

a number increased by one in respect of bridge 12A. No case was cited in which the operation of omission clauses has been limited to small omissions.

In regard to the water-courses, these were as visible to the contractors and as well known to them as to the defenders. If, however, there might have been any obligation on the defenders such as is alleged, the case seems to me to be covered by the protecting clauses.

Nor can I see any ground for claiming damages in respect of the boulder clay in Castle Semple. The bores, which did not disclose it, were taken by a professional borer and were not edited. The defenders were unaware of its existence, and committed no wrong against the pursuers. Besides, the case is covered by the clauses as to omissions.

A point made about some undefined amount of delay in giving plans in connection with 12A bridge and the water-courses is not on record, and is too vague to be dealt with as a substantive ground of damage.

On the whole matter I am of opinion that the defenders are entitled to absolvitor.

The Court sustained branches (b) and (e) of the pursuers' third plea-in-law, repelled branches (c) and (d) of said plea, found that the pursuers were entitled to be paid for the work executed upon a *quantum meruit* basis, found *separatim* that the defenders were in breach of the contract in question, and that the pursuers were entitled to damages in respect thereof; but standing the above judgment, found it unnecessary to dispose of the pursuers' fourth plea-in-law, and remitted the cause to the Lord Ordinary for further procedure.

Counsel for Pursuers—Clyde, K.C.—MacRobert. Agents—Pringle & Clay, W.S.

Counsel for Defenders—Macmillan, K.C.—Hon. W. Watson, K.C. Agents—John C. Brodie & Sons, W.S.

Tuesday, February 3.

FIRST DIVISION.

[Lord Dewar, Ordinary.]

SUZOR v. BUCKINGHAM.

Reparation—Master and Servant—Slander—Privilege—Malice—Averments—Facts and Circumstances Inferring Malice—Relevancy.

A bookkeeper and cashier, who had been in the employment of a clothier, to whose shop a tea-room was attached, raised an action of damages against the manager of his former employer. Pursuer averred that certain discrepancies having occurred between the records of the returns from the tea-room and the cash, he was summoned on 3rd July 1913 to the private room of his employer, when the defender accused him of having taken the money and defrauded his

employer, and that on the evening of the same day he was dismissed; that on 5th July the defender came to his house and again accused him of having taken the money; that the defender made no inquiry into the matter; that the shortages occurred and were ascertained before the money passed through the pursuer's hands; that some months previously the defender's attitude to the pursuer had changed, that he had ceased to come to his house, and took every opportunity of showing his ill-will; that the defender had urged their employer to get rid of the pursuer, and was anxious to find an excuse for getting him dismissed; that he had made these accusations maliciously to gratify his animus against him.

Held (1) that the pursuer's averments did not disclose that the second occasion, July 5th, was a privileged occasion, and (2) that even if it appeared at the trial that said occasion was privileged, yet the pursuer had made averments relevant to infer malice and to displace the privilege.

Samuel Suzor, cashier, Stirling, *pursuer*, raised an action of damages for slander against Sydney Buckingham, manager to Messrs M'Lachlan & Brown, clothiers, Stirling, *defender*.

The pursuer averred—“(Cond. 1) The pursuer was for several years cashier and bookkeeper to Messrs M'Lachlan, Pepper, & Company, Limited, Glasgow, until that company was wound up in 1909. He also acted as private secretary to the late Andrew M'Lachlan until his death in 1910, and assisted in the winding-up of his affairs after his death. On the invitation of Mr John M'Lachlan, a brother of the said deceased Andrew M'Lachlan, the pursuer in February 1911 entered the employment of Messrs M'Lachlan & Brown, milliners, &c., at 8-12 Murray Place, Stirling, as bookkeeper. The said John M'Lachlan also carries on a tailor and clothier's business in Stirling at 59-63 Murray Place there. Said last-mentioned business is under the management of the defender. The pursuer and defender were on friendly and intimate terms till about the beginning of 1913. They visited regularly and frequently at each others houses, and when the defender called at the millinery department he made a point of chatting with the pursuer. In or about January 1913 the defender's demeanour towards pursuer entirely changed. He discontinued visiting at the pursuer's house, avoided pursuer, and only spoke to him when he had occasion in connection with business matters. The pursuer believes and avers that the defender became jealous of the confidence that the said John M'Lachlan reposed in the pursuer, and conceived a scheme in his own interest to undermine said confidence. (Cond. 2) The pursuer's duties consisted at the first of writing up the books of the business at 8-12 Murray Place, Stirling, including the said John M'Lachlan's private cash-book. About six months later the pursuer was transferred to the counting-house, to take in addition a

