

and of the complaints to the landlord were not set forth. The pursuer should have left the house and sued for damages.

Authorities—*Fraser v. Hood*, December 16, 1887, 15 R. 187; *Scottish Heritable Security Company (Limited) v. Granger*, January 28, 1881, 8 R. 459.

The pursuer maintained that there was sufficient specification. She had been induced to stay on in the house owing to the representations of the defender that the drains would be put right.

At advising—

LORD JUSTICE-CLERK—I am of opinion that the statements of the pursuer in this record are not relevant, and that there should be no inquiry in this case.

The substance of the case is this—the pursuer is the widow of a person who was the tenant of the house owned by the defender, in which the pursuer lives, and to which the complaint applies. This house had been occupied by the pursuer and her husband from year to year since June 1883, and the statement is that in 1887 the drains of the house had become defective, and that unpleasant smells were thus caused, and then the complaint ends with this statement, that two of the pursuer's children died of diphtheria, and a demand for damages to the amount of £1000 is made.

I think that the whole statement of the pursuer is entirely and absolutely defective. It is not alleged what was the fault in the drains, nor indeed that any fault in them produced the disagreeable odours and other results complained of. There is an averment that a complaint was made to the local authority as to the state of the drains, but it is not stated what the local authority did, or whether they thought it necessary to do anything, or what reply was given to the complaint. It is assumed that because these two children died from diphtheria it must have been communicated to them from defects in the drainage. It is plain that the whole statement is defective as a complaint on which to found a claim of damages, and the last item of damage, the deaths of the children, clearly cannot be allowed to go to proof.

LORD YOUNG—I am of the same opinion, and from the beginning I was clearly of opinion that the record was utterly defective in its statements, and proceeded upon an entirely erroneous idea. This is a small flat of the value, we were told, of £300, and an action is brought by the tenant against the landlord for damages to the extent of £1000, three times the value of the house. I never heard of such a thing. She says she felt a bad smell in the house, and the landlord was told that there was something the matter with the drains. Then two of her children die of diphtheria, and this action is brought against the landlord on the principle apparently that a landlord insures the lives of his tenant and their whole family against the evil consequences of continuing to live in a house after they believe it to be in an insanitary condition. I know of no principle for such a proceeding, nor any precedent. I am clearly of opinion that neither *ex contractu* nor *ex delicto* nor *quasi ex delicto* can this action be sustained.

LORD RUTHERFURD CLARK—I am also of opinion that this action is not relevant.

LORD CRAIGHILL was absent.

The Court pronounced this interlocutor:—

“The Lords having heard counsel for the parties on the appeal, Sustain the same; recall the interlocutor of the Sheriff-Substitute appealed against; sustain the defences; assize the defender from the conclusions of the action: Find the defender entitled to expenses in the Inferior Court and in this Court,” &c.

Counsel for the Pursuer—Shaw—W. C. Steele.
Agent—A. B. Cartwright Wood, W.S.

Counsel for the Defender—A. S. D. Thomson.
Agent—John Latta, S.S.C.

Wednesday, July 11.

SECOND DIVISION.

[Sheriff of Ayrshire.

SHAW V. MORGAN.

Reparation—Slander—Privilege.

At a meeting of the police commissioners of a burgh a member moved that in lieu of the system of issuing summary warrants for the recovery of arrears of water rates, which had been placed in the hands of a certain sheriff-officer, a collector should be appointed for their recovery. In speaking in support of the motion, he said—“What could be more repulsive than to demand rates from a dying woman. . . . Sheriff-officers were not always worshippers of the sober deity.” On the provost of the burgh, who presided, saying, “For myself, I think the sheriff-officer now acting a competent man,” the mover replied—“A man who is drunk cannot be competent. . . . I would rather let loose a wild beast upon the community than a drunk man.”

In an action of damages by the sheriff-officer referred to, the Court found in fact that the defender made use of the language complained of in the course of his duty, and that it was not proved that he willingly spoke falsely or was actuated by malice, and held that, in these circumstances, as the defender so expressed himself while *versans in officio*, the statements were privileged, and that he should be *assoluzied*.

