Counsel for the Appellants—The Dean of Faculty (Campbell K.C.)—Horne. Agents—M. J. Brown, Son, & Company, S.S.C.

Counsel for the Respondent—Munro—Mair. Agents—Macpherson & Mackay, S.S.C.

Thursday, July 11.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

FARRELL *v.* BOYD.

Reparation — Slander — Privilege — Malice —Facts and Circumstances Inferring Malice—Medical Examination—Police—Wrong Diagnosis on Insufficient Examination by a Police Surgeon—Relevancy.

"The mere fact that a medical man makes a wrong diagnosis on an insufficient examination, and adheres to it when it is brought to his knowledge that other medical men take a different view, does not necessarily imply either malice or recklessness."

Conduct of and *language* used by a police surgeon in examining, and expressing his opinion on his examination of, a police constable *held* not to imply malice or recklessness so as to overcome the privilege protecting him in the execution of his duty.

Title to Sue—Bar—Police—Bye-Law Governing Employment whereby Action without Consent Forbidden.

Constables in the Glasgow Police Force are appointed subject to certain bye-laws, No. 20 of which provides—"No member of the force shall prosecute any person in any court of law for any alleged assault committed on him in the execution of his duty or for alleged defamation of character; nor shall he prosecute any servant of the police establishment for any alleged debt or damage, without in every case first obtaining the written consent of the chief-constable . . ."

Held (*per* Lord Ordinary, Salvesen) that failure to obtain consent did not affect the title to sue, but only rendered the member of the force raising an action without such consent subject to the discretion of the chief-constable; and that even where the action was against another member of the police establishment, at least where it was not averred that such other member was subject to the same bye-law.

On June 15, 1906, Francis Farrell, police constable, Glasgow, raised an action against John Adam Boyd, M.B., C.M., surgeon to the Glasgow Corporation Police Force, to recover £1500 as damages for slander.

The pursuer, who held his position of constable subject to certain bye-laws (*v. sup. second rubric*), averred that in conducting a prisoner to prison on 9th March 1906 he had sprained his ankle, but not realising the seriousness of his accident had remained on duty till unable to do so on the 11th; that he had then reported the injury and had been examined on the 12th by the defender who had at that time, said the injury was a severe sprain, and had ordered him to call on the 22nd at the Central Police Office. "(Cond. 4) On 22nd March the pursuer called at the Central Police Office and saw the defender. The defender again examined him. In the course of his examination he asked the pursuer if he had ever suffered from venereal disease. The pursuer denied that he ever had, and the defender thereupon said—'None of your damned lies. You must have had it, and that is the effect of it in your ankle just now. That is what I call gonorrhœal rheumatism.' The pursuer thereupon attempted to explain how the injury had happened as above set forth, and that it did not happen as the defender apparently supposed. The defender, however, would not listen to him and again said—'None of your damned lies. I have had my eye on you for some time. I have seen as fly men as you before; you are not going to do me. That is the effect of venereal disease, and possibly you may lose your foot through the effects of your whoring.' The pursuer thereafter again protested against the defender's conclusions, and emphatically denied that he had ever been affected in the way indicated by the defender. The defender, however, still refused to listen and said he would report the pursuer's conduct to the Superintendent of the Division. He also ordered the pursuer to return to the Central Police Station on Thursday, 29th March. . . . (Cond. 5) On Thursday, 29th March, the pursuer called again and was examined by the defender. He then informed the defender that he had been examined by Dr . . ., Glasgow, who was of opinion that the injury was only a severe sprain. The defender immediately retorted—'It is nothing of the kind. It is gonorrhœal rheumatism. I have seen too much of this in the infirmaries not to know what it is.' The pursuer again protested, and denied that he was or could possibly be suffering from this disease, but the defender again took no notice of his protestations and denial. He instructed him to return in a fortnight and then dismissed him. (Cond. 6) The pursuer accordingly again called on 12th April, and the defender thereupon repeated his statements as to the nature of the pursuer's injuries in spite of the pursuer's protests. He also used abusive and violent language to the pursuer, calling him amongst other things 'a bloody scoundrel.' (Cond. 7) About the beginning of April the defender reported to the Chief-Constable regarding the pursuer's injuries in the following terms—'He suffers from gonorrhœal rheumatism.' The said statements to pursuer himself, and said report regarding him to the Chief-Constable, are of and concerning the pursuer, and are false, calumnious, and malicious. They conveyed, and were intended by the defender to convey, the meaning that the pursuer had been leading a loose and immoral life, and that in consequence thereof he had contracted

