Friday, March 15.

SECOND DIVISION.

[Sheriff Court at Peterhead.

GALL *v.* SLESSOR.

Reparation—Slander—Privilege—Malice—Doctor Writing to Chemist who had Dispensed Prescription—Terms of Letter Inferring Malice.

In a country town it was the custom for a doctor to have a particular chemist who usually dispensed his prescriptions and knew the meaning of the terms used therein. If a prescription of another doctor was brought to a chemist, and he was in doubt as to a term, it was usual for him to inquire of the doctor's particular chemist. A chemist having received a prescription of a doctor whose particular chemist he was not, inserted in the mixture a different compound of a drug from that intended—a mistake which was held to have been excusable, the terms used being applicable to several different compounds. He had not inquired at the doctor's particular chemist. The doctor having learned of the fact, communicated by telephone with the chemist, and not receiving, as he conceived, a very courteous reply, wrote a letter to him. The chemist raised an action of damages for slander based on the letter.

Held that the occasion was privileged and that malice must be averred and proved.

Terms of letter written by the doctor, after ample time for consideration, which were held to be so extravagant and to indicate such recklessness as to infer malice.

Alexander Gall, chemist and druggist, Fraserburgh, brought an action of damages for slander in the Sheriff Court at Peterhead against Robert Alexander Slessor, medical practitioner, Fraserburgh.

The following narrative of the *facts* is taken from the opinion of LORD LOW:—"This is an action of damages for slander brought by Alexander Gall, chemist and druggist, Fraserburgh, against R. A. Slessor, medical practitioner there. The slander complained of is contained in the letter which is quoted in article 2 of the condescendence.

"The circumstances in which the letter was written were as follows:—On 7th August 1905 a fisher girl suffering from dyspepsia consulted the defender, who gave her the prescription No. 15 of process. That prescription consisted of several ingredients—the first and principal ingredient being a compound bismuth mixture, which was described in the prescription by the formula 'Mist. Bism. Co.' It appears that a practice has prevailed to some extent in Fraserburgh for each medical man to employ a particular chemist, to whom, in order to obviate the necessity of writing out compound ingredients of prescriptions *ad longum*, he might give a short formula for such ingredients as he was in the habit of using frequently. The defender says that when he began practice in Fraserburgh a few years ago he found it to be expedient to adopt the prevailing custom and to employ a special chemist, and accordingly he selected a gentleman of the name of Hunter.

"The defender had been in the habit of using a bismuth mixture which was known as 'Hewlitts,' but Hunter advised him that it was too expensive for the class of patient which he was likely to have, and accordingly he devised a mixture upon the same lines as Hewlitts' but which could be made up at a smaller cost. The defender arranged with Hunter that in his prescriptions that mixture should be indicated by the formula 'Mist. Bism. Co.' The defender says that he regarded that formula as being so indefinite that if it were presented to any chemist other than Hunter such chemist would require to apply either to Hunter or to himself in order to ascertain the precise composition of the mixture. I think that the defender was mistaken in that view, because there is a large body of evidence to the effect that there are several well-known bismuth mixtures, all of which would be properly described by the formula 'Mist. Bism. Co.,' and any one of which a chemist would be entitled to use in making up a prescription containing that formula, unless there were something in the prescription indicating that a particular mixture was intended.

"The important distinction, at all events for the purposes of this case, between the different bismuth mixtures is that some are prepared so as to give an alkaline reaction and others an acid re-action. The defender's mixture, and that which he intended to be supplied to the patient, was alkaline, but the pursuer, to whose shop the patient went to have the prescription made up (the defender having said nothing to her on the subject), supplied an acid mixture. He did so because the second ingredient in the prescription was *Liquor Peptici*, which has an acid re-action, the effect of which might have been neutralised if an alkaline bismuth mixture had been used. In my opinion the evidence shows that the pursuer was for that reason justified in supplying an acid mixture, no particular mixture being specified in the prescription; and the mixture which he supplied appears to have been one which had been in common use in Fraserburgh. Further, there is an incident which seems to me to indicate that the pursuer acted in perfectly good faith. One ingredient in the prescription was 'Bipalox,' which the pursuer had not in stock, and he sent to Hunter's shop for it, assuming that he would get it there as Hunter was the defender's chemist. Now, I think that if the formula used in the prescription for the bismuth mixture had appeared to the pursuer to be ambiguous, he would at the same time have inquired what was the mixture which was intended. He says that he would have done so, and it would have been the natural thing to have done.

"Upon the 8th of August, the day after he had given the prescription in question, the defender was in Hunter's shop, and found that the latter had not dispensed the prescription, but that the pursuer had presumably done so, having sent to Hunter for the ingredient I have mentioned. The defender accordingly rang up the pursuer on the telephone, and having ascertained that he had dispensed the prescription, asked him what he had put in it. The pursuer replied that he had used the acid bismuth mixture of Burnett's shop, and a somewhat heated conversation seems to have ensued, which the pursuer closed, as the defender thought, in a discourteous manner by cutting off the telephonic communication. That occurred before eleven o'clock in the morning, and the defender did not write the letter complained of until he had finished his work for the day. He says that when he wrote it 'his feelings of indignation had not in any way calmed down.'"

