effect *stante matrimonio*. I do not share the Lord Ordinary's doubt on this point, which I think is settled by the case of *Dunlop* v. *Johnston*, 3 Macph. 758, aff. 5 Macph. (H. of L.) 22.

The only matter as to which some doubt might have existed is in regard to the policy of assurance. In the view which I take of the case this policy was assigned not as a provision to take effect in the event of the wife's survivance, but simply as one asset of the male defender's effects which was made over along with the rest of his property.

[*His Lordship then dealt with the question as to the sum of* £439.]

The Court recalled the interlocutor reclaimed against, granted decree of reduction, and ordained the defender Mrs Robertson to deliver to the pursuer the titles of the leasehold subjects and the policy of insurance.

Counsel for the Pursuer and Reclaimer —Ure, Q.C.—M'Clure. Agents — Cairns, M'Intosh, & Morton, W.S.

Counsel for the Defenders and Respondents—W. Campbell, Q.C., A.S.D., Thomson. Agents—Duncan Smith & M'Laren, S.S.C.

Friday, January 25.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

NEILL *v.* HENDERSON.

Reparation—Slander—Privilege—Judicial Slander — Arbitration Proceedings — General Charge of Mendacity against Witness — Malice — Issue — Malice in Issue.

In an action of damages for slander the pursuer averred that after he had given evidence in the course of certain arbitration proceedings between the defender and A, which he had been asked by A to attend as a witness, the defender, in the presence and hearing of the arbiter, A's agent, and A, said to the arbiter "That man cannot speak one word of truth, and all he has stated just now is lies from beginning to end," or used words of like meaning and import; that the said statement was of and concerning the pursuer, was false and calumnious, and was made maliciously and without probable or any cause; that pursuer immediately called on the defender to withdraw the statement, but he refused to do so and reiterated it, and that subsequently the pursuer wrote to the defender calling upon him to apologise, but that the defender made no answer to this letter.

Held (1) (*aff.* judgment of Lord Kincairney, *dub.* Lord Young) that the action was relevant; and (2) (*rev.* judgment of Lord Kincairney, *dub.* Lord Moncreiff) that malice must be inserted in the issue.

George Neill, formerly builder and now commission agent, Edinburgh, raised an action against Simon Henderson, baker, Edinburgh, in which he concluded for payment of £500 as damages for slander.

The pursuer averred—"(Cond. 2) About twenty years ago the defender and Dr John Bowie, 41 Lauriston Place, Edinburgh, and John Nisbet, High Street, Edinburgh, purchased the estate of Parsons Green for feuing purposes, and entered into an agreement for the construction of certain roads dividing their respective portions of said estate. Some time ago disputes arose between the defender and Dr Bowie as to the payment of the cost of constructing said roads. The defender and Dr Bowie agreed to refer the matters in dispute between them in connection with said roads to the arbitration of Mr William Ormiston, Lord Dean of Guild of Edinburgh. Mr Ormiston accepted the reference, and appointed a meeting of parties and their agents to be held on the ground on 6th April 1900, at 2·30 P.M., to hear parties and take evidence on the matters in dispute. As the pursuer had constructed the major portion of the roads on said estate, he was asked by Dr Bowie to attend the proposed meeting, so as to point out to the arbiter the roads which he had made on the orders of and at the expense of Dr Bowie. (Cond 3) On said 6th April 1900 the pursuer accordingly went to said meeting at Hobart Street, Parsons Green. After the agents of the parties had made statements to the arbiter, the pursuer was called upon to state to the arbiter which of the roads in question were made by the different proprietors Dr Bowie and the defender. After the pursuer had made this statement, the defender, in the presence and hearing of the said William Ormiston, Alexander Guild, of Messrs Reid & Guild, W.S., agent for Dr Bowie, and the said Dr Bowie, said, 'Mr Ormiston, that man cannot speak one word of truth, and all he has stated just now is lies from beginning to end,' or used words of like meaning or import. The said statement was of and concerning the pursuer, was false and calumnious, and was made maliciously and without probable or any cause. The pursuer immediately called upon the defender to withdraw the said statement, but he refused to do so. On the contrary, the defender reiterated the said slanderous statement in the same or similar language, and subsequently, during said meeting, he addressed other offensive terms towards the pursuer. Subsequently the pursuer wrote the defender by registered letter, calling upon him to apologise for said slanderous statement, but to this letter the defender has made no answer."

The defender pleaded—"(1) The pursuer's averments are neither relevant nor sufficient to support the conclusions of the summons. (3) In any event, any statement made by the defender regarding the pursuer being privileged, and the defender having made the same without malice, and

with probable cause, decree of absolvitor should be pronounced."

