The Court adhered.

Counsel for the Respondents (Pursuers)—Constable, K.C.—D. M. Wilson. Agents—Menzies & Thomson, W.S.

Counsel for the Reclaimers (Defenders) The Provident Association of London, Limited—Chree, K.C.—Lippe—Dykes. Agents—Mackenzie & Fortune, S.S.C.

Counsel for the Reclaimers (Defenders) David Livingstone Dryburgh and William Gray—Chree, K.C.—Lippe—Dykes. Agent—James P. Niven, Solicitor.

Saturday, December 6.

SECOND DIVISION.

[Lord Dewar, Ordinary.

COUPER *v.* LORD BALFOUR OF BURLEIGH.

(See also *ante*, 50 S.L.R. 320; 1913 S.C. 492.)

Reparation—Slander—Privilege—Malice—Deliberate Falsehood and Fabrication of Charges—Recklessness—Repetition—Refusal to Apologise.

In an action of damages for slander, A, the matron of a county hospital, averred that B, a local ratepayer, had transmitted to the county clerk certain charges of professional misconduct against her by letter, in which he further expressed the opinion that if the charges were true A was guilty of criminal conduct. She further averred that these charges, having been held groundless after two inquiries instituted by the Hospital Committee and the Local Government Board at B's request, B transmitted by a second letter further charges against her to the Local Government Board and obtained a third inquiry, which also exonerated her with regard to the first letter. She further averred that the defender had made certain statements, therein contained, without any information, hearsay or otherwise, as to them and without regard to whether they were true or false, and that, when he moved for the second inquiry he had received information which showed that they were false. With regard to the second letter she further averred that the defender made the statements in it recklessly and in the knowledge that they were false and to gratify his resentment and ill-will, that he "deliberately invented" certain of the statements, and that from the information in his possession he knew the statements made in the letter were untrue. She averred further that, notwithstanding the result of the inquiries, the defender refused to withdraw the charges or to apologise. It being admitted that the occasion was privileged, *held* that the averments were relevant to infer malice on the part of B, and issues *allowed*.

Reparation—Slander—Issue—Innuendo.

B, a local ratepayer, brought certain charges against A, the matron of a county hospital, in connection with the management of the hospital, and in acknowledging the receipt of the report of an inquiry which had exonerated A he wrote—"I wish to say that, so far as I am concerned, I have but a languid interest in the question of which members of the staff lied the most." A having brought an action of damages for slander against B, in which she sought to innuendo these words as representing that she had lied in giving evidence in the inquiry, *held* (*rev.* judgment of Lord Dewar, Ordinary) that the words could not bear the innuendo sought to be put on them.

Elizabeth Birnie Couper, matron, Clackmannan Combination Infectious Diseases Hospital, Alloa, *pursuer*, brought an action against the Right Honourable Alexander Hugh Bruce, Baron Balfour of Burleigh, residing at Kennet, Alloa, *defender*, in which she claimed £2000 damages for slander.

The pursuer averred, *inter alia*—"(Cond. 1) The pursuer is matron of the Clackmannan Combination Infectious Diseases Hospital, Alloa. She has occupied that position for seven years to the entire satisfaction of the Hospital Committee, her employers. The hospital is administered by a committee of management who are nominated by the County Council of Clackmannan and the burghs of Alloa, Alva, Tillicoultry, and Dollar. (Cond. 2) On 15th July 1911 two children, Rose and Carlos Forbes, aged respectively six and three years, were admitted to the hospital, being notified by Dr James Robertson, Clackmannan, their family medical attendant, as suffering from scarlet fever, and were placed in the scarlet fever ward. On 31st July a Mrs Comrie was admitted to the hospital suffering from scarlet fever and died next day in the hospital. Carlos Forbes died in the hospital on 21st August 1911. (Cond. 3) On or about 1st September 1911 the defender, without communicating in any way with the said Hospital Committee, addressed the following letter to James Whitehead Moir, Solicitor, Alloa, Clerk to the County Council of Clackmannanshire, namely:—'*Kennet, Alloa, Sept.* 1, 1911.—Dear Mr Moir,—I desire to lay before you the following statement of facts, and beg the favour that a stringent inquiry will be made into the whole circumstances, which seem to me to reflect very seriously on the management of the County Fever Hospital. On Saturday, July 15th, two children of my overseer, Mr R. Forbes (Rose and Carlos being the Christian names), were taken to the hospital. They were both suffering from scarlet fever of a very mild type. Both were out of bed and progressing to a favourable recovery when seen by their parents on August 5. On August 11th Rose was sent home said to be cured, but on the following day or on the 13th she developed serious fever and had to be again taken to the hospital. This

time the fever was most severe. I understand it was of the type known as 'septic.' The little boy also developed the severe type of fever about the same or *an earlier date*. The serious part of the case is this, that on or about July 30th a woman from Sauchie with the most malignant type of fever was put into a bed in close proximity to the children, almost the next bed to one of them. This woman died within a few hours. The dates would seem to show that both children were infected from this poor woman with the malignant fever, and as I have said the little boy died. I am told that a lad Norval from Clackmannan, who entered the hospital about May 22nd suffering from the same mild form of fever as these two children, also got the serious type of fever in the hospital but recovered. So far the facts are not, I think, susceptible of contradiction. I am told, but this is hearsay, that the matron was responsible for putting the Sauchie woman into the close proximity to the two Forbes children, and that she did it in spite of remonstrances from at least one other member of the staff. If this is the case it points in my opinion to criminal conduct. In any case the whole circumstances should in my opinion be made the subject for a most rigid and circumstantial inquiry. I am confident you will agree with me and that the County Council will see that such an inquiry is made. I add that I reserve my right to carry the matter further by appeal to the Local Government Board, or otherwise as may seem right.—J. W. Moir, Esq.—I am, faithfully yours, BALFOUR OF BURLEIGH.' The defender on any matters affecting the hospital had previously communicated with the said Hospital Committee and in regard to such matters it was his duty, and he knew it, if he had any complaint to make against the hospital staff, to make such complaint to the said Hospital Committee. (Cond. 4) The statements in the said letter, namely—[Pursuer here quoted the letter from "The serious part" down to "recovered," and from "I am told" down to "criminal conduct"]—are of and concerning the pursuer, and are false, calumnious, and malicious. The woman referred to was put in the bed in which it is customary to put female patients on their admission. If the defender had made any inquiry he would have found this to be the case. It was not true that the defender had received any information, hearsay or otherwise, that the pursuer had put the woman into the bed mentioned in spite of remonstrances from at least one other member of the staff. No such remonstrances had been made, and the defender was never told that they had. Further, it was not true that the defender had been told that a lad Norval had entered the hospital suffering from the same mild type of fever as the two children, and had got the serious type in the hospital. A boy Norval was admitted to the hospital, but he was suffering on admission from a very bad type of fever. The statements referred to were made by the defender recklessly and without regard to whether they were true or false. These statements were intended to represent and convey, and did represent and convey, the meaning that the pursuer was responsible for the death of Carlos Forbes mentioned in the letter by reason of her criminal conduct as matron in putting a patient suffering from the most malignant type of fever into close proximity to the said Carlos Forbes. There was absolutely no foundation for any imputation upon the character of the pursuer. (Cond. 5) The defender had no right or duty to make the said statements complained of, and in any event he had no right or duty to make the said statements to the said James Whitehead Moir. The said James Whitehead Moir was not an official of the hospital, nor concerned in its management. The County Council of Clackmannanshire, to which body the said James Whitehead Moir was clerk, was not the proper authority to receive or deal with complaints against the hospital, and the defender knew that it was not. Any complaint should have been addressed to the Hospital Committee, and the defender knew that. The defender addressed the said letter to the said James Whitehead Moir instead of to the said Hospital Committee for the purpose of prejudicing the said committee and their servants, and in particular the pursuer, in the eyes of the County Council, who elect four out of thirteen members of the said committee, and with a view to getting the County Council to influence its representatives on the said committee to support his false accusations when the matter was considered by the said committee, who, alone, as he well knew, could investigate them. Further, with the object of forcing both the County Council to use pressure upou the said committee and of compelling the said committee to make a report substantiating his false accusations, he intimated in the said letter that he reserved his right to appeal to the Local Government Board, by way of threat, believing that he would thereby coerce the said committee into making a report bearing out his accusations rather than have a Local Government Board inquiry into their administration. . . . (Cond. 6) The said letter of 1st September 1911 was transmitted by the said James Whitehead Moir to the said Hospital Committee. Neither he nor the County Council of Clackmannan had power to investigate the accusations made therein, and the defender knew that they had not. After inquiry, the said committee found that the allegations of the defender against the management of the hospital were not supported by any evidence, and in particular with regard to the said statements complained of by the pursuer as affecting her, the said committee found that they were (as they were in fact) groundless. The said committee further recorded their opinion that the defender should either substantiate his said complaint in regard to her by evidence or withdraw it. In particular, the committee found (1) that the lad Norval had come into hospital suffering from a severe attack of scarlet fever, and that his illness was not contracted there; (2) that the woman

