upon them. They do not, and were not intended to cast any imputation or reflection upon the pursuer or his actings, or his character or capacity."

In my opinion, the words complained of (if indeed they require to be innuendoed), will bear the innuendo put upon them by the pursuer, and are *prima facie* defamatory. They suggest that the pursuer condemned the defender's work, not because he believed it to be disconform to contract, but simply in order to annoy the defender and gratify an old grudge against him. If this is the true meaning of the words, they are undoubtedly defamatory, and calculated to injure the pursuer personally and in his profession of architect.

Even if privilege had been pleaded I should have been of opinion that the writings complained of were deprived of any privilege which they might otherwise have possessed by the palpable excess of the language used, and the deliberate imputation to the pursuer of dishonest motives.

The case against the agent, Mr Murray Dunlop, is somewhat different. He pleads privilege, and the Lord Ordinary has allowed an issue on the footing that the agent acted on the instructions of his client, and that accordingly the letters *prima facie* were privileged. The word "maliciously" has therefore been inserted in the issue.

We were told by counsel that the pursuer is content with the issue as it stands. Had it not been so, I should have doubted whether the agent's letters were privileged. The privilege of a law-agent depends upon his acting strictly on the instructions, and as the mouthpiece, of his client. As long as he confines himself to doing this, any pertinent statements which he may make in his client's interest will, I assume, be held to be privileged; and in general he will not be held responsible for their truth or accuracy.

But this privilege may be lost, and I think it is lost when the agent, not content with speaking or writing in the name of his client, personally adopts and corroborates the charge which he is instructed by his client to make. Now, the defender Dunlop does that in the present case. In writing to the pursuer's employers he says, "This is not the first time I have met with your client's imperious conduct, and it clearly appears from other expressions in the letters that by "imperious conduct" the defender means that the pursuer was in the habit of gratifying his "spleen" or an "old grudge" against a contractor by condemning his work without cause.

But dealing with the letters as privileged (as the pursuer accepts the burden), I think that malice is sufficiently averred. The pursuer may not succeed in establishing malice to the satisfaction of a jury, but I think that he is entitled to have an opportunity of doing so.

The Court adhered in both actions.

Counsel for Pursuer in both actions—Ure, Q.C.—Hunter. Agent—Henry Robertson, S.S.C.

Counsel for Defenders in both actions—Salvesen, Q.C.—Guy. Agent—John Veitch, Solicitor.

Tuesday, June 12.

SECOND DIVISION.

STEWART'S TRUSTEE *v.* J. T. SALVESEN & COMPANY.

Bankruptcy—Constitution of Bankruptcy—Notour Bankruptcy—Insolvency—Company—Expiry of Charge without Payment—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 7 *and* 8—*Debtors (Scotland) Act* 1880 (43 *and* 44 *Vict. cap.* 34), *sec.* 6—*Diligence.*

The mode of constituting notour bankruptcy introduced by section 6 of the Debtors (Scotland) Act 1880 only applies to cases in which imprisonment was rendered incompetent by the provisions of that Act; and consequently, as it was never at any time competent to imprison a firm, a firm cannot be rendered notour bankrupt merely by insolvency concurring with the expiry without payment of a charge given to the firm as a firm only.

On 24th May 1899 the estates of John Malcolm Stewart, timber merchant, Eglinton Saw Mills, Glasgow, sole partner of and carrying on business as James T. Ferguson & Company, timber merchants and saw millers, Glasgow, were sequestrated by the Sheriff of Lanarkshire, and on 5th June 1899 Mr James R. Hodge, chartered accountant, Glasgow, was elected trustee, and was duly confirmed on 8th June 1899. The firm of James T. Ferguson & Company for some years prior to 16th January 1899 consisted of the bankrupt John Malcolm Stewart and James T. Ferguson, timber merchant, Glasgow. The latter retired from the firm on 16th January 1899, and subsequently died on or about 6th April 1899. On Mr Ferguson's retiral from the firm a minute of dissolution was entered into between Mr Stewart and Mr Ferguson under which Mr Stewart undertook all the liabilities and took over all the assets of the firm. The dissolution was not advertised or intimated to creditors. On 15th October 1898 the firm of James T. Ferguson & Company accepted a bill for £335, 3s. 4d., payable at six months' date, to Messrs Cant & Kemp, timber merchants, Glasgow. This bill having been dishonoured at maturity, was protested by Messrs Cant & Kemp against James T. Ferguson & Company, and upon 22nd April 1899, by virtue of an extract registered protest and warrant thereon by the Sheriff of Lanarkshire of same date, James T. Ferguson & Company, as a company, were charged to make payment to Messrs Cant & Kemp of the amount of the said bill within six days after the date of the said charge, under the pain of poinding. The charge expired on

