, the remaining debtor, was bound jointly and severally; nor does the discharge the creditor is said to have granted impair the right of relief which the representatives of Stewart Robertson have against the other two debtors for recovery of anything paid over and above Stewart Robertson's proper share.

I think the interlocutor of the Lord Ordinary is right.

LORD KINNEAR—I agree with the Lord Ordinary on both points.

The parties to the bond are bound jointly and severally as partners and as individuals. Partners are not merely cautioners for their firm, although the firm is the primary debtor. They are themselves the firm, and if they borrow money to be used in their common business, each must be held to have equally received the whole. Each of the partners would, therefore, have been liable *in solatium* even if their separate liability had not been expressed in terms. But the partners in the present case bound themselves jointly with the firm and with each other, and also severally; and by the terms of their obligation, as well as by their relation to one another, they are all principal debtors. A partner who undertakes an obligation in these terms may be precluded from maintaining that the firm must be sued, in the first place, before an action can be brought against him as an individual for a co-partnery debt. But in other respects his liability is exactly the same as if the debt had been contracted by the firm in the ordinary course of business.

As to the second point, there can be no doubt that a creditor who discharges one of several co-debtors will debar himself from enforcing his claim against the others if he has thereby defeated their right of relief. But the claimants had done nothing which can be construed as a discharge of the debt when they lodged their claim on the estate in the hands of the judicial factor. A creditor does not discharge one of several partners by taking dividends from the insolvent estate of the others or of the firm.

LORD PRESIDENT—I agree.

The Court adhered.

Counsel for Claimants and Respondents—Dickson—C. D. Murray. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Reclaimer—Jameson—Crole. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, November 23.

FIRST DIVISION.

[Sheriff of Inverness, &c.

MILNE *v.* SMITHS.

Reparation—Slander—Husband and Wife—Malice—Privilege—Master and Servant—Relevancy.

In two conjoined actions of damages for slander brought against the wife of the rector of a boarding-school and her husband as her administrator-at-law, and for his own right and interest, the pursuer averred, in the first action, that the female defender in the presence of her domestic servants used certain libellous expressions regarding him; and in the second action, that she falsely and calumniously accused him of circulating defamatory stories reflecting upon her character, and of being the author or writer of a lewd inscription regarding her. It was not averred that the husband authorised or approved of the alleged slanders. The defence of privilege was stated to the first action on the ground that the female defender was entitled and bound to warn her servant against receiving the attentions of a man of the pursuer's known character.

At the adjustment of issues, *held* (1) (following *Barr* v. *Neilson*) that the husband was not liable for slander by his wife, there being no averment of complicity on his part; (2) that where the pursuer's record did not disclose a case of privilege, the words "maliciously and without probable cause" should not go into the issue; (3) that the expression "a low scamp" might stand as part of an issue in context with words unquestionably actionable; (4) that the second action fell to be *dismissed* as irrelevant.

Question (*per* Lord Kinnear) whether the privilege of a master or mistress goes so far as to give the right to defame a third party for the instruction of a servant?

Andrew Milne, draper, Fochabers, brought two actions in the Sheriff Court at Elgin against "Mrs Jane Garrow or Smith, wife of and residing with William Smith, rector, Milne's Institution, Fochabers, and the said William Smith, administrator-at-law for his said wife, and for his own right and interest," craving decree in each case for £500 damages for alleged slander.

In the first action the pursuer averred that "on Monday 7th December 1891 the female defender, in the kitchen or other part of Milne's Institution buildings, falsely and calumniously stated, in the presence and hearing of Nellie Angus" and three other persons, all domestic servants at the Institution, "that the pursuer was a noted blackguard," "a low scamp," and "that he went after every good-looking girl for the purpose of seducing them."

He pleaded that "the female defender having slandered the pursuer is liable in reparation, and the male defender is liable as her administrator-at-law."

The defenders averred that Mrs Smith had the charge and supervision of the staff of servants employed in the boarding establishment connected with the school; that she had made a rule against the servants absenting themselves without her permission; that (Stat. 3) "the scullery-maid, Nellie Angus, had frequently to be reproved for disobeying the rule referred to, and having admitted on several of these occasions that she had been in the company of the pursuer, Mrs Smith . . . felt it to be her duty as her mistress to warn her against receiving the pursuer's attentions, his character having become notorious throughout Fochabers owing to the disclosures in an action for aliment of an illegitimate child brought against him in the Sheriff Court of Elgin in 1886;" that she allowed Nellie Angus, with two of her fellow-servants, to go to a ball in Fochabers on 4th December 1891, and afterwards learned that the pursuer conveyed her home at or about 4 a.m., and remained with her outside in the grounds until past 6 a.m. "(Stat. 7) On or about the 8th December Mrs Smith reprimanded Nellie Angus in presence of the cook and housemaid. . . . Counter statement that the female defender spoke to Nellie Angus about the pursuer in insulting and slanderous terms is denied."

