

I am of opinion, therefore, that this stated case should be dismissed as incompetent, and therefore that we cannot entertain the question of law which we are asked to decide. Perhaps, however, what I have had occasion to say may sufficiently indicate what my answer to the question would have been if competently before us.

The LORD PRESIDENT and LORD M'LAREN concurred.

The LORD PRESIDENT intimated that LORD KINNEAR, who was present at the hearing but absent at the advising, concurred.

The Court dismissed the appeal as incompetent, and found neither party entitled to expenses.

Counsel for the Appellant—Salvesen, Q.C.—Sandeman. Agent—W. B. Rainnie, S.S.C.

Counsel for the Respondents—Glegg—W. Thomson. Agents—Macpherson & Mackay, S.S.C.

Friday, November 2.

## SECOND DIVISION.

[Lord Kincairney, Ordinary.]

### DUNDAS v. LIVINGSTONE & COMPANY.

*Reparation—Slander—Privilege—Malice—Charges Made against Employee by Employer to Guarantee Company—Issue—Slander—Malice in Issue.*

A traveller raised an action of damages for slander against a firm of whisky merchants. The pursuer averred that he had been engaged by the defenders at a salary with a commission on sales, and as a condition of his employment insured the defenders with a guarantee company against embezzlement by himself; that in the following year his remuneration had been changed from salary and commission to commission alone; that thereafter he had left the defenders' employment on account of charges being made against him of retaining sums collected by him for the defenders; that an accountant, acting on behalf and by instructions of the defenders, had made an accusation against the pursuer to the guarantee company of misappropriating these sums, and had intimated a claim under the policy; that thereupon a statement of sums so alleged to have been misappropriated by the pursuer was sent to the guarantee company; that the defenders were well aware that the policy had been rendered void by the change in the terms of the pursuer's remuneration, and that they had no claim under the policy; that they were actuated in acting as they did by a desire to discredit the pursuer with the insurance

company, and to hamper him in obtaining other employment, in which he might use his knowledge in competition with them; and that they made these charges knowing well that the pursuer was not guilty of embezzlement or dishonest appropriation, but that the whole question between him and them was merely one of accounting.

Held that a *prima facie* case of privilege was disclosed on record, and that malice must be inserted in the issues for the trial of the cause.

Francis Dunnitt Dundas, commercial traveller, Leith, raised an action for £500 as damages for slander against Messrs Livingstone & Company, wholesale whisky merchants, Musselburgh, and Robert Lumsden, accountant, Edinburgh, jointly and severally or severally.

The pursuer averred that in September 1898 he was engaged by the defenders Livingstone & Company to travel for them in the North of Scotland at a salary, with a commission on all sales; that as a condition of his engagement he insured the defenders with the Life and Health Assurance Association, Limited, against embezzlement by himself, conform to policy dated 31st January 1899; that in May 1899 the pursuer's remuneration was by arrangement altered from salary and commission to commission alone; that thereafter he left the employment of the defenders Livingstone & Company in consequence of charges made against him of not accounting for all the money received by him on their behalf. He further averred as follows:—“(Cond. 12) On 26th September 1899 a letter was written by the defender Lumsden, on the instructions and on behalf of the other defenders, to the Life and Health Assurance Association, Limited, with which the firm had been insured against embezzlement by pursuer. Said letter intimated that there were suspicions of irregularities in connection with pursuer's accounts. Said letter inferred, and was intended and understood to infer, a charge against pursuer of having embezzled money collected by him for the defenders Livingstone & Company. At the date of said letter the defenders were no longer insured with the said company, the policy having been avoided by the change in the terms of pursuer's remuneration from salary and commission to commission alone as from 8th May 1899. (Cond. 13) On a date between the 6th and 13th October 1899 the defender Lumsden, acting on behalf of and with instructions of the other defenders, called at said Insurance Company's office, 41 George Street, Edinburgh, and intimated to Mr Mitchell, the cashier to the company, that pursuer had embezzled or misappropriated considerable sums of money belonging to Livingstone & Company, and that he wished to make a claim under the policy, or used words to that meaning and effect. (Cond. 14) Following thereupon a statement was sent on 24th October to said company of sums alleged to have been misappropriated by pursuer. Said statement, which is referred to for its terms, is erroneous in the respects herein-

before specified in regard to the statements previously sent to pursuer, and is also otherwise grossly inaccurate. Said statement and a letter by which it was accompanied represented that the pursuer had embezzled or misappropriated the sums therein specified. The said Insurance Company, after several interviews had taken place between their officials and pursuer, declined to recognise the claim, and the defenders have taken no steps to substantiate it. (Cond. 15) The said various charges of embezzlement made against the pursuer by the defender Lumsden, acting under instructions or within the scope of his employment and authority from the other defenders, are false, malicious, and calumnious. Said charges were, moreover, made maliciously and without any probable cause. It is untrue that pursuer has misappropriated any money entrusted to or collected by him for said defenders. On the contrary, the pursuer believes and avers, on a proper statement of the accounts between him and Livingstone & Company, there is a considerable balance of commission still due to him."

