

clear in the end of his specification—[*Reads the passage read by the Lord President and by Lord Deas*].

There is a difference taken between the expression "expanding tool" and "expanding instrument." The "expanding tool" is the three things, the roller, roller-stock, and tapering-plug in combination; the "expanding instrument" is that tapering plug which can only act where there are radial slots or something equivalent, which will allow the rollers to be pressed outwards. There is a gauge too in Dudgeon's tool, to keep the instrument at the same part of the tube, for it is only by that means that you get the necessary expanding power; that is the way Dudgeon's patent works. Now, we have seen both instruments, and the first thing that strikes one in Thomson's patent is that there is no divergence of the rollers; they are fixed in the stock; they are skewed, however, so as to make the tool conical in its shape, and therefore it must, in short, be in motion to act successfully, entering the tube gradually until you come to the thickest part of the tool, when the expansion is complete. Therefore, I think that in principle Thomson's patent is different, and so is the mode of operation, and therefore I am satisfied that there is no infringement.

Prayer of petition refused.

Counsel for Complainer—Lord Advocate (Watson)—Balfour—Hunter. Agent—D. Curror, S.S.C.

Counsel for Respondent—Asher—Jameson. Agents—Auld & Macdonald, W.S.

Saturday, December 23.

## FIRST DIVISION.

[Sheriff of Lanarkshire.

HARVEY v. DYCE.

*Jurisdiction—Slander—Privilege—Damages—Judge—Sheriff.*

*Held* that a Judge has absolute protection for words spoken by him in his judicial capacity against an action for damages.

*Observed* (per Lord President) that no Judge is irresponsible, but no Judge is responsible in an action of damages.

John Harvey, writer in Lanark, and procurator in the Sheriff Court there, raised this action against the Sheriff-Substitute of Lanarkshire, residing in Lanark, concluding for £1000 of damages and *solatium* due to him in consequence of the defender having slandered him while debating a case in the Sheriff Court. The expressions complained of were "that the pursuer was an insane man," and "that he was a juggler," and further, "that he was a liar."

The defender admitted that on the occasion referred to he had occasion to observe on the manner in which the pursuer was conducting the debate before him; but pleaded—"(1) The action is incompetent in the Sheriff Court of Lanarkshire, or any other inferior Court. (2) There being no case stated by the pursuer relevant to infer

that the defender acted in the matter complained of extrajudicially, beyond his powers or competency as a Judge, the action is not maintainable to any effect. (3) The defender, having in the matter complained of acted regularly in the exercise of his judicial functions, in good faith and with probable cause, and the contrary not being relevantly or competently averred, the action is untenable. (4) Generally, the action being raised against a judicial functionary in respect of matter occurring in the course of his judicial functions, and for alleged damage said in consequence to arise, is an incompetent action, and the statements thereof are not relevant to infer the conclusions."

The Sheriff of the county remitted the case to another of his Substitutes (GALBRAITH), who sustained the 1st, 2d, and 3d pleas, and assolized the defender. In a note annexed to his judgment he assigned as his ground of judgment the incompetency of dealing with an action such as the present in the Sheriff Court. On the general ground of incompetency he gave no opinion.

The Sheriff (DICKSON) adhered, but added the following note:—

"*Note*—The Sheriff-Substitute bases his judgment on the ground of his not having jurisdiction to entertain the action, supposing (for the sake of argument) that it were competent in another Court. The Sheriff is not prepared to adopt this view, for which, so far as he knows, there is no authority. He prefers to reserve his opinion upon it as involving a question of difficulty which it is not necessary to decide, seeing that he has no doubt that, upon the authorities quoted by the Sheriff-Substitute, as well as upon principle, the action is incompetent either in this Court or in any other Court."

The pursuer reclaimed, and argued—The case of *Haggart's Trustees v. Lord President Hope*, quoted against him, had no application to an inferior Judge. If the Supreme Court had no jurisdiction to entertain this action, what remedy was there? Besides, although a Judge might be protected by his judicial functions to a certain extent, in using the language alleged he *ipso facto* laid down his judicial position and its privileges.

The defender argued—This case is altogether incompetent. The law is, that a Judge on the judgment-seat has an absolute immunity against actions of damages.

Authorities—*Haggart's Trs.*, June 1, 1821, 1 S. 46, and H. of L. 2 Shaws Appeals 125; *Hamilton v. Anderson*, June 18, 1858, 3 Macq. 363; *Scott v. Stansfield*, 3 Law Reports (Exchequer) 220 (C-B. Kelly's opinion).

At advising—

LORD PRESIDENT—I am of opinion that this action is not maintainable. The allegation of the pursuer is that on the 4th of April the defender, "while he was sitting in judgment as Sheriff-Substitute in the Court at Lanark, and hearing the pursuer in a debate on an action at his instance against James Lindsay, missionary, Lanark, and before and in presence of William B. Allan, Sheriff-Clerk-Depute," and various other persons, did slander the pursuer. It has been settled by a series of judgments both in this country and in England that against an action so laid the privilege of a Judge is absolute. No Judge is irrespon-

sible; but no Judge is responsible in an action of damages. I entirely concur in the opinion of the present Chief-Baron that has been quoted to us. It is, I think, a very sound and a very sensible opinion.

