

should substantially reaffirm the Sheriff-Substitute's findings in fact, but recal the findings in law with the exception of the first, and should find instead that when on 22nd October Crockart employed the defenders to conduct the displenishing sale on his farm both parties were acting in the ordinary course of business, and although this employment incidentally gave the defenders security for their previous advances, the delivery to them of the stock and cropping for the purposes of such sale is not struck at by the Act 1696, cap. 5.

LORD GUTHRIE—I am of the same opinion. I think Mr Morison was right in saying that the real question in the case, and the only question, is whether the transaction complained of was or was not in the ordinary course of trade. If so, it appears to me that the ninth and nineteenth findings in the Sheriff-Substitute's judgment are conclusive of the question, and ought to have led to the finding in law to the effect that the transaction is not challengeable under the Act because it was in the ordinary course of business, which Lord Dundas has proposed. As I understand Mr Morison's argument, he did not in the end maintain, and in my opinion on the authorities referred to by your Lordships he could not maintain, that the mere fact of the transaction happening to result in a preference in favour of the appellants, no such preference being intended, would by itself take it out of the ordinary course of business. His argument turned on the specialty that the bankrupt was going out of business and was realising his whole trade assets. That undoubtedly made the transaction one of extraordinary rather than of ordinary administration. But none the less was it, in the particular circumstances in which Crockart was placed, the natural and ordinary course for him to pursue. Indeed, had he employed another firm of auctioneers, say Macdonald, Fraser, & Company, as it is said he should have done, he would have been departing from the ordinary course of business so far as his past course of dealing showed. And suppose he had taken this course the transaction would have been equally an act of extraordinary and not of ordinary administration.

In this view, the case of *Craig's Trustee v. Macdonald, Fraser, & Company* (4 F. 1132), which the respondent maintained was final in his favour, has no application, because it was expressly found both by the Lord Justice-Clerk and Lord Moncreiff, who formed the majority, that it was not in the ordinary course of trade. It was not averred that the transaction was in the ordinary course of trade, and to sustain the transaction in question in the present case in the ordinary course of business seems to me in accordance both with the letter and the spirit of the statute.

The LORD JUSTICE-CLERK was absent.

The Court sustained the appeal; recalled the interlocutor of 12th January 1912; found in fact in terms of the nineteen

findings in fact of the said interlocutor, with the following additional finding in fact, viz.—(20) That neither the defenders nor Crockart had any intention of creating a preference in favour of the defenders, or to satisfy or pay to the defenders the debt of £185, 12s. 9d. due by him to them to the prejudice of his other creditors; found in law in terms of the first finding in law in the said interlocutor; and in lieu of the second finding in law, found (2) that the transaction complained of was entered into and carried through by the parties in the ordinary course of business, and was not struck at by the Act 1696, cap. 5; sustained the second and third pleas-in-law for the defenders, and assozied them from the conclusions of the action.

Counsel for the Appellants—Dean of Faculty (Scott Dickson, K.C.)—Jameson. Agents—Carmichael & Miller, W.S.

Counsel for the Respondents—Morison, K.C.—D. Anderson. Agents—J. Miller Thomson & Company, W.S.

Wednesday, January 15.

SECOND DIVISION.

[Lord Dewar, Ordinary.]

COUPER v. LORD BALFOUR OF BURLEIGH.

Reparation—Slander—Privilege—Malice—Reiteration—Refusal to Withdraw Charge or Apologise.

In an action of damages for slander, A, the matron of a county hospital, averred that B, a member of the public, had transmitted to the county clerk certain charges of professional misconduct against her by letter, in which he further expressed the opinion that if the charges were true A was guilty of criminal conduct. She further averred that these charges having been held groundless after two inquiries instituted by the hospital committee and the Local Government Board at B's request, B transmitted further charges against her to the Local Government Board and obtained a third inquiry, which also exonerated her, and that B subsequently refused to withdraw the charge or apologise. It being admitted that the occasion was privileged, *held (rev. judgment of Lord Dewar, Ordinary)* that these averments were not relevant to infer malice on the part of B, and action *dismissed*.

Elizabeth Birnie Couper, matron, Clackmannan Combination Infectious Diseases Hospital, Alloa, *pursuer*, brought an action against the Right Honourable Alexander Hugh Bruce, Baron Balfour of Burleigh, residing at Kennet, Alloa, *defender*, in which she claimed £2000 damages for slander contained in two letters written by the defender on 1st September 1911 and 11th January 1912 respectively.

The pursuer averred—“(Cond. 1) The pursuer is matron of the Clackmannan Combination Infectious Diseases Hospital, Alloa, and she has occupied that position for nearly seven years. (Cond. 2) On 15th July 1911 two children, Rose and Carlos Forbes, aged respectively six and three years, were admitted to the hospital, being notified by Dr Robertson, Clackmannan, their family medical attendant, as suffering from scarlet fever, and were placed in the scarlet fever ward. On 31st July a Mrs Comrie was admitted to the hospital suffering from scarlet fever and died next day in the hospital. Carlos Forbes died in the hospital on 21st August 1911. (Cond. 3) On or about 1st September 1911 the defender addressed the following letter to James Whitehead Moir, solicitor, Alloa, clerk to the County Council of Clackmannanshire, namely:—

“*Kennet, Alloa, Sept. 1, 1911.*

“Dear Mr Moir—I desire to lay before you the following statement of facts, and beg the favour that a stringent inquiry will be made into the whole circumstances, which seem to me to reflect very seriously on the management of the County Fever Hospital. On Saturday, July 15th, two children of my overseer Mr. R. Forbes (Rose and Carlos being the Christian names) were taken to the hospital. They were both suffering from scarlet fever of a very mild type. Both were out of bed and progressing to a favourable recovery when seen by their parents on August 5. On August 11th Rose was sent home said to be cured, but on the following day, or on the 13th, she developed serious fever and had to be again taken to the hospital. This time the fever was most severe. I understand it was of the type known as “septic.” The little boy also developed the severe type of fever about the same or an earlier date. The serious part of the case is this, that on or about July 30th a woman from Sauchie with the most malignant type of fever was put into a bed in close proximity to the children, almost the next bed to one of them. This woman died within a few hours. The dates would seem to show that both children were infected from this poor woman with the malignant fever, and as I have said the little boy died. I am told that a lad Norval from Clackmannan, who entered the hospital about May 22nd suffering from the same mild form of fever as these two children, also got the serious type of fever in the hospital, but recovered. So far the facts are not, I think, susceptible of contradiction. I am told, but this is hearsay, that the matron was responsible for putting the Sauchie woman into the close proximity to the two Forbes children, and that she did it in spite of the remonstrances from at least one other member of the staff. If this is the case it points in my opinion to criminal conduct. In any case the whole circumstances should in my opinion be made the subject for a most rigid and circumstantial inquiry. I am confident you will agree with me, and that the County Council will see that such an

inquiry is made. I add that I reserve my right to carry the matter further by appeal to the Local Government Board, or otherwise as may seem right.—I am, faithfully yours,
BALFOUR OF BURLEIGH.

