relicti. (2) By the law of Scotland *jus relicti* is a certain share of the wife's estate, fixed so far as regards value as at the date of the wife's death. The estate having been reduced to cash by realisation, admittedly in due course and without undue delay, any question of valuation is obviated, and apart from specialties, which do not exist in the present case, no subsequent change in value, either of decrease or increase, which occurred in the course of the subsequent management of the estate by the executor will diminish or enlarge the value of the *jus relicti.* It follows that the amount of the petitioner's claim is not affected by reason of the depreciation in value of the investments referred to in the question."

Counsel for the Petitioner — Dean of Faculty (Clyde, K.C.)—Henderson. Agents —Melville & Lindesay, W.S.

Counsel for the Attorney - General — Lord Advocate (Munro, K.C.) — Solicitor - General (Morison, K.C.) — Pitman. Agents—Carmichael & Miller, W.S.

Counsel for James Thomas Jones—Wark. Agent—P. Morison & Co., W.S.

Tuesday, June 6.

SECOND DIVISION.

HENDERSON AND ANOTHER, PETITIONERS.

Poor's Roll—Senior Counsel—Authority to Act for Poor Litigant — C.A.S., 1913, *A*, *x*, 13.

It is unnecessary to obtain the authority of the Court to enable senior counsel to appear on behalf of a litigant who has obtained the benefit of the poor's roll.

C.A.S., A, x, 13, enacts—"No other advocate or agent than those appointed as herein provided shall be employed, or allow their names to be used in any stage of the cause, unless, on application to the Lord Ordinary or the Court by note, to be signed by the advocate or agent already appointed, the assistance of one of the other counsel or agents for the poor shall be specially authorised; . . ."

Mrs Janet Henderson and another, *pursuers,* brought in the Court of Session an action of damages for personal injuries against the Musselburgh and District Electric Light and Traction Company, *defenders.* The Lord Ordinary (ORMIDALE) having assoilzied the defenders, the pursuers lodged a reclaiming note, and thereafter applied for and were admitted to the benefit of the poor's roll. They then presented a note to the Lord Justice-Clerk, in which they stated that a senior counsel had offered to appear with Mr Inglis, to whom the case had been remitted as one of the counsel for the poor, and craved the Court to authorise the said senior counsel to act in the cause. On the note appearing in the Single Bills of the Second Division counsel for the petitioners referred to C.A.S., 1913, A, x, 13, and moved the Court to grant the prayer of the note. The Court having desired that the motion should be further heard, the case was put out for hearing in the Single Bills of 6th June 1916.

The DEAN OF FACULTY (CLYDE), who appeared at the Bar, having been requested to address the Court, *argued* that as under the Acts of Sederunt of June 16, 1819, and December 21, 1842 (which were in the same terms as C.A.S., 1913, A, x, 13), it had been decided that senior counsel were entitled to give their services in cases on the poor's roll without requiring the authority of the Court — *Garvie* v. *Hammermen of Perth*, 1832, 10 S. 755, at p. 758, *note; Bell* v. *Murray*, 1833, 12 S. 187—notwithstanding the re-enactment by the C.A.S. of the provisions of the earlier Acts of Sederunt which had been open to question, the same rule should be adhered to. He also stated that while it had been laid down that the senior acting for a poor litigant in a case on the poor's roll must do so gratuitously—*Robertson* v. *Finlay*, 1849, 12 D. 393; *Wark* v. *Russell & Wardrop*, 1850, 12 D. 1074—in more recent practice fees to senior counsel had been allowed.

The Court being of opinion that the authority of the Court was not required to enable senior counsel to appear in the cause, found it unnecessary to deal with the note.

Counsel for the Petitioners—E. O. Inglis. Agent—W. K. Lyon, W.S.

Tuesday, October 17.

SECOND DIVISION.

[Lord Dewar, Ordinary.

A B *v.* Y Z.

