

Company for the sum of £231, 17s. 6d., with legal interest from 1st November 1890, the date of the valuation.

LORDS ADAM and KINNEAR concurred.

LORD M'LAREN was absent.

The Court recalled all the interlocutors in the Sheriff Court subsequent to the original interlocutor closing the record, and ordained the defender to rank the pursuer as a creditor on the estate of A. H. Harrison & Company for £231, 17s. 6d., with interest from 1st November 1890, the date of the valuation.

Counsel for the Pursuer—Graham Murray, Q. C. — Galloway. Agents—Carmichael & Miller, W. S.

Counsel for the Defender—C. S. Dickson—Morison. Agent—Alex. Morison, S. S. C.

Friday, December 22.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

WAUGH v. THE "AYRSHIRE POST" LIMITED.

Reparation—Slander—Imputation of Inciting to Bloodshed and Violence—Issues.

A newspaper having published an anonymous letter, in which the writer expressed his own desire and that of other Orangemen for the chance of letting out the Papist blood once more, an action of damages was brought against the proprietors of the newspaper by a person who averred that the letter falsely pointed to him as its writer. Held (rev. Lord Kyllachy) that the pursuer was entitled not merely to an issue of verbal injury but to one of slander.

The following paragraph appeared in the *Ayrshire Post* newspaper, published in Maybole, on 28th July 1893:—"Halt! Who goes there?" "An Orangeman."

"Belmont Terrace,
Maybole, July 17th 1893.

"Mr Oculeus (or whatever they may call you),—I don't often lower myself with buying your *Ayrshire Post*, as I am more of a gentleman than read such rubbish of news as what is gathered up from your low scum of reporters, as your staff is made up of nothing but midden-rakers and chimney-sweeps. Mr Oculeus, I think you are some mean, low scamp, when you are afraid to give your name. But I don't suppose you have a father. But you might give us your mother's name, and then we will have a chance of knowing your proper character. But I have a good idea what you are when you attack a respectable man like Mr Toner. But he is neither afraid to show his face nor to come from Glasgow to silence a mob of Radicals like Mr Thompson, John James, and the Chimney Sweep, the *Post's* respectable reporter. Mr Oculeus, you must be a

mean coward, like all the rest of your bloodthirsty crew, when you did not come to Irvine last Saturday and tell us about our long tile hats there. I know your reason. Mr Wallace of Cloncaird would have put his Orange sword down your throat, same as we have done at Boyne Water. I only wish we may have the chance to meet you and your Radical crew. We will give you what we gave some of your Radical friends at Girvan in 1831, as we Maybole heroes is just thinking long for the time to come when we will have the chance of letting out the Papish blood once more. Mr Oculeus, I did not intend to lower my name with such trash as chimney-sweeps and midden-rakers, but if you don't appologise for speaking about God-fearing, law-abiding people like what belongs to our Orange Order, as nothing but a good Protestant would be admitted into our ranks. But I suppose, Mr Oculeus, you are angry that Dr Moir, or the boy doctor, as you had the impudence to call him, is left your ranks. We knew that a gentlemen like Dr Moir would scorn to be among you when he could get his equals in Mr Gilmour's, Mr Toner's, and Mr Smith's company—gentlemen you would be afraid to speak to. I will speak to Mr Wallace of Cloncaird, and see what can be done, as you are no gentleman, when you cannot give us your name. I am a coward, are you? Because I do not give my name. Yet, while accusing me of that, you do not give your own name. Sook in with the Wallaces, my nameless one, and you are all right. That's the straight tip—from one of them. . . . H. R. Wallace is president of a lodge of these fire-eating blitherers. Really I feel ashamed of my kinsman. Fancy Hugh sprawling over the heads of these poor fanatical Orangemen to raise himself into a little power, to which he cannot attain through any other source. He stoops to conquer! A descendant of the Scottish patriot—my much-respected great (6 greats) grand-dad—processing with these fanatical, fire-eating, blustering, and bombasting Orangemen with their obsolete tiles! Still, I must say, I think more of his conduct than that of Mr Smith of the Castle or Mr Gilmour. They appear to be ashamed of their connection with the Orangemen. Yet they are Orangemen though they never process. My readers will now see for themselves why Toner, Smith, Gilmour, &c., are down on the *Post*. I would like to give my readers a little more information, but space forbids me this week."

