excluded to the extent specified. Sub-section 3 enacts—"Except as hereinafter provided, the wife's moveable estate shall not be subject to arrestment, or other diligence of the law, for the husband's debts, provided that the said estate . . . is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband." That again plainly applies to the estates of all married women. I see no reason why the fourth sub-section, on which the present question depends, should be more restricted in its application. The ground, in policy, whatever it may have been, on which it was thought that a wife should not be allowed to compete with her husband's creditors in bankruptcy must be the same whether, as between the spouses themselves, the husband's rights are excluded by a deed of settlement or by operation of law. But at all events the words of the Act cover both cases.

The second point rested on an argument of some subtlety, but I think fallacious. It was said that we were not concerned with the wife's money, but with the money of the children, and that the purpose of the Act was to regulate the patrimonial rights of the spouses during the marriage, but that it had nothing to do with the rights arising to either party on its dissolution—in this case by the death of the wife. It is common ground, however, that the wife's right to claim repayment of her advances is transmissible, and that it passes to her representatives or to her legatees. Now if the statute makes no provision to the contrary, the legal character and effect of the transmission must be regulated by the ordinary rules of law, and her representatives must take her estate exactly as it stood in her, and not otherwise. The question therefore is what was the extent of the wife's claim upon the sequestrated estate, because that is the claim which has passed to her representatives or to her children exactly as it stood in her. The respondent sought to enforce his argument by a somewhat confused assumption that what passed to the children was the money. But the money remains at her death exactly where it was before—in the hands of the husband or of his trustee in bankruptcy. The representatives do not take a real right by mere survivance. What passes to them is a *jus crediti*. If the husband had been solvent, the wife's representatives would have had a good action for repayment of the money, but on his sequestration the right to the money passed to his trustee in bankruptcy; the right of the wife and her representatives was converted into a claim for a dividend, and she and they alike must take that claim under the condition which the statute imposes. If a similar condition had been stipulated by contract when the money was advanced, no one would doubt that the wife's stipulations would have been binding upon her representatives, and I think it makes no difference that the conditions of her claim are fixed by statute.

I am therefore entirely of the same opinion as your Lordship. I think the rights of the children are no higher than the rights of this lady herself, and that accordingly the trustee is entitled to deal with the claim exactly as if it had been made by the wife herself in her lifetime.

LORD MACKENZIE—I am of the same opinion and on the same grounds.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court recalled the interlocutor of the Sheriff-Substitute and affirmed the deliverance of the trustee.

Counsel for Pursuer (Respondent)—Clyde, K.C.—Morton. Agent—Charles George, S.S.C.

Counsel for Defender (Appellant)—Cullen, K.C.—C. D. Murray. Agents—Cairns, M'Intosh, & Morton, W.S.

Saturday, July 4.

FIRST DIVISION.

[Sheriff Court at Elgin.

DUNBAR *v.* GILL.

Right in Security—Long Lease—Statute—Assignation in Security—Action of Maills and Duties—Competency—Registration of Leases (Scotland) Act 1857 (20 *and* 21 *Vict. cap.* 26), *secs.* 6 *and* 20—*Heritable Securities (Scotland) Act* 1847 (10 *and* 11 *Vict. cap.* 56), *sec.* 2.

Held that as section 6 of the Registration of Leases (Scotland) Act 1857 provides a particular procedure whereby an assignee in security of a long lease may enter into possession, such assignee is not entitled to bring an action of maills and duties to recover sub-rents.

