

to found upon as a separate title from the disposition. That is a very important and interesting question of heritable right as distinctly as can be. And it is not possible to hold that in a process of summary ejection a burgh court can decide as the foundation of its decree of ejection that the provision of an alimentary right in favour of a wife is such as can be held on a separate title—a title merely of liferent. It is not competent to the burgh court to decide that question, and if they cannot give a decree of ejection without doing so, the whole proceedings are incompetent.

I agree with what has been said as to the case having been very well treated in the Inferior Court. The judgment is most excellent if there had been jurisdiction to pronounce it. The interlocutor is remarkably well put, but it is self-condemnatory as regards the competency, because it finds in law that a certain right belongs to the wife, and not to the husband as regards heritable subjects.

LORD MURE—I have come to the same conclusion. I should have been very glad if we could have decided the questions raised on the titles. The question of competency, however, is raised, and we must dispose of that first.

I have always understood that inferior courts, with the exception of cases where they have special jurisdiction given them, have no right to entertain questions of heritable right. That I think is quite fixed.

The first time I read the interlocutor of the Magistrates it appeared to me that it distinctly raised and decided a question of heritable right. Mr Ure suggested that it was rather hard that because the Magistrates gave findings in law a decree of ejection, otherwise good, should be touched. But the case stated on record, and the pleas-in-law, forced them to decide the question of heritable right. The third plea for the defender is—"The defender in entering into the contract of marriage with the pursuer was entitled to rely on the public records, and the same not disclosing any exclusion of his legal rights of *jus mariti* and right of administration in the properties in question, no secret or latent deed containing such exclusion can be competently pleaded against him." And the fourth plea is—"Assuming that by the terms of said mutual disposition and settlement defender's legal rights were excluded, the pursuer not having taken infetment thereon, but on a title containing no such exclusion, the defender cannot be affected by the terms of the former deed."

It was not the Magistrates who raised the question, they merely applied themselves in their findings to dispose of pleas specifically put as to the meaning of the titles. It was simply a question of heritable right which was before them, and I quite agree that it was incompetent for them to entertain it.

LORD SHAND—I think it not surprising that the Burgh Court did not take up this question, as the only plea stated to the competency on the record is the first—"It is incompetent for this Court to entertain any consistorial question, such as the pursuer's justification for separating herself from her husband, and all such averments should be deleted from the proceedings."

And apparently, even when the case came up on the suspension, the same view ran through the arguments. The point argued before Lord Fraser, as may be seen from his note, was that the case of husband and wife is not like the case of landlord and tenant. Further, the opening on the reclaiming-note did not suggest the point upon which the case is now decided. The question was raised by Mr Strachan sharply upon this argument, that because the question was one of heritable law, therefore it was incompetent for the Burgh Court to entertain it. That is an objection applicable not merely to Burgh Courts but Sheriff Courts.

Taking the argument as now stated I see no answer to it. The pursuer claims possession of this heritable property in virtue of her right of liferent under the mutual disposition. The defender replies that he has also a heritable right, founding upon the disposition under which the widow bought and was infeft. The question comes to be a competition of heritable rights. Whether that arises in a process of summary ejection or another process makes no difference. The ground of decision is not rested on the fact that this was a process of summary ejection. The objection taken is that a Burgh Court has no jurisdiction in questions of heritable right. This case requires the decision of a question of that kind, and therefore it is incompetent for the Burgh Court to entertain it. I am accordingly of opinion that we must sustain the objection to the competency even though it has been taken late in the day.

LORD ADAM—No doubt a summons or petition of removing and ejection is quite competent in a Burgh or Sheriff Court. But where it appears that the whole question on which the decision of the case must depend is one of heritable right, what might be, as originally brought, a competent summons of removing becomes incompetent as involving a question of heritable right. Accordingly from the nature of this case it appears to me that there was necessarily no jurisdiction in the Burgh Court to entertain it.

The Court recalled the interlocutor of the Lord Ordinary and sustained the reasons of suspension.

Counsel for the Complainer—Strachan—M'Lennan. Agent—Robert Broatch, L.A.

Counsel for the Respondent—Ure—A. S. D. Thomson. Agents—Smith & Mason, S.S.C.

Friday, November 30.

SECOND DIVISION.

[Sheriff of Elginshire.]

ADAM v. M'LEAN.

Reparation—Slander—Privilege—Defamatory Statement by Member of Public Committee with Reference to Business before it.

