

and, with reference to the preceding finding, assoilzies the defenders respectively from the conclusions of the action, and decerns: Finds the pursuer liable to the defenders respectively in the expenses of process, of which allows an account to be lodged, and remits the same to the Auditor to tax and to report."

"*Note.*—The Lord Ordinary trusts he may be held as here absolved from the duty which, in the ordinary case, he endeavours to discharge, of stating in a note the views on which he has proceeded in giving judgment. The result of his consideration of the evidence which was led in his presence, and which has since formed the subject of able argument before him, is embraced in the terms of the preceding interlocutor."

The case standing No. 60 of the Long Roll of the Second Division, their Lordships, before disposing of the petition, gave the action of divorce precedence; and, on advising the reclaiming note in that case, they adhered to the interlocutor of the Lord Ordinary. The Court then took up the petition. The respondent, in answer, founded on alleged habits of intoxication of which the petitioner had been guilty, and to which she was still said to be addicted, and on familiarities with other men which were founded on in the action of divorce,—the proof of which consisted of some correspondence between the petitioner and a gentleman not her husband. The respondent also said that latterly, besides neglecting her other duties, she had been harsh to the children. The answers concluded as follows:—"It is humbly submitted, in these circumstances, that the petitioner is not a person with whom the respondent could safely allow his children to associate. Even although it were held, as the Lord Ordinary has held, that the evidence did not amount to proof of adultery, no wife could for years be addicted to habits of intoxication, as the petitioner was, and could receive and write such letters, without being morally debased. The respondent trusts that, although he was unable to convince the Lord Ordinary that the proof was sufficient to entitle him to decree of divorce, he will be able to convince your Lordships that it is so; but, even if he fail in that action, he has now said enough to justify him in not allowing to the petitioner access to the children. But still farther, this is not a case in which, where the action of divorce is *in pende*nte, the Court should interfere with the right of the father to the custody and supervision of his children, upon whom any intercourse with their mother will have the most prejudicial and distressing effect."

CLARK and THOMSON for Petitioner.

FRASER and LANCASTER for Respondent.

The Court pronounced the following interlocutor:—

"*Edinburgh, 13th June 1868.*—The Lords having resumed consideration of the petition, with the answers thereto, and heard counsel, Find that the petitioner is entitled to have access to her children, subject to regulation; and in the meantime, and subject to the further orders of the Court, direct and decern that an opportunity be given to the petitioner to see her children once every two months for the space of not exceeding four hours on each occasion, at such place and in presence of such party as may be mutually agreed on by the petitioner and the respondent: Failing such agreement, grant power to the Sheriff of Lanarkshire to fix a place of meeting, and to name a proper party in whose presence the interviews of the petitioner with her

children shall take place; the first interview to take place at the end of two months from the date of this interlocutor: Find the petitioner entitled to the expenses of this application hitherto incurred, and remit to the Auditor to tax the same and to report: Further continues the case in the rolls, and decerns."

Agents for Petitioner—J. & R. D. Ross, W.S.

Agents for Respondent—Murray, Beith, & Murray, W.S.

Tuesday, May 16.

## FIRST DIVISION.

CUNNINGHAM *v.* PHILLIPS.

*Reparation—Slander—Newspaper—Issue.* Form of issue in action of damages against a newspaper editor for publication of a continuous series of defamatory articles.

This was an action of damages for defamation at the instance of the Reverend John Cunningham of Crieff, against David Phillips, proprietor, publisher and editor of the *Strathearn Herald*. The issues as reported to the Inner-House by the Lord Ordinary were six in number; the first being:—

"(1) Whether in the number of the said newspaper published on or about 12th October 1867, the defender printed, published and circulated, or caused to be printed, published and circulated, an article entitled 'The Organ again,' and paragraph referred to the said article, both contained in schedule A. hereunto annexed; and whether said article and paragraph, or either of them, or part of them or either of them, were of and concerning the pursuer, and falsely and calumniously represented or insinuated that he, along with others, had solicited or procured the raising of a small-debt action in the Sheriff-court of Perthshire, at the instance of David Arnot, clerk and letter-writer in Crieff, against Alexander M'Nab, weaver there, for the purpose of eliciting something to remove the disgrace alleged by the defender to hang on the promoters of a movement for the introduction of an organ into the parish church of Crieff; and falsely and calumniously represented or insinuated that the pursuer had dismissed one of his best Sabbath school teachers without reason assigned, because he was opposed to the organ, and might object to its being played in the Sabbath school; or contains any one or more of the said false and calumnious representations or insinuations, or false and calumnious representations or insinuations of the same or similar import, to the loss, injury, and damage of the pursuer?"

The second issue was laid on an article of 26th October 1867, alleged to represent and insinuate that the pursuer and others had instituted the said action, and were endeavouring to destroy the reputation of their neighbours.

The third issue was laid on an article of 2d November 1867, alleged to represent or insinuate that the pursuer knowingly and wilfully instigated or abetted a lawless or rebellious act against the authority of the Church of Scotland.