The Registration of Leases (Scotland) Act 1857 (20 and 21 Vict. cap. 26), which in section 4 makes provision for assignations in security of long leases recorded under the Act, enacts—Sec. 6—"All such assignations in security as aforesaid shall, when recorded, be transferable, in whole or in part, by translation in the form as nearly as may be of the Schedule (D) to this Act annexed; and the recording of such translation shall fully and effectually vest the party in whose favour it was granted with the right of the granter thereof in such assignation in security to the extent assigned; and the creditor or party in right of such assignation in security, without prejudice to the exercise of any power of sale therein contained, shall be entitled, in default of payment of the capital sum for which such assignation in security has been granted, or of a term's interest thereof, or of a term's annuity, for six months after such capital sum or term's interest or annuity shall have fallen due, to apply to the Sheriff for a warrant to enter on possession of the lands and heritages leased; and the Sheriff, after intima-

tion to the lessee for the time being, and to the landlord, shall, if he see cause, grant such warrant, which shall be a sufficient title for such creditor or party to enter into possession of such lands and heritages, and to uplift the rents from any sub-tenants therein, and to sub-let the same, as freely and to the like effect as the lessee might have done: Provided always that no such creditor or party, unless and until he enter into possession as aforesaid, shall be personally liable to the landlord in any of the obligations and prestations of the lease."

Section 20—"The several clauses in the schedules to this Act annexed shall be held to import such and the like meaning, and to have such and the like effect, as is declared by the Act of the 10th and 11th of Queen Victoria, chapter 50, sections second and third, to belong to the corresponding clause in the schedule to the said recited Act annexed. . . . . ."

The Heritable Securities (Scotland) Act 1847 (10 and 11 Vict. cap. 50), section 2, enacts—"The clause of assignation to rents to become due or payable shall be held to import assignation to rents from and after . . . (*a certain term*) . . . including therein a power to the creditor, in default in payment, to enter into possession of the lands disponed in security and uplift the rents thereof subject to accounting. . . . . ."

By contract of lease, dated 14th and 29th August 1866, and duly recorded, the Earl of Seafield, on the narrative that his predecessors had let to the deceased John Steuart certain subjects in Grantown, with entry at Whitsunday 1812, and that for the space of nineteen years, with a promise to renew for a space of other nine nineteen years, granted to James M'Gillivray (then in right of the obligation) a lease of the said subjects for the space of nineteen years from Whitsunday 1850, with an obligation to renew for the space of seven nineteen years more. On 22nd August 1874 James M'Gillivray assigned the lease to Marmaduke Gill, conform to assignation and conveyance recorded on 6th November 1874. By bond and assignation in security, dated 6th, and recorded 22nd March 1877, Marmaduke Gill assigned the lease in security of the sum of £700 to William Grant, who transferred his right to Miss Alexandrina Dunbar, by translation and assignation in her favour dated 10th and recorded 19th August 1882. In 1894 Marmaduke Gill sold the lease to Dr William Gill, who died in 1906, and whose executrix and trustee was his widow, Mrs Elizabeth Webster Macdonald or Gill.

On 8th May 1907 Miss Alexandrina Dunbar raised an action of maills and duties in the Sheriff Court at Elgin against Mrs Gill and against certain sub-tenants of the subjects leased, concluding for payment of the rents, maills, and duties to become due by the sub-tenants, or so much of said rents and others as would satisfy and pay the pursuer (1) a certain sum, being the half-year's interest on said bond and assignation in security due at Martinmas 1906, and (2) a like sum, the half-year's interest to become due at Whitsunday 1907, and a like sum at each succeeding term of Martinmas and Whitsunday.

Defences were lodged for Mrs Gill, who averred, *inter alia*—"(Ans. 1) . . . . Explained that the lease specified in said deeds was a lease for the space of nineteen years from the term of Whitsunday 1850, and it had lapsed and come to an end prior to the date of the bond and assignation in security founded on. The pursuer was never in possession of the subjects, and never had any real right, and she has no valid right or title to uplift the rents of the subjects."

The pursuer pleaded—"(1) The pursuer being entitled, in virtue of said bond and assignation in security, to enter into possession of said subjects and uplift the rents thereof, decree should be pronounced in terms of the conclusions of the summons. (2) The defence is irrelevant, and the objections stated by the compearing defender, besides being irrelevant, are *jus tertii*."

