condescendence on a day other than the eighth day appropriated to the town of Inverness, and to the defenders a conjunct probation, said proof to proceed before Lord on a day to be afterwards fixed by his Lordship: Find the expenses of the appeal to be expenses in the cause," &c.

Counsel for Pursuer and Respondent—Johnston, K.C.—D. Anderson. Agents—Skene, Edwards, & Garson, W.S.

Counsel for Defenders and Appellants—Hunter, K.C.—Constable. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, December 14.

FIRST DIVISION.

[Lord Pearson, Ordinary.

H. *v.* P.

Reparation—Slander—Statement by Defender that Pursuer had Committed Adultery with Defender—Veritas—Averments of Misconduct by Pursuer with Men other than Defender—Relevancy—Deletion.

In an action of damages for slander founded on an alleged statement by the defender, contained in a letter written by him to the pursuer, and subsequently repeated by him before witnesses, that she (the pursuer) had committed adultery with him, the defender pleaded that the statement was true, and lodged a statement of facts in which he averred, *inter alia*, that the pursuer had on a specified occasion committed adultery with A, and had on other specified occasions been guilty of indecent familiarities with B and C.

Held (*affirming* judgment of Lord Pearson, Ordinary) that these averments were irrelevant and fell to be deleted from the record. *A* v. *B*, Feb. 23, 1895, 22 R. 402, 32 S.L.R. 297, *followed.*

On 15th August 1905 Mrs —— or H., wife of H., raised an action against P., in which she sought to recover £1000 as damages for alleged slander.

The pursuer averred—"(Cond. 2) On 12th August 1905 she received the following letter from the defender:—

'. . . 11*th August* 1905.

. . . .

'Dear Madam,—I have now to notify you that I have at last made up my mind to make a confession as to my having committed an act of adultery with you, while you was, and is now, the lawful wife of G. F. H... As to time and place, I will fully explain when my opportunity comes to be heard in Court. You can make use of this letter in any way you think fit, and either answer it personally to me or through your agent.—Yours truly, D. C. H. P...'

"(Cond. 3) The said letter contains a statement that the pursuer had carnal connection with defender at a time when the pursuer was the wife of the said G... F... H.., and thus committed adultery with him. Said statement is false, malicious, and slanderous. The pursuer has never at any time committed adultery with the defender. The defender has since the 11th of August last repeatedly stated to a number of people that the pursuer has committed adultery with him, and in particular he called on the pursuer's husband on or about 17th August last and repeated that statement to him. (Cond. 4) Further, the defender on 27th September last went to the house occupied by pursuer, and there in the presence and hearing of his step-daughter," Miss E, Mr F, "and the defender's brother-in-law," Mr G, "said to the pursuer that he had fornicated with her, and that she and Miss" E "were a pair of whores, or used words of the like import and effect of and concerning pursuer, meaning thereby to represent that the pursuer was a prostitute. Said statements are false, calumnious, and malicious."

In answer the defender admitted writing the letter, and averred that the statement therein was true. In a statement of facts he averred that there had been great intimacy between the pursuer and himself, that they had been together on a great many occasions, on all of which the pursuer had indulged in improper familiarities towards him, even before strangers and friends, and that "the result of this intimacy was that the pursuer committed adultery with the defender on two occasions, viz., in the parlour of the defender's dwelling-house at ——, on a Saturday evening towards the end of September 1904, and again in the private office at defender's public-house between 1st and 17th October 1904."

The statement also contained the following articles:—"(Stat. 7) Both before and during the time when the pursuer was intimate with the defender she made a regular practice of walking and driving with other men, both alone and in company with the defender and others. She also allowed and encouraged these other men to take improper familiarities with her, and her conversation and conduct in the course of said walks and drives was of a lewd and indecent description. Among those was A, with whom in August 1900 she committed adultery in her own house in . . . . She confessed this act of misconduct to her husband, who forgave her. (Stat. 8) Among others with whom the pursuer thus made a practice of walking and driving alone or in company with the defender and others were B and C. Between 1899 and 1904 she very often drove out with B to agricultural shows or places in the neighbourhood. Both on these occasions and in her own house she allowed and encouraged B to take indecent familiarities with her. In particular, on one occasion in the month of July or August 1900 or 1901, when the pursuer and B were driving in the neighbourhood of . . . ., their conduct was such that the pursuer's brother-in-law, Mr ——, who met them while cycling, stopped and publicly remonstrated with

pursuer. She also walked and drove a great deal with C both about . . . . and and . . . ., and allowed him to take similar familiarities with her. In particular, in the end of August or beginning of September 1900, when her husband was in London, she drove with C to . . . . and . . . ., and such familiarities were indulged in on both these occasions. The names and addresses of A, B, and C have been communicated to the pursuer's agents."

