"period of payment" within the meaning of this will, although admittedly the issue of the testator's children had no right to demand payment until all the liferents had expired, and although they could not accelerate payment by procuring a renunciation of the liferents forming a burden on their respective shares. The argument of the learned counsel proceeded upon an assumption which is absolutely erroneous, viz., that the testator directed payment to be made upon the respective beneficiaries attaining the age of 25, whereas he merely declared that payment should not be made until they attained that age. Counsel also cited the Second Division case of *M'Kay's Trustees* v. *Gray*, 1903, 5 F. 1086, but I cannot regard that decision as an authority, seeing that no argument was (so far as appears from the report) offered in favour of what seems to me to have been the natural meaning of the will. The Judges were asked to elect between the views that vesting took place at the beneficiary's majority, or alternatively at the death of the widow. It does not appear to have been argued that the period of payment could not arrive without the concurrence of both events. In a later case, *M'Ewan's Trustees* v. *Macdonald's Trustees*, 46 S.L.R. 631, the same Division decided that the period of payment, and consequently of vesting, did not arrive until the death of the surviving spouse. It was unnecessary to decide whether vesting was still further postponed. There is a later decision of the same Division—*Gray's Trustees* v. *Gray*, 1907 S.C. 54—which was not cited at the debate, in which the "period of payment" was held to depend upon the concurrence of both events, viz., the lapse of the widow's liferent and the majority of the beneficiary. I have dealt with these authorities as being more or less in point; but, after all, the present case, like all others of its kind, must be decided upon the best construction one can put upon the language of the particular instrument under consideration. So viewing the matter, I think that the proper answer to the eighth query is that vesting was postponed until the occurrence of all the events therein mentioned. The ninth query must be answered in the affirmative, and the tenth in the negative.

LORD JUSTICE-CLERK—That is the opinion of the Court. [The Court consisted of the LORD JUSTICE-CLERK, LORD DUNDAS, and LORD SKERRINGTON.]

LORD SALVESEN was sitting in the Lands Valuation Appeal Court.

The Court pronounced this interlocutor—

"Answer the second . . . and ninth questions of law . . . in the affirmative: Answer the first, third, and tenth questions of law . . . in the negative: Find in answer to the eighth question of law . . . that vesting is postponed until the whole of the events therein mentioned have taken place. . . ."

Counsel for the First Parties—J. M. Hunter. Agents—Pringle & Clay, W.S.

Counsel for the Second, Fourth, Sixth, and Eighth Parties—MacRobert. Agents—Fyfe, Ireland, & Company, W.S.

Counsel for the Third, Fifth, Seventh, and Ninth Parties — Chree — Macmillan. Agent—Peter Macnaughton, S.S.C.

Tuesday, December 5.

FIRST DIVISION.

[Lord Cullen, Ordinary.

SMITH *v.* WALKER.

Reparation—Slander—Innuendo—Failure to Aver Facts and Circumstances Justifying Innuendo—Relevancy.

W. wrote to E., a bookmaker, a letter in the course of which he said—"As regards your friends L. and D., neither of whom I have had the distinguished—I may say the very distinguished—pleasure of meeting, and as I always bet with the ready only on the race-course, I think it rather out of place for them to send alleged accounts to me." In an action of damages for slander by D. against W., the pursuer sought to innuendo these words as representing that he (the pursuer) had attempted to obtain money from the defender by presenting fraudulent accounts to him showing a balance due by the defender on certain betting transactions. *Held* that the words were not capable of reasonably sustaining the innuendo, and that, in the absence of any averment of facts and circumstances capable of supporting the alleged sinister meaning, the action must be dismissed as irrelevant.

Capital and Counties Bank v. *Henty*, (1882) L.R., 7 A.C. 741, *followed*.

George William Smith, turf commission agent, Leeds, carrying on business under the name of George Drake, brought an action of damages for slander against James Walker, publican, Aberdeen.