The letter of 28th September 1899 from the defender Lumsden to the Insurance Company was as follows:—"Dear Sirs,—Policy No. 4009.—*F. D. Dundas*.—My clients Messrs Livingstone & Company, Musselburgh, yesterday intimated to me that they had some suspicion that certain accounts had been collected by the above employee Mr Dundas, and had not been fully accounted to them. They are making full inquiry into the matter, and will let me have the result as soon as possible. Meantime, at their request, I beg to acquaint you of the circumstance."

The letter of 24th October from Mr Lumsden to the Insurance Company was as follows:—"Dear Sirs,—*Livingstone & Company*.—Policy No. 4009.—My clients Messrs Livingstone & Company have been here in reference to your letter to them of some days ago asking for a note of the accounts collected by Mr F. D. Dundas and not accounted for by him, and at my request they have sent me the enclosed list. I may explain that Messrs Livingstone & Company have placed the collecting of Mr Dundas's accounts in the hands of the Debts Recovery Association, managed by Mr James Craig, C.A., and I believe that he has seen some of the receipts granted by Dundas. I have told my clients that you may require production of all the receipts under which a claim is made, and that these, although they have already been produced, should again be written for. In the list sent herewith are the names of those customers who allege that certain sums have been paid by them to Dundas, but as yet no receipts have been seen. In the meantime the probable amount of these are entered in pencil, and Mr Craig has been asked to get production of the receipts." The statement enclosed in this letter was headed "Statement of Accounts paid Mr Dundas and not transmitted to Livingstone & Company, Musselburgh,"

and contained a list of customers, the dates of payment, and the amounts paid.

After the record had been closed and issues lodged the Lord Ordinary (KINCARNEY) on 7th March 1900 allowed the pursuer to amend his record as proposed by minute. These amendments consisted in inserting "to the defenders' knowledge" before "avoided" in condescence 12; in adding to condescence 14 the following sentence—"During the whole of their communications with the Insurance Company and its representatives the defenders were well aware that they had no claim under the policy, and had no serious expectation that they would recover anything. They were actuated in said communications by a desire to discredit the pursuer with the Insurance Company, and by rendering it difficult for him to be reinsured, to hamper him in obtaining other employment in which he might use his knowledge in competition with them;" and in adding to condescence 15 the following sentence—"The defenders were well aware that a balance against the pursuer was only brought out by debiting against salary and commissions sums which he had expended in expenses duly accounted for to them, for which he was not credited, and other sums which were not under the contract between pursuer and Livingstone & Company proper charges against him. They made said charges knowing well that pursuer was not guilty of embezzlement or dishonest appropriation, but that the whole question between him and them was merely one of accounting."

The pursuer proposed, *inter alia*, the following issues for the trial of the cause—  
"2. Whether, on a date between 6th and 13th October 1899, the defender Lumsden did, within the office of the Life and Health Assurance Association, Limited, 41 George Street, Edinburgh, in presence and hearing of William B. M. Mitchell, cashier of the said company, say of and concerning the pursuer that he had appropriated considerable sums of money belonging to Livingstone & Company, and that they desired to make a claim against the said association in respect of said sums, under a policy dated 31st January 1899, by which said defenders were insured in respect of pursuer's intromissions, or did use other words of the like meaning and effect of and concerning the pursuer, and did thereby falsely and calumniously represent that the pursuer had dishonestly appropriated money belonging to and for which he was accountable to the said defenders; or, Whether, on a date between 6th and 13th October 1899, the defender Lumsden, acting on behalf and with the instructions and authority of the defenders Livingstone & Company, did, within the offices of the Life and Health Assurance Association, Limited (and so forth, as in first alternative of issue). Damages laid at £150. 3. It being admitted that the letter dated 26th September 1899, and the letter dated 24th October 1899, and the statement accompanying the same . . . were written and sent to the said Life and Health Assur-

ance Company, Limited, by the defender Lumsden, acting on behalf and under the instructions of the defenders Livingstone & Company; whether the same, or any, and which of them, are of and concerning the pursuer, and falsely and calumniously represent that he had dishonestly appropriated to his own uses the sums in the said statement, being money belonging to the defenders Livingstone & Company, and for which he was accountable to them. Damages laid at £200."