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

A B and C D, two employees in the drawing office of an electrical engineering works, brought actions against Y Z, the manager. The pursuers averred that on a certain day they were talking in the afternoon in the lavatory adjoining the office in which they were working, when they heard some-one approaching; being unwilling to be found talking during business hours they entered a water-closet off the lavatory and closed but did not bolt the door; when they left the water-closet the defender summarily dismissed them, and in answer to a request for explanation replied, "When two men are discovered under those circumstances there is only one inference to be made from their conduct." Further, the pursuers averred that on the following day the defender went into the drawing office and addressed

the members of the drawing office staff, saying in the course of his remarks—"Two of your members were dismissed yesterday at a moment's notice. They left without a shred of character. They are not men, they are beasts." The pursuers also averred that the defender made no inquiry into the matter, that he refused to listen to explanation, and that he made these accusations maliciously. It was admitted that the first occasion was privileged, but it was contended that malice had been relevantly averred, and that if the second occasion was privileged, then that malice had also as to it been relevantly averred.

Held that malice had not been relevantly averred as regarded the first occasion, and that the second occasion was privileged, and that no relevant averments of malice had been tabled; and pursuers' case *dismissed.*

A B and C D, assistants in the drawing office of an engineering works, *pursuers*, brought actions against Y Z, the manager of the works, *defender*, to recover in each case £3000 damages for slander. The averments were almost identical in the two cases.

A B *averred*—"(Cond. 2) On or about 18th January 1916 the pursuer and a fellow-draughtsman named C D, also in the employment of [the firm of engineers], along with a number of their fellow-draughtsmen, were working in the drawing office of the company. In the course of the afternoon of that date the pursuer and the said C D were in the lavatory provided for the use of the drawing office. While standing in the lavatory talking together they heard some-one approaching in the corridor adjoining the said lavatory, and the pursuer and the said C D, not being desirous of being found talking together during business hours, walked into a water-closet adjoining the said lavatory and closed but did not bolt the door. The person whose steps they had heard, and who it is believed and averred was the defender, entered the lavatory and after a short time left it. During the time he was in the lavatory he did not attempt to ascertain who was in the water-closet or whether the door was bolted. The pursuer then left the water-closet and returned to the drawing office. (Cond. 3) When the pursuer left the lavatory the defender was standing in the corridor. The pursuer had just got back to the office when the defender came to the office door and called him out. He went with the defender to the lavatory, and the defender, pointing to the water-closet door, demanded to know who was in it. The pursuer, realising from the tone of the defender's voice that he was annoyed at something, declined to tell. The defender then ordered the pursuer to put on his hat and coat and go, and told him that he must not come anywhere near the works again. (Cond. 4) The pursuer then began to collect his belongings, but found that he could not conveniently get everything taken away by him at that time, and told the defender that he would return the following day and remove them in a bag. The defender refused to allow this. The pursuer then left. The said C D was also dismissed on the said date. (Cond. 5) Immediately after the said C D left the water-closet the defender, referring to the fact that the pursuer and C D had been in the water-closet together, stated to C D, 'When two men are discovered under those circumstances there is only one inference to be made from their conduct,' or used words of like import and effect. By the said statement the defender falsely, calumniously, and maliciously represented and intended to represent that the pursuer had been guilty of sodomy. C D on behalf of himself and the pursuer assured the defender that his inference was unfounded and offered to explain the circumstances, but the defender refused to listen to any explanation. (Cond. 6) On the following day, 19th January 1916, the defender went into the drawing office and addressed the members of the drawing office staff, and, *inter alia*, stated 'Two of your number were dismissed yesterday at a moment's notice. They left without a shred of character. They are not men; they are beasts'—or used words of like import and effect. The said statement was made in the presence of . . . [*here followed the names of six employees*] . . . or one or more of them. The two persons referred to in the said statement were the pursuer and the said C D. It was so understood by those who heard it. (Cond. 7) The statement quoted in the preceding article was of and concerning the pursuer, and is false and calumnious. It was maliciously made by the defender. Further, the said statement falsely, calumniously, and maliciously represented, and was intended by the defender to represent, that the pursuer and the said C D had been guilty of conduct so indecent as to destroy their character as men, and to degrade them to the level of beasts. Before making the statements complained of in articles 5 and 6 the defender made no attempt to ascertain whether the grave accusations he was uttering had any foundation of truth. The statements were made recklessly without any inquiry and without any regard as to whether they were true or false. When an explanation of the circumstances was offered by C D, as above stated, the defender refused to listen to it. When in the lavatory the defender by trying to open the door of the water-closet could and would have ascertained that it was not snibbed or fastened in any way, and that there was accordingly not the slightest ground for suspicion regarding the conduct of the pursuer and C D, but he made no attempt to ascertain if the door was snibbed, and without any reasonable ground or probable cause made the grave imputations complained of on the character of the pursuer."