The letter quoted in article 2 of the condescendence was:—

"37 Broad Street, 8/8/05.

"Sir—As I consider you have taken a very serious and unwarrantable liberty with one of my prescriptions, and a liberty of which you do not seem to realise the gravity, I am resolved to push the matter with the object of protecting my own and my patients' interests in future. If, however, you will send me an apology by 12 noon to-morrow the 9th August, and refund the money you got by false pretences from my patient, I will refrain from putting the case in the hands of the police.

"I trust you understand your position under the Adulteration of Food and Drugs Act, but if you don't you have only to let this matter go on to get enlightenment—I am, Yours, &c., "R. A. Slessor."

"A. Gall, chemist."

The prescription referred to as No. 15 of process was:—

"℞ Mist. Bism. Co. ... ... ℥iss.
Liq. Peptici ... ... ℥vi.
Aloin ... ... gr.i.
Nepenthe ... ... ℥iss.
Aq. ad. ... ... ℥vi. M.
Sig. ℥ss. t. d. s. p. c.
℞ Bipalox viii.
Sig. 1 nocte p. r. n. R. A. S."

The defender, *inter alia*, pleaded—"(1) Privilege. (2) The letter founded on was in the circumstances justified."

On 23rd March 1906 the Sheriff-Substitute (Robertson) after a proof pronounced this interlocutor—"Having considered the cause, Finds in fact (1) that the letter referred to on record was written by defender to pursuer and is of and concerning pursuer; (2) that the defender when writing said letter was in a privileged position; and (3) that malice on defender's part is not averred nor proved, and that it cannot fairly be inferred from the terms of said letter: Finds, therefore, in law that defender cannot be held liable in damages for the statements made in said letter, and assoilzies him from the conclusions of the action, and decerns."

The pursuer appealed and argued—(1) The letter was in itself slanderous, and the occasion on which it was written was not privileged. There was no element of contract between doctor and chemist nor any such legal relation between them as would give the doctor a right, or put on him a duty, to interfere. (2) Assuming the occasion was privileged, the privilege was limited, and the letter went far beyond it. From the want of pertinence of the letter to the circumstances which gave rise to it, and from the intemperate and extravagant language therein, malice was to be inferred, and the privilege attaching to the occasion was lost—*Hamilton* v. *Hope*, March 10, 1827, F.C, 5 Sh. 534 (L.J.-C. Boyle); *Torrance* v. *Leaf*, July 29, 1835, 13 Sh. 1146; *Lee* v. *Ritchie*, May 14, 1904, 6 F. 642, 41 S.L.R. 509; *Macdonald* v. *M'Coll*, July 18, 1901, 3 F. 1082, 38 S.L.R. 781; *Adam* v. *Allen*, June 23, 1841, 3 D. 1058, especially Lords Cockburn and Ivory at 1067; *Laughton* v. *The Bishop of Sodor and Man*, 1872, L.R., 4 P. Ap. 495, at p. 505; *Robertson* v. *M'Dougall*, 1828, 4 Bing. 670; *Fryer* v. *Kinnersley*, 1863, 15 C.B.N.S. 422; *Tuson* v. *Evans*, 1840, 12 A. & E. 733; Cooper on Defamation, 2nd ed. p. 203; Odgers on Slander, p. 264 and 322.

Argued for the defender (respondent)—(1) In considering whether the occasion was privileged neither the language used nor the belief in its truth of the person using that language must be regarded—*Jenoure* v. *Delmege*, [1891] A.C. 73. The prescription not having been dispensed to the doctor's satisfaction he had an interest and a duty to make a communication pertinent, as the letter was, to that matter, and made to a person concerned in that matter, namely, the chemist. And accordingly the occasion was privileged—*Auld* v. *Shairp*, July 14, 1875, 2 R. 940, especially Lord Moncreiff at 946, 12 S.L.R. 611; *Toogood* v. *Spyring*, 1834, 1 C.M. & R. 181, Parke B. at 193; *Macdonald* v. *M'Coll*, July 18, 1901, 3 F. 1082, Lord President Balfour (quoting with approval Lord Kyllachy in *Sheriff* v. *Denholm*, December 18, 1897, 5 S.L.T. 234), 38 S.L.R. 781; *Stuart* v. *Bell*, [1891] 2 Q.B. 341, which was approved of in *Nelson* v. *Irving*, July 7, 1897, 24 R. 1054, 34 S.L.R. 786; *Waller* v. *Loch*, 1881, L.R., 7 Q.B.D. 619. (2) Assuming the occasion privileged, the pursuer must exclude the possibility of the defender having believed that his letter was a true representation in order to take it out of the privilege. In considering the meaning to be attached to the letter it must be read with the knowledge of the circumstances in which it was written possessed by the recipient, who alone need ever have seen it—namely, the knowledge of the custom in Fraserburgh of each doctor having a particular chemist, and the knowledge of the doctor's assumption that if the prescription were taken to another chemist he would communicate with the ordinary chemist or himself regarding any indefinite ingredient. So reading the letter it appeared that it meant merely—you have charged for a medicine which was never prescribed. The doctor must be presumed to have believed that thereby the

