

Wednesday, March 28.

STEWARTS v. SCOTTISH NORTH-EASTERN
RAILWAY COMPANY.

Reparation—Culpa—Master and Servant—Railway Company—Onus probandi. In an action of damages against a railway company at the instance of the widow and children of one of its servants, said to have been killed through the fault of the defenders or one of their servants, direction to a jury (per Lord Justice-Clerk) that the *onus* of proving that there was fault on the part of one of the company's servants lay on the pursuers, and that as there had not been evidence of fault on the part of any particular servant the verdict must be for the company.

Counsel for Pursuers—Mr Scott and Mr F. W. Clark. Agent—Mr D. F. Bridgeford, S.S.C.

Counsel for Defenders—The Solicitor-General and Mr Watson. Agents—Messrs Webster & Sprott, S.S.C.

This is an action of damages at the instance of Mrs Treziah Maitland or Stewart and others, the widow and children of the now deceased Charles Stewart, surfaceman, Calsies, Cove, against the Scottish North-Eastern Railway Company, for injury occasioned to them by the death of the said Charles Stewart while in the service of the railway company, through the fault of the defenders. The issue sent to trial was as follows:—

“It being admitted that the pursuers are the widow and lawful children of the deceased Charles Stewart, sometime surfaceman, residing at Calsies, Cove:

“Whether, on or about the 8th day of November 1864, the said Charles Stewart was a surfaceman in the defenders' employment, and while returning from his work was struck by a train and killed on the defenders' line of railway between Cairnrobin cutting and Cove Station, through the fault of the defenders—to the loss, injury, and damage of the pursuers?”

Damages for Mrs Treziah Maitland or Stewart laid at £300; and for each of the other pursuers—viz., Margaret Stewart, James Maitland Stewart, Charles Maitland Stewart, Jane Jemima Maitland Stewart, and Francis Maitland Stewart—at £200.

After hearing evidence for the pursuer it was contended on his behalf that by rule thirty-six of the company's regulations, the previous train which passed an hour and a-half before the special train came up, by which the deceased was killed, should have had a red board placed in front of the engine, and that the *onus* lay upon the defenders to show that the fault of this not having been done did not lie with them.

For the defenders it was maintained that by the regulations the servants of the company were directed to be prepared for the approach of special trains at any time without previous intimation.

The LORD JUSTICE-CLERK observed that rule thirty-six was a rule enacted by the company and for the guidance of their servants, and that the *onus* of proving fault on the part of the defenders lay with the pursuers. He must therefore direct the jury that it was incumbent on the pursuers to prove that the death of Charles Stewart was caused by the fault of some person for whom the defenders were responsible, and that as the pursuer had not done so in the present case they must find for the defenders.

Verdict for the defenders accordingly.

Wednesday and Thursday, March 28 and 29.

BELL v. BLACK AND MORRISON.

(*Ante*, p. 169).

Reparation—Judicial Slander. In an action of damages for judicial slander by Procurators-

Fiscal, ruled (per Lord Justice-Clerk) that the statement complained of was pertinent, and therefore privileged—but verdict for the pursuer.

Counsel for Pursuer—Mr George Monro and Mr E. S. Gordon. Agents—Messrs Murdoch, Boyd, & Henderson, W.S.

Counsel for Defenders—The Lord Advocate and Mr A. Moncrieff. Agents—Messrs Murray & Beith, W.S.

In this case the pursuer is John Bell, farmer, Glenduckie, and the defenders are Alexander Black and William Morrison, writers in Cupar, and procurators-fiscal for Fifeshire. The following is the issue:—

“It being admitted that, on or about the 25th day of December 1864, the defenders, as joint procurators-fiscal for the shire of Fife, presented a petition to the Sheriff of Fife, at their instance, in the terms contained in the schedule hereunto annexed; and that, in an action at the instance of the pursuer in this Court, defences were lodged for the defenders, which defences contained the following statements with reference to the foresaid petition—‘The statements in the said petition were and are true, and were made by the defenders in good faith and on probable grounds:’

“Whether the said statements were maliciously inserted in the said defences by the defenders, falsely and calumniously represent that the pursuer was, during the years 1863 and 1864, or part thereof, engaged in a conspiracy for the purpose of taking the life of the Rev. James Pitt Edgar, minister of the parish of Dunbog, and the life of John Ballingall, farmer, Dunbog, or of doing them some grievous bodily harm, and for the purpose of wilfully setting fire to or attempting to set fire to their dwelling-houses or premises, or otherwise of doing serious injury and damage to their property and persons—to the loss, injury, and damage of the pursuer?”

