Wednesday, May 18.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

RIDDELL *v.* CORPORATION OF GLASGOW.

Reparation—Slander—Master and Servant — Liability of Employer for Slander Uttered by Servant — Corporation — Privilege—Averments inferring Malice.

A brought an action of damages for slander against the Corporation of Glasgow, in which she averred that B, a tax collector in their employment, while in the course of collecting police taxes at her house, had accused her of tampering with a receipt for the taxes in order to defraud his employers, and that on her repudiation of the charge he had assaulted her. She further alleged that B had repeated the slander in the house of a neighbour and subsequently in the tax-collector's office.

Held (*aff.* judgment of Lord Salvesen) (1) that B in uttering the statements complained of was acting within the scope of his employment, and that, accordingly, the action was relevant; but (2) that the occasion was privileged. *Held further*, that malice had been relevantly averred and issues *allowed*.

Mrs Esther Lorimer or Riddell, 30 Sister Street, Glasgow, brought an action against the Corporation of the City of Glasgow, in which she sued for £500 damages for slander.

The pursuer averred—"(Cond. 2) On or about 28th September 1909 the pursuer's husband Nathaniel Riddell was the tenant of the dwelling-house still occupied by him and the pursuer at 30 Sister Street aforesaid, of which the rental is £8, 4s. Police assessments were payable by pursuer's husband in respect of his tenancy and occupancy of said house amounting to 17s. 0½d. In conformity with the practice in Glasgow said assessments were accepted by the defenders in instalments. At said date the following sums had been paid to account of the assessments due, viz.— 7s. 6d., 4s., 2s. 6d., and 2s., making in all 16s., leaving a balance of 1s. 0½d. remaining due. (Cond. 3) On said date Matthew Gilmour, 104 Cardross Street, Dennistoun, Glasgow, who was in the service of the defenders as a tax collector, and whose duties included the collection of the police assessments payable by pursuer's husband, and the granting of receipts therefor and for instalments thereof, while in the exercise of his duty as police tax collector in the employment of the defenders, called twice at pursuer's said house at 30 Sister Street aforesaid. On the first occasion the said Matthew Gilmour came to pursuer's said house and demanded payment of the police taxes, the said Nathaniel Riddell was absent at work, but the pursuer, the said Mrs Esther Lorimer or Riddell, who was alone in the house at the time, tendered to Gilmour the sum of 1s. 0½d., being the balance due by her husband at that date for police taxes for the current year. Gilmour declined to accept said sum, and stated that the pursuer's husband was due to the defenders the Corporation of Glasgow, in name of police taxes, the sum of 4s. 0½d. for said house at 30 Sister Street. Gilmour thereupon demanded production of all the receipts for police taxes for the current year in the possession of the pursuer, who immediately produced four receipts, being for the sum of 7s. 6d., 4s., 2s. 6d., and 2s., making a total of 16s., which she had on various dates paid to the collector Gilmour as representing the Corporation of Glasgow, which clearly showed that there only remained a balance of 1s. 0½d. due to the Corporation, and handed the same to Gilmour for examination. Upon examining the said receipts Gilmour remarked that he would call again the same afternoon and left pursuer's house. (Cond. 4) About 3 p.m. on said date the said Matthew Gilmour again called at the pursuer's house at 30 Sister Street aforesaid, and again requested the pursuer Mrs Esther Lorimer or Riddell to produce to him the four receipts which she had exhibited to him on the morning of said date. The receipts were accordingly produced. Among these receipts was one for 7s. 6d. The said receipt presented no appearance of having been altered, but nevertheless the said Matthew Gilmour accused the pursuer of altering and forging the said receipt for 7s. 6d. from the sum of 4s. 6d. to 7s. 6d. for the purpose of defrauding the defenders of the sum of 3s. He further stated that he would lodge information with the police authorities, which would result in the pursuer the said Mrs Esther Lorimer or Riddell being put into jail for three months for forgery. Pursuer demanded that Gilmour should immediately hand her back the said receipt for 7s. 6d., fearing that Gilmour would destroy same, and she indignantly repudiated the suggestion that she had acted dishonestly, and she threatened to report Gilmour at the office of the defenders in Tobago Street, Glasgow, for his conduct. Gilmour thereupon violently caught hold of the pursuer, pulled and pushed her about, and attempted to forcibly take possession of the remaining receipts which she held in her hand. As pursuer endeavoured to retain possession of said receipts Gilmour caught hold of one or more of said receipts, and some were partly torn. Pursuer fearing further violence at the hands of Gilmour shouted loudly for help in the hope that some of the neighbours in the adjoining houses would come to her assistance. Gilmour becoming alarmed left pursuer's house, but pursuer followed him down the common stair of the tenement. (Cond. 5) Pursuer upon proceeding down stairs entered the house within said tenement occupied by a Mrs Johnston, and she was followed into said house by Gilmour, who repeated said allegations against the pursuer in presence and hearing of the