referred to in the defender's letter of 1st September was put into the bed into which it was customary to put new patients; and (3) that the members of the nursing staff on duty at the time in question repudiated the statement to the effect that any remonstrance had been made by them. Further, it appeared from reports by the physician who had charge of the hospital that it was extremely doubtful, in view of subsequent developments, whether the diagnosis of the said Dr Robertson, that the said two children were suffering from scarlet fever when they went to the hospital, was correct. The said Dr Robertson is a personal friend of the defender. (Cond. 7) On 12th October 1911 the decision of the said Committee of Management was communicated to the defender. Copies of signed statements from (1) Dr John Crawford, the medical superintendent; (2) Dr R. Cramb, principal officer of Govan Combination Hospital, Shieldhall, Glasgow, and who had acted as *locum tenens* for the said Dr John Crawford during the first fortnight of August 1911; (3) the pursuer; and (4) the nurses of the hospital, together with a copy of the said letter of 5th October 1911, were also transmitted to the defender. (Cond. 8) The defender, although invited by the said committee to withdraw his said charges against the pursuer, declined to do so. On the contrary, the defender openly expressed his dissatisfaction with the conclusions of the said committee, impugned without the slightest ground therefor the impartiality of the said committee, and in spite of his knowledge that there were no grounds in fact for the imputations he had made against the pursuer he did not withdraw his charges, but determined to press for further inquiry. The defender intimated this resolution upon his part by letter, dated 17th October 1911, to the said James Whitehead Moir. The defender was very angry that the said committee had not yielded to the pressure he had tried to put on them by his said letter of 1st September 1911, and by his threat of appealing to the Local Government Board. He was in particular annoyed that his accusations had been found baseless, that it had become generally known among the public in Alloa and Clackmannanshire (as it had) that he had been found in the wrong in his allegations, and that the accuracy of his friend Dr Robertson's diagnosis had been doubted. The defender had no right or duty to demand any further inquiry on the part of anyone into the statements made by him in the said letter of 1st September 1911. No one with any legitimate interest disputed the conclusions reached by the said committee or complained of these conclusions in any way, and the defender in particular had no information of any kind warranting his pressing for any further inquiry into the said charges upon the personal conduct of the pursuer. Moreover, the defender had then received information which showed that these charges were false and ought not to have been made in his said letter of 1st September 1911. He determined, however, upon getting an additional inquiry into the whole of the statements in his said letter of 1st September 1911, not in the interests of the father of the said children or on public grounds, but solely in the hope that he might get some sort of report which would relieve him of the public discredit he had incurred by making charges which had been found baseless, and which would remove the doubts cast on the diagnosis of Dr Robertson. (Cond. 9) On or about 18th October 1911 the defender addressed a letter to the Secretary of the Local Government Board for Scotland in the following terms:—'*October 18th*, 1911.—Sir—I beg to transmit the accompanying correspondence relative to the Combination Fever Hospital in Alloa for the information of the Local Government Board for Scotland. I have numbered them 1 to 6 in chronological order.—I am, &c., BALFOUR OF BURLEIGH.' The correspondence sent with this letter consisted, *inter alia*, of (1) copy of the defender's said letter of 1st September 1911 to Mr Moir; (2) the said letter dated 5th October 1911 by the clerk to the said Hospital Committee to Mr Moir; (3) copy of the said signed statements by the medical superintendent, the pursuer, and others, referred to in said last-mentioned letter; (4) Mr Moir's letter to the defender dated 12th October 1911, transmitting the said letter of 5th October 1911 and relative signed statements; and (5) copy of the defender's said letter of 17th October 1911 to Mr Moir. The defender also at the same time communicated privately in writing with the legal member of the said Board. The defender had no right to communicate privately with the said legal member or any member of the Board in reference to the matter, and he did so solely with the view of improperly influencing the consideration by the said legal member of the said Board of the said letter of 18th October 1911 and its other enclosures to the prejudice of the pursuer. It is believed that the Board returned the said private letter to the defender, who is hereby called upon to produce the said letter or a copy thereof. (Cond. 10) Although the defender did not in his said letter of 18th October 1911 expressly ask for a further inquiry, his object and purpose in writing that letter, and in writing the said private letter to the legal member of the said Local Government Board for Scotland, was to get the Board to cause an inquiry to be made with reference to the whole allegations made by him in the said letter of 1st September 1911. The defender was well aware that there were no grounds, public or otherwise, for any such inquiry. He had been a former President of the Board, and he thought that the fact of his previous official connection with the Board would influence the Board to order such an inquiry. No other person upon the information which he placed before the Board could have obtained such an inquiry. The Board, relying on the defender's eminent position, believed that he must have grounds for the said allegations which he made. In point of fact he had no grounds whatever, and he was, moreover, in possession of information completely disproving such allegations.