“J. W. Moir, Esq.”

“(Cond. 4) The statements in the said letter, namely:—‘. . . [*Pursuer here quoted the sixth, seventh, eighth, and tenth paragraphs of the letter from “The serious part” down to “recovered,” and from “I am told” down to “criminal conduct”*] . . .’—are of and concerning the pursuer, and are false, calumnious, and malicious. These statements were intended to represent and convey, and did represent and convey, the meaning that the pursuer was responsible for the death of Carlos Forbes mentioned in the letter by reason of her criminal conduct as matron in putting a patient suffering from the most malignant type of fever, in spite of remonstrances from at least one other member of the hospital staff, into close proximity to the said Carlos Forbes. There was absolutely no foundation for any such imputation upon the pursuer. (Cond. 5) The defender had no right or duty to make the said statements complained of. The said James Whitehead Moir was not an official of the hospital nor concerned in its management. The defender made the statements complained of recklessly, without any cause and without having any grounds therefor, and without making the slightest inquiry into the truth thereof. Had he made the slightest effort to test the truth thereof he would have at once discovered that the charges made by him against the pursuer were false, and that the charge made by him in particular against her in respect of mere hearsay was completely devoid of any foundation. (Cond. 6) The said letter of 1st September 1911 was transmitted by the said James Whitehead Moir to the committee of management of the hospital, and after inquiry the said committee found that the allegations of the defender against the management of the hospital were not supported by any evidence, and, in particular with regard to the said statements complained of by the pursuer as affecting her, the said committee found that they were groundless. The said committee further recorded their opinion that the defender should either substantiate his said complaint in regard to her by evidence or withdraw it. The members of the nursing staff on duty at the time in question repudiated the statement to the effect that any remonstrance had been made by them, and of this repudiation the defender was formally made aware. The clerk to the hospital, by letter dated 5th October 1911, intimated to the said James Whitehead Moir the decision of the said committee of management, and reference is made to this letter for its terms. (Cond. 7) On 12th October 1911 the decision of the said committee of management was communicated to the defender. Copies of signed statements from the medical superintendent, the pursuer, and the nurses of the hospital,

together with a copy of the said letter of 5th October 1911, were also transmitted to the defender. Although invited by the committee of management to withdraw his said charges against the pursuer he declined to do so. On the contrary, the defender openly expressed his dissatisfaction with the conclusions of the said committee, and in spite of his knowledge that there were no grounds in fact for imputing criminal conduct to the pursuer he declined to withdraw this charge and determined to press for further inquiry. The defender intimated this resolution upon his part by letter dated 17th October 1911 to the said James Whitehead Moir. (Cond. 8) On or about 18th October 1911, notwithstanding that the said committee of management had exonerated the pursuer from the said charge of criminal conduct, and that the defender had been made aware of their decision as aforesaid, the defender addressed a letter to the Local Government Board for Scotland, or to the Secretary thereof, in which he demanded that the Board should cause an inquiry to be made with reference to the whole allegations made by him in the said letter of 1st September 1911. In his said letter of the 18th October 1911 the defender again re-asserted and repeated the said charges he had made in his said letter of 1st September 1911. (Cond. 9) The Local Government Board appointed their Medical Inspector, Dr Frederick Dittmar, to inquire into the allegations made by the defender, and after making his investigations he reported to the said Board that in his opinion it was impossible to say from whom the said Carlos Forbes obtained his infection after admission to the hospital, but that it was not likely that he was infected by the said woman patient. In connection with the discharge of her duties by the pursuer no blame was in any way attached to the pursuer by Dr Dittmar. (Cond. 10) On or about 27th December 1911 the said Local Government Board communicated to the defender the report of Dr Dittmar. The defender was displeased with the result of this inquiry, and attributed such result to the partisanship of the said Medical Inspector. He refused to accept the inquiry held by Dr Dittmar as final. (Cond. 11) On or about 11th January 1912 the defender addressed a letter to the Secretary of the Local Government Board, containing a passage in the following terms:—'All along I have been afraid that a much worse state of things existed than has been revealed. I understand now that events have occurred since I left home some days ago which throw a lurid light on the whole matter under discussion. I understand, from a source on which I think I can rely, that two or three of the hospital nurses have resigned their places, and that the matron has also gone, and that they realise the grave responsibility of their position and some of the things that have occurred. A further inquiry would throw a good deal more light upon the actual state of matters, and upon what happened. I understand these nurses went to a medical