venereal disease. No one who has not suffered from venereal disease can suffer from the said disease of gonorrhœal rheumatism. . . . (Cond. 8) Further, the said false and calumnious statements and report were made by the defender maliciously to gratify a spite which for reasons unknown to pursuer he had conceived against the pursuer. They were made without any probable cause or justification. Further, they were made and repeated recklessly and without the inquiry necessary to enable defender to form such an opinion, and without regard to the data which are necessary for the diagnosis of the disease of gonorrhœal rheumatism. No medical man is justified in diagnosing or is entitled to diagnose a case as a case of gonorrhœal rheumatism unless he either upon examination finds the patient actually suffering from a gonorrhœal discharge, or knows from personal knowledge of the patient's history, or by means of bacteriological examination, that he has suffered from gonorrhœa in the past. The pursuer has never in the whole course of his life suffered from gonorrhœa. There was no discharge from his person at any time when he was examined by the defender which would have been mistaken for a gonorrhœal discharge or have justified the defender's statements. The defender did not know from personal knowledge of the pursuer's history that he had suffered from gonorrhœa in the past, and the defender never made any bacteriological examinations. Further, the said false and slanderous statements were repeated and persisted in by the defender to the pursuer, and said report to the Chief-Constable was made by defender in spite of the pursuer's earnest and repeated declaration that he had never suffered from venereal disease, and in spite of the fact (which had been brought to his knowledge by the pursuer) that several medical men in Glasgow whom the pursuer had consulted and who had examined the pursuer were and are of opinion that the injuries are merely the result of a severe sprain. Further, the defender did not before making and thereafter repeating said statements, or before making said report to the Chief-Constable, take any trouble to verify or test or inquire into the account given to him by the pursuer of the manner in which he had received the said injuries, although the said injuries were completely explained thereby. The defender has further refused to withdraw or reconsider the said statement, although the pursuer has offered to submit to examination by any neutral medical man that the Chief-Constable might select, and has refused to accept the result of any such examination. (Cond. 9) In consequence of the false and slanderous and reckless and malicious charges contained in the said statements and report, the pursuer has suffered severely in his feelings and health, and also in his position and prospects. On account of the reflections involved in it upon his moral character, his prospects as a member of the Glasgow Police Force have been materially injured. He has also during his incapacity been reduced to half-pay as an officer injured through his own fault, instead of receiving the full pay he is entitled to as having been injured in the course of his duty. Further, he was recently married, and the said statement is of such a nature as, if allowed to remain uncontradicted, is calculated to prejudice his domestic relations."

The defender pleaded, *inter alia*—"(1) The pursuer not having obtained the written consent of the Chief-Constable to sue the present action he is barred from prosecuting the same. (2) No relevant case."

On 20th October 1906 the Lord Ordinary (SALVESEN), finding the pursuer's averments were not relevant, assoilzied the defender.

Opinion.—". . . [*After narrating nature of action and averments*] . . . . The first plea with which he (*i.e., the pursuer*) is met is one of no title to sue. It is based on the fact that the pursuer has admittedly not got the consent of the Chief-Constable to bring the present action, as provided by bye-law No. 20, subject to which the pursuer was appointed and still holds his position in the Glasgow Police Force. That bye-law is in these terms—". . . [*quoted supra in second rubric*]. . . ." The defender urged that this bye-law was one framed in the interests of the servants of the police establishment, and that he, as one of these, was entitled to found upon it to the effect of having the action dismissed.

"I have no difficulty in rejecting this contention. I think it impossible to hold, as regards the earlier part of the bye-law, that the public have any *jus quæsitum* entitling them to enforce compliance with its provisions, and I do not see that the second portion, on which the defender specially founds, is in any different position. It cannot be said that such a bye-law is in the interests of individual servants of the police establishment, although conceivably it might be used, if the defender's interpretation of it were sound, to shield a delinquent. Nor is it said that the defender has subscribed any similar provision, in which case there would at least have been mutuality between the pursuer and defender in this respect. The true object of the bye-law I take to be to enable the Chief-Constable to control the raising of actions by members of the police force against each other, or against members of the public, on certain specified grounds, while they remain in the police force. Accordingly, a breach of the bye-law would no doubt, in the discretion of the Chief-Constable, be a good ground for dismissal of any member of the force who contravened it, but does not, I think, affect their common law right to seek a remedy for injuries sustained or debts due to them in the ordinary courts of law.