said Mrs Johnston, and falsely and calumniously stated of and concerning the pursuer, in her hearing, and in the presence and hearing of the said Mrs Johnston, that she, the pursuer, had altered and forged the said receipt from the sum of 4s. 6d. to 7s. 6d., having 'put a tail upon the figure 4, making it into a 7,' and had thereby attempted to defraud the Corporation of the City of Glasgow of the sum of 3s., and that she was liable to be put into jail for three months for forgery. Pursuer indignantly repudiated the allegations of Gilmour, who repeated same several times in presence of the said Mrs Johnston. (Cond. 6) Pursuer, accompanied by Mrs M'Laren, who also resides at 30 Sister Street aforesaid, thereupon proceeded to the office of the collector of police assessments in Tobago Street aforesaid. The pursuer upon entering said office proceeded to the counter, where she was met by a servant of the defenders whose name is believed to be Mr Robert Osborne, who is police tax collector at said office. The said Matthew Gilmour at said office, and in the presence and hearing of the said Mr Robert Osborne and Mrs M'Laren, repeated the accusation that the pursuer had altered and forged the said receipt from the sum of 4s. 6d. to 7s. 6d. for the purpose of defrauding the defenders of the sum of 3s. Pursuer again indignantly repudiated Gilmour's allegation, but the said Matthew Gilmour repeated and persisted in said accusation. (Cond. 7) The said statements were false, calumnious, and malicious. They were wholly without foundation. They were made without probable cause, recklessly, maliciously, and without caring whether they were true or false. The said statements were made by the collector the said Matthew Gilmour in the course of and within the scope of his employment. In making said accusations said Matthew Gilmour was acting as the servant of the defenders for the purpose of enforcing their claim to the said sum of 3s. of which she was accused of attempting to defraud the Corporation. The said statements have received great publicity in the pursuer's neighbourhood and have injured her greatly in her character and feelings."

The defenders pleaded, *inter alia*—"(1) The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed, with expenses. (4) In any event, any statements made by the said Matthew Gilmour having been made by him in the execution of his duty are privileged, and these having been made without malice, decree of absolvitor should be pronounced."

On March 10, 1910, the Lord Ordinary (SALVESEN) approved of the following issue:—"Whether, on or about 28th September 1909, and in or about the pursuer's house at 30 Sister Street, Calton, Glasgow, the defenders, by Matthew Gilmour, assistant collector of taxes and sheriff-officer in their service, falsely, calumniously, and maliciously stated of and concerning the pursuer that she had altered and forged a receipt for 7s. 6d. from the sum of 4s. 6d. to 7s. 6d., for the purpose of defrauding the defenders of the sum of 3s., or used words of like import and effect, to the loss, injury, and damage of the pursuer?"

[His Lordship also approved of issues in similar form applicable to the slanders which were alleged to have been uttered in Mrs Johnston's house and in the tax collector's office.]