(Cond. 11) The Local Government Board therefore appointed their medical inspector, Dr Frederick Dittmar, to inquire into the said allegations made by the defender. Dr Dittmar is not only a highly experienced official of the Board, but a medical man of the best reputation and character, and conducts any investigations committed to him by the Board with scrupulous care and impartiality. After making his investigations he reported to the said Board that in his opinion the said Rose and Carlos Forbes probably did not suffer from scarlet fever when admitted to the hospital, that it was impossible to say from whom the said Carlos Forbes obtained his infection after admission to the hospital, that it was not likely that he was infected by the said woman patient, and that in any event that matter was of secondary importance. In connection with the discharge of her duties by the pursuer, no blame was in any way attached to the pursuer by the said Dr Dittmar. (Cond. 12) On or about 27th December 1911 the said Local Government Board communicated to the defender the report of the said Dr Dittmar. The said report contains, *inter alia*, careful statements of the evidence given to Dr Dittmar by all the persons who could give any information on the matters of the charges made by the defender. The defender was very angry at the result of this second inquiry. It was well known in Alloa and Clackmannanshire generally that the inquiry was taking place, and the defender was extremely annoyed that this second inquiry, like the first, resulted in showing the baselessness of his accusations and casting great doubt on Dr Robertson's diagnosis. The defender attributed, without any cause, this result to the partisanship of the said Dr Dittmar. He refused to accept the inquiry held by him as final. The defender resolved, regardless of all truth and considerations, to bring the hospital management and those who had anything to do with the hospital into disrepute, and in furtherance of this resolve he determined to renew the charges he had already made, and to make further charges against, *inter alios*, the pursuer, without having the slightest ground therefor. (Cond. 13) On or about 11th January 1912 the defender, in pursuance of his said resolution, addressed a letter to the Secretary of the Local Government Board, in the following terms:—'11*th January* 1912.—Sir—I duly received your letter of the 27th, with a copy of Dr Dittmar's report. I regret to have to say that neither the method of the inquiry nor the result seem to me, according to my humble judgment, to be at all satisfactory. I think it was a grave error of judgment on the part of Dr Dittmar to be driven about the country by Dr Crawford, in regard to whose administration at least one part of his inquiry had reference. I do not wish to use harsh terms, but I think the result achieved is little less than a farce. Medical terms are used in such a way as to confuse rather than to enlighten people of even average intelligence. This I can see, ignorant as I am, from such knowledge as I have acquired during my thirty years' presidency of the London Fever Hospital. Taking the report itself, let me refer you to the following points—On page 29, in the twentieth line, Dr Dittmar commits himself to this statement—"The responsible officials in hospital do not appear to have been absolutely certain that the cases had scarlet fever when admitted to hospital, but Dr Crawford's opinion was that, though not typical cases, on the whole they were probably suffering from the disease. It was perhaps natural to leave them in the scarlet fever ward in the circumstances, but from what occurred I think it will be generally admitted that it was a pity they were not moved to one of the observation wards within a few days of admission to hospital." I do not think many people will agree with him, and in my opinion if those in authority really entertained any doubt, the course taken is enough in itself to condemn the whole administration of the hospital. Either the authorities had suspicion at the time that the children had not scarlet fever, or they had no such suspicion. If they had no such suspicion, they cannot found upon it now. If they had, no words of mine can be too severe for the folly of leaving children in a ward of the kind under the circumstances then existing. I may say that it was both illegal as a matter of administration, and cruel as a matter of conduct. On page 31, on the third line from the bottom, Dr Dittmar again refers to the observation wards. May I ask if he saw them, and if he has anywhere recorded his candid opinion about them? Page 32, the seventeenth line. It may be of no importance in Dr Dittmar's opinion how the child got his second attack of fever, but even Dr Dittmar cannot gloss over the fact that the boy did get it and that he died of it. In the third line from the bottom of the same page Dr Dittmar says—"The idea that Carlos was infected by this woman has probably arisen from the circumstance that her case and that of Carlos both ended fatally." This seems to me a perfectly fatuous and entirely silly remark, for which no shade or shadow of foundation is given. If the poor child died of septic infection and not malignant fever, it only makes the case for the hospital worse. With regard to the two last lines on page 33, Dr Dittmar may belittle the incident as much as he likes, but it seems to me harsh treatment for a baby fever patient notwithstanding Dr Dittmar's opinion. But are the nurses to be relied on? With regard to the last four lines of page 34 I suggest that the state of circumstances therein revealed is not in accordance with the Public Health Act, and yet, so far as I can see, there is no real condemnation of the state of matters admitted to exist. All along I have been afraid that a much worse state of things existed than has been revealed. I understand now that events have occurred since I left home some days ago which throw a lurid light on the whole matter under discussion. I understand, from a source on which I think I can rely, that two or three of the hospital nurses have resigned their places and that the

matron has also gone, and that they realise the grave responsibility of their position and some of the things that have occurred. A further inquiry would throw a good deal more light upon the actual state of matters and on what happened, but that inquiry would have to be conducted by a gentleman who really desired to find out the truth. I understand these nurses went to a medical man in Alloa and informed him that the original charts and registers in the case of the Forbes boy had been wilfully destroyed, either with the knowledge or under the direction of the matron, and that those submitted to Dr Dittmar were fabricated for the purpose. I am going to Switzerland to-morrow, and shall be away for about ten days, but the Local Government Board and Dr Dittmar may rest assured that the matter will not rest where he has left it.— I am, &c., BALFOUR OF BURLEIGH.' (Cond. 14) The statements in the said letter of 11th January 1912 are in part of and concerning the pursuer, and are false, calumnious, and malicious. They were made by the defender recklessly and without any cause, in the knowledge that they were false, and in gross disregard for the interests of the pursuer, and not for the purpose of having the circumstances of the illness of the said Rose and Carlos Forbes investigated, but to gratify his resentment and ill-will at his said charges having been found baseless, and at the reflections which had been cast on the said Dr Robertson's diagnosis. So far as any of these statements were based upon alleged information supplied to the defender by the said Dr Robertson, the defender was not entitled to rely on its accuracy. The defender was aware that Dr Robertson's diagnosis had been doubted, that Dr Robertson was very angry at this, and that Dr Robertson, like himself, was anxious to get the hospital, its committee and servants, discredited in public estimation. The defender himself represented in the said letter of 11th January 1912 that certain nurses examined by the said Dr Dittmar were not trustworthy persons, and yet some of the grave charges against the pursuer made by the defender in the said letter were based, as he knew, on information said to have been furnished by these nurses. The defender further knew when he wrote the said letter of 11th January 1912 that one of the said nurses had been summarily dismissed by the medical superintendent with the approval of the convener of the Hospital Committee on 8th January 1912. Notwithstanding these facts, and that the said Dr Robertson had invited the defender before taking any further action in the matter to see the said nurses, the defender declined this opportunity and immediately wrote his said letter of 11th January 1912. The defender had no information before writing his said letter of 11th January 1912, other than a letter dated 9th January 1912, addressed to him by the said Dr Robertson. The information in the said letter did not justify him in writing the said letter of 11th January 1912. The statement at the end of said letter that 'the Local Government Board and Dr Dittmar may rest assured that the matter will not rest where he has left it,' was made with the view of forcing the Local Government Board to make a report regardless of truth, which might appear to justify the accusations which the defender had made. The said letter was written, not with the *bona fide* object of getting an impartial inquiry into the matter, but with the object of getting a report which might, regardless of truth, establish a false reputation of the defender as a public-spirited ratepayer. (Cond. 15) Further, the defender deliberately invented the statements in the said letter, namely — "That the matron" (meaning thereby the pursuer) "has also gone, and that they" (meaning thereby the said nurses and the pursuer) "realise the grave responsibility of their position, and some of the things that have occurred." For these statements in particular affecting the pursuer the defender had absolutely no ground whatever. Neither the said Dr Robertson nor anyone else had ever made any statements to the defender to any such effect, and he had no information of any kind, hearsay or otherwise, warranting his making such statements. In fact from the information then in his possession he knew that it was untrue to suggest or assert that the pursuer had surrendered her position as matron, that she had gone from the hospital, that she had left Alloa, and also that she had realised her position, and had acknowledged or confessed by her conduct in leaving the hospital her guilt of the charges he imputed to her in the said letter of 11th January 1912. Prior to the adjustment of the record in this action it was admitted on behalf of the defender that the sole information upon which he proceeded in writing the said letter of 11th January 1912 was the said letter of 9th January 1912, written to him by the said Dr Robertson. (Cond. 16) The said statements complained of in the said letter of 11th January 1912, and in particular the statements contained in the second last paragraph thereof, were intended to represent and convey, and did represent and convey, that the pursuer was responsible for the death of the said Carlos Forbes by reason of her criminal conduct while acting as matron of the hospital in putting a patient suffering from the most malignant type of fever into close proximity to the said Carlos Forbes; that the pursuer had given false evidence to the said Dr Dittmar at the inquiry before him; that she had procured nurses acting under her to give false evidence thereat; that she had wilfully destroyed, or caused to be destroyed, original charts and registers in the case of the said Carlos Forbes; that she had fabricated, or caused to be fabricated, other charts and registers in their place; that she had uttered and submitted these fabricated charts and registers to the said Dr Dittmar as true and genuine documents, and to defeat the ends of justice; that, realising her guilt, she had deserted her said post as matron, and left Alloa as a person guilty of grave crimes; that but for the partiality of the said Dr Dittmar her guilt, as alleged by him, would have been discovered; and that she was