"The defender, however, further pleads that the action is irrelevant on the ground that the alleged slander was uttered in circumstances in which the defender was privileged, and that no facts and circumstances are averred from which malice can reasonably be inferred. The pursuer admits

that the defender's privilege is of that high degree which requires that he should put not merely malice but want of probable cause into the issue. He admits further that specific facts and circumstances must be averred as the defender contends, and the only controversy between the parties is whether such facts and circumstances have been relevantly averred. The pursuer founds, in the first instance, on the language which the defender is alleged to have used on the occasions when he examined him. I attach little importance to this, because I regard it as merely a coarse and somewhat vigorous mode of stating an opinion; and the ground of action would have been as good if the same opinion had been expressed in a more temperate and considerate manner. The pursuer further says that the statements and report were made by the defender 'to gratify a spite which, for reasons unknown to the pursuer, he had conceived against the pursuer.' His counsel, however, admitted that there was nothing except the defender's conduct in relation to the matter out of which the action has arisen on which he could found as instructing the alleged ill-will; and I think the rule as to specific facts and circumstances is not satisfied unless these are extrinsic to and independent of the alleged slander. On this point I refer to Lord M'Laren's opinion in *Campbell* v. *Cochrane*, 43 S.L.R. 221.

"The more serious averments are those which follow, to the effect that no medical man is entitled to diagnose a case as one of gonorrhœal rheumatism unless upon one or other of three grounds stated by the pursuer—none of which existed in this case; and that the defender acted recklessly in stating the opinion and making the report which he did—so recklessly indeed that his conduct can only be attributed to private malice or entire want of consideration for the pursuer's interests. Now, I am bound to assume that the defender's diagnosis was in fact erroneous; and the circumstance that he does not plead *veritas* rather indicates that he is not now himself confident that the diagnosis was correct. I assume also, in the pursuer's favour, that according to the best medical opinion a reliable diagnosis of the ailment in question can only be based on one or other of the grounds he mentions. But the mere fact that a medical man makes a wrong diagnosis, on an insufficient examination, and adheres to it when it is brought to his knowledge that other medical men take a different view, does not necessarily imply either malice or recklessness, and as I read the pursuer's averments there is really nothing more. The defender on three occasions appears to have medically examined the pursuer, and to have formed the opinion which he so brusquely expressed and embodied in his report to the Chief-Constable. He is admittedly a man of large experience in his profession; and he may well have thought that what he found on examination was sufficient to enable him to form a reliable opinion. If the pursuer has suffered a wrong, he may still convince the Chief-Constable of the fact, and obtain redress, but, in my opinion, he has not stated any relevant ground for subjecting the defender in damages. The defender was admittedly acting within the scope of his duty in all that he did; and I do not think there are any relevant facts stated from which I can draw the inference that he has forfeited the privilege which the law confers on all statements so made. I shall therefore assoilzie."

The pursuer reclaimed, and argued—Admitting that the defender was entitled to a high degree of privilege, there were averred facts and circumstances inferring malice sufficient to overcome that privilege. The statements made by the defender constituting the slander did not proceed merely from a mistake in diagnosis. The ordinary methods of diagnosis had not been adopted, and the defender had hastily and recklessly jumped to a conclusion, refusing to listen to the pursuer's explanations, and clinging tenaciously to that conclusion, and repeating his statements in face of a contrary medical opinion cited to him. The defender's conduct and utterances showed that he had conceived an ill-will towards the pursuer. He had a special duty towards the pursuer, who was bound to submit himself to examination. He should therefore have inquired, before reporting, into the alleged cause of the injury, and that would have satisfied him he was wrong, but he had failed to do so. This failure, the reckless persistence in his assertions, his utter disregard of all explanation, his neglect of the proper medical means of testing his opinion, and the language used, negatived any idea that the defender was acting in the *bona fide* discharge of his duty and overcame the privilege. The action was relevant, and the interlocutor of the Lord Ordinary should be recalled.

Counsel for the defender were not called upon.

LORD PRESIDENT—The case for the reclaimer here has been exceedingly well stated by Mr Macdonald, and that only confirms me in the view that the Lord Ordinary's interlocutor is right. The Lord Ordinary has admirably summarised the ground of his decision where he says—"The mere fact that a medical man makes a wrong diagnosis on an insufficient examination, and adheres to it when it is brought to his knowledge that other medical men take a different view, does not necessarily imply malice." Now, the thing we are in search of here is malice, for this was a report made by an official which in the course of his duty he had to make. It is therefore privileged, and no action of slander can lie without proof of malice either from something extrinsic to the report or from the exaggerated terms in which his opinion was given. I can find no averments on record here from which malice could be inferred on either of these grounds, and am therefore of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD KINNEAR—I also entirely agree with the Lord Ordinary.