man in Alloa and informed him that the original charts and registers in the case of the Forbes boy had been wilfully destroyed, either with the knowledge or under the direction of the matron, and that those submitted to Dr Dittmar were fabricated for the purpose.' In this letter the defender ascribed the conclusions of Dr Dittmar to partisanship, without the slightest ground for any such imputation. (Cond. 12) The statements quoted from the said letter of 11th January 1912 are in part of and concerning the pursuer, and are false, calumnious, and malicious. They were made recklessly and without any cause, and without making any inquiry, and in gross disregard for the interests of the pursuer. The slightest inquiry by the defender into these statements would have disclosed the entire want of any justification for them. (Cond. 13) The said statements complained of in the said letter of 11th January 1912 were intended to represent and convey, and did represent and convey, that the pursuer had wilfully destroyed, or caused to be destroyed, original charts and registers in the case of the said Carlos Forbes, had fabricated or caused to be fabricated other charts and registers in their place, had uttered and submitted these fabricated charts and registers to the said Dr Frederick Dittmar as true and genuine documents, and to defeat the ends of justice, and further, they represented that the pursuer, realising her guilt, had deserted her said post as matron, and that the pursuer was not fit to be matron of the said hospital or of any hospital. (Cond. 14) The purpose of the defender in writing the said letter to the said Local Government Board of 11th January 1912 was to force a fresh inquiry because of his displeasure and disappointment with the result of the said two previous inquiries. Moved by the defender's said groundless allegations, the said Local Government Board appointed James A. Fleming, K.C., Sheriff of Dumfries and Galloway, as their commissioner to hold another inquiry on their behalf. (Cond. 15) The result of the inquiry held on three days in February 1912 by the said Commissioner was that he reported to the said Local Government Board that the charges made against the pursuer of fabricating evidence in view of Dr Dittmar's inquiry and of deliberately concealing relevant facts from him were without foundation, and he found no fault proved against the pursuer. The said commissioner stated regarding her—'On the other hand, the matron impressed me very favourably. I think she is a woman anxious to do her work, truthful in her whole account of what she has done, even of the faults she had committed, and full of zeal and desire to have the hospital work done as smoothly as possible.' The said commissioner found that the statements reflecting on the pursuer and the said hospital were made by the defender to the said Local Government Board on the authority of Dr Robertson, that these statements were based on 'mere spiteful

tittle-tattle,' that his informant (Dr Robertson) had carefully noted the charges of grave misconduct against the hospital staff (meaning thereby, *inter alios*, the pursuer) by a dismissed probationer and her tool, that the said Dr Robertson had 'deliberately refrained from testing' the accuracy of the said statements by any questions or by any communications with the hospital committee or anyone else. (Cond. 16) On or about 29th June 1912 the said Local Government Board by its Secretary formally informed the clerk to the said committee of management that they concurred in the findings of the said commissioner. A copy of the report of the said commissioner was sent to the defender, and he was apprised by the said Local Government Board of their said concurrence therein. . . . (Cond. 18) On or about 13th May 1912 the pursuer by her agents requested the defender to withdraw the said charges and insinuations which he had made against her in the said letters complained of, and to make such reparation to her as he might consider right and proper in the circumstances. Again, on 22nd May 1912, failing to obtain a satisfactory reply from the defender, the pursuer's agents urged the defender to accept the findings of Sheriff Fleming and to grant the pursuer the fitting reparation of a full apology. The pursuer would then have been satisfied with such an apology, and offered by her agents in their letter to the defender of 22nd May 1912 that the whole matter in so far as regards herself might be honourably closed by the compliance of the defender with her request for such retraction. So far from acquiescing in this reasonable proposal, the defender has intimated by letter from his agents that he declines to withdraw any of his allegations against the pursuer or to give any apology to the pursuer, and that he considers his actings have been meritorious in that they have given the pursuer, by means of the successive inquiries instigated by him as aforesaid, an opportunity of clearing herself from the stigma thrown upon her conduct as matron."

The defender pleaded, *inter alia*—"(1) The pursuer's averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed."

On 27th November 1912 the Lord Ordinary (DEWAR) approved of the following issues for the trial of the cause—"It being admitted that on or about 1st September 1911 the defender wrote and despatched the letter [quoted in cond. 3 above], Whether the statements in the said letter are in whole or in part of and concerning the pursuer, and are false, malicious, and calumnious, to the loss, injury and damage of the pursuer? It being admitted that on or about 11th January 1912 the defender wrote and despatched a letter which contained the passage [quoted in cond. 11 above], Whether the statements in the said passage are in whole or in part of and concerning the pursuer, and are false, malicious, and cal-

umnious, to the loss, injury and damage of the pursuer? Damages laid at £2000 sterling."

Opinion.—"After a narrative of pursuer's averments"—"In these circumstances the pursuer avers that she has been obliged to bring this action to vindicate her character from the said charges and accusations, and she proposes two issues. The first is founded on the paragraph I have quoted from the letter of 1st September, which it is averred was intended to represent, and did represent, that the pursuer by her criminal conduct was responsible for the death of Carlos Forbes. And the second issue is founded on the letter of 11th January 1912, which she avers represented that she wilfully destroyed original charts and registers, and fabricated others and submitted them to the commissioner to screen her criminal conduct and defeat the ends of justice.

"The defender objects to both issues on the grounds (1) that the words complained of are not defamatory, and (2) assuming that they are defamatory, they were used on a privileged occasion, and the pursuer, he maintains, has not set forth on record facts and circumstances from which malice can reasonably be inferred.

"Counsel for defender did not offer much argument on the first point, and I do not think that it can be seriously disputed that to accuse the matron of a hospital of criminal conduct in the discharge of her duties, and of having fabricated documents to deceive a commissioner appointed to inquire into her conduct, is calculated to injure her in her character and reputation. If she had been found guilty of these offences she would have been unfit to hold the post of matron in this or any other hospital. I am therefore of opinion that the statements complained of are actionable. But I think that the occasions on which both letters were written were privileged. It is clear from the pursuer's record, and from the correspondence to which both parties referred me, that the defender in writing to the authorities was acting in what he believed to be the discharge of a public duty. The child who had died was the son of his overseer. It is not disputed that information had been placed before the defender that there had been mismanagement in the hospital. But it is said that he had no right or duty to communicate this information. I cannot agree with that. If the defender had reasonable cause to believe that the information he received was true, and that the mismanagement was calculated to spread infection and endanger the public health, I think he was privileged in communicating such information to the proper authority. Although the first letter should perhaps have been addressed to the Clerk of the Combination Hospital and not to the Clerk to the County Council, still the County Council, as the public health authority for the county of Clackmannan, are at least partly responsible for the management of the hospital, and I do not think that there is anything in the point

that the communication was not addressed to the proper authority. Indeed the pursuer did not appear to press this point. Her case, as I understand it, is, not that the defender fell into a technical error, but that he persistently, recklessly, and maliciously accused her of offences which she had not committed, and persists in accusing her, or at all events refuses to withdraw the accusation, although she has, after three official inquiries, been found to be innocent.