At a meeting of the Public Health Committee of a village the chairman stated that a case of typhoid fever had been reported to him by a medical practitioner, who said that

it was probably traceable to the milk supplied from a certain dairy. In an action of damages for slander against him by the dairyman it appeared from the evidence that there was no ground for attributing the outbreak of the disease to the pursuer's dairy, and it was not proved that the doctor had indicated the dairy as the probable source of the danger. *Held* that as the defender had made the statement in the discharge of his public duty, and in the honest belief that he was correctly representing the views expressed by his informant, malice could not be inferred, and that the defender was entitled to absolvitor.

This was an action in the Sheriff Court of Elginshire by Donald M'Lean, carter, Dunbar Street, Burghead, against William Adam, chemical manure manufacturer there, for damages for alleged slander.

The pursuer kept a small dairy in addition to his other business. There was a severe outbreak of typhoid fever in the town in June 1887, and upon the 22nd June the defender, who was chairman of the Public Health and Water and Drainage Committees of the local authority of the district, made a statement to the members of the committee, which appeared in the minutes thus—"The convener stated to the meeting that a case of typhoid fever had been reported to him by Dr Hay, Forres, who said that it was probably to be traced to the milk supplied from Mr D. M'Lean's dairy, as cases resembling typhoid had been in that family for some time previous. It was the opinion of the committee that a sample of the milk should be procured, and sent for analysis to Dr Littlejohn, Edinburgh. Mr Adam and Mr Jenkins were appointed a committee to have this done."

The pursuer averred that this statement was false, and was made maliciously and without probable cause, and that in consequence thereof his business had greatly fallen off, and he had sustained loss and injury to the amount of £250.

The defender denied these averments. He averred that in June 1887 he became aware of a serious outbreak of typhoid fever in Burghead, and that he along with a number of the inhabitants was greatly alarmed thereat. In his position as convener of the committees above named, and also as being an inhabitant of the village, he was desirous to ascertain, and if possible remove, the cause of the epidemic. By certain circulars which the Board of Supervision had issued from time to time, and which had been received by the said local authority, he learned that it had been ascertained that disease, especially enteric or typhoid fever, had been transmitted through the agency of milk. These circulars recommended all local authorities in whose district there might be dairies to inspect them from time to time with reference to their water supply and their general sanitary arrangements, and also to cause inquiries to be made from time to time as to the existence of contagious or infectious disease at such dairies, and whenever such disease was found to exist to take such steps as their medical officer might advise with a view to prevent the dissemination of the disease. He further stated that on June 20th, in consequence of a consultation with Mr Dick, a medical student, and Dr Petrie Hay and Mr George

Grant, Burghead, an inquiry was instituted as to the source of the milk supply of certain patients who were then suffering from typhoid fever in Burghead. It transpired, as he averred, that in four cases of illness, which were reported to be typhoid fever, the milk supplied to the houses in which the patients lived had come from the pursuer's dairy. He further stated that "immediately after making these inquiries he, along with Messrs Grant and Dick again met Dr Petrie Hay, and reported to him the result, whereupon he expressed his opinion that the typhoid fever might have come from pursuer's dairy, as he had recently attended two children in his house, and could not account for the high fever they were suffering from."

The defender pleaded—" (4) The defender having acted solely in the discharge of a public duty, with probable cause and without malice in the matter complained of, he is entitled to have decree of absolvitor pronounced in his favour. (5) The defender having in his official capacity as convener foresaid, conducted the inquiry referred to in his statement of facts, and having at the meeting of the said committee, and solely for their guidance in the matter, made the statement complained of in accordance with a duty incumbent upon him to supply all information in his possession relating to the public health of Burghead, he is entitled to the plea of privilege."