This action of damages for alleged slander was brought in the Sheriff Court at Ayr, the pursuer being John Shaw, a sheriff-officer at Ayr, the defender being Arthur Morgan, bookseller and stationer, Ayr, a member of the Town Council and Police Commission of the burgh, and also of a committee called the “Arrears of Rates Committee.” On 8th December 1886 this committee met and agreed to employ the pursuer for the recovery by summary warrant of arrears of water rates which had become due and payable on 8th November previous. This appointment was approved of by the Town Council

on 13th December. On the 15th a summary warrant was obtained from the Sheriff, and the pursuer in virtue of his appointment proceeded to execute the warrant against parties in arrear. At a meeting of the Arrears of Rates Committee shortly thereafter it was arranged that the pursuer should meet every morning with two or more of the members and report his work of the previous day, and this resolution was duly carried out. On 14th February 1887, at the ordinary monthly meeting of the Police Commission, the defender made the following motion in reference to the police and other assessments which became due and payable on 14th February 1887—"In the middle of March, to appoint a collector to call for all unpaid rates, without costs, and that this collector be authorised to receive instalments from those out of employment, and that all rates unpaid at the end of the statutory period be recovered according to law." In the course of a speech in support of the above motion, in which he said "it was undesirable to have a sheriff-officer if they could get a collector to do their work satisfactorily," the defender used the following expressions—"What could be more repulsive than to demand rates of a dying woman?" . . . "Sheriff officers were not always worshippers of the sober deity." On the Provost of the burgh, who presided, saying—"For myself, I think Shaw" (the pursuer) "is quite a competent man," the defender replied—"A man who is drunk cannot be competent, and Bailie Shankland knows that. I would rather let loose a wild beast upon the community than a drunk man." This was the slander complained of.

The pursuer averred that he believed that in consequence of his requiring the defender to pay his arrears of rates he had incurred the malice of the defender, and that the words complained of were not pertinent to the subject-matter then before the Police Commission. He further averred—(Cond. 15) "The defender did not attend these committee meetings as he ought to have done, so as to receive all information and explanations of the pursuer's conduct and proceedings in the discharge of his duties, and complain there and then against the pursuer, who had there the right to or privilege of reply, and which was the proper time and place to challenge the pursuer's conduct, but the defender, on the contrary, took advantage of his public position to comment unfairly, falsely, maliciously, calumniously, and without probable cause, upon the pursuer's conduct at the said meeting of Police Commissioners, without notice to the pursuer, and where the pursuer had no privilege of reply, to the prejudice of the pursuer, and to his loss, injury, and damage to his feelings, character, reputation, and business." (Cond. 17) "The said false and calumnious statements by the defender against the pursuer . . . before the Police Commissioners were without probable cause, and if not made maliciously, were made recklessly, culpably, and calumniously, without due inquiry into the whole facts and circumstances connected with the pursuer's proceedings and conduct as collector."

The defender replied—"The whole statements made by the defender at the said meeting are not libellous—were made by the defender to his fellow Commissioners in *bona fides*, in the exercise of his public duty; were pertinent to the discussion pending before the meeting; true in

fact (at least the defender had probable cause for believing them true); and he was privileged, as a member of the said Police Commission, to make the statements referred to at the said meeting." He then proceeded to condescend on a number of occasions on which, he alleged, the pursuer had been drunk during business hours while in the execution of his duty as collector of arrears of water rates.

The pursuer pleaded—" (1) The statements complained of are false and calumnious statements, and were made in the presence and hearing of the parties herein named. (2) The said false and calumnious statements being made by the defender in reference to the pursuer, and meant by the defender to apply to the pursuer, as libelled, to the pursuer's loss, injury, and damage to his feelings, character, reputation, and business, the pursuer is entitled to *solatium* and damages therefor. (3) The defender's statements at the meeting of Police Commissioners, not having been pertinent to the subject-matter before the meeting at the time, were not privileged. (4) The statements complained of were made by the defender maliciously and without probable cause, to the loss, injury, and damage to the feelings, character, reputation, and business of the pursuer, for which the pursuer is entitled to *solatium* and damages. (5) The said false and calumnious statements and imputations by the defender upon the pursuer, before the Police Commissioners, being made without probable cause, and recklessly, culpably, and calumniously, without due enquiry into the whole facts and circumstances, as above set forth, to the loss, injury, and damage to the pursuer's feelings, character, reputation, and business, the pursuer is entitled to *solatium* and damages therefor. (6) The defender has not averred a relevant defence of *veritas convicii* in respect of his statements in council. (7) The defender has not averred a relevant defence to entitle him to raise the plea of privilege in respect of his statements in council."