The defender pleaded—"(4) The statements of the defender having been made upon a privileged occasion, and without malice, the defender is entitled to decree of absolvitor."

On 21st June the Lord Ordinary (DEWAR)

allowed two issues proposed by the pursuers and disallowed one proposed by the defender.

The issues allowed were in the following terms—"(1) Whether on or about the 18th day of January 1916, in or about the lavatory in the premises of . . . and in the presence and hearing of C D, engineer's draughtsman, then in the employment of the said . . . the defender did falsely, calumniously, and maliciously say of and concerning the pursuer—'When two men are discovered under these circumstances there is only one inference to be made from their conduct'—or did use words of the like import and effect of and concerning the pursuer, meaning thereby that the pursuer had been guilty of sodomy, to the loss, injury, and damage of the pursuer? (2) Whether on or about the 19th day of January 1916, in the drawing office in the premises of . . . and in the presence and hearing of . . . or one or more of them, the defender did falsely and calumniously say of and concerning the pursuer—'Two of your number were dismissed yesterday at a moment's notice; they left without a shred of character; they are not men, they are beasts'—or did use words of the like import and effect of and concerning the pursuer, to the loss, injury, and damage of the pursuer? Damages laid at £3000 sterling."

The defender reclaimed, and argued—The first occasion was admittedly privileged, and no relevant averment of malice had been made. In all cases in which a master was dissatisfied with a servant and dismissed the servant, the master was entitled to tell the servant the reason, and in so doing he was privileged. The language used was not reckless, but in the circumstances moderate. In regard to the second occasion, this also was a privileged occasion. There was a clear duty on the defender to address his employees for discipline's sake—*Toogood* v. *Spyring*, 1 C. M. & R. (1834) 181; *Somerville* v. *Hawkins*, (1851) 10 C.B. 583, *per* Baron Maule at p. 588; *Manby* v. *Witt*, (1856) 18 Scott's C.B. Rep. 544; *Spill* v. *Maule*, (1869) L.R., 4 Ex. 232; *Laughton* v. *Sodor and Man*, (1872) L.R., 4 P.C. 495; *Shaw* v. *Morgan* (*cit.* by Lord Dundas), 1888, 15 R. 865, *per* Lord Young at p. 870, 25 S.L.R. 620; *Hunt* v. *Great Northern Railway*, [1891] 2 Q.B. 189; *Barr* v. *Musselburgh Merchants' Association*, 1912 S.C. 174, 49 S.L.R. 102; *Lyell* v. *Henderson*, 1916, 53 S.L.R. 557, *per* L.C. Buckmaster at p. 566; *James* v. *Baird*, 1916 S.C. 510, 53 S.L.R. 392; *London Association for Protection of Trade and Another* v. *Greenlands, Limited*, [1916] 2 A.C. 15. If the language complained of could bear two interpretations, one of which was innocent, then the pursuers' case must be dismissed—*Langlands* v. *Leng & Company, Limited*, 53 S.L.R. 212; *Russel* v. *Stubbs, Limited*, 1913 S.C. (H.L.) 14, 50 S.L.R. 676. There was no duty on the defender to make inquiry. This duty only existed in hearsay cases—Cooper on Defamation, p. 200; *Suzor* v. *M'Lachlan*, 1914 S.C. 306, 51 S.L.R. 313. The defender had a moral duty and a social duty to stamp out indecencies. He fulfilled this duty by peremptorily dismissing the pursuers. He further owed a duty to his employers to maintain discipline. This duty he discharged by addressing the other employees—*Milne* v. *Smiths*, 1892, 20 R. 95, 30 S.L.R. 105.