It appeared from the proof that in June 1887 there had been a serious outbreak of fever in Burghead and the surrounding district, and that circulars from the Board of Supervision had been addressed to the local authority upon the subject. Dr Hay deponed as follows with regard to his interview with the defender—"Mr Dick was with me all the time when I had a conversation with Mr Adam. I did not know that he was convener of the local authority at the time. I was merely talking on the subject of the fever as I might have talked with any other person. The conversation so far as I recollect was about milk in the first place, and something about drains or both. Mr Adam referred to the question of milk; I did not express an opinion that the fever could be traced to the milk, but I rather thought the opposite. In the conversation he tried to make that out, and he advised me to look to the milk supply. He stated that he considered the milk was the cause of the fever, or at all events the cause of the outbreak. We had a conversation—backward and forward—on the subject, but I cannot meantime remember all that passed, and I said when I left him that I was unable to convince him, and he went away with the same opinion that he held when he came up to me. I talked more about the drains than the milk. I went to look at a ventilator with Mr Adam and Mr Dick in Sellars Street, afterwards there was some talk about the smell, and I made the remark that I would find all the ventilators blindfolded if they would lead me along the streets; I think that was what I said, at least it is all I recollect. When Mr Adam was talking about the milk I spoke about the milk which Ross of Colfield supplied. I said he was also supplying milk to Forres and the Colfield district, and if there had been any fever in Forres I said I should have found out where the milk came from that the people were taking. I

advised Mr Dick to ascertain in cases of fever where the milk was coming from. . . I saw a baby in the pursuer's house suffering from measles. There was another child ill, but he got better in a week. Mr Adam spoke to me about having the milk analysed. I said it would be all into buttermilk before it could be analysed. I asked Mr Dick to make sure and find out where the people were getting their milk from, and to see if it was coming from one source. He told me next day that the people were getting it from various quarters. . . Burghhead is not a large place. The streets were opened up at the time. They are very porous, and they have been made use of for every kind of sewage since ever it was a village. When the drains were formed and the earth thrown up to a depth of several feet I think you have not far to go for the cause of the fever. The soil was saturated with sewage. . . It is not a correct report of my conversation with Mr Adam if he stated that I said that a case of typhoid fever was probably to be traced to the milk supplied from the pursuer's dairy."

The defender, after narrating his meeting with Dr Hay on the morning of the 20th June, and the inquiries made as to the milk supplied to the infected houses, deponed—"I saw Dr Hay during that day again, and we told him the result of our investigations, and he said, looking to Dick, 'That is just it, these cases we met with in M'Lean's house must have been typhoid fever. We spoke about the matter and talked a good deal about it, and I asked Dr Hay what should be done. . . I met him again at the ten o'clock train. We talked about having an analysis of the milk. . . We talked the matter over generally, and he said if a case existed like that of the pursuer's in Forres they would have no hesitation in closing it right off. Immediately on going to the office I wrote a note to Mr Nicoll asking him to call a meeting of the Health Committee."

The witness Grant deponed—"We met Dr Hay again at the end of the street. I don't know which of us made reference to the milk and where it was got. Dr Petrie Hay answered that that was just what he was saying, and that all these children he had seen were suffering more or less of the same. I had heard at this time that the pursuer's children were ill, I never heard of anything further than measles."

It was proved that the pursuer's dairy business had been ruined by the reports which circulated in regard to the milk supplied by him, and that he had been compelled to sell his cow.

The Sheriff-Substitute (RAMPINI) upon 28th June 1888 found that the said statements were unfounded in point of fact, and that they were made maliciously, and without reasonable or probable cause; that they were not privileged in point of law; that in consequence of the said statements the pursuer had suffered serious injury and damage to his business and reputation, and that the defender was liable to him in damages to the amount of £100.

"Note. — . . . It seems very much to the Sheriff-Substitute as if the defender, having formed his own theory of the cause of this fever, had been determined to maintain it through thick and through thin; that so convinced was he in his own mind that he was right, and that Dr Hay was wrong, that he could not or would not listen

to anything that was said on the other side. In no other way can the Sheriff-Substitute account for the reckless, and, as it has been proved, entirely unfounded statement he made to the meeting on 22nd of June. This is not the temper in which the chairman of an important committee should approach the discussion of questions which involved so much to the whole community of Burghhead. Nor is this, the Sheriff-Substitute thinks, the temper which will entitle him to plead privilege in a case like the present.

"Personal ill-will, the Sheriff-Substitute gladly believes, the defender had none against the pursuer. But evidence of personal ill-will is not required to establish malice in law. Malice may be inferred from facts and circumstances, and 'the falsehood of what is said is not always an important consideration in cases of this kind, but sometimes it is conclusive,' and as the Sheriff-Substitute has been unable to find the slightest justification in fact for the statements the defender made to the meeting he thinks it is conclusive here." . . .