The pursuer pleaded—"(3) The averments in articles 7 and 8 of defender's statement of facts (added at adjustment) are irrelevant, and should not be admitted to probation."

The defender pleaded — "The pursuer having committed adultery with the defender, and the statement in the letter complained of being accordingly true, the defender should be assoilzied, with expenses."

On 24th February 1905 the Lord Ordinary (PEARSON) appointed the 7th and 8th articles of the defender's statement of facts to be deleted from the record.

Opinion—"In this action the pursuer, Mrs H..., sues Mr P..., retired publican, ..., for damages for slander founded on a letter which he wrote to the pursuer notifying her that he had made up his mind to confess to an act of adultery with her. The defender, who takes an issue of *veritas*, makes specific averments in his statement of facts that the pursuer had also misconducted herself with another man, and that on two occasions she was guilty of unchaste conduct with other men, whose names and addresses have been communicated to the pursuer's agents. These statements are denied by the pursuer, who maintains that they should be deleted from the record. The defender claims to have these averments added to the inquiry which is to be held, on three grounds. The first is that he is entitled to prove the facts regarding these three instances as adminicles of proof of the misconduct charged in the letter complained of. The proposal is to establish a probability that she committed adultery with him by proving instances of unchastity with other men. In some cases, particularly in criminal practice, it is allowable to lead general evidence of repute of unchastity. But that is not proposed here. The averments in question are averments of specific instances, such as have been allowed to be proved in certain circumstances in matrimonial cases. But, so far as I have heard, such an inquiry has not been allowed in any case at all resembling the present, and I am not in favour of extending the practice. The second ground is that the defender is entitled, as the pursuer's character of chastity is in issue, to have the facts ascertained in mitigation of damages, in respect that if she had an unchaste character the damages would be diminished. It must be kept in mind that it is really the defender who put the pursuer's character in issue; and, as pursuer of the issue of *veritas*, I hold that he must confine himself to the two instances in that issue of which he has undertaken to prove the truth. Beyond that I do not see the justice or the expediency of allowing, in mitigation of damages, proof of other instances of unchastity. The contention assumes that the pursuer will get a verdict —in other words, that she is innocent of the misconduct charged, else there will be no damages to mitigate; and that being so it comes to this, that because the defender says falsely that the pursuer was guilty of two instances of misconduct with himself, he is to be allowed to reduce the damages by proving what he calls other instances with other men. I do not think that is permissible; and upon this ground the defender also fails. The third ground is that proof of the allegations would furnish a test of the pursuer s credibility. That raises quite different considerations. While I do not think these statements ought to remain on the record for either of the two purposes mentioned, it is a question of some nicety whether they should remain on the record for the purpose of testing credibility, or, being deleted from the record, should be deleted under the implied reservation that notice having been given of them the defender will be at liberty to cross-examine the pursuer upon these specific statements. I have some difficulty in seeing how, upon the conditions laid down in the case of *A* v. *B* (22 R. 402), such cross-examination could be useful as a test of the credibility of the pursuer. If she answered yea—that is, if she confessed to the charge in the cross-examination—then, of course, there would be no further question about it; but if she denied it the defender could not follow it up; he must be satisfied with her answer. Such an examination, however, would certainly operate as a steadying influence upon the witness who was being examined, because she would know that she would be liable to a prosecution for perjury if she were proved to have sworn falsely. I propose to follow the case of *A* v. *B*, and to delete the statements from the record, reserving to the defender the right to put questions in cross-examination."

The defender reclaimed, and argued—The statements in question were relevant to his counter issue of *veritas*, and he was therefore entitled to prove them. They were relevant both as affecting the probability of the fact alleged in the letter and also in mitigation of damages. Evidence of such facts as the defender averred was allowed in matrimonial cases and should be admitted here. The only available evidence was that of the parties, who contradicted each other, and where there was a paucity of evidence the strict rule could be relaxed—*Whyte* v. *Whyte*, March 15, 1884, 11 R. 710, 21 S.L.R. 470. In the case of *A* v. *B*, February 23, 1895, 22 R. 402, 32 S.L.R. 297, the *species facti* were different. The rule in criminal cases was that acts of unchastity might be proved if part of the *res gestæ*—*Dickie* v. *H. M. Advocate*, July 15, 1897, 2 Adam 331, 24 R. (J.C.) 83, 35 S.L.R. 5. The evidence should be allowed in mitigation of damages—*Brash* v. *Steele*,

February 27, 1845, 7 D. 539. [The LORD PRESIDENT referred to the case of *Livingstone* v. *Dinwoodie*, June 28, 1860, 22 D. 1333.] [LORD KINNEAR—You may cross-examine on these facts but you would be bound by the answer.] *Verry* v. *Watkins*, 1836, 7 C. & P. 308. *Tolman* v. *Johnstone*, (1860) 2 F. & F. 66, was also referred to.