Argued for pursuers—Although it was admitted that the first occasion was privileged, nevertheless malice had been relevantly averred. Malice was shown by the reckless nature of the charge, by the lack of inquiry, by the summary method of dismissal, and the refusal to hear explanations—*Lee* v. *Ritchie*, 1904, 6 F. 642, 41 S.L.R. 509; *Dinnie* v. *Hengler*, 1910 S.C. 4, 47 S.L.R. 1; *Suzor* v. *M'Lachlan* (*cit. supra*); *Lyell* v. *Henderson* (*cit. supra*); *Lightbody* v. *Gordon*, 1882, 9 R. 934, 19 S.L.R. 703; *Shaw* v. *Morgan* (*cit. supra*), cited *per* Lord Salvesen; *Main* v. *Douglas*, 1893, 20 R. 793, 30 S.L.R. 726, cited *per* Lord Dundas; *Slessor* v. *Gall*, 1907 S.C. 708, 44 S.L.R. 547. With reference to the second issue, the occasion was not privileged, because the relationship of master and servant had ceased—*Suzor* v. *Buckingham*, 1914 S.C. 299, 51 S.L.R. 309. The functions of the judge and the jury in considering malice were the same as those existing in the consideration of innuendo—*Smith* v. *Green*, 1853, 15 D. 549, *per* Lord President M'Neill at p. 552. The question came therefore to be—Were there sufficient averments which, if proved, would justify a jury in inferring malice?—*M'Lean* v. *Fraser*, 1823, 3 Murray's Reps. 353; *Urquhart* v. *Dick*, 1865, 3 Macph. 932; *Bell* v. *Black*, 38 Scot. Jurist, 412; *Ritchie* v. *Barton*, 1882, 10 R. 813, 20 S.L.R. 530; *James* v. *Baird* (*cit. supra*); *Denholm* v. *Thomson*, 1880, 8 R. 31, 18 S.L.R. 11.

At advising—

LORD JUSTICE-CLERK — I have had an opportunity of reading the opinion of Lord Dundas, in which I concur.

LORD DUNDAS—The Lord Ordinary has not furnished us with any note of the grounds upon which he decided to allow the pursuers' issues in these cases. I much regret this, because I should like to have been certain that in arriving as I have done at an opposite conclusion I had duly weighed and discounted the various reasons which led his Lordship to the result he reached. It appears to me that the pursuers have not stated a case on record relevant for inquiry.

The parties are agreed that the first of the two occasions libelled was privileged. The pursuers maintain that the second was not so. I think they are wrong. The limits within which statements although erroneous in fact and injurious to the character of another may (in the absence of malice) be protected by privilege were said by Parke, B., in *Toogood* v. *Spyring*, (1834) 1 C. M. & R. 181, at p. 193, to include those "made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." That opinion has since been, as Lord Macnaghten observed in *Mackintosh* v. *Dun*, [1908] A.C. 390, "frequently cited, and always with approval." In *Shaw* v. *Morgan*, (1888) 15 R. 870, Lord Young put the matter in very

similar language when he said that "if the statement be made in the discharge of a duty or in the reasonable attention to a man's own business and affairs, which gives him legitimate cause to write or speak of his neighbour, the occasion displaces the presumption of malice and the presumption of falsehood, and he is only answerable if malice be shown to have existed in fact, and if the statement be untrue." Now what was said by the defender upon the second occasion libelled was uttered by him on the day following the pursuers' dismissal, and addressed by way of explanatory information to the members of the drawing-office staff, to which the pursuers had belonged. It seems to me that in these circumstances the defender's statements were plainly made "in the conduct of his own affairs, in matters where his interest is concerned," and that he had "legitimate cause" to speak of his reasons for dismissing the pursuers with "reasonable attention" to his "own business and affairs." The matter intimately concerned both the defender and his other employees, and one can see that the pursuers' dismissal if unexplained by the defender, and possibly misrepresented from other quarters, might have produced results very injurious to the welfare of the business. That is in my judgment a sufficient ground for holding the occasion to be privileged. But I should be prepared to hold further that the defender's statements were made in the discharge of a duty, because, to use the words of Maule, J., who delivered the opinion of a strong Court in *Somerville* v. *Hawkins*, (1851) 10 C.B. 583, "it was the duty of the defendant, and also his interest, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff, as such association might reasonably be apprehended to be likely to be followed by injurious consequences both to the servants and to the defendant himself." See also *Manby* v. *Witt*, (1856) 18 C.B. 544.

