Tuesday, March 3.

SECOND DIVISION.

[Sheriff of Renfrew and Bute, at Paisley.

WALLACE *v.* MOONEY.

Reparation—Assault—Slander—Privilege—Ejecting a Suspected Bad Character from Enclosure at Race Meeting—Policeman.

A man went to a race meeting, and having paid the price of admission entered the paddock. A policeman who recognised him as one who had been more than once convicted of theft, and was suspected of resetting stolen property, ejected him, at the same time stating to the bystanders, "This is W. the resetter." He brought this action against the policeman for damages for assault and slander on the ground that the defender had no legal right so to act. The Court *assoilzied* the defender, holding that the pursuer being a noted bad character, the defender's actings were within his privilege and duty as a policeman.

James Wallace, lessee of the Bird and Dog Market, Glasgow, the pursuer of this action, went on 15th August 1884 to the race meeting held on the race-course at Paisley. He paid 5s. for admission, and entered the enclosure known as the paddock and ring. William Henry Mooney, the defender, a police constable on duty there, saw him standing listening to what was passing among a group of men, and ordered him to leave the paddock, and on his refusing, proceeded to put him out of it. Wallace resisted, and in answer to his inquiry, "What are you putting me out for?" Mooney said, "You are Wallace the resetter, from Glasgow."

Wallace raised this action against Mooney for £500 in name of damages for assaulting him and slandering him on the occasion referred to. He averred—"(Cond. 4) The said assault committed by the defender was malicious and without probable cause, and the said slander uttered by him was false, malicious, and without probable cause, and was intended to convey, and did convey or tend to convey, to the persons in whose presence the same was uttered that the defender was a resetter; that he was an habitual receiver of stolen property, knowing the same to have been stolen; that the defender, in his capacity as an officer of police, had found stolen property, feloniously acquired by the pursuer, in his house; that the pursuer was well known to the defender as a resetter, and was wanted by the police authorities accordingly, and was given over to, and apprehended and removed in custody of, the foresaid two constables of police as a criminal; and that the pursuer was not following any legitimate calling." He alleged that in addition to saying that he (pursuer) was Wallace the resetter, from Glasgow, he had called out, "You remember what I got under your jawbox in Trongate, Glasgow," or similar words; and that the defender had violently seized him and ejected him. He alleged that at the time the defender was engaged in betting, and was affected by liquor.

The defender in reply stated—"(Stat. 2) The defender was in the knowledge that the antecedents and present reputation of the pursuer (whom he observed in the paddock) were very bad. In particular, he knew the following circumstances regarding the pursuer, viz.:—That in or about the year 1861 the pursuer was convicted at the Circuit Court, Glasgow, of the crime of theft by means of housebreaking, and was sentenced to four years' transportation. That in or about the year 1876 the pursuer was convicted of the crime of theft, and sentenced to imprisonment for fifteen months and to a period of police supervision, and that thereafter, whilst residing in Glasgow, he was obliged for a period of about three years to report himself on the first Monday of every month to the superintendent of police. That about ten years ago the pursuer was apprehended by the Glasgow police on a charge of reset, the pursuer's house having on this occasion been watched by the police and two women been arrested at the door, one of them having in her hand a gold watch which had been stolen from a man shortly before. That in or about the year 1881 a warrant was issued by the Sheriff of Lanarkshire for the apprehension of the pursuer on a charge of theft of wood, but although the pursuer was searched for he could not be found. That on 9th November 1882 Christopher Lyons was apprehended in pursuer's premises, 42 Market Street (City), Glasgow, and a watch which he had stolen by means of assault and robbery found in his possession. Lyons was subsequently convicted at the Circuit Court of the theft of the watch. That on 6th March 1883 Charles Reilly was apprehended in Market Street (City), Glasgow, when in the act of reaching a stolen watch to pursuer in his premises, 42 Market Street (City), and Reilly was afterwards convicted of the theft. That the pursuer's house has on several occasions within recent years been searched by the Glasgow police for stolen property. That the pursuer is by a large number of detective and other officers of the Glasgow police reputed a resetter, and is known and referred to by them as Wallace the resetter."

He further stated that what he did was done in the exercise of what he believed to be and what was his duty as a police constable and that it was done without malice.

The defender pleaded—"(1) The defender having neither slandered nor assaulted the pursuer, he should be assoilzied, with the expenses of process. (2) The whole sayings and actings of the defender having been in accordance with his duty as a police constable, the defender should be assoilzied with expenses."

