

# SUMMER SESSION, 1909.

## COURT OF SESSION.

Thursday, May 13, 1909.

### FIRST DIVISION.

[Lord Guthrie, Ordinary.]

OGSTON & TENNANT, LIMITED *v.*  
THE DAILY RECORD, GLASGOW,  
LIMITED.

*Reparation—Slander—Newspaper—Diligence to Recover Writs—Anonymous Letters—(a) Original Letters, (b) Covering Letters, and (c) All Communications Received by Defenders Tending to Show Truth or Untruth of Statements Published and Purpose and Bona Fides in Publishing.*

In an action of damages for slander against a newspaper in respect of certain articles and letters published therein, the defenders, *inter alia*, pleaded that the passages complained of were fair comment on matters of public interest. An issue was adjusted, putting to the jury whether the statements complained of were of and concerning the pursuers, and falsely and calumniously represented that "the pursuers by themselves or in company with others had been guilty of deceiving the public and traders by dishonest methods and practices in business."

*Held* (1) that the pursuers were entitled to a diligence to recover the letters where the statements complained of referred to a particular communication received from a particular person, though such person was described under a pseudonym, but not to recover other letters from the same parties relating to the original letters—such letters so far as material falling under the article granted; and (2) that they were not entitled, in connection with the statements complained of which referred to no particular communication, to a diligence for the recovery of all communications received by the defenders tending to show the truth or untruth of the statements and the defenders' purpose and *bona fides* in making them, inasmuch

as, such communications not bearing to be from any particular person but involving the world in general, their presence or absence was not material to the truth or falsehood of the defenders' statements, and the article as framed was so wide as to be incapable of practical working out.

On 11th September 1907 Ogston & Tennant, Limited, soap manufacturers, Glasgow, brought an action against The Daily Record, Glasgow, Limited, in which they concluded for £25,000 as damages for slander alleged to be contained in certain articles and letters published by the defenders. [Examples of the letters and articles complained of are given in the opinion (*infra*) of the Lord President.]

The defenders denied the pursuers' averments, and pleaded, *inter alia*, that the articles published were "fair comment on matters of public interest."

On 26th November 1908 the First Division approved of the following issue—"It being admitted that the defenders printed and published in the issues of the *Daily Record and Mail* newspaper between 20th October and 29th November 1906, and in the issues of the *Scottish Weekly Record* newspaper between 27th October and 24th November 1906, the matters contained in the schedule hereto annexed on the respective dates set forth in the said schedule—Whether the statements therein contained are in whole or in part of and concerning the pursuers, and falsely and calumniously represent that the pursuers by themselves, or in company with others, had been guilty of deceiving the public and traders by dishonest methods and practices in business—to the loss, injury, and damage of the pursuers? Damages laid at £25,000."

On 27th February 1909 the Lord Ordinary (GUTHRIE) granted diligence against havers at the pursuers' instance for recovery of the documents called for in the following supplementary specification:—"1. The letters or other written communications, lists, or other documents referred to in the following passages of the schedule annexed to the issue:—[A list of the passages followed, in all of which a particular communication was referred to]. 2. All letters, telegrams, or other written communications passing between the defenders or anyone

on their behalf and the authors or alleged authors of, or the parties writing and/or sending, the letters or other written communications referred to in the immediately preceding article relating to said letters or communications between 1st July 1906 and the date of raising the present action. 3. All letters or other written communications received by the defenders between 1st July 1906 and the date of raising the present action showing or tending to show (1) whether the facts stated in the following excerpts from the articles scheduled to the issue are or are not truly stated by the defenders; (2) the defenders' knowledge of the truth or falsehood of the facts so stated; or (3) whether the facts so stated were stated by the defenders *bona fide* and in the public interest or for their own purposes or from other indirect motives—[A list of excerpts followed]. 4. Failing principals, copies, drafts, impressions, or scrolls of the foregoing or any of them."