The pursuer averred, *inter alia*—"(Cond. 2) On or about 2nd June 1911 the defender was introduced personally to the pursuer by Robert Evans, turf commission agent, at Epsom races, where the pursuer was carrying on business under his trade name. The said introduction was for the purpose of enabling the defender to bet with the pursuer on credit, and the pursuer, relying on the recommendation of the said Robert Evans, did enter into certain betting transactions on credit with the defender, as a result of which the defender became indebted to the pursuer to the amount of £95. The pursuer subsequently rendered to the defender an account for the said transactions, a copy of which is herewith produced and referred to. (Cond. 3) In a letter dated 12th June 1911, and addressed

and sent to the said Robert Evans, the defender wrote, 'As regards your friends Lee and Drake, neither of whom I have had the distinguished, I may say the very distinguished, pleasure of meeting, and as I always bet with the ready only on the race-course, I think it rather out of place for them to send alleged accounts to me. . . .' (Cond. 4) The said statements in the said letter, written and sent by the said James Walker to the said Robert Evans, were written of and concerning the pursuer, and are false, malicious, and calumnious. By said statements the said James Walker represented, and intended to represent, that the pursuer, though well knowing that no betting transactions had ever taken place between him and the defender, had attempted to obtain money by fraudulently presenting to the defender accounts showing a balance due by the defender on certain betting transactions. Further, the said statements represented and were intended to represent that the pursuer, having received full and final payment in ready money from the defender of all sums due to him in respect of any transactions between them, relying on the absence of any receipt, was endeavouring fraudulently to obtain a second payment from the defender in respect of the same transactions. The said statements were calculated to injure, and did injure, the pursuer in his professional reputation. . . ."

The defender pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action."

On 15th November 1911 the Lord Ordinary (CULLEN) approved of the following issue—"Whether on or about 12th June 1911 the defender did write and send to Robert Evans a letter containing the following words, viz., 'As regards your friends Lee and Drake, neither of whom I have had the distinguished—I may say the very distinguished—pleasure of meeting, and as I always bet with the ready only on the race-course, I think it rather out of place for them to send alleged accounts to me'; and whether the whole or any part of the said words are of and concerning the pursuer, and were meant and intended to represent, and did falsely and calumniously and injuriously represent, that the pursuer was attempting to obtain money from the defender by presenting fraudulent accounts to him showing sums due by the defender on alleged betting transactions between the pursuer and the defender, to the loss, injury, and damage of the said pursuer. Damages laid at £500."

The defender reclaimed, and argued—The innuendo was unreasonable and strained. The words simply meant that the defender denied that any debt was due. The case of *Blasquez* v. *Lothians Racing Club and Reid*, June 29, 1889, 16 R. 893, 26 S.L.R. 633, founded on by the pursuer, was distinguishable, as the words there complained of were used in connection with the pursuer being turned off a race-course, which was the substantive ground of action.

Argued for respondent—The innuendo was reasonable. The proper test was whether it was inconsistent with the words complained of—*Mackay* v. *M'Cankie*, January 27, 1883, 10 R. 537, *per* Lord President Inglis at p. 539, 20 S.L.R. 357. The present case was similar to *Blasquez* (*cit.*), where an issue was allowed. Reference was also made to the opinion of Lord M'Laren in *Sexton* v. *Ritchie & Company*, March 18, 1890, 17 R. 680 at p. 696, 27 S.L.R. 536, *aff.* 18 R. (H.L.) 20, 28 S.L.R. 945.

LORD PRESIDENT—This is an action at the instance of George William Smith, a turf commission agent, against James Walker, a licensed publican carrying on business in Aberdeen. The pursuer sets forth that he is a turf commission agent—which in common parlance is a bookmaker—and that he carries on business under the name of George Drake. He then sets forth that on a certain date in June 1911 the defender was introduced personally to him by Robert Evans, another turf commission agent, at the Epsom races, and he says that he entered into certain betting transactions on credit with the defender. The defender denies that betting transactions were entered into, but of course at this moment we must take it that the pursuer's statement is correct. Then in the next condescendence the pursuer says—"In a letter dated 12th June 1911, and addressed and sent to the said Robert Evans, the defender wrote"—he does not quote the whole letter, but he simply takes this quotation—"'As regards your friends Lee and Drake, neither of whom I have had the distinguished—I may say the very distinguished—pleasure of meeting, and as I always bet with the ready only on the race-course, I think it rather out of place for them to send alleged accounts to me." The letter is admitted to have been transmitted. Upon that the pursuer raises an action of damages for slander against the defender, and an issue has been granted by the Lord Ordinary which runs thus—". . . [*His Lordship quoted the issue.*] . . ."