The defender pleaded, *inter alia*—"(1) The pursuer has no title to sue. (3) The averments of the pursuer are irrelevant, and insufficient to support the prayer of the petition. (7) The pursuer not being entitled, in virtue of the bond and assignation in security libelled, to enter into possession of the subjects and uplift the rents thereof, the action should be dismissed and this defender found entitled to expenses."

After various procedure the Sheriff-Substitute (WEBSTER), on 5th November 1907, pronounced an interlocutor sustaining the pursuer's second plea, and decerning against the defender in terms of the prayer of the petition.

The defender reclaimed, and argued — (1) The pursuer had no right to the sub-rents sought to be attached by this action. At the date of the assignation in security to the pursuer's author there was nothing to assign, because the first nineteen years had expired, and there was no renewal. Further, the lease, being for less than thirty-one years, could only be registered in virtue of section 17 of the Registration of Leases (Scotland) Act 1857 (20 and 21 Vict. cap. 26), which made registerable a lease for less than thirty-one years, provided there was an obligation to renew for a period which, added to the original period, amounted to thirty-one years. Such registration was only competent provided there had been renewal *de facto*, and the pursuer did not even aver any such renewal. (2) In any event, even assuming that the pursuer had a duly-constituted right in security under the Act, she had chosen the wrong remedy. Section 6 of the Act specifically provided the method by which such a party might make the right effectual, and any other procedure was by implication excluded. The position of a party holding a statutory assignation in security of a long lease was entirely different from that of the secured creditor at common law over lands, and the former must comply with the provisions of the statute to get the benefits thereby conferred—*Russell* v. *Campbell*, July 25, 1888, 26 S.L.R. 209; *Luke* v. *Wallace*, March 13, 1896, 33 S.L.R. 474. In the

latter case it was held that an assignee of a long lease was not entitled to bring an action of poinding of the ground. The importation into the Act, by section 20, of section 2 of the Heritable Securities (Scotland) Act 1847 (10 and 11 Vict. cap. 50) did not enable the statutory assignee in security of a long lease to make his right effectual by an action of maills and duties. [Other objections to the relevancy of the pursuer's case were also argued.]

Argued for the pursuer (respondent)—(1) The pursuer had a perfectly good right to the sub-rents in question. Where there was an obligation to renew and the tenant had remained in possession after the expiry of the first period, possession would be ascribed to a renewal for the whole period which the obligation covered —Bell's Prin., sec. 1190. Further, the lease was not for nineteen years, but for seven times nineteen years, and when possession was once taken under such a lease that made the tenant's right real for the whole period, including the periods for which there might be renewal—Rankine on Leases (2nd ed.), p. 133; *Wight* v. *Earl of Hopetoun* (1763), M. 10,461, 15,199; *Scott* v. *Straiton* (1771), M. 15,200. The lease therefore fell within the Act. In any event, the defender had made no averment which would found her objection on this point, and if it were true that there had been no renewal, that would strike at the defender's right also. The pursuer must therefore be presumed to have a duly constituted right in security under the Act. (2) The procedure adopted by the pursuer for making that right effectual, though not the procedure provided by section 6 of the Act, was competent. By the importation into the Act, by section 20, of section 2 of the Heritable Securities (Scotland) Act 1847, the assignee in security of a long lease was placed in the same position and entitled to the same remedies as a creditor in a bond and disposition in security containing an assignation of rents, and there was no doubt that such a creditor could make his right to rents (and sub-rents) effectual by an action of maills and duties—Bell's Comm. i, 793.

At advising—

LORD M'LAREN—This is an appeal from the judgment of the Sheriff-Substitute of Inverness, Elgin, and Nairn in an action in the form of an action of maills and duties instituted by the assignee (in security) of a tenant under a long lease granted by the Earl of Seafield of subjects in Grantown. The action is directed against sub-tenants and concludes against them for payment of their rents to the secured creditor.