Opinion.—"This is an action of damages founded on an alleged verbal slander of the pursuer by Matthew Gilmour, who was employed by the defenders as their servant to collect the police taxes of the district in Glasgow in which the pursuer resides. Her case is that when called upon for the balance due by her husband of the police taxes for the current year she tendered the sum of 1s. 0½d., and exhibited receipts for 7s. 6d., 4s., 2s. 6d., and 2s., making a total of 16s., which she had paid to Gilmour on various dates to account of the total taxes of 17s. 0½d., that Gilmour after examining the receipts remarked he would call again the same afternoon, and that when he did so call he accused the pursuer of altering the receipt for 7s. 6d. from the sum of 4s. 6d. for which it had been truly made out, for the purpose of defrauding the defenders of the sum of 3s. It is conceded that the statement by Gilmour would expose him to a relevant action of damages for libel; but the defenders say, in the first place, that they are not responsible for Gilmour's slanders; and secondly, that as the occasion was privileged the action must be dismissed, on the ground that there are no facts and circumstances set forth on record from which malice can be legitimately inferred.

"The first point appears to me to be decided against the defenders by the case of *Finburgh*, 1908 S.C. 928, where it was held that there is no difference in law as respects the liability of a master between words spoken and words written by a servant; and accordingly the only question on this head is whether it has been relevantly averred that the servant acted within the scope of his employment and for his master's benefit. On that matter I entertain no doubt. It is not suggested by the defenders that Gilmour was endeavouring to collect the extra 3s. in order that he might put the money in his own pocket and so defraud the defenders; but if not, then what he did was plainly within the scope of his employment, for it was his duty to collect the taxes which he conceived to be legally due. It is true that the demand being, as it now turns out, unwarranted (for there is no plea of *veritas*), it has not in fact benefited the defenders, but, on the contrary, has resulted in an action being raised against them. But the same may be said of all actions against employers founded on a delict committed by their servants in the execution of their duty; yet such actions are constantly entertained.

"The occasion, however, disclosed in condescendence 4 was in my opinion plainly privileged. If Gilmour for any reason thought that the sum in the receipt

had been altered, it was his duty to call the pursuer's attention to the fact and to demand an explanation; and the same is true of the subsequent occasion when the pursuer attended at the Tobago Street Police Office and complained of the charge that had been made against her. It follows that malice must go into each of the two issues which are based on what took place on these separate occasions, and that if it appears from the pursuer's record that the statements were made in good faith and not maliciously, these issues would fall to be disallowed.

"In the present case there is nothing to suggest personal ill-will on the part of Gilmour, at all events no preconceived malice which he sought to gratify by making an unfounded charge. Malice of this kind, if averred, would probably exclude the action; for if a servant abuses his position to gratify his personal spite he is not acting within the scope of his employment. But the malice which is sufficient to warrant the granting of an issue need be no more than conduct of such a kind as to indicate that the servant uttered the slander recklessly and without that due consideration for the feelings of the pursuer which a person accused of crime is entitled to expect. Here there are two matters founded on. In the first place, there is a statement that the receipt which is produced shows no signs of having been tampered with, and lends no probability to the charge which Gilmour made; and it may be further noted that the defenders tender no explanation as to how the false accusation came to be made by their servant. But, in the second place, the conduct of Gilmour, as described in condescendence 4, may be legitimately founded on as showing that on that occasion he acted in such a reckless and improper manner as to entitle a jury to infer that he acted maliciously. It is always difficult to draw the line between the cases to which the rule applies, that facts and circumstances must be averred independently of the actual occurrences founded on, and the cases to which it is not applicable. *Buchanan*, 7 F. 1001, is an illustration of the former, and *Brown* v. *Fraser*, 8 F. 1000, of the latter. I think this case more closely resembles the second of these two decisions; and I shall accordingly allow the first issue.

