

the safe conduct and traffic of the road. It is not matter of obligation. The thing is not to be taken out of their hands or imposed upon them in consequence of the views that may be taken by us. They are the judges in the matter. If, when the thing is forced upon their notice, they come to the conclusion that it is reasonable that the particular road should be lighted in order that the traffic may be conducted safely, there does not seem to me to be anything by which the exercise of that discretion is restricted. If they may light, they may expend that which is requisite for the purpose of lighting. I think this is the true meaning of their position in the administration of their trust. I therefore concur in thinking that both questions should be answered in the affirmative.

LORD RUTHERFURD CLARK—I have a good deal of difficulty, I confess, upon the second question, which is the more important, and my doubts are not altogether removed even yet; but I am not disposed to differ from the judgment your Lordships have pronounced.

The **LORD JUSTICE-CLERK** was absent.

The Court answered both questions in the affirmative.

Counsel for Parties of the First Part—**Mackintosh—Graham Murray. Agents—H. B. & F. J. Dewar, S.S.C.**

Counsel for Parties of the Second Part—**J. P. B. Robertson—Jameson. Agents—Mackenzie & Black, W.S.**

Friday, July 18.*

FIRST DIVISION.

[Lord Adam, Ordinary.]

STRACHAN v. AULD AND ANOTHER.

Sale—Sale by Auction—Judge of Roup—Exclusion of Court of Law—White Bonnet.

The duties of the judge of the roup extend only to the decision of questions arising during the sale.

By the conditions of a roup it was provided that the highest offerer should be purchaser; that a person named therein "is appointed judge of the roup, to whom are hereby submitted all disputes and differences of every kind which may arise in relation to the sale either between the exposer and offerers or among offerers themselves, and his decision shall be final and binding on all parties." Some time after the sale one of the bidders who had not been preferred to the subject, claimed it as being the highest *bona fide* bidder, on the ground that the offers higher than his own were not *bona fide* bids, but were made by persons bidding in collusion with the exposer in order to raise the price. *Held* that this question did not fall to be decided by the judge of the roup.

In August 1883 Robert Campbell Auld, a farmer and breeder of Angus polled cattle at Alford,

advertised a sale of a herd of 50 polled cattle to be held at Aberdeen on 13th September. Catalogues were issued describing the animals, and stating that the auctioneer would be James Farguhar, and the judge of the roup would be James Reid, Greystone. The catalogue contained these conditions of sale—“(1) The stock will be exposed separately, according to the numbers of the following catalogue, and the highest offerer on each lot will be preferred to the purchase. (2) The statements in the catalogue are correct so far as known to the exposer, but he shall not be bound by them in any respect. (3) All purchases shall be settled for immediately after the sale in ready money. Parties failing so to settle will in the exposer's or judge's option either forfeit the purchase and be liable in one-fifth part of the price as the stipulated damage, or be bound to abide by and implement their purchases. (4) Immediately after each purchase is declared the risk of the animal shall be exclusively with the purchaser; and it is declared that until a settlement shall be made in terms of these conditions the delivery of the animal shall be suspended. (5) Mr James Reid, Greystone, is judge of the roup, to whom are hereby submitted all disputes and differences of every kind which may arise in relation to the sale either between the exposer and offerers or among offerers themselves, and his decision shall be final and binding on all parties.”

On 13th September the sale was held. One of the animals exposed was a two-year-old heifer, described as “Pride of Aberdeen 30th, 5209, got by Knight of the Shire, 1699, dam Pride of Aberdeen 9th, 3253.” Of this animal James Walker was declared the purchaser at 510 guineas, the last offer before his being 505 guineas, offered by George Wilken.

In December following John Strachan raised this action against the exposer Auld and against Walker for declarator that the pretended purchase by the defender Walker was for and on behalf of the defender Auld, was fraudulent, and *funditus* null and void; that the Marquis of Huntly was the true purchaser of the heifer at 300 guineas, and entitled to the heifer on payment thereof; that pursuer was now in right of the Marquis of Huntly, as such purchaser; or otherwise, as might be determined in the course of the process, that the pursuer in his own right was the true purchaser of the heifer at 325 guineas, or at such other price as might be fixed and determined by the Court in the process, and entitled on payment of that or such price to delivery of the heifer; further, he concluded against Auld for decree of delivery of the heifer on payment of 300 guineas, or otherwise for £300 as damages.