The defender pleaded—" (4) The statements having been made by the defender in his capacity of a Police Commissioner of the burgh of Ayr, at and to a regular meeting of the Town Council or Police Commission of Ayr, and having been made by the defender in *bona fides*, and with probable cause, he is entitled to be assolized from the conclusions of the action in respect of such statements. (7) The defender having neither borne nor shown any *animus defamandi* towards the pursuer, is entitled to be assolized from the conclusions of the action. (8) The whole statements made by the defender being true in fact, or warranted by the pursuer's acts and behaviour, the defender is entitled to be assolized."

After certain procedure the Sheriff (BRAND), on 22nd August 1887, allowed a proof, and remitted to the Sheriff-Substitute.

The Sheriff-Substitute (G. WATSON), on 19th January 1888, after proof, pronounced this interlocutor:—" . . . [After quoting the language complained of]—Finds that these statements were intended by the defender, and were understood by those to whom they were addressed, to apply to the pursuer, and to signify that he had been drunk while engaged as aforesaid in collecting the arrears of water rates: Finds in law that in making the said accusations against the pursuer the defender

was not in the circumstances protected by privilege: Finds in fact that the defender has failed to prove that the said accusation was well-founded in fact: Therefore finds in law that the said accusation being false and calumnious, the defender is liable in damages to the pursuer in respect thereof; Assesses the damages at £10; and decerns against the defender for that sum."

"*Note.*—The words complained of being undoubtedly injurious to the character of the pursuer, the defender pleads—(1) that they were privileged by reason of the occasion on which they were uttered, and (2) that they were warranted by truth.

"1. *The Plea of Privilege.*—Wherever there is a duty to make a statement that is injurious to the character of another, there is also the privilege to do so without malice being inferred. Hence members of a public body, such as the Police Commission of Ayr, being responsible for the good conduct of the officials employed by them, have *prima facie* a certain privilege in communicating to their fellow-members in the discharge of their public duty what may injuriously affect the character of such an official. This privilege, however, is not absolute, but subject to be displaced by contrary considerations, and in the present case the Sheriff-Substitute is of opinion that there are two grounds on which the defence of privilege must be repelled.

"1. The observations complained of by the pursuer were not pertinent to the business then under consideration of the Police Commission—viz., the defender's motion, the terms of which are set forth in the above interlocutor. It was not necessary for the defender's purpose, in advocating that motion, that any individual reference should be made to the pursuer. The motion related to the collection of the police and other assessments just then falling due, and the defender was quite entitled to commend the more lenient method which he proposed, by pointing out and illustrating the inevitable harshness of the alternative system of poinding by a sheriff officer. But there was no proposal before the Commission that the pursuer or any other individual should be appointed to collect the assessments in question, and the defender therefore was not called upon to animadvert on the conduct of the pursuer. The way to test the right of the defender to speak of an individual is to consider whether it is at all necessary for the performance of the duty, or legitimate in the exercise of the right, properly belonging to the defender on the occasion in question, to make any allusion to any individual at all, per Lord President Inglis in *Craig v. Jex Blake*, July 7, 1871, 9 Maeph. 978. Judging by this test, the Sheriff-Substitute is of opinion that the defender's remarks, so far as reflecting on the character of the pursuer, were not pertinent to the occasion, and were not privileged.

"2. Another answer to the defender's plea of privilege is indicated in the note to the Sheriff-Principal's interlocutor of 22nd August 1887. The Sheriff there expresses the opinion that as the pursuer was in the first instance at least responsible to the Arrears Committee of the Town Council, the course adopted by the defender in accusing the pursuer at a meeting of the Police Commission, at which the pursuer had no right to appear and defend himself, is one in which he