not fit to be the matron of the said hospital or of any hospital. (Cond. 17) The purpose of the defender in writing the said letter to the said Local Government Board of 11th January 1912 was to force a third inquiry, because of his displeasure and disappointment with the result of the said two previous inquiries, and in particular because the result of the said two inquiries proved that he had made baseless charges against the management of the hospital and against the pursuer. The defender wished to get another inquiry, not in order to substantiate the charges he had made, which he knew to be groundless, but in the hope of obtaining some finding that would free him from reproach for the false charges he had made, and would make him appear to be a public-spirited citizen. The defender had no right as a citizen or otherwise to address the said letter of 11th January 1912 to the Local Government Board. Further, in pursuance of his said policy of compelling the Board to accept his views, he improperly threatened the Board in the said letter that he would bring their position in the matter before Parliament. The Board ordered a fresh inquiry in respect of his attack upon the said Dr Dittmar, his threats if the Board did not comply with his request, and his fresh and groundless allegations against the pursuer. The Board appointed James A. Fleming, K.C., then Sheriff of Dumfries and Galloway, as their commissioner, to hold this inquiry. (Cond. 18) The result of the inquiry held on three days in February 1912 by the said commissioner was that he, on 18th March 1912, also reported to the said Local Government Board that all the charges made against the pursuer by the defender were without foundation. The witnesses adduced at this inquiry were all examined on oath. The pursuer was a member of the staff of the said hospital, and as such she was one of these witnesses so examined. On 25th April 1912 the Local Government Board transmitted to the defender a copy of the report of the said commissioner. (Cond. 19) On or about 29th April 1912 the defender, who refused to accept the findings of the said commissioner, addressed a letter to the Secretary of the said Local Government Board in the following terms: —'*29th April* 1912.—Sir—I have to acknowledge the receipt of your letter of the 25th, and enclosing a copy of the report, dated the 18th March, by Sheriff Fleming on the allegations made to the Board that certain evidence submitted to their medical inspector in regard to the Clackmannan Combination Hospital had been found to be false. It bears all the marks of a careful and conscientious investigation, but for that Sheriff Fleming's reputation is a sufficient guarantee. I wish to say that so far as I am concerned I have but a very languid interest in the question of which members of the staff lied the most. The point in which I was interested was that into which Dr Dittmar was originally appointed to inquire, namely, as to the treatment of the Forbes children, and as to the attempts on the part of the hospital authorities to allege that they had never had scarlet fever as a sort of quasi justification for the treatment they received in the hospital and as a palliation of their responsibility for the melancholy results which followed. I have already expressed my view of Dr Dittmar's inquiry and of his report, and really these are the only matters about which I have either any real interest or any claim to express an opinion. I see nothing in this report to lead me to modify the views which I then expressed, and in regard to which it would be of prime interest to me if I could have the judgment of the Local Government Board.—I am, &c., BALFOUR OF BURLEIGH.' The statements in the said letter of 29th April 1912 are in part of and concerning the pursuer, and are false, calumnious, and malicious, and were intended to represent and did represent that notwithstanding that the said commissioner had reported to the said Local Government Board that the said charges made by the defender in his said letter of 11th January 1912 against the pursuer were without foundation, these charges were nevertheless true; that his original charges against the pursuer first made in his said letter of 1st September 1911 were also true; that in particular she was responsible for the improper treatment the said Forbes children received, and for the death of one of them in consequence of such treatment; that she was a deliberate liar and had no regard for truth; and that she had given false evidence in the said inquiries conducted by the said Dr Dittmar and by the said commissioner; and that in the inquiry before the said commissioner she had been guilty of perjury. Without any justification the defender by writing the said letter sought to induce the said Local Government Board to support his unwarrantable persistence in his said accusations against the pursuer, and to issue a judgment differing from the findings of the said commissioner. On 31st May 1912 the said Local Government Board, by letter of that date written by their Secretary, informed the defender that 'they entirely agree with Sheriff Fleming's conclusions that no fault is proved against the administration of the hospital so far as regards the Hospital Committee, the medical officer, the matron, or the sisters.' The said Board at the said time characterised the defender's said attack upon Dr Dittmar, which he renewed in his said letter of 29th April 1912, as unjustifiable, and it was in fact unjustifiable. On or about 29th June 1912 the said Board, by their Secretary, informed the clerk to the said committee that they concurred in the findings of the said commissioner. It is believed and averred that in further correspondence with the said Board, after receipt by him of the Board's said letter of 31st May 1912, the defender has adhered to and persisted in the imputations made by him upon the pursuer and the said Dr Dittmar. The defender is called upon to produce said further correspondence. (Cond. 20) On or about 13th May 1912 the pursuer by her agents requested the de-

fender to withdraw the said charges and insinuations which he had made against her in the said letters complained of, and to make such reparation to her as he might consider right and proper in the circumstances. Again on 22nd May 1912, failing to obtain a satisfactory reply from the defender, the pursuer's agents, by letter of this date, urged the defender to accept the findings of Sheriff Fleming, and to grant the pursuer the fitting reparation of an apology. The pursuer then offered that the whole matter in so far as regards herself might be so honourably closed. The defender declined to accept Sheriff Fleming's report and insisted upon the Local Government Board giving their judgment thereon before he would consider the pursuer's said request for an apology. The Board intimated their judgment as aforesaid to him on 31st May 1912. Thereafter the defender still declined to withdraw any of his allegations against the pursuer, or to give any apology to the pursuer."