general supervision of the counting-house department of the business. In connection therewith the pursuer had to meet travellers and check cash with the return slips and record sheets. The pursuer did not handle the cash. The cash was in charge of Miss Grace M'Donald. (Cond. 3) At the close of business each day the said Grace M'Donald emptied the till into bags. These bags were securely fastened by her, and were handed by her to the pursuer, who lodged them in the safe overnight. The bags were taken from the safe the following morning and returned unopened to the said Grace M'Donald, whose duty it was to count the money and check same with the record sheets and the disbursement books and receipts. There were frequently discrepancies between the cash and the returns in the record sheet. This was inevitable in a business of the kind. These discrepancies, which might be shortages or surpluses, were reported by the said Grace M'Donald to pursuer, and when they could not be accounted for the pursuer noted them on the record sheets, and in the exercise of the discretion conferred upon him by the said John M'Lachlan placed shortages in cash against returns from the tea-room department of the business, and credited said department with surpluses when these occurred. These deductions and additions were apparent. When unexplained shortages occurred at close intervals the pursuer reported same to the said John M'Lachlan. Said discrepancies all occurred and were all ascertained before the returns were made to pursuer. (Cond. 4) On the morning of Thursday, 3rd July 1913, the pursuer reported a shortage to the said John M'Lachlan, and advised him to instruct the said Grace M'Donald to exercise more care. In the afternoon of said 3rd July 1913 the said John M'Lachlan requested pursuer to attend upon him in his private room. This the pursuer did. The defender was in the room with Mr M'Lachlan. Mr M'Lachlan then stated that he had spoken to the said Grace M'Donald, who had said that she could not help 'shorts' and 'overs.' Addressing pursuer Mr M'Lachlan said—"It is most irregular. Where has the money gone to? You have taken the money, and it is only your pride that keeps you from owning it." The defender there and then, without any investigation, without occasion, and without being asked by the said John M'Lachlan for his opinion, and in the presence and hearing of the said John M'Lachlan, addressing the pursuer, interposed and stated that 'You are responsible for the shortages, and have taken the money and defrauded Mr M'Lachlan'—or used words of a similar import and effect. On the evening of the same day the defender, professing to act on the instructions of the said John M'Lachlan, dismissed pursuer and took possession of the keys in his charge. . . . The pursuer admits that he made alterations on the tea-room column of the record sheets when 'shorts' or 'overs' were of small amount so as to square the slips with the actual cash in the till. These alterations were apparent, and were made, as the defender knew or ought to have

