Tuesday, January 9

SECOND DIVISION.

[Lord Kincairney, Ordinary.

M'CALLUM *v.* FINDLAY, M'DIARMID, & COMPANY.

Reparation—Slander—Privilege—Question of Privilege Left Open for Determination at Trial.

A farm servant brought an action of damages for slander against a firm of bottlers, who had written to his master that the pursuer had on the day before deliberately stuck a knife into the leg of their horse drawing their van, and that they thought it desirable that the matter should be brought under his notice, as it was possible that his horses might be subjected to similar treatment.

The defenders stated that they had written the letter on the report of the vanman in charge of the horse on the occasion in question, because they thought that what had been reported to them should be communicated to the pursuer's master as a statement made to them. They averred that they had no knowledge of the pursuer and no malice towards him.

The Court (*aff.* judgment of Lord Kincairney) *held* that this was not *prima facie* a case of privilege and that malice did not need to be inserted in the issue, and *approved* of an issue in ordinary form, the question of privilege being left open for determination at the trial.

Donald M'Callum raised an action for £150 damages for slander against Findlay, M'Diarmid, & Company, City of Glasgow Bottling Stores, Glasgow.

The pursuer averred—"(Cond. 1) The pursuer is a workman in the employment of Mr John Shaw, tenant of the farm of Nerston, near East Kilbride. He has been in said employment for over three years. He is a married man and has a family. Among his other duties pursuer has the charge of and looks after his employer's horses. (Cond. 2) On or about 29th November 1898 pursuer was driving a horse and cart belonging to Mr Shaw from Loch Katrine Distillery, Glasgow, to Nerston. When he reached the foot of an ascent called Bunker's Hill he met a horse and van belonging to the defenders, and in charge of one of their servants, standing at the foot of the hill. The weather was frosty, and the road was slippery from frost. Defenders' horse was unable to pull the van with its load up the hill, and defenders' vanman asked pursuer to assist him to start his horse. One or two other horses and carts were passing at the same time, and the pursuer and two other men went to assist defenders' vanman in starting his horse. The pursuer, as he was requested, took the horse by the head in the usual way, the other men taking their places at the wheels and at the back of the van. They endeavoured to get the horse and van to move, but without effect. The horse either would not or could not start, and pursuer and the others who had assisted left, pursuer going up the hill to overtake his own horse. (Cond. 3) Shortly thereafter defenders' vanman overtook pursuer and the others and charged the pursuer with stabbing his horse. This charge was utterly untrue, and pursuer at once denied it, and explained to defenders' servant that he had not a knife in his possession. The latter repeated the charge several times. Pursuer did his best to satisfy him that he had not stabbed his horse. He returned with him to see his horse, and defenders' servant pointed out a spot near the top of one of the fore legs where there was a lump, apparently caused by the horse having slipped and fallen. The pursuer suggested that, as they were not far from a veterinary surgeon's, the horse should be taken up to him to be examined. The horse was accordingly taken out of the shafts and taken to the smithy of Mr John Taylor, veterinary surgeon. Mr Taylor was not in at the time, and the pursuer came away, leaving defenders' vanman, who wished to have his horse sharpened for the frost. (Cond. 4) On the following day the defenders, who carry on business as aerated water manufacturers in Glasgow, wrote the following letter and sent it by post to the said Mr John Shaw the pursuer's employer:—"*Glasgow, 30th November* 1898. Mr John Shaw, farmer, Nerston, East Kilbride. Dear Sir,—Yesterday, as our vanman was on the East Kilbride Road, a servant in your employment, named Donald M'Callum, deliberately stuck a knife into our horse behind the foreleg, and we have thought it desirable that the matter should be brought under your notice, as it is possible that your horses may be subjected to similar treatment. While nothing serious has developed in connection with this malicious act, we have under consideration the necessity for reporting this act to the Society for the Prevention of Cruelty to Animals, but in the meantime we shall be glad to hear from you on the subject.—Yours truly, *pro* FINDLAY, M'DIARMID, & CO.—GEORGE WALKER." The said letter is of and concerning the pursuer, and falsely and calumniously and maliciously represents that the pursuer deliberately and maliciously stabbed defenders' horse in the foreleg, and this was so cruel and wanton an act as to justify defenders reporting it to the Society for the Prevention of Cruelty to Animals with a view to pursuer being prosecuted and punished. The said letter also falsely, maliciously, and calumniously represents that the said conduct on the part of the pursuer was so bad that the pursuer ought to be dismissed from the employment he was in as unfitted and unsafe to be entrusted with the charge of horses. The statements and charges against pursuer contained in said letter are false; they are wrongful, calumnious, and malicious, and highly injurious to the