"I think I must, on the same grounds, allow the third issue. It is true that there is no statement of any violent conduct on the part of Gilmour in the Tobago Street office; but by this time he had, according to the defender's own account, given the pursuer a final receipt for the whole sum of 17s 0½d. He knew that she strenuously maintained that the receipt for 7s. 6d. was in its original state; and he had had time to examine it and see whether it showed any signs of having been tampered with or altered. In these circumstances, to repeat deliberately a charge of fraud of so serious a nature against the pursuer, however much he personally believed in it, may well be considered by a jury to be so reckless an act as to infer malice, and I do not propose therefore to withhold it from their consideration.

"The second issue raises a different question, namely, whether the occasion on which the words complained of were spoken was privileged? It may well be that it was only part of the same incident that is narrated in condescendence 4; but on the pursuer's statement of what occurred I should not have held that there was *prima facie* any privilege. She says that she went downstairs after her interview with Gilmour and entered the house of a neighbour, Mrs Johnston, and that Gilmour followed her and repeated the same slanderous allegation in the presence of Mrs Johnston that he had made to the pursuer herself. On this statement it is not obvious that there was any privilege. It was one thing to call the pursuer's attention to the matter of the receipt, but it was a totally different thing to publish the charge in the presence of a neighbour who was not concerned in the matter at all. I should accordingly have been disposed to allow the second issue without malice being inserted in it; but as the pursuer is willing to take the *onus* of proving malice, I shall allow the issue as it stands. The conduct of Gilmour in Mrs Johnston's house, the violence of his language, and the repetition of the charge, are sufficient material from which malice may be inferred if they are substantiated by evidence."

The defenders reclaimed, and argued—(1) The action was irrelevant, for Gilmour was acting outwith the scope of his employment in accusing the pursuer of fraud. His sole business was to collect money in a particular way—Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), section 56—and it was no part of his occupation to comment on the conduct of taxpayers. A corporation was not responsible for its servant's slander unless the slander was uttered by the servant while acting within the scope of his authority—*Agnew* v. *British Legal Life Assurance Company, Limited*, January 24, 1906, 8 F. 422, 43 S.L.R. 284. The case of *Finburghs* v. *Moss Empires, Limited*, 1908 S.C. 928, 45 S.L.R. 792, relied on by the respondent, was distinguishable, for in that case the manager was clearly acting within the scope of his employment when he uttered the slander complained of. (2) The occasion was clearly privileged, and no facts and circumstances relevant to infer malice were averred. There was in this case privilege of the highest order, for Gilmour had no interest in the money collected. Malice therefore could not be inferred from his actings at the time, and nothing antecedent or extraneous was averred. The action should therefore be dismissed—*Campbell* v. *Cochrane*, December 7, 1905, 8 F. 205, 43 S.L.R. 221. *Brown* v. *Fraser*, June 27, 1906, 8 F. 1000, 43 S.L.R. 741, founded on by the Lord Ordinary, was distinguishable, for the facts there averred, if true, showed that the defender had acted both maliciously and without probable cause.

Argued for pursuer (respondent)—It was immaterial whether the act complained of had or had not been specially authorised; the master was liable if it had been done in the course of an employment which he had authorised—*Citizens' Life Assurance Company Limited* v. *Brown*, 1904, A.C. 423; *Ellis* v. *National Free Labour Association*, May 12, 1905, 7 F. 629, 42 S.L.R. 495. No doubt the servant must be acting for his master's benefit—*Barwick* v. *English Joint Stock Bank*, 1867, L.R., 2 Ex. 259—but Gilmour was plainly doing so here. The slander was uttered with the object of obtaining payment of rates. (2) Malice was relevantly averred. It was not necessary to aver facts antecedent to the incident complained of. That rule was only applicable where the privilege was of a very high order, as in the case of *Cochrane* v. *Campbell* (*sup. cit.*). The statements complained of had been recklessly uttered, and that was sufficient—*Ingram* v. *Russell*, June 8, 1893, 20 R. 771, 30 S.L.R. 699; *Douglas* v. *Main*, June 13, 1893, 20 R. 793, 30 S.L.R. 726; *Macdonald* v. *M'Coll*, July 18, 1901, 3 F. 1082, 38 S.L.R. 781; *Lee* v. *Ritchie*, May 14, 1904, 6 F. 642, 41 S.L.R. 509; *Gall* v. *Slessor*, 1907 S.C. 708, 44 S.L.R. 547; *Finburghs* v. *Moss Empires, Limited* (*sup. cit.*).