is not protected by any privilege, and this opinion derives additional force from the circumstances disclosed in evidence. It appears that at a meeting of the Arrears Committee, shortly after the pursuer's appointment as collector, it was arranged by those present that certain members should attend every morning during the collection of the arrears at the Town Chamberlain's Office, that meetings were accordingly held daily, or almost daily, at which the pursuer reported his proceedings on the previous day, and received instructions in special cases; that persons who had complaints against the pursuer, or desired explanations, frequently attended also, and that their cases were investigated by the members of committee present. These meetings being informal, and being held daily, or nearly so, at the same hour, members of committee were not summoned to them by notice; but the defender was aware that such meetings were taking place daily, and Bailie Shankland depones—"I remember having a conversation with the defender sometime after the pursuer had been appointed, during which the defender informed me of several cases in which severity was said to have been used by the pursuer, and on that occasion I recommended the defender to attend the morning meetings, when he would be able to ascertain as to the truth of these reports." The defender was aware that other members of committee had investigated the complaints as well as he, and that their inquiries had led them to a different conclusion from that which he had arrived at, yet he declined to avail himself of the opportunities of investigation which they had used, and which were equally open to him. In these circumstances the Sheriff-Substitute is of opinion that the plea of privilege cannot be sustained—see *Odger on Libel and Slander*, p. 282.

"The result of this finding is to make it unnecessary for the decision of this action to inquire into the averments of special malice made on record against the defender. The Sheriff-Substitute thinks it right, however, to state his opinion, after considering the evidence, that the pursuer has entirely failed to prove the existence of such malice. The Sheriff-Substitute is persuaded that the defender was actuated not by motives of personal ill-will, but by a *bona fide* sense of duty and a benevolent desire to put an end to what he honestly believed to be a public abuse. It is therefore with great reluctance that the Sheriff-Substitute has come to the conclusion that, for the reasons stated, the observations complained of were not protected by privilege."

After discussing the evidence as regards the defence of *veritas*, the Sheriff-Substitute said—"Looking to the whole evidence and keeping in view that the question is not what may probably have been, but what is proved to have been the case, the Sheriff-Substitute is of opinion that the defence of *veritas* has failed. The pursuer is therefore entitled to damages, and the Sheriff-Substitute is of opinion that £10 is a fair sum to be awarded in the circumstances."

On appeal the Sheriff (BRAND), on 27th February 1888, adhered under reference to the annexed note and dismissed the defender's appeal.

"*Note.*—The Sheriff having fully considered the able argument submitted for the appellant, and perused the whole evidence adduced, is

of opinion that the words complained of were of and concerning the pursuer, were false and calumnious, were uttered without probable cause, and as uttered, were not privileged. He is further of opinion that the damages awarded are moderate and reasonable. In view of the elaborate note of the Sheriff-Substitute with which the Sheriff generally agrees, he thinks it unnecessary to enter upon any detailed examination of the evidence. The defender undertook the *onus* of proving the *veritas* of his allegations of drunkenness, an undertaking which has led to a proof going beyond reasonable limits in point of length, and which proof has broken down. The defender appears to have been disposed to accept without proper inquiry injurious statements made against the pursuer, but when the correctness of these statements came to be narrowly investigated it was found that they had no adequate basis in fact. The examination of this part of the proof by the Sheriff-Substitute was exhaustive, and the Sheriff has nothing to add to it. Had the defender adopted the obvious course of bringing those who complained of the pursuer's conduct and acting before the committee on 'appeals against rates,' and placing them face to face with the pursuer, such inquiry must necessarily have been made as to have ascertained how the facts stood, and the present action would probably never have been heard of. The defender says no doubt that he mentioned the matter on more than one occasion both to Bailie Shankland and Councillor Allan, but that his complaints did not receive attention. The former admits that the defender made complaints in committee, and the latter that he spoke of the matter in a coffee house. But this was not enough. The defender should have brought together the parties complaining, and the pursuer complained against, and then and there instituted a formal inquiry before the committee into the charges made. The defender demurs to the constitution of the committee, says it had no *locus standi*, and asks can he be blamed for not complaining to a self-chosen committee. But can the defender seriously argue, first, that he did complain, but was not listened to, and second, that he did not complain because the committee had no *locus standi*? Are not these positions mutually destructive? It was argued for the defender that he was entitled to use the words complained of, if he had probable cause, though they were not proved to be true, and in support of this contention reliance was placed on the case of *Spill v. Maule*, L.R., 4 Ex. Ch. 232. But this argument is at variance with the defence, which is that he had probable cause, because the words were true, and their truth he set about to establish and failed. Nor does the English case quoted help him.