The title founded on is a lease or tack dated 14th August 1866, which narrates that the Earl's predecessors had let to the deceased John Steuart the subjects in question with entry at Whitsunday 1812, and that for the space of nineteen years, with a promise to renew the said tack or lease for a space of other nine nineteen years. On this narrative Lord Seafield lets to James M'Gillivray (then in right of the obligation) and his heirs and assignees the subjects as therein described, and that for the space of nineteen years from the term of Whitsunday 1850, which was thereby declared to be the commencement of a third nineteen years' lease, with obligation to renew in terms of the original grant.

The condescendence states that this lease was by James M'Gillivray assigned to Marmaduke Gill, through whom the present tenant Mrs Elizabeth Macdonald or Gill derives right.

The said Marmaduke Gill assigned the leasehold subjects to William Grant in security of a loan of £700, and the pursuer Miss Dunbar has acquired the creditor's right in the bond and assignation in security. These facts are undisputed.

The first objection to the action is that the lease, which, as I have said, is for nineteen years from Whitsunday 1850, has not yet been renewed. This objection, if tabled in the record in the Sheriff Court, would probably have been fatal to the diligence. But the objection is purely technical, because Lord Seafield is under obligation to renew the lease, and as it does not appear on the face of the record that the lease has not been renewed, the objection is not raised in a form which makes it necessary for a Court of Appeal to dispose of it.

The next objection is that an action of maills and duties is not a species of diligence which is open to a creditor who has no higher security than an assignation of a leasehold interest.

It has not and could not seriously be disputed that the right of a heritable creditor to compel the tenants to pay their rents to him when the proprietor is in arrear is a right which at common law is only competent to a creditor who holds a security over a feudal estate. But on behalf of the pursuer it was maintained that the Act of Parliament which provides for the registration of long leases in the Register of Sasines (20 and 21 Vict. c. 26) had put creditors holding securities over registered leases in the same position as proper heritable creditors.

The 20th section of this Act provides that the several clauses in the schedules to this Act annexed shall have the same meaning and effect as is declared by the Act 10 and 11 Vict. c. 50, secs. 2 and 3, to belong to the corresponding clauses in the schedule to the said recited Act, and also that the procedure for a sale at the instance of a heritable creditor shall be applicable to a sale of any such lease assigned in security. I am here giving only the substance of the clause. Now the first and second schedules to the Long Leases Act, which are the forms for an absolute assignation and an assignation in security respectively, contain the words "I assign the rents." I do not doubt that this abridged clause is capable of expansion in terms of the Act 10 and 11 Vict. c. 50, and that it imports an effective assignment of the benefits of the rents in favour of the creditor. It seems to follow (but I do not wish to express an unqualified opinion on a point which is not before us) that if this assignment were properly intimated to the tenants, the bondholder would have

a preference in bankruptcy. But I do not find in either of the statutes referred to anything importing a declaration that the diligence known as an action of maills and duties is to be open to a creditor holding a security over a registered lease.

But for section 6 of the Long Leases Act there might be room for the argument that the power of compelling the sub-tenant to pay to the secured creditor was given by implication. But as in general an express power will exclude an implied power where the conditions are different, I must hold that the argument is displaced by the 6th section, which gives a remedy to the creditor *ejusdem generis* with an action of maills and duties but under different conditions. The substance of the provision is that where there is default of payment of the capital sum or interest for the period of six months, the creditor may apply to the Sheriff for a warrant to enter on possession of the lands and heritages leased, and that the Sheriff, after intimation, shall, if he see cause, grant such warrant, which, as the statute explains, will empower the creditor to uplift rents from sub-tenants. Now an action of maills and duties is a proceeding under which the pursuer may obtain as matter of right a decree in absence, but this is a very different right from that of obtaining a warrant *causa cognita* from a judge. It is impossible to suppose that the Legislature intended that these rights should subsist concurrently, and I therefore come to the conclusion that the pursuer has been wrongly advised as to her remedy, and that her right to the rents payable by sub-tenants could only be made effectual by means of a special warrant in terms of the 6th section of the statute. The appeal must therefore be sustained and the action dismissed.