A proof was led. The pursuer admitted the convictions in 1861 and 1876 founded on in the defender's statement. He led evidence to show that he had, with the exception of these convictions, been carrying on business in good credit as a general dealer in horses, harness, gigs, and the like, and had become proprietor and tenant of houses which he let and sublet to tenants. He also admitted that he had gone by several different names, but stated that Wallace was his real name. It was shown that the defender had once assisted to search his house, he being a reputed resetter. The defender explained that the jawbox he had referred to was the place where the pursuer was suspected of keeping resetted goods. The pursuer had been apprehended on a charge of reset which was not pressed. Stolen

wood had been found on his premises, and thieves had been apprehended at his door with stolen goods in their possession. In particular, a thief called Lyons had been so apprehended when leaving his door, and the pursuer had been seen to warn a thief called Reilly of the approach of the police, whom, according to the evidence of a detective who was examined by the defender, he had observed when on the point of having something handed to him by Reilly. The defender had general orders to keep bad characters out of the paddock.

The Sheriff-Substitute (COWAN) pronounced this interlocutor:—"Finds in fact that on 15th August last the defender, in the execution of his duty as a police officer, required the pursuer to leave the paddock of Paisley Racecourse, and that on his refusal to do so he forcibly ejected him therefrom, stating at the same time to the pursuer within the paddock, and to the constables on duty at the entrance gate thereof, that pursuer was Wallace the resetter, from Glasgow: That at the time of doing this the defender was in the knowledge of two previous convictions of aggravated theft against the pursuer—one involving a sentence of five years' penal servitude, and the other fifteen months' imprisonment with hard labour and three years' police supervision, and also in the knowledge that the pursuer was on pregnant grounds believed by many detectives in the police force of Glasgow to be a resetter: Finds that it was in accordance with the general instructions given to the defender by his superior officers that he prevent the criminal class, and in particular persons bearing the character of thieves or resetters, from remaining in the paddock at the races: Finds in law that the defender was in the circumstances of the case warranted in requiring the pursuer to leave the paddock, and entitled on his refusal to eject him therefrom: That the defender was privileged, by his official position, in the statement he made regarding the pursuer, and there being no malice on his part proved, and that all he did being in the *bona fide* discharge of his duty as an officer of police, he is not liable in damages to the pursuer: Therefore assoilzies the defender from the conclusions of the libel."

"*Note.*—The pursuer's case does not present itself to the Sheriff-Substitute as that of a man who, in however humble a way, has honestly set himself, after undergoing imprisonment, to lead an upright and honourable life. With such a man every right-minded person would have the deepest sympathy. But the pursuer, who lays stress on his having since his imprisonment carried on a strictly legitimate business, appears to the Sheriff-Substitute not to have in any effectual way made it clear that his old courses were abandoned, although, being as he himself expressed it, a clever fellow, he has, in the seven years since elapsing, kept out of the meshes of the law. Yet, in the opinion of the Sheriff-Substitute, there have been even during those years pregnant grounds of suspicion against him. Witness the theft of wood in 1881, when a warrant was granted for his apprehension, during the currency of which he kept out of the way, and the charge in which was so mysteriously departed from. Witness also the case of Christopher Lyons in 1882, and of Charles Reilly in March 1883. If there were no unconvicted resetters in Glasgow, the disposal of stolen goods would be much more difficult than it is, and crime would greatly decrease. The Sheriff-Substitute is of opinion that the power of the police to exclude from places of public resort persons of improper character was in this instance rightly exercised. That it was so is confirmed by the unparliamentary language used by the pursuer at his ejection, and by the naive description given by the witnesses James Warnock and Samuel Strachan of their conversation with the pursuer, they being without and he within the charmed circle of the paddock. That what they say is true was practically admitted by the pursuer, and is confirmed by what the defender and the witness James Fulton say as to the listening attitude of the pursuer when the defender first spoke to him. The pursuer does indeed represent Samuel Strachan as unknown to him till he came forward as a volunteer witness at the paddock gate; but that is not true. The Sheriff-Substitute has not accepted the version of what occurred at the paddock given by the pursuer's witnesses. He thinks it right to record that these witnesses impressed him most unfavourably, and that he would hesitate to receive testimony coming from such witnesses. In particular, the Sheriff-Substitute considers the allegation brought forward against the defender, that he was engaged immediately before he ejected the pursuer in a betting transaction, to be a pure invention, and the imputation of any want of sobriety on the part of the defender to be conclusively disproved. The defender has received from Captain Sutherland, of the burgh police force in Paisley, a high character as an intelligent and able officer, and the Sheriff-Substitute regards his conduct on the occasion in question, when placed in trying and difficult circumstances, as in accordance with that opinion."

The pursuer appealed, and argued—(1) There was no foundation in any statute warranting the statement that a police constable, in order to prevent a crime which might exist only in his own imagination, might eject persons from the paddock. Such a claim of right of ejection must not be confounded with the right to apprehend pickpockets given by the Act 34 and 35 Vict. c. 112, sec. 7 (the Prevention of Crimes Act 1871). The defender must show that he had the privilege he claimed. The police supervision had expired. (2) The common law gave no such right of ejection—Hume on Crimes, vol. ii., p. 71. The defender simply made himself a judge in the case, and exercised his judgment summarily—*Sinclair* v. *Broughton and Government of India*, June 1882, 47 Law Times, p. 170. (3) Common sense was against such a right. The pursuer had paid his five shillings, and had thus complied with the conditions of entrance into the enclosure. He was conducting himself quite properly. All that was even said against him was that he was eavesdropping. A word of warning was the most notice that the defender could be said to be entitled to take of him in the circumstances. The slander also entitled the pursuer to damages, unless the words used were held to be privileged, but owing to the publicity of utterance there could be no privilege. They were reckless, and could do no good to anyone.

