quate and sufficient recompense to the pursuer for what he has endured. But the question whether we should interfere with the verdict of the jury on the ground of excess of damages is of course a very delicate one, and after hearing the opinions of your Lordships I am not prepared to dissent from the judgment of the Court.

The Court discharged the rule.

Counsel for Pursuer—Comrie Thomson—Shaw. Agents—J. & J. W. Mackenzie, W.S.

Counsel for Defenders—D.-F. Balfour, Q.C.—C. S. Dickson. Agents—Millar, Robson, & Company, S.S.C.

Thursday, January 7.

SECOND DIVISION.

[Sheriff of Renfrew and Bute.

M'FADYEN *v.* JAMES SPENCER & COMPANY.

Reparation — Slander — Charge of Dishonesty against a Body of Workmen—Malice—Privilege—Relevancy.

A firm of shipowners sent an account and a letter to certain shipwrights demanding payment for six bottles of whisky abstracted by their men while working in the hold of a ship belonging to the firm. Thereafter each of the workmen who had been in the hold—four in number—brought an action of damages for slander against the shipowners, on the ground that he had been represented by them as dishonest and as having stolen six bottles of whisky. There was no averment of malice on the part of the defenders in having written as they had done.

Held (Lord Rutherfurd Clark *dub.*) that no charge of dishonesty had been made against any particular individual, that the defenders were entitled by way of privilege to acquaint the shipwrights with the fact of the whisky having been stolen by their workmen, that no averment of malice had been put upon record, and that accordingly the action fell to be *dismissed* as irrelevant.

Messrs Campbell, M'Donald, & Company, shipwrights, Glasgow, sent certain of their workmen upon Friday 11th September 1891 to erect a bulkhead for gunpowder on board the ship "Firth of Forth," belonging to Messrs James Spencer & Company, shipowners, Glasgow, then lying in Queen's Docks, Glasgow.

Upon 14th September 1891 Messrs James Spencer & Company sent the following account to Messrs Campbell, M'Donald, & Company—"To six bottles whisky, @ 3s. 6d. per bottle, abstracted by your men while putting up the powder bulkhead on board 'Firth of Forth'—£1, 1s." Upon Messrs Campbell, M'Donald, & Company asking an explanation of the rendering of this account, Messrs James Spencer & Company wrote as follows—"In reply to yours of yesterday's date, we know that when your men went down the hold to put up the powder bulkhead the whisky cases were intact, but after they left we found on examination that a case had been tampered with, and six bottles of whisky abstracted. We could come to no other conclusion but that your men had taken it."

Thereafter Hector M'Fadyen, joiner, 85 Shields Road, Glasgow, and three others, each raised a separate action in the Sheriff Court at Paisley against Messrs James Spencer & Company for £500 as damages for slander. In his action M'Fadyen averred that he and other three men were the only workmen employed by Messrs Campbell, M'Donald, & Company on board the said ship on the day in question, that the defenders' account and letter were of and concerning him, as one of the said Campbell, M'Donald, & Company's men therein referred to, and wickedly, falsely, maliciously, calumniously, and without probable cause represented him as being dishonest and as having stolen six bottles of whisky. The averments in the other actions were similar.

The defenders stated that in putting forward a civil claim for the value of the whisky in question they had probable cause for acting as they did, and in sending the account and the letter founded on they were not actuated by malice towards the pursuer or any other person, and the communications in question were in the circumstances privileged.

They pleaded—"(1) The pursuer's averments are irrelevant and insufficient to warrant the prayer of the petition. (2) The defenders having probable cause for sending the account and letter founded on, and these communications being privileged, decree of absolvitor should be granted. (3) The defenders not having slandered the pursuer, and having expressly disclaimed all imputations against the pursuer's character, they should be assoilzied."

Upon 10th November 1891 the Sheriff-Substitute (COWAN) pronounced the following interlocutor:—"For the reasons stated *infra*, repels the first plea-in-law stated in defence: Repels also the second plea-in-law except in mitigation of damages: Finds that the pursuer has stated a relevant claim, and that in making the statements complained of in the account rendered, and the letter addressed to pursuer's employer, the defenders were not privileged to make said statement: Therefore allows parties a proof of their respective averments, and to the pursuer a conjunct probation: Grants diligence against witnesses and havers, but in respect of the necessary absence of the witnesses for the defenders at sea, sists process until their return, and decerns.