pursuer. The pursuer has charge of his master's horses, and this was known to the defenders, and the statements in said letter were intended and were calculated to have the effect of inducing Mr Shaw to dismiss pursuer from his employment. Mr Shaw on receiving said letter regarded the charges therein made as very serious, and at once intimated to pursuer that if they were proved the pursuer was not to consider himself any longer in his employment. He further expressed the opinion that neither he nor anyone else would trust pursuer with horses. Said charges were made recklessly, and without due inquiry, or any inquiry at all, into the circumstances, and without probable cause. If they had made inquiry, the defenders would have ascertained that the charges were totally unfounded and false. The pursuer did not at any time stick a knife into or stab the said horse, or inflict any injury upon it, and this could have been ascertained by the defenders. The defenders wrote and posted said letter, and made said injurious and slanderous statements concerning the pursuer ultroneously, and they had no right or duty whatever to do so."

The defenders stated that on the morning following the injury to the horse, their servant who had charge of it reported to them what had occurred, and they thought that what had been reported to them ought to be communicated to the master of the pursuer as a statement made to them. They averred that they had no knowledge of the pursuer and no malice towards him.

The defenders pleaded, *inter alia*—"(2) The giving of information to the said John Shaw as to what had been reported to the defenders having been authorised by them in good faith and in the honest discharge of a duty resting on them in the circumstances, the action cannot be maintained. (3) The said letter having, in any view, been written on a privileged occasion and without malice, the defenders are not liable in damages."

The pursuer proposed the following issue for the trial of the case—"Whether the letter contained in the schedule was written and sent by defenders to Mr John Shaw, therein designed, and whether said letter is of and concerning the pursuer, and falsely and calumniously charges the pursuer with deliberately and maliciously stabbing defenders' horse with a knife, to the loss, injury, and damage of the pursuer? Damages laid at £150."

On 4th July 1899 the Lord Ordinary (KINCAIRNEY) approved of the issue and appointed the same to be the issue for the trial of the cause.

Opinion.—"This is an action of damages for slander contained in a letter written by the defenders to the pursuer's employer, in which it is asserted that the pursuer had maliciously injured a horse belonging to the defenders, and in which the defenders say that they had brought the matter under the notice of the pursuer's employer because his, the employer's, horses might possibly be subjected to similar treatment. The question debated was whether the occasion was privileged. The defenders in pleading privilege relied, I think, chiefly on the important case of *Stuart* v. *Bell*, 3rd May 1891, 2 Q. B. 341, and on *Nelson* v. *Irving*, 10th July 1897, 24 R. 1054. In the case of *Stuart* v. *Bell*, an action of damages for slander against the Mayor of Newcastle, Mr Bell, was dismissed on the ground of privilege and absence of malice, Lord Justice Lopez dissenting. The plaintiff had been a valet in the employment of Mr Stanley, the African explorer, and Mr Stanley was at the time the guest of Mr Bell, the Mayor. While Mr Stanley was Mr Bell's guest, the Chief-Constable at Newcastle showed Mr Bell a letter from the Chief-Constable of Edinburgh, intimating that the plaintiff had, when in Edinburgh, been suspected of theft. The letter was very cautiously expressed, and intimated that there was nothing but suspicion against the valet. Mr Bell, the Mayor, informed Mr Stanley of the information he had received, but did not show him the letter, and Mr Stanley, in consequence, dismissed the plaintiff. It was held that the conduct of the Mayor was justifiable and privileged in the circumstances. It will be observed that the defender was in the responsible position of Lord Mayor of Newcastle, and was, as such, entertaining Mr Stanley as his guest. The judgment of the Court did not proceed solely on the fact that the pursuer was Mr Stanley's servant, and therefore that it was Mr Stanley's interest and right to be told of the suspicions against him. I doubt whether the judgment would have been pronounced if that had been all. It proceeded on a complex view of the whole facts. 'The reason,' Lord Justice Lindley observed, 'for holding any occasion privileged is common convenience and welfare of society, and it is obvious that no definite line can be so drawn as to mark off with precision those occasions which are privileged, and separate them from those which are not.'

"In *Nelson* v. *Irving*, after a proof in the Sheriff Court, it was held that the defender, who was an innkeeper, and had informed the shooting tenant on neighbouring lands that he had been told that the pursuer had been poaching on his ground, was in a privileged position, and entitled to be assoilzied in the absence, I suppose, of relevant averments of malice. It appears that the shooting tenant had suspected poaching on his shootings and had requested the defender to be on the look-out, and to keep him informed. The defender was apparently held to be privileged, because the communication which he made to the shooting tenant was not made ultroneously, and not only in the shooting tenant's interest but also at his request.