The defender appealed, and argued—The occasion on which the alleged libellous statement was made was privileged, and malice must be proved. There was no malice here. At the worst the defender had misunderstood the medical men, and in his report to the meeting he honestly believed that he was correctly reporting the result of the consultations. The statement was made in the interests of the public, and in discharge of the defender's duty as a public official. Publication was not proved, as this statement complained of was made to a committee and not to the public; what really had caused the loss of the pursuer's business was the fact that milk had been sent away for analysis from the pursuer's dairy, but he had not complained of that—*Shaw v. Morgan*, July 11, 1888, 15 R. 865; *Broomfield v. Greig*, March 10, 1868, 6 Macph. 563; *M'Murphy v. Campbell*, May 21, 1887, 14 R. 725.

The respondent argued—Even if the occasion on which the statement containing the alleged slander was uttered was privileged, there was such malice and want of probable cause as would make the defender liable. It was proved by the evidence of the doctor, and of the defender himself, that Dr Hay had not told the defender that the milk from the pursuer's dairy was the source of the disease. The statement was made with such recklessness and disregard of the interests of his neighbours that malice might be inferred. Dr Hay deponed that the fever arose rather from exhalations from the drains than from the milk, and the defender was the author and chief supporter of the drainage scheme being then carried out in Burghhead, so that he might be desirous to shift the blame from himself—*Denholm v. Thomson*, October 22, 1881, 8 R. 31.

At advising—

LORD JUSTICE-CLERK—The pursuer claimed damages from the defender on the ground that his business as a milk-dealer in Burghhead, in the county of Elgin, had been ruined in consequence of a statement made by the defender that an outbreak of typhoid fever among the inhabitants was probably to be attributed to milk supplied by the pursuer. The defender maintained that the statement was made by him as the chairman of

the Burghead Public Health and Water and Drainage Committee, and in the fulfilment of his office as a member of a public body having a duty to report such matters relating to the sanitary condition of the place as might become known to him, and that he neither acted maliciously nor without probable cause. The Sheriff-Substitute has, after taking a proof, decided against the defender, and finding that the statements were made maliciously and without probable cause, has awarded £100 of damages. The case is a most unfortunate one. The evidence makes it certain that there was no ground for attributing the outbreak or spreading of typhoid fever in Burghead to the milk sold by the pursuer, and it appears to be highly probable that but for the unfortunate report of the defender to the committee, and the somewhat ill-judged action taken upon that report, the pursuer might have been selling his milk profitably to this day instead of having his little business destroyed. I think the defender would have acted much more prudently if he had confined his report to the expression of his belief that milk would probably be found to be the cause of the mischief, and if the committee, instead of singling out and pointing the finger of suspicion at the pursuer's dairy as distinguished from others, had directed samples to be taken from all the milk-dealers; they would thus have saved the pursuer from the desertion of customers, which in so small a place was sure to follow any indication on the part of the authorities that one dairy in particular was suspected.

But while it is certainly deplorable that such error in discretion should have been committed, leading to disastrous results to the pursuer's milk business, the question, whether it is to be held that the defender in making his report was acting maliciously, and therefore is to be liable in damages for the consequent injury, is an entirely different one. It can hardly be suggested that in this case there is any trace of personal malice producing a direct desire to cause injury. The pursuer's counsel did not in debate maintain that the proof disclosed any such case. He rather argued that malice was to be implied in the legal sense from the facts disclosed, on the ground that the true inference from them was that the report had been made in reckless disregard of the pursuer's interests. The highest point to which he attempted to bring up his case was that the evidence did not justify the idea that the pursuer could have had an honest belief in the truth of what he said had he well considered the matter, and that he must be looked upon as guilty of such recklessness as is held in law to imply malice from his making so groundless an assumption. Now, it appears to me that the inference of malice from the recklessness of statement must depend not merely upon the falsity of the statement, however gross, although that is undoubtedly an element which may be of importance along with others, but upon other considerations. A statement may be absolutely devoid of foundation, and yet may not be uttered in such circumstances of reckless disregard of another's interest or peace of mind as necessarily to be held malicious. Malice may or may not be the necessary implication according to the surrounding circumstances. For example, if the injurious statement accuses the injured party of

some gross crime or highly dishonourable conduct—attacks a man in such a way as to bring disgrace on his personal character, the inference may readily be drawn from the mere fact of its being recklessly made without any reasonable ground for belief that the person originating the calumnious report, or spreading it, acted maliciously, regardless whether his injurious words were true or not. On the other hand, if the direct statement complained of is plainly not to injure the person to whom it relates, or to indulge a propensity to tell scandalous tales of one's neighbours, but to effect some laudable innocent purpose, and particularly if the purpose be one of importance to the public weal, then it is not, and cannot be so easy to infer that the rashness of the statement, as indicated by its falsity, amounted to utterly reckless, and therefore in a legal sense malicious calumny.

