Fisher, and Margaret M'Nab, now or lately the defender's servants, or one or other of them, the defender did falsely and calumniously and maliciously say of and concerning the pursuer, 'You are drunk,' or used words of like import and effect, to the loss, injury, and damage of pursuer. Damages £170."

Against this interlocutor the defender reclaimed, and the pursuer moved the Court to vary the terms of the issue by deleting the words "and maliciously."

Argued for the defender—The action was irrelevant. The words were not seriously meant; they were merely thrown out by the defender *in rixa* during a squabble between him and the pursuer. They were therefore not a proper subject for an action —*Shand* v. *Finnie*, Feb. 10, 1802, Hume's Decisions, 612; *Cusine* v. *Begbie*, December 10, 1803, Hume's Decisions, 622. The words themselves in the circumstances of the case were not actionable. Opinion of Lord President Hope in *Friend* v. *Skelton*, March 2, 1835, 27 S.J. 237. Even if the accusation was held to be seriously made, and the words were held to be actionable, it was a statement made to a servant by a master and therefore was privileged, and malice must be both averred and proved. No special malice was averred, and therefore no issue should be allowed.

Argued for the pursuer—The words of the defender were actionable, since they had hurt the feelings and reputation of the pursuer. To charge the head cook in the preseuce of others with being drunk was an actionable accusation, and it was for the jury to judge whether or not the accusation was slanderous—*Balfour* v. *Wallace*, July 14, 1853, 15 D. 913; *Craig* v. *Jex Blake*, July 7, 1871, 9 Macph, 973; *Rankine* v. *Roberts*, Nov 26, 1873, 1 R. 225; *Farquhar* v. *Neish*, March 19, 1890, 17 R. 716. The statement was not privileged, and malice should not be inserted in the issue. No doubt the statement was made by a master to a servant, but it had been spoken before other servants and shouted out several times in a public place —*Milne* v. *Smith*, November 23, 1892, 20 R. 95; *Ingram* v. *Russell*, June 8, 1893, 20 R. 771, opinion of Lord President Inglis p. 776; *Douglas* v. *Main*, June 13, 1893, 20 R. 793. Tendency of modern decisions was to leave the question of privilege open till the trial of the cause.

At advising—

Lord Young—This is an action by a cook against her employer for damages for defamation. Now, it appears from the pursuer's statements on record that some sort of contention arose between the cook and her master, that they both lost their temper, and that upon that occasion he said to her "You are drunk, you must go at once." The action is not upon "go at once" but on "you are drunk," and the pursuer has added on record the explanation—a very candid one—that the defender made the accusation "you are drunk" without taking any trouble to ascertain whether or not it was true. He was angry with the pursuer for asking for further assistance, and he simply made the accusation in order to browbeat her, and the question is, whether that is a relevant statement to support an action of defamation. I am of opinion that it is not. If a cook gets into a squabble with her master upon the question of requiring further assistance in the kitchen, and they both lose their temper, and the master in order to browbeat the servant, says to her "you are drunk," I do not think that constitutes a case of defamation which is an actionable case. I am therefore of of opinion that the action should be dismissed.

Lord Rutherfurd Clark—Looking at the averments made by the pursuer on record, I think this case is a very extraordinary one, but notwithstanding these averments I personally would be inclined to allow the pursuer an issue.

Lord Trayner—I think the pursuer's case is irrelevant. The words used by the defender of which the pursuer complains were uttered by him, according to the pursuer's averment, while he was in a violent temper, and were uttered not for the purpose of making an accusation against the pursuer, but simply "to browbeat her." The *animus injuriandi* therefore which lies at the root of such cases as the present is negatived by the pursuer's own averment.

Lord Justice-Clerk—I have come to the conclusion to agree with the majority of your Lordships.

The Court recalled the Lord Ordinary's interlocutor, and dismissed the action as irrelevant.

Counsel for the Pursuer—Wilson—W. Thomson. Agent—Edward P. Thomson, W.S.

Counsel for the Defender—Young—Glegg. Agents—Morton, Smart, & Macdonald, W.S.

Friday, January 19.

FIRST DIVISION.

INSPECTOR OF GALASHIELS *v.* INSPECTOR OF MELROSE AND THE BOUNDARY COMMISSIONERS.

Boundary Commissioners — Transferred Area—Relief of Paupers—Competency of Order—Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. c.* 50), *sec.* 50.

By order which came into force 11th June 1891 the Boundary Commissioners transferred a portion of the parish of M. to the parish of G.