"If I am right in thinking that the occasion was privileged, the next question is whether there is a sufficient averment of malice on record. A bare averment that the defender acted maliciously is not enough. If the occasion was privileged, the statements complained of, although untrue in fact, nevertheless must be presumed to have been communicated in good faith, in the exercise of a right, or the performance of a duty, unless there is on record some averment which will displace that presumption. And the pursuer will not be entitled to an issue unless she has set forth on record facts and circumstances from which, if proved, a jury might reasonably infer malice. But I think she has done so, and that she is entitled to have her case submitted to a jury. Although, as I have said, the defender was privileged in placing facts as to mismanagement before the hospital authorities, he appears to have gone beyond what was necessary for that purpose in suggesting that the pursuer was guilty of 'criminal conduct' and of 'fabricating' documents. In the case of *Gall v. Stessor*, 1907 S.C., p. 708, it was held that '... to charge the pursuer deliberately, after ample time for consideration, with having obtained money on false pretences, and to threaten him that unless money was refunded and an apology made the matter would be put into the hands of the police, was so extravagant and indicated such recklessness as to infer malice.' Following that authority, I think it possible that the jury might, if they thought proper, reasonably reach the conclusion that the statements made in the present case were so extravagant and reckless as to be inconsistent with the *bona fide* discharge of a public duty, and to infer malice. Then the pursuer makes the averment that the statements were made without any grounds therefor, and without the slightest inquiry, and that after the first official inquiry had been held and the defender was invited by the committee to withdraw the charges he not only declined to do so but repeated them 'in spite of his knowledge that there were no grounds in fact for imputing criminal conduct to the pursuer.' These averments may not, of course, be true, but at present I must assume that they can be proved, and on that assumption I think they require explanation. If it be true, for example, that the defender knew after the first inquiry that there were no grounds in fact for imputing criminal conduct to the pursuer, it is difficult to see what legitimate purpose could be served in repeating the

charge and continuing to press it against her. And it has been decided that to accuse a person of a crime without having made any inquiry is a circumstance from which a jury would be entitled to infer malice. (*Dinnie v. Hengler*, 1910 S.C., p. 4.) And the fact that a defendant refused to withdraw a plea of justification yet did not attempt to prove it, has been held evidence of malice in England. (*Simpson v. Robinson*, 12 Q.B. 511.) Of course the defender may have quite a good explanation to offer, and the pursuer may be entirely wrong in thinking that he was actuated by any malicious motive. I express no opinion on that. All I decide is that she is in the circumstances entitled to have her case laid before a jury. I accordingly approve both issues, with the addition of the word 'malicious' inserted in each.

"The defender argued that the words 'without probable cause' should also be put in the issues. But these words do not appear to be appropriate to a case of this kind. (See the Lord President's opinion in *Webster v. Paterson & Sons*, 1910 S.C. 459.)"

The defender reclaimed, and argued—There were here no facts and circumstances sufficient to infer malice. The Lord Ordinary had proceeded on four grounds—(1) the strength of the language used, (2) want of inquiry, (3) repetition, and (4) refusal of apology. When taken in connection with the admitted facts of the case, however, the strength of the language was not greater than the occasion warranted if the charge were believed to be true—*Spill v. Maule*, 1869, L.R., 4 Ex. 232. Nor could malice be inferred from want of inquiry if, as in the present case, an official inquiry was the proper method of ascertaining the truth. *Dinnie v. Hengler*, 1910 S.C. 4, 47 S.L.R. 1, founded on by the Lord Ordinary, was not in point, as it was a case of master and servant. Further, there was here no repetition in the true sense of the term—*cp. Douglas v. Main*, June 13, 1893, 20 R. 793, 30 S.L.R. 726. The first complaint was made to the Hospital Committee, and the second to the Local Government Board, who had power to order an inquiry and were really a court of appeal, while the third was based on fresh information. Finally it could not be said that defender could only transmit the information at the risk of being found liable in damages if wrong, and, as he was entitled to transmit the information, it was impossible to infer malice from a refusal to apologise. Malice could only be inferred from subsequent actings where the circumstances made it an inevitable inference—*Reid v. Coyle*, December 24, 1892, 30 S.L.R. 335, *per* Lord Trayner at p. 338. The present case was different from all other cases in that it was a transmission of hearsay as hearsay to a public authority with a request for an inquiry, and in such cases it did not matter if the transmitter stated what the position would be if the information were true or left it to be inferred. In such a case to displace privilege it was necessary to show that the information came from

someone whom no reasonable person would take as worthy of credit.

Argued for the pursuer—There was on record a sufficient averment of circumstances to infer malice. Defender had used unnecessarily strong language in communicating his charge to the authorities—*Gall v. Slessor*, 1907 S.C. 708, 44 S.L.R. 547. In doing so he had showed unreasoning prejudice and reckless disregard of pursuer's position—*Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, 1892, 1 Q.B. 431; *Smith v. Green*, March 10, 1853, 15 D. 549, *per* Lord Fullerton at p. 552, foot. The defender ought to have made some inquiry into the truth of the charges he was communicating—*Dinnie v. Hengler* (*cit. sup.*). Malice was further to be inferred by his reiteration of the charge after it had been disposed of by two inquiries—*Ingram v. Russell*, June 8, 1893, 20 R. 771, 30 S.L.R. 699; *Currie v. Weir*, January 27, 1900, 2 F. 522, *per* Lord Moncreiff at p. 524, 37 S.L.R. 332—as also by the fact that he refused to retract and apologise—*Simpson v. Robinson*, 1848, 12 A. & E. 511; Folkard on the Law of Slander and Libel (7th ed.), p. 212. The subsequent acts and words of the defender might be given in evidence to show *quo animo* he uttered the words which were the subject of the action—*Pearson v. Lemaitre*, 1843, 5 Man. & G. 700, *per* Tindal, C.J., at p. 719. Defender was responsible for his attitude at or subsequent to the inquiry—*Cassidy v. Connochie*, 1907 S.C. 112, *per* Lord Stormonth Darling at p. 1116 foot, 44 S.L.R. 831; Odgers on Libel and Slander (5th ed.), p. 144. In the present case any privilege he had had been exceeded—*Craig v. Jex-Blake*, July 7, 1871, 9 Macph. 973, 8 S.L.R. 616. Reference was also made to Cooper on Defamation (1st ed.), pp. 30 and 200, for list of cases there quoted, and to *Jenoure v. Delmege*, [1891] A.C. 73.

