levity of conduct or indiscretion on the part of a minister of religion would be a proper ground for the exercise of Church discipline in the form of a trial on libel before the Presbytery.

The pursuer then objected that on appeal to the Synod that body had remitted his case to a committee or commission with power to dispose of it finally. I agree with your Lordships that this is not the true cause of action as disclosed in the summons, and that it would not be fair to the defenders that their counsel should be called to answer it in this action. I will not attempt to anticipate all the defences which might be stated to an action on this ground. One obvious answer would be that the pursuer did not appeal to the Synod, as he might have done, from the deliverance of the commission, and ask their decision on the merits of his case. Another defence might be (I do not of course mean to indicate an opinion) that the pursuer had submitted to the jurisdiction of the commission.

In dismissing this action I do not wish to be understood as concurring in an opinion which is held by many, that in no circumstances ought a court of law to cut down a decree or sentence professing to emanate from a voluntary church court or ecclesiastical authority. There might be a usurpation of jurisdiction so flagrant that the Church itself might be compelled to resort to the civil courts for its protection against the acts of persons professing to represent it and acting in its name.

In the view we take of this case the question of the right of the pursuer to specific relief does not arise.

LORD ADAM and LORD KINNEAR concurred.

The Court recalled the Lord Ordinary's interlocutor, and *simpliciter* dismissed the action.

Counsel for the Pursuer and Reclaimer—Ure—Crabb Watt. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defenders and Respondents—Shaw, Q.C.—Younger. Agent—William Robson, S.S.C.

Thursday, January 30.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MURDISON *v.* THE SCOTTISH FOOTBALL UNION.

Reparation—Slander—Privilege—Association for Sport—Football Match—Referee.

Held (*aff.* judgment of the Lord Ordinary) that a referee at a football match between members of two clubs belonging to the Scottish Football Union, was privileged in making a complaint to the committee of the Union that a player had "used offensive language" to him during the match, and in giving evidence in support of his complaint to the committee.

Reparation — Slander — Association for Sport—Publication of Resolution—Privilege—Title to Sue and be Sued.

The pursuer in an action of damages for slander called as defenders (1) the members of committee of the Scottish Football Union, "as such committee and as representing the said Union"; (2) the members of the committee as individuals. The pursuer averred that the committee, acting upon a complaint by a referee at a football match between members of two clubs belonging to the Union, and in which the pursuer was a player, adopted a finding that the pursuer had used offensive language to the referee, and passed a resolution that he be severely censured, and be ordered to apologise to the referee, and that this finding and resolution were published in certain newspapers upon the instructions of the committee. *Held* (1) that the pursuer was not entitled to an issue against the committee as representing the Scottish Football Union, the ground of his action being that the committee, in the matter of which he complained, had acted without the authority of the Union; and (2) (*rev.* judgment of the Lord Ordinary) that the pursuer was entitled to an issue of slander against the members of committee individually, and that, having regard to the allegations as to publication, the pursuer's averments did not necessarily imply privilege or require that malice should be put in the issue.

Form of issue approved.

Reparation—Patrimonial Loss—Resolution of Association for Sport—Relevancy.

Held (*rev.* judgment of the Lord Ordinary) that a resolution of the committee of the Scottish Football Union suspending a member of a club belonging to the Union from playing, did not entitle him to an issue that the said resolution had been "wrongfully, incompetently, and unwarrantably passed and caused to be published by the committee, to his loss, injury, and damage," the alleged wrong not being one which affected any question of property or patrimonial right, and the appropriate issue, so far as it affected reputation, being an issue of slander. *Blasquez* v. *The Lothians Racing Club*, June 29, 1889, 16 R. 893, *distinguished.*

Expenses—Amendment of Record.

An amendment of record in the Inner House which did not involve any radical alteration of the pleadings, or a change of the ground of action, *allowed* on payment of expenses in the Inner House. *Morgan, Gellibrand, & Co.*, December 9, 1890, 18 R. 205, *distinguished.*

The facts of this case are narrated as follows by the Lord Ordinary:—"The Scottish Football Union is composed of all the football clubs in Scotland playing the game

under the Rugby Football Rules which have been admitted into its membership, and it is alleged that the affairs of the Union are managed by a committee.

"On 27th October 1894 a match was played at Mossilee, Galashiels, between the Gala Football Club, of which club the pursuer Murdison is a member and vice-captain, and the Watsonian Club, both of which clubs are members of the Scottish Union. At this match the third defender, James Dick junior, acted as referee. At the match there seems to have been a good deal of rough and disorderly behaviour, into which I need not go, because the pursuer has not lodged any issue in reference to what took place on the field. He seeks damages on account of what came after.