The defenders pleaded, *inter alia*—"The statements made by the female defender of or concerning the pursuer being privileged, the action ought to be dismissed."

In the second action, some months later, between the same parties, the pursuer averred that (Cond. 6) "the female defender called at the pursuer's shop on or about 2nd March 1892, and in the presence and hearing of John M'Intosh, police-constable at Fochabers, and Charles Ross, draper's assistant there, falsely accused the pursuer of circulating statements of a defamatory and incriminating character regarding her and the Rev. John P. Watt. . . . In particular, she stated that the pursuer had said in the presence and hearing of the dressmakers employed by him, 'We've got them now. Mr Watt and Mrs Smith have been caught on the sofa at Findhorn." . . . (Cond. 9) "On the occasion of her visit to the pursuer's shop on 2nd March the female defender . . . accused the pursuer of being the author or writer of the whole or part of the writing quoted in article 7 [which was an obscene inscription on a dyke near Fochabers], or used words and expressions implying that she was such, and she has since said date frequently repeated said statements of and concerning the pursuer."

He pleaded, *inter alia*—"The female defender having by the circulation of false and calumnious statements of and concerning the pursuer, injured him in his business, is liable in reparation, and the other male defender is liable as her administrator-at-law."

The defenders stated that "on 3rd March last the pursuer sent a message to Mrs Smith, by two of her own servants, to say that if she would come to his shop he would acquaint her who told him certain stories which were being spread abroad affecting her character. Mrs Smith accordingly went to pursuer's shop, when she asked pursuer what he had got to say to her. The pursuer remarked that he supposed she blamed him for certain lewd writing which had appeared on the wall fronting the defender's residence on the morning of 2nd March, to which Mrs Smith replied that she didn't think he did it, but that she thought he knew something about it."

The defenders pleaded—"(1) Any statement made by the female defender of and concerning the pursuer being true in fact and justifiable, the action ought to be dismissed. (2) The action being irrelevant, the action ought to be dismissed. (3) In any event, the male defender not being liable for any slander uttered by the female defender, he ought to be assoilzied with expenses."

After certain procedure, the Sheriff (IVORY) conjoined the two actions and allowed a proof.

The defender appealed for jury trial and issues were ordered.

The pursuer proposed the following issues —"(1) Whether, on or about 7th December 1891, in or near Milne's Institution, Fochabers, in the presence and hearing of Nellie Angus, domestic servant, Reidhaven Street, Elgin, Margaret Johnston, Annie M'Phail, and Annie Dunbar, domestic servants, Milne's Institution aforesaid, or one or more of them, the defender Mrs Smith falsely and calumniously said of and concerning the pursuer, that he was "a noted blackguard," "a low scamp," and "that he went after every good-looking girl for the purpose of seducing them," or did use words of a like import and effect of and concerning the pursuer, to his loss, injury, and damage?" "(2) Whether on or about 2nd March 1892, in or near the pursuer's shop in Fochabers, and in the presence and hearing of John M'Intosh, police-constable, Fochabers, and Charles Ross, draper's assistant there, or either of them, the defender Mrs Smith falsely and calumniously accused pursuer of circulating statements of a defamatory and incriminating character, and of being the author or writer of lewd and immoral language regarding her and the Rev. John P. Watt, minister of the parish of Bellie, to the loss, injury, and damage of the pursuer?"