known, to make up for unexplained shortages or surpluses of cash. (Cond. 5) On Saturday, 5th July 1913, defender called at pursuer's house and showed him three cash balance cards for April, May, and June 1913 which disclosed shortages. The defender there and then, in the hearing of pursuer's wife, addressing pursuer, stated to the pursuer—"I have come to ask you for explanations; you must have taken the money"—meaning the money represented by said shortages. The defender further asked the pursuer to admit having done so, and said that 'if you don't do so the matter will be put into lawyers' hands.' Defender persisted in said accusation notwithstanding pursuer's denials and protests and offer to give full explanations to Mr M'Lachlan. Shortages and surpluses occurred frequently, both before and after the pursuer entered the employment of the said John M'Lachlan. This was well known, and the defender knew it to be inevitable in a business of the kind. In the daily cash balance cards there was a special column for 'shorts' and another special column for 'overs,' and this card was open on the cash girl's desk and was daily posted by her. (Cond. 6) The said statements made by the defender of and concerning the pursuer were false and calumnious, and were made by him recklessly, maliciously, and without probable or any cause. The defender knew that pursuer did not handle the cash. Had the defender made the slightest inquiry he would have found, as was the fact, that the pursuer did not handle the cash, and that the shortages occurred and were ascertained before the returns were reported to pursuer by the said Grace M'Donald, and that there was no ground whatever for said accusations. For several months before July 1913 the defender's attitude towards the pursuer had changed and was distinctly hostile. The defender had been a frequent visitor at the pursuer's house, but he ceased to call and took every opportunity of showing ill-will to the pursuer. The defender urged on Mr M'Lachlan to get rid of the pursuer, and was anxious to find an excuse for getting the pursuer dismissed. Said accusations were made by the defender maliciously, to gratify the animus he had conceived towards the pursuer. The pursuer has in consequence of said unfounded accusations suffered and will continue to suffer greatly in his feelings and reputation, while his chances of securing and retaining responsible employment have been seriously impaired and his character blasted."

The defender pleaded, *inter alia*—" (1) The pursuer's statements being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (3) The occasions in question having been privileged, and there being no relevant averment of malice, the action should be dismissed."

On 16th December 1913 the Lord Ordinary (DEWAR) disallowed the first issue proposed by the pursuer, which related to the interview on 3rd July 1913, and allowed the second issue, which was in the following terms—"Whether on or about the 5th day

of July 1913, and within the pursuer's dwelling-house at 28 Union Street, Stirling, the defender, in the presence and hearing of the pursuer and of Mrs Suzor, his wife, falsely and calumniously stated of and concerning the pursuer that pursuer had dishonestly taken his employer's money, or used words of the like import and effect, meaning thereby that pursuer was dishonest and had been guilty of theft, to the loss, injury, and damage of the pursuer."

Opinion.—"The averments on which this action is founded are very similar to those in the action brought by the present pursuer against John M'Lachlan, with which I have already dealt [*v. following case*]. The defender is manager to Messrs M'Lachlan & Brown, and was present at the interview which the pursuer had with Mr M'Lachlan on 3rd July 1913. The pursuer complains that on that occasion the defender said—"You are responsible for the shortages, and have taken the money and defrauded Mr M'Lachlan"—or used some such words. And two days afterwards he called at the pursuer's house and showed him three cash balance cards, and said—"I have come to ask you for explanations; you must have taken the money," meaning the money represented by the shortages. And it is stated that he asked the pursuer to admit having done so, and said that "If you don't do so the matter will be put into lawyers' hands."

"The pursuer proposes two issues, the first founded on the statement alleged to have been made on the 3rd July 1913, and the second on the statement made on the 5th July.

"I am of opinion that the first issue should be disallowed. When the statement complained of was made, the defender had been called into his employer's private room to help to discover the reason for the shortage in the firm's cash. He was the manager vested with authority over the employees, and responsible for the proper conduct of the business. He had, I think, a right and a duty to speak freely to the employees on all that concerned the firm's affairs. The occasion on which he spoke was therefore privileged, for he was presumably acting in the firm's interests, in the discharge of his duty, and there is nothing on record to suggest that he was actuated by any improper motive.

"The second issue, however, is in a different position. The defender went to the pursuer's house after he had been dismissed, and was therefore no longer subject to the defender's authority, and it is said accused him of dishonesty in his wife's presence. It may be that there was some special reason for this visit, and that the question of privilege may arise at the trial, but on the pursuer's statement of the facts—and at this stage of the case I can only consider that—it does not appear to me that the defender, who had already expressed his opinion on the matter, had any right or duty to follow the pursuer to his home and reiterate his opinion. I am therefore of opinion that the occasion was not privileged and that the issue should be allowed."