"On the day of the match, 27th October, the referee, James Dick junior, wrote to the secretary of the Football Union a letter in the following terms:—'As referee in the match Watsonians *v.* Galashiels, at Galashiels to-day, I regret that I find it my duty to report the treatment I received there. During the match, which was a fast and exciting one throughout, my decisions were repeatedly questioned by members of the Galashiels team, and I was the object of several offensive remarks. The spectators hooted and hissed every decision of mine which was not in favour of the local team—this I may say the Galashiels team made no effort to prevent. Immediately on the call of time I was surrounded by the entire crowd of spectators, and but for the prompt action of Messrs Gordon Cochrane, W. S. Brown, and a few members of both teams, would have fared badly. We had to fight our way to the pavilion, and after leaving the field were pelted with mud, &c., and followed by hundreds of men and boys till safely within Mr Cochrane's house. Beyond a few kicks on the legs, and a blow from a stone on the back of the head, I sustained no injury. The Watsonians were similarly treated during their drive to the hotel. As to a reason for the demonstration, I am at a loss. If I was glaringly unfair, I presume the Galashiels team will appeal to the Union committee regarding my decisions; otherwise the matter is more inexplicable and unwarranted. I make no further comment, but simply leave this letter in your hands, to be dealt with as you see fit.'

"On 29th October the secretary replied—'I have your letter of the 27th inst., which will have the attention of the committee as soon as I am able to place all the necessary information before them. Meantime I will be obliged if you can inform me of the name of any one or more players who used offensive remarks to you during the game, or who questioned your decisions.'

"On the same day the defender, Dick, replied—'*Gala* v. *Watsonians*. I am in receipt of your letter of to-day's date. I can give the name of one player who was probably the worst offender, both in questioning my decisions and in making offensive remarks; I refer to T. Murdison, one of the Gala forwards. He is perhaps unfortunate in being singled out, as I could have mentioned others had I known their names. I regret that I should have to mention names at all, but I believe in doing so I am furthering the best interests of football.'

"In consequence of these letters a meeting of the committee of the Union was held, and it was resolved to investigate the disturbances complained of. This resolution was intimated to the Gala and Watsonian clubs, but in the intimations no express reference was made to any charge against the pursuer.

"The inquiry was held on 9th November. The pursuer attended and gave evidence, and he denied the statements made about him in Mr Dick's letter of 29th October. Mr Dick also gave evidence, and the pursuer states that he not only reiterated the charges in his letters, but further accused the pursuer of having during the match called him, the referee, 'a bloody little brute.'

"The pursuer avers that the inquiry was conducted unfairly and irregularly in various particulars, which will be noticed afterwards.

"The result was that on 9th November the committee adopted the following finding and resolution—'That T. Murdison used offensive language to the referee.' . . . 'That T. Murdison be severely censured, and be ordered to apologise to the referee.'

"It is averred that the committee specially instructed the secretary to 'communicate their decision to the press.'

"The pursuer did not apologise, and on 6th December 1894 a resolution was adopted 'that T. Murdison be suspended from playing until the committee withdraw the suspension.' The pursuer's averment on this point (Cond. 7) is that this resolution was adopted by 'the members of the committee, who are the second defenders, or some of them.'

"It is averred in Cond. 7 that the 'findings and resolutions were published in newspapers containing football intelligence throughout Scotland with the first and second defenders' knowledge and sanction, and thus obtained wide publicity among football players and among the general public.'

"The pursuer avers that this suspension was illegal and incompetent, and that its effect is 'to prevent the pursuer from playing in any club or against any club which is a member of the Football Union. Such clubs refuse to play along with or against any person who has a professional stigma set against him, and, in consequence of the jurisdiction asserted by the first and second defenders, members of clubs composing the Union decline to play with or against the pursuer, for fear that the said defenders should treat their doing so as an offence.' The defenders admit that, so long as the suspension stands, no club which is a member of the Scottish Football Union is entitled to play either with or against the pursuer.

"The defenders called in this action are —(1) The Scottish Football Union and its

president, vice-president, secretary, and treasurer, and also various individuals, as forming along with these officials the committee of the Football Union, 'as such committee, and as representing the said Union,' described as the first defenders; (2) the various individual members of the committee, called the second defenders; and (3) James Dick junior, called the third defender. The action concludes for £1000 from 'the first defenders, as committee foresaid, and as representing the said Union, and the second defenders as individuals;' and for £500 as against James Dick junior, the third defender.

"Defences have been lodged for (1) the first and second defenders, and (2) for James Dick junior, the third defender.

"As in both defences the first plea is that the action is incompetent, and second, that it is irrelevant, the case was debated in the procedure roll. In the course of the debate it appeared desirable that the pursuer's case should be expressed in issues, more especially as his counsel intimated that he did not intend to propose issues in regard to what took place on the field; and accordingly, by interlocutor of 26th June the pursuer was appointed to lodge the issues which he proposed. He now lodged thirteen issues, on which, as well as on the pleas against the competency of the action, parties were heard."