Counsel for the pursuer and respondent were not called on.

LORD PRESIDENT—I am of opinion that the Lord Ordinary has come to the right conclusion in this case, and I should be sorry if the law of Scotland obliged us to come to any other. I refrain from expressing the views which are very near to one's lips as to the propriety of putting on record, in a case of this kind such averments as are here put relating to third parties, and I content myself with saying that I entirely concur and agree with what was said with the greatest felicity by Lord President Robertson in the case of *A* v. *B* (22 R. 402). The present case seems to me to be *a fortiori* of that case, for if it be true in a case of rape that averments having to do with third parties are irrelevant, it is much more true in the present case.

I should like also to say, as to the case of *Whyte* v. *Whyte* (11 R. 710), with which I am very familiar, that the principle laid down there is limited to matrimonial cases, and for this reason, that it being the duty of the Court to protect the matrimonial bond against grievous injury, the very strict rule has been in such cases somewhat relaxed.

I therefore propose that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN—I concur.

LORD KINNEAR—I agree, and think the cases cited are directly in point. The Lord Ordinary was perfectly right in striking out the averments objected to, because the proof proposed is as to matters entirely collateral to the issue, and involves unnecessarily the character and reputation of third parties. The circumstance that the strictest rule of relevancy has been relaxed in matrimonial cases is no ground for relaxing it in other cases.

The Court adhered.

Counsel for the Pursuer and Respondent—George Watt, K.C.—Ingram. Agents—Graham Pole & Lawrence, S.S.C.

Counsel for the Defender and Reclaimer—The Lord Advocate (Shaw, K.C.)—Constable. Agent—J. Ferguson Reekie, Solicitor.

Saturday, December 16.

FIRST DIVISION.

(Before Seven Judges.)

[Sheriff-Substitute at Airdrie.

DOBSON *v.* THE UNITED COLLIERIES LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (2) (*c*)—"*Serious and Wilful Misconduct*"—*Acting in Breach of a duly Published Statutory Rule—De facto Ignorance of Statutory Rule duly Published—Coal Mines Regulation Act* 1887 (50 *and* 51 *Vict. c.* 58)—*Permitting Naked Light to be in such a Position as to Ignite an Explosive.*

Rule 1 of the additional special rules framed for a mine in pursuance of the Coal Mines Regulation Act 1887 provided—"While charging shotholes or handling any explosives not contained in a securely closed case or canister a workman shall not smoke or permit a naked light to remain in his cap or in such a position that it could ignite the explosive."

A miner having drilled a shothole went to his powder-box for a cartridge, and having got the cartridge, which was not in a closed case or canister, was returning to his working-place with the cartridge in his hand and his lamp in his cap. In getting back he had to crawl through a narrow road only 2 feet in height, and while he was doing so the naked light in his cap came in contact with the powder in the cartridge, an explosion ensued, and he was injured. The conditions of exhibition at the mine of the special rules satisfied the requirements of sub-sec. 1 of sec. 57 of the Coal Mines Regulation Act 1887. The workman, however, did not *de facto* know the rule, having neither read it nor seen it, and in acting as he did he was following his own practice and that of other miners in the mine.

Held that the accident having been caused through the workman's breach of a duly published statutory rule, his injury was attributable to his serious and wilful misconduct in the sense of sec. 1, sub-sec. 2 (*c*), of the Act.

M'Nicol v. *Speirs, Gibb, & Co.*, Feb. 24, 1899, 1 F. 604, 36 S.L.R. 428, *commented on.*

Opinion (*per* Lord President and Lord Kyllachy) that acting in breach of a duly published statutory rule, where there was no dominant reason for so doing, was serious and wilful misconduct, for which ignorance of the rule could in no circumstances be an excuse. *Opinion* (*per* Lord M'Laren) that circumstances were conceivable where the workman might be excusably ignorant. *Opinion* of Lords Kinnear and Stormonth-Darling *reserved.*

Opinion of Lord President and Lord