

very reason for creating the trust at all was that the trustees might redeem the estate and entail it as directed, and it is hard to say now that he intended that any part of it should be sold; and further, the words which I have already quoted appear to me to be an express prohibition. The Lord Ordinary supposes that the truster had two purposes, to pay his debts and to entail his estate; and he suggests that as his object cannot be carried out completely as he wished it, the next best thing to do is to sell one half of the estate and entail the other; but that is simply a guess as to what would have been the truster's intention, and I do not think we can substitute a mere conjecture for the clear expression in the trust-deed. I am of opinion that we ought to refuse the petition.

The other Judges concurred.

The Court pronounced the following interlocutor:—

“Recall the said interlocutor, and refuse the petition, and decern; and authorise the petitioners to pay out of the trust-funds the expenses of both parties as the same may be taxed: Appoint accounts of said expenses to be given in, and remit the same, when lodged, to the Auditor to tax.”

Counsel for the Reclaimer—Solicitor-General (Clark). Agents—Dundas & Wilson, C.S.

Counsel for the Respondents—Watson and Mackay. Agent—Alexander Howe, W.S.

M. Clerk.

Friday, June 13.

FIRST DIVISION.

[Sheriff of Fifeshire.

JAMESON V. BONTHRONE.

Damages for Slander—Actionable expressions.

Held (dub. Lord Deas) that the epithet “d—d puppy” is not actionable.

This was an appeal from the Sheriff-court of Fifeshire in an action of damages for slander raised in the Sheriff-court at the instance of the Procurator-Fiscal of Auchtermuchty against Alexander Bonthrone, brewer and malster, at one time a Bailie and now Provost of the same burgh. The damages said to be sustained by the pursuer were explained to be “in consequence of the defender having slandered him by stating within the Burgh Court-room, at an adjourned meeting of the Licensing Magistrates on the 23d April 1872, that he (the pursuer), who was in attendance in the Court as Procurator-Fiscal to give information to the presiding Justices in regard to the applicants for licenses and the premises sought to be licensed, was a ‘damned puppy and a low blackguard,’ or by having falsely, maliciously, injuriously, and calumniously used and uttered words to that effect, whereby the defender represented the pursuer as a degraded, impertinent, base, vile, scurrilous, vicious, ill-conducted fellow, and utterly unworthy and incapable of holding the honourable and exalted office of Procurator-Fiscal for the burgh of Auchtermuchty, and the pursuer has not only been rendered contemptible and disreputable in the eyes of his fellow townsmen, but has suffered greatly in his feelings and character, and his integrity and usefulness as a public official has been greatly

injured.” A minute of defence was lodged, to the effect that on the occasion in question the defender was offering some pertinent observations to the Bench when the pursuer improperly interfered and called out, “Sit down, Sir: You have no right to speak here;” that he thought the pursuer was rude in thus interrupting him, and he retorted the words “damned puppy;” that he regretted using these words; but did not remember having used the other words complained of—“low blackguard.” Proof was led; and the Sheriff-Substitute (BEATSON BELL) found that it was not proved that the defender used to the pursuer the words “low blackguard;” and that, in point of law, the words admitted to have been used by the defender in the circumstances were not actionable.

The Sheriff (CRICHTON) adhered.

The pursuer appealed to the First Division of the Court of Session.

Authorities relied on—Ersk. Inst. iv. 4, 80; *Graham*, 13 D. 634; *Brownlie*, 21 D. 480; *Denholme*, 4 Murray's Jury Rep. 195; *Sheriff v. Wilson*, 7 D. 528.

The defender was not called upon.

At advising—

LORD PRESIDENT—Two epithets are alleged to have been applied by the defender to the pursuer, viz., “low blackguard” and “d—d puppy.” There is no doubt that the first of these expressions is actionable. That was decided by the case of *Brownlie*. As to the other expression, I am not aware that it has ever been proposed before to try the question as to the use of the epithet “puppy,” and I do not think that the word d—d adds anything to its significance. The question therefore comes to be, Is the expression “puppy” actionable? I think not. No doubt it is an epithet of contempt, but it is not every expression of contempt that is actionable. The only other question is, whether it is proved that the actionable words were used. I agree with the Sheriff that it is not.

LORD DEAS—I agree with your Lordship. I am not prepared to say that the epithet “puppy” never can be actionable. A great deal depends upon the circumstances where and when it is used. If actionable at all, it must inuendo something; but anything it is said to inuendo in this case is certainly not proved, and “puppy” by no means necessarily implies all here alleged to have been meant by it. Sometimes it may be used in an almost approbatory sense.

LORD ARMILLAN and LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

“Find, in fact, that at an adjourned licensing Court held by the Magistrates of Auchtermuchty on the 23d April 1872, the defender (respondent) said in the presence and hearing of the said Magistrates and others, that the pursuer (appellant) was a damned puppy: Find it not proved that he did then and there say that the pursuer was a low blackguard: Find, in law, that the words damned puppy are not actionable; Therefore refuse the appeal, and decern: Find the appellant liable in ex-

penses; Allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for Pursuer—Campbell Smith and Rhind. Agent—P. H. Cameron, S.S.C.
Counsel for Defender—Watson and Balfour. Agents—Adamson & Gulland, W.S.