He set forth in his condescendence the advertisement and issue of catalogues as above narrated; further, that immediately before the sale the auctioneer stated to the company assembled, in presence and by authority of the defender Auld, and as an inducement to offer, that the sale was “entirely unreserved.” He then set forth the bidding as above narrated, and then—“(Cond. 4) The bidding was begun by the Most Honourable Charles Gordon Marquis of Huntly, who offered 200 guineas, and after several other offers had been made he offered 300 guineas, whereupon the defender James Walker, farmer, Westside of Brux, offered 320 guineas. The Marquis of Huntly then

*Decided 19th March.

gave up bidding, and the pursuer offered 325 guineas, and continued to offer as against the said James Walker, in the belief that he was a *bona fide* offerer, till the price reached 495 guineas, when the said James Walker offered 500 guineas. At this stage George Wilken, farmer, Waterside, Alford, acting as after mentioned, offered 505 guineas, and no other offers having been made the said James Walker was declared the purchaser. (Cond. 5) The sale in question was not a *bona fide* unreserved sale. On the contrary, it had been arranged beforehand between the defender the said Robert Campbell Auld and the said James Walker that the latter should appear at the sale and make offers for the animals, and in particular the animal in question, of a higher price than would be offered by any other offerer at the sale. Such higher offers were to be entirely in the said Robert Campbell Auld's own interest, and with the object as after stated. Accordingly, the said James Walker, when he made the offer of 320 guineas, and all the offers above that sum, did so in the interest and on the behalf of the defender the said Robert Campbell Auld himself; and the animal, along with a number of others which the said James Walker ostensibly purchased, were removed from the sale-yard and kept in possession by and are still retained in the possession of the defender Robert Campbell Auld, who refuses to deliver the said animal to the pursuer." In condescendence 6 he averred that Wilken, who, as above stated, bade 505 guineas, was not acting with the intention of buying, but knew that Walker had instructions from Auld to outbid any other offerer, and that his offer would therefore not be accepted, and did not abide by the offer. The condescendence then went on to state that the pursuer "believed and averred that the object which the defender Auld had in asking parties, including the other defender Walker, to offer was if possible to have the reputation and price of his herd of animals raised, and in particular to have an offer of upwards of 500 guineas made at a public sale for one of the 'Pride' breed to which the heifer in question belonged—that having been the highest price paid for any animal of the 'Erica' breed of cattle, the two breeds being considered of about equal standing, and the defender wishing to increase the value of his own herd, being the 'Pride' breed."

The pursuer further stated that he held an assignment from the Marquis of Huntly transferring to him all his interest in the animal.

He pleaded—"(1) The offers made by the defender Walker at the sale mentioned on record having been made in the interest and on behalf of the other defender, and not being *bona fide* offers, were illegal, and the defender Walker is not entitled to retain possession of the animal. (2) The pursuer is entitled, upon the facts stated being admitted or proved, to obtain possession of the animal in question on payment of the sum offered by the Marquis of Huntly. (3) The pursuer, either in right of the Marquis of Huntly or in his own right, is entitled to obtain decree of declarator and delivery in terms of the conclusions of the summons. (4) The pretended sale to the defender the said James Walker having been fraudulently carried through as condescended on, is null and void, and is not binding upon the pursuer or the other *bona fide* offerers

at the sale, and the pursuer is therefore entitled as a *bona fide* offerer to obtain possession of the animal in question on payment of the highest sum offered by the Marquis of Huntly, or otherwise on payment of the sum first offered by himself."

Walker did not appear to defend the action.

Auld defended the action. He denied the pursuer's averment that the sale was not a *bona fide* unreserved one, and that the offers of Walker and of Wilken were not made in *bona fide*. He stated that "by the conditions of the sale the question raised falls to be decided by the judge of the roup. The defender is willing, and hereby offers to accept and abide by the decision of the said judge."

He pleaded—"(1) Assuming the pursuer's averments to be founded on fact, he has no title or interest to insist in the action. (2) In respect of the conditions of sale the action is incompetent, or at all events the question raised therein falls to be decided by the judge of the roup. (3) The pursuer's averments being irrelevant, the defender ought to be assolizied with expenses."

The Lord Ordinary (Adam) repelled the defender's second plea-in-law, and allowed the parties a proof before answer of their respective averments.

The defender reclaimed. He argued—By the conditions of sale any such question as was here raised fell to be decided by Reid, the judge of the roup. It was such a question as might have been expected to arise and to require to be referred to him, and the clause of reference to him in the conditions of sale quite covered it. The position of a judge of the roup was one well suited for determining such a question.

Authority—*Ewing v. Laurie*, January, 13, 1825, F.C.

The pursuer's counsel were not called on.

At advising—

LORD PRESIDENT—After listening with all attention to the argument for the reclamer, I am not satisfied that the Lord Ordinary has done anything wrong. As to the second plea-in-law, that the matter falls to be determined by the judge of the roup, I think that argument proceeds on a misapprehension of the position and functions of a judge of the roup. He is not an arbiter in any proper sense regarding questions arising after the sale is over, as to the liabilities of parties as seller or purchaser, or as to the validity of the roup. He is simply appointed to see fair play on both sides at the sale, and to interfere if anything irregular is done. Whatever he decides in such matters is no doubt binding on the parties, but there is no question of that kind raised here. Everything at the sale was on the face of it regular, and accordingly the judge of the roup was not called on to exercise his functions at all, and when the roup was over his duties as a judge were at an end. His position seems to me to be very similar to that of umpire at games, with which we are all acquainted, who is simply to decide questions while the game is going on.