The pursuer averred—"(Cond. 4) The said letter of 29th October 1894, written and dispatched by the third defender, was in part of and concerning the pursuer, and falsely, calumniously, and maliciously represented, and was intended to represent the pursuer as having used coarse and improper language unbecoming a gentleman and a member of a club in the Scottish Football Union, as being a person who did not play the game of football fairly in accordance with the laws of said game, and in particular, as being a person who, in defiance of said laws, openly challenged and repudiated the authority of the appointed referee, and as being a person unworthy to play football with the members of clubs composing the said Union, and with whom the members of said other clubs ought not to play football; and further represented the pursuer as being a person who had falsely and calumniously imputed gross partiality and unfairness, or at least gross incompetency, to the said third defender in his actings as referee at said match, and had falsely and calumniously represented that the said defender was unfit for the post of referee, and was a dishonest umpire. These imputations were wholly unfounded, and have led to the pursuer being wrongfully excluded, as after mentioned, from playing in clubs and with clubs belonging to the Union. The pursuer through this exclusion has been greatly injured, not only in his feelings but in his reputation. (Cond. 6) . . . At said inquiry, in the presence and hearing of the second defenders, or one or more of them, he falsely, calumniously, maliciously, and without probable cause, not only read and reiterated the charges against the pursuer contained in his said letters of 27th and 29th October, but further charged the pursuer with having, at said match on 27th October, called him (the third defender) 'a bloody little brute.' Said charges were absolutely unfounded, and the said defender thereby made and intended to make the same representations of and concerning the pursuer as are detailed in Cond. 4. (Cond. 7) . . . On or about 6th December 1894 the members of committee, who are the second defenders, *or some of them* [the words in italics were deleted by the amendment of record in the Inner House, afterwards referred to], falsely, calumniously, maliciously, and without probable cause, adopted and published a pretended resolution in the following or similar terms—'That T. Murdison be suspended from playing until the committee withdraw the suspension.' All the said pretended findings and resolutions were published in newspapers containing football intelligence throughout Scotland with the first and second defenders' knowledge and sanction, and thus obtained wide publicity among football players and among the general public. [The following additional statement was made by the amendment:—Upon the said committee's instructions the finding and resolution of 9th November 1894 were communicated to, *inter alia*, the following newspapers, viz., the *Edinburgh Evening Dispatch* and the *Glasgow Herald*, and on or about 7th December 1894 the resolution of 6th was also communicated to the said *Edinburgh Evening Dispatch* newspaper. These newspapers and others published the said finding and resolution of 9th November so communicated in their issues of the following dates, viz., the *Edinburgh Evening Dispatch* on the 12th November 1894, and the *Glasgow Herald* on the 12th November 1894. Subsequently the said resolution of 6th December was published in the issue of the *Edinburgh Evening Dispatch* on the 7th.] The pursuer's suspension and all the said pretended findings and resolutions were *ultra vires* of the said defenders, and incompetent and illegal."

The defenders pleaded that the action was irrelevant and incompetent, and the first and second defenders further pleaded privilege.

Issues were lodged for the pursuer against the third defender embodying the different innuendoes set forth in his condescendence. Four issues were directed against the first and second defenders relating to the first deliverance of the committee, and containing the same innuendoes as those against the third defender.

The 13th issue lodged was in the following terms:—"Whether the Scottish Football Union, through its committee, and the said committee and the second defenders, or one or other and which of them, or one or more and which of the second defenders in name of the first defenders, on or about 6th December 1894, wrongfully, incompetently, and unwarrantably passed and thereafter caused to be published in the newspaper press a resolution 'that T. Murdison be suspended from playing until the committee withdraw the suspension,' to the

loss, injury, and damage of the pursuer. Damages laid at £400."

The Lord Ordinary on 26th July 1895 pronounced an interlocutor by which he dismissed the action against the defender Dick as irrelevant, refused the first twelve issues proposed, and approved of the thirteenth issue.

Note. — [*After narrating the facts as given above*]—"I am not prepared to dismiss the action as incompetent. The charges against the Football Union and the committee and its individual members are, it is true, quite different from those made against the third defender Dick; but that defender is sued for a separate sum of damages. The charges, however, involve much the same inquiry, and it does not seem to be incompetent—although I doubt whether it is convenient—to combine with the action against him the separate and different claim against the Union and the committee and its members. But the defenders maintained that the incompetency of the action arose from this, that a slump sum of £1000 was claimed against two defenders, distinguished in the summons as being different parties, viz., the Union and the committee in the first place, and secondly, the individual members of the committee; and it was said that the action was therefore incompetent on the authority of the cases of *Barr* v. *Neilson*, 20th March 1868, 6 Macph. 651, and *Taylor* v. *M'Dougal & Son*, 15th July 1885, 12 R. 1304. The objection is strict and technical, and I rather think that these cases do not apply, because all of these defenders, supposing them different, appear to have been participant in the acts of which the pursuer complains, and the question raised by the action is whether all or any of the defenders are chargeable with and liable in damages for acts in which they are all said to have been participant. There is no decision that such an action is incompetent.

"The cases of *Somerville* v. *Rowbothan*, 27th June 1862, 24 D. 1187, and *The Renton Football Club* v. *M'Douall*, 30th March 1891, 18 R. 670, seem to meet any objection to the manner in which the Football Union has been called.