R., Clerk.

Friday, June 13.

FIRST DIVISION.

[Lord Ormisdale, Ordinary.]

LORD ADVOCATE v. M'DOUALL.

Salmon Fishing—Barony Title—Prescription.

In a case where the possessors of an estate under a barony title had been in use to give leave "to fish" in the sea *ex adverso* of their lands, on condition of receiving the salmon and the choice white fish—held that this was not salmon fishing properly so called, and was not sufficient to found a plea of prescription.

This was an action of declarator, at the instance of the Lord Advocate on behalf of the Crown, against Mr M'Douall of Logan, who holds his estate under a barony title, and its object was to have it found that the defender had not acquired any prescriptive right to the salmon-fishing in the sea *ex adverso* of his lands. The defender's barony title being quite sufficient if supplemented by possession for the period of prescription to found a right of salmon-fishing, the case turned mainly on the proof of possession.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 16th January 1873.*—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, Finds it has been sufficiently proved that the defender and his predecessors have for more than forty years, or for time immemorial, prior to the institution of this action, enjoyed and exercised, under and in virtue of good and habile titles, the exclusive right of fishing for salmon, grilse, and salmon trout in the sea *ex adverso* of the following lands belonging to them, mentioned in the conclusions of the summons, viz.: All and Whole the lands forming or embraced in the barony of Logan, situated in the parish of Kirkmaiden and county of Wigtown, bounded by the sea, extending, the coast of the said barony, on the Irish Channel or western side, from Drumbredan Bay on the north to Crummag Head on the south, and on the Bay of Luce or eastern side from Chapel Rossan on the north to Kilstay or Palwhinrick Burn on the south, and the five merk lands of Crichen, and the five merk lands of Carrachtree, also lying within the said parish of Kirkmaiden and county of Wigtown: Therefore, *quoad* the right of fishing for salmon, grilse, and salmon trout in the sea *ex adverso* of said lands, assoliszes the defender from the conclusions of the summons, and decerns; and in respect the defender does not claim, and has not attempted to prove, a right to fish for salmon, grilse, or salmon trout in the sea *ex adverso* of the following lands, mentioned in the conclusions of the summons, viz., the five merk lands of old extent of Mool, the croft of land commonly called Croft Gregnan, the croft of land called

Cove Croft in Mool, the five merk lands of old extent of Altown, now commonly called Maryport, the five merk lands of Corgie, all lying in the parish of Kirkmaiden and county of Wigtown: the twenty shillings land of Genoch, five merk lands of Nether Torrys, forty-six shillings and eight-penny lands of Over Torrys, and twenty shilling lands of Whytecrook and Croftling, lying within the parish of Old Luce and Sheriffdom of Wigtown: Therefore, *quoad* these last-mentioned lands, Finds, decerns, and declares in terms of the conclusions of the summons: Finds that the other lands mentioned in the conclusions of the summons are not to any extent bounded by the sea: Therefore, *quoad* these other lands, assoliszes the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses, allows an account thereof to be lodged, and remits it, when lodged, to the Auditor to tax and report.

"*Note.*—The Lord Ordinary does not think that to the extent to which *absolvitor* has now been pronounced any serious difficulty can be entertained on the proof; and in regard to that part of the conclusions of the summons for which decree has been pronounced in favour of the pursuer, there could of course be no difficulty, as no dispute was raised in relation to it.

"All the lands *ex adverso* of which the defender has now been found to have proved a prescriptive right to the salmon fishing are admittedly component parts of the barony of Logan, with the exception of the lands of Crichen and Carrachtree, about which it is said to be not quite clear whether they form parts of the barony or not. This matter, however, is of no practical importance, because, whether they are to be held as forming part of the barony or not, they are held under Crown charters *cum piscationibus*, which is sufficient to found a right by possession for the prescriptive period to salmon fishings; and as a barony title is sufficient for the same purpose, there can be no question, and none was raised, as to the defender's titles, *quoad* the whole lands in regard to which he has been found successful, being good and habile, if fortified by possession for the prescriptive period, to give him a right to salmon fishings. *Nicol and Others (Milne's Trustees) v. Lord Advocate*, 1 July 1868, 6 Macph. p. 972.

"Accordingly, the only disputed question between the parties in this case related to the import and effect of the proof;—the defender, who had undertaken the *onus probandi*, contending that it was ample and sufficient to support the right of salmon fishing claimed by him; while on the part of the pursuer it was argued, that it was not so, but, on the contrary, that it merely showed that although a few fish of the salmon kind were occasionally caught by or for the defender and his predecessors, that occurred accidentally in the course of prosecution of white or other fishing, in such a way as to be incapable of establishing a right of salmon fishing. The Lord Ordinary has been unable to give effect to this argument for the Crown. He has, indeed, had very little difficulty in giving effect to the contention of the defender.

"The proof will require to be read and considered as a whole in order to form a just and sound appreciation of it. The Lord Ordinary has, after a careful consideration of it, to observe that it appears to him to contain all the elements necessary to support the defender's case. (1) Whether the salmon fishing exercised by the defender and his pre-