At advising—

LORD DUNDAS.—This is an action of damages for slander. The statements complained of are contained in two letters written by the defender on 1st September 1911 and 11th January 1912 respectively. It is admitted on the one hand that the statements are *prima facie* libellous, and on the other that the occasions were privileged. The sole question is whether or not the pursuer has relevantly averred malice. The Lord Ordinary decided in the affirmative and allowed issues. His carefully expressed opinion proceeds upon the cumulative effect of four elements, viz. (1) undue strength of the language used; (2) that the statements were tenaciously adhered to and repeated; (3) that the defender made no inquiry into the truth or otherwise of the statements; and (4) that he declined, and declines, to withdraw them or to apologise. I have come to the conclusion that the pursuer's averments are irrelevant because they do not disclose any issuable matter on the head of malice. It seems to me that the synthesis of the Lord Ordinary's reasoning is destroyed if a fair amount of analysis is applied to it. The

pursuer's record must be reasonably construed along with the letters themselves and such other letters as are imported into her condescence, but no others. It is important, having regard to some portions of the arguments of the pursuer's counsel, to emphasise at the outset that the statements complained of were made by the defender to public authorities in the alleged discharge of a public duty, and that the presumption is that they were so made *in bona fide* and not from any oblique motive. In *Jenoure v. Delmege* ([1891] A.C. 73)—a case bearing considerable resemblance to the present in several respects—Lord Macnaghten, who delivered the opinion of the Privy Council, said—"There is no reason why any greater protection should be given to a communication made in answer to an inquiry with reference to a servant's character than to any other communication made from a sense of duty, legal, moral, or social. The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case *bona fides* is always to be presumed."

By the first letter, that of 1st September 1911, the defender laid before the county clerk a statement of facts, and begged that a strict inquiry should be made into the whole circumstances, which seemed to him to reflect very seriously on the management of the County Council Fever Hospital. He reserved his right to carry the matter further by an appeal to the Local Government Board, or otherwise as might seem right. The paragraph chiefly complained of is that in which he said—"I am told, but this is hearsay, that the matron was responsible for putting the Sauchie woman into the close proximity to the two Forbes children, and that she did it in spite of remonstrances from at least one other member of the staff. If this is the case it points in my opinion to criminal conduct." I should be disposed to read this as meaning that if the reported hearsay should prove to be true in fact the matron would, in the defender's opinion, be criminally responsible for the child's death; but the word "criminal" may have been used, as it sometimes is, only in the sense of "highly reprehensible." Even upon the former of these constructions, I do not think it could be legitimately inferred from the language used that the defender went beyond what was proper for his purpose, and was inspired by malice. The pursuer avers (cond. 5) that "the defender had no right or duty to make the said statements complained of." I think that he had the right and duty of any citizen who *bona fide* believes that wrong has been done to lay the alleged facts before the proper authority for investigation, and that in doing so he was entitled to formulate his own view of what ought to follow if the facts reported on hearsay should be established as true. The pursuer goes on to aver that the defender made the statements

recklessly "and without making the slightest inquiry into the truth thereof." Her counsel could not suggest, and I cannot imagine, what form of independent inquiry it was the defender's duty at that stage to undertake. He asked that the proper authority should inquire. The case of *Dinnie v. Hengler* (1910 S.C. 4), referred to by the Lord Ordinary, has no application. There a master, without making any inquiry at all, charged his servant with dishonesty in presence of other persons, and an oblique motive was alleged pointing to actual malice. It seems to me, therefore, that from the letter of 1st September 1911 and its surrounding circumstances as disclosed by the pursuer's record, no legitimate inference of malice could possibly be drawn.

A domestic inquiry having been conducted by the hospital authorities, its result was on 5th October 1911 communicated by their clerk to the county clerk, and afterwards to the defender. The pursuer avers (cond. 5) that "although invited by the committee of management to withdraw his said charges against the pursuer he declined to do so. On the contrary, the defender openly expressed his dissatisfaction with the conclusions of the said committee, and, in spite of his knowledge that there were no grounds in fact for imputing criminal conduct to the pursuer, he declined to withdraw this charge and determined to press for further inquiry"; and (cond. 8) that he demanded that the Local Government Board should cause such inquiry to be made. I think the defender was quite entitled to ask (as he had originally stated his intention to ask) for this further and independent investigation, and that no inference of malice could be reasonably drawn from his so doing. If, under analogous circumstances, a procurator-fiscal to whose notice a citizen had brought certain alleged facts should decline to act, or, after making some inquiry, should express the view that the facts did not disclose any ground for proceedings, I apprehend that the citizen might, without any room for a suggestion that he was actuated by malice in doing so, approach the Crown Office with a request for further investigation. Nor do I think that the defender was bound to act upon the "invitation" of the hospital committee that "the statement should either be substantiated by his Lordship or withdrawn by him." It was not, in my judgment, for the defender either to substantiate or to withdraw; it was for the Local Government Board, if they thought fit, to inquire into the facts as he desired them to do.

The Local Government Board did think fit to order an inquiry, which was accordingly conducted by Dr Dittmar; and his report was communicated to the defender about 27th December 1911. On 11th January 1912 the defender wrote to the Local Government Board the letter, part of which is scheduled to the second issue, and the whole of which is printed in the appendix. Enclosed with it was a letter, dated 9th January, which he had received from

Dr Robertson. The pursuer (conds. 12, 13, 14) alleges that the statements in the defender's letter were malicious, made recklessly and without any inquiry, and in gross disregard for the interests of the pursuer; and that his purpose was "to force a fresh inquiry because of his displeasure and disappointment with the result of the said two previous inquiries." Now it is clear from the letter itself (and its enclosure), and from the pursuer's averments, that since the date of Dr Dittmar's investigation new information, involving fresh matter for inquiry, had been brought to the defender's notice by Dr Robertson. The demand for renewed investigation was not a mere iteration of what had gone before. I cannot understand why the defender should not have been entitled to ask for further inquiry, or how malice could be inferred from his having done so; nor, so far as I see, is there anything violent, or possibly suggestive of malice, in the language of this letter any more than in that of the letter of 1st September 1911. There is not here, in my opinion, any ground for applying the doctrine laid down, e.g., in *Gall v. Slessor* (1907 S.C. 708), to which the Lord Ordinary alludes.