"For the pursuer it was maintained that the Sheriff-Substitute had not sufficiently adverted to the words, 'What could be more repulsive than to demand rates of a dying woman;' and it was contended that this was the most serious part of the slander, and should have led to the awarding of larger damages than has been given, but the Sheriff is of opinion that these words do not fall to be read separately from the other words complained of. The probable intention in using them was not to make a

charge of mere brutality, but to illustrate how objectionable it was to hand over the collecting of rates to a person addicted to drink. In that view the passages complained of are to be taken as a whole, and as containing one slander."

The defender appealed, and while admitting that the proof of the *veritas* of the alleged slander had failed, argued it was proved that complaints had been made to him as to the harsh way in which the pursuer was performing his duty. He was quite entitled to attack the system under which the rates were being levied as an irrational one. Indeed it was a duty to the public imposed on him by his public position to do so. The occasion was, then, a privileged one. In the words of the Lord President in the case of *Craig v. Jex Blake*, July 7, 1871, 9 Macph. 973—The statements were "necessary for the performance of his duty and legitimate within the exercise of the rights properly belonging to him." It was a clear case of a statement made pertinent to the issue.

The pursuer replied—1. It was the defender's duty if he desired to attack the pursuer's system of levying the rates to have brought up the matter at a meeting of the Arrears Committee where the pursuer could have met him and defended himself. This was all the more incumbent upon him inasmuch as it was clearly proved that he knew these meetings took place every morning. In the words of Odger on Libel and Slander, p. 282, he had neglected "to avail himself of means at hand of ascertaining the truth," and this neglect was "evidence of such wilful blindness that privilege would not avail him." 2. The statements were not privileged for they were not pertinent to the motion which he was making. The question had been directly raised in *Craig v. Jex Blake*, and it was held that there was no privilege where a person singled out another individually and attacked him as a concrete instance of the evil he was attacking. The case of *Rae v. M'Lay*, July 8, 1852, 14 D. 988, was even more analogous—*vide* also *M'Kellar v. Duke of Sutherland*, January 14, 1859, 21 D. 223. The question before the meeting was simply one as to whether in future a sheriff-officer should be appointed a collector or not. It was no warrant for an attack on an individual.

At advising—

LORD JUSTICE-CLERK—The question on which alone I mean to speak is the question of privilege. It appears to me that the judgment of the Sheriff is right, so far as he found that the words which were spoken by the defender were calumnious; and in the second place, I think the Sheriff is also right in holding that the plea of *veritas* has not been established. There remains only the question of privilege, and on that point I shall make a few observations.

The nature of the case is such as one always regrets to find should come before the Court. The defender is a town councillor of the burgh of Ayr, and the pursuer is a sheriff-officer. It appears that in the town council of Ayr a discussion took place with regard to the mode of collecting the police and other rates which were collected together within the burgh, and that the pursuer in his capacity of sheriff-officer had been one of the

persons who had been appointed by the Arrears Committee as a collector of these rates. Some feeling apparently had got up within the burgh that the rates were oppressively collected, and a discussion accordingly took place in the town council on 10th January upon the subject. A motion was made by the defender to the effect that an energetic man should be appointed to collect the arrears of the police rates. That apparently was objected to by the Provost, and in the course of the discussion the question arose, or rather observations were made, with regard to Shaw, who had been in the habit of collecting these rates. Apparently Bailie Shankland, who was convener of the committee, said he was not aware of anything that had taken place that could be considered in the least repugnant to the feelings of the members of the Council; and that in appointing Mr Shaw to collect the arrears they thought they were making as suitable an appointment as they could. Then the Provost interposed, and said—"For myself I think Shaw is quite a competent man;" and the defender proceeded to reply in these words,—“a man who is drunk cannot be competent, and Bailie Shankland knows that. I would rather let loose a wild beast upon the community than a drunk man.” Now, unquestionably these were not well chosen epithets, and it was not wonderful that the pursuer felt himself injured by the remarks. That the observation was intended for Shaw was quite certain, but the defender has pleaded privilege. I am of opinion that the words were privileged, and that in that respect the judgment of the Sheriff is not sound.