With regard to the relevancy I say nothing. The Lord Ordinary has not decided that. He has allowed a proof before answer, and looking at the very peculiar averments I think that is the most judicious course to take. I am therefore for adhering.

LORD MURE and LORD SHAND concurred.

LORD DEAS was absent.

The Court adhered.

Counsel for Pursuer—Trayner—Comrie Thom-
son. Agent—Alexander Morison, S.S.C.

Counsel for Defender—M'Kechnie. Agents—
Irons, Roberts, & Lewis, S.S.C.

Friday, July 18.

FIRST DIVISION.

[Sheriff of the Lothians.

SCOTT v. TURNBULL.

*Reparation—Slander—Judicial Slander—Privi-
lege—Malice—Relevancy.*

In an action of damages for slander alleged to be contained in a judicial pleading, where the statements complained of were relevant to the action, *held* that the pursuer was bound to aver facts and circumstances from which malice could be inferred, and in respect of his failure to do so, action *dismissed* as irrelevant.

Observed (per Lord President) that even where the statement complained of was irrelevant to the action in which it was used, the pursuer must aver malice.

This was an action in the Sheriff Court of the Lothians at Edinburgh, brought by James Gibson Scott against Patrick Turnbull, chartered accountant, Edinburgh, liquidator of the Money Order Bank, Limited, to recover £2500 damages for alleged judicial slander.

The action in which the slander was alleged to have been uttered was one brought on 2d February 1883, in the Court of Session, at the instance of Scott against the Money Order Bank, Limited. The company went into liquidation on 12th February 1883, and Turnbull having been appointed liquidator, was sisted as a defender. That action concluded for £5500 damages in respect the defenders had failed to work a system invented by the pursuer, in terms of an agreement entered into between them, in consequence of which the pursuer had been deprived of his share of the profits of the company, and in respect the defenders had so mismanaged the business generally that the pursuer's system and inventions had been brought into disrepute and rendered of no value.

In that action Scott pleaded—“(2) The defenders having failed to adopt and work the pursuer's system, and having otherwise mismanaged the business of the company, and having thereby caused loss and damage to the pursuer to the extent concluded for, the pursuer is entitled to decree in terms of the conclusions of the summons, with expenses.”

The defenders pleaded—“(5) The pursuer having by his own misconduct brought about or contributed materially to bringing about the present state of matters, he is barred *personali exceptione* from succeeding in this action.”

In support of this plea the defenders made the following statement which constituted the alleged

slander—“(Stat. 4) The pursuer was never formally installed in office as manager, but according to the agreement he acted as such till on or about the 28th May 1881, when he was suspended from that office by the chairman of the board of directors in consequence of absence from business, inattention to his duties, and general misconduct. Prior to this, viz., towards the end of April 1881, the pursuer's attention was called to the fact that he had been intoxicated during business hours, and had been seen in that state by the chairman. He was asked to apologise and pledge himself that such a state of things should not recur. He practically admitted the offence, tried to explain matters, and promised good behaviour for the future. He again misbehaved in the same way within a month or thereby. The pursuer's conduct and a correspondence between him and the chairman was brought under the consideration of the directors at a meeting held on 8th June 1881, and it was resolved that the chairman should inform the pursuer that at the next meeting his dismissal from office would be moved. The chairman reported that he had suspended pursuer from his duties, which was confirmed by the meeting. (Stat. 10) Notwithstanding the pursuer's dismissal, he immediately thereafter began a systematic interference with the officials and agents of the company, representing himself as an official of the company, and claiming right to examine documents belonging to the company. Through this and other means of a like nature the company was commercially injured with the public, and the confidence of a number of the agents in the management and working of the business was shaken. Further, the pursuer at various times made unfounded charges against the directors and officials of the company, and threatened proceedings to enforce certain alleged rights. The pursuer was well aware that his conduct was greatly to the prejudice of and injurious to the company. His agents admitted this in the correspondence, which is produced and referred to for its terms. These charges were persisted in down to 24th August 1881, when the pursuer's agents, on his behalf, wrote that everything contained in any letter written by him to the chairman or law-agents, or communicated to them, which could be construed into an accusation against the company or anyone connected with it, was fully and without reservation withdrawn. The pursuer, however, shortly after this renewed his charges and misrepresentations.”

In that action the defenders were assolized.

In the present action the pursuer narrated the pleadings in the previous case and averred—“(Cond. 5.) In the statement of facts for defenders contained in the closed record in said action, the defender falsely, maliciously, and injuriously made the following statements of and concerning the pursuer, viz., ‘The pursuer was never formally installed in office as manager, but according to the agreement he acted as such till on or about the 28th May 1881, when he was suspended from that office by the chairman of the board of directors in consequence of absence from business, inattention to his duties, and general misconduct. Prior to this, viz., towards the end of April 1881, the pursuer's attention was called to the fact that he had been intoxicated during business hours, and had been seen