28th April 1899 without payment of the bill, and no other diligence was used. When this charge expired, James T. Ferguson & Company were insolvent. On 6th March 1899, and within sixty days before the expiry of the charge, James T. Ferguson & Company indorsed and handed over to Messrs J. T. Salvesen & Company, timber merchants, Grangemouth, a bill dated 6th January 1899, at four months' date, drawn by James T. Ferguson & Company upon and accepted by Smith & Riddell, builders, Glasgow, for the sum of £500. This bill was indorsed and handed to Messrs J. T. Salvesen & Company in security for payment of a bill for £344, 6s. 6d. accepted by Messrs J. T. Ferguson & Company payable to Messrs J. T. Salvesen & Company, which had fallen due on 27th February 1899, and the expenses and interest thereon.

In these circumstances questions having arisen between the trustee and Messrs J. T. Salvesen & Company the present special case was presented for the opinion and judgment of the Court.

The parties to the case were (1) the trustee, and (2) Messrs J. T. Salvesen & Company.

The questions of law for the opinion and judgment of the Court were as follows:—"(1) Was notour bankruptcy of James T. Ferguson & Company constituted by their insolvency concurring with the expiry of said charge at the instance of Cant & Kemp without payment having been made? (2) Is the indorsation by James T. Ferguson & Company to the second parties reducible under the Act of 1696, chapter 5, in respect of its having been adhibited within sixty days before the expiry of the said charge?"

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79) enacts as follows:—Section 7—"Notour bankruptcy shall be constituted by the following circumstances:—1st, by sequestration or by the issuing of an adjudication of bankruptcy in England or Ireland; or 2nd, by insolvency concurring either (*A*) with a duly executed charge for payment, followed, where imprisonment is competent, by imprisonment or formal and regular apprehension of the debtor, or by his flight or absconding from diligence, or retreat to the sanctuary, or forcible defending of his person against diligence, or where imprisonment is incompetent or impossible, by execution of arrestment of any of the debtor's effects not loosed or discharged for fifteen days, or by execution of poinding of any of his moveables, or by decree of adjudication of any part of his heritable estate for payment or in security; or (*B*) with sale of any effects belonging to the debtor under a poinding or under a sequestration for rent, or with his retiring to the sanctuary for twenty-four hours, or with his making application for the benefit of *cessio bonorum*." Section 8—"Notour bankruptcy of a company shall be constituted either in any of the foregoing ways or by any of the partners being rendered notour bankrupt for a company debt."

The Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34) enacts as follows:—Section 6—"In any case in which under the provisions of this Act imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made. Nothing in this section contained shall affect the provisions of section 7 of the Bankruptcy (Scotland) Act 1856."

Argued for the first party—The firm of James T. Ferguson & Company were rendered notour bankrupt in respect of their insolvency concurring with the expiry of a charge without payment having been made. This was the effect of the Bankruptcy (Scotland) Act 1856, sections 7 and 8, read along with the Debtors (Scotland) Act 1880, section 6. The result of the latter enactment was that in all cases in which imprisonment was incompetent, either as the result of that Act or apart from that Act, a debtor could be rendered notour bankrupt in respect of insolvency concurring with the expiry of a charge without payment. It was to be observed here, moreover, that Stewart was the sole partner of the firm of James T. Ferguson & Company, and consequently he might prior to 1880 have been imprisoned upon such a charge as the one here in question. Therefore even if the mode of constituting notour bankruptcy introduced by the Debtors (Scotland) Act 1880 was only applicable to cases in which imprisonment was rendered incompetent by that Act, it applied here.

Argued for the second parties—The firm of James T. Ferguson & Company were not rendered notour bankrupt by their insolvency concurring with the expiry of a charge without payment. A company could, under section 8 of the Bankruptcy (Scotland) Act 1856, be rendered notour bankrupt, either (1) in any of the ways prescribed by section 7 of that Act where imprisonment was incompetent (imprisonment of a company being impossible), or (2) by any of the partners being rendered notour bankrupt for a company debt. None of these methods of rendering a company notour bankrupt had been resorted to here. The method of constituting notour bankruptcy introduced by the Debtors (Scotland) Act 1880 was not applicable, because it only applied where imprisonment was rendered incompetent by that Act. That was not the case here, because imprisonment of a company was never competent or indeed possible. It made no difference that there was only one partner of this firm. The only charge here was against the company as a company. Imprisonment of the sole partner could never at any time have lawfully and competently followed upon such a charge.