Thereupon Samuel Waugh, shoemaker, 2 Belmont Terrace, Maybole, Secretary of the County Grand Orange Lodge of Ayrshire, raised an action of damages for £500 against *The Ayrshire Post*, Limited proprietors of the said newspaper for slander, on the ground that the letter contained in the above paragraph purported to have been written and sent by him although he had nothing to do with it. He averred that "The said letter is wholly false and calumnious, and, *inter alia*, attributes to the pursuer sentiments of the most odious and

criminal kind. In particular, the said pretended letter falsely and calumniously represented the pursuer as longing for an opportunity of committing murder on his Roman Catholic fellow-citizens, or, at all events, of shedding their blood in civil commotion. The said letter is calculated to hold up the pursuer to the contempt and hatred of the community with which he is connected, and of inciting the hatred against him of many of his fellow-citizens. In particular, the reference to the incidents of 1831 has grievously injured the pursuer's feelings, inasmuch as one of his relatives suffered capital punishment in consequence of his participation in certain riots which then took place. The said occurrence was known to very few persons, but in consequence of the said letter it has become matter of public talk. The said calumnious statements were made maliciously for the purpose of injuring the pursuer, and of gratifying the political animosity which it is believed and averred the defenders or their manager cherished against him."

The defenders admitted that the letter was not written by the pursuer, but explained that at the time they were, after due inquiries, under the *bona fide* belief that it came from him, and that he wished it published. His name was not however mentioned, nor was any statement made about him. They further explained that their manager had by letter to the pursuer dated 2nd August, stated "Far be it from us to traduce you or anyone without reason, and I am only too anxious to assist you in finding out the culprit."

The pursuer lodged an issue of slander in ordinary form, and alternatively proposed an issue finally adjusted to read thus:—"Whether the said letter and paragraph are of and concerning the pursuer, and falsely impute to him that he is and avows himself to be a person of fanatical and odious sentiments who desires an opportunity of shedding the blood of his Roman Catholic fellow-citizens in civil commotion; and whether the said letter and paragraph were written and published with the design and with the result of holding up the pursuer to public hatred and contempt, to his loss, injury, and damage?"

Upon 9th December 1893 the Lord Ordinary (KYLACHY) disallowed the first issue and approved of the second.

"*Opinion.*—In this case the pursuer proposes two alternative issues,—the one an ordinary issue of slander, and the other an issue in a special form similar to the issues allowed by the Court in *Sheriff v. Wilson*, 17 D. 52; *Cunningham v. Phillips*, 6 Macph. 926; *Maclaren v. Ritchie* (not reported); *Paterson v. Welch*, 20 R. 744.

"I have come to the conclusion that the second of those issues, somewhat altered in its terms, is the proper issue to try the case. I am not satisfied that the imputations on the pursuer's character amount to slander, that is to say, to a charge against his character. To say of a man that he is a fanatic, or that he holds or avows sentiments which are even widely fanatical, may be very offensive and very injurious, but I am not

satisfied that such a statement is in any proper sense defamatory so as to be actionable *per se*, and without an express averment of intention to injure. I am not therefore prepared to send the first issue to the jury, more especially as no precedent can be found for an issue of slander in such circumstances.

"The second, I propose, should run thus —[as quoted *supra*].

"It will be observed that as intention to injure is of the essence of the charge under this issue, I have put the question whether the letter and paragraph in question were written and published with that design. It will be for the jury to say at the trial if the facts raise the question whether an intention to injure on the part of the defender is consistent with what the defender alleges, viz., that he made all due inquiries, and had a *bona fide* belief in the authenticity of the letter.

The pursuer reclaimed, and argued that he was entitled to an issue of slander. It would be difficult to imagine a worse slander than to say of a person, living as the pursuer did among Roman Catholics, that he entertained the sentiments expressed in this letter. Here he was actually made to express these sentiments. It was because there was no slander, although there might be verbal injury, that the issue in *Paterson v. Welch* was adopted. The case was ruled by the cases of *Mackay v. Campbell*, July 25, 1893, 11 S. 1031; *Russel v. Shireffs*, March 16, 1837, 15 S. 881; *Graham v. Roy*, February, 11, 1851, 13 D. 634. This case was stronger than that of *Macfarlane v. Black & Company*, July 6, 1887, 14 R. 1870, where it was held to be a slander to call a man a "scoffer;" here the pursuer was said to desire the blood of those who differed with him in religious opinion.

Argued for the defenders—This letter must be read as a whole, and when so read was not slanderous. It was not to be taken seriously. At the worst it ascribed to the writer of the letter extreme political fanaticism. That was not slanderous. Nothing was said against his private character. It would be unfair to allow an issue of slander, because as they were not proving *veritas* and could not prove privilege they could not then get into the whole case, which showed they had acted under an erroneous but justifiable impression. The issue allowed by the Lord Ordinary, upon the authorities referred to by his Lordship, would fully meet the case and was the proper one in the circumstances.