I apprehend that the plea that must be sustained here is the fourth. The other pleas may be of more doubtful relevancy.

**LORD DEAS**—I agree with your Lordship, and I also think that the proper course is to sustain the defender's fourth plea. The first plea might raise a very important and a very difficult question. It certainly seems to me that it would be anomalous if there could be an action of damages brought before one inferior Judge for what was said or done before another, particularly when the one is a Substitute appointed by the other. But before that question can be raised your Lordships will have to hold that this action is competent in the Supreme Court; but if, as I think, it is incompetent here, it is certainly incompetent before the Sheriff.

**LORD MURE**—I agree with your Lordships. The fourth plea-in-law should be sustained, as it seems to meet the facts of the case most fully.

I think the Sheriff exercised a wise discretion in not dealing with this case.

**LORD SHAND**—I am of opinion that on grounds of public policy a Judge must have absolute protection for words spoken in the course of judicial proceeding. Now, the case here raises that point. The pursuer was speaking in a cause before the defender, sitting in judgment as Sheriff-Substitute in the Court at Lanark, when these words were used. I therefore agree with your Lordships that the fourth plea for the defender must be sustained.

The Court pronounced the following interlocutor:—

“Recal the interlocutors of the Sheriff-Substitute and the Sheriff, dated respectively the 20th May and 13th June 1876: Sustain the fourth plea-in-law stated for the defender: Assolzie the defender from the conclusions of the summons, and decern: Find the pursuer (appellant) liable in expenses in the Inferior Court and this Court; allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report.”

Counsel and Agent for Pursuer—Party.

Counsel for Defender—Balfour—Mackintosh.

Agents—J. W. & J. Mackenzie, W.S.

## HIGH COURT OF JUSTICIARY.

Friday, December 22.

### APPEAL—GRAHAM v. LANG.

*Excise—Certificate, Breach of—Act 25 and 26 Vict. cap. 38, Schedule A.*

A sale of exciseable liquor to a child apparently under the age of fourteen years, who is merely the messenger of an adult person,

does not constitute a breach of certificate in the sense of the schedule.

This was a case stated by the Magistrate of the Central Police Court of Glasgow in a complaint in which the appellant John Graham, spirit dealer, 69 Bell Street, Glasgow, the holder of a certificate for the sale of exciseable liquors, was charged by the respondent John Laing, procurator-fiscal of that Court, with an offence against the laws for the regulation of Public Houses in Scotland, in so far as on the 18th November 1876 he did, within his licensed premises, sell or supply exciseable liquor—to wit, brandy—to a girl named Mary M'Cue, who then was apparently under fourteen years of age, this being his first offence. The case stated that at the trial it was proved that on the date libelled Mary M'Cue, a girl of ten years of age, asked the appellant's shopman for one half glass of brandy, for which she paid 3d. The brandy was given to the girl in a bottle which she brought with her, and which was corked before being returned to her. The girl stated she had been sent with the money by her mother; that she had been in the shop for drink before, but always with her mother; that she did not know the shopman, nor did the shopman know her; that the shopman asked her no questions, and she told him nothing. The shopman corroborated this evidence. He said he did not know for whom the girl came, and added—“I was not aware that there was any objection to serving little children with drink if the drink was put into a bottle and carried away.” The girl's mother stated she had sent her daughter for the brandy; and this explanation was made by the girl to a police-sergeant whom she met at the door of the public-house. On these facts the magistrate held that the brandy having been sold without inquiry or information as to whether the girl was really a messenger or not, a breach of certificate had been committed. He imposed a penalty of £2, 10s. or eight days' imprisonment.

The question of law stated was—“Whether, on the facts proved, was the brandy sold or supplied to the girl Mary M'Cue contrary to the terms and intent of the appellant's certificate?”

The appellant argued—The complaint was laid on Schedule A of 25 and 26 Vict. cap. 35, which forbids publicans to “sell or supply exciseable liquor to girls or boys apparently under fourteen years of age.” Here it was admitted that the girl was a messenger. There was no sale to her.

The respondent argued—In *Donaldson v. Linton*, 8th December 1875 (*ante*, vol. xiii. p. 163) Lord Justice-General Inglis says it would be no breach to sell to a “child who came to purchase it as a messenger for an adult, and was known to the public-house keeper to be acting in that capacity.” The publican must take reasonable means to satisfy his mind of the fact. Here the child was a messenger, but was not known to be so.

At advising—

**LORD YOUNG**—The facts of the case are extremely simple. A sick bed-ridden mother sent her little girl, ten years of age, to a public-house to get half a glass of brandy which she required. Unfortunately some bed-ridden mothers are under the necessity of making little children their messengers. The publican, without making any in-