The defender pleaded, *inter alia*—"(1) The pursuer's averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed."

On 15th July 1913 the Lord Ordinary (DEWAR) approved, *inter alia*, of the following issues for the trial of the cause:—"(1) It being admitted that on or about 1st September 1911 the defender wrote and despatched the letter [*quoted in cond.* 3 *above*], Whether the statements in the said letter are in whole or in part of and concerning the pursuer, and are false, malicious, and calumnious, to the loss, injury, and damage of the pursuer? (2) It being admitted that on or about 11th January 1912 the defender wrote and despatched the letter [*quoted in cond.* 13 *above*], Whether the statements in the said letter are in whole or in part of and concerning the pursuer, and are false, malicious, and calumnious, to the loss, injury, and damage of the pursuer? (3) It being admitted that on or about 29th April 1912 the defender wrote and despatched the letter [*quoted in cond.* 19 *above*], Whether the statements in the said letter are in whole or in part of and concerning the pursuer, and falsely, maliciously, and calumniously represent, and were intended to represent, that the pursuer had lied in giving evidence in inquiries conducted by Dr Dittmar and Sheriff Fleming, K.C., or make similar false, malicious, and calumnious representations of and concerning the pursuer, to the loss, injury, and damage of the pursuer?" Two other issues approved by the Lord Ordinary were withdrawn by the pursuer in the Inner House.

Opinion.—". . . [*After a narrative of the pursuer's averments*] . . . —These, I think, are the material facts upon which the pursuer founds. She makes a number of averments which I shall notice presently, but the substance of the case she presents is this: The defender is a man in a very prominent position, whose utterances and opinions carry great weight. He has recklessly and maliciously preferred grave charges against her, which have affected and still most seriously affect her character and reputation. These charges have been investigated at the defender's request on three separate occasions by three impartial tribunals. She has been declared innocent on all three occasions. Yet the defender will not acknowledge her innocence, but persists in accusing her still. She has made every effort to induce him to assist in removing the stigma from her character which he has placed upon it, and to restore her to the position she occupied in public estimation before he attacked her. All her efforts have failed, and she now appeals as a last resort for a trial by jury. The defender's answer to this is that he made the statement complained of in the public interest on a privileged occasion and without malice, and is therefore under no legal obligation to withdraw anything he said. Assuming that the occasion was privileged—and I think it was—the question whether the pursuer is entitled to a jury trial depends upon whether she has stated on record facts and circumstances sufficient, if proved, to show that the defender abused the occasion, and displayed such reckless disregard of the pursuer's feelings and interests that a jury might reasonably infer that he was acting, not in the public interest, but from some improper motive. Before proceeding to consider this question it is necessary to recall the circumstances in which a jury trial has already been refused.

"When the case was previously before me the only letters I was asked to consider were the first two. I decided that they contained defamatory statements, but that the occasions on which they were written were privileged, and that the pursuer must therefore aver upon record facts and circumstances from which malice might reasonably be inferred. Their Lordships of the Second Division agreed with me in this. I further decided that the averments made by the pursuer in record were sufficient, if proved, to entitle the jury, if they thought fit, to infer malice and to decide in the pursuer's favour. The considerations which weighed with me in reaching this conclusion were these—(1) It appeared to me that the defender had used language of unnecessary violence, and had *prima facie* not treated the pursuer's interests and feelings with that consideration which the law expects and requires of one who is protected in discharging a public duty. While the defender was privileged in laying facts before the authorities sufficient to induce them to institute an inquiry into the management of the hospital, he appeared to have gone beyond what was necessary for that purpose in suggesting that the pursuer had been guilty of criminal conduct. (2) The pursuer averred and offered to prove that the charges were made without any inquiry as to whether they were true or false. (3) They were repeated after her innocence had been established. (4) The defender refused to withdraw them, although, as the pursuer averred, he knew that there were no grounds in fact for imputing criminal conduct to her at all. I thought that if these things were proved to the

satisfaction of the jury, they might quite reasonably reach the conclusion that the defender had permitted his mind to be influenced by some improper motive, and had gone beyond the region of privilege, and I accordingly allowed the issues. But my interlocutor was recalled by the Inner House. That decision is of course binding on me, and the question now is whether the averments which the pursuer has made on this record are sufficient to distinguish the present case from that which has already been decided. I think they are.

"In the former case, although it was held that the pursuer's averments fell short of what was relevant to infer malice, I gather from the opinions expressed that they were not considered very far short. Lord Dundas said—'It may be that the defender could in the circumstances, without any sacrifice of principle or of dignity, have expressed some measure of regret that statements made by him in the *bona fide* discharge of a duty . . . should have cast unmerited reflection upon the pursuer's character and caused her pain and inconvenience. It may be that such an expression would have been a kind and handsome act on his part.' Lord Salvesen agrees with this and says—'It is to be regretted that the defender should have *lent such a credulous ear to the statements of the doctor.*' And Lord Guthrie says—'It is impossible not to feel sympathy for a person like the pursuer, who has been subjected to the anxiety, pain, and expense of three inquiries into charges which these inquiries have proved unfounded, *and to regret that these charges should ever have been made.*' Now when a man lends too credulous an ear to the voice of the slanderer and makes unfounded charges which should never have been made, and which cause anxiety, pain, and expense, and when he refuses to do anything at all—even to say a word which could be said without sacrifice of principle or dignity—to assist in repairing the injury which his credulity and rashness have caused, I think he must be assumed to have come very near that point when one may reasonably ask whether he has acted in this way in the honest belief that it was all necessary in the public interest, or whether he has not permitted himself to be influenced at some stage by some improper motive. I do not, therefore, think that much additional averment is necessary. But the pursuer has put a good many new averments on record, and the following, I think, are the most important—(1) It is averred that it is not true that the defender had received any information, hearsay or otherwise, that the pursuer had put the woman into a bed in close proximity to the children in spite of remonstrances from at least one of the other members of the staff. No such remonstrance had been made, and the defender was never told that it had. These statements were made by the defender recklessly and without due regard to whether they were true or false. (2) That although the defender knew that the Hospital Committee was the proper authority to address, yet he wrote to the Clerk to the County Council for the purpose of getting the County Council to influence its representatives on the committee to support his false accusations. (3) When the Hospital Committee delivered its report, the defender impugned, without the slightest grounds therefor, the impartiality of the committee, and in spite of his knowledge that there were no grounds for the imputations he had made against the pursuer, determined to press for further inquiry, not on public grounds, but because he was angry that he had been found in the wrong, and hoped that a fresh report might relieve him from the public discredit he had incurred by making charges which had been proved baseless. (4) That the defender 'deliberately invented' the statements in the letter of 11th January that the pursuer had surrendered her position at the hospital and had left Alloa, and that he knew from the information then in his possession that it was untrue to suggest that she acknowledged by her conduct in leaving the hospital her guilt of the charges he imputed to her. (5) That the defender wrote a private letter to a member of the Local Government Board (which was returned to him) with the view of improperly influencing the Board to the prejudice of the pursuer. Some of these averments may be very difficult to substantiate, but at this stage I must assume that they are true and can be proved, and on that hypothesis there can, I think, be no doubt that they are relevant and sufficient to entitle the pursuer to have her case laid before a jury. 'If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, and that he did do a wrong thing from some wrong motive. So if it be proved that out of anger or from some other wrong motive he has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly by reason of his anger or other motive, the jury may infer that he has used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive'—*Clark* v. *Molyneux*, 3 Q.B. Div. p. 247. I think this dictum covers the pursuer's case. She offers to prove that the defender made some of the accusations against her knowing them to be false; that he made others recklessly without caring whether they were true or false—and he did so, not in the public interest, but because he was angry that he had been found in the wrong. The only question I have to consider is whether these averments are relevant and sufficient. I think they are. It will be for the jury to decide, after hearing evidence, whether they are true or false. I therefore approve of the first two issues. . . .