The defenders argued—Both actions were wrongly directed so far as they craved decree against the husband, there being no averment that he was present or approved or had anything to do with the alleged acts of slander by his wife—*Barr* v. *Neilson*, 6 Macph. 651; *Scorgie* v. *Hunter*, 9 S.L.R. 292. There were three objections to the first issue—(1) Malice and want of probable cause should be inserted, for it appeared from pursuer's statements and admissions that this was a case of privilege. It was the duty of a mistress to warn her servant against keeping company with a man of the character and under the circumstances

admitted, and the privilege covered publication to the fellow servants—*Hunt*, 7 Times' Law Reports, 493. (2) The words "low scamp" were not actionable—*Mackintosh* v. *Squair*, 5 S.L.R. 635. (3) The clause "did use words of a like import and effect" should go out. Where the actionable character of the statements alleged to be libellous depended not on innuendo, but on the very words themselves, as where one person was said to have called another "a blackguard," no deviation from the exact words should be allowed. The second issue was irrelevant. The pursuer disclosed that serious slanders affecting the female defender were in circulation, and she put it to him on reasonable suspicion whether he was not the author of them. That was not actionable, like a charge of crime or moral offence; it was not even an accusation of telling an untruth, for the pursuer did not say the stories were untrue. Further, the issue and the record were too vague; it was not stated to whom, where, when, and how the defender had said the defamatory statements were circulated.

Argued for pursuer—The *res judicata* in *Barr's* case was simply that a husband and wife could not be sued conjunctly for separate offences. Here the husband concurred in the wife's defences, and should not be allowed to escape from the action at this stage — *Baillie* v. *Chalmers*, 3 Pat. Apps. 213; *Fraser* v. *Cameron*, 29 S.L.R. 446. The husband having delegated to his wife the charge of the domestic establishment, was liable for all her acts, whether fraudulent or not, if within the scope of her authority — *Mackay* v. *Commercial Bank of New Brunswick*, L.R., 5 P.C. App. 394, and *Barwick*, there cited; *Houldsworth* v. *City Bank*, 6 R. 1164. The mistress might be privileged in speaking to the girl alone, but not in administering a public rebuke involving defamation of a third party. The particulars desiderated in regard to the second issue must be known to the defender, and it was for her to say. The pursuer wished to have his character cleared of the charge of disseminating such slanders, which was *a fortiori* of the slanders complained of in *M'Laren* v. *Roberts*, 21 D. 183; *Watson* v. *Duncan*, 17 R. 404.

At advising—

LORD PRESIDENT—The first point raised by the defenders is that there is no case alleged upon record which raises in law liability against the male defender. The record is completely bare of any statement of complicity on the part of the husband in the slander complained of. We can, I think, therefore, only allow this action to proceed against the husband if we are of opinion that the act of slander by the wife of itself imports liability against the husband. Now, after the decision in the case of *Barr* v. *Neilson*, which seems to me exactly in point, that is an untenable proposition. There it was distinctly laid down that a husband is not liable in person or estate for the slander of his wife. It is, of course, not at all derogatory of that proposition, to add the qualification that that implies that there is no personal conduct on his part which creates liability, even if the wife is innocent. I am, therefore, for assoilzieing the husband from both actions.

But then, taking the first action, we come to the question of the first issue. Mr Jameson has maintained that the words "maliciously and without probable cause" ought to go into the issue. I confess to seeing an initial difficulty in the way of adopting that course, for I find that the pursuer's record in the first action contains no averment of that nature. The logical and proper result of Mr Jameson's argument would be that the action should be thrown out, and not that the words "maliciously and without probable cause" should be inserted in the issue. But then the question at this stage is whether the pursuer on his own record has disclosed a situation importing privilege. I think not. If we take his account of these proceedings, the pursuer does not involve himself in any of the elements of privilege. Mr Jameson endeavoured to connect the pursuer stage by stage with matters contained in the defender's statements on record. But at each stage he had to rely either on the defender's own account of what took place or on conjectures as to the facts. But looking, as we must do, at the pursuer's own record, no case of privilege is disclosed. It will, of course, be open to the defender, who has pleaded privilege, to make out such facts as will support her in that position — such a defence will be entirely open to her at the trial. I therefore think that "malice" and "want of probable cause" cannot go into the issue, and that the action does not fall to be dismissed on account of their absence from the record.

The other question raised is that the expressions "low scamp" should not stand as part of the issue, on the ground that they are not actionable. That is not the question. The introduction of so many mere words no doubt adds a little to the difficulty of the pursuer's establishing the whole of his issue, but the words are really added as the context of other words which unquestionably are opprobrious and actionable.

Mr Jameson thinks that if the words in the issue are about the low water-mark of relevancy in point of slander, those words of style "or of the like import and effect" ought not to go into the issue. That is a somewhat difficult contention, but I do not think we are called upon to decide upon it in the view which I take of the position which the words "low scamp" occupy in this controversy.

