

THE
SCOTTISH LAW REPORTER.

WINTER SESSION, 1894-95.

In order to secure regularity of publication, it is occasionally necessary to insert the Reports of Cases slightly out of the order of dates on which they have been decided.

COURT OF SESSION.

Tuesday, October 16.

FIRST DIVISION.

CUNNINGHAM v. PETHERBRIDGE.

Reparation—Slander—Master and Servant—Privilege.

In an action of damages for slander, brought by a domestic servant against her master, the pursuer averred that one evening she and a fellow servant took two men who had come to visit them into their bedroom; that the defender having discovered this ordered the visitors to leave the house; that about three o'clock on the following morning he came into the bedroom where the pursuer was alone and in bed, charged her with immoral conduct the night before, and with being the mother of an illegitimate child, and then expressed a wish to have connection with her. The defender pleaded that as the pursuer's master he was privileged in charging her with misconduct. *Held* that although a case of privilege might be disclosed at the trial, no such case appeared on the pursuer's averments, and that it was not necessary for the pursuer to put malice in issue.

Observed—The general rule is, that an accusation by a master to his servant of misconduct then and there brought to the master's knowledge is privileged.

Helen Cunningham, domestic servant, brought an action of damages in the Sheriff Court at Dundee against her employer, James Petherbridge, on the ground that he had slandered her while in his service.

The pursuer, averred, *inter alia*—"Pursuer and the other servants of the defender were allowed by him to have visitors, and on the evening of 7th April the sweetheart of pursuer and the sweetheart of the tablemaid in the employment of defender called upon pursuer and the said tablemaid . . . They were taken by pursuer and the said tablemaid into their bedroom . . . instead of to the kitchen, in order that any conversation that passed might not be heard by defender or any other member of his household in the flats above, . . . as defender had previously complained of the conversation reaching them from the kitchen. . . . On pursuer coming out of said bedroom for the purpose of procuring a drink of water for one of said visitors before they left, she came upon defender immediately on the outside of said bedroom. The defender thereupon ordered said visitors out, and sent the tablemaid to the parlour upstairs, where she remained till three or four o'clock next morning. The pursuer soon after went to bed in said bedroom. About three o'clock on the following morning defender went to pursuer in said bedroom and asked if she was sleeping. Pursuer replied that she was not, and defender thereupon charged her with being guilty of immoral conduct with one of said visitors on the previous evening in said bedroom. Pursuer repudiated this charge. . . . He also said that she was the mother of an illegitimate child, which allegation is untrue."

The pursuer further made averments to the effect, that having made these charges against her the defender then attempted to take liberties with her, and suggested that she should allow him to have connection with her, which she refused to do.

The defender denied these averments.

The defender pleaded—"(1) The pursuer's statements are irrelevant. (2) Privilege."

Upon 13th June 1894 the Sheriff-Substitute (CAMPBELL SMITH) repelled the first and second pleas-in-law for defender, and allowed the pursuer a proof.

The pursuer thereafter appealed to the First Division for jury trial, and submitted, *inter alia*, the following issues for trial of the case:—" (1) Whether on or about 8th April 1894, and within the defender's residence in South Tay Street, Dundee, the defender falsely and calumniously charged the pursuer with having been guilty shortly before of immoral conduct in said house with a man who had visited her there, to the loss, injury, and damage of the pursuer? (2) Whether upon the same occasion the said defender falsely and calumniously charged the pursuer with having been the mother of an illegitimate child, to her loss, injury, and damage?"

Argued for defender—The relationship of master and servant as a rule raised the presumption of privilege. There was nothing here to take the case out of the general rule. The charges were made immediately after the event giving rise to them. It was the master's duty to take the pursuer to task. Accusations referred to in issues 1 and 2 really constituted one charge of immorality. There were no averments of facts and circumstances from which malice might be inferred, therefore no issue should be allowed, and in any case "maliciously" should be inserted in both issues—*Innes v. Adamson*, October 25, 1889, 17 R. 11; *Laidlaw v. Gunn*, January 31, 1890, 17 R. 394; *Farquhar v. Neish*, March 19, 1890, 17 R. 716.

Argued for pursuer—There was here no case of privilege, and therefore no need to aver malice or insert "maliciously" in the issues—*M'Bride v. Williams & Dalzell*, January 28, 1869, 7 Macph. 427; *Ritchie & Son v. Barton*, March 16, 1883, 10 R. 813; *Ramsay v. MacClay & Company*, November 18, 1890, 18 R. 130. There was no reason for the accusation, and it was most ill-timed, being made at three o'clock in the morning in the servant's room. As to the second issue, the defender had no right or duty to charge pursuer with being the mother of an illegitimate child.

At advising—

LORD PRESIDENT—It may be convenient to take the issues *seriatim*, as the question raised on each is different. The first issue is "Whether . . . the defender falsely and calumniously charged the pursuer with having been guilty shortly before of immoral conduct in said house. . . ." The question is whether "maliciously" must be put in issue, and that depends on the case stated by the pursuer. The law presumes malice in all slanders, but that pre-

sumption is displaced when the facts, as stated by the pursuer, disclose that the defender had a duty to speak and a proper occasion for speaking of the matter in hand.

It cannot be maintained in every case that, given the relationship of master and servant, all conversations between the master and the servant touching the servant's conduct in the house are necessarily privileged. The general rule is that an accusation by a master to his servant of misconduct then and there brought to the master's knowledge is privileged; but it is necessary to look at the pursuer's condescendence to see whether that is the case here. Looking at that condescendence, I do not think it discloses on its face a case of privilege. The acts complained of by the master are alleged to have taken place on the evening of the 7th April, but no accusation was made until three o'clock on the following morning. The men left the house, and the master and the servant both went to bed. The pursuer's story is that at three o'clock in the morning the master went to the servant's room and in course of conversation accused her of immoral conduct, but that he also did a great deal more. The suggestion is that he visited her room for the purpose of soliciting her chastity, and that the visit of the young men was used as a mere pretext for the purpose of inducing her to consent. If that is a fair reading of the condescendence, it does not disclose a case of privilege. The facts may come out quite differently on evidence, and then it will be for the judge at the trial to instruct the jury that there is a case of privilege, and I think the interests of the defender will be sufficiently safeguarded by thus leaving it.

As regards the second issue a different question arises. There the accusation of misconduct is not of recent misconduct, but of misconduct at some antecedent time. It may turn out that the charge was a proper one, but this does not appear from the record. Matters may be brought out at the trial showing a case of privilege, but I think here also it will be safer to leave the issue without "maliciously," and to leave that question in the hands of the presiding judge. . . .

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court approved of the issues above quoted.

Counsel for Pursuer and Appellant—Gunn. Agent—John Mackay, S.S.C.

Counsel for Defender and Respondent—Jameson—A. S. D. Thomson. Agent—Alexander Ross, S.S.C.