The defender reclaimed, and argued—The

Lord Ordinary was right in holding that there was no relevant averment of malice on record, but wrong in allowing the second issue. The privilege which attached to the first occasion also attached to the second, for it was in reality but a continuation of the inquiry commenced at the first. The repetition of the accusation on the second occasion was not an unwarranted repetition but was privileged. For "all material statements made by the persons interested in the detection of a crime during their investigations and relative thereto are privileged"

—Odgers on Libel and Slander, (5th ed.) p. 273—and this passage was cited with approval by Collins, M.R., in *Collins v. Cooper*, 1902, 19 T.L.R. 118. The judgment of Lord Ellenborough in *Fowler and Wife v. Homer*, 1812, 3 Campbell's Rep. 294, at 295, was to the same effect. The presence of the pursuer's wife, for which the defender was not responsible, did not destroy the privilege attaching to the occasion—*Toogood v. Spyring*, 1834, 1 C.M. & R. 181; *Jones v. Thomas*, 1885, 53 L.T. 678; *Taylor v. Hawkins*, 1851, 16 Ad. & E. 308; Odgers on Slander, p. 295. There was no relevant averment of facts and circumstances inferring malice on record; it was easy to insert vague general averments of ill-will, such as in cond. 6, and if such were held relevant privilege would be of no avail to prevent every master sued by his servant for impeaching his honesty having to submit to a jury trial.

Argued for the pursuer—The pursuer while acquiescing in the refusal of the first issue did not admit that the Lord Ordinary's reasoning was sound. The second occasion was not privileged. The defender was the manager not of the tea-room but of the tailoring department. In any case neither a master nor his manager was in a privileged position after the dismissal of the servant, for his only interest thereafter was to recover the money, and that was not an interest which gave rise to privilege. Moreover, the occasion was not privileged, for the defender had not used it for investigation, but merely for accusation—*Ingram v. Russell*, June 8, 1893, 20 R. 771, 30 S.L.R. 699. But assuming that the occasion was privileged such averments as were made here were relevant to infer malice—*Laidlaw v. Gunn*, January 31, 1890, 17 R. 394, 27 S.L.R. 317; *Dinnie v. Hengler*, 1910 S.C. 4, 47 S.L.R. 1.

At advising—

LORD PRESIDENT—This is an action of damages for alleged slander at the instance of a person named Suzor, who alleges that he was in the employ as a bookkeeper of a firm of M'Lachlan & Brown, that in addition to his duties as bookkeeper he undertook a general supervision of the counting-house department, and in performance of his duties there he had to meet commercial travellers and check cash with return slips and record sheets, that at the close of the day's trading the contents of the till were emptied into bags and handed to the pursuer to place them in the safe overnight. He alleges, however, that he himself did not handle the cash, that to another servant of the firm that duty was entrusted, that frequent dis-

crepancies—inevitable and well known to the defender—occurred between the cash and the record sheets, that when these discrepancies took the form of surpluses he credited them to the tea-room department of the business, and that when they took the form of shortages he set them against the returns from the tea-room department of the business. All this he alleges he did in the exercise of a discretion confided in him by his employer.

On the morning of 3rd July 1913, he says, he discovered a shortage and reported it to his employer, and suggested that he should bid the servant in charge of the cash be more careful in future. On the afternoon of that day he was summoned to the private room of his employer, where the defender, who is designed in the summons as the manager of the business of M'Lachlan & Brown, was present, and the pursuer alleges that in the presence of his employer, the defender, addressing the pursuer, said, "You are responsible for the shortages and have taken the money and defrauded Mr M'Lachlan," or used words of similar import and effect. And two days later, on the 5th July, the defender, it is alleged, appeared at the pursuer's house and addressing him in the presence of his wife said, "I have come to ask you for explanations; you must have taken the money," meaning the money represented by the shortages. The defender further asked the pursuer to admit having done so, and said, "If you don't do so the matter will be put into lawyers' hands."