LORD KINNEAR — I agree, and I think that the ground your Lordship has stated is sufficient for the decision of the case. We had a variety of criticisms from the Dean of Faculty on the whole procedure before us, which if it were necessary would require consideration in detail. I am disposed to think that the greater number of the defects pointed out by the learned Dean are mere apparent anomalies which do not go to the substance of the matter at all, and are perhaps necessarily consequent upon the main provisions of the statute. The purpose of the statute so far as we are concerned is to enable the holders of leasehold ground to give a real security to their creditors which may be effectual notwithstanding that there is no immediate change in the natural possession; and in order that that design may be carried out the statute authorises with reference to leases proceedings which are more properly applicable to rights of property in land, and uses language which is more appropriate to titles of property than to leases. But then it is just because that is so that I think we must be cautious, in reading particular instruments, against being over-critical in case we should thereby be going against the plain design and purposes of the statute. The main purpose of the statute is in itself simple enough, and the methods prescribed seem to me to rest upon perfectly sound analogies, and I am disposed to think that there is no difficulty in carrying out the purpose of the Act.

But there remain two objections which appear to me to be formidable. The first, upon which I desire to express no decided opinion, and I think your Lordship in the chair has expressed none, is that the pursuer has not established any sound statutory basis for the procedure at all, because she has not disclosed upon the face of her proceedings that she does hold a statutory security over an existing lease recorded in the Register of Sasines. That is the fundamental basis of the whole proceeding, and if it be so, there is an end of the question. I am not satisfied that the answer to this question which was maintained by Mr Dickson is perfectly sound, because it is a fundamental condition of the pursuer's right to an action of this kind that it should be shown to be based upon the real right which the statute requires in order to support the proceedings at all. The criticisms upon the defender's record may be formidable enough, but an argument *ad hominem* will not support a diligence in execution against land, and therefore I am not satisfied that the Dean's objection on this point has been met. But I do not desire to express any final opinion on the subject, which would require an examination of the whole series of instruments, because the other ground upon which your Lordship has proceeded is sufficient. The pursuer's case in support of this proceeding is rested upon the importing of the 2nd section of the Heritable Securities Act 1847 into the Registration of Leases Act 1857 by the terms of the 20th section of the latter, and the argument is that if these two enactments are read together there is statutory authority for enforcing the right by an action of maills and duties. Now the second section of the Heritable Securities Act says nothing about an action of maills and duties. The 20th section of the Registration of Leases Act says that the several clauses in the schedules annexed to the Act which have been followed in the instruments now before us "are to import such and the like meaning, and to have such and the like effect, as is declared by the Act of 10 and 11 of Queen Victoria, chapter 50, sections 2 and 3," to belong to the corresponding clauses in the schedule to that Act. Now section 2 of the Heritable Securities (Scotland) Act is the section with which we are concerned, and all that it says, so far as applicable to the present question, is that the clause of assignation of rents shall be held to import an assignation to rents from and after a certain term in the fuller form now generally in use, "including therein the power to the creditor, in default in payment, to enter into possession of the lands disponed in security and uplift the rents thereof." Now, if that were the enactment upon which the present pursuer had to proceed, I could see a very sound argument for

saying that that must mean an action of maills and duties, because no other process is prescribed for entering into possession, and therefore it might be said that the ordinary procedure known to the law is that which is to be followed. But when we read that provision as part of the Registration of Leases Act, we find, that the statute itself provides a special proceeding for entering into possession, because the sixth clause sets out in terms the specific method by which a creditor is to enter upon possession of the lands and heritages and to uplift the rents from any sub-tenant. I take it to be a general rule of law that when an Act of Parliament creates a new right and at the same time prescribes a new method of procedure for giving effect to it, anyone who desires to take advantage of the Act must follow strictly the prescribed procedure. The pursuer has not followed the procedure but has gone outside the terms of that statute, and has adopted a form of procedure which it does not recognise, and therefore I am of opinion with your Lordship that this proceeding falls.