The pursuer proposed the following issue for the trial of the cause—"Whether on or about the 6th day of April 1900, and at or near Hobart Street, Parsons Green, Edinburgh, the defender, in the presence and hearing of William Ormiston, Lord Dean of Guild of Edinburgh, Alexander Guild, of Messrs Reid & Guild, W.S., Edinburgh, and Dr John Bowie, 14 Lauriston Place, Edinburgh, or one or other of them, did falsely and calumniously say of and concerning the pursuer: 'Mr Ormiston, that man cannot speak one word of truth, and all he has stated just now is lies from beginning to end,' or did use words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage. Damages laid at £500 sterling."

On 13th November 1900 the Lord Ordinary (KINCAIRNEY) approved of the issue for the pursuer and appointed the same to be the issue for the trial of the cause.

Note.—"I am of opinion that the issue lodged by the pursuer should be approved. The words complained of amounted to a general charge of mendacity, and are, in my opinion, slanderous. The case of *Milne* v. *Walker*, November 24, 1893, 21 R. 155, appears to be in point. There have been cases in which language of that sort has been held not to support an award of damages, where it appeared from the proof that the words were spoken in the heat of a quarrel, and were not intended to impute, nor understood as imputing, actual delinquency, but were merely of the nature of coarse vituperation, and were so understood by the person attacked, as in *Watson* v. *Duncan*, February 4, 1890, 17 R. 414, and *Christie* v. *Robertson*, July 12, 1899, 1 F. 1155. These were not judgments on issues, but on the evidence, and if in this case it shall appear in the evidence that nothing slanderous was intended or understood, the defender may be entitled to a verdict.

"It was argued for the defender that the case was one of privilege, the words complained of being spoken in the course of proceedings in an arbitration. The pursuer maintained that proceedings before an arbiter were not to be regarded, in questions of this sort, as judicial proceedings. But I am clearly of opinion that they are (see *Macmillan* v. *Free Church*, July 9, 1862, 24 D. 1282, at p. 1285; *Hay* v. *Cameron*, June 18, 1898, 6 S.L.T. 67), and that words spoken in the course of proceedings before an arbiter are entitled to a certain measure of privilege. But I do not consider that such privilege covers a charge of general mendacity; and I am therefore of opinion that it is not necessary to take an issue of malice. I may add that I think malice is relevantly averred.

The defender reclaimed, and argued—(1) There was no issuable matter on record. Even if the defender had made the statement averred by the pursuer, it plainly related to what had passed at the time, and not at any prior period. It was not a charge of general mendacity, but only a statement that what the pursuer had said while giving evidence in the course of the arbitration was not true. The whole point of the charge was in the second part, the first part was merely explanatory. The statement amounted to no more than this—"That is a discredited witness, and you are not to believe him." The case of *Milne* v. *Walker*, *supra*, did not apply. In that case the charge was made deliberately in a letter written to the newspapers, and it was not a mere casual observation like the present. The observation was also made *in rixa*, and the literal meaning of the words was extravagant. The action should therefore be dismissed as irrelevant.—*Macdonald* v. *Rupprecht*, January 19, 1894, 21 R. 389. (2) If the action were relevant, the statement was privileged, and the issue should be varied by inserting the words "and maliciously." Arbitration proceedings were in the same position as judicial proceedings. There were no facts and circumstances stated on record from which malice could be inferred, and a mere general averment of malice was not sufficient.—*Scott* v. *Turnbull*, July 18, 1884, 11 R. 1131; *Gordon* v. *British and Foreign Metaline Company*, November 16, 1886, 14 R. 75; *Selbie* v. *Saint*, November 8, 1890, 18 R. 88. In any event, malice must be inserted in the issue, and no example could be cited of any case of judicial slander where an issue had been allowed in which malice had not been inserted in the issue. The practice was all the other way.—*M'Intosh* v. *Flowerdew*, February 19, 1851, 13 D. 726; *Mackellar* v. *Duke of Sutherland*, January 14, 1859, 21 D. 222.

Argued for the pursuer—(1) The action was relevant. The words used were clearly defamatory. The initial statement was a general charge of mendacity, and it was thereafter stated that his conduct on this occasion was a particular example of a general practice. (2) The case was not one of privilege. The pursuer had not been a party to the constitution of the Court of Arbitration. Further, the Lord Ordinary had rightly held that the initial part of the statement was so irrelevant that it took away any privilege that the defender might otherwise have had. If the case were one of privilege, there were sufficient facts and circumstances stated on record to infer malice.—*Douglas* v. *Main*, June 13, 1893, 20 R. 793; *M'Ternan* v. *Bennett*, December 21, 1898, 1 F. 333.