The third, fourth, and fifth issues were not before the Court in the previous action, and therefore require separate consideration. They are based upon the letter which the defender wrote to the Local Government Board on 29th April, and the two letters which his solicitors on his instructions wrote to Messrs Wood and Robertson on 4th and 25th June. The first question raised is

whether the occasions on which these letters were written were privileged. I think they were. The pursuer argued that at the time they were written all the inquiries which the defender had demanded were at an end, and that the plea of public interest, which afforded protection to the earlier correspondence, did not extend to these letters. This is true. But then all the letters were written in reply to communications which invited and, I think, required answers. The letter of 29th April was written in reply to a communication from the Local Government Board, in which they enclosed Sheriff Fleming's report and directed the defender's attention to certain portions of it. They obviously desired and expected the defender to offer comments. In these circumstances I think he had clearly a right and an interest—and probably a duty—to state his views and, if he thought necessary, to criticise the report. He was quite entitled to say that he did not agree with the report and to give his reasons for saying so—provided he was not actuated by some improper motive. Similarly I think he was privileged in instructing his solicitors to reply to Messrs Wood and Robertson's letters. The pursuer had instructed them to ask the defender to withdraw the charges. I think he was entitled to instruct his solicitors to give reasons for his refusal to do so; but of course if his refusal to retract were inspired by an improper motive, and the reasons given were not honest reasons, then the privilege is lost. I am therefore of opinion that all three occasions were privileged, and the word 'maliciously' must be inserted in all the issues."

"The next question is, whether the words complained of in the third issue will bear the innuendo which the pursuer seeks to put upon them. The words occur in the letter dated 29th April, and are—'I wish to say that so far as I am concerned I have but a very languid interest in the question of which members of the staff lied the most.' The innuendo proposed is whether these words were intended to represent that 'the pursuer had lied in giving evidence in inquiries conducted by Dr Dittmar and Sheriff Fleming.' The defender maintained that the words are not reasonably capable of bearing that meaning; that they only refer to the fact that a considerable portion of Sheriff Fleming's report dealt with the unsatisfactory nature of the evidence given by some of the nurses, and were not intended to refer to or reflect on the pursuer at all. That may be so. But it must be kept in view that the defender had already accused the pursuer of wilfully destroying documents and fabricating others to deceive the commissioner, and it was largely on account of that accusation that Sheriff Fleming had been appointed, and that, I think, was the chief question to which he directed his attention. He found, after a very careful analysis of the evidence, that the accusations were without foundation, and that some of the nurses had given false evidence and that the pursuer had spoken the truth. In these circumstances the defender cannot be surprised that his comment—which is certainly not generous—should be open to misconstruction. If he did not mean to suggest that the *whole* staff—including the pursuer—lied, he should have made that clear. It may be that he was not thinking of the pursuer at the time. That is quite possible. But on the other hand he may have intended to include her, and if he did I think the words used are capable of bearing the innuendo. It will be for the jury to say, after they have heard any explanation the defender may have to offer, whether he intended or did not intend to accuse the pursuer of having given false evidence. . . ."

The defender reclaimed, and argued—There was here no relevant averment of malice. The Lord Ordinary had misapplied *Clark* v. *Molyneux*, 1877, 3 Q.B.D. 237. The question was, not whether malice was proved, but whether there were such averments on record as could justify a jury in inferring malice. It was settled in Scots law that to justify a jury in making such an inference there must be on record a clear and distinct averment of extrinsic facts showing malice. It was not enough to aver that the statements had been made knowing them to be false. This was settled in various cases of judicial slander—*Campbell* v. *Cochrane*, December 7, 1905, 8 F. 205, 43 S.L.R. 221; *M.* v. *H.*, 1908 S.C. 530, 45 S.L.R. 874; *Stevenson* v. *Wilson*, January 16, 1903, 5 F. 309, 40 S.L.R. 286. The present case approximated to one of judicial slander—*cf.* Lord M'Laren in *Ingram* v. *Russell*, June 8, 1893, 20 R. 771, 30 S.L.R. 699. Averments of deliberate invention alone, without facts and circumstances to support them, were not sufficient—*A* v. *B*, 1907 S.C. 1154, 44 S.L.R. 870, *s.v. Farrell* v. *Boyd*. The pursuer must aver facts which showed that the defender knew he was inventing, and deliberately did so—*Webster* v. *Paterson & Sons*, 1910 S.C. 459, and *per* Lord Guthrie at p. 463, 47 S.L.R. 307. The additional averments in the present case did not distinguish it from the previous case of *Couper* v. *Lord Balfour of Burleigh*, January 15, 1913, 1913 S.C. 492, 50 S.L.R. 320.