I am of opinion that that issue ought not to be granted. The law upon this matter is, I think, perfectly well settled, and I might quote many cases in which it has been laid down, but I will take one in the House of Lords. It is an English case, but in this matter there is no distinction between the law of England and the law of Scotland, and I take the words of Lord Selborne, the Lord Chancellor, in the case of the *Capital and Counties Bank* v. *Henty*, 1882, 7 App. Cas. 744. Lord Selborne says there—"In *Sturt* v. *Blagg*, Wilde, C.J., said, 'It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an innuendo, but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it.'" There the quotation ends, and Lord Selborne proceeds in his own words—"If the judge, taking into account the manner and the

occasion of the publication and all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the innuendo to the jury." And then he goes on, in a sentence I need not quote, to say that there must be something which to a reasonable mind would suggest the innuendo. It therefore always comes to be this, if the words are not slanderous in themselves and an innuendo is suggested, does the Court think that the words are capable reasonably of sustaining that innuendo?

I am of opinion here that the words are not capable reasonably of sustaining the innuendo. I think when you say, "I am a person who always bets in ready money, and therefore it is absurd for anyone to send me accounts for an alleged debt," you show of course perfectly clearly that you repudiate the idea of owing anything; but you do not seem to me to say anything which can be reasonably construed into an averment that the attempt to say that you did owe something was a fraudulent attempt.

Now I think that as the argument developed, Mr M'Clure was driven to admit that if you take the mere words as they stand, that view is correct. But his argument was this. He said—"If I am allowed to prove all the surrounding circumstances between these people, I shall show that it was not unreasonable to take this meaning out of the words, and I cannot do this unless I have the opportunity of submitting the circumstances to a jury." I do not doubt that Mr M'Clure so far was perfectly right—that is to say, that you may by bringing in extraneous facts and circumstances give a point to words which without these extraneous facts and circumstances they would not bear, but which in the light of these extraneous facts and circumstances they may bear.

But then I think the facts and circumstances must be there. In other words, going back again to Lord Selborne, it is "taking into account the manner and the occasion of the publication and all other facts which are properly in evidence." I need not remind your Lordships that of course the English method of jury trial is different from ours. There is no issue. Demurrer in such cases is unknown. The case goes to trial and the question that we are now trying is not tried, as here, upon a question of granting an issue, but is tried and concluded at the trial itself; and it resolves itself into a consideration by the presiding judge whether he shall take away the case from the jury or not—that is to say, whether he shall say to the jury, "Well now, gentlemen, consider if these words reasonably can bear the innuendo," or whether he shall say to the jury, "I tell you that, inasmuch as I am of opinion that the words will not reasonably bear the innuendo, there is nothing more for you to do except to return a verdict for the defendant." Now applying that to our practice, we have got to do that at the stage of approving the issue; and accordingly, if you translate Lord Selborne's words—"taking into account the manner and the occasion of the publication and all other facts which are properly in evidence"—into words that exactly fit our practice, you must substitute for the words "properly in evidence" the words "which are properly averred on record."

Now when I come to the record I find no averment of that sort. It is a mere naked averment. And I also find this, that even the whole letter is not put forward. It might have been possible to put a colour upon the words from the position that this sentence occupied in the letter. If I may use the expression—colloquial, perhaps, more than literary—if a thing is brought in by the head and the heels, it is of course very much easier to show that it has a sinister meaning than if it comes in its place in the context in the natural course of the letter. If I might be permitted to make a guess about this quotation, it looks like an answer to something said before, but that of course I cannot tell. If, however, there was colour to be got from the facts and circumstances, the pursuer ought to have set them forth. Instead of doing that, he takes out of the letter this little sentence, harmless in itself, and says—"If you will allow me to prove all I want to prove, I think I can show it has a sinister meaning." I think he cannot be allowed to do that, and I think the innuendo cannot reasonably be taken out of the words as they stand.

Accordingly I think that the interlocutor of the Lord Ordinary ought to be recalled and that the action should be dismissed.

LORD KINNEAR—I am of the same opinion. I think that the words complained of will not reasonably bear the meaning the pursuer puts upon them. He takes a single sentence out of a letter, and upon the words of that sentence he alleges that he has a good action for slander. The sentence taken by itself seems to me to come to no more than a rather more peremptory version of what the defender says in stating his position upon record, because the pursuer begins by alleging that he had a transaction with the defender as the result of which the defender became indebted to him to the amount of £95, and the answer is that the defender never had any transaction with the pursuer; he is not aware of ever having met him, he does not know him, and he denies that the account is due. Now if there is ground for that defence, it is a perfectly relevant statement which a man is entitled to make when he is asked for money that he denies to be due.