In an action by G. against M. the Court of Session decided that M. continued to be liable for the relief of paupers who had acquired a settlement by birth or residence there before the date of the Commissioners' order.

M. and G. having failed to make an

agreement adjusting their financial relations, went, under sec. 50 of the Local Government Scotland Act of 1889, to the Boundary Commissioners, who, *inter alia*, ordained G., as from 11th June 1891, to assume responsibility for, and to relieve M. of all allowances made since that date or to be made in respect of paupers who had at that date acquired a settlement within the transferred area.

Held that this order was not *ultra vires* of the Commissioners.

By order, dated 13th December 1890, the Boundary Commissioners, acting under the Local Government (Scotland) Act 1889, determined and ordered that, subject to the provisions of the Act, so much of the parish of Melrose as was situated in the county of Selkirk should cease to be part of that parish, and should form part of the parish of Galashiels. This order was confirmed by Act of Parliament, and came into force on 11th June 1891.

Thereafter a question arose and was litigated between the parish of Galashiels and the parish of Melrose as to the effect of this order upon the liability of the parish of Melrose for the maintenance of paupers who, by birth or residence in the part of the parish which had been so transferred, had their settlement in the parish of Melrose at the date of the transfer. It was decided by the First Division of the Court, 12th May 1892, 19 R. 758, that the transfer by the Boundary Commissioners did not affect the liability of Melrose for parochial settlements acquired prior to the date of the transfer.

The first and second sub-divisions of section 50 of the Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50) are as follows:—"(1) Any councils and other authorities affected by this Act, or by any order or other thing made or done in pursuance of this Act, may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses of the parties to the agreement so far as affected by this Act or such order or thing, and the agreement and any other agreement authorised by this Act to be made for the purpose of the adjustment of any property, debts, liabilities, or financial relations, may provide for the transfer or retention of any property, debts, and liabilities, with or without any conditions, and for the joint use of any property, and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint use, and in respect of the salary, remuneration, or compensation payable to any officer or person, and that either by way of a capital sum or of an annual payment.

"(2) In default of an agreement as to any matter requiring adjustment for the purposes of this Act, then, if no other mode of making such adjustment is provided by this Act, such adjustment may be made or determined by the Commissioners."

By sub-section 3 of the same section it is provided—"The Commissioners, when making an adjustment under this Act, shall be deemed to be a single arbiter within the meaning of the Lands Clauses Consolidation (Scotland) Act 1845, and the Acts amending the same, and the provisions of those Acts with respect to an arbitration shall apply accordingly."

Questions arose between the two parishes, *inter alia*, as to the adjustment of liabilities and income and expenses in connection with the administration of the poor-law, as affected by the order of the Boundary Commissioners. They failed to agree in adjusting their differences, and accordingly under sub-section 2 of section 50 the adjustment fell to be made and determined by the Boundary Commissioners. The Commissioners, on 4th August 1892, issued a provisional award, and after considering representations by the Parochial Board of Galashiels, on 10th November 1892 issued an award, the operative part of which is as follows:—"(First) We ordain the second parties (the Parochial Board of Galashiels) as from 14th June 1891 to assume responsibility for and relieve the first parties (the Parochial Board of Melrose) of all advances made since that date, or to be made in respect of paupers whose claim is derived from (*a*) birth prior to 11th June 1891, within the area transferred from the parish of Melrose to the parish of Galashiels by our said order of 13th December 1890; or (*b*) industrial residence within the said area for the statutory period prior to 11th June 1891. (Second) We ordain the first parties to pay to the second parties the sum of £300 per annum for the period of four years, the sum of £200 per annum for the four years thereafter, and the sum of £100 per annum for the four years years next again thereafter, the first payment to be at Martinmas 1892, the second at Martinmas 1893, and so on, interest at the rate of five per cent. to run on each of the said payments from the time at which it becomes due till paid; and (Third) We ordain the first parties to transfer to the second parties, as from 15th April 1892, for the use of paupers in the parish of Galashiels, the right to ten out of the twenty-eight beds belonging to the first parties in the Galashiels Combination Poorhouse, the second parties bearing as from that date the burdens effeiring to the additional share in the said poorhouse thus acquired, and being, on the other hand, entitled to one of the votes at present exercised by the first parties at meetings of the Committee of Management of the said Combination Poorhouse; and we declare that the provisions of this award shall be in full satisfaction of all claims competent to either of the parties against the other, and a final settlement of all financial questions that have arisen or that may arise between them in respect of the foresaid transference of area so far submitted to us in the foresaid claims and answers, and we ordain that each of the parties shall pay one-half of the cost of the stamp to be affixed to this award, and the party paying for the stamp is hereby found entitled to recover

the half of the cost thereof from the other party, but *quoad ultra* we find no expenses due to or by either party."