LORD DUNDAS—I am of the same opinion, and I do not think I can usefully add a word to what your Lordships have said.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court sustained the appeal and dismissed the action.

Counsel for the Pursuer (Respondent)—Dickson, K.C.—D. M. Wilson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defender (Reclaimer)—Dean of Faculty (Campbell, K.C.)—Munro. Agents—Clark & Macdonald, S.S.C.

Saturday, July 11.

FIRST DIVISION.

[Lord Johnston, Ordinary.

M'LEAN *v.* HART.

Reparation—Slander—Judicial Slander—Privilege—Malice—Averment of Facts and Circumstances.

In an action of damages for judicial slander, where the statement complained of is pertinent to the action in which it is made, the pursuer must aver facts and circumstances from which malice can be inferred.

A, who had been the co-defender in an action of divorce by B, in which B had obtained decree although the co-defender was assoilzied, brought an action of damages against B for judicial slander on these averments; that in the divorce action B had falsely, recklessly, maliciously, and without any cause, stated in the record of that action—"In consequence of the information elicited by the pursuer from the defender, the pursuer has made inquiries and has ascertained, and now avers, that "upon certain dates" the defender misconducted herself with the co-defender, and that the co-defender is the father of the child which was born to the defender"; that no such inquiries had been made; that the only thing connecting A with the alleged adultery was a written confession by the wife, which, as was known to B, she was at the time repudiating, and which had been instigated by B with the view of obtaining the divorce. *Held* (*rev.* judgment of Lord Johnston, who had allowed an issue) that the action was irrelevant, and the defender *assoilzied*.

Scott v. *Turnbull*, July 18, 1884, 11 R. 1131, 21 S.L.R. 749, *approved* and *followed*.

Observations (*per* Lord M'Laren) on the amount of privilege accorded to written pleadings as compared with that accorded to oral advocacy.

On 4th March 1908 William C. M'Lean, apprentice baker, Bo'ness, brought an action against Patrick Campbell Hart, C.E., Glasgow, in which he claimed £500 as damages for judicial slander.

The pursuer averred—"(Cond. 3) On 21st January 1907 the defender raised an action in the Court of Session against his wife, concluding for divorce on the ground of the adultery of his wife with the pursuer or some other male person to the defender unknown. In said action the pursuer was called as co-defender, and the defender averred on record that 'In consequence of the information elicited by the pursuer from the defender, the pursuer has made inquiries and has ascertained, and now avers, that upon Tuesday, 1st May 1906, and upon other dates during that month, and also in the month of April preceding, the defender (Mrs Hart) misconducted herself with the co-defender (pursuer), and that the co-defender is the father of the child which was born to the defender (Mrs Hart) on or about 11th January 1907.' These statements are false and calumnious, and were made by the defender recklessly, maliciously, and without probable or any cause. No inquiries whatever were made by the present defender, or on his behalf, relative to the pursuer's connection with the case, and the only communication he caused to be made to the present pursuer was in December 1906, when he endeavoured, through a private detective, to induce the pursuer to sign a similar confession to corroborate the said alleged confession by Mrs Hart. This the present pursuer refused to do. Further, the present defender never had any information connecting the present pursuer with his wife's alleged adultery, except a statement in one of the two documents referred to below, which document the present defender knew, at the time he took the oath of calumny, his wife was repudiating as false. Further, no evidence was attempted to be led at the trial against the pursuer. (Cond. 4) In said action the defender produced and founded on written