It is conceded that the expressions used on both occasions were defamatory, but the defender pleads that on the face of the condescendence it is plain that both occasions were privileged.

The Lord Ordinary, holding that the averments of the pursuer disclosed a case of privilege on the first occasion, disallowed the issue proposed relative to the defamatory statement then uttered, but held that the defamatory expressions used on the second occasion were not, as disclosed in the pursuer's averment, employed on a privileged occasion, and, holding further that there was nothing on the record to suggest that the defender was actuated by any improper motive, the Lord Ordinary has allowed the second issue. The pursuer acquiesces in the judgment of the Lord Ordinary with regard to the first issue, but not in the whole of the reasoning on which his Lordship's judgment depended. The defender, on the other hand, contends that the second issue should follow the fate of the first.

I am of opinion that the course taken by the Lord Ordinary here was correct. No doubt the defender alleges that the motive which prompted the second interview and the object of the defender's call was to follow forth the investigation which had been set afoot at the first interview, that the second stands closely related to the first, that both indeed formed really one continuous interview, and that this is plain from the opening words alleged to have been used by the defender on the second interview—"I have come to ask you for explanations"—and

that the reference to lawyers clearly reveals that the defender came on his master's instructions, on his master's business, and not on his own initiative.

Now all that may probably be so, but I cannot say that on the face of the record it clearly is so, for the pursuer avers that no investigations of any kind were undertaken at the first interview, that there were therefore none to be followed forth, that on the contrary the defender at the first interview, without any investigation, without occasion, and without being asked by the employer for his opinion, volunteered the words which I have just read, and that on the evening of the same day the defender, professing to act on the instructions of the employer, dismissed the pursuer and took possession of the keys in his charge, and that accordingly at the date of the second interview the relation of master and servant had terminated, and that there was no authority and no control exercisable by the defender over the pursuer, and no relation in which a privileged utterance could be made; and further, the pursuer does not admit, much less does he aver, that the defender on the second occasion came on the master's business. On the contrary, on the pursuer's averments it would appear that the defender came to the pursuer's house on the second occasion on his own initiative.

Accordingly I am of opinion that the Lord Ordinary was right in allowing an issue, and in allowing an issue without malice being inserted. But then, since if in the course of the trial it appears that the occasion was privileged, then inasmuch as his Lordship has expressed the opinion that there was nothing on the record to suggest that the defender was actuated by any improper motive, the defender would be entitled straightway to claim a verdict in his favour, it becomes necessary for us to consider and decide whether or no the averments made by the pursuer on this record are relevant and sufficient, if proved, to displace the privilege and set up a case of malice. I am of opinion, differing from the Lord Ordinary, that they are.

The pursuer undertakes to demonstrate that on the second occasion the defender was prompted, not by a proper motive, but by an improper motive in using the expressions which he did. He alleges that in the commencement of the year a total change took place in the demeanour of the defender towards the pursuer, who had hitherto been close friends; that the defender had become jealous of the confidence which the employer reposed in the pursuer, had insisted on his being dismissed, was eager that he should be dismissed from the service, and that he contrived a scheme for his undoing; that he trumped up (for no other expression will serve) that he trumped up these accusations against the pursuer in order to manufacture plausible grounds for his dismissal from the service of M'Lachlan & Brown; that he knew these accusations were unfounded; that he knew the shortages had taken place in the cash before it reached the pursuer at all; that the slightest investigation would have shown that the accusations were un-

founded; that the means of investigation were at his hand, and that he declined to avail himself of them.

Now these averments may be difficult to prove, but if proved I am of opinion that they are sufficient to entitle a jury to infer that the defender on the occasion in question was actuated, not by the honest motive which the law imputes to a man who uses defamatory expressions on a privileged occasion, but by personal jealousy of the pursuer and a malicious desire to secure his dismissal from the firm's service. On these grounds and holding these views I am of opinion that the Lord Ordinary's interlocutor ought to be affirmed.