At advising—

LORD JUSTICE-CLERK — The answers to be given to the queries in this special case depend upon the interpretation to be put

upon statutory enactment. The parties of the first part desire to have it held that the indorsation of a bill by Ferguson & Company to the second parties is reducible on the ground that Ferguson & Company had become notour bankrupt on the expiry of a charge on 28th April 1899, and therefore that the indorsement and handing over of the bill, which was on 27th February, was within sixty days of bankruptcy. It is first necessary to see whether, in a question of bankruptcy of a firm, the law contained in the Bankruptcy Act of 1856 is affected by the 6th clause of the Debtors Act of 1880. That clause enacts—[*His Lordship read the clause*]. Now, this clause upon the face of it relates only to those cases in which by the Act imprisonment for debt is rendered incompetent. It therefore does not apply to the case of bankruptcy of a firm, for a firm could not be imprisoned, and therefore a clause relating to cases in which the Act made imprisonment incompetent where formerly it was competent cannot apply. The case must therefore be considered under the Bankruptcy Act of 1856, as unaffected by the Act of 1880. In that statute section 7 gives a general definition of notour bankruptcy, and section 8 states a special manner in which a company may be made notour bankrupt, viz., by a partner being made notour bankrupt for a company debt. That section does not apply here, and therefore we are thrown back on section 7, section 8 declaring that notour bankruptcy of a company may be constituted in any of the foregoing ways, viz., the ways specified in section 7. Section 7 is divided into two heads, with only the second of which, relating to insolvency, we have to do in this case. Part of that head relates to cases in which imprisonment was competent, and this must now be read out; therefore the cases are limited to those in which imprisonment was not competent, and what the clause declares is that notour bankruptcy shall be constituted by insolvency concurring with "execution of arrestment of any of the debtor's effects not loosed or discharged for fifteen days, or by execution of poinding of any of his moveables, or by decree of adjudication of any part of his heritable estate for payment or in security; or (*B*) with sale of any effects belonging to the debtor under a poinding, or under a sequestration for rent." No one of these alternatives occurred in the present case, and therefore the elements necessary to constitute notour bankruptcy of the firm in question did not concur.

LORD TRAYNER—The first question put to us in this case is, whether James T. Ferguson & Company were rendered notour bankrupts by the use of the diligence referred to in the case. I am of opinion that this question must be answered in the negative.

The requirements necessary to constitute notour bankruptcy, either in the case of an individual or a company, are prescribed by the 7th and 8th sections of the Bankruptcy Act 1856. In every case there must be insolvency, and it is admitted that the firm in question was insolvent. But with insolvency there must concur (in the case of an individual debtor where imprisonment is not competent or possible) the use of certain diligence against the debtor's estate. There must be (1) an arrestment of the debtor's effects not loosed or discharged for 15 days, or (2) poinding of the debtor's moveables, or (3) adjudication of his heritage. There are other and alternative conditions which need not be here noticed. In the case of a company, which is the case we are dealing with, notour bankruptcy may be constituted either in any of the foregoing ways, or by any partner being rendered notour bankrupt for a company debt. The present case must be considered on the footing that imprisonment was neither competent nor possible. No personal diligence could proceed against a firm. Now, what was done here was to charge the company, as a company, for a company debt. No other diligence was resorted to. There was no arrestment, no poinding, no adjudication. An expired charge against the company does not, according to the provisions of the Bankruptcy Act, constitute notour bankruptcy against the firm. But that was all that was done here. Nor was any partner of the company rendered notour bankrupt for a company debt. On the statement before us no partner was even charged for payment of the debt in question, or, so far as appears, for any other company debt.

It was maintained, however, by the first party that an expired charge (with insolvency) was of itself enough to constitute notour bankruptcy under the Debtors Act 1880. And it is so. But it is so only in cases where imprisonment was made incompetent by the provisions of that Act, and has no application to cases where imprisonment was formerly incompetent, as was the case in reference to a firm. It is apparent also that the Act of 1880 only applies to individual debtors, and leaves the law as regards the notour bankruptcy of companies in the position in which it was placed by the Act of 1856.

If the first question is answered in the negative, it follows that the second question must be negatived also.

LORD MONCREIFF—Notour bankruptcy is said to have been constituted by the insolvency of the firm of James T. Ferguson & Company, concurring with a duly executed charge of payment given to the company, followed by the expiry of the days of charge without payment. No other diligence was used, and neither of the partners of the firm was rendered notour bankrupt for a company debt.