The defender's counsel argued that, assuming the two occasions to be privileged, as I hold that they were, the pursuers' records disclose no relevant allegations of malice, and that the actions therefore fail. I think the argument is well founded. It was contended for the pursuers that malice was relevantly averred, because it must be inferred from the reckless and intemperate nature of the language used, and the facts alleged as to the abrupt manner of the pursuers' dismissal without any inquiry or investigation by the defender, who (to quote from C D's record) "maliciously refused to allow the pursuer to make any explanation, and summarily declined to discuss the matter." In deciding as to the relevancy or otherwise of the pursuers' averments of malice one must, I apprehend, consider the words attributed to the defender along with the facts known to him (according to the pursuers' records) at the time the statements were made. There is here, be it observed, no suggestion of antecedent malice, or any actual ill-will, spite, or grudge. It appears that the defender was aware that the two young men were shut up together in one of the three water-closets adjoining the lavatory, a small dark place, for a period of at least ten minutes or thereby. He summarily dismissed the pursuers. One of them having demanded an explanation, the defender used the words quoted in cond. 3. It is to be kept in view that this occasion being admittedly privileged the *bona fides* of the defender in saying what he did is to be presumed. As Lord Macnaghten observed in *Jenoure* v. *Delmege*, [1891] A.C. 73, at p. 79—"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." I am unable to discover anything in the words used that can be held to be reckless, extravagant, or unreasonable, or evidencing malice if the defender believed, under the circumstances above summarised, that the pursuers' conduct was such as to be inconsistent with ordinary human decency; and I take a similar view with regard to the language — very strongly expressed, no doubt — attributed to the defender on the second occasion. I respectfully adopt as precisely applicable to the present case what was said by the Lord Chancellor (Lord Buckmaster) in the recent case of *Lyal v. Henderson*, (1916) 53 S.L.R. 557, at p. 566 — "To submit the language used on privileged occasions to a strict scrutiny, and to hold all excess beyond the actual exigencies of the occasion to be evidence of express malice, would greatly limit, if not altogether defeat, the protection which the law gives to statements so made. (See *Laughton* v. *Sodor and Man*, L.R., 4 P.C. 495.) The real question is whether, having regard to the circumstances, the statement is so violent as to afford evidence that it could not have been fairly and honestly made, for the very essence of a privileged occasion is that it protects statements that are defamatory and false when apart from the protection the very character of the statement itself carries with it the implication of malice. If once the privilege be established, unless there be extrinsic evidence of malice, there must be something so extreme in the words used as to rebut the presumption of innocence, and to afford evidence that there was a wrong and an indirect motive prompting the publication—*Spill* v. *Maule*, L.R., 4 Ex. 232." I am unable, looking to the circumstances alleged and to the legitimate presumption of the defender's *bona fides*, to read the strong expressions used by him as being inconsistent with a fair and honest belief reasonably entertained by him; and I do not think that a jury could properly, or would be entitled to, regard them otherwise. As to the pursuers' other contention, I cannot hold that the defender, looking to what he himself observed, was under a duty to make investigation or inquiry; or that any investigation he might have made would have been likely to be of a fruitful character. Nor do I consider that having dismissed the pursuers he was bound to listen to explanations on their part; to decline to

do so may or may not have been an error of judgment, but fell distinctly short of anything like an evidence of malice.

I think therefore that we ought to recal the Lord Ordinary's interlocutor, sustain the first plea-in-law for the defender in each case, and dismiss the action.

It is to be regretted that the future careers of these two young men may be hampered by what has occurred. But it seems to me that if this should be so they have mainly themselves to blame. Their conduct, assuming the truth of their own averments, appears to have been amazingly foolish; they have augmented the publicity of the matter by raising these, as I think ill-founded, actions, and gravely accentuated the scandal by the mode in which, for obvious tactical purposes, the innuendoes have been stated on their records.