I imagine that the general rule applies, that if in the conduct of public business any member of a public body, considering and deliberating for the public benefit, makes use of expressions pertinent to the matter in hand, although reflecting individually on persons, that is privileged unless malice is alleged and proved. It is an important principle, and I think a very salutary one, that malice should be proved, and if it could be shown that a member of a public body had been abusing his position for the malicious purpose of calumniating his neighbour, then of course privilege would be avoided, and he would be responsible. But I think this is not a case of that kind, and I am also of opinion that the town council in this particular instance is a body, the members of which are privileged in dealing with the public affairs of the burgh. It is part of the government of this country, part of the municipal government of the country, and is of very wide importance and weight. Therefore I think that the principle which has been extended to such bodies as kirk-sessions, the Senatus Academicus of a University, and such like, would apply more strongly to an important municipal body like the town council of a burgh. The Sheriff referred to the case of *Jex Blake*, but I think that that case stands in contrast to the present instead of furnishing an analogy. The case of *Jex Blake* proceeded upon this principle, which has been given effect to in other cases besides, that there may be privilege in regard to words spoken on the subject-matter under deliberation, but that that privilege should not protect the speaker if he travelled beyond the subject to the individual. That principle applies to a case where the body

in which the observations are made is not of the same weight and public character as a town council, but is a body, the meetings of which are substantially private—such as a private charity. The case of *Jex Blake* arose out of a meeting of the contributors to the Edinburgh Infirmary, a body having no corporate existence, but entitled no doubt to a voice in the matter that was under discussion, viz., how far women should be admitted to the infirmary as practitioners, and in the course of the meeting a lady made some observations which referred to a riot of students which had taken place, and spoke of one of them by name in pretty strong language. Now that was an entirely different case. It presented elements of mere criticism with regard to an individual, not being pertinent to the subject-matter. I think, therefore, that the distinction between the cases is very manifest.

On the whole matter, I think this was a privileged body, and that a statement made in the ordinary course of municipal business is a privileged statement unless malice is proved. I am for altering the judgment of the Sheriff and for absolving the defender.

LORD YOUNG—I am of the same opinion. The word privilege is, as has often been remarked, an unfortunate and misleading word, but the thing which it expresses is very intelligible, and may be simply stated. It is misleading because it conveys to the uninstructed mind an impression that there may be circumstances in which slander is privileged. That is not so. The doctrine of privilege rests upon the proposition that there is no such thing as slander without malice. Slander is a defamatory statement maliciously made to the injury of another. If a statement, however defamatory in its character, is made without any malice it is not slander; it is not actionable. You will find the law stated to that effect most emphatically in the English textbooks and by judges in our own cases. But when any man or woman makes or writes anything which is defamatory of another, he or she is assumed to do so maliciously, and the law presumes malice from the defamatory character of the statements, unless the occasion on which it was made is what the law calls privileged, so that the presumption of malice is displaced by the occasion. If a man in mere gossip and tittle-tattle speaks defamatory words of another it would be assumed that he did so maliciously, and he would answer accordingly. Malice would be imputed to him without any evidence whatever except that he made that statement defamatorily of his neighbour, and the untruth of the statement being defamatory would be assumed also unless he proved the truth. But if the occasion was privileged, if the statement was made in the discharge of a duty, or in the reasonable attention to a man's own business and affairs which gave him legitimate reason to write or speak of his neighbour, the occasion would displace the presumption of malice and the presumption of falsehood, and he would only be answerable if malice was shown to have existed in fact, and if it appeared that the statement was untrue.

Now what was the occasion here? A member of the town council at a meeting of a committee of that body made a perfectly legitimate motion—whether a sensible motion or not is not for me

to judge. The substance of it was to put the collection of the arrears of police rates not into the hands of the sheriff-officer to be collected under a distress warrant, but into the hands of a collector to be appointed, and to receive a percentage upon what he collected. In support of that motion he made a speech pressing it upon the favourable consideration of the committee which he was addressing, and illustrating the importance of the subject and the advantage of adopting the course his motion recommended by the evil of the other system, according to what he had observed, or according to what he had heard, or it might be even by fanciful cases put by way of illustration. Well, I dare say that the speech which he made was not all relevant to the matter in hand. I am not sure that most speeches we are accustomed to hear, or even to make, are all relevant to the matter in hand. The speaker in this case, at all events, was speaking on the subject before the meeting, and according to his lights and abilities was pressing his views upon the favourable consideration of his audience, and answering, it might be, objections which might be stated. Well, if a member of a town council is either in the full assembly of that august body, or in a committee of that council appointed for any special purpose, addressing them in the discharge of his public duty as a member, I think the occasion is *prima facie* privileged; and what the defender said upon the subject of the motion being *prima facie* pertinent to it in the general and comprehensive sense of the term I have explained, then it should not be assumed that he was actuated by malice and was speaking untruth merely because he said something defamatory of another. What this orator in a town council said of the pursuer I take to be defamatory. He imputed to him some reckless conduct in executing a warrant—at least it was said he imputed it to him—and also the vice of intoxication. It was explained to the Court that the pursuer was an old soldier, who had retired with a good service pension, and had been a sheriff-officer for a number of years since his retirement. I should have thought that he would not have taken the suggestion of intoxication so much to heart. But the suggestion was no more than one of intoxication, and it was made by a rhetorical town councillor supporting what I assume to be a very legitimate motion, and one of vast importance in his view, to the effect that rather than put these summary warrants into the hands of a sheriff-officer, which might be very oppressive to poor people who were behind with their rates, it would be more humane to those in arrear, and likely on the whole to be more profitable to those who were interested in the collection, if a collector was appointed at a percentage as was proposed. I cannot say that the occasion was such that I must assume that the defender was actuated by malice towards the pursuer here, and that there was no foundation for his statement merely because he made it.