Thereafter the Inspector of Poor for the parish of Galashiels brought an action against the Inspector of Poor for the parish of Melrose and the Boundary Commissioners to have said award or decree-arbitral, or in any case the first head thereof, reduced as being *ultra vires* of the Commissioners.

The Inspector of Poor for Galashiels pleaded that "the said award or decree-arbitral being within the statutory powers of the Commissioners, the defenders ought to be assoilzied."

Upon June 13th 1893 the Lord Ordinary (WELLWOOD) assoilzied the defenders with expenses.

"*Opinion.*—[*His Lordship's narration of the facts of the case is given supra*]—The pursuers the Parochial Board of Galashiels seek reduction on the ground that the first branch of the award was *ultra vires* of the Commissioners, the reason stated being shortly this—that it was contrary to and inconsistent with the express decision of the Court to which I have referred. At first sight the award seems startling, because it ordains the parish of Galashiels to do what the Court declared that legally it was not bound to do. But when the provisions of the 50th section are examined, I think that it will be seen that there is no real inconsistency between the award and the judgment. The judgment is a binding decision as to the legal rights of the parties. The award is intended to operate as an equitable adjustment on the assumption of Melrose's liability being as declared by the Court. Under sub-division (1) the two parishes might, if they had chosen, have agreed, *inter alia*, to transfer liabilities binding upon one or other of them by law, with or without conditions or payment by either party in respect of such transference. There was thus nothing to prevent the parishes from agreeing, that the liability resting upon Melrose in respect of parochial settlements acquired before the date of transfer, should be taken over by Galashiels, with or without payment of some equivalent by Melrose. They did not succeed in adjusting their differences, and accordingly it fell to the Commissioners, acting as an arbiter, to decide whether the parishes were bound, with a view to an equitable adjustment, to do what they might have done had they been able to agree. The matter truly submitted to the Commissioners was, whether in adjusting liabilities, income, and expenses which had been affected by the transfer, it was right and proper that Galashiels should take over the liability in question, and if so, on what terms and conditions. Now, such an agreement or reference was not inconsistent with legal liability resting at the outset with Melrose. On the contrary, that was a condition of the reference, and an element in favour of Galashiels to be considered in the adjustment.

"The following passage from the opinion of the Lord President in the case of *Galashiels* v. *Melrose*, 19 R. 762, shows that that judgment was not intended to preclude financial adjustment between the parties—'It is obvious that such changes might require financial adjustment between the two parishes or other areas, the one of which was losing and the other acquiring the land in question. The portion of land to be disjoined might be so mixed up with the rest of the parish as regards common assets and common liabilities that simply to disjoin might leave a very unjust balance between the parish gaining and the parish losing, and it requires very slight stretch of imagination to picture cases in which such pecuniary adjustments would be required. The two parishes concerned therefore are authorised to make these adjustments for themselves if they can, and failing them the Commissioners have power, after they have made an order as to the boundaries, to follow that up by an another order effecting such an adjustment as appears appropriate in each case. All that is a comparatively simple proceeding in point of principle, for it relates entirely to the settlement of details, and it does not involve that the parties or the Commissioners are authorised to determine what are the rights of the two parishes apart from such adjustment.'

"If it had appeared on the face of the proceedings that the Commissioners ordained Galashiels to accept liability without counterpart or consideration, the award might have been held to be *ultra vires*. But *ex facie* of the award it appears that what the Commissioners presumably consider a fair counterpart or equivalent is to be given by Melrose.

"Now, by statute the award of the Commissioners is given all the finality of a decree-arbitral pronounced by an arbiter under the Lands Clauses Act, and it can only be impugned on the recognised grounds on which such decrees-arbitral are subject to review. The Commissioners may or may not have made such an adjustment or given Galashiels such compensation as this Court *tota re perspecta* might have awarded, but I take it that is not the province or within the power of the Court to interfere with the Commissioners' determination on that ground."

The pursuer reclaimed, and argued—The matters about which parishes were to make agreements or failing agreement to get settled by the Boundary Commissioners were such as were "affected by the Act," but in the previous case—*Inspector of Galashiels* v. *Inspector of Melrose*, May 12, 1892, 19 R. 762—liability for relief of paupers within the transferred area was held not to be affected by the Act; therefore this order of the Commissioners dealing with this matter was *ultra vires*. The mere fact that the liability held still to attach to Melrose was liability to pay money did not make it a financial matter under the Act.