LORD SALVESEN—The most interesting question in this case is whether on the second occasion libelled the defender's statement, which we must presume to have been as false as it was defamatory, is protected by privilege. On the occasion in question the defender summoned the whole staff of the drawing-office for the purpose, *inter alia*, of informing them of the grounds which had led him to dismiss their two fellow-servants, the pursuers in the present cases. These grounds of dismissal involved a grave charge of misconduct against the pursuers. Can the defender in such circumstances plead that the communication was privileged?

The point has not been made the subject of express decision in our Courts, but the circumstances are very similar to those which occurred in the case of *Somerville* v. *Hawkins*, (1851) 10 C.B. 583. Wilde, C.J., ruled at the trial that such a statement made to fellow-servants was a privileged communication, and his ruling was upheld by a strong Court. Maule, J., who delivered the judgment of the Court, said (at p. 589)—"We think that the case falls within the class of privileged communications, which is not so restricted as it was contended on behalf of the plaintiff. It comprehends all cases of communications made *bona fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words. In this case, supposing the defendant himself to believe the charge—a supposition always to be made when the question is whether a communication be privileged or not — it was the duty of the defendant and also his interest to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff, as such association might reasonably be apprehended to be likely to be followed by injurious consequences, both to the servants and to the defendant himself." I desire to add that where a master has summarily dismissed a servant for gross misconduct he owes it to himself as well as to his staff to inform them of the reason of the dismissal. If he does not do so his conduct may well be misconstrued or misrepresented; and the relations between him and his remaining employees are very likely to become strained by what without explanation might naturally be supposed to be arbitrary and oppressive conduct on his part.

My view, then, being that the second occasion was equally privileged with the first, the only other question that remains is whether the pursuers have relevantly averred that the defender acted maliciously? Where a defamatory statement is made ultroneously the law presumes malice; but where the occasion is privileged the presumption is that the defamatory words were uttered in the honest belief that they were true. It is not enough for the pursuer to aver facts which are equally consistent with the statement having been made *bona fide* or maliciously. Cockburn, C.-J., in the case of *Spill* v. *Maule*, L.R., 4 Ex. 232, makes this perfectly plain—"Now the presumption of law being in favour of the absence of malice in the defendant, and the only evidence of malice being his description of acts done by the plaintiff which were capable of a twofold construction, that presumption of innocence which attaches to the writer must also where his act is capable of a double aspect still attend him. Starting with the presumption of innocence in his favour, we must assume that the defendant did entertain that view of the plaintiff's acts which induced him to believe, and honestly to believe and say, that the plaintiff's conduct was dishonest and disgraceful. We have not to deal with the question whether the plaintiff did or did not act dishonestly or disgracefully; all we have to examine is whether the defendant stated no more than what he believed, and what he might reasonably believe; if he stated no more than this, he is not liable, and unless proof to the contrary is produced we must take it that he did state no more." Applying this ruling to the present case I think it is not doubtful that the facts known to the defender, which I assume were capable also of an innocent interpretation, were of such a nature that he might reasonably and without malice draw the conclusion which he expressed to the pursuers and afterwards to their fellow-clerks. There are no averments which point to any antecedent ill-feeling on his part towards the pursuers. He may have drawn a mistaken inference from their conduct—and from the absence of a plea of *veritas* it must be assumed that he did—but there is nothing in the pursuers' statements on record from which I can infer that he acted maliciously. Assuming that the defender honestly believed that the equivocal situation in which the pursuers had placed themselves was one which could only lead to the inference of misconduct on their part, I cannot see that he used any language in describing that conduct which was not appropriate to the circumstances as he believed them to exist. It was argued, however, that his refusal to listen to any explanation on the part of the pursuers after he had dismissed them was evidence of malice. In some cases this may be so, where a defamatory charge is made on the information of another, and where a

slight extrinsic inquiry would have shown that the charge was unfounded. In this case, however, the defender was acting on the evidence of his own senses, and there was no possibility of any extrinsic evidence. The explanation of the pursuers, which presumably would have been on the lines of their averments on record, might well have failed to carry conviction to the defender's mind, and was at all events such an explanation as he might honestly disbelieve. In these circumstances I think the pursuers have failed to make a relevant allegation of malice, and that accordingly we ought to dismiss the action. The only consolation that can be afforded the pursuers is, that as the defender has not asked an issue of justification it must be assumed that the charge is untrue and it cannot therefore be repeated by others without their exposing themselves to an action of damages for defamation.