It might be shown that the defender did act through malice, and one important step towards showing that would be to prove that the statement he made was untrue, and that he had no reasonable ground for believing it to be true. If a man makes a statement which in fact is untrue of his neighbour, and does not show that

he had any reasonable ground for making it, that is an element from which it might be concluded that really he was actuated by malice in making that statement, and that being affirmed, he is guilty of actionable wrong. But I think that upon the evidence here the occasion was privileged, and that it is not established that the defender acted maliciously. He did not by any means say that the pursuer acted oppressively towards the woman referred to, or that he was in the habit of getting tipsy more than was becoming in a man in his position. I do not say that has been established by any means, but I think the defender, in the reference he made, was entitled, without being guilty of actionable wrong, to use that language, unless the circumstances were such as to show that it was malicious. I think there is abundant evidence to show that it was a matter of very common rumour and talk that this thing had happened, and that it was a matter of rumour and talk that this retired soldier and existing sheriff-officer did take sometimes more than was good for him, and I do not think that a rhetorical reference to that by an eloquent town councillor upon such an occasion ought to be made the subject of an action of damages for slander unless it can be shown that he had pique and ill-will against that individual, or, without going so far as pique and ill-will, unless it can be shown that his statement was such that the Court must characterise it as malicious, proceeding from *malus animus*. Upon these grounds I should decide this case.

We were referred to the case of *Jex Blake*. I must say I think the present case is distinguishable from that. There was there not such a body as a town council, or a committee of a town council, which is really a constitutional body, but there was a statutory body, no doubt, of contributors or subscribers to the Edinburgh Infirmary. I think that was a different occasion from a meeting of the town council, which is one of the constitutional bodies with lawful authority in the country, and different from a body of subscribers, even although under a private Act of Parliament. I am not anxious to dwell upon this case, but I say without hesitation that I think the case of *Jex Blake* requires reconsideration. There has been a considerable variety of decisions in this branch of the law, and if it is allowable to go back a few years before the *Jex Blake* case it will be found that the tendency of the decisions was to negative privilege altogether unless a man was in the absolutely necessary discharge of a duty rendering it incumbent upon him to make the statement, and would have been failing in his duty if he had not made it. I think you will find a considerable advance in the direction I have indicated in these observations before 1871 and since 1871, when the judgment in the *Jex Blake* case was pronounced. I should have thought, and I confess that is my opinion now, that the occasion there was a privileged occasion, and that when Miss Jex Blake was speaking of a professor's assistant as having taken part in a student's riot, and in such a way that the best apology to offer for him was that he was tipsy, the occasion was privileged; and the mere fact of imputing intoxication and taking part in a student's riot to one of the students who happened to be a professorial doctor's assistant was not sufficient to imply malice. That was *prima facie* a kind of statement which,