I think it very possible that words in themselves apparently innocent may be shown to have a slanderous meaning when they are read with reference to the circumstances in which they were uttered or written, or with reference to the context in which they occur. But then if the pursuer intends to make a case to justify an innuendo upon these grounds, he is bound

relevantly to allege the circumstances which he says tend to show the meaning of the words complained of, and above all he is bound to produce the whole document out of which he has chosen to pick a single sentence to form the subject of this complaint. I think there is no relevant averment here of any fact which would enable a jury to put a different meaning upon the words than the innocent meaning which they naturally bear, and if the pursuer intended to make a complaint of slander from the use of language in one sentence of a letter he was bound to give us the context in which it occurred as well as the particular sentence of which he complained. I therefore agree with your Lordship that there should be no issue.

LORD ORMIDALE—I concur with your Lordships.

LORD JOHNSTON and LORD MACKENZIE were absent.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for Pursuer (Respondent)—M'Clure, K.C.—Normand. Agents—Mackenzie & Kermack, W.S.

Counsel for Defender (Reclaimer)—Watt, K.C.—D. Anderson. Agent—James A. B. Horn, S.S.C.

HOUSE OF LORDS.

Tuesday, December 19.

(Before the Lord Chancellor (Loreburn), Lord Ashbourne, Lord Kinnear, and Lord Shaw.)

BLACK *v.* FIFE COAL COMPANY, LIMITED.

(*Ante*, November 24, 1908, 46 S.L.R. 191, and 1909 S.C. 152.)

Reparation—Master and Servant—Negligence—Statutory Duty—Common Law Liability of Master for Consequences to Fellow-Servants of Breach of Statutory Rule by Servant—Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 49, *General Rules* 4 (1), 7, *Special Rule* 37.

The Coal Mines Regulation Act 1887, sec. 49, enacts—"The following general rules shall be observed, so far as is reasonably practicable, in every mine."

Held that although this did not impose on the mine-owner an absolute duty that the rules be observed, it placed on him, in the event of a breach of a rule, the *onus* of proving that he had done everything that was practicable to have the rule observed. If he failed to discharge this *onus*, he was liable at common law for any damage resulting therefrom, and could not derive protection from the doctrine of common employment.

Circumstances in which *held* that the owners of a coal mine were liable at common law and not under the Employers' Liability Act 1880 only, for the death of a miner from carbon monoxide gas, where the presence of the miner in the mine was held to be due to breaches of general rules 4 (1) and 7, and special rule 37, by the under-manager in charge of the mine and the fireman, inasmuch as the mine-owners had not taken such means as were open to them of making these officials competent to deal with carbon monoxide.

This case is reported *ante ut supra.*

The pursuer appealed to the House of Lords.

The interlocutor of the Sheriff-Substitute (HAY SHENNAN) and the interlocutor of the Second Division which was appealed against, giving the findings in fact, were in these terms:—

The Sheriff-Substitute's—"The Sheriff-Substitute finds in fact as follows—(1) The deceased Alexander Hynd Black, the husband and father of the pursuers, was, on 27th April 1906, and for some time prior thereto, in the employment of the defenders as an oncost worker in their No. 11 Pit, Lumphinnans. On the night of Thursday, 26th April, he and Thomas Serrie were sent to repair the main brae in that pit. Early on the morning of Friday, 27th April 1906, while they were so engaged, they were overcome by carbon monoxide gas and lost their lives. (2) At the time of the accident the air current for ventilating No. 11 Pit was brought down the shaft of No. 1 Pit, being thus the downcast shaft, and after passing through the Lochgelly splint and parrot seam of No. 1 Pit ventilated all parts of No. 11 Pit, the shaft of which was the upcast for the return air. The Lochgelly splint and parrot seam is universally recognised to be specially liable to spontaneous combustion, and part of this seam in No. 1 Pit was on fire in 1901. This outbreak was treated by sealing up the fire area with stoppings, but it was not possible in long wall workings as these were to be sure that the fire was quite extinguished. The air course from No. 1 Pit to No. 11 Pit passed near some of these stoppings, and any fumes which might escape from leaking stoppings must be carried with the air through all the workings of No. 11 Pit. (3) On Tuesday, 24th April 1906, John Gray, who was manager of both pits, was informed by Hunter, an oversman in No. 11 Pit, that there was a strange smell in the air coming to No. 11 Pit, and he instructed Hunter to examine the workings. Hunter found some smoke issuing from stoppings not far from the seat of the old fire in No. 1 Pit and set men to repair them. Gray then formed the opinion that the smell came from the seat of the old fire in No. 1 Pit. (4) On Wednesday, 25th April, and Thursday, 26th April, there was smoke or haze with a peculiar smell in the workings of No. 11 Pit, and several of the miners, including the deceased Black,