

a cage is liable to pass and re-pass it. The duties of a bottomer are to push off and on the hutches, and keep order at the bottom and make signals to the brakesman. I consider that there ought to have been, as well, a bell signal for the bottomer or miner to communicate with the brakesman in the major coal." And the Government Inspector explains—"We have frequently accidents from the engineman mistaking the signals. A bottomer would generally go upon the same signal."

Now, there was no bottomer here, and I think the weight of the evidence is that it would at all events have greatly conduced to the safety of the miners if there had been one. The signal was mistaken, or rather that was mistaken, for a signal which was not intended as a signal at all. I think the probability is it would not have occurred had there been a bottomer who would always give the same signal, and thus a mistake would almost be impossible. A bell signal would not be so liable to be mistaken as the human voice. I am of opinion, therefore, that a proper and altogether reasonable precaution for the safety of the men was wanting and that the master is responsible, and I cannot accede to the view of the Sheriff-Substitute when he says he is unable to see how the precaution of having a bottomer would guarantee the men against the accident. It would not have made the accident impossible. The question is not one of guaranteeing the men against accident or rendering such impossible. I did not know that any precautions could be specified which would have that effect, but we always proceed on the view that if ordinary and reasonable precautions, which would greatly conduce to the safety of the miners and would have rendered an accident much less likely, have been omitted, then the master who is responsible for the omission shall be held liable for the accident occurring in consequence of such omission, or shall be liable where the observance of that precaution might reasonably have been expected, and would probably have prevented the accident. I am therefore of opinion that the Sheriff-Substitute is in error here. I ought to notice that I desire to be understood as expressing no opinion that this was a place where, under the Mines Regulation Act, there must imperatively be a bottomer. I proceed on the view which I understand is the view of the Government Inspector and the mining engineer, that the presence of a bottomer and a safer working of signals was reasonably necessary for the safety of the men engaged. I think, then, that the Sheriff's judgment should be altered, and that we must find that the pursuer's husband met his death in consequence of the fault of the defenders, who are in consequence liable in damages to her.

LORDS CRAIGHILL and RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

"Find in fact that the deceased Alexander Murdoch was killed at the time and place and in the circumstances averred by the pursuer on record, through the fault of the defenders, and that the pursuer is the widow of the deceased: Find in law that the defender is

liable in damages to the pursuer: Therefore recal the interlocutors of the Sheriff and of the Sheriff-Substitute appealed against: Assess the damages at One hundred and fifty pounds sterling; ordain the defenders to make payment of that sum to the pursuer, with interest thereon at the rate of five pounds per centum per annum from the date of this decree till paid: Find the pursuer entitled to expenses," &c.

Counsel for Appellant—J. A. Reid—Orr. Agent—W. & F. C. MacIvor, S.S.C.

Counsel for Respondent—Sol.-Gen. Asher, Q.C.—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Saturday, March 7.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

BERTRAM v. PACE.

Reparation—Process—Issue—Innuendo—Counter Issue.

A gamekeeper brought an action of damages for slander on the ground that the defender had said that he (defender) had repeatedly sold game for pursuer, and had paid him the proceeds, meaning thereby that the pursuer had taken game off his master's land and sold it and appropriated the proceeds, and thus been guilty of dishonesty. The defender proposed to take a counter issue whether the pursuer had left game with him for sale, and he had sold it and transmitted the money to pursuer. The Court *disallowed* this issue on the ground that it omitted all suggestion of dishonesty.

James Bertram, gamekeeper and forester to Sir Thomas Dick Lauder at Fountainhall, Haddington, raised the present action, concluding for £500 in name of damages for slander against Robert Pace, farmer at Ormiston Mains in the county of Haddington. The alleged slander was said to have been uttered in the course of a proof which was being led in another action between the same parties in the Sheriff Court-room, County Buildings, Haddington on 30th June 1884. The pursuer alleged that during the temporary absence of the Sheriff from the Court-room the defender had stated to him personally, "and in the presence and hearing of a large audience then assembled in Court, that he the defender had repeatedly sold or disposed of game for and on behalf of pursuer, and paid him the proceeds thereof. On the same day, and within the said County Buildings, the defender also repeated the said accusation to Mr Andrew Wood, solicitor, Haddington, and at same time, and in the lobby of the said County Buildings, while certain of the parties were temporarily absent from Court, the defender stated to the pursuer's agent Mr Andrew Gemmell, solicitor, Haddington, in presence of the said Andrew Wood, that he (Mr Gemmell) did not surely know what kind of man he was acting for,

and that he (the defender) had repeatedly sold game off Fountainhall for and on behalf of the pursuer, and paid him the proceeds thereof." The pursuer alleged that the meaning conveyed, and intended and calculated to be conveyed, by the said statements was, that the pursuer had taken game off the estate of Fountainhall, and sold the same and appropriated the proceeds thereof to his own uses and purposes, and had thus been guilty of dishonesty and a breach of the trust reposed in him by his employer.

The pursuer further averred that these accusations were false and slanderous, and that he had been called upon by his employer's factor to vindicate his character, as otherwise he might lose his situation. He also alleged that although the defender had been asked to retract and apologise he had refused to do so.