An inquiry was in fact held by Sheriff Fleming; and the pursuer avers (cond. 15) that his report bore that "the charges made against the pursuer of fabricating evidence in view of Dr Dittmar's inquiry, and of deliberately concealing relevant facts from him, were without foundation, and he found no fault proved against the pursuer." Thereafter the pursuer's law agents wrote certain letters to the defender, and a correspondence was continued between his law agents and them. The pursuer (cond. 18) summarises this correspondence, which must be looked at in considering the relevancy of this part of the pursuer's record. Her agents requested the defender to withdraw the false and libellous charges, allegations, and insinuations which they maintained he had made against her, or to apologise for them. The defender (through his solicitors) declined to do either. His attitude is expressed in their last letter to be that "while, as the result of these inquiries, he is now satisfied that the matron was not so much to blame as she seemed at first sight to be, he does not see anything in his action which calls for either apology or compensation." I do not think that a member of the public who has in the *bona fide* discharge of a duty submitted matters to a public authority for their investigation is legally bound, if the result of such investigation is to absolve some person from injurious implication in the subject-matter inquired into, to apologise to that person, or to withdraw any statement he may have made about him or her in his *bona fide* disclosure to the authority. A duty of future reticence may be imposed upon him, but I do not think he is legally bound even to recant his original belief; it might be impossible for him conscientiously to do so. But the pursuer's counsel urged that, whether or not the defender is bound in law to apolo-

gise or to withdraw, his persistent refusal to do either is a ground from which a jury might legitimately infer that he was actuated by a malicious intent when he wrote the first (or, at all events, the second) of the letters complained of. I am not aware of any authority for this view, and I think it is unsound. The English case of *Simpson* (1848, 12 Ad. & Ell. 511) referred to by the Lord Ordinary, is a long way off the point attempted to be made. The Court there declined to say that a judge had misdirected the jury when he told them that with reference to the question of malice they might consider the whole of the defendant's conduct, one feature of which was that while his record pleaded, *inter alia*, the truth of the alleged verbal slander, he gave no evidence at the trial in support of that plea, and refused to admit that the words were false though the plaintiff offered, on his doing so, to accept an apology and nominal damages. It may be that the present defender could, in the circumstances, without any sacrifice of principle or of dignity, have expressed some measure of regret that statements made by him in the *bona fide* discharge of a duty, upon information which had turned out to be in part at least erroneous, should have cast unmerited reflection upon the pursuer's character and caused her pain and inconvenience. It may be that such an expression would have been a kind and a handsome act on his part. But I think these considerations are matters outside the proper province and contemplation of a court of law. I know of no authority, and none was cited to us, for holding that the mere obstinate retention of a personal belief or view is by itself a ground upon which malice may be inferred, and that is, I think, what the pursuer's argument upon this head of the case must amount to.

On the whole matter, we ought, in my judgment, to recal the Lord Ordinary's interlocutor, sustain the defender's first plea in law, and dismiss the action. The case, in my opinion, ought not, according to our established law and practice, to go to a jury, because the pursuer's record does not contain any issuable matter on the essential element of malice.

LORD SALVESEN—The only point in controversy in this case is whether the pursuer has sufficiently averred facts and circumstances from which malice can be inferred. The Lord Ordinary's reasoning is plausible and at first impressed me, but after further consideration I have come to be of opinion with your Lordship that his judgment cannot be supported. Malice in the sense of animosity or ill-will is here out of the question. It is not alleged that the defender had any acquaintance with the pursuer or had even come in contact with her; nor is it suggested that he had any object to serve by her dismissal or by her conduct being made the subject of censure. His relation to the pursuer was merely that of the recipient of complaints regarding her from the father and medical attendant of two children, one of whom had died in

the hospital from an infectious disease contracted there. It is not averred that he added to orebellished the information that had been conveyed to him by the interested parties in the communications which he made to the hospital authorities or to the Local Government Board. There is therefore nothing to detract from the *prima facie* view that the defender in making these communications was actuated solely by a sense of public duty. It is no doubt true, as the Lord Ordinary has pointed out, that the character of the statements made and the mode of making them may sometimes be such as to justify a tribunal in inferring malice or, in other words, drawing the conclusion that the person making them while professing to act in the discharge of a public duty was not really doing so, but was actuated by motives of hostility towards the subject of the complaint. Such hostility may even be engendered at the very time that the accusations are made, and may be consistent with there being no previous acquaintance between the parties; but it must be carefully distinguished from the indignation which a public-spirited person may well feel when facts are brought to his notice which suggest to his mind that there has been culpable mismanagement of a public institution resulting in the sacrifice of life.

Is there anything, then, in the pursuer's averments from which malice on the part of the defender can legally be inferred? Let me examine them in detail as summarised by the Lord Ordinary. (First) it is said that the defender acted recklessly and without inquiry. That he did not make inquiry is true, but so far from this being evidence of recklessness in the circumstances here disclosed I think it is proof of discretion. Had the defender constituted himself a private detective he could scarcely have failed to reveal the suspicions which he harboured and might easily have exposed himself to an action of slander. The course he took was to lay the facts that had been brought under his notice before the proper authorities and leave to them the duty of investigation. In so doing he exercised an undoubted privilege which it is not in the public interest to penalise. Again, the Lord Ordinary thinks that the defender went beyond what was necessary for his purpose in suggesting in the letter of 1st September that the pursuer had been guilty of criminal conduct; but this was a mere comment on the facts narrated, and it is obvious from the rest of the letter that the defender was under the belief (now ascertained to be erroneous) that the woman who infected the two children was suffering from a different type of fever from scarlet fever; that the pursuer had been made aware of this at the time and had nevertheless persisted in putting this woman into a bed in close proximity to the children. If she had done so the word "criminal" would perhaps not be too strong to characterise her conduct.