LORD DUNDAS—I also agree.

The Court adhered to the interlocutor of the Lord Ordinary and refused the reclaiming note.

Counsel for the Pursuer (Reclaimer)—Jas. Macdonald. Agents — M'Gregor & Purves, W.S.

Counsel for the Defender (Respondent)—Dean of Faculty (Campbell, K.C.)—Munro. Agents—Patrick & James, S.S.C.

Tuesday, July 16.

FIRST DIVISION.

[Exchequer Cause.

INLAND REVENUE *v.* EDINBURGH MAGISTRATES.

Revenue—Income-Tax—Assessment—Heritable Subjects Prohibited by Statute from Earning Profit but Self-Supporting — Slaughter-Houses Belonging to Corporation—Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 60, *Schedule A, No. I, and No. III Rule* 3 — *Edinburgh Slaughter-Houses Act* 1850 (13 *and* 14 *Vict. c. lxx*).

A corporation owned slaughter-houses erected under a private Act, which, *inter alia*, provided that the dues charged on animals slaughtered and the rents payable by fleshers for the use of booths should be fixed triennially at such figures as to make the undertaking self-supporting but not a profit-earning subject.

Held that the subjects fell to be assessed under No. I and not under No. III of Schedule A, Income-Tax Act 1842, sec. 60.

Revenue — Income-Tax — Valuation for Assessment—Valuation by Assessor not an Officer of Inland Revenue—Property and Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 60—*Lands Valuation* (*Scotland*) *Act* 1854 (17 *and* 18 *Vict. c.* 91).

Per Lord M'Laren—"I see no reason to doubt that the Inland Revenue Department is entitled to found on the valuation made under the Lands Valuation Act, although that valuation is not necessarily binding on them."

The Income-Tax Act 1842, sec. 60, Schedule A, enacts—"No. I—General Rule for estimating lands, tenements, hereditaments, or heritage mentioned in Schedule A—The annual value of lands, tenements, hereditaments, or heritages charged under Schedule A shall be understood to be the rent by the year at which the same are let at rack-rent, if the amount of such rent shall have been fixed by agreement commencing within the period of seven years preceding the fifth day of April next before the time of making the assessment, but if the same are not so let at rack-rent, then at the rack-rent at which the same are worth to be let by the year; which rule shall be construed to extend to all lands, tenements, and hereditaments or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value, except the properties mentioned in No. II and No. III of this Schedule."

No. III — "Rules for estimating the lands, tenements, hereditaments, or heritages hereinafter mentioned which are not to be charged according to the preceding General Rule.—The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited. . . . *Third*, of iron-works, gasworks, . . . rights of markets and fairs, . . . and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments, or heritages, on the profits of the year preceding. . . ."

At a meeting of the Commissioners for the General Purposes of the Income-Tax Acts, held at Edinburgh on 18th October 1905, the Lord Provost, Magistrates, and Council of the City of Edinburgh appealed against an assessment made upon the Corporation for the year ending 5th April 1905 of £91, 19s., being income-tax at the rate of 1s. per pound on £1839, the net annual value for that year of the slaughter-houses owned and occupied by them at Fountainbridge, and erected by them under the Edinburgh Slaughter-Houses Act 1850 (13 and 14 Vict. c. lxx). The annual value of the premises in the valuation roll, which was made up by an Assessor not an Officer of Inland Revenue, was entered as £2425, and this entry, less deductions, had been adopted for the purposes of income-tax. The appeal having been sustained the Surveyor appealed.

The case stated—"The assessment was made under the Acts 5 and 6 Vict. c. 35, sec. 60, Schedule A, No 1 General Rule; 16 and 17 Vict. c. 34, sec. 2; and 4 Edw. VII, c. 7, sec. 7.

"The Corporation claimed as regards the Act 5 and 6 Vict. c. 35, to have the assessment made as in all previous years under No. III Rule 3 of Schedule A and the Rules of Schedule D of that Act.

"The following facts were admitted or proved:— . . . (*c*) The Corporation levy and take, as authorised by the Act of 1850, from every flesher to whom a booth or a share of a booth in the slaughter-houses is allocated, over and above the dues on cattle slaughtered therein, a yearly rent payable half-yearly at Whitsunday and Martinmas. The booths are occupied in some cases solely by one flesher, in other cases by two fleshers, and in other cases by three fleshers. The rent of each booth is £8 per annum, and where a booth is occupied by more than one flesher each of them pays a proportionate part of the rent of £8. The dues at present payable by a flesher renting a booth or share of a booth