The defenders reclaimed, and argued—This was plainly a fishing diligence and ought not to be granted—*County Council of Fife v. Thoms*, July 9, 1898, 25 R. 1097, 35 S.L.R. 868. Publishers of a newspaper were not bound to publish the names of anonymous correspondents—*Morrison v. Smith & Company*, January 30, 1897, 24 R. 471, 34 S.L.R. 370. The case of *Cunningham v. Duncan & Jamieson*, February 2, 1889, 16 R. 383, 26 S.L.R. 316, was distinguishable. Articles 2 and 3 were much too wide, and if granted could not be executed. [The Court called for a reply *quoad* articles 2 and 3 only.]

Argued for respondents—The documents called for in articles 2 and 3 were required to enable the respondents to meet the defence of "fair comment." They were supplementary to article 1, and if article 1 were granted it followed that articles 2 and 3 must also be granted. This was not a fishing diligence, for the respondents had specified as exactly as they possibly could the letters called for.

At advising—

LORD PRESIDENT—In this case a very ample diligence was granted by the specification of January 12th, and then the Lord Ordinary at the same time indicated by his note relative to that interlocutor that "Standing the defenders' plea of fair comment, which they declined to withdraw, or even as affecting the question of damages, I think the pursuers, under the words 'falsely and calumniously' in the adjusted issue, may frame competent articles for recovery of documents bearing on the defenders' *bona fides* if they will select certain averments in the articles complained of as false, and as made by the defenders in knowledge of their falsehood." Accordingly, the pursuers then put in a supplementary specification which the Lord Ordinary granted, and it is upon that that this reclaiming note has been taken.

The first article asks for "the letters or other written communications, lists, or other documents referred to in the following passages of the schedule annexed to

the issue." Now, each of the passages there practically sets forth that a certain communication has been received from a certain person—when I say a certain person, I mean, not a certain person given by name and address, but a certain person given by way of description—and, agreeing as I do with what the Lord Ordinary has said, I think that is a perfectly competent article, because I think it is quite fair. For instance—"We have for a long time been buying Ogston & Tennant's soap," writes Janet, "but since they are going into the new Lever business we are giving it up." Now that is taken out of an article which is going to be sent to the jury as "fair comment" upon the doings of these soap manufacturers. "Fair comment" is evidenced by the fact that the public are rising against these methods and are giving up the practice they had of buying their soap. I think, therefore, it is evidently perfectly fair that the pursuers, who, of course, want to meet the defence of "fair comment," should know whether Janet ever wrote this letter at all, or whether Janet is just another name for the newspaper article writer himself. Accordingly, I think the allowance of this first article is right.

The second article, however, asks for "all letters, telegrams, or other written communications passing between the defenders or anyone on their behalf and the authors or alleged authors" of the letters referred to in the previous article. I cannot see any reason for this second article. I doubt whether anything would be recovered under it at all; but I cannot see any reason for it, for either these communications are part of the original communication made, in which case they would obviously be recovered under the first article—that is to say, taking again Janet's letter, if Janet had really sent a letter and a letter was produced signed "Janet," it would of course be a perfectly fair question at the Commission to say—"Did this letter come in an envelope with a postage stamp on it and nothing more, or was there another communication inside the letter or outside the envelope." And then, if there was, it would equally fall under that article. But if not, if it is not part of the original communication, then I do not see that communications between the newspaper and people who may have written letters, but which communications are not *per se* referred to in the course of the newspaper article, really come into the matter at all. And therefore I think that the second article must be disallowed.

The third article must be equally disallowed, because I do not think it is really capable of practical working out. It calls for "all letters or other written communications received by the defenders between 1st July 1906 and the date of raising the present action"—that is to say, the whole world is upon the other side—"showing or tending to show (1) whether the facts stated in the following excerpts from the articles scheduled to the issue are or are not truly stated by the defenders; (2) the defenders' knowledge of the truth or falsehood of the

