

cause serious damage thereto," &c. Here again there is no specification of dates—nothing to suggest that the operations complained of were anterior to the pursuer's acquisition of the estate, for the estate is described as the *pursuer's* lands. The terms of the article do not carry back beyond twenty years. If there were any doubt as to the reasonable construction of this, it would be entirely removed by the pursuer's answer to the 3d statement of the defenders, in which he says:—"It is only within the last ten years, and chiefly within the last five years, that the damage done to the pursuer's land commenced to be serious." This may be taken as a construction of the words in the 6th article of the condensation "for some time," and "latterly." And there is therefore not the slightest foundation in the record for the kind of case the pursuer has been trying to bring within the issue proposed. I therefore think the contention of the defenders should be given effect to; and the only suggestion I wish to make is, to omit the words "the said" in the issue. It is not necessary to say much as to the issue proposed by the defenders. The essential objection to them both is, that there is no foundation for them in averment. The pursuer claims for damages during the last twenty years, and there is nothing in the defenders' statement against this. On the contrary, there are averments putting acquiescence out of the case. For it is said that there were no injurious operations to acquiesce in; it is said that after Mr Stewart acquired the iron works, the practice of depositing slag in the burn was discontinued, and only on two occasions there was an accidental slip of slag into the burn. How the pursuer could acquiesce in the deposition of slag in these circumstances the defenders have failed to explain.

The other Judges concurred.

The pursuer's issue, as amended, was approved of, and the defenders' counter issues were disallowed.

Agents for Pursuers—Melville & Lindesay, W.S.
Agents for Defenders—James Webster, S.S.C.

Thursday, July 4.

SECOND DIVISION.

MILNE *v.* BAUCHOPE.

(*Ante*, vol. iii., p. 372.)

Reparation—Slander—New Trial—Contrary to Evidence—Head-Master—Privilege. In an action of damages for slander at the instance of a school-mistress against a master, who claimed to be head-master of the school and who maintained the privilege of his situation to utter the slander libelled on, new trial refused, in respect the slander did not fall within the privilege.

In this case, Eliza Milne, teacher, was pursuer, and John Bauchope, teacher, was defender. The following issue was submitted for the pursuer:—

"It being admitted that the pursuer is a certificated teacher, and was infant schoolmistress of St Mary's Sessional School, Edinburgh, from October 1861 to July 1875, and that the defender was, during said period, and still is, a master in said school.

"Whether, on or about the 10th day of January 1865, the defender did write and transmit, or

cause to be written and transmitted, to the Rev. Dr Grant, minister of the parish of St Mary's, Edinburgh, a letter in the terms contained in the schedule. And whether, in said letter, the defender did falsely and calumniously say of and concerning the pursuer that she had told falsehoods—to her loss, injury, and damage?"

"Damages, £500."

The letter in question charged the pursuer with misrepresentations of fact regarding some of the pupil teachers; of conduct in many respects subversive of discipline; and concluded by saying:—"She questions some of the scholars about me in a way she ought not to do. She has spoken insolently and falsely to me and about me in presence of the pupil teachers and others. In many instances she has shown little or no interest in school, and she seems to be actuated by a spirit of petty annoyance. She has sometimes told direct falsehoods, occasionally to the knowledge of the pupil teachers. Her conduct in ignoring my position, and the daily system of petty annoyance which she pursues, makes me desirous of having this state of matters remedied as soon as possible."

The following counter issue was submitted for the defender:—

"Whether the statements in the said letter, to the effect that the pursuer had told falsehoods, are true?"

The jury, by a majority of nine to three, found that, although by the letters and documents before the Court the defender is regarded as head-master, there is no evidence to show that he was appointed to such an office, and the jury do not recognise him as such; also by the same majority they found for the pursuer, and assessed the damages at £10.

The defender moved for a new trial, on the ground that the verdict was contrary to evidence, and obtained a rule.