Argued for respondents — This was a financial matter with which the Boundary Commissioners were bound to deal under the 50th section of the Act failing an agree-

ment being made by the parishes themselves. That this was a question for the Commissioners was recognised in the case of *Borthwick* v. *Temple*, July 17, 1891, 18 R. 1190, the opinions in which were not affected as to this matter by those in the more recent case of *Galashiels* v. *Melrose*.

At advising—

LORD PRESIDENT—I have no doubt that the Lord Ordinary is right.

In the previous case we merely held that liability for the pauper there in question remained with the same parish as previously notwithstanding the Commissioners' order. The parishes in that case, which are the parishes here, having failed to agree upon the rectification of their financial arrangements necessary in consequence of the change of boundaries, went to the Commissioners to determine the matter.

The Commissioners saw that the burden of continuing to relieve paupers within the transferred area which the Court had declared to continue, pinched the old parish, viz., Melrose. Accordingly, instead of fixing that so much of the liability should be borne by the new parish in future, they quite properly ordained the new parish to relieve the old parish of the burden of maintaining the paupers, liability for whom remained with Melrose, at the same time ordering a *quid pro quo* to be given by Melrose.

This award is simply an equitable adjustment of the rates, and does not touch the question of liability which was decided in the previous case. I think this order of the Commissioners was quite within their powers, and I cannot say that I think the case presents any difficulty.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Guthrie—Dundas. Agents—Bruce & Kerr, W.S.

Counsel for the Defenders and Respondents—Rankine—C. N. Johnston. Agents—Romanes & Simson, W.S.

Tuesday, January 23.

FIRST DIVISION.

[Sheriff of Forfarshire.

HORSLEYS *v.* GRIMOND.

Ship—Bill of Lading—Discrepancy between Quantity of Goods in Bill of Lading and Quantity Delivered—Onus.

Where the quantity of goods delivered is less than the quantity stated in the bill of lading signed by the shipmaster, the *onus* of proving that the greater quantity was not in fact shipped, so as to relieve the ship from accounting for such quantity to the holder of the bill of lading, rests with the shipowner.

Where a master signed for 910 bales of jute and only 898 bales were delivered, the owner was *held* not to have discharged this *onus* by the evidence of the master and mate to the effect that all possible care had been taken both in shipping and in looking after the bales, and that those delivered must have exhausted the number shipped; especially as they explained that during the voyage several of the bales had had to be taken out of the ship in consequence of stranding, and were replaced.

Opinion (*per* Lord M'Laren) that where goods are measured by weight, pecuniary claims against the shipowner will not necessarily or probably arise upon a slight discrepancy between the weight stated in the bill of lading and that ascertained at delivery.

Messrs J. & A. D. Grimond, spinners, Dundee, shipped a cargo of jute from Calcutta by ss. "Hesper," owned by Messrs G. & M. H. Horsley, West Hartlepool, for delivery at Dundee. The bill of lading for one consignment, duly signed and delivered by the master of the vessel, stated that 910 bales had been shipped. In an action for the balance of freight still due, brought in the Sheriff Court at Dundee by Messrs Horsley against Messrs Grimond, the latter explained that only 898 out of the 910 bales had been delivered, and that the value of the 12 bales awanting fell to be deducted from the freight.

The pursuers pleaded — "(1) The said vessel having performed the said voyage, and delivered to the defenders respectively all the bales of jute shipped by or consigned to them as aforesaid, and delivered on board at Calcutta, pursuers are entitled, by the terms of the bills of lading, to payment of the freight thereof, with interest and expenses as craved for. (4) If the said 12 bales were not shipped at Calcutta, the pursuers are not responsible therefor."

The defenders pleaded—"(1) The pursuers being responsible, in terms of the charter-party and bill of lading, for the correct delivery of the goods in conformity with the bills of lading, their answer to these defenders' counter claim for 12 bales short delivered is irrelevant and ought to be repelled. (2) The pursuers having short delivered 12 bales of the quantity consigned to these defenders, and received on board the pursuers' vessel, the defenders are entitled to deduction of the value thereof from the balance of freight claimed from them under one and the same contract."

A proof was allowed, in which the pursuers put the chief officer and the master of the "Hesper" into the witness-box. The former deponed that he had most carefully checked with the aid of tally-clerks the bales as they were shipped at Calcutta, and that all so shipped were delivered at Dundee. He explained that the ship had gone aground in the Gulf of Suez, requiring the temporary removal of 150 of the bales into