What then were the circumstances of the present case, and how do these principles apply to them? There was a serious outbreak of typhoid fever in Burghead. It was plainly the duty of the defender in his official position to endeavour to trace the disease to its source, and I think the evidence indicates that he was doing so, not with the object of attacking or injuring anyone, but for the purpose of doing what he could to assist in checking the outbreak and stamping out the disease. He had interviews with Dr Hay, who practised in the village, and with Mr Dick, a gentleman acquainted with medical science, at which undoubtedly the milk supply was spoken of by the medical men as a proper subject for inquiry—a circular from the Board of Supervision had asked attention to the milk supply as a probable means of communication of enteric disease. It was after these interviews with Dr Hay and Mr Dick that the defender made the report complained of. Now, that he should be engaged in inquiry, should have conversations with the doctors, and should report to his committee, were all proceedings in themselves within his duty, and perfectly laudable. He was no busybody rushing about to make himself important by professing superior knowledge, and making statements without responsibility. His actions are therefore to receive favourable and not unfavourable constructions in themselves. The circumstances all point to his being engaged according to his rights in the fulfilment of public duty. Then the report which he makes is upon a matter of importance in the circumstances. Unquestionably the subject of milk was brought up in the conversations with the medical men, and was considered by everyone as being one for consideration and inquiry. There is a conflict of evidence as to the question whether Dr Hay did or did not indicate milk supply as the probable source of the mischief. It is undoubted that he did direct attention to milk supply, because he states that he cautioned Mr Dick, who was resident in Burghead, about the milk, and that he advised him to ascertain in cases of fever where the milk was coming from, and he and Mr Dick inspected the pursuer's milk premises, and made inquiries from the witness Grant as to the place from which the milk supply came to a house in which typhoid fever had broken out. But Dr Hay, while admitting that there was conversation about milk, which he says "one is always suspicious of" in

cases of typhoid outbreak, he denies that he gave the defender any ground for believing that he thought the pursuer's dairy the probable source of the evil. He states that he said to the defender that he "could not convince him," meaning by these words that he could not convince him that the fever was to be attributed to bad drainage and not to milk, and Mr Dick's evidence tends to confirm this. On the other hand, the defender states that Dr Hay, on learning that the milk had been supplied from pursuer's dairy, made the remark "That is just it," and these cases we met with in M'Lean's house "must have been typhoid fever;" and this is so far confirmed by the witness Grant, who states that on Dr Hay being informed of the milk supply to the infected house coming from pursuer's dairy, he answered that "was just what he was saying, and that all those children he had seen were suffering more or less of the same." In the view I take of the case it is unnecessary to solve this conflict of evidence. The whole evidence taken together plainly imports that in the circumstances the question of milk supply was important, and should be investigated, and that, rightly or wrongly, the defender had taken up the impression that Dr Hay had suggested that the illness in the pursuer's house had probably a typhoid character, and that therefore there were probable grounds for suspicion that the pursuer's milk might be a cause of propagation of the disease. He may have formed a wrong impression of what Dr Hay meant, and the recollection of four persons present may vary as to details of a general conversation, but I find nothing in the evidence, taken as a whole, to satisfy me that the defender was not in the *bona fide* belief that suspicion did attach to this dairy of the pursuer, and that, in stating that belief to the committee, of which he was chairman, he acted in his public capacity, and without any motive except the good of the community. I have said already that I think greater prudence would have been shown had the report been more guarded, and been acted on in a less invidious way. But, looking to the whole circumstances, I am unable to come to the conclusion that the defender either was actuated by direct malice or acted with that disregard of a neighbour's good name and interests which is to be held so inexcusable in its recklessness as that malice must be held to be implied from the acts done without any evidence or direct malice. I must move your Lordships therefore to recal the interlocutor of the Sheriff-Substitute, to find that the pursuer has failed to prove that the defender, in making the report to the Water and Drainage Committee, acted maliciously, and to assize the defender from the conclusions of the action.