"*Note.*—Even if it were true that whisky was abstracted from the hold of the 'Firth of Forth,' the defenders were beyond their legal right in demanding from the pursuer's employer payment for it. The delict of the servant does not constitute a ground of

claim against the master. The defenders might properly have made inquiries at the master to ascertain what workmen had been employed at the vessel; they might even, as the result of such inquiries, have lodged a criminal complaint against the pursuer, and such action on their part would have been privileged. They chose, however, to render a baseless claim to the pursuer's master, adding the statement complained of. The Sheriff-Substitute cannot see that they were privileged to do so. At the same time, there being no allegation of special damage, the Sheriff-Substitute cannot but think the damages claimed greatly in excess of the loss suffered, and he trusts parties may now come to an arrangement."

Similar interlocutors were pronounced in the other cases.

The pursuer appealed for jury trial to the Court of Session, and proposed the following issue—"It being admitted that on or about Friday 11th September 1891 the pursuer was a journeyman joiner in the employment of Campbell, M'Donald, & Company, shipwrights and joiners, 53 Crookston Street, Glasgow, and was engaged in putting up a powder bulkhead on board the vessel 'Firth of Forth,' then lying in Queen's Dock, Glasgow; that on or about 14th September 1891 the defenders rendered to the said Campbell, M'Donald, & Company the account contained in schedule 1 annexed hereto, and on 15th September 1891 addressed to the said Campbell, M'Donald, & Company the letter contained in schedule 2 hereto annexed, both of which documents were duly received by the said Campbell, M'Donald, & Company: Whether the said account and letter are of and concerning the pursuer, and falsely and calumniously represent him as being dishonest and as having stolen six bottles of whisky, to his loss, injury, and damage?"

Argued for the defenders—(1) The pursuer's averments were irrelevant. (2) Malice was not averred. It was necessary here to aver and to prove malice, because the defenders here were privileged. There was a duty incumbent upon them to inquire what had become of the whisky, and they were fully justified in writing to Messrs Campbell, M'Donald, & Company as they had done—*Shaw* v. *Morgan*, July 11, 1888, 15 R. 865. (3) The letters complained of did not amount to slander.

Argued for the pursuer—It was not necessary to aver and prove malice. It was presumed unless there was privilege. There was no case of privilege here. The defenders were complete strangers to Messrs Campbell, M'Donald, & Company, and were under no duty to send them the account and letter complained of, or to tell them they suspected their workmen of theft. It was not a complaint to the criminal authorities, which would have been privileged. It was a simple charge against four workmen of theft at a particular time and place, made to private individuals—*cf. Wilson* v. *Purvis*, November 1, 1891, 18 R. 72.

At advising—

LORD JUSTICE-CLERK—The facts here disclosed on record are as follows—the pursuer in this case, and other workmen who have brought similar actions, were in the hold of a particular vessel upon a certain day. After they had left the hold the defenders sent an account to their employers for payment of the price of 6 bottles of whisky which it was averred had been removed by them, and on the following day the letter in schedule 2 was written. These are the facts upon which the pursuers rely as constituting slander.

The case is peculiar, and I do not know of any case which has occurred before exactly like it. It is clear that the defenders were not accusing individual men of having taken the whisky. There is no suggestion made that they knew either who the men were or how many there were. They just stated that having examined a case of whisky they had found six bottles had been abstracted and they asked the workmen's employers to pay their value. I think that this was quite a legitimate demand on the part of the defenders if they believed upon inquiry into the matter that that was the way in which the whisky had been abstracted, and that they were entitled to make the application they did.

The ordinary presumption of calumny does not arise where, as here, there was privilege on the part of the defenders in making their statement and claim. Accordingly the next question is, whether there is any averment of malice entitling the pursuers to an issue upon which to go to trial? I find no such averment in this record, but only a general abstract statement that the defenders acted "wickedly, falsely, maliciously, calumniously, and without probable cause." That is not more than what is averred where there is no privilege; but where there is privilege a pursuer must state facts, which, if proved, will set up malice against the defender. It is difficult to see how any such statement could have been made in the circumstances here in face of the letter, which explains the reason of defenders acting as they did, for if the defenders brought out these facts, an issue of malice could not be substantiated.

In my opinion the words "We could come to no other conclusion but that your men had taken it" do not constitute an allegation of theft against any particular individual at all. I could understand that in some circumstances "your men" might imply certain men individually, but I do not think that is the case here. The statement merely amounts to this—your men were there, some bottles have been abstracted, we cannot but presume they were abstracted by your men.