Then I come to the second issue, and here I think the issue is a fair reflex of the record. Now it is proposed, that in place of calling upon the pursuer to tell the defender what the words were which the pursuer alleges to have been uttered and to be slanderous, that the matter to be tried by the jury should be, "whether the

defender falsely and calumniously accused the pursuer of circulating statements of a defamatory and incriminating character, and of being the author or writer of lewd and immoral language." We are well accustomed to the forms of style in actions of slander. If it is in doubt whether certain particular words were used of and concerning the pursuer, the words "or words of the like import and effect" are added so as to embrace any deviations from the precise phraseology used, so long as the substance is adhered to. In this case, however, there is nothing whatever which any juryman might believe to be an act of circulating statements of an incriminating and defamatory character which might not be proved under this issue, and which would not entitle the pursuer to a verdict. The Court has not got an opportunity of pronouncing now, nor has the judge an opportunity of pronouncing at the trial, whether the words alleged to have been used are of such a character or nature as to infer liability for defamation. Therefore I think this is an impossible issue, and when we turn to the record it is no better, and it seems to me that this second action ought to be thrown out. Upon the whole matter I am for assoilzieing the husband in both actions, and for dismissing the second action as irrevelant, and allowing the proposed issue in the first action to stand as the issue in the cause between the pursuer and the female defender.

LORD ADAM concurred.

LORD M'LAREN—I concur in the judgment proposed, and have little to add.

I should like to say, with reference to one of the points argued by Mr Jameson, that my experience of jury cases has led me to think that in most cases the question of privilege is more conveniently raised at the trial, when the facts are before the Judge, than at the stage of adjustment of issues. The forms of issues of slander and the averments necessary to support such issues are now well settled, and the pursuer of an action of damages can almost always draw his condescendence so as not to disclose that the occasion upon which the words used were uttered was privileged. Privilege is something having reference to the occasion, and to the relation between the person who used defamatory words and the person to whom they were addressed. By merely withholding the circumstances which raise the privilege, the pursuer may keep malice out of the issue, but when it appears at the trial that the communication is privileged, the Judge will direct the jury that they must find that malice has been established before they can give a verdict for the pursuer.

There is no question here of "probable cause." Probable cause is an offence proposed by a person who is sued in an action of damages in consequence of having given information to the public authorities, or for setting the authority in motion, the most ordinary instance being information of a crime given to the police or the procurator-fiscal. The defence of probable cause has been extended to cases of prosecutions under the Customs and Revenue Acts, but it would never be competent to a master in an action against him by a servant, or in any case where there was anything of the private relation of duty between the person said to have uttered the slander and the person to whom it was addressed.

I agree that the case of *Neilson* is conclusive as regards the husband's liability; indeed, I think there is great force in Mr Jameson's argument that the foundation of the husband's liability for his wife's debts is always resolved into the question of authority given expressly or by implication to contract debt. I rather think that the case of *Neilson* shows that the true foundation of the husband's liability for his wife's delict is that he must have authorised it, or identified himself with his wife in the proceedings in order that he should be responsible for it.

Then as regards the second action, I am of opinion that there is no substance in it. The statements do not amount to a relevant charge that the defenders had falsely and calumniously accused the pursuer of anything recognised as a crime or a social offence.

LORD KINNEAR — I am of the same opinion. I would only add, with reference to the first issue, that the claim of privilege maintained appears to me to be somewhat exceptional. The privilege arising out of the relation of master and servant entitles, if it does not require, the master to exercise full freedom of speech in reference to the conduct and character of the servant on such occasions as may raise a duty on the master to explain his opinion. Whether a master or mistress has a right to defame a third party is a different question. I do not say there is no such privilege. It may be the right or the duty of the mistress of a household to warn her servants against associating with persons of bad character. But injurious statements which may be made for this purpose may or may not be privileged according to circumstances. It is impossible to lay down any general rule, and therefore I think it essential that the facts should be ascertained before the Court is called upon finally to decide whether this is a privileged case or not.

The Court pronounced the following interlocutor:—

> "Assoilzie the defender William Smith from the conclusions of the first action: Find him not entitled to expenses therein: Approve of the first issue, and appoint the same to be the issue for the trial of the first action as against the female defender: Assoilzie the defender William Smith from the conclusions of the second action: *Quoad ultra* dismiss the said second action, and decern: Find the defenders entitled to expenses in the second action, both in this Court and in the Inferior Court, and remit the accounts thereof to the Auditor to tax," &c.

Counsel for the Pursuer and Respondent—M'Kechnie—W. Thomson. Agents—W. & J. L. Officer, W.S.