The fourth issue was—

"Whether, in the number of the said newspaper published on or about 9th November 1867, the

defender falsely and calumniously printed, published and circulated, or caused to be printed, published and circulated, as part of the evidence given in said small-debt actions by a Miss M'Nab, the passage contained in schedule D. hereunto annexed, and whether the said passage, or part thereof, is of and concerning the pursuer's manse; and falsely represents or insinuates that the said manse was a grossly immoral and ill-regulated house, and that great numbers of bastards were begotten in it, or contains one or more of said false and calumnious representations or insinuations, or false and calumnious representations of the same or similar import, to the loss, injury, and damage of the pursuer?"

The fifth issue put the question, whether certain articles published on 27th November 1867 falsely and calumniously represented that the pursuer had been guilty of wilful falsehood, and was a likely person to be guilty of perjury if he were required to repeat his false statements on oath?

The other issue put the question, whether certain articles published on 16th November 1867 falsely and calumniously represented or insinuated that the pursuer had instigated certain proceedings in the kirk-session of his parish against M'Nab and his wife for the sin of perjury, charged against them from vindictive or other selfish and improper motives?

After some discussion on the issues, the Lord President suggested that the present was a case in which a general issue might be taken, laid on a series of defamatory articles, amounting to a continuous persecution, and referred to the cases of *Sheriff v. Wilson*, 1 March 1855, 17 D. 528, and *M'Laren v. Ritchie* (*Scotsman Newspaper*), 8 July 1856 (unreported).

The pursuer then proposed an issue, "It being admitted, &c. &c. (then followed the articles and paragraphs complained of), Whether the said articles and passages, or any parts thereof, are of and concerning the pursuer; and whether the pursuer is thereby calumniously and injuriously held up to public hatred, contempt and ridicule, to his loss, injury, and damage?"

At advising—

**LORD PRESIDENT**—The Court have considered the matter carefully. The difficulty is this. The publication which forms the subject of the 4th and 5th issues originally proposed seems to be slanderous as they are innuendoed, and the pursuer therefore would be entitled to have issues laid on these publications. There is some difficulty in embracing in this general issue now proposed two articles which are in themselves slanderous, and might be made the subject of a distinct claim of damages on that ground. The pursuer is in this position that he must choose between two courses. If he wishes to prosecute in these two cases as for slander, he must take separate issues. But if he is disposed not to deal with these two cases as distinct slanders, but to deal with them as steps in a general persecution, he would require to minute that he is not to insist for damages in respect of these as separate slanders.

The pursuer put in a minute stating "that in the event of the Court adjusting a general issue as now proposed for the trial of the cause, he would not insist in reference to the matter contained in the 4th and 5th issues as reported by the Lord Ordinary for any separate claim of damages as for slander."

The following issue was adjusted:—

"It being admitted that the pursuer is the minister of the parish of Crieff, and that the defender is the proprietor and publisher of a newspaper called the "Strathearn Herald," and General Advertiser for Crieff, Comrie, Auchterarder, &c., published at Crieff, in the county of Perth, and that there were printed and published in the said newspaper of the dates after mentioned the articles and verses hereinafter quoted, viz.:"—

(Then followed the articles, with the dates of publication.)

"Whether the said articles, passages, and verses are of and concerning the pursuer; and were published in pursuance of an intention to expose, and did calumniously and injuriously expose, the pursuer to public hatred, contempt and ridicule, to his loss and damage?"

Damages claimed, £1000.

Agents for Pursuer—Macgregor & Barclay, S.S.C.  
Agents for Defender—M'Ewen & Carment, S.S.C.

Wednesday, June 17.

#### ROBERTSON v. HEITON.

*Agreement—Guarantee—Construction.* A letter held, on construction of its terms, not to amount to a guarantee of payment, and action for payment dismissed.

Douglas contracted to perform the mason-work of a dwelling-house, of which the defender Heiton was the architect. Robertson supplied lime for the work, and now sued Douglas and Heiton for the price. Robertson's case was, that, not being sure of Douglas' solvency, he declined to furnish him with lime except on the order and responsibility of Heiton as well as of Douglas; that Heiton ordered the pursuer to supply the requisite lime, stating that he would pay the pursuer for the same, and repay himself out of the money to be paid to Douglas; that the pursuer accordingly furnished lime to Douglas, and asked payment from Heiton, who, however, delayed to pay, but, in December 1865, wrote to the pursuer that, "in reference to the promise I made you regarding the lime supplied, I will deduct these sums from the amount due John Douglas, on the completion of his contract, to the extent of the funds in hand." Heiton admitted the letter, but denied liability, Douglas having failed, Robertson sued him and Heiton for the price of the lime, resting his case against Heiton on the letter of December 1865, the conclusion being for payment of £82, "being the amount of an account for lime and bricks furnished by the pursuer to the said John Douglas, and which was supplied upon the order of the defender, the said Andrew Heiton, and for payment of the price of which he is also liable to the pursuer, under and in virtue of his holograph letter to the pursuer, dated 8th December 1865." The Sheriff-substitute (BARCLAY) assolvied Heiton, on the ground that the letter contained no unconditional obligation of payment, but merely implied that, if the money of the contractor came into Heiton's hands, he would deduct the pursuer's claim before paying the contractor. The Sheriff adhered.

The pursuer advocated.

FRASER and SCOTT for advocator.

CLARK and SHAND for respondent.

At advising—

**LORD PRESIDENT**—I am of opinion that the in-