Damages laid at £1000.

SCHEDULE REFERRED TO IN THE FOREGOING ISSUE.

(Copy Petition.)

“Unto the Honourable the Sheriff of Fife, or his Substitute, the petition of Alexander Black and William Morrison, joint procurators-fiscal of the shire of Fife for the public interest—

“Humbly sheweth—That the petitioners are in course of taking a precognition against James Pringle, millwright, residing at Barley Mill, in the parish of Abdie and shire of Fife, present prisoner in the prison of Cupar, accused of having, along with other persons, whose names are to the petitioner's unknown, during the years 1863 and 1864, or part thereof, wickedly and illegally conspired together for the purpose of taking the lives of the Rev. James Pitt Edgar, minister of the parish of Dunbog, in the county of Fife, and of John Ballingall, farmer, Dunbog, aforesaid, or of doing them some grievous bodily injury, and for the purpose of wilfully setting fire to or attempting to set fire to their dwelling-houses or premises, or otherwise of doing serious injury and damage to their property and persons: As also, of wickedly and maliciously writing and sending, or causing and procuring to be written and sent, threatening letters to the Rev. James Pitt Edgar and John Ballingall.

“That, in the course of said precognition, the petitioners have recovered various letters and other documents, showing that other persons than the said James Pringle have been engaged in said conspiracy, and in writing and sending said threatening letters—all which are herewith produced; and particularly that John Bell, farmer, Glenduckie, Barbara Honeyman or Black, wife of and residing with William Black, parochial Schoolmaster, Dunbog, George Black and William Black, sons of and residing with the said William Black, and David Nelson, a roadman, residing at Glenduckie, having been engaged in said conspiracy, and in writing and sending said threatening letters: That the petitioners are informed, and have reason to believe,

that written documents and other articles referring to and connected with said conspiracy and threatening letters are in the possession of the said John Bell, William Black, schoolmaster, Barbara Honeyman or Black, George Black, and William Black, and also in the possession of the said David Nelson; and as it is necessary for the purposes of said precognition to recover and take possession of the same, the present application for warrant to search becomes necessary.

"May it therefore please your Lordship to grant warrant to officers of Court, and their assistants to search the dwelling-house, repositories, and premises at Glenduckie occupied by the said John Bell, the premises at Dunbog occupied by the said William Black, schoolmaster, and the repositories there belonging to him, or the said Barbara Honeyman or Black, George Black, and William Black, and also the dwelling-house, and premises, and repositories at Glenburnie, occupied by the said David Nelson, for the said written documents, and all other articles tending to establish guilt, or participation in said crimes, and to take possession thereof, to be produced before your Lordship; or otherwise to do in the premises as to your Lordship shall think proper.

"According to justice, &c.

(Signed) "ALEX. BLACK.
"WM. MORRISON."

This action arose out of the circumstances connected with the presentation of the Rev. James Pitt Edgar to the parish of Dunbog in 1862. It appeared from the evidence that on the 25th December 1864 the defenders presented a petition to the Sheriff of Fifeshire, craving warrant to search the houses of the parties therein named, among whom were the present pursuers, for documents or other articles tending to establish their participation in a conspiracy to murder the Rev. Mr Edgar and John Ballingall, farmer, Dunbog, and to set fire to their houses; and also of writing and sending threatening letters to the said persons. This warrant was executed the following day upon the pursuer, and various writings were carried away. The pursuer thereupon brought a suspension of the warrant, and on 30th January 1865 the Court of Justiciary suspended it. Thereafter, on the 15th February 1865, the pursuer raised an action of damages for illegal search. To this action defences containing the statement which is the foundation of the present action were lodged on the 21st March. The statement complained of did not appear in the draft prepared by junior counsel, but was inserted by senior counsel on being sent to him for revision. The record was then closed on the 19th May 1865, and subsequently the action was taken out of Court, on a tender by the defenders of the sum of £201 and expenses.