On 20th March 1900 the Lord Ordinary approved, *inter alia*, of these issues, and appointed the same to be the issues for the trial of the cause.

*Note*—"The first issue was not objected to, and must of course be allowed. At the debate I was much disposed to disallow the other issues, on the ground that the letters complained of were privileged, and that, having regard to the special circumstances of this case, there was no relevant averment of malice; but since the debate the pursuer has amended his record, and I think that now issues cannot be denied on these letters. I am not now prepared to say that there is no relevant averment of malice. The question therefore is, whether privilege is disclosed by the condescence. At the discussion I thought it was; but on this point also the record has been amended, and in consequence of that amendment I think it safer to leave the question of malice to be decided at the trial; and I shall therefore approve of the issues 2 and 3. The defenders took no distinction between the case of Livingstone & Company and that of Lumsden."

The defenders reclaimed, and moved the Court to alter the second and third issues by inserting "and maliciously" after the word "calumniously."

They argued—A *prima facie* case of privilege appeared on record. If a pursuer's averments disclosed a *prima facie* case of privilege, then malice must be inserted in the issue. It was only where it was doubtful whether or not there was privilege that the question of malice was left to be decided at the trial—*Reid v. Moore*, May 18, 1893, 20 R. 712; opinion of Lord Trayner, 717. The presumption that a statement was privileged could not be elided by the pursuer making a bald averment that the defender knew it to be false at the time he made it. The pursuer admitted that the defenders made a claim under the policy, and in order to make such a claim they of necessity were bound to bring under the notice of the Insurance Company the alleged defalcations by the pursuer. Their statements were therefore presumably privileged, and this presumption was not overcome by the pursuer's averment that they knew when they made the statements that the policy had been voided.

Argued for pursuer—The question whether there was privilege or not would depend on the evidence. If it was shown that the defenders knew when they wrote the letters to the Insurance Company that the policy had been voided, then it was not a case of privilege. In these circumstances the ques-

tion of malice should be left for decision at the trial—*M'Callum v. M'Diarmid*, Jan. 9, 1900, 2 F. 357.

At advising—

LORD JUSTICE-CLERK—There is no dispute in regard to those issues in this case which relate to slanderous statements made to individuals. The question is, whether as regards statements made to the company with whom the defenders had insured themselves against defalcations by the pursuer, the pursuer in taking an issue of slander must not undertake to prove specific malice. I am of opinion that in this case it is right that the word "maliciously" should be inserted. There can be no doubt that if the defenders believed that their servant had been guilty of defalcation in regard to funds in his hands to which they had right, it was their right and their duty to communicate that to the insurers, who would be called on to make good their loss. I think it was their duty, but if there could be any doubt on that matter I think it was distinctly their right. On that ground, if there was nothing else in the case, the insertion of the word "maliciously" in the issue would be imperative in my opinion. But it is said that the claim of the defenders against the Insurance Company had fallen, and that therefore the privilege in making the statement is excluded. That is not admitted, and we cannot know how it stands until the facts are ascertained. It may have a considerable bearing on the question of malice should it turn out at the trial that the defenders had no ground for supposing that they had a claim against the Insurance Company. But at present I see no ground for holding that the occasion was not privileged. It is only on a question of legal objection that it can be maintained that the defenders had lost their privilege. That cannot be accepted at this stage of the case as a ground for adjusting the issues in a particular way. I am therefore in favour of varying the second and third issues by inserting the word "maliciously."

LORD YOUNG—I agree that if there is to be an issue the occasion was privileged, and in order to succeed the pursuer must prove malice. Of that I have no doubt whatever. The most ordinary way of proving malice is for the pursuer to show that the defender's statements were such as he knew to be false or had no reasonable ground for thinking to be true. But I must say that I have a very strong impression that there is here no relevant case at all, because it is well established that a mere averment of malice is not sufficient; there must be some statement of facts and circumstances upon which the averment is founded. I think there is no such statement on this record. It is indeed stated that the representations were made to the Insurance Company by the defenders when they knew that they had no claim under the policy against the company. But this is merely a statement that the defenders were of opinion that they had no claim at law, and that is not, according to my im-

pression, sufficient. But no argument was submitted on this point, and it is unnecessary to decide it, although I have heard learned judges express the opinion that it was the duty of the Court, if they thought a case not relevant, to take objection to its being proceeded with.