LORD YOUNG—I am substantially of the same opinion. I do not know that it is necessary almost to say anything. I must confess the record in this action did not make a favourable impression on me, and I thought from the first reading of it and of the evidence that it was altogether exaggerated, and a great deal made of very little. The pursuer is a carter in Burghead, and he kept one cow. He kept one cow to add to his living gained principally by carting. The defender is a member of the Board of Health Committee of Burghead, and the action by this

carter and owner of one cow is for £250 of damages against this chairman of the Board of Health Committee of the place, because one day at a meeting of the committee, consisting of two gentlemen besides himself, he stated that a case of typhoid fever had been reported to him by Dr Petrie Hay, Forres, who had said it was probably to be traced to the milk supplied from pursuer's dairy. The chairman of the Board of Health, making that statement at a meeting of the board—the number being three, himself one of them—of the import of a conversation, as he understood, with a doctor, leads to a claim for damages to the extent of £250. Well, the thing is extraordinary on the face of it, and has rather a ridiculous aspect. The Sheriff has given him £100. I do not know how many cows that would buy for him, but the damage to his business from this statement at a meeting of the committee, for there is nothing else, the Sheriff assesses at £100. Well, anything more extraordinary or approaching the ridiculous I do not remember, at least recently, to have met with. But let us look at the thing upon its merits. It seems that the statement was noted in the minutes of this committee of three—noted apparently that the chairman had stated the import of this conversation with the doctor. It contains no reflection upon the pursuer's character or the character of his cow—not the least. There is no imputation of any offence or moral delinquency of any kind; it is a simple statement that the doctor had represented to him in conversation that he was inclined to believe that typhoid fever was to be traced to the milk which had been got in his shop. Well, people should always be cautious in speech no doubt, but this does not strike my mind as an occasion for an extraordinary caution. A neighbour's character is not involved in any way. The subject is not of extreme delicacy, and there is not a call for any extraordinary caution in speech. The chairman of the Health Committee stated what he understood to be the import of the conversation he had with the doctor. I think it was an occasion rather for perfect freedom of speech. There is no occasion for anybody to tell a falsehood to the prejudice of his neighbour. There is no occasion which will justify or give privilege in doing that; but the suggestion is that the chairman of the Board of Health Committee was telling a wilful falsehood to the prejudice of his neighbour in order to affect the milk business of this carter who kept the one cow. That is extraordinary on the statement of it. He may have misapprehended the import of the doctor's opinion on the conversation he had with him, but to say that he was a man who wanted to destroy, by telling a wicked falsehood, the business of this carter by a malicious statement in regard to the milk he supplied is extraordinary on the face of it. There is no other suggestion of malice. What could it be? He was not a competitor in the milk business. He did not keep a cow. It is not suggested that he wanted to transfer the business from the pursuer to another, and therefore proceeded to defame the character of the pursuer's cow. The only thing that can be suggested is that he had misapprehended the import of the conversation he had with the doctor. I am not so sure that he did. I take it from the doctor, because he says so, that he did not really blame the milk,

and that he did not mean to convey this impression in the intercourse he had with the pursuer, but I as certainly believe that he did convey that impression to the defender; that the defender honestly took that impression, and quite honestly repeated it in what he believed to be the discharge of his duty, and what I think was in the discharge of his duty if he had taken that impression. I think it was his duty, and I would not be content by saying that it was not proved that he acted maliciously; I should find as a matter of fact that he did not act maliciously, but acted in the discharge of his duty in making the statement he did in the honest belief that the statement was true. I think that is according to the fact and according to the evidence. I am not impugning the doctor in any way when he says that his suspicion did not attach to the milk, and that he did not mean in his conversation with the defender to convey that impression. But I think he did convey that impression. I am certain of it, and unless the defender was perjuring himself for no earthly purpose, and was telling a wilful falsehood for no earthly purpose that I can conceive, he must have taken that impression. He swears that he did, and I believe him. That makes an entire end of the case. I think it was a ridiculous exaggerated case from the first from the statement on record and the evidence in support of it, and I am of opinion that it entirely fails on its merits. I think the defender here acted honestly and in the discharge of his duty in making in this committee a statement of a harmless character in itself, and imputing no delinquency whatever to anybody. We all know—it is matter of common knowledge—that where there is an outbreak of typhoid fever there is suspicion directed to the milk supply, because it has been communicated through that source; and suspicion was more likely to be raised here because there was fever—and a very bad fever—in the pursuer's house at the time. It was measles, not typhoid, but fancy an action being brought against anybody who had made a mistake, and said so-and-so was ill of fever, when it was only measles—saying a man has got gout when it was only rheumatism. There is no use saying we must be very cautious; you must not say a man has a bad cold when he has not a cold at all; it is something else of a more harmless description. I think the defender, so far as my opinion goes, passes out of this case without any reflection, even which would impute rashness to him. There may be suffering. I cannot believe for a moment that there has been such suffering as pursuer says; that his milk being examined had sent all his customers away from him is not credible on the statement in the least, but where we have a violent epidemic of that sort—even where we have an epidemic of crime—there may be suffering by innocent people who are suspected without any due grounds. But that is not a ground of action of damages against those who are not actuated by malice and not telling falsehoods to injure others, but in the honest discharge of their duty with whatever ability they may be able to bring to its discharge. I am clearly of opinion that the judgment ought to be altered, with expenses to the defender in both Courts.