At advising—

LORD JUSTICE-CLERK—In adjusting the issue in this case the only question is whether the word "maliciously" should be inserted in the issue. In my opinion it should be inserted. The slander is said to have been uttered in speaking to an arbiter during the course of a practically judicial proceeding. It has been the practice, where issues have been allowed in cases where the alleged slander was spoken in the course of such proceedings, to put the malice specifically in the issue, as a matter to be proved. I would therefore insert the word "maliciously" before approving of the issue.

LORD YOUNG—I do not think it is desirable to express any opinion in this case, as I understand that all your Lordships except myself are of opinion that it should go to trial. It must therefore go, and it will serve no useful purpose for me to state why I differ from that view.

LORD TRAYNER—I think the language used by the defender, and here complained of, was libellous, and that the pursuer is entitled to an issue. But as the language in question was used in the course of a judicial or *quasi* judicial proceeding, and was not plainly irrelevant or impertinent to the matter being discussed, I think the defender was privileged, at least to the extent of requiring that malice should be put in issue, and this I think should now be done.

LORD MONCREIFF—The only question is whether the word "maliciously" should be inserted in the issue. My own opinion is that it should not, because I think, on the pursuer's statement, which is what we have to deal with, no privilege is disclosed; or rather, that any privilege that attached to the occasion or to the party was lost owing to the intemperance of the words which the defender is said to have used. But I do not mean to press my own views on that matter for two reasons. In the first place, it is the general practice to insert the word "maliciously" in cases of judicial slander; and I do not desire lightly to depart from what seems to be a well established practice. But, secondly, it matters very little whether the word "maliciously" is introduced or not into the issue. Even if it is introduced, in my opinion the pursuer will have fully discharged the burden thus laid upon him if he establishes at the trial to the satisfaction of the jury the facts which he sets forth in the third article of the condescendence—that is, that the defender used the words imputed to him, that there were no circumstances to put upon them a different meaning from that which they naturally bear, and that on being called upon to withdraw them the defender reiterated the charge. I say that if these averments are proved there will be evidence upon which it will be competent for the jury to find that the defender used the words maliciously in the sense of the issue.

The issue having been amended by the insertion of the words "and maliciously," the Court approved of the issue as amended and appointed it to be the issue for the trial of the cause.

Counsel for the Pursuer and Respondent—Watt, K.C.—A. M. Anderson. Agents—Gray & Kinnison, S.S.C.

Counsel for the Defender and Reclaimer—Shaw, K.C. — Craigie — D. Anderson. Agents—Coutts & Palfrey, S.S.C.

Friday, January 18.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

WILSON'S TRUSTEE *v.* W. & J. RAEBURN.

Bankruptcy — Effect of Bankruptcy — Act 1696, *c.* 5—*Sale Concluded within Sixty Days of Bankruptcy in pursuance of Scheme to Secure Preference—Reduction.*

A trustee in bankruptcy brought an action against (1) the purchaser of an inn and licensed business sold by the bankrupt within sixty days of bankruptcy; (2) a firm of brewers who had received payment of debts due to them out of the proceeds of the sale; and (3) two solicitors who had held a disposition of the property subject to a relative agreement entered into between the bankrupt, the brewers, and themselves. The trustee concluded (1) for reduction of the missives of sale and disposition following thereon; (2) for an accounting against the purchaser; or alternatively (3) for declarator that the brewers had obtained an illegal preference; and (4) for an accounting against the brewers. He averred that under the agreement referred to, the solicitors were to hold the disposition in security and for payment, *inter alia*, to the brewers of the price of all goods supplied to the bankrupt, the security being for a certain limited sum; that at the time when the sale was effected all the defenders knew that the seller was hopelessly insolvent; that the transaction was carried through solely to enable the brewers to get payment of their unsecured debts, and thus to gain a preference over the other creditors; that the purchaser knew this, and acted throughout in the interests of the brewers, who continued to have control over the licensed premises; that in connection with said purchase the purchaser was indebted in a considerable sum to the brewers; that the price paid was not a full price; and that the whole transaction was carried through fraudulently, and was part of a scheme participated in by all the defenders to secure the brewers a preference which they would not otherwise have obtained. Restitution of the price was not offered. The brewers pleaded in defence that the payments made to them out of the price were valid and effectual in respect that they were made in cash, and also that they were made under and in virtue of the heritable security and relative agreement above mentioned. *Held* (*aff.* Lord Kincairney, Ordinary) (1) that the pursuer had averred no relevant grounds for reduction of the sale, or for any conclusion against the purchaser, and that he was entitled to absolvitor; but (2) that the averments