The next point made is that after receiv-

ing the report of the committee of management the defender nevertheless determined to press for a further inquiry. A less resolute person might have been content to let the matter drop; but it does not follow because the report failed to carry conviction to the defender's mind that his demand for an independent investigation was actuated by malice. Indeed the report of the committee contained passages which were calculated to induce the defender to take the further action he had indicated in his first letter. The opinion expressed by them that the statements made by the defender should either be substantiated by evidence or withdrawn by him was, to say the least of it, injudicious. At all events the defender acted within his legal right in bringing the whole matter under the notice of the Local Government Board, and throwing upon them the responsibility of making further investigation if they thought fit. At first sight it seems to savour of persecution that the defender after this second inquiry had resulted in the complete exoneration of the pursuer should have made an application for a third inquiry; but this demand was in my opinion justified by the additional information he had received from what *prima facie* he was entitled to regard as a reliable source. It is to be regretted that the defender should have lent such a credulous ear to the statements of the doctor whose mistaken diagnosis, if the view of the hospital authorities was well founded, was at the root of the whole trouble. But if he honestly believed these statements he had a right to communicate them and to ask a further inquiry. The fact that the Local Government Board did order a new inquiry shows that the additional facts weighed with them as they did with the defender. I fail to find any trace of malice in the letters of the defender founded on, or anything inconsistent with the view that he acted throughout from a genuine desire to secure proper management of the hospital. The pursuer makes a formal averment in cond. 7 that the defender knew that there were no grounds in fact for imputing criminal conduct to the pursuer, but this statement must be read along with the context, from which it appears that his so-called knowledge depended upon his unreserved acceptance of the views expressed by the hospital committee. Other knowledge it is not maintained that he had, for his original informant had plainly not withdrawn the imputations of which he had induced the defender to be the mouthpiece.

The last matter from which malice is sought to be inferred is that the defender, after the result of the third inquiry had been made known to him, declined to withdraw the imputations he had made against the pursuer or to grant her the fitting reparation of a full apology. I agree with Lord Dundas that an expression of regret might well have been made that the pursuer had been subjected to so much anxiety and distress as the result of the defender's communications, but neither an apology

nor a withdrawal could be legally demanded. The defamatory information was expressly transmitted on the footing that it depended on hearsay, and none of it was made on the defender's own authority. I can well understand that he takes up the position even now that believing the source of his information to be reliable he was justified in acting as he did. To have apologised for having believed the information would be to reflect upon the source from which it came; and as the pursuer at first sought reparation as well as an apology, the defender's caution is all the more intelligible. On the whole I do not think there is anything in the terms of his agent's letters—assuming, as I do, that they were written by the defender's instructions and with his full approval—to justify an inference of malice. The result is that this action falls to be dismissed, but I desire to add, in case our judgment might be misconstrued, that I assume throughout that there were no grounds for any reflection on the pursuer's conduct as matron of the Alloa Hospital, and that she has succeeded in completely vindicating her character as the result of the three searching inquiries to which it has been subjected.

LORD GUTHRIE—I am of the same opinion. The case made by the pursuer raises no question of law, and the parties are agreed on all the essential facts, except as to the existence of malice on the part of the defender in writing the letters of 1st September 1911 and 11th January 1912, which are the foundation of the pursuer's case.

On the one hand it is admitted that the defender, writing these letters about matters of public importance in which he had a legitimate interest to the public bodies whose duty it was to investigate these matters, occupies a position of privilege which will bar all action against him at the instance of the pursuer unless she makes such averments as will be reasonably relevant, if proved, to establish malice on his part in writing the letters.

On the other hand it is admitted that, without direct averment of antecedent acts and causes, there may be such averments of extravagant words or conduct as will be sufficient foundation for a reasonable inference of malice.

The pursuer does not suggest any antecedent reason why the defender should have entertained malice towards her. She founds on statements passed on by him to the proper authorities as hearsay requiring investigation, but she does not suggest that he in any way originated these statements or even altered them. Nor does she aver any communication, verbal or written, of these statements to persons who had no duty of inquiry into their accuracy or inaccuracy.

It is impossible not to feel sympathy for a person like the pursuer, who has been subjected to the anxiety, pain, and expense of three inquiries into charges which

these inquiries have proved unfounded, and to regret that these charges should ever have been made. Such sympathy and regret might, perhaps unduly, weigh with a court dealing with the authors of these baseless charges. The case is very different where, as here, the action is brought, not against the authors of the charges but against a citizen who, in the exercise of what seems to me to have been a public duty, transmitted the derogatory allegations to the proper authority, not as well founded but as requiring investigation. Any regret that we may have that the defender did not, through his agents in their concluding letters, express the sympathy and regret to which I have above referred is, however, in the region of moral, not of legal obligation.

I agree with your Lordships in thinking that the pursuer's four points, taken not singly but together, as she is entitled to have them taken, cannot reasonably lead to the inference of malice on the part of the defender when he wrote the letters complained of. These points are:—(1) Failure to make inquiry before writing the letters; (2) extravagance of language in the letters themselves; (3) refusal to rest satisfied with the first (the hospital) inquiry, or with the second (Dr Dittmar's) inquiry, and persistence in demanding the third (Sheriff Fleming's) inquiry; and (4) refusal, after the favourable result of all three inquiries, to withdraw the statements passed on by him, and apologise and make reparation for having passed them on. Your Lordships have dealt fully with all these points, and I have nothing to add. The argument of the pursuer seems to me to ignore the nature and result of the legal doctrine of privilege. For instance, it was urged that the defender fell under the rule that he who passes on a slanderous statement is as responsible as he who originates such a statement—a rule which can obviously have no application where, as here, the defender, if he had not a duty, certainly had a right, to pass on the statements in question so long as he left them unaltered and communicated them only to the responsible authorities.

On the whole matter I am of opinion that the issues should be disallowed and the action dismissed.