The defender admitted saying to Bertram (the pursuer) "Do you not mind when I sold the stuff for you," whereupon the present pursuer said, "That will be another case." He also admitted saying that he had repeatedly carried "stuff" for Bertram and disposed of it, and handed to him, or others for him, the proceeds. He alleged that these statements were true, and further alleged that—"During the years from 1866 to 1872 inclusive, while he (the present defender) drove the cart and the milk produce from Ormiston Mains by Tranent to Musselburgh, and afterwards, during the years 1873, 1874, and early part of 1875, while the defender's son, Robert Pace drove the said cart and milk produce, he and his said son repeatedly in each year, and during said respective periods, carried 'stuff' for the pursuer and disposed of it, and the defender handed the proceeds to the pursuer, or to his wife, or brother John Bertram, or other relatives or representatives of the pursuer. The 'stuff' referred to consisted almost wholly of hares and rabbits, was brought to the defender's house, sometimes in the daytime and sometimes at night, by the present pursuer, or by the said John Bertram, or by other relatives or representatives of pursuer, and was handed over to the defender or his wife, or such member of the family or household as was then present. This defender had no knowledge where the pursuer got the 'stuff' referred to, or what he did with the said proceeds." He also stated that the pursuer had called him and his family "a bad poaching lot."

The defender pleaded that the pursuer's statement was unfounded in fact; also, *inter alia*—"(3) Privilege. (4) The pursuer having also slandered the defender, there arises *compensatio injuriarum*. (5) *Veritas*, the statements made by the defender being true."

The Sheriff-Substitute allowed the parties a proof.

The pursuer appealed to the Court of Session for jury trial.

The following issues, as amended at the bar, were proposed by the pursuer:—"(1) Whether, on or about the 30th day of June 1884, within the County Buildings, Haddington, the defender, in the presence and hearing of Andrew Wood, solicitor, Haddington, did falsely and calumniously say of and concerning the pursuer that he, the defender, had repeatedly sold or disposed of game for and on behalf of the pursuer, and paid him the proceeds thereof, meaning thereby that the

pursuer had taken game off the estate of Fountainhall, belonging to Sir Thomas North Dick Lauder, Baronet, the pursuer's employer, and had sold the same, and had appropriated the proceeds thereof to his own uses and purposes, and had thus been guilty of dishonesty and a breach of the trust reposed in him by his employer, to the loss, injury, and damage of the pursuer? Damages laid at £250. (2) Whether, on or about the 30th day of June 1884, within the County Buildings, Haddington, the defender, in the presence and hearing of the pursuer's agent, Andrew Gemmell, solicitor, Haddington, did falsely and calumniously say of and concerning the pursuer that he, the said Andrew Gemmell, did not surely know what kind of man he was acting for, and that he, the defender, had repeatedly sold game off Fountainhall for and on behalf of the pursuer, and paid him the proceeds thereof, meaning thereby that the pursuer had taken game off the estate of Fountainhall, belonging to Sir Thomas North Dick Lauder, Baronet, the pursuer's employer, and had sold the same, and had appropriated the proceeds thereof to his own uses and purposes, and had thus been guilty of dishonesty and a breach of the trust reposed in him by his said employer, to the loss, injury, and damage of the pursuer? Damages laid at £250."

The following proposed counter issues were lodged by the defender:—"(1) Whether the statements actually made by the defender on the occasions specified in the issues were true? (2) Whether, on various occasions during the time from 1865 to 1873, and during the years 1873, 1874, and 1875, the pursuer, by himself or others, left at the defender's house, for the purpose of being sold or otherwise disposed of, hares, rabbits, and pheasants, or one or other of them; and whether the defender handed or transmitted to the pursuer, or others having his authority to receive the same, the money received by defender for the said hares, rabbits, and pheasants, or one or other of them? (3) Whether, on various occasions and at various places during the time from the beginning of 1875 to the end of 1883, the pursuer falsely and calumniously stated to James Allan, gardener, Ormiston, to James M'Lennan, tenant of Fountainhall, and to More Cockburn, ploughman, Ormiston Mains, or to one or more of them, that the defender's family were 'a bad poaching lot,' or did use words of like import and effect, to the defender's loss, injury, and damage?"

Authority cited with regard to third counter issue—*Tullis v. Crichton*, March 8, 1850, 12 D. 867.

At advising—

LORD PRESIDENT—I think that the issues proposed by the pursuer are fair and reasonable, but the two first counter issues seem to me to be irrelevant, while the third is quite incompetent. The first is undoubtedly too vague, while the second does not meet the alleged slander, for all suggestion of dishonesty is omitted altogether. I am therefore for disallowing the counter issues.

LOKDS MURE, SHAND, and ADAM concurred.

The Court approved of the proposed issues for the pursuer and disallowed the counter issues.

Counsel for Pursuer—Darling. Agents—Paterson, Cameron, & Co., S.S.C.

Counsel for Defender—Campbell Smith. Agent—Andrew Newlands, S.S.C.