"In this case the defenders stood in no relation either to the pursuer or to his employer. It does not seem to the purpose that the horse supposed to be injured belonged to the defenders. That would have been an important circumstance had the defenders asked payment for the injury to their horse; but seeing that they did

not, I fail to see their interest in making this communication to the pursuer's master. Was it then their duty to the pursuer's master to make it? I am not prepared at this stage to say that it was not. But I do not think it has been established as law that whenever any man is informed of a fault committed by a servant of such a sort that it may be repeated to the master's detriment, it is either his duty or his right to inform the master. I think that such a doctrine would be carrying such a right of interference too far, and beyond the principles of the judgments in *Stuart* v. *Bell* and in *Nelson* v. *Irving*. In *Stuart* v. *Bell* the judgments are very elaborate, and they seem to me to proceed on all the facts of the case, and on the fact, *inter alia*, that Mr Bell and Mr Stanley were host and guest. I do not think it can be said that privilege will always arise when the person to whom the defamatory information is communicated had an interest to know what was told him. It may be so in many cases, but I am not prepared to affirm so wide a general proposition. If it shall appear in the course of the proof that the defenders were really actuated by a single desire to do a legitimate benefit to the employer, there may be room for the plea of privilege. But there might not be room for the plea if it should appear that the defenders accepted what was told them carelessly and without inquiry, or were moved rather by irritation on account of the injuries to their horse than a desire to benefit their neighbour. On these grounds I think this is one of those cases where the question of malice may depend on the evidence, and may be left for determination at the trial.

"That being my view, it is inexpedient that I should discuss the relevancy of the averments of malice. All I would say is that I cannot tell at present whether the defenders' conduct indicated legal malice or not."

The defenders reclaimed, and argued—This was a clear case of privilege. Where a person was so situated that it became right in the interests of society that he should tell a third party certain facts, then if he *bona fide* and without malice does tell them, it is a privileged communication—*per* Blackburn, J., in *Davies* v. *Snead*, 1870, L.R. 5, Q.B. 611. There was a common interest among traders to see that their horses were not ill-used. The pursuer averred that the defenders knew that he had charge of his master's horses. This showed a duty on the part of the defenders to communicate to the pursuer's master the information which they had received. Besides, if the information which the defender received were true, a crime had been committed. All members of society were interested in the prevention of crime, and the defenders as the owners of the horse had a special interest and duty in the matter. The occasion was therefore privileged, and *Nelson* v. *Irving*, *supra*, was in point. If it was a case of privilege, then the action could not be maintained, as although there was a general averment that the defenders acted maliciously, there were no facts and circumstances set forth on record to infer malice. In any case malice ought to be inserted in the issue.

Pursuer's counsel was not called on.

LORD JUSTICE-CLERK—As regards the question of relevancy, I think this case is presented in a form which is quite usual and often seen. It is alleged upon record that a statement has been made, which, if not true, is plainly slanderous, and it is further said that that statement was made recklessly and without inquiry or probable cause. *Prima facie*, that discloses a relevant case, unless there are also facts and circumstances stated which show privilege. A man who utters a slander, having no duty or right or interest to make the statement containing it, is held to make a statement which is false and calumnious, and he is liable in damages whether he made the statement maliciously or not. On the other hand there are many cases where a person uttering a slander is held to be privileged, as, for example, the case of a master giving the character of a servant. It is only where the false statement is also malicious that a verdict can be obtained against the master. But the question whether there is privilege or not must often depend upon the facts of the case as disclosed by the evidence adduced at the trial, and in many cases it must be left to the presiding judge to direct the jury whether the facts brought out disclose a case of privilege or not.

In this case I cannot say that I see any case of privilege upon record. The defenders accepted the statement of their servant that their horse had been stabbed by the pursuer, and they thereupon wrote the letter which is complained of, informing the pursuer's master of this, and stating that they were considering the necessity of reporting the act to the Society for the Prevention of Cruelty to Animals. They do not say now on record that the stabbing ever took place at all. I do not see that the defenders had any duty to write such a letter. If they had been of opinion that there was a case against the pursuer, they should have gone to the proper authorities and told them of what they had been informed, in order that the proper authorities might make inquiries and take action if so advised. In such a case undoubtedly they would have been privileged. But here they write to the man's employer, and I do not see that they had any duty to do that. The class of cases in which malice must be put in issue are those cases where the alleged slander has been uttered by persons holding an official position, or is contained in communications made to persons in official position who have a right to know; so also in cases of master and servant. But there are other cases in which special circumstances may set up a case of privilege. In such cases it may be essential before the question of privilege can truly arise that the facts should be ascertained. In the present case I agree with the Lord Ordinary that the question

of malice will depend upon the evidence, and I think the issue adjusted by him is right.