according to the judgment, showed malice and ill-will towards the student. I happened to be counsel in that case, and probably I may take a stronger and stiffer view against the judgment, as it was adverse to my side, than I might otherwise have done. But there is another feature in the case which appears upon the face of the report. The pursuer, a student, who was Dr Christison's assistant, was put into the witness-box for the defender, and in the examination in chief of the pursuer as evidence for the defender, counsel for the defender proposed to put the following question—"Did you take any part in the riot?" The pursuer's counsel objected, and the Judge disallowed the question, so that the young gentleman objected to answer the question, and said he would rather say nothing upon that subject. There was no issue of *veritas*, but if there is anything established in this class of cases at the present day it is that without any issue of *veritas* you may ask the party who is complained of about his own conduct in the matter, and take his own account of it, in mitigation of a claim of damages for the injury alleged to have been done to him. In my judgment the decision requires reconsideration. At all events I am not now, seventeen years afterwards, going back to apply it to a member of a town council making a speech in the town council upon the occasion of a legitimate motion. I hold that the statement was made by the defender in the course of his duty as a member of the town council in a speech, and that it was pertinent to the speech which in the discharge of his duty the defender made on that occasion, and that falsehood and malice have not been proved.

LORD RUTHERFURD CLARK—I confess that I have had great difficulty in drawing a distinction between the present case and the case of *Jex Blake*. With respect to the latter case I wish to say nothing against the judgment. As your Lordships are both of opinion that a distinction may be drawn between the cases, I am willing to accept the distinction, and to agree with your judgment.

LORD JUSTICE-CLERK—I wish to make one observation in regard to the case of *Jex Blake* that I forgot, namely, that this case differs from it in this respect, that the individuality of the pursuer was a question in this case; it was not so in the case of *Jex Blake*. In regard to other matters I am not going back upon the ground Lord Young referred to, but I think that we are now applying the law as laid down in the previous cases.

The Court pronounced this interlocutor:—

"Find in fact that on the occasion libelled the defender used the language complained of by the pursuer; that he did so in the course of his duty as a member of a committee of the town council; and that it is not proved that he willingly spoke falsely, or that he was actuated by malice: Find in law that he was privileged in expressing himself as he did in respect that he was *versans in officio*: Therefore sustain the appeal, and recal the judgment of the Sheriff and Sheriff-Substitute appealed against: Assoilzie the defender from the conclusions of the action."

Counsel for the Appellant—Dickson—Hay.
Agent—D. W. Paterson, S.S.C.

Counsel for the Respondent—Salvesen. Agents
—Sturrock & Graham, W.S.

Friday, July 6.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

WARRANT AND OTHERS *v.* MACKINTOSH.
Fishings—Salmon Fishings—Competing Titles—Possession.

In an action of declarator of exclusive right of salmon fishing in a part of the river Ness, the pursuers founded upon a Crown title granted in 1591 to the town of Inverness, which conveyed the whole salmon and other fishings in the water of Ness between the stone of C and the sea, which included the fishings in dispute. The defender's title was a Crown charter in favour of the Earl of Moray granted in 1566, which conveyed half of the lands of H, with the salmon and other fishings "pertaining" to the same. The defender held the other half of the lands of H under a title from F, which made no mention of fishings. Under his title from Lord Moray the defender claimed a joint right of salmon fishing, along with the pursuers, in the Ness *ex adverso* of the half of the lands of H thereby conveyed. It was proved that the fishings *ex adverso* of the one-half of the lands of H held of Lord Moray by the defender were the fishings in dispute, and that the defender had possessed the fishings *ex adverso* of the whole lands of H, chiefly by rod fishing, but also by net and coble, for more than the prescriptive period. The pursuers had had possession of the fishings specified in their title by net and coble and by rod fishing from time immemorial.

Held (rev. Lord M'Laren—*diss.* Lord Rutherford Clark) that, in the absence of anything to the contrary, the fishings "pertaining" to the one-half of the lands of H held of Lord Moray by the defender were the fishings *ex adverso* of this one-half, that on the evidence the defender had had possession of these fishings, and had therefore a joint right along with the pursuers.

Observations on the effect of rod fishing in a question regarding the possession of salmon fishings.

This was an action at the instance of Mrs Catherine Munro Warrant of Bught, in the county of Inverness, widow of Duncan Grant of Bught, and wife of Colonel William Edmund Warrant, of the Royal Engineers, and her marriage-contract trustees, and the Provost, Magistrates, and Town Council of Inverness, against Angus Mackintosh of Holme, in the county of Inverness, and Charles Innes, solicitor, Inverness, for his interest, the conclusions of the summons being for declarator "that the pursuers and the defender Charles Innes have the sole and exclusive right of salmon fishing in the river Ness from both banks from the stone of Clachnahagaig to the mouth of the river where it joins the sea at low water, with the