**LORD TRAYNER**—The first issue was not objected to by the defenders, and I agree with the Lord Ordinary that it must be allowed.

With regard to the second and third issues, the defenders move that the word "maliciously" should be inserted. This the Lord Ordinary, in adjusting the issues, refused to do, on the ground that if it appeared at the trial of the cause that the defenders were entitled to plead privilege, the pursuer would then be required to prove malice in order to succeed, and that therefore there was no necessity for putting malice in issue antecedently to the trial. In the ordinary case—that is, the most usual case—this course would be the proper one to adopt. But I think our practice on this matter is now fairly well settled, and the rule seems to be, that where upon the pursuer's record there is disclosed a *prima facie* case of privilege, malice should be put in the issue, and otherwise not. In the present case I think the record does disclose a *prima facie* case of privilege. Statements, otherwise slanderous, are considered privileged if the statement is made either in the performance of a duty or in the exercise of a right. Now, here the statements made by the defenders, and to which the second and third issues have reference, were made to an Insurance Company by whom the pursuer's honesty had been guaranteed, and were necessary to support the defenders' claim under the policy of insurance or guarantee. The defenders were, *prima facie*, entitled to make the statements complained of in support of the claim they were making under the policy, and were therefore privileged in making them. That being so, it follows, on the rule I have referred to, that malice should be put in issue. It is said by the pursuer that the defenders knew when they made these statements that the policy was void, and that no claim under it could be maintained, and that the statements were made, not in support of any claim, but to damage the pursuer's reputation. If this be established, it may prove the malice which the pursuer avers, and entitle him to a verdict. But on this part of the case I think the pursuer must prove malice in order to succeed, and must, as I have said, take an issue that the statements complained of were made maliciously. I entertain no doubt that the pursuer has relevantly averred malice. In my view, therefore, the issues, as adjusted by the Lord Ordinary, should be varied as proposed by the defenders.

**LORD MONCREIFF**—There is no dispute about the first issue, and I think it should be granted as it stands.

As to the second and third issues, in judging whether a pursuer's averments dis-

close a case of privilege, it is necessary to discriminate between averments which merely imply malice and those which are sufficient *prima facie* to negative privilege. Stated broadly, the distinction to be taken is between the circumstances and occasion in and on which the words complained of were uttered, and the motives which induced the defender to use them. The relations between the pursuer and the defenders, the nature of the words used, the occasion on which and circumstances in which they were uttered—all these matters are relevant to the question whether the occasion was privileged. But the privilege of the occasion is not necessarily affected by averments as to the motives which led to the words being used or allegations of the defenders' dishonesty in using them. These are very material in deciding whether the words were used maliciously as well as falsely, but that is another matter. The whole question, indeed, is one of onus. If the word "maliciously" is inserted in the issue the pursuer may still succeed, but he must prove malice. If, on the other hand, "maliciously" is not inserted, the defenders may still succeed if they are able to show at the trial that the occasion was privileged, and the pursuer is unable to establish malice.

Now, in the present case, I think that taking a broad view of the pursuer's averments, *prima facie* a case of privilege is disclosed. Under the policy in which the defenders were interested, they were bound, under penalty of forfeiture, to intimate at once to the Insurance Company if they entertained any suspicions of their traveller's honesty, and this they did in the letters, which seem to me to be couched in temperate language. It is said that these statements were not made honestly, and that the defenders' sole motive in making them was not to preserve their rights under the policy, which (it is said) were already lost, but to discredit the pursuer. If this is proved it may be very good evidence of malice on the part of the defenders, but it appears to me to be extrinsic to the question whether the communication was privileged or not.

I therefore think that the second and third issues should be altered to the effect of inserting the word "maliciously."

The Court recalled the interlocutor reclaimed against, varied the second and third issues for the pursuer in terms of the defenders' motion, and the variations having been made, approved of the pursuers' issues as so amended, and remitted to the Lord Ordinary to proceed in the cause.

Counsel for the Pursuer—Watt, Q.C.—Christie. Agent—Robert H. Paterson, Solicitor.

Counsel for the Defenders—Salvesen, Q.C.—Horne. Agents—H. B. & F. J. Dewar, W.S.