LORD SKERRINGTON—In this action of damages by the pursuer Mr Suzor against his former fellow-employee Mr Buckingham, the pursuer proposed two issues, the first of which was refused and the second of which was granted by the Lord Ordinary. The question which we have to decide is whether this judgment is well founded. The pursuer acquiesces in the disallowance of his first issue, but the defender maintains that the second issue also should be disallowed upon the same grounds, viz., that the occasion was one of privilege, and that the pursuer has not relevantly averred malice. In my judgment the Lord Ordinary came to a proper conclusion when he decided that it is not clear upon the face of the pursuer's averments that the occasion referred to in the second issue was privileged. The defender has himself to blame for the result. If he had made an articulate statement of facts he would probably have succeeded in eliciting from the pursuer admissions which would have shown that the occasion was a privileged one.

At the trial it may be proved that on the occasion libelled the defender had express or implied instructions to represent his employer Mr M'Lachlan, and it may also be proved that the occasion was one on which Mr M'Lachlan, if he had himself been present, would have been privileged to speak freely to the pursuer. The Lord Ordinary says that there is nothing upon the record to suggest that the defender was actuated by any improper motive when he charged the pursuer with dishonesty. It would follow that if the trial Judge should rule that the occasion was privileged a verdict must be returned for the defender. I am, however, of opinion that the pursuer has made averments which would entitle a jury, if they see fit to do so, to infer malice on the part of the defender. He ought therefore to be allowed to prove these averments in the event of the Judge at the trial ruling that the occasion was privileged. The pursuer avers that the defender, who had previously been upon friendly terms with him, suddenly became unfriendly, and he attributes this conduct to jealousy on the part of the defender. He further avers that the defender had tried to induce Mr M'Lachlan to get rid of the pursuer, and was anxious to find an excuse for getting him dismissed. The defender accordingly refrained from

making inquiries which would have satisfied him of the pursuer's innocence. From these facts, if proved, a jury might legitimately infer malice on the part of the defender. For the reason stated in the other action I think that the pursuer might have contented himself with a general averment of malice.

LORD HUNTER—I concur

LORD JOHNSTON and LORD MACKENZIE were absent.

The Court adhered.

Counsel for the Pursuer—Cooper, K.C.—Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Counsel for the Defender—Solicitor-General (Morison, K.C.)—D. P. Fleming. Agents—Duncan Smith & Maclaren, S.S.C.

Tuesday, February 3.

FIRST DIVISION.

[Lord Dewar, Ordinary.]

SUZOR v. M'LACHLAN.

Reparation—Master and Servant—Slander—Privilege—Malice—Averments of Malice—Facts and Circumstances from which Malice can be Inferred.

A person who had been employed as cashier and bookkeeper by a tailor and clothier and owner of a tea-room, raised an action against his former employer. The pursuer averred that on two occasions (which he admitted to be privileged) the defender had charged him with taking money out of the tea-room receipts; that the defender made the accusations maliciously and without probable cause; that the defender had taken a dislike to him and had resolved to get rid of him; that he made a series of groundless complaints against him in order to induce him to resign; that finding this course ineffectual he recklessly made these accusations against him as a plausible excuse for his dismissal; that he made no investigation into the circumstances which caused the shortage; that he well knew shortages were inevitable, and that they took place before the cash reached the pursuer's hands; that while admittedly the tea-room column of the record sheets was altered when "shorts" and "overs" were of small amount so as to square with the cash in the till, the pursuer would have been able to give a satisfactory explanation of everything but was not allowed; and that the defender made no investigation of any kind.

In defence it was submitted that as the pursuer's own averments disclosed that the defender had probable ground for his accusation and was not acting maliciously, the action was irrelevant.

The Court (*reversing* the Lord Ordinary, Dewar) repelled the plea of irrele-