At advising—

LORD PRESIDENT—The first question to be considered is, whether an issue of slander should be granted. Now, the way in which the case strikes me is this—The pursuer complains that the newspaper held out to the public that he had written and sent for publication the letter printed by them. If it would be immoral or a piece of grievous misconduct to offer for publication the letter attributed to him, then it is plain that an assertion that he wrote it and

offered it for publication is plainly actionable. This leads me to examine the letter. It contains much trash, but it seems to me that the lines founded on by the pursuer can hardly be read otherwise than as inciting to violence and bloodshed, or, I should rather say, may quite rationally be read as having that meaning. There are allusions all through the letter to acts of violence to Roman Catholics, the meaning of which it is difficult to mistake. Now, Mr Shaw admits that it is actionable to accuse a man of inciting to violence, and if this letter may fairly be read as inciting to violence, then the pursuers seem entitled to have an issue of slander. I therefore propose that we should allow the following issue—[*His Lordship quoted the issue printed infra*].

My opinion proceeds on the ground that to write a letter inciting to violence and bloodshed is so grave an act of misconduct that to inscribe such a letter to a man is slanderous. Under the issue which I propose that we should grant it would be quite open to the defenders to acquaint the jury with any extenuating circumstances which may have led them to publish the letter, and which might be pleaded in mitigation of damages. Thinking as I do that the pursuer is entitled to an issue of slander, that issue supersedes the necessity of resorting to the form adopted by the Lord Ordinary.

LORD ADAM—I have no doubt that to publish of anyone that he is a person who has incited to bloodshed and violence is *per se* actionable, and the question comes to be whether the letter and paragraph do impute such sentiments to the pursuer? The question of libel or no libel is one for the jury, and we are not entitled to withhold the letter and paragraph from a jury unless we are satisfied that the innuendo placed upon the letter by the pursuer is unreasonable. To that extent we may construe an alleged libel; we are, in short, just now in the same position as if a jury had returned a verdict for the pursuer on an issue of slander, and we were being asked to upset their verdict on the ground that it was unreasonable. I am of opinion that the innuendo here is a reasonable one, and that being so, I think the issue proposed by your Lordship is the right one. Had the letter and paragraph not been *per se* slanderous, or capable of being innuendoes as slanderous, then it would have been necessary to show that the publication had been made with a view to do the pursuer injury, and had done him injury. In such a case the issue adjusted by the Lord Ordinary would have been the right one, but I do not think that that is the case we have here, and I therefore concur in the issue now proposed.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court approved of the following issue for the trial of the cause:—"It being admitted that the defenders in the issue of

28th July 1893 of the *Ayrshire Post* newspaper, printed and published the paragraph, including the pretended letter contained in the schedule hereto annexed, Whether the statements contained in said paragraph and letter are of and concerning the pursuer, and falsely and calumniously represent that the pursuer had written a letter for publication in a newspaper, in which letter he incited to riot and bloodshed, to the loss, injury, and damage of the pursuer? Damages laid at £500."

Counsel for the Pursuer and Reclaimer—Salvesen—Younger. Agents—Sturrock & Graham, W.S.

Counsel for the Defenders and Respondents—Shaw—Hunter. Agent—R. Ainslie Brown, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, January 9, 1894.

(Before the Lord Justice-Clerk).

H. M. ADVOCATE v. BLACK.

Justiciary Cases—Criminal Procedure Act 1887 (50 and 51 Vict. c. 35), sec. 31—Withdrawal of Plea after Withdrawal of Libel.

Under the 31st section of the Criminal Procedure Act a plea of guilty may be withdrawn if the libel is withdrawn by the Crown—*H.M. Advocate v Lyon, 1 White 539, distinguished.*

In this case William Matthew Black, who was charged with having committed incest with his wife's daughter, pleaded guilty before the Sheriff, and was remitted to the High Court for sentence.

Black was brought before the High Court at Edinburgh for sentence. It was then stated by the prisoner's counsel that the prisoner, although he had had the assistance and advice of a law-agent, had pleaded guilty. But there was a fact in the case the legal significance of which the prisoner had not been aware of, and did not communicate to his agent, viz., that this daughter of his wife was illegitimate. In these circumstances he argued that the libel was irrelevant, and moved the Court to allow the prisoner to withdraw the plea which he had tendered.

LORD JUSTICE-CLERK—It has already been held that pleas given under the 31st section of the Criminal Procedure Act 1887 could not be withdrawn, but the difficulty might be obviated by Crown counsel not moving for sentence if he were satisfied as to the facts stated—*H.M. Advocate v. Lyon, December 26, 1887, 1 White 539, 15 R. (Jus. Cas.) 66, 25 S.L.R. 209.*

The Advocate-Depute (LORIMER) said he was satisfied that the girl was an illegitimate daughter of the prisoner's wife, and