"Holding, then, that it is not necessary to dismiss the action as incompetent, it is necessary to consider its relevancy, and the issues which have been lodged, on which indeed the argument mainly turned.

"The first eight issues are directed against the defender Dick, and the other defenders have no concern with them. Dick, on the other hand, has nothing to do with the remaining five issues. The first four issues are laid on his two letters to the secretary of the Union above quoted, and the fifth, sixth, seventh, and eighth, on the evidence which he gave at the inquiry instituted by the committee of the Union.

"Now, speaking generally, it appears to me that the letters are temperately and moderately expressed, and bring before the committee a legitimate complaint without the use of exaggerated or defamatory language. Further, I think that supposing Mr Dick had reason as referee to make a complaint at all, his complaint was addressed to the proper quarter, and that altogether independent of any special rules on the subject.

"It was argued that according to the rules of the Union, complaints when competent fell to be made to the Union, not to the committee. But the Union is a body of such a nature that it must of necessity act through a committee; and I think that a complaint to the Union could only be made to it through the committee, and that every complaint to the committee was also a complaint to the Union. Further, I consider that the power to take cognisance of the conduct of the clubs which were members of the Union during their matches, and to entertain complaints about such conduct, was necessarily inherent in such a body as the Union, and in the committee by which its affairs were carried on.

"Such letters as those under consideration, being letters bringing definite charges before the appropriate body or tribunal, are not readily to be extended beyond their natural meaning by innuendo, so as to make them embody charges which their words do not fairly express. The two letters read together import no more than that the pursuer used language which was offensive to the referee, and that he questioned his decisions.

[*His Lordship here dealt with the issues in detail.*]

"I am further of opinion that Mr Dick, in writing these letters to the committee of the Union, was unquestionably in a strong position of privilege; and further, that this is a case in which a general averment of malice is insufficient, and that the record contains no sufficient averment of particulars from which malice can be inferred. I think that there is really no such statement. The cases on this point were quoted and commented on at the argument. I have carefully considered them, and find it difficult to extract from them any very clear principle and distinction. I think they are consistent with the conclusion I have expressed.

"The next four issues are directed against the Union, the committee, and the members of the committee. They relate to the first deliverance of the committee, by which it was found 'that T. Murdison used offensive language to the referee.' . . . 'That T. Murdison be severely censured and be ordered to apologise to the referee'. . . . On the whole, I am of opinion that these issues should be disallowed, on the ground that it is not actionable to say of a man that he used offensive language and is severely censurable, and also on the ground that the committee and the members of it were in a position of privilege, and that no particulars inferring malice are averred.

"There are, it is true, a number of statements with reference to the manner in which the inquiry was conducted which are founded on as evincing malice, or at least such disregard of the pursuer's rights as might be held equivalent to malice. I do not think it necessary to advert to these in detail.

I think the complaint as to the exclusion of a newspaper correspondent is absurd; the reason for such exclusion, whether a good or a bad one, being plainly in no way indicative of *animus* against the pursuer. Assuming the truth of the pursuer's averments as to the procedure of the committee, I cannot say that I think they indicate recklessness or carelessness, but rather deliberation. I do not mean to say that they were in all points to be commended, or that the pursuer's interests, assuming his averments, were safeguarded as they would have been in a court of justice. But that was hardly to be expected, and I am not prepared to regard the defects in procedure averred as indicative of malice or of carelessness equivalent to malice.

"The statement that the committee published their resolution in the newspapers caused me at first some difficulty. It is denied, but (although very unlikely to be true) must be accepted in a judgment on relevancy. If the committee did publish their resolution, that would certainly be, to my mind, a highly reprehensible act. But if the resolution itself be not defamatory, I do not see that the publication of it can be actionable.

"There remains the thirteenth issue, which is different from all the rest. It refers to the second deliverance which purported to suspend the pursuer from playing until the committee withdrew the suspension. Under this issue damages are claimed as for a legal wrong, and the case of *Blasquez* v. *Lothians Racing Club and Reid*, 29th June 1889, 16 R. 893, was referred to as a precedent. In that case the third issue adjusted was whether 'the defenders, the Lothians Racing Club, wrongfully expelled the pursuer, or caused him to be expelled, from the ring or paddock of the Lothian Racing Club and Edinburgh meeting at Musselburgh, to the loss, injury, and damage of the pursuer,' which appears to warrant an issue for a wrong of a kind not very dissimilar to that complained of here.

"The pursuer maintains that the sentence was wholly *ultra vires*. The defenders maintain that power of suspension is expressly conferred by the rules of the Union. They refer to a rule at page 31 of a book of bye-laws and laws of the game, bearing date 1890-91. But the pursuer does not admit that these rules were in force at the date in question, and he points to a book of bye-laws and rules bearing date 1894-95, which does not contain the rule in question. If the defenders shall prove that the rule on which they found was in force, they may thereby completely meet the pursuer's case. But I do not see how the pursuer's averments that the rules in force are all contained in the later handbook can be disregarded. It seems a point which cannot be cleared without inquiry.