At advising—

LORD LOW—The first question is whether the slander alleged to have been uttered by Gilmour was uttered by him in the course of his employment under the Corporation of Glasgow. Upon that point I have no hesitation in holding that it was so uttered, at all events in the pursuer's own house and in the house tenanted by Mrs Johnston, these being the occasions to which the first and second issues are directed. What Gilmour said on these occasions was said by him while collecting rates and with the object of obtaining payment of the amount which he believed to be due, and I have therefore no difficulty in agreeing with the Lord Ordinary that there is a relevant averment that the slander was uttered by Gilmour while acting within the scope of his employment.

I have, however, felt some doubt about the incident in the office of the collector of police assessments. My inference from the averments in regard to that occasion rather is that Gilmour was no longer acting in the course of his employment, but was defending himself against a complaint made by the pursuer. But all three incidents, however, may fairly be regarded as different stages of one transaction, and accordingly I think that all the issues may be allowed.

The second question is whether the occasion was privileged. I have no doubt that it was a case of privilege, although privilege of a limited nature. That being so, malice must be averred and proved, and I do not think that the mere use of the word 'malice' would be sufficient. Averments of facts and circumstances inferring malice are required. But in my opinion there are such averments. There is the incident described towards the end of condescendence 4, where Gilmour is alleged to have assaulted the pursuer, and the slander was repeated after sometime for consideration and reflection in Mrs Johnston's house and then in the collector's office—these incidents suggest a recklessness and persistence on the part of Gilmour from which a jury might be justified in inferring malice. On the whole matter, therefore, I am of opinion that we should affirm the interlocutor of the Lord Ordinary.

LORD ARDWALL—I have felt this to be a narrow case on both points, as all cases of this kind must be where a corporation or other employer—for I do not think there is any difference in this matter between a corporation and any other employer—is sought to be made responsible for the wrongful act of a person in their employment. With regard to slander especial care must be taken not to make the employer responsible on any but the clearest grounds. I wish to emphasise what I said in the case of *Agnew* v. *The British Legal Life Assurance Company* (8 F. 422) to this effect—"To hold that a company or corporation or other large employer is liable for all or any libellous language rashly used by anyone in their employment in the course of such employment would be to introduce an appalling extension of the law of defamation. I take it to be the sound rule that it is the person who utters or writes the defamatory matter who is alone responsible for it, and that it is only in very special circumstances that the principal may be held responsible for the language of his agent." But I think that we have these special circumstances here, because the alleged slander was directly connected with and was clearly relative to Gilmour's duty to his employers, namely, the collecting of police taxes. The slander alleged consisted in this, that he accused the pursuer of having tampered with a receipt, and that statement obviously was made with the object of exacting payment of the sum which he said the receipt falsely bore to have been paid. I cannot imagine a statement more directly connected with the discharge of his duty, or more clearly arising out of his employment, and that was the nature of each of the three slanders complained of. What I wish to guard against is the idea that the Corporation would have been liable if, for instance, Gilmour had gone to this house for the purpose of collecting taxes, and had there and then made a general attack on the pursuer's character having no relevancy to the collection of taxes.

The only other matter is the question of malice, and here again I think this is a narrow case. But I agree with my brother Lord Low that there are sufficient averments of circumstances from which malice may be inferred, because, whatever might be said of the first accusation which is complained of, it appears that what followed was a very unseemly tussle over

certain receipts, during which Gilmour apparently lost his temper, and then this was followed up quite unnecessarily by his repeating the slander before a third party and again in the office of the collector. I think it possible to infer from these averments (assuming them to be true) that Gilmour had taken a spite of some sort at the pursuer, and that therefore the pursuer is entitled to lay them before a jury, leaving them to judge whether malice was present or not.