LORD JUSTICE-CLERK—I concur in the opinions which have been expressed, to the effect that the averments in the record are not relevant to entitle the pursuer to have issues approved of for trial. The defender, who was legitimately interested in a family whose head was an employee on his estate, proceeding upon information given to him as to the circumstances in which a child of that family died of scarlet fever—information which, if true, seemed to him to imply that irregularities had taken place in regard to that child when it was in the infirmary in Alloa—wrote the first letter complained of. That letter was written to a public body—those in charge of the infirmary. It set forth what

he had been told by the parent and medical man, and asked that an inquiry should be held into the circumstances. The statements in the letter were on the face of them slanderous if they were not correct as to fact, and as they are not maintained by the defender to be statements he can substantiate, the pursuer would be entitled to an issue in ordinary form unless the defender can maintain that there is privilege, and that therefore no issue can be allowed unless malice be competently averred so as to be put in issue. Upon the question whether there is privilege there can be no doubt. The statements complained of were made to a public authority with a view to inquiry, and must be presumed to have been made in the *bona fide* exercise of the citizen's right to bring before the proper authority what has been communicated to him and as to which inquiry in the public interest is called for. There is no *prima facie* presumption in such circumstances that the person reporting and asking for investigation has any personal or sinister motive in calling the attention of those responsible for the working of a public institution to the matter and asking them to look into it. There can be no question that, as Lord Macnaghten expressed it in the case of *Jenouire v. Delmege*, that in such cases "*bona fides* is always to be presumed."

There is no doubt that in this first letter the defender expressed himself in emphatic language, which my Lord Dundas has quoted. But I cannot see that when he reports the information he has received, expressly calling attention to the fact that he is not speaking of his own knowledge, but is speaking only from hearsay, and only says that if it is true a serious responsibility has been incurred, that any malice can be inferred. He made no assertion of its truth. He put it as a quotation of what had been laid before him, and the mere statement that if it should turn out to be true it pointed to criminal responsibility cannot in my opinion be held to imply malice. That he should have and express an opinion as to the character of what was done, if it should be established that it was done, cannot be accepted as entitling a pursuer to an issue, in a case where malice must be put in issue, if he had a right and duty to lay the matter before the proper authority for inquiry, as I am of opinion he undoubtedly had.

It is true that the defender made a second application for a second inquiry, but this was on new information conveyed to him by a medical man. I cannot see how it can be said that this request for an inquiry on this new information can possibly be made a ground for implying malice in the previous proceedings, nor how it can be made to imply malice by itself. The suggestion that the citizen who is *bona fide* informed of some alleged reprehensible conduct occurring in a public institution, is to have malice implied against him because he places the matter in the hands of the public body whose subordinate's conduct is impugned without first making

inquiry himself, is a suggestion to which I cannot give my assent. It would surely be a most unfair burden to put upon any citizen that when informed of there being something reprehensible occurring in a public institution it should be necessary for him, before asking the proper body to examine into the matter, to make an examination himself, and that if he did not do so it should be inferred that he harboured malice. I think his conduct might well be challenged by the public authority itself if he attempted to conduct any inquiry of the subordinates without calling them in, he having no right to interfere with their establishment. If the person in regard to whom the allegations were made were under the control of the person accused of slander, as in the case where a servant living in his family comes under suspicion, something might be said for holding that he ought to make inquiry within his own circle, as the head of his own house, and not rush to make accusations recklessly. But no such case could arise for civil damages unless he made an assertion of guilt. But here there was no relation between parties at all. The defender had no right to make inquiries into the working of the infirmary. If he thought that an inquiry should be held, he, in my opinion, acted rightly in laying the matter before those who had the control of the establishment in which it was reported that something had been done which was not right. I cannot therefore hold that in anything that he did in asking for the inquiry he can be held to have displayed specific malice.

But then it is said that—to use the Lord Ordinary's words—"his statements were tenaciously adhered to and repeated." This is based upon the fact that, being dissatisfied with the action of the hospital authorities, he availed himself of his legal right to appeal to the Local Government Board. I confess I am quite unable to see how, when the law entitles the citizen to take an appeal to a Department that has power to review a matter, the taking of such an appeal can be held to be a ground for inferring malice. The illustration given by Lord Dundas of a party, who has given information to a procurator-fiscal for inquiry, applying to the Crown Office when dissatisfied by the refusal of the procurator-fiscal to proceed seems to me most apposite. If there was no malice to be implied from the giving of the information to the procurator-fiscal, how could an application to the proper reviewing authority for review be any ground for implying malice? It is significant that in his first letter he expressly referred to, and reserved his right to invoke, the jurisdiction of the Local Government Board should he see cause to do so.

When it is said by the Lord Ordinary as a ground for implying malice that "the statements were tenaciously adhered to and repeated," it appears to me that the mistake is made of looking on the statements as being statements of alleged fact.

The defender's position all along was that he asserted only that he was informed, and desired to have the matter inquired into by proper authority. His persistence consisting of taking a legitimate appeal where he had a right of appeal, I can see nothing in that indicating specific malice.

After the Local Government Board inquiry was held, and a report obtained, the circumstances leading to the second proposed issue arose. The defender wrote to the Local Government Board enclosing a letter received from a Dr Robertson. That letter, on the face of it, shows that some new alleged facts had been laid before the defender, and it was upon this new matter that he asked for inquiry, and this new matter was inquired into by Sheriff Fleming, who after inquiry found that there was not ground for what was set forth in Dr Robertson's letter.

Then occurred the correspondence between the agents for the pursuer and the defender and his agents. This is founded upon as implying malice. I do not think it necessary to go into this fourth ground stated by the Lord Ordinary to justify the allowing of issues as in a relevant case. Lord Dundas has done so very fully, and I agree entirely with what he has said, and also what he has said on the case referred to in debate. I am unable to see, if it be held that the implication of malice cannot be legitimately made on the first three grounds directly connected with the letters forming the subjects of the proposed issues, the fact that the defender declines to meet a demand for apology because the things he reported as matter for inquiry have not been substantiated, can be held to draw back, so that from that fact it can be held that when he wrote the letters asking for inquiry he was actuated by malice.

I concur entirely in what your Lordships have said as to the pursuer being vindicated as regards her conduct by the inquiries which were made.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first plea-in-law for the defender, and dismissed the action.

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