The defender replied — The question was whether the pursuer had an absolute right to be in the paddock as a public place, the condition

of admittance into which was satisfied by payment of five shillings. This was not so; on the contrary, he would never have gained admittance had the authorities known his character. The defender was only acting in obedience to lawful commands of his superiors when he ejected the pursuer. There was no slander in the words used. They were justifiable and without malice.

At advising—

LORD YOUNG—I do not think this case is attended with any practical difficulty. There is a stateable and argueable point of law in the case, but I think everyone who knows the undoubted facts of the case will feel at once that no other conclusion could be arrived at than that expressed in the Sheriff-Substitute's judgment. The pursuer of the action is a convicted thief. He has been convicted repeatedly of serious thefts. He has suffered penal servitude and a long period of imprisonment, and has been subject to police supervision. It is true that the last conviction was in 1875, and that the police supervision to which he was then subjected expired in 1879, and that the occasion which has given rise to the present action did not occur till 1884. But down to the very date of that occasion he was a suspected character by the Glasgow police, who esteemed him a resetter of stolen goods, and were in the habit of searching his premises in pursuit of stolen property. One detective stated that in 1883 he saw a convicted thief in the pursuer's company in the act of handing a stolen watch to the pursuer, and that on seeing the police the pursuer advised the man to "sling" it and run. The man did so, but was apprehended and convicted. Now, I can hardly take it from such a man that he had turned away from his wickedness, and that he was doing nothing but what was lawful and right in August 1884. He got into the paddock of the racecourse, where he would certainly never have been admitted had it been known who he was and what he was when he applied for admittance. There is nothing to induce the Court to believe that the paddock was a public place to which persons of the pursuer's character were entitled to be admitted upon tendering 5s. The police constables had instructions to preserve order, and had orders from their superiors to turn out of the paddock any bad characters, and not merely those who were detected actually committing crime, but those who were known to be bad characters; and if I wished an illustration of a man who was a bad character, I should say that the pursuer was a very good type of such. I therefore think the instructions to turn out such people were perfectly lawful and entirely proper, and that when the police constable, without malice, but in obedience to quite proper and lawful instructions, turned the pursuer out of the paddock, he acted in accordance with his duty, and would have failed in his duty had he acted otherwise; and when he made the statements that he did he was not guilty of slander any more than of an assault. I am therefore prepared on these grounds to negative the grounds of action of slander and assault. Therefore simply negativing them, I propose that we should assoilzie the defender.

LORD CRAIGHILL and LORD RUTHERFURD-CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

"Find in fact that the defender did not slander the pursuer, and did not assault the pursuer, and in law that he is not liable in damages: Therefore assoilzie the defender from the conclusions of the action: Find him entitled to expenses in this Court," &c.

Counsel for Pursuer (Appellant) — Comrie Thomson—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for Defender (Respondent)—J. P. B. Robertson—A. J. Young. Agent—J. Stewart Gellatly, S.S.C.

HOUSE OF LORDS.

Tuesday, February 24.

(Before Lord Chancellor, Lords Watson, Bramwell, and Fitzgerald).

SIR ROBERT BURNETT, BART. *v.* THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

(*Ante*, vol. xxi. p. 246, 11 R. 375—21st Dec. 1883.)

Superior and Vassal—Irritancy—Railway—Private Right to Stop Trains.

The proprietor of land through which a railway was formed feued to the railway company at a nominal feu-duty land on which the company undertook to erect and maintain "a station for passengers and goods travelling by the . . . railway, at which all passenger trains shall regularly stop." An irritant clause provided that in the event of the company discontinuing the use of the station as a regular goods and passenger station, the grant should be null, and the ground and all buildings thereon should revert to the granter. The company erected the station, which was called C, and for a time all passenger trains stopped at it, but there were established after the date of the contract certain trains subsidised in the public service by the Home Office and Post Office, in which ordinary passengers might travel, and which were regularly advertised as conveying passengers in the company's time tables. These trains were not regularly stopped at C. In an action by the proprietor to have it found that the company were bound to stop at C, to take up and set down passengers, all trains not hired by individuals for their exclusive use, and in particular the trains above described—*held* (*rev.* judgment of Second Division) that these trains came within the obligation, and that the company were bound to stop them.

There were also established certain Saturday excursion trains not stopping at C. The tickets for these trains were all return tickets only available to return the same day. *Question*, Whether these trains were passenger trains in the sense of the obligation?