The procedure adopted is that provided by the 6th section of the Debtors Act 1880; and shortly stated, the question is, whether this new mode of constituting notour bankruptcy is to be read into the 7th section of the Bankruptcy Act 1856. If it is, the firm has been duly rendered notour bankrupt; because, by the 8th section of the Bankruptcy Act 1856 notour bankruptcy of a company may be constituted by any of the

ways in which notour bankruptcy of an individual may be constituted under section 7, excepting of course such as are appropriate to cases in which imprisonment is competent.

But having regard to the peculiar terms in which the 6th section of the Debtors Act 1880 is expressed, I am of opinion that its operation is confined to those cases in which imprisonment is rendered incompetent by that Act, viz., to the cases of those persons who previously were not privileged debtors.

If the 4th section, by which imprisonment was, with certain exceptions, abolished had stood alone, the effect would have been simply to increase the number of privileged cases; and the modes in which notour bankruptcy might be constituted, both in the case of such persons and of companies, would have been regulated by the 7th and 8th sections of the Bankruptcy Act 1856. But for some reason the Act does not stop there, but introduces by the 6th section a new mode of constituting notour bankruptcy confined apparently to the cases in which, under that Act, imprisonment is rendered incompetent. And the section concludes with the words: "Nothing in this section shall affect the provisions of section 7 of the Bankruptcy (Scotland) Act 1856."

I am therefore of opinion that, although the question is technical, notour bankruptcy has not been constituted in this case, because none of the modes prescribed by the Bankruptcy Act 1856 have been adopted.

I am therefore for answering both questions in the negative.

LORD YOUNG was absent.

The Court answered both questions in the negative.

Counsel for the First Party — M. P. Fraser. Agents — Simpson & Marwick, W.S.

Counsel for the Second Parties—Younger. Agents—J. W. & J. Mackenzie, W.S.

Friday, June 15.

SECOND DIVISION.

MARSHALL *v.* MARSHALL.

Succession — Destination — Conditional Institution or Substitution—Trust—Ultra vires—Effect of Unauthorised Destination in Conveyance by Trustees.

A testator by his trust-disposition and settlement conveyed his whole estates, heritable and moveable, to trustees, and, *inter alia*, directed them at the first term of Whitsunday or Martinmas after his death to convey certain lands "to A, my youngest son, whom failing to his lawful children equally among them."

The testator died survived by A, and the trustees, by disposition, in which they narrated the clause in the trust-disposition, disponed the lands "to A, whom failing to his children equally among them, whom failing to his heirs and assignees whomsoever." This deed was recorded on behalf of A only.

On A's death intestate, survived by two sons, *held* (1) that the provisions of the trust-disposition imported, not a substitution, but a conditional institution; (2) that the insertion of the substitution in favour of A's children in the disposition granted by the trustees was unauthorised by the settlement under which they acted, and did not affect the rights of parties; and (3) that consequently A's elder son as his heir-at-law was entitled to succeed to the whole lands.

James Marshall, of Goodockhill and Sandyford, by his trust-disposition and settlement, dated 1st November 1880, conveyed his whole heritable and moveable estates to trustees, and particularly the several estates in land therein described. With regard to these estates, he directed his trustees, subject to certain special provisions as to the minerals, "to convey and make over, at the first term of Whitsunday or Martinmas that shall occur six months after my decease, my foresaid several lands and others in favour of my after mentioned sons respectively, viz. — . . . *Item*, My trustees shall convey my foresaid lands of Syderig or Newhouse, specially above disponed in the fourth place, with the teinds and all parts and pertinents thereof, to the said Gavin Ballantyne Marshall, my youngest son, whom failing to his lawful children equally among them."

James Marshall died on 5th January 1881, survived by Gavin Ballantyne Marshall. James Marshall's trustees, by disposition dated 18th and 23rd March 1882, and recorded 19th April 1883, in which they narrated the clauses above quoted, disponed and conveyed the lands of Syderig or Newhouse "to the said Gavin Ballantyne Marshall, whom failing to his children equally among them, whom failing to his heirs and assignees whomsoever" under reservation of the minerals. In terms of the special direction with regard to them the minerals so reserved were ultimately also conveyed to Gavin Ballantyne Marshall by a disposition containing a destination in terms practically identical with those above quoted. Both these dispositions were recorded under warrants directing registration on behalf of Gavin Ballantyne Marshall. They were not recorded on behalf of Gavin's children.

Gavin Ballantyne Marshall died intestate on 15th November 1896, survived by his widow, Mrs Isabella Murray or Marshall, and two pupil sons, James Marshall and William Murray Marshall. The deceased never altered the destination in the said dispositions.

In these circumstances questions arose as to the rights of Gavin Ballantyne Marshall's two children in the estate of Syderig or Newhouse. For the decision of these questions a special case was presented to the