chemist had offended against the Food and Drugs Act. Words *prima facie* actionable which were not seriously meant as an attack on character were not actionable—*Watson* v. *Duncan*, February 4, 1890, 17 R. 404, 27 S.L.R. 319, Lord M'Laren's opinion—especially where the criticism is made to the same person of whom it is made—*Cockburn* v. *Reekie*, March 8, 1890, 17 R. 568, 27 S.L.R. 454. The occasion being privileged, the presumption was in favour of the absence of malice—*Spill* v. *Maule*, 1869, L.R. 4 Ex. 232, Cockburn, C.J., 236—and the *onus* was put on the pursuer of proving that the defender was actuated by malice independent of and antecedent to the occasion on which the communication in question was made—*Wright* v. *Woodgate*, 1835, 2 C. M. & R. 573, Parke, B., at 577; *Campbell* v. *Cochrane*, December 7, 1905, 8 F. 205, 43 S.L.R. 221, Lord M'Laren's opinion. Reference was also made to *Neilson* v. *Johnson*, February 8, 1890, 17 R. 442, 27 S.L.R. 333.

At advising—

LORD LOW—. . . . [*After narrating facts supra*] . . . . The letter is plainly slanderous, and the defence is that the occasion upon which it was written was privileged, and that it is not proved that it was written maliciously.

I am of opinion that the occasion was privileged. The medicine which was dispensed to the patient was not precisely what the defender intended, and although the difference between what was intended and what was supplied was not very material, I have no doubt that the defender had a right, if not a duty, to inquire into the matter, because it is a serious thing for a chemist to dispense a drug which is not in precise accordance with the physician's prescription. I therefore think that anything pertinent to the occasion which the defender might have said or written to the pursuer would have been protected unless malice was averred and proved. For example, if the defender had accused the pursuer of gross carelessness in the conduct of his business, or of want of reasonable skill as a chemist, I think that such a statement would have been privileged. But the letter which the defender actually wrote went, in my opinion, far beyond anything which the occasion warranted. It is true that the precise terms of a privileged communication are not to be scrutinised too strictly, and if the letter had been written in the heat of the moment, when the defender first learned of the mistake which had been made, there would have been a good deal to be said for the view taken by the learned Sheriff-Substitute. But so far from that being the case the defender wrote the letter after he had had the greater part of a day to think over the matter. That circumstance imports into the case an element of deliberation which, in my judgment, is fatal to the defence. To charge the pursuer deliberately, and after ample time for consideration, with having obtained money on false pretences, and to threaten him that unless the money was refunded and an apology made the matter would be put into the hands of the police, was, in my opinion, so extravagant and indicated such recklessness on the defender's part as to infer malice.

It therefore seems to me that the pursuer is entitled to an award of damages. In regard to the amount this is plainly not a case for awarding a large sum, but as little is it a case in which justice would be done by a merely nominal award. I therefore propose to your Lordships that we should grant decree for a sum of £30.

The LORD JUSTICE-CLERK and LORD ARDWALL concurred.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor—

"Sustain the appeal and recal the said interlocutor appealed against: Find in fact (1) that the letter referred to on record was written by the defender to the pursuer, and is of and concerning the pursuer, and is false and calumnious; and (2) that facts and circumstances, including in that expression the terms of said letter itself, have been proved sufficient to infer malice on the defender's part in writing said letter: Find in law that the defender is liable to the pursuer in damages in respect of the statements in said letter: Assess the damages at the sum of £30, for which sum grant decree against the defender," &c.

Counsel for the Pursuer (Appellant)—Clyde, K.C.—Grainger Stewart. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defender — Solicitor-General (Ure, K.C.)—George Watt, K.C.—A. R. Brown. Agents — Macpherson & Mackay, S.S.C.

Friday, March 15.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

HUGHES *v.* J. & W. STEWART.
MITCHELL *v.* J. & W. STEWART.

Jurisdiction—Court of Session—Sheriff—Reparation—Foreign Firm Carrying out Contract in Scotland—"Place of Business"—"Personal Service"—Employers' Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 6 (1)—*Relevancy of Averments.*

A workman raised an action in the Sheriff Court to recover damages for personal injuries at common law or under the Employers' Liability Act 1880 against his employers, a foreign firm carrying out a contract within the sheriffdom, and subsequently had the cause transferred to the Court of Session. He averred that the firm had had for several months before and after the accident an office or place of business at the place where the contract was being carried out, and that the action