Argued for the pursuer—There was on record a sufficient averment of malice—*Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, 1892, 1 Q.B. 431; *M* v. *H* (*cit. sup.*); *Clark* v. *Molyneux* (*cit. sup.*); *Shaw* v. *Morgan*, July 11, 1888, 15 R. 865, 25 S.L.R. 620. Recklessness inferred malice—*Forteith* v. *Earl of Fife*, March 20, 1821, 2 Murray 463; *Macdonald* v. *Fergusson*, March 10, 1835, 15 D. 545, *per* L. P. M'Neill at p. 548. So also did repetition—*Ingram* v. *Russell* (*cit. sup.*), *per* Lord M'Laren, p. 778. So also did the violence of the language used—*Torrance* v. *Leaf*, July 29, 1835, 13 S. 1146; *Gall* v. *Slessor*, 1907 S.C. 708, 44 S.L.R. 547. The deliberateness and persistence of the attacks on the pursuer's character inferred malice—*Currie* v. *Weir*, January 27, 1900, 2 F. 522, *per* Lord Moncreiff at p. 524, 37 S.L.R. 382. There was further in the present case a complete absence of apology

(Falkland on Libel, p. 212), and innocent intention would not excuse — *Hulton* v. *Jones*, 1910 A.C. 20, *per* Loreburn (L.C.) at p. 23; *Wragg* v. *Thomson & Company, Limited*, 1909, 2 S.L.T. 409. There was further a relevant averment of want of proper inquiry — *White & Company* v. *Credit Reform Association*, [1905] 1 K.B. 653, *per* Collins (M.R.), 658; *Elliott* v. *Garrett*, [1902] 1 K.B. 870. As also falsehood—*Shaw* v. *Morgan* (*cit. sup.*), *per* Lord Young at pp. 870, 871. It was not necessary for relevancy that the pursuer knew that the information was not true. It was sufficient that he recklessly proceeded on inadequate information. The defender had further made his charges to the wrong authority — *Hebditch* v. *MacIlwaine and Others*, [1894] 2 Q.B. 54, *per* Esher (M.R.), p. 59, and Davey (L.J.), p. 64. If these averments were sufficient, nothing else which took place later could detract from their effect as showing the defender's state of mind at the time.

At advising—

LORD DUNDAS—This case is the sequel of an action of damages for slander raised by the present pursuer against the present defender which was before us some time ago (1913 S.C. 492). In that case the Lord Ordinary allowed issues, but we reversed his judgment and dismissed the action, because we held that, the occasions being admittedly privileged, the pursuer had not relevantly averred malice on the part of the defender. The pursuer in this new action has greatly amplified her condescendence. The Lord Ordinary has held it to be relevant and has approved of five issues for the trial of the cause. The fourth and fifth of these were (rightly and properly I think) abandoned by the pursuer's counsel at our bar. I have come to the conclusion that of the remaining three issues the first and second must be allowed and that the third should be refused. In support of the first and second issues the pursuer in her new record makes a series of averments which I cannot doubt are relevant to infer malice. Some of them amount to very grave allegations indeed, importing as they do that the defender has been guilty of deliberate falsehood and fabrication. I do not disguise my impression that the pursuer will have the greatest difficulty in proving them at the trial, when one looks at the documents which are in process, quite apart from one's public knowledge of the defender's character and position. But I assume, as I am bound to assume, that the record has been framed by learned counsel with a full sense of their great responsibility, and upon what they have reason to believe are reliable instructions. In cond. 4 it is averred, with regard to certain statements in the defender's letter of 1st September 1911, that it is not true that he had received any information, hearsay or otherwise, that the pursuer had put the Sauchie woman into the bed mentioned in spite of remonstrances from at least one member of the staff; that no such remonstrances had been made, and that the defender was never told that they had been made; and that the defender made the statements recklessly and without regard to whether they were true or false. Again, the pursuer alleges (cond. 8) that when the defender moved for an inquiry by the Local Government Board, after he had received the report of the investigation by the hospital authorities, he had then received information which showed that there was no ground for the imputations against the pursuer contained in his said letter of 1st September 1911; that he was influenced, in moving for the second inquiry, by oblique motives; and (cond. 10) that "in point of fact he had no grounds whatever, and he was, moreover, in possession of information completely disproving such allegations." Then as regards the defender's letter of 11th January 1912, the pursuer avers (cond. 14) that the statements in it, so far as of and concerning her, were made by the defender recklessly and without any cause, in the knowledge that they were false, and to gratify his resentment and ill-will; and that the letter was written "not with the *bona fide* object of getting an impartial inquiry into the matter, but with the object of getting a report which might, regardless of truth, establish a false reputation of the defender as a public-spirited ratepayer." The pursuer further avers (cond. 15), with reference to the same letter, that the defender "deliberately invented" certain of the statements made in it; that he had "absolutely no grounds whatever" for making them; that neither Dr Robertson nor anyone else had ever made any statements to the defender to any such effect, and he had no information of any kind, hearsay or otherwise, warranting his making them; and that in fact, from the information then in his possession he knew it was untrue to suggest what is said or suggested in his letter. However startling the averments I have summarised may be, they are deliberately made upon the pursuer's record by responsible counsel, and I cannot doubt that they are relevant, because if they can be substantiated they would afford amply sufficient grounds for attributing malice to the defender. There is another topic which, as it is averred by the pursuer, seems to me to raise matter for inquiry. It is alleged (cond. 9) that on 18th October 1911, when the defender wrote to the Local Government Board, after the Hospital Committee's report had been issued, he at the same time sent a private letter to the legal member of that Board in reference to the matter. The pursuer alleges that this private letter was written solely with the view of improperly influencing the legal member's consideration of the subject-matter of inquiry, and that it was returned to the defender by the Board; and she calls upon the defender to produce the letter. The defender does not produce it. If we had the letter before us, it may be that its contents would turn out to be harmless enough as regards the matters at issue. But in its absence I must say that I cannot be judicially satisfied, having regard to the pursuer's averments, that its

contents may not be such as to afford ground for some reasonable inference of malice or oblique motive on the defender's part. The incident is, I think, one calling for inquiry and explanation.

I agree, therefore, with the Lord Ordinary that the first and second issues must be allowed. The third issue stands, I think, in a different position. I am for refusing it, upon the ground that the words complained of could not, in my judgment, upon any reasonable or legitimate construction, be held to have been used of and concerning the pursuer. The issue is based upon a passage in a letter, dated 29th April 1912, by the defender to the secretary of the Local Government Board, where he says—"I wish to say that so far as I am concerned I have but a very languid interest in the question of which members of the staff lied the most." The proposed issue puts the question whether the statements are in whole or in part of and concerning the pursuer, and falsely, maliciously, and calumniously represent, and were intended to represent, that the pursuer had lied in giving evidence in inquiries conducted by Dr Dittmar and Sheriff Fleming, K.C.? The hospital staff consisted of a visiting physician, a matron (the pursuer), a sister, and four probationers. If the passage complained of is isolated from its context and taken quite by itself, it might be open to read it as meaning or implying that as all the staff had lied, the defender was not concerned which of them had lied the most. But the passage must be read along with its immediate context. The opening sentence of the letter discloses that the defender was acknowledging receipt of Sheriff Fleming's report, which he characterises as bearing all the marks of a careful and conscientious investigation. Then follow the words complained of. Now the learned Sheriff's report, which is produced, and must at this stage be considered so far as is necessary for the fair understanding of the defender's letter, makes it plain that he had carefully expressed his opinion in regard to the truthfulness, or the reverse, of the witnesses examined before him; and while commenting in very unfavourable terms upon the evidence of certain nurses, stated that, on the other hand, the pursuer impressed him favourably, and was, in his opinion, truthful in her whole account of what she had done, even of the faults she had committed. I think it would be a wholly unreasonable construction, in these circumstances, if a jury were to hold that the passage in the letter which is complained of was intended to refer to or include the pursuer. Her counsel frankly admitted that upon his reading of the words they might be held to refer to any member of the staff, including the visiting physician, quite as well as to the matron.