"Now, if a wrong has been done to the pursuer in this matter, I am not disposed to regard it as other than a serious wrong. It does not affect his patrimonial interests, nor necessarily or directly his character; but it puts him in a position of great disadvantage, obloquy, and discomfort. It was, if it have the effect which both parties attribute to it, a sentence of extreme severity, not (whether the committee have power or no) to be lightly pronounced; and I cannot help thinking that it is a wrong—if a wrong at all—for which redress against those who did the wrong cannot be refused without denial of justice. I think it much the most serious wrong averred.

"But the pursuer has stated this part of his case in such a manner as to make it very difficult to allow the issue he proposes. For he avers in Condescendence 7 that this wrong was done, not by the first defenders—that is, the Union and committee as such—but by the second defenders, *i.e.*, the individual members of the committee, or some of them; while the issue proposed is whether the wrong was done by the Union through its committee, and the said committee (*i.e.*, the first defenders) and the second defenders, or one or other and which of them, or one or more and which of the second defenders, in name of the first defenders.

"It is right to say here that the pursuer craved leave to amend the record, and that one of the amendments which he desired to make was to delete from this part of his record the words 'or some of them.' He was not, however, prepared to pay the expenses which I was prepared to award as a condition of allowing the amendment. Besides, the amendment did not fully meet the difficulty.

"Having regard, however, to the averment that the findings and resolutions were published with the knowledge and sanction of the first defenders, as well as of the second, and also the express adoption of the sentence by the Union, I am inclined to think that the difficulty raised by the pursuer's record, though troublesome, may be got over, and that the last issue may be approved of."

The pursuer reclaimed.

In the course of the debate in the Inner House the pursuer craved leave to amend his record by deleting the words "or any of them" in Cond. 7 quoted above, and by making the addition, above referred to, in that condescendence, specifying the papers containing and the dates of the appearance of the resolutions published.

The respondents objected to the proposed amendments being allowed except on payment by the pursuer of all expenses since the closing of the record, as without these amendments the record would not have been relevant — *Morgan, Gellibrand & Company* v. *Dundee Steamship Company*, December 9, 1890, 18 R. 205; *Gallacher* v. *Pattison*, November 10, 1891, 19 R. 79; *Haughton* v. *North British Railway Company*, November 29, 1892, 20 R. 113.

LORD PRESIDENT—The question at present before us is, what are the conditions upon which we should allow the pursuer's proposed amendments. It seems clear that the party proposing to amend must pay the expenses incurred in the Inner House, inasmuch as the expense of the discussion

here has been wasted. Quite possibly he may ultimately be found liable to pay a proportion of the expenses in the Outer House subsequent to the date of closing the record; but that is a complicated question, which it would be extremely difficult if not impossible for us to determine at this stage. Accordingly, the safe course seems to be to allow the proposed amendments conditionally upon payment of expenses in the Inner House. With reference to the cases cited by Mr Ure, I do not read them as laying down, as an inflexible rule, that no amendment of the record is allowed in the Inner House except upon payment of expenses from the closing of the record. Our practice is more discriminating, and has regard to the quality of the amendment. The rubric of the report in *Morgan, Gellibrand, & Company* has very well caught the spirit of the principle—"Amendment of record, involving considerable alteration of the pleadings or a change of the ground of action, will be allowed in the Inner House, either in reclaiming-notes or in appeals, only on payment of the expenses in the cause from the date of closing the record, and the account of expenses must be paid before further hearing by the Court."

The true principle of the rule is that the expense occasioned by some defect in the record which is to be remedied by the amendments proposed must be borne by the party amending, and if such defect be of a radical nature, then the date for fixing the term when expenses became due is the date of the closing of the record. But this rule does not preclude the Court from making less onerous conditions in allowing less radical amendments, or amendments the scope of which is uncertain and may be elucidated by further discussion. In this case I do not wish to prejudge the question as to whether at a subsequent stage the pursuer may not also be found liable in the expenses in the Outer House.

LORD ADAM—I am of the same opinion. The true principle is that the expenses caused by amendments should be put upon the party desiring to make those amendments. There is however no general rule, such as that propounded by Mr Ure, to the effect that expenses should always be found due from the date of closing the record. That would be a dangerous rule, because it might prevent a party from making a judicious amendment, which would not have the effect of rendering nugatory all the expense already incurred by the parties.

LORD KINNEAR — I agree. It is quite possible that an amendment may be proposed which is a proper and even a necessary one, but which, in cases where the record is already clear and explicit involves no further expense at all. Accordingly the rule laid down by your Lordship seems to me to be a sound one.

LORD M'LAREN was absent.

The Court allowed the pursuer's amendment conditionally on his paying expenses of the discussion in the Inner House. The pursuer also proposed four additional issues, embodying with some modifications the purport of the thirteen issues already proposed by him, including an issue against the third defender without innuendo.