LORD TRAYNER—I think that the issue which the Lord Ordinary has approved is the proper issue for the trial of this case. I do not require to say whether I concur in the views expressed by the Court of Appeal in the case of *Stuart*, or those expressed by our own Court in the case of *Nelson*. It is not necessary to say anything about these cases, because I think the present action can be dealt with on a very simple ground not affected by these decisions. This action is founded upon the averment that the defenders made a false and calumnious statement concerning the pursuer to the pursuer's master. Such a case must be treated as an ordinary case of slander; it is not *prima facie* a case in which privilege can be pleaded, for there is nothing stated on record to show that the defender was entitled or had any duty to make the charge which he did. The Lord Ordinary was right, and acting in accordance with usual practice, to leave the question of privilege open for determination at the trial, so that if a case of privilege is made out in course of the trial the pursuer will not succeed unless malice is proved.

LORD MONCREIFF—I am of the same opinion. I think that the Lord Ordinary has taken the proper course in approving of the issue as it stands. I also agree with him that the question of privilege should be left over for the trial. I am not prepared to say that even if a case of privilege is disclosed at the trial and if it is necessary for the pursuer to prove malice, there are not statements on record which would enable him to do so.

LORD YOUNG was absent.

The Court adhered.

Counsel for Pursuer—Orr. Agents—George Inglis & Orr, S.S.C.

Counsel for Defenders—Kincaid Mackenzie—T. B. Morison. Agent—D. Hill Murray, S.S.C.

Tuesday, January 9.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

POLLOK *v.* WORKMAN.

Title to Sue—Sole Title—Action at Instance of Party not having Sole Title to Sue.

In an action for damages in respect of an injury arising out of a wrongful act it appeared that persons other than the pursuer would also have a title to sue in respect of the same injury. There was no offer by the pursuer on record to prove that these parties had refused to concur in the action, or that they could not be found, and they were not called as defenders for their interest. The Court *dismissed* the action.

Darling v. *Gray & Son*, July 31, 1892, 19 R. (H.L.) 31, *per* Lord Watson, *followed.*

Title to Sue — Reparation — Actionable Wrong.

An action was brought by the daughter of a person deceased for damages and *solatium* in respect that the defenders had without her authority conducted a *post mortem* examination of her father's body.

Held (by Lord Kyllachy) that the pursuer had a title to sue, and that the action was relevant.

Opinion by the Court that this judgment was right.

Mrs Margaret Mitchell or Pollok, residing at Nitshill, raised an action for £250 damages against (1) Charles Workman, M.D., Glasgow, (2) Messrs Anderson & Chisholm, solicitors, Edinburgh, and (3) The Ocean Accident and Guarantee Corporation, Limited, Edinburgh, jointly and severally, or severally.

The pursuer made the following averments — She was the daughter of the late Thomas Mitchell, gardener, Glasgow. Mitchell died on 29th January 1899 at the house of James Allan, 82 Paisley Road, Glasgow, from injuries which he had sustained on 16th December 1898 while working at Wellshot Colliery, Cambuslang, belonging to the United Collieries Company, Limited. He was survived by his wife and the pursuer and three other children. His wife and children, other than the pursuer, were resident in England, and had not for years past had much intercourse with the deceased. On learning of her father's death the pursuer arranged that his body should remain at Allan's house till the funeral on 1st February. On 30th January her agents intimated a claim for compensation on behalf of her mother, herself, and the other members of the family, to Messrs Anderson & Chisholm, agents for the Ocean Accident and Guarantee Corporation, Limited, with whom the United Collieries Company was insured. On 31st January Dr Workman, without permission from the pursuer or her agents, made a *post mortem* examination of the body. The examination thus wrongfully made by Dr Workman was made upon the immediate instructions of Messrs Anderson & Chisholm, acting as servants or agents on behalf of the Ocean Accident and Guarantee Corporation, Limited, in full knowledge that neither legal warrant nor consent from anyone entitled to give it had been obtained or asked. As a consequence of these illegal proceedings the pursuer had suffered severely in her feelings, and the defenders were liable to her in reparation.

The pursuers pleaded—"(1) The defender Dr Workman having wrongfully and illegally made the *post-mortem* dissection libelled, to the loss, injury, and damage of the pursuer, one of the daughters and next-of-kin of the said Thomas Mitchell, is liable to her in reparation for the injury thereby done to her, and this being moderately estimated at the sum sued for, decree