LORD RUTHERFURD CLARK—I concur in the judgment your Lordships are about to pronounce.

The statement which the defender made, and which is complained of by the pursuer, was made by the defender in the discharge of his duty, and I think was made by him in the honest belief that it was true. I see no evidence of actual ill-will or malice, and I do not think there is any proof from which we can imply any such. I am therefore of opinion that the case for the pursuer is not established.

LORD LEE—In this case the statement complained of as defamatory was made by the defender as convener of the Water and Drainage Committee of the local authority of Burghhead at a meeting of that committee. The record discloses this fact, and therefore it is clear that the defender was in a privileged position, and that the issue to be proved by the pursuer required that he should establish that the statement was made maliciously.

It is no doubt well settled that malice may be inferred from recklessness. But I do not think it is correct to say that recklessness amounts to malice, or necessarily implies malice. The correction of the Sheriff-Substitute's interlocutor in *Denholm v. Thomson*, 8 R. 31, shows that it was considered necessary in that case to affirm malice in point of fact, and not sufficient to say, as the Sheriff-Substitute had said, that the defenders "acted with a recklessness amounting to malice in the legal sense." There is also a recent case in the First Division in which this point was considered, and considered more fully than the report indicates. I refer to the case of *Ritchie v. Burton*, 10 R. 813. It may be gathered from the opinion of Lord Deas, however, correcting an expression he had used in the case of *Watson v. Burnet*, and also from the opinion of the Lord President, that it was not thought sufficient to support the verdict that there was evidence of recklessness. It was dealt with as a question upon the evidence whether the recklessness was such as, combined with the other circumstances, justified the jury in finding malice proved. The Lord President's examination of the evidence was directed to the object of showing that there was not mere recklessness, but such a repetition of the slanderous expressions as might be held to imply ill-will, and to exclude the idea that the defender in his letters was merely expressing in good faith his view of the pursuer's conduct.

Upon the evidence in the present case I concur in holding that it is entirely insufficient to prove or to suggest that the defender acted otherwise than honestly, and within his privilege and duty, in reporting to the committee what he understood Dr Hay to have said.

I therefore concur in the proposed judgment.

The Court issued the following interlocutor:—

"The Lords . . . recal the interlocutor of the Sheriff-Substitute of 28th June 1888: Find that the pursuer is a carter, and carries on the business of a dairyman at Burghhead, and the defender, chemical manufacturer there, is chairman of the Water and Drainage Committee of the local authority: Find that in the month of June 1887 a serious and alarming outbreak of typhoid fever occurred in the village of Burghhead, and that on the 22nd day of that month the defender at a meeting of the said committee made

the statements contained in the 3rd article of the pursuer's condescendence of and concerning the pursuer in the hearing of the parties therein named: Find that the said statements were unfounded in point of fact: Find that the defender in making said statements acted in his official capacity as chairman of the Water and Drainage Committee of the local authority of Burghhead, and solely for the information of the committee, and that he made them in *bona fide* and belief that they were true: Therefore sustain the fourth and fifth pleas-in-law for the defender, assoilzie the defender from the conclusions of the action: Find him entitled to expenses in the Inferior Court and in this Court: Remit, &c., and decern."

Counsel for the Appellant—Balfour, Q.C.—Shaw. Agents—Cumming & Duff, S.S.C.

Counsel for the Respondents—D.-F. Mackintosh—Guthrie. Agents—Gibson & Paterson, W.S.