The LORD JUSTICE-CLERK and LORD DUNDAS concurred.

The Court adhered.

Counsel for Pursuer (Respondent)—Crabb Watt, K.C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Defenders (Reclaimers)—Morison, K.C.—M. P. Fraser—A. Crawford. Agents—Campbell & Smith, S.S.C.

Tuesday, May 24.

FIRST DIVISION.
(SINGLE BILLS.)

JACOBS *v.* THE PROVINCIAL MOTOR CAB COMPANY, LIMITED.

Expenses—Tender—Amendment of Record by Defenders after Lodging of Tender—Subsequent Acceptance of Tender—Expenses Occasioned by Amendment.

Where a tender is made by a defender to a pursuer, and after a lapse of time the pursuer accepts it, the defender is entitled to the expenses incurred by him in the period between the making of the tender and its acceptance so far as these have been incurred in the natural progress of the cause.

In an action of damages for personal injury the defenders lodged a tender. Thereafter they amended the record so as to present an entirely different account of how the accident happened. The pursuer subsequently accepted the tender.

Held that the defenders were not entitled to the expenses occasioned by the amendment, these not being expenses incurred in the natural progress of the cause.

Nathan Jacobs, clothier, Trongate, Glasgow, brought an action against the Provincial Motor Cab Company, Limited, in which he sued for £2500 as damages for personal injury which he averred he had sustained through being knocked down by one of the defenders' cabs while crossing the Trongate.

On record the defenders stated—"The pursuer, when first observed by the driver of the cab, was coming from south to north. The driver, in order to make sure of avoiding the pursuer, then directed his course towards the south side of the street, which the pursuer had left. The pursuer, however, after crossing over to beyond the centre of the road, observed the motor cab approaching, and suddenly turned and ran back towards the south side of the street. The driver at once turned his cab towards the northern side of the street, but the pursuer lost his head and, becoming confused, again turned and ran towards the north side, and across the course of the cab."

The record was closed on 22nd January 1910 and an issue approved on January 29th. On 9th February 1910 the defenders lodged a tender.

On 8th March 1910 the defenders in the Inner House craved leave to amend the record by deleting, *inter alia*, the passage quoted and substituting therefor the following:—"The pursuer, when first observed by the driver of the cab, was crossing from north to south. The pursuer, however, after leaving the north pavement observed the motor cab approaching, and halted with a view to allowing the motor cab to pass him on the south, but immediately thereafter he changed his mind and ran forwards towards the south side of the street. The driver thereupon turned his cab towards the northern side of the street, when the pursuer lost his head and, becoming confused, turned and ran into the cab."

The Court allowed the amendment, the pursuer being found entitled to the expenses occasioned thereby as these might be subsequently fixed on taxation.

The case was tried before the Lord President and a jury on 22nd March 1910. In the course of the trial the pursuer accepted the tender, the jury returning a formal verdict in the pursuer's favour for the sum contained therein.

On 24th May the pursuer moved the Court to apply the verdict; to decern in favour of the pursuer for the sum of £201; to find the pursuer entitled to expenses down to 9th February 1910, being the date of the tender; and *quoad ultra* to find the defenders entitled to expenses, except in so far as these had been disposed of in favour of the pursuer by the interlocutor allowing the amendment.

Counsel for the defenders submitted that they were entitled to the expenses since the date of the tender.

LORD PRESIDENT—This point is peculiar, but not, I think, difficult. The law is settled that when a tender is made by a defender to a pursuer, and after a lapse of time the pursuer accepts it, the pursuer gets what is offered by the tender and his expenses to its date; but that, on the other hand, the defender is entitled to the expenses incurred by him in the natural progress of the cause in the period between the making of the tender and its acceptance. That is trite law, and in this case will receive proper and full application.

The peculiarity here is that after the defender had made his tender he came forward with a proposal to amend the record in such fashion as to present an entirely different account of how the