Counsel for the Defenders and Appellants—Jameson—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Saturday, November 26.

FIRST DIVISION.

MACDUFF, PETITIONER.

Bankruptcy — Sequestration — Acquisition of Property by Undischarged Bankrupt after the Discharge of the Trustee—Appointment of New Trustee on Petition of the Bankrupt — Nobile Officium—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 103.

An undischarged bankrupt, whose estates had been sequestrated in 1869, and whose trustee had been discharged in 1870, now averred that having since succeeded in business, he was able and willing to pay in full all his creditors, and craved the Court, in the exercise of their *nobile officium*, to appoint a meeting of the creditors for the election of a new trustee.

Held that the petition fell to be *granted*, on the principles followed in a series of cases where the petition was at the instance of creditors.

The estates of Robert MacDuff and of the firm of P. & R. MacDuff, storekeepers, Holm Street, Glasgow, of which the said Robert MacDuff was sole partner, were sequestrated on May 13th 1869, and Mr James Mair Davies, accountant in Glasgow, was confirmed trustee. The realised funds having proved insufficient to admit of any dividend being paid, the trustee obtained his discharge on August 29th 1870, but the bankrupt was never discharged.

On 5th November 1892 the said Robert MacDuff presented a petition to the First Division, praying their Lordships to appoint a new trustee on his sequestrated estates, or otherwise to grant warrant to hold a meeting of the creditors on the said sequestrated estates for the election of a new trustee.

The petitioner stated that recently he had been successful in business, and was now able and willing to pay in full all his creditors; that he had been compelled in the interest of his true and *bona fide* creditors to apply for the appointment of a new trustee, instead of making a private settlement with them, owing to the actings of Mr James Dunbar, writer, Glasgow, who had been law-agent for the trustee in his sequestration; that "the said James Dunbar, when he became aware of the intention on the part of the petitioner to pay his creditors in full, immediately put himself in communication with the largest creditors, and arranged with four of them to assign their claims to him for a very small sum. . . . The assignations were taken by the said James Dunbar, not in favour of himself, but in favour of William Daniel Baird, solicitor, Glasgow, who was at one time his partner in business;" and that actions were being raised to have the assignations reduced on the ground of essential error.

The said William Daniel Baird, as assignee in right of the debts for which certain creditors of the petitioner were ranked, was allowed to lodge answers to the petition. He stated that "sometime after his bankruptcy the petitioner left Glasgow, and till recently was not further heard of by his creditors. It now appears, and the respondent avers, that for many years the petitioner has been carrying on an extensive and lucrative business in Liverpool, and more recently in Glasgow also. . . . The petitioner must have a number of current obligations and debts incurred in connection with the said business." The respondent further averred that the petitioner in 1889 had applied for his discharge without composition, but declined to proceed with the application on learning that it would require to be advertised and intimated to his creditors; that in May 1889 he applied for and obtained a compromise of a debt for a very small sum on the plea of poverty; that he did not express any intention of paying his creditors in full till he was applied to for payment on behalf of the respondent, and that his agent thereupon asked the respondent to settle for 2s. 6d. in the pound; that the petitioner's means consisted exclusively of his earnings in business since the sequestration, which were subject to his current debts and liabilities, and could not be transferred to a trustee for the exclusive benefit of the creditors in the sequestration.

Argued for the petitioner—The answers were not relevant, nor even pertinent to the question before the Court. Section 103 of the Bankruptcy Act provided that estate subsequently acquired by an undischarged bankrupt should belong to the trustee. Where the trustee was discharged, the consistent practice for thirty years had been that the Court provided the machinery to give effect to the section by appointing a new trustee — *Thomson, Petitioner*, 2 Macph. 325; *Whyte* v. *Northern Heritable Securities Company*, 18 R. (H. of L.) 37, and 28 S.L.R. 950.

Argued for the respondent—The petition was unnecessary and incompetent. The petitioner had no interest to make the application; if solvent, he ought to pay his creditors, and if in doubt to whom he should pay, whether the assignors or the assignee, he could keep the money till distressed, and protect himself against diligence by consigning and raising a multiplepoinding. The petition was not in the interest of the creditors; it would lead to a competition and a crop of litigation; for it was settled that if the creditors allowed the bankrupt to engage in trade and acquire money, the old creditors could not claim the funds to the exclusion of the new creditors—*Abel* v. *Watt*, Novem-