J. C. SMITH and KERR showed cause.

WATSON and GLOAG in support of the rule.

At advising—

LORD COWAN said—I am of opinion that the verdict ought to stand, and that a motion for a new trial should be refused. That the pursuer's issue was proved, and that the counter-issue was not supported by evidence of any materiality whatever, are positions which are indisputable. From the alleged position of the defender as head-master of the school, it was argued that, as malice was not established, the verdict ought to be set aside. The terms of the verdict on this point are—"That although by the letters and minutes before the Court the defender is recognised as head-master, there is no evidence to show that he was appointed to such a situation." It was as head-master that the defender claimed privilege, and the jury found him not appointed to that situation. But the verdict proceeds—"And they do not recognise him as such." They refuse to recognise him as head-master in the question in the issue before them. The operative part of their finding as regards the case they were trying is this latter part. On these premises they find for the pursuer. Two questions here occur—

(1) Whether the jury have egregiously erred as to the view they have taken of the position of the defender as head-master? and (2) whether they have egregiously erred in refusing to recognise him as head-master in this question with the pursuer? On these points there is evidence both documentary and parole:—(1) The position of the defender in certain minutes and letters is stated to be that of

head-master: but it is remarkable that in a letter, dated 1st November 1855, from the secretary of the directors, intimating his appointment, it is only stated that he is "appointed on the situation as teacher." It is therefore not astonishing to me that the jury did not find he was appointed head-master, and it is not so flagrantly contrary to evidence as to require it to be quashed. (2) But, secondly, the question is, have the jury not erred in not recognising him as such in this question with the pursuer? I do not dispute the privileged position of a person placed in the position of governor, head-master, or rector of an institution, with proper functions and privileges in relation to its managements; and his communications in this position would not justify an action of slander unless malice was the ground. On this point the following remarks occur:—(1) The pursuer was appointed female teacher in the school, and the terms of her appointment did not, as far as they go, place her in any subordinate position; and her appointment flowed directly from the directors. (2) It does not appear that the defender had any but a general control of the school, and he had no right to interfere with the pursuer in her demeanour or her treatment of her pupil teachers. But the letter appended to the issue is not confined to matters within the defender's province as head-master. Some of his accusations have reference to matters occurring in private life—*e.g.*, 1 and 2 of special charges. (Reads 1 and 2 of schedule, p. 2 of issue). This falls under the 2d of my heads as to the view the jury took of his position as head-master in this question. Such charges cannot fall within his position as head-master, even supposing him to have occupied such a position. No. 3 (p. 2 of issue), and 5 and 7 of subordinate statements, fall still more strongly under this second head. These last charges form the sting of the letter as an alleged slanderous communication. These cannot fall within the position claimed by the defender. Such a position will not justify such calumnious statements. The counter-issue taken in justification is in general terms, and had reference to specific instances mentioned in record (stat. vii., p. 12). Counter-issue is "Whether the statement in the said letter, to the effect that the pursuer had told falsehoods, are true?" I am of opinion that the counter-issue ought not to have been in the vague terms in which it is. The charges of falsehood are vague and general; and in the proof led we shall search in vain for evidence of that clear and convincing character which would alone be sufficient in such a case. The jury have returned a verdict which was imperative in a so deeply implicated matter of simple justice. On the whole, I am of opinion that the verdict ought not to be disturbed.

LORD BENHOLME—I have arrived at the same conclusion with Lord Cowan. The issue does not mention privilege nor malice. (Reads issue.) This issue is clearly proved. That it was falsely said no one can doubt, nor is it more doubtful that it was calumnious. The question is, is there anything in the question of privilege or non-affirmation of malice which affects this? It is true that in such a case a case of privilege may emerge on proof. But the jury do not recognise any, and on this point they have merely a certain finding—"That although by the letters and minutes before the Court the defender is recognised as head-master, there is no evidence to show that he was appointed in such a situation, and they do not recognise him as such." It is a matter of fact that in minutes