For these reasons I think we should recall the Lord Ordinary's interlocutor; refuse the third, fourth, and fifth issues; approve of the first and second issues; and appoint these to be the issues for the trial of the cause.

LORD SALVESEN—I have had an opportunity of reading the opinion of Lord Dundas, and am unable to resist the reasoning with which he supports his conclusions. I cannot, however, refrain from saying that I concur with reluctance and regret. Apart from the position which the defender holds in public esteem, I think that the averments made by the pursuer that he deliberately invented defamatory stories with regard to a woman with whom he had never come in contact are so improbable as to be almost incredible, and it is these statements alone which contain relevant material from which malice may be inferred. We are, however, not at liberty to consider at this stage of the cause whether the pursuer's averments are capable of proof, but only whether, if proved, they would support the charge of malicious defamation which is now made. There is no better evidence of a slander being malicious both in fact and in law than that it was uttered in the knowledge of its falsity. This was conceded by the defender's counsel, but his main ground in support of the plea of irrelevancy was that the averments were lacking in specification. I fail to see, however, how the only serious averments of the pursuer can be made more specific without disclosing the evidence upon which they are presumably based, and this she is not bound to do as a condition of obtaining an inquiry.

LORD GUTHRIE—In view of the opinions delivered in this Division when the previous case between the parties was before the Court, the only question which arises on the first two issues is whether, the circumstances being on the face of the pursuer's own averments privileged, facts and circumstances have now been averred by the pursuer sufficient, if proved, to infer malice on the part of the defender. Under the previous record we had to deal with averments which charged the defender with the circulation of defamatory statements about the pursuer, but we construed these averments as admitting that the defender passed on the statements as he got them. In my opinion I said—"The pursuer founds on statements passed on by the defender to the proper authorities as hearsay requiring investigation, but she does not suggest that he in any way originated these statements or even altered them." The pursuer now avers, in connection with the letters which form the subject of the first and second issues, that instead of passing on statements reported to him by others as these statements reached him, the defender invented material statements defamatory of the pursuer contained in these letters. Obviously, such conduct, if proved, might reasonably be held to infer malice. In regard to the third issue, I agree that, taking the letter of 29th April 1912, along with Sheriff Fleming's report to which it refers, the statements in the letter are not reasonably capable of bearing the innuendo which the pursuer seeks to put upon them, and therefore that the third issue should be disallowed.

LORD JUSTICE-CLERK—When the former case between these parties was considered by the Court it was decided that upon the

record as presented no issue could be allowed, there being a case of privilege disclosed, and there being no averments of fact from which malice could be implied. There is now, in this second action, a record presented to the Court, in which very grave charges are made against the defender—many in number and expressed in very strong terms—stronger than in the course of a long experience I have ever seen in a case of the kind. Lord Dundas, in an opinion which I have had the opportunity of perusing, has given a full statement of the charges now made against the defender, and it is unnecessary to recapitulate them. They include accusations of deliberate and wilful falsehood—statements that the defender had received information regarding the conduct of the hospital officials, when in point of fact he had received no such information—that neither by hearsay or otherwise had he been informed of things as to which he asserted that he had been so informed; that he made statements knowing them to be false; and it is even said that he "invented" accusations which he knew to be untrue, and that he endeavoured to induce a public authority to give a decision contrary to what he knew to be the fact.

All these things are stated in the condescendence by the pursuer and maintained as fact by her counsel, who must be presumed to have well considered what allegations were to be made as stating matter of fact, and at this stage the Court must take the statements *pro veritate*, and, on the assumption that they do relate facts, consider whether they are such as to give ground for an issue based on malice. I agree with your Lordships that they do supply such ground. If they can be substantiated by evidence, then beyond doubt a case of malice would be made out. I therefore agree that the first and second issues should be allowed to go to trial.

I think it right to notice that there is another averment relating to a letter said to have been written to a member of the Local Government Board by the defender when he was endeavouring to induce the Board to take up the inquiry regarding the matters of which he complained. It is said that the letter was one in which he endeavoured unjustifiably to bring pressure to bear upon the Board, taking advantage of his distinguished position. It is alleged that the Local Government Board returned the letter to him. If so, it is in his possession, and is not as yet produced. If such a letter, written with such intent, was sent as alleged, I cannot doubt that it might be a question of fact for the consideration of a jury whether it afforded evidence of malice. At present when the contents are not revealed, I think the allegations regarding it may be taken into consideration in the question whether malice is sufficiently averred.

As regards the third issue, I concur with your Lordships in thinking that it ought to be disallowed. I am unable to see that reading the part of the letter in the schedule in any reasonable sense it can be held that there is any accusation made against the pursuer. The defender is referring to Mr Fleming's report, in which the pursuer is spoken of only in terms of approbation, but the report speaks somewhat strongly in regard to the want of truthfulness of some of the nurses in the hospital. When the defender in his letter speaks of "those who lied the most," the expression cannot be extended beyond those of whom Mr Fleming spoke, except upon the footing that it was intended to include the whole staff, for there is certainly no allusion to the pursuer individually. There is no indication that allusion is being made to any other persons than those whom the reporter had indicated as having prevaricated and so not spoken the truth. It therefore does not seem to me that the words quoted can bear the innuendo which the pursuer endeavours to put upon them. I am in favour therefore of disallowing the third issue, and the fourth and fifth having been withdrawn, the result will be that the first and second issues only will be approved of for the trial of the cause.

The Court recalled the interlocutor of the Lord Ordinary, disallowed the third issue, the fourth and fifth issues having been withdrawn, approved of the first and second issues for the trial of the cause, and remitted the cause to the Lord Ordinary to proceed therein.

Counsel for the Pursuer (Respondent)—Cooper, K.C.—Wilton. Agents—G. M. Wood & Robertson, W.S.

Counsel for the Defender (Reclaimer)—Clyde, K.C.—J. H. Miller. Agents—W. & J. Cook, W.S.

Tuesday, December 2.

SECOND DIVISION.

[Lord Hunter, Ordinary.

THE FARMERS' MART, LIMITED *v.* MILNE.

Contract—Pactum illicitum—Double Interest—Direct and Necessary Double Interest.

An agreement between a company and their manager provided that the manager should be entitled to undertake any factorship or trusteeship on, or other office involving the management of, any estate, and should be bound to pool all remuneration derived therefrom with all fees and commissions derived by the company from any sales or valuations in connection with such estates, each party being entitled to one-half of the proceeds. The agreement did not bind the manager to employ the company for such sales or valuations. In an action of accounting by the company against their manager for fees earned by him as trustee under a trust deed for behoof of creditors, *held* (*rev.* judgment of Lord Hunter, Ordinary) that as under the agreement the manager was put in such a position that his