Friday, November 30.

SECOND DIVISION.

MACDONALD v. MACKESSACK.

Process—Decree of Summary Ejection from Agricultural Subject for Failure to Stock—Reduction on the ground of Irregularity in Proceedings—Competency of Action in Sheriff Court.

A Sheriff Court decree for sequestration of the effects of an agricultural tenant for past rent was granted of consent. Thereupon the landlord moved for a plenishing order upon the tenant, and for his summary ejection in case of failure. The tenant by minute stated that he was proceeding to stock. The Sheriff, in respect of that statement, pronounced no formal order, but remitted to a man of skill to see the stocking carried out, and to report within a month. Upon his reporting that there was no stock of any kind upon the place, the Sheriff pronounced decree of summary ejection. *Held (diss. Lord Young)* that as there had been no formal order upon the tenant there had been no default, and that the decree ought to be reduced.

*Question—*Whether an action of ejection from an agricultural subject on account of failure to stock is competent in the Sheriff Court.

In July 1887 Robert Mackessack, Esquire of Ardgye, Alves, Elgin, presented a petition in the Sheriff Court of Elgin, against Robert Macdonald, his tenant in Cardenhill, Alves, who held a nineteen years' lease from Whitsunday 1887, at a yearly rent of £14, praying, *inter alia*, for warrant to sell the sequestered effects on the farm for arrears of rent, and in the event of the subject of hypothec being exhausted, "or the premises being insufficiently furnished and hypothecated after any sale hereunder, to ordain the defender to stock and replenish the said premises so as to afford sufficient security for payment of any remaining rent payable or to become payable as

aforsaid; and failing his doing so, within such time and at the sight of such person as the Court shall appoint, to grant warrant summarily to eject the defender."

Upon 27th October 1887 the tenant by minute consented to decree, and upon the same day the Sheriff-Substitute (RAMPIN), in respect of this minute, granted warrant for the sale of the whole or a sufficient part of the sequestered effects to satisfy the arrears due.

Before a sale took place the tenant applied for *cessio*, and on 12th November 1887 decree of *cessio* was pronounced. On 10th December 1887 the trustee sold the stock on the farm under the *cessio*. The landlord lodged a claim with the trustee for £37, 17s. 9d., and on 15th March 1888 the whole proceeds of the estate, under deduction of trustee's commission and expenses, were paid over to the landlord by the trustee. The amount so paid was £20, 15s. 6d., which sum included the past rent, for which decree was craved in the landlord's petition, and also a portion of the current year's rent (Whitsunday 1887 till Whitsunday 1888) of the farm of Cardenhill.

Upon 27th December 1887 the landlord lodged a minute in the following terms—"Brown, for the pursuer, stated that in respect the trustee under the *cessio* of the said Robert Macdonald had recently sold off and displemished the said farm of Cardenhill, the event referred to in the prayer of the petition, viz., 'the subject of the hypothec being exhausted,' had now happened, and the Court is now moved to ordain the defender to stock and replenish the said farm and premises, so as to afford sufficient security for payment of rent now due or to become due at the term of Whitsunday next; and failing his doing so within fourteen days at the sight of Harbourne Marius Straghan Mackay, land surveyor, Elgin, or within such other time and at the sight of such other person as the Court shall appoint, to grant warrant summarily to eject the defender and his goods, gear, and effects from the said farm and premises, and to authorise the pursuer to re-let the same for such periods, and for such rent as may appear best, all in terms of the prayer of the petition." To that minute the tenant upon 18th January lodged the following answer—"That he was proceeding to lay down a crop for the incoming season and was proceeding to stock the said farm of Cardenhill in a husbandlike manner as craved for in said minute." And upon 19th January 1888 the following interlocutor was pronounced—"Having advised the minute and answers, in respect of the statement in the latter that the defender is now in process of laying down a crop for the incoming season, and of stocking the farm of Cardenhill, remits to Mr Harbourne Marius Straghan Mackay, land surveyor in Elgin, to see the same carried out *quam primum*, and to report to the Court not later than 19th of February next."

Upon 18th February 1888 Mr Mackay reported as follows—"In terms of remit from the Sheriff-Substitute of Elginshire, I to-day visited the possession of Cardenhill, occupied by Robert Macdonald. It contains about 23 acres of arable land divided into six lots. Of this land one lot should have been sown out with young grass, but this has not been done. About 12 acres should