and letters he was recognised as such, and it is urged by the defender that as he was head-master the verdict is wrong. But no minute of his appointment has been shown to prove it. However, I do not lay much stress on that. He was a master in this school, and had a duty to perform in regard to it, having an interest in its character and success. If then, as such, a privilege exists, does it cover this communication made by the defender to Dr Grant? If the verdict is wrong we must also be prepared to say that such privilege was sufficient to cover such a communication. That may have been what the jury intended to say when they said they did not "recognise him as such." My own idea is that they thought no situation of privilege proved. But this does not exhaust the matter, for this communication goes beyond any privilege. In these circumstances we cannot interfere with the verdict.

LORD NEAVES—I concur in the opinions which have been delivered. I confess I do not think we are called upon to disturb this verdict, nor would we be justified in doing so. I would regret if so much time was to be devoted to a new trial. As regards the question of justification, there cannot be the smallest ground for overturning the verdict. It would require very strong evidence indeed before we could give a new trial, when the jury have acquitted the party accused on the counter-issue. But there are no grounds even for approaching this. Privilege depends, first on fact, second on law—1st, on the situation claimed; 2d, on the law of privilege as to that situation. The jury found something in this man's position as head-master. He held a very equivocal position. The defender was master, the pursuer mistress. That was all. It does not come out clearly that he was head-master in the high sense which he attempts to arrogate to himself. I cannot say that the jury were wrong. As regards this point I especially agree with Lord Benholme. We must see that the nature of the communication for which privilege is claimed falls under that privilege. A situation giving him a general charge in the school will not justify this letter, especially when the charges are in a general form, of which it is impossible to approve, as *e.g.*, charge 7, "She has sometimes told falsehoods, occasionally to the knowledge of the pupil teachers." A letter of this kind written without communication to the party charged, and without specification of charges, is one of which it is impossible to approve. It is impossible to say that the jury have disregarded any just privilege, and I cannot say that the verdict is contrary to substantial justice.

LORD JUSTICE-CLERK—I confess I feel great satisfaction that your Lordships have come to the conclusion that the verdict should not be disturbed. I think we are not in a position to say that there has been any substantial injustice done. But in regard to the special finding of the jury, I confess I have had some hesitation. They have expressed an opinion on the matter of fact of the appointment of the defender as head-master. But for the introduction of that finding I would have had no hesitation in supporting the verdict. But there is a ground in the evidence to which this finding is opposed. It seems opposed to the great weight of the evidence. There are, indeed, no minutes of the appointment of the defender as head-master, but several minutes and letters expressly recognise his position. The difficulty arises from the consideration that the particular finding of the jury is like an affirmation that their verdict is rested on this

question. But it may be that the construction of finding is that it is only as to the matters which were particularly before the jury. Therefore although I have expressed these doubts, I do not wish to dissent from the opinions of other judges, I consider that no injustice has been done.

The rule was accordingly discharged.

Agent for Pursuer—James Bruce, W.S.

Agent for Defender—Andrew Scott, W.S.

Thursday, July 4.

THE LONDON AND CALEDONIAN MARINE INSURANCE COMPANY v. THE LONDON AND EDINBURGH SHIPPING COMPANY AND THE DUNDEE, PERTH, AND LONDON SHIPPING COMPANY.

Issues—Supplementary and Conjoined Actions—Two Defenders—Competency. A party brought an action, and, in consequence of the defence pleaded, which had the effect of throwing liability upon another party, raised a supplementary action against the latter. The two processes were ultimately conjoined. The pursuer having proposed issues against both parties, held (*dub.* Lord Neave) that that course, although it necessarily entailed defeat of the pursuer by one or other of the defenders, was competent.