facts so stated; or (3) whether the facts so stated were stated by the defenders *bona fide* and in the public interest or for their own purposes, or from other indirect motives." Now, when we come to the excerpts, these are all excerpts which differ from the excerpts in article 1, because they do not indicate that any particular communication was received from any particular person, but which set forth that certain things are said upon the authority of the newspaper. For instance, take the one that is headed "Cornering Raw Material." "Active efforts have been exerted by the Soap Trust during the week to seize upon every available source of supply for raw material." Now whether that statement was fabricated by the newspaper writer or not may be a question, but it is perfectly evident that the statement can be justified by the newspaper writer without the production of any letter at all. He might have learned it by word of mouth. And therefore the mere fact of whether there is a letter or whether there is not does not really go to the truth or falsehood of the statement; whereas, of course, the fact as to whether Janet wrote in the way she is said to have done does go to the truth or falsehood of that statement. Moreover, the parties here can get everything they want without this call. It is quite clear that if the newspaper here is going to put forward "fair comment" they will not be able to make good that defence before a jury without putting into the box the person who wrote the article. And if the person who wrote this article "Active efforts are being exerted by the Soap Trust, &c." is in the box, of course the pursuers may ask him what ground he had for the statement. If in his answer he said, "Oh, I received countless letters," well, I think he would make a very bad impression upon the jury if, being asked "Would you produce any of them?" he said, "Oh no, I have left them all at home." He would not be able to justify his statement without producing some letters.

Therefore upon the combined grounds that I do not think that the letters are of the essence as they are in the first article, and also that I never knew a diligence granted where the one side of the correspondence involved the world in general, I think this article 3 ought to be refused.

LORD KINNEAR—I am of the same opinion.

LORD PEARSON—I also agree.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor, disallowed articles 2 and 3 of the said specification, and granted diligence for the recovery of the documents called for in articles 1 and 4 thereof as amended.

Counsel for Pursuers (Respondents)—Murray, K. C.—Hamilton. Agents—Morton, Smart, Macdonald, & Prosser, W. S.

Counsel for Defenders (Reclaimers)—Cooper, K. C.—Lyon Mackenzie. Agents—W. & F. Haldane, W. S.

Thursday, May 13.

FIRST DIVISION.

[Lord Salvesen, Ordinary.]

LEON v. THE EDINBURGH EVENING NEWS, LIMITED.

*Reparation—Slander—Mis-description—“Prisoners Acquitted”—Relevancy.*

A newspaper account of a police case in which the accused were acquitted was headed "Prisoners Acquitted." One of the accused brought an action of damages for slander against the newspaper for having falsely and calumniously stated that he had been a prisoner when as matter of fact he had never been arrested or committed to prison.

Held that the words "prisoners acquitted" were not libellous, and action dismissed as irrelevant.

On 9th January 1909 Levy Leon, 3 M'Donald Road, Edinburgh, brought an action against the Edinburgh Evening News, Limited, in which he claimed £500 as damages for slander alleged to be contained in the head-note to a paragraph published by the defenders.

The head-note and paragraph were as follows:—"The Edinburgh Licensing Prosecution. Prisoners Acquitted. The test case in which Levy Leon and Barnet Jablensky were charged with a contravention of the Licensing (Scotland) Act came up for decision at Edinburgh City Police Court to-day, Bailie Inches presiding. The accused were charged with trafficking in exciseable liquors at a dance on the evening of 1st October in the Free Gardeners' Hall, Picardy Place. The Magistrate said that after fully considering the evidence he found the charge not proven, but thought that the action of the police was justified. The accused men were acquitted."

The pursuer averred that the paragraph falsely and calumniously stated that he had been a prisoner when as matter of fact he was not.

The defenders admitted that the pursuer had never been apprehended or committed to prison, that no warrant to apprehend or imprison him was granted, and that he had duly appeared at the different diets of the case.

They pleaded, *inter alia*, that the action was irrelevant.

On 13th March 1909 the Lord Ordinary (SALVESEN) allowed the pursuer an issue.

*Opinion.*—"This is an action of damages for slander said to be contained in a paragraph published in the defenders' newspaper. The facts averred by the pursuer are that on 4th November 1908 he was served with a complaint for an alleged breach of the Licensing (Scotland) Act 1903; that on 6th November the relevancy of the complaint was debated, when it was held to be relevant, and proof allowed; and that on 10th November the charge was held not proven. The pursuer attended the trial under citation. He had not been appre-