The LORD JUSTICE-CLERK, in charging the jury, observed—The thing complained of is that in the defences to the action of damages for the use of an illegal warrant, the defenders stated that the statements in the petition for the warrant were true, and were made in good faith and on probable grounds. The question here is not whether the statements in the petition were justifiable at the time they were made, but whether the repetition of them in these defences when they were lodged in March 1865 was justifiable. In the issue there is very little matter remaining in dispute between the parties—because, first, there is no doubt the statement complained of was inserted in the defences; and, second, there can be no doubt that the statement had the meaning ascribed to it in the issue. The sole question, therefore, is whether it was maliciously inserted by the defenders. I am bound to say at the outset that the defenders are answerable in law for the statements lodged in these defences. It is a different and ulterior question in determining whether they acted maliciously, to consider if the form in which the statement was put was suggested not by them, selves but by their counsel; but in so far as regards mere legal responsibility for the statement,

there is no doubt whatever that the defenders are answerable. On the other hand, a party to an action has a certain privilege. He is entitled to say anything that is pertinent to his cause, no matter whether it is slanderous or libellous either against his opponent, or, to a certain extent, other persons. His statement is privileged on two conditions—first, that it should be pertinent to the cause; and, second, that he does not act from malice. I have, therefore, to direct you in point of law that the statement was not impertinent, and therefore the only question which remains is whether the pursuer has offered sufficient proof of malice. It was true that the statement as it stood was prepared not by the defenders but by counsel. It must, however, be obvious that the materials which the counsel had in framing the statement were supplied by the defenders; and it had not been shown that the materials supplied by the defenders were such as to make it unjustifiable on the part of counsel to state the defences in that form. With regard to the imputation of malice, that is a thing not to be surmised but proved. Direct evidence is not necessary to establish malice; it might be enough for the pursuer to prove facts and circumstances from which it might be reasonably inferred. Against all the evidence relied on by the pursuer to prove malice, it must be remembered that it is always to be presumed in the case of such respectable and high officials as the defenders, that their only object was to discharge their duty aright. Zeal in the performance of their duty was a most commendable quality, and even although it might sometimes outrun discretion, it was not to be imputed as malice. A little over-zeal was not malice, and must never be mistaken for it. It might be a want of calmness and temper, but it was not malice. Malice must be a feeling of ill-will of some kind actuating the party against the individual who complained. Undoubtedly the circumstances under which the petition in question was granted were such as to excuse the defenders for showing an unusual amount of zeal. But the whole matter turned on the evidence of malice, and that was a matter peculiarly for the jury.

Mr MONRO, for the pursuer, excepted to the ruling of the Court on the point of pertinency.

The jury, after an absence of half an hour, returned a unanimous verdict for the pursuer, assessing the damages at £100.

Thursday and Friday, March 29 and 30.

INGLIS v. INGLIS (*ante*, p. 183.)

Reparation—Slander. In an action of damages for written slander—verdict for the defender.

Counsel for Pursuer—Mr E. S. Gordon and Mr A. B. Shand. Agent—Mr J. Renton, Jun., S.S.C.

Counsel for Defender—The Solicitor-General, Mr Clark, and Mr J. T. Anderson. Agents—Messrs White-Millar & Robson, S.S.C.

The pursuer in this action is William Allan Inglis, flour merchant in Musselburgh, and the defender is John Inglis, flour merchant, Steam Mills there; and the issue sent to trial is as follows:—

"Whether the defender, in or about July 1865, wrote and circulated among the pursuer's customers a letter in the terms set forth in the schedule hereunto annexed? And whether the said letter is of and concerning the pursuer, and falsely and calumniously represents that the pursuer, having without right or title obtained a number of the defender's empty sacks, dishonestly retained said sacks, and dishonestly refused to give them up to the defender—to the loss, injury, and damage of the pursuer?"

Damages laid at £500.

SCHEDULE.

Letter referred to in the preceding issue.

"Steam Mills, Musselburgh, July 1865.

"Dear Sir,—William A. Inglis, who recently acted as agent for the sale of my flour in your district, inti-