Argued for reclaimer—(1) The action was laid competently—*Jack* v. *Fleming*, October 15, 1891, 19 R. 1, and cases cited in Lord Ordinary's note—*Smyth* v. *Muir*, November 13, 1891, 19 R. 81; *Liquidators of Western Bank* v. *Douglas*, January 21, 1860, 22 D. 447, at 497. The Union and the individual members of the committee were all acting together and concurring in doing the one wrong, and were therefore all liable. (2) The pursuer had a patrimonial interest, having been deprived of his lawful recreation by this slander, and was therefore entitled to damages, as in the case of a person expelled from a club. Accordingly he was entitled to the 13th issue allowed by the Lord Ordinary—*Blasquez, supra*, 16 R. 893; *Paterson* v. *Welch*, May 31, 1893, 20 R. 744; commented on *Waddell* v. *Roxburgh*, June 9, 1894, 21 R. 883. (3) As regards the defenders' plea of privilege, the pursuer was in no relation to the Union, and did not consent to abide by their jurisdiction, and so there was no privilege in the letters or evidence. But in any case the publication in the papers was not covered by privilege—*Rankine* v. *Roberts*, November 26, 1873, 1 R. 225.

Argued for respondents—(1) The action was incompetent, there being no authority for combining two entirely separate actions against separate defenders, on separate grounds, with one conclusion for a slump sum—*Barr* v. *Neilson*, March 20, 1868, 6 Macph. 651. Apart from the inconvenience of such an action, the defenders were seriously prejudiced thereby. (2) There was privilege on the face of the action, and no averments had been made by the pursuer whence malice could be inferred. (3) The pursuer had not averred any patrimonial loss, and had therefore no right of action, and the issue allowed by the Lord Ordinary should not be admitted—*M'Millan* v. *Free Church*, July 19, 1861, 23 D. 1314 at 1346; *Forbes* v. *Eden*, April 11, 1867, 5 Macph. (H. of L.) 47, at 51. The case of *Blasquez* referred to by the Lord Ordinary was a much stronger one than the present. The principle of the decisions in the English club cases was that the member expelled had been deprived of some right of property. No such loss was averred here.

At advising—

LORD KINNEAR—I agree with the Lord Ordinary that, in so far as regards the defender James Dick, there is no issuable matter on record. None of the various innuendoes which the pursuer proposes in the separate issues can in my opinion be allowed. The object with which they are framed seems to be to put to the jury a variety of arguments more or less forcible for holding that the language of which the

pursuer complains is in its normal acceptation libellous. But that is not the purpose of an innuendo. I mean that an innuendo ought to be an averment that words which in their ordinary acceptation are not libellous, had, in the circumstances in which they were used, a specified libellous meaning, or that they had a libellous application not otherwise obvious. The pursuer must therefore define with precision the specific meaning which he ascribes to language not obviously libellous, and I think it was a fair criticism that was made upon the pursuer's innuendo that he proposes to put a great variety of somewhat vague meanings on the same words. But when the innuendoes are examined, which I do not think it necessary to do in more detail, it appears to me that none of them are legitimate innuendoes in the sense I have described. In so far as they do more than suggest arguments upon the construction of the language used, they either add to the defender's words something which he did not say, or else they put in more violent language what he has expressed in perfectly moderate and reasonable language.

I agree with the Lord Ordinary that none of the eight issues which were proposed in the Outer House should be allowed. The question remains whether the new issue which the pursuer proposes without an innuendo can be sustained. Now, I agree with the Lord Ordinary that the statements made by the defender Dick, of which the pursuer complains, are not a fit subject for an action of libel. The pursuer's own averments disclose a condition of things of which any umpire who was treated as the defender is said to have been treated was entitled to take notice. I entirely agree with what the Lord Ordinary has said upon this matter. It appears to me that the letters are temperately and moderately expressed to bring before the committee a legitimate complaint, without the use of exaggerated or defamatory language. Further, I think that supposing Mr Dick had reason as referee to make a complaint at all, his complaint was addressed to the proper quarter, and that altogether independent of any special rules upon the subject. But notwithstanding that the defender might be entitled to express an honest opinion to the effect contained in his letters, and afterwards in his evidence before the committee, he might nevertheless be liable in damages if it could be shown against him that he was not acting honestly and in the exercise of the privilege which the occasion gave rise to, but dishonestly for the malicious purpose of injuring the pursuer; and accordingly we must consider whether the pursuer has not made sufficient averments of malice to entitle him to an issue. I think that he has not. I agree with the Lord Ordinary that this is one of those cases in which it is necessary that a specific averment of facts and circumstances, from which malice is to be inferred, ought to be made before the pursuer can be allowed to have an issue. Malice must always be a matter of proof. It may in many cases be inferred from the violence of the language used, or it may be inferred from some improper method of publication. But in the present case it cannot be suggested that either of these grounds exists for inferring malice, and therefore it must be inferred from extrinsic circumstances which ought to have been averred. But there is no such averment. It is not said that the pursuer and defender knew anything of one another before the occasion which gave rise to the complaint, and no relation whatever is averred as existing between them except that of player and umpire. It seems to me that there is nothing on record to rebut the presumption which arises from a privileged occasion, or to displace the honest and proper motive of the defender, and to show that he was acting dishonestly and maliciously. I am therefore of opinion that in so far as regards this defender the action ought to be dismissed.