I think the defenders should be assoilzied.

LORD YOUNG—I concur, and especially in the last observations made by your Lordship. I think Spencer & Company's charge against Campbell, M'Donald, & Company, for whisky abstracted by their men while engaged in fitting up a bulkhead in a cer-

tain vessel would have been justified upon proof that the whisky did in fact disappear while Campbell, M'Donald, & Company's men were there, so that some of them—it might be only one of them—must have taken it. It would not have been necessary, in order to support their claim against Campbell, M'Donald, & Company, to prove that all the men helped to take it, or who the men were who were there. It would have been sufficient to prove that the whisky had disappeared while the men were on the premises and must have been taken by one or all of them. In the letter written in explanation of the demand this is exactly the explanation given. It stated six bottles had been abstracted. It did not make a charge of theft against any individual man at all, but a general charge against the workmen of the firm from whom the demand was made, but the case having got into the hands of law-agents, they have brought four separate actions, one for each of the men actually employed. The peculiar feature of this case is that each pursuer must, as a preliminary, prove that he was one of the workmen employed at the bulkhead, and that might lead to controversy upon which the evidence might be conflicting. The pursuers accordingly put this preliminary point into the issue.

It is impossible to suggest upon the statement here that any good or bad feeling is shown by Spencer & Company against all or any of the men employed. They only make a claim against their employers for whisky abstracted. It would have been the same if a larger quantity of whisky had been abstracted, and if 100 and not four men had been employed. The claim would have been similar, but would each of the 100 men have had a separate action? I must say that that approaches to the extravagant, but I do not pursue this further.

I would revert to the view I expressed in the case of *Shaw* as stating the law of privilege as I then understood it, and as I still understand it. Having regard to these views I am of opinion that the circumstances here show privilege repelling the presumption of malice. Accordingly, malice must be alleged, and I think the rule applies that the mere use of the word "maliciously" will not avail. Something must be averred which if proved would *prima facie* justify the use of the word. There is no such averment upon record here, and I am of opinion the action should be dismissed as irrelevant.

LORD RUTHERFURD CLARK—I have had some doubts which have not been entirely removed, but as I understand your Lordships are agreed, any doubt on my part can be of no consequence.

LORD TRAYNER—I agree with the views stated by Lord Young. I think the circumstances here rebut the presumption of malice, and that malice must be averred and proved. Facts must be stated justifying the use of the word malice, the mere use of which is not sufficient. We have here no such averment of fact, and therefore I agree in thinking the case irrelevant.

The Court pronounced the following interlocutor:—

"Find that the pursuer has not averred facts relevant to support the conclusions of the action; therefore dismiss the action," &c.

This judgment ruled the other three cases.

Counsel for the Pursuer M'Fadyen, &c.—Burnet. Agents — Emslie & Guthrie, S.S.C.

Counsel for Another Pursuer Coghill—Baxter — Outram. Agents — Emslie & Guthrie, S.S.C.

Counsel for the Defenders — Comrie Thomson—Craigie. Agents—Fyffe, Ireland, & Dangerfield, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, January 9.

(Before the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Trayner.)

BATCHEN *v.* MORRISON.

Justiciary Cases—Public House—Public Houses Acts Amendment (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 20—*Relevancy.*

The Public Houses Acts Amendment (Scotland) Act 1862 provides by section 20 that it shall be lawful for any justice of the peace, &c., on being satisfied by the personal examination upon oath of a credible witness that there is reasonable ground for believing that excisable liquors are trafficked in within any house not licensed for the sale thereof, or by any person not licensed to sell in such house, or that such liquors are illegally kept for sale at such house, to grant warrant to search for the same, and if more than one gallon be found, to seize it; and proceeds—"and the person occupying or using the premises when such liquors shall be found as aforesaid shall thereby be guilty of an offence." *Held* that, on a sound construction of the section, the fact that the liquors are trafficked in or kept for the purpose of traffic is essential to the constitution of the offence, and that a complaint which failed to set forth that fact was *irrelevant.*

Peter Batchen, licensed grocer, Elgin, was charged before the Magistrates of the royal burgh of Elgin, at the instance of Alexander Morrison, Procurator-Fiscal of Court, upon a complaint which set forth that he "was on Sunday, the 20th day of September, in the year 1891, the person occupying or using the dwelling-house, No. 238 High Street, Elgin, which is not licensed for the sale of excisable liquors, and the said Peter Batchen having no licence to sell excisable liquors therein,