The pursuers are the assignees of the owners of a cargo of jute shipped on board the "Temora," for transmission from London to Dundee, and lost at sea on board that vessel; and they have paid the value of the cargo to the owners. The pursuers first brought an action for the value against the London and Edinburgh Company as owners of the "Temora." A defence having been stated that the Edinburgh Company had not contracted to carry the jute, inasmuch as they had let the vessel on hire to the Dundee Company for the trip, and had nothing to do with the cargo, the pursuers raised a supplementary action against the Dundee Company, which was conjoined with the other. The pursuers proposed issues in identical terms against both sets of defenders. It was objected that, as such issues would be contradictory to each other, they could not be granted.

GIFFORD and SHAND for Pursuers.

D.-F. MONCREIFF, YOUNG, WATSON, and DUNCAN for Defenders.

At advising—

Lord Cowan—I do not think that many observations are required in this case. After giving the case every attention, and also the arguments that were addressed to us, I have arrived at the conclusion that the pursuers are entitled to have the two issues that they propose. In their first action they have started a case which is certainly in itself a very relevant case against the defenders called in that action and they are entitled to have an issue under that record if they think fit. I see no reason why they should not get an issue in that first action, if they choose to take it. Then, in the second action, in consequence of the nature of the defence that is put in to the first action, a defeat of the ends of justice might possibly arise were the two companies not before the same jury; because, in defence to the first action, the Edinburgh Shipping Company state that, in that particular voyage, when the goods of the pursuers were sent for transmission to Dundee, they did not employ their own

vessel, but had given their vessel over to the service of another Company. What was to be done about this—for the pursuers were rightly advised in bringing an action against that other Company—in order that they might have both parties in the field, one or other of whom, whatever may be the merit of their respective positions, is certainly responsible for the damage suffered by the pursuers? I think the first action was brought against the Edinburgh Company, as it was that Company that caused the vessel to be borrowed; but the Edinburgh Company said that the Dundee Company are finally responsible, and then the action is brought against that Company. That is the second action, and the Edinburgh Company are called in it for their interest. I think that is the way in which they stand. There are no conclusions in the second action as against the defenders in the first action. The conclusions in the first action are against the defenders in that action, the London and Edinburgh Shipping Company; and the conclusions in the second action are against the Dundee Company simply, the other Company being merely called for their interest. Now, in the second action, just as in the first, I think that a relevant case is laid; and if there is a relevant case, we cannot hold that the pursuers are not entitled to an issue to try the case they have upon record in a relevant form. Then the question arises whether the two issues in these conjoined actions—because the actions have been conjoined after having been resisted by the defenders—the question arises whether the issue in the one action and the issue in the other action are not to go to the same jury, and at the same time how may we express these issues? I can see no difficulty in the way of the Court with regard to this. I fail to have heard any argument or principle against it; I fail to have heard any authority quoted as good against a proposition which ought to be well founded if we look at the justice of the position in which the pursuers are placed, and the justice which the pursuers are entitled to have. I fail to see any authority against that course being taken. But I beg to say, for my own part, that the case of *Gairns* is conclusive as regards the practice of the Court when the justice of the case requires that the pursuer, who has suffered damage, should have a claim against two parties, or against one or other of two parties, who are fighting against each other, which is the party liable. I think it is also consistent with what I remember of the case of *Dickson*. In that case the iron ore from an ironstone pit, which was below a coal-pit, had been brought to the surface, and the result was that some of the burning ore tumbled down into the coal-pit and set it on fire, and a great deal of damage was done. The coal-owners brought an action against the owner of the property, and brought also in the same action the owner of the iron ore—they brought the contractors, and the sub-contractors, and various parties. No doubt it was arranged in that case that we should go first of all to issue with one of the parties; but I never heard it disputed that we were entitled to do more; and I do think, if justice required it, we would have been entitled to an issue against one or other of them. That being so, I do not see that these two defenders—who, while they respectively dispute the right of the pursuers to have damages at all, will be fully heard upon that matter—have any reason to complain of this course being followed. If the pursuer is defeated at the very outset of his case, then of course they both get off; but they