There remains the question whether there is any case against the other defenders, the Scottish Football Union and its committee, and the individual members of the committee. The case against the committee stands in a somewhat different position from that in which it stood before the Lord Ordinary. His Lordship thought that the committee also was privileged, and that there was no averment from which it could be inferred that they were acting maliciously. But the pursuer has amended his record in the Inner House, and he now alleges that the committee, after making a certain inquiry which was conducted, according to his statement, in an exceedingly partial, unfair, and irregular manner, came to a certain conclusion against him; and then he goes on to say that upon the instructions of the committee, the finding and resolution against him, which was that the pursuer had used offensive language to the referee, and that he should be severely censured and be ordered to apologise, were communicated to the following newspapers; and then there follows a list of the newspapers—the *Edinburgh Evening Dispatch* and the *Glasgow Herald*—on the 7th December 1894, and it is added that the resolution so communicated was published by both of these newspapers in November and December.

Now, it appears to me that a statement by such a body published to the world in newspapers may be injurious to the reputation of the person affected, and I am not prepared to say, that if such a body as this publishes to the world that a particular person has used offensive language to a referee which is severely censurable, and that he ought to be called upon to apologise, such a statement cannot be so injurious to the person charged that, if he is charged falsely, he should not be entitled to damages. The defenders are not in a position to say that such a statement could not cause the society of the pursuer to be shunned by those with whom he was accustomed to associate in playing the game of football. If it had that result, then, according to the ordinary rule, it is a statement on which he is entitled to ask the verdict of the jury

whether it was or was not defamatory or injurious to him. I do not express any further opinion than that I think this statement so published is one which the pursuer is entitled to lay before the jury; but if it is in itself injurious, the same question arises with reference to the defenders, who were charged with the responsibility of making it, as with reference to the case against the other defender Dick, whether they were not in a privileged position, and if so, whether any sufficient averment of malice is made against them. When the case was before the Lord Ordinary his Lordship thought in the first place that their position was clearly privileged, and in the second place that there was no sufficient averment of malice with reference to the committee any more than with reference to the other defender. In the aspect which the case has now assumed I am not prepared to assent to either of these conclusions. I think it is very possible that it may turn out that the members of the committee who were chargeable with this publication were privileged, but I think that may depend upon facts and circumstances which are not fully known to us at present. It may depend upon the rules of the society, and upon the extent to which the pursuer has submitted himself to the censure and discipline to be exercised by the governing bodies of the society. These are circumstances as to which we are not fully informed. It is enough to observe in the first place that the pursuer has averred against the committee conduct with reference to their treatment of him, and to the extent to which these averments are proved he is entitled to say that it was unfair and irregular; and secondly, it must be observed that there may be a privilege in a society of this kind to discuss matters and to promulgate opinions with reference to them among the members of the society itself, which would not necessarily carry with it a right to publish them to the world—that is to say, to publish injurious matter to persons in regard to whom no such privilege can exist. It appears to me therefore that in the first place there is a sufficient case upon this issue to go to the jury; and secondly, that it ought to be left to the Judge at the trial to direct the jury, according as the facts turn out, whether the case is one of privilege or not, and therefore whether it will be necessary for the jury to find malice in order to entitle the pursuer to succeed. I should be disposed, therefore, to allow the pursuer the third issue which he proposes in his amended issues, but not in the terms in which he proposes it. It is proposed to put to the jury—"Whether on or about 9th November 1894 the Scottish Football Union, through its committee, and the said committee and the second defenders, or one or other and which of them, or one or more and which of the second defenders, made a finding and passed a resolution in the following terms." Then it quotes the resolution I have referred to, and goes on—"and published or caused it to be published in the following newspapers," &c.

Now, I think the pursuer has averred no case upon which he is entitled to complain of this finding and publication except against the individual members of the committee against whom he may prove that they made the publication. There is no case against the Scottish Football Union upon this matter. If the pursuer was injured, the persons liable for it are those who did the wrong. The pursuer does not aver, and I think his averments exclude the idea that the Scottish Football Union as a body, if it be a body liable to be sued in such a matter at all, is answerable for the wrong of which he complains. On the contrary, he says that the committee had no authority from the Football Union to act in the manner of which he complains. Therefore I am of opinion that the action must be dismissed against the first called defenders as well as against the private defender Dick, and that the only case that remains is one against the individual members of the committee. In the working out of the case against them it will of course be necessary to prove against each of them that he individually was responsible, first, for the passing of the defamatory statement of which he complains, and secondly for its publication. It is not a complaint which can be established upon the committee generally, or against such a society as the Football Union generally. It must be proved against each particular wrongdoer who is said to be answerable for the wrong, if wrong there was.