LORD GUTHRIE—I have had an opportunity of reading Lord Dundas's opinion, and I concur in it.

The Court recalled the interlocutors of the Lord Ordinary and dismissed the actions.

Counsel for the Pursuers (Respondents)—Anderson, K.C.—D. Jamieson. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for the Defender (Reclaimer)—Dean of Faculty (Clyde, K.C.)—Watt, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Saturday, October 21.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

GRAHAM *v.* EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED.

Reparation — Negligence — Road — Horses and Vehicles—Duty of the Driver of a Vehicle towards a Dog.

An action of damages for pecuniary loss was raised on the ground that a dog belonging to the pursuer was, while making stool by the side of the road close to the pursuer, run over by a lorry driven by the defenders' servant. It was averred that the driver was not keeping a good look-out. *Held* that the averments were relevant, and proof *allowed.*

James Graham, *pursuer*, brought an action in the Sheriff Court at Edinburgh against the Edinburgh and District Tramways Company, Limited, *defenders*, to recover £90 as loss and damage arising through a prize-bred Highland terrier bitch named "Betty" having been run over at the side of the road by a motor-lorry belonging to the defenders and driven by one of their servants, being £75 for the bitch and £5 each for three pups.

The pursuer averred—"(Cond. 2) On Friday, 30th October 1914, at or about 9·45 p.m., a white West Highland terrier bitch named 'Betty,' aged one year and seven weeks or thereby, and belonging to the pursuer, was in the act of making stool on the north side of the roadway of Grange Loan, Edinburgh, and near the pursuer's dwelling-house, when she was knocked down and run over by a motor-lorry, numbered S. 1492, No. 2, belonging to the defenders, and driven at the time of the accident by one of the defenders' servants in the course of his employment with the defenders. The near or left-hand wheels of the said lorry passed over the body of the said terrier, and she was thus instantaneously killed. (Cond. 3) The said accident occurred through and was entirely due to the fault and negligence of the defenders' said servant. On the occasion in question he was driving the said lorry westwards along Grange Loan at an excessive speed and on the north side of the roadway, on which side he had no occasion to be and ought not to have been. The width of the roadway of Grange Loan is 27 feet 6 inches or thereby, and there was nothing to prevent him from driving the said lorry (which was 5 feet or thereby in width) on the south side of the roadway, on which side he ought to have been. Further, he failed to give any warning of his approach and he failed to keep a proper look-out and to have the said lorry properly lighted. At and immediately prior to the time of the said accident the only light at the front or sides of the said lorry was a small lamp at the front of the right-hand side thereof. That light was inadequate to enable any person or animal to ascertain the whereabouts or breadth of the said lorry, and the pursuer, who was standing near his said terrier, could not, owing to the said inadequate lighting, ascertain the whereabouts or breadth of the said lorry until it was so close beside him and the said terrier that he could not save her, although he had been keeping a proper look-out. The said terrier was also keeping a proper look-out, but it was impossible owing to the said inadequate lighting for the said terrier to ascertain the whereabouts or breadth of the said lorry. Had the said driver driven the said lorry on the south side of the roadway, the said accident would not have happened. Had the said driver given any warning of his approach by sounding a horn or otherwise as it was his duty to do, and had he been driving at a moderate speed as he ought to have done, the said accident would have been avoided by the said terrier leaving the roadway, but owing to the said failure to give warning and to the said excessive speed there was no opportunity for the said terrier to escape the said lorry. Further, had the said driver been keeping a proper look-out, which it was his duty to do, he would have seen the said terrier in time to avoid the accident, and could have avoided it by drawing up in a reasonable distance or drawing to the side had he been driving at a moderate speed. The place of the accident was lighted at the time by a street lamp, and the said white terrier was plainly visible against the surface of the roadway, which was of dark material. It is believed and averred that on the occasion