There remains a question of a somewhat different kind, whether the pursuer is entitled to the issue which the Lord Ordinary has allowed—[*His Lordship here quoted the issue*]. Now, I am unable to ascertain from anything stated on record, or from any argument which we had the advantage of hearing, what is the legal right of which the pursuer complains that he was deprived, as he says in his issue. It appears to me, from the statement that if a resolution in these terms were published in the newspapers, and if it had induced persons who would otherwise be willing to play football with the pursuer to refuse to do so, it might possibly support an issue for defamation. But the pursuer disclaims any intention to take an issue of slander upon this resolution. He says that he desires only an issue which would give him reparation for the substantive wrong done to him. I confess I am unable to see what the substantive wrong was. All that he says about it is that it was illegal and incompetent, and that its effect is to prevent him from playing in any club or against any club which is a member of the Football Union. Now, how does it prevent him from doing so? It must either mean that the Football Union as a body decline to play, or that they advise their members not to play. If the latter is the true meaning, that is just an innuendo of defamation and nothing else. If he complains, not of the defamation, but of the fact that people would not play football with him, that does not appear to me to be a legal wrong or an

invasion of any legal right. Nobody has a right which he can enforce at law to compel other people to play a game of football with him. If there be an agreement between them to play a game together, that is not an agreement which the law will enforce. The general rule is that such agreements are personal. Agreements to associate for purposes of recreation, or agreements to associate for scientific or philanthropical or social or religious purposes are not agreements which courts of law can enforce. They are entirely personal. Therefore in order to establish a civil wrong from the refusal to carry out such an agreement, if it can be inferred that any such agreement was made, it is necessary to see that the pursuer has suffered some practical injury, either in his reputation or in his property. No averment of that kind is made. As to the first kind of injury, as I have already stated, the pursuer disclaims the idea of putting an issue upon that ground of charge.

The Lord Ordinary has referred to the case of *Blasquez* v. *The Lothians Racing Club* as an authority for the issue which he thought it right to grant in this case. That appears to me to be a case entirely distinct, because what was complained of there was that the pursuer had been expelled from a public place, that is, a place to which presumably he would have been entitled to resort unless he had been wrongfully turned out of it by the persons of whom he complained. The complaint was that he had been wrongfully expelled from the ring of the Lothians Racing Club's Edinburgh Meeting at Musselburgh to his loss, injury, and damage. Now, that is a totally different kind of complaint from that which the pursuer makes here. It appears to me, therefore, that upon this ground there is no cause of action which can be sustained, and I should be disposed to suggest to your Lordships that we ought to recal the Lord Ordinary's interlocutor and dismiss the action as against the defenders first called, and also against the defender third called, and to allow the one issue which I referred to, amended in the manner I have suggested, against the defenders second called, and against them only. Supposing that issue is allowed, I do not understand that the defenders make any motion that they should be allowed a counter issue.

The Lord President, Lord Adam, and Lord M'Laren concurred.

The Court dismissed the action as against the first and third defenders, and allowed an issue against the second defenders in the following terms:—"Whether, on or about 9th November 1894, the defenders, or one or more and which of them, made a finding, and passed a resolution in the following terms, videlicet—'That T. Murdison used offensive language to the referee,' meaning thereby James Dick, the referee at a football match played at Galashiels on 27th October 1894; 'that T. Murdison be severely censured and be ordered to apologise to the referee,' that is, to the said James Dick; and whether the defenders, or one or more and which of them, sent or caused to be sent a copy of the said finding and resolution to Mr William Wintrup, honorary secretary of the Gala Football Club, on or about 10th November 1894, and published the said resolution or caused it to be published in the following newspapers, videlicet, the *Edinburgh Evening Dispatch* of 10th November 1894, and the *Glasgow Herald* of 12th November 1894: Whether the said finding and resolution are of and concerning the pursuer, and are false and calumnious, to the pursuer's loss, injury, and damage. Damages laid at £1000."

Counsel for Pursuer — Dickson — M'Lennan — Cooper. Agent — Richard Lees, Solicitor.

Counsel for Defenders — Ure — Cullen. Agents—Strathern & Blair, W.S.

Wednesday, February 5.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

BROWN *v.* FURNIVAL & COMPANY.

Reparation—Negligence—Master and Servant—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *sub-sec.* 3.

A workman was injured while engaged along with three fellowworkmen in lifting into an upright position part of a printer's guillotine, which was being removed in sections, and which, previous to the attempt to place it upright, was lying on its side on a lorry. It had been contemplated that, as on previous occasions, the part in question, which consisted of the body of the machine, would weigh 6 cwt. or 7 cwt., but owing to a breakage, rendering it impossible to detach the knife block, its weight upon this occasion was 9 cwt. The order was given by one of the men who was directing the operation, and who himself assisted in the manual labour. It was represented to him by pursuer and the others that it would be dangerous to attempt to lift the machine with only four men available, but notwithstanding this he ordered the operation to be proceeded with.

Held that there was no actionable negligence, within the meaning of sec. 1, sub-sec. 3, of the Employers Liability Act 1880, on the part of the workman in charge in giving the order.

Question—Whether a workman assisting in and directing such an operation is a person "to whose orders or directions the